THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 23 OF 2022

(Originating from the District Land and Housing Tribunal of Mtwara at Mtwara in Land Application No.70 of 2018)

BAKIRI OMARY MTUMWENI (As the Administrator Of the Estate of the late OMARY MZEE MTUMWENI) ..... **APPELLANT**

VERSUS

TATU SALUMU NAMALA .....**1ST RESPONDENT**

ALLY SHABANI KAGOMA .....**2ND RESPONDENT**

COSTER BARNABAS .....**3RD RESPONDENT**

HENRY MOSHI .....**4TH RESPONDENT**

MWALAMI .O. MTUMWENI .....**5TH RESPONDENT**

JUDGEMENT

1/8 & 29/9/2023

LALTAIKA, J.

The appellant herein **BAKIRI OMARY MTUMWENI** who is administrator of the estate of the late Omary Mzee Mtumweni is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara in (the DLHT)

in Land Application No. 70 of 2018. He has appealed to this Court on the following grounds:

1. *That, the trial chairman erred in law and fact by holding that the sale of the disputed land to wit Plot No 391, Block "A" between the 1st Respondent and the former administrator of the estate Omari Mzee Bakiri Mtumweni namely Yunus Mpate Mussa are valid while the High Court of Tanzania at Mtwara (This Court) Through P.C. Civil Appeal No 03 of 2014 at Page 10 nullified all sales Conducted by Yunus Mpate Mussa including the sale of Disputed land.*
2. *That, the trial chairman erred in law and fact by entering its decision in favor of the 1st Respondent and dismissed the entire Application while the Appellant managed to prove his case on the required standard.*
3. *That, the trial chairman erred in law and fact by entering its judgment without reasoning, without considering and evaluate properly the evidence by the appellant adduced during trial including all exhibits tendered during trial and without considering the final submission filed by the appellant and hence led to wrongly decision of dismissing Land Application No 70 of 2018.*
4. *That, the trial chairman erred in law and fact by departing from the opinions of the assessors without any justifiable reasons and recording the said opinion in the judgment.*
5. *That, the trial chairman erred in law and fact by applying the authorities to wit case laws in his judgment which are distinguishable and irrelevant in the case at hand as there was no decision of the Court of appeal nullifying the said decision of this Court in P.C Civil Appeal No 3 of 2014.*

When the appeal was called for hearing on 25th May 2023 the appellant appeared in person, unrepresented. The first and fifth respondents enjoyed the legal representation of **Ms. Rose Ndemereje, learned Advocate** while the 2nd, 3rd and 4th were absent as it was in previous sessions. The appellant prayed that the matter be disposed of by way of written submissions and that the appeal proceeds expar-te against the 2nd, 3rd, and 4th respondents. There being no objection from the rest of the respondents through their counsel, a schedule to that effect was agreed upon.

A **factual and contextual backdrop** necessary to appreciate the

crux of contention is as follows. It all began in February 2012 when a **man named Omary Mzee Bakiri Mtumweni** passed away without leaving a will. He left behind a widow, **Tatu Salumu Namala**, and ten children from different mothers. The diverse family included Rehema, Rukia, Hadija, Mwajuma, Ganima, Mwahija, Mzee, Bakiri, Haji, and Mwarami, each with their unique personalities and dreams.

Following Omary's passing, the family faced the daunting task of settling his estate. They agreed on two critical decisions: firstly, to appoint **Yunus Mpate Mussa**, Omary's younger brother, as the administrator of the estate, and secondly, **to abide by Islamic law (shariah) in administering the assets.** These decisions aimed to ensure fairness and justice in dividing Omary's possessions.

Yunus Mpate Mussa took on the responsibility of managing the estate and, as the family agreed, began the process of dividing Omary's properties among the rightful heirs. However, one property stood out – **a house located at Plot No 391, Block A Chikongola in Mtwara town**. The family collectively decided that this house should be preserved for the use of all family members, symbolizing their unity and shared heritage.

Unfortunately, things took a turn for the worse. In a shocking twist, Yunus Mpate Mussa, allegedly in **conspiracy with Tatu Salumu Namala,** decided to sell the disputed house at a substantially reduced price of TZS 20,000,000, far below its market value. This decision was made without the consent or consideration of the other heirs, raising suspicions of ulterior motives.

