IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 70 OF 2022

(C/F Application No. 1 of 2021 in the District Land and Housing Tribunal for Mbulu)

MARTIN KWASLEMA.....APPELLANT

VERSUS

DOSLA SLAQHATE.....RESPONDENT

JUDGMENT

31/05/2023 & 25/07/2023

GWAE, J

Aggrieved by the decision of the District Land and Housing Tribunal of Mbulu at Mbulu, the Appellant has filed this appeal with six grounds of appeal and an additional of three more grounds. Nevertheless, in the submission, the appellant dropped grounds number two and six and the following grounds which I have re-arranged (inclusive of the additional grounds) for determination;

1. That, the learned trial chairman and his gentlemen assessors of the trial tribunal grossly erred in law and fact by failing completely to examine and evaluate the evidence on record properly.

2. That, the learned trial chairman of the trial tribunal grossly erred in law and fact in deciding the case in favour of the respondent herein without taking into account the sale agreement of the appellant.
3. That, the Hon. Chairman of the District Land and Housing Tribunal grossly erred in law and facts by failure to identify the suit land and its boundaries.
4. That, the Hon. Chairman of the District Land and Housing Tribunal grossly erred in law and fact by not taking into account that the appellant herein proved his case beyond standard.
5. That, the trial tribunal erred in law in that all exhibits admitted in tribunal during trial were not read out to the parties.
6. That, the trial tribunal erred in law for failing to record the opinions of the tribunal assessors in the proceedings.
7. That, the trial tribunal erred in law for opening defence case before closing prosecution/appellant's case as a result it denied the appellant his right to produce all his material witnesses.

The appeal was disposed by way of written submissions, which I shall consider them while discussing the grounds of appeal. Before the court the appellant enjoyed services from the learned counsel **Mr. Arnold A. Tarimo,** on the other hand, advocate **Alpha Ng'ondya** represented the respondent.

Before going to the substance of this appeal, I find it appropriate to give a brief background of the matter. The appellant filed a suit against the respondent claiming to be the lawful owner of the disputed land measuring 12 acres located at Harar village, Hydom Ward, Mbulu District within Manyara Region. In his application, the appellant alleged that the respondent invaded into his land on 05/01/2020 and started to cultivate on it. He thus sought an order declaring him the lawful owner and the respondent be evicted from the suit land.

In proving his case, the appellant summoned four (4) witnesses and tendered one exhibit ("M1") which is a sale agreement. On the other hand, the respondent countered the appellant's claims through his two witnesses. It was the case of the appellant and his witnesses that he purchased the suit land from one Yeremia Lohay (the appellant's uncle- "baba mdogo" with consideration of Tshs. 10,080,000/=. The appellant also established that before Yeremia Lohay owned the suit land it previously belonged to one Nade Mungana who then sold it to Yeremia Lohay.

On his side, the respondent and his witnesses established that his father, Slaqhate Maghara gave him the disputed land in the year 1974 and that he has been using it. However, he stated that previously, he had

a dispute with one Bombo Nade who is the son of his sister over the suit land. In that, dispute the said Bombo Nade was allegedly to have sold the respondent's land to Yeremia Lohay, which is the present suit land. thereafter the respondent filed a suit in the Ward Tribunal where he was declared the lawful owner of land measuring 6 ½ acres. Consequently, he was handed over the disputed land through execution. Execution order together with the report of tribunal broker were tendered and collectively marked as exhibits "U1".

Upon hearing of both parties, the tribunal gave its judgment in favour of the respondent on the reason that the appellant failed to establish his case on the balance of probabilities that, the suit land belongs to him. Hence, this appeal before the court.

In disposing of this appeal, I shall commence with grounds number 3, 5, 6, and 7 while grounds number 1, 2 and 4 shall be determined jointly as they revolve on the evaluation of evidence as argued by the parties' advocates.

Starting with **ground number 3**, the appellant argues that the Hon. Chairman of the District Land and Housing Tribunal (trial tribunal) failed to identify the suit land and its boundaries. Expounding on this ground of appeal the appellant submitted that much as the appellant

properly identified the disputed land together with its boundaries, but yet the tribunal ought to have visited the locus in quo to satisfy itself on the proper descriptions of the disputed land. He supported his assertion with the decision of the Court of Appeal of Tanzania in the case of **Sikuzani Saidi Magambo and Kirioni Richard vs Mohamed Roble,** Civil Appeal No. 197 of 2018 (Unreported) and **Nizar M.H vs Gulamali Fazal Janmohamed** (1980) T.L.R 29

On the other hand, the respondent was of the view that there was no deed for visit of the locus as the land in dispute was properly identified and both parties are familiar with the suit land.

I have gone through the records of this appeal and as correctly argued by the appellant that, he properly described the suit land in his application and even the boundaries were well established. Nevertheless, he urged that, the tribunal did not properly identify the land in dispute adding that the tribunal ought to have visited the locus in quo whereas its omission is incurable irregularity.

I have meticulously read the decisions of the Court of Appeal cited by the appellant attached in his submissions. In the said cases the Court of Appeal insisted that there is no law which forcefully require the trila court or Tribunal to conduct a visit at the locus in quo and that the same

is done at the discretion of the court or tribunal especially where there is a need to verify the evidence adduced by the parties during trial.

However, the Court of Appeal went on to state that where the court or tribunal exercises this discretion it must observe certain guidelines and procedures as set out in the case of **Nizar M.H** (supra) to ensure fair trial.

With the above observations of the Apex Court of the land, it is the firm view of this court that the tribunal was not mandatorily obliged to visit the locus in quo. Above all, there is no any law that required the tribunal to do so, and thus its omission cannot vitiate the proceedings unless otherwise the tribunal decided to exercise its discretion and failed to observe the guidelines set out in the case of **Nizar M.H vs Gulamali Fazal** (supra).

Moreover, since the appellant herein was the applicant at the trial tribunal if at all he thought there was a need to visit the locus in quo he would have requested the tribunal to do so. That being said I find no merit on this ground of appeal.

In ground number 5, the appellant alleges that the trial tribunal erred in law in that, all exhibits admitted in tribunal during trial were not readout to the parties. Submitting on this ground, the appellant stated

that it is a well-established principal of law that, whenever any document has been admitted as an exhibit it must be read out and that in this matter there is no evidence indicating that the tribunal read out the exhibits that it admitted. On his part the respondent argued that it was not true that the exhibits were not read out, according to him the exhibits were all read out and all parties were made aware of the documents.

In this ground of appeal, it is undisputed fact that the exhibits that were tendered by the parties and admitted by the tribunal during trial were all not read out in court. The essence of reading out exhibits was reiterated in the case of **John Mghandi @ Ndovo vs. The Republic,** Criminal Appeal No. 352 of 2018 (unreported) where the Court of Appeal stated as follows;

> *"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that, the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record o f the evidence."*

From the above position of the law, it is authoritative that the essence of reading out the document after its admission is to enable the other party to be aware of the contents and details of the said document in order to prepare or enable him for his defence. In the matter at hand two exhibits were tendered in court which is a sale agreement that was tendered and marked as exhibit "M1", handing over letter of piece of land measuring 7 ½ acres dated 10october 2019, DLHT's eviction order issued on 15th October 2019 collectively admitted as "U1" tendered by the respondent. It should be remembered that, it was the appellant who tendered (sale agreement "ME1") personally. Hence, it is apparent that he knew the contents of the said document. More so, even before tendering of the said document the appellant gave a brief explanation of the said sale agreement where he stated as follows;

> *"Eneo la mgogoro ni mali yangu ambalo nilinunua mwaka 2014 kutoka kwa Jeremia Lohay kwa thamani ya Tshs. 10,800,000/= likiwa na hekari 12 na baada ya hapo nililitumia bila mgogoro wowote hadi mwaka 2020 kwa shughuli za kilimo na Pamoja na ufugaji na mnamo mwezi wa 10 mwaka 2020 mdaiwa alianza kuvamia eneo hilo akidai eneo hilo ni mali yake, eneo hilo kabla ya kuuziana na Jeremia Lohay lilikuwa ni mali ya Nade Mungana, naomba kutoa mkataba wa mauziano ya tarehe 21/11/2014 kati yangu na Yeremia Lohay kuhusu eneo la mgogoro."*

From the above explanations, it is the firm view of this court that much as the contents of the documents were made aware to the parties and that since it was the appellant who tendered the said document then the omission to read the sale agreement did not in any way prejudice the interest of either party. The same finding applies to exhibit "U1" these are tribunal's documents, which the tribunal took judicial notice. Therefore, the omission to have them read out was not fatal and did not prejudice the interest of either of the parties nor did they occasion any injustice. This ground of appeal is without merit.

Coming to **ground number 6,** the appellant alleged that the trial tribunal erred in law for failing to record the opinions of the tribunal assessors in the proceedings. In his submission, the appellant argued that the opinion of the assessors must be recorded in the proceedings and failure to do so is a fatal irregularity. The respondent on his part maintained that the opinions of the assessors were recorded as demonstrated in the judgment of the tribunal at page 6.

It has been the position of the law that where the trial has been conducted with the aid of assessors each assessor must give his/her opinion in writing and the same must be read over to the parties. This

position has been consistently emphasized by the Court of Appeal of Tanzania in a number of cases including the case of **Zubeda Hussein Kayagali vs Oliva Gaston Luvakule & another,** Civil Appeal No. 312 of 2017 (Unreported) where the Court stated as follows;

> *"Moreover, in order for the trial to be taken to have been effectively conducted with aid of assessors, the Chairman ought to require each assessor present to give his or her written opinion and the same be read over to the parties for them to know the nature of the opinion which would be considered by the Chairman in the judgment.".*

From the records of this appeal, it is apparent that this requirement was complied with. The proceedings of the trial tribunal at page 23 demonstrate that on 14/06/2022 the opinions of the assessors were read over to the parties ("Maoni ya Wazee yamesomwa kwa wadaawa"). Moreover, at page 6 of the impugned judgment it is vividly shown that the chairman narrated the opinions of the assessors. Therefore, much as the opinions of the assessors are reflected in both the proceedings and the judgment this ground of appeal also lacks merit.

That being said, I now turn **to ground number 7** where the appellant complained that, the trial tribunal erred in law for opening defence case before closing applicant/appellant's case as a result it denied

the appellant his right to produce all his material witnesses. Expounding to this ground of appeal, the appellant submitted that in the proceedings the appellant did not ask the tribunal to close his case and therefore he was denied his right to call his other material witnesses and therefore it occasioned injustice to him as he was denied his right to be heard. The respondent on the other hand argued that, the appellant never raised a concern at the tribunal that he had other witnesses and that even when the matter came for hearing of the defence case the appellant replied that he was ready to proceed.

This ground does not need to detain me much as the proceedings speak for themselves. At page 16 of the typed proceedings, it is observed that on 2nd March 2022 after hearing of the evidence of SM4, the appellant prayed to close his case and for easy of reference I wish to quote;

*"**Mdai** – Naomba kufunga Ushahidi wangu.*

***Imetiwa sahihi na** N. M. Ntumengwa*

Mwenyekiti

2/3/2022

***Wakili Ndibalema** – Tunaomba tarehe nyingine ya kusikiliza Ushahidi was Mdaiwa.*

***Imetiwa sahihi na** N. M. Ntumengwa*

Mwenyekiti

2/3/2022"

From the above elaboration, it is ostensible that the appellant himself informed the court of his intention to close his case and thus he cannot thereafter say that, the tribunal proceeded with hearing of the defence case without closing his case. His complaint is found to be an afterthought. The 7th ground of appeal is also bound to fail as I hereby dismiss for want of merit.

Having said the above, I now turn to **grounds number 1, 2 and 4** in which this court is called upon to determine whether the trial tribunal properly evaluated the evidence before it. The appellant herein is the one alleging over the ownership of the disputed land and as it is the position of the law that who ever alleges the existence of the facts, he is under the obligation to prove existence of those facts. See the decision of the Court of Appeal in the case of **Godfrey Sayi vs Anna Siame as Legal Representative of the late Mary Mndolwa,** Civil Appeal No. 114 of 2012 (Unreported) (See also section 110 of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019).

Similarly, it is a common knowledge that, in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities.

In the matter at hand, it is the appellant who alleged that the disputed land to be lawful property to him. Thus, the burden of proof was upon him to prove that, the said land belongs to him. The question that follows is therefore whether the appellant successfully discharged his duty.

From the proceedings of the trial tribunal, it is the evidence of the appellant that he obtained the suit land through the sale from one Yeremia Lohay and that, the same was accompanied with a sale agreement that was contracted between the appellant and the said Yeremia. But, none of his witnesses testified to have witnessed the sale agreement between the appellant and Yeremia Lohay except for the fact that they knew that the appellant bought the said land from Yeremia and that, the said land previously belonged to Nade Mungana.

Another appellant's witness Jonathan Petro, MS2 testified to have witnessed the sale agreement however in the said agreement he was referred as Jonathan Tluway. Despite SM2 being the key witness, his evidence as observed by this court is contradictory as on cross-examination, he testified that he did not know the size of the dispute land and the sale consideration which entails that he was not so much familiar with the sale agreement between the parties.

In the light of the evidence of the appellant and his witnesses, it is uncertain as to how the appellant came into possession of the disputed land. Similarly, it is uncertain or contradictory on whether the appellant bought the suit land for ten million and eighty thousand or one million and eighty thousand. I decisively hold this view simply because, sale agreement (AE1) indicates that, the suit land was sold for 1,080,000/= while the appellant's testimony is to the effect that, the price of the suit land was Tshs. 10,080,000/= (See page 7 and 9 of the typed proceedings as well as hand written proceedings).

This court also had time to go through the sale agreement, it is unfortunate that, the authenticity/validity of the said agreement is also questionable as there is no signature of the Ward Executive Officer, known by his acronym WEO) of Haydom save only for the seal his office to show that he witnessed the sale.

More so, it is firm view of this court that since the appellant alleged that he acquired the said land through sale from one Yeremia Lohay. It follows therefore, the said Yeremia Lohay was a key witness to substantiate the sale of the disputed land and that the same belonged to the appellant and not otherwise. Alternatively, the appellant ought to have informed the trial tribunal whereabouts of the seller. My finding is fortified

by the case of **Hemedi Saidi vs. Mohamedi Mbilu** (1984) TLR 113 where it was stated among other things that:

> "*In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence;* ***where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's*** *interests."* *(emphasis supplied)*

Moreover, the witnesses of the sale agreement namely; Marseli Domel, Vita Nade, Jonathan Tluway and Bombo Nade. The two out of four witnesses of the sale agreement are the sons of the said Nade Munga, previous owner did not appear for testimonial purposes. "). It has been the position of the law that if material witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the appellant. Worse still, One Marseli Domel whom the appellant said to have witnessed the sale agreement, denied to have witnessed the same save the sale agreement between one Yeremia Lohay and Nade Mungana. For easy of reference, parts of the evidence adduced by Mr. Marseli Domel, SM4 when cross examined by the respondent's counsel (Mr. Ndimbalema) is hereby reproduced

("Yeremia ndiye aliempa Mdai eneo hilo, sijui walipeana vipi na sijua kama walikuwa na mkataba .... Niliwahi kuwa shahidi wa mkataba kati ya Yeremia Lohay na Nade Mungana, najua ugomvi kati ya mdai ila sijui yanahusisha eneo gani kwa sababu mdaiwa ndiye anayelitumia.."

Examining the evidence of **PW4 (SM4),** I find the same to be contradictory on whether he witnessed the sale agreement dated 21st September 2014 as glaringly depicted in the PE1 and as per the appellant's testimony. It is therefore, my considered view that the appellant ought to have proved his case on the balance of probability that the land in dispute belongs to him however; the evidence on record does not credibly support his assertion. Thus, this court finds no reason to fault the decision of the trial tribunal.

In the upshot, this appeal is without merit. Consequently, it is dismissed in its entirety with costs.

It is so ordered.

DATED at **ARUSHA** this 25th July 2023

M. R. GWAE
JUDGE

Court: Right of further appeal to the Court of Appeal fully explained

M. R. GWAE
JUDGE
25/07/2023