Outraged by this unlawful sale and fearing an unjust distribution of their father's estate, the heirs came together and filed a Civil Suit (**Case No 26/2012) before the Primary Court of Mtwara**, seeking the revocation of Yunus Mpate Mussa's position as administrator and the invalidation of the sale agreement with Tatu Salumu Namala.

Their perseverance and pursuit of justice eventually paid off when, on September 13, 2013, the court ruled in favor of the heirs. Yunus Mpate Mussa was officially removed from his role, and all agreements he had entered into, including the sale of the disputed house, were declared null and void.

Unwilling to accept defeat, Yunus Mpate Mussa appealed the decision, taking the case to the **Mtwara District Court through Probate Appeal No 1/2013**. However, the verdict remained in favor of the heirs, and the earlier judgment was admitted as evidence (exhibit P2) during the trial.

Undeterred, Yunus Mpate Mussa made yet another unsuccessful appeal to the **High Court of Tanzania at Mtwara, Probate Appeal No 3 of 2014**, where the decision was upheld once more. This court not only nullified the unlawful sale but also ordered the disputed house to be returned to a newly appointed estate administrator for the late Omari Mzee Bakiri Mtumweni.

Following this ruling, the new administrator, the appellant in the story, was advised to take legal action to rectify all the unlawful contracts executed by Yunus Mpate Mussa. This led to the filing of Land Application No 70 of 2018 before the District Land and Housing Tribunal for Mtwara at Mtwara,

which is the focus of the ongoing legal battle. In this application, the appellant sought to declare the disputed land as part of Omary Mzee Bakiri Mtumweni's estate and requested eviction of the tenants and payment of rent for the time they occupied the property. The next part of this judgement summarizes the rival submissions based on the grounds of appeal reproduced above.

Submitting in support of the appeal, the appellant Bakiri Omary Mtumweni (through an unnamed legal aid provider) contended that the trial chairman erred in both law and fact by asserting the validity of the sale of the disputed land, specifically Plot No 391, Block 'A,' between the 1st Respondent and the former administrator of the estate of Omari Mzee Bakiri Mtumweni, namely Yunus Mpate Mussa. The appellant highlighted that this Court, in P.C. Civil Appeal No 03 of 2014, page 10, nullified all sales conducted by Yunus Mpate Mussa, including the sale of the disputed land.

The appellant then provided an account of the proceedings during the trial, indicating that the 1st respondent had laid claim to ownership of the disputed land, specifically, a house situated at Plot No 391, Block 'A.' She had asserted that this property belonged to the late Omari Mzee Bakiri Mtumweni prior to his passing. Additionally, she claimed to have acquired ownership through its purchase from Yunus Mpate Mussa, the former estate administrator.

He underscored that there existed no dispute regarding the fact that the honorable court had invalidated the sale agreement between the 1st respondent and Yunus Mpate Mussa concerning the aforementioned

disputed house. This court had deemed the sale contrary to both the law and the interests of the heirs, noting that it contradicted an earlier agreement among the heirs not to sell the property. The appellant then quoted from the judgment:

> *"'...further he (the former administrator) sold a house to the widow of the deceased which is contrary to the earlier agreement that the house should not be sold. Such sale is nullified as it was not in the best interest of the heirs. I find no reasons to fault the two courts below on those facts.' (Page 10)"*

The appellant proceeded to draw attention to the fact that the judgment rendered by the High Court in P.C. Civil Appeal No 03 of 2014 had been admitted as Exhibit P3 without any objection from the respondents. He elucidated that, according to the legal implications of nullification, the sale was rendered void, signifying that no sale had, in reality, taken place between the two parties. Consequently, he contended that the disputed land remains an integral part of the estate of Omari Mzee Bakiri Mtumweni, which should rightfully fall under the administration of the appellant.

The appellant then drew attention to the fact that no appeal or application for revision had been filed with the Court of Appeal following the decision rendered by this honorable court in P.C. Civil Appeal No 03 of 2014. He emphasized that, in accordance with the law, the failure to initiate an appeal or application for revision signified the respondent's satisfaction with the aforementioned decision. Furthermore, **he observed that even if the 1st respondent argued that she had not been a party to P.C. Civil Appeal No 03 of 2014, the law provided her with the** opportunity to challenge the decision through the mechanisms of review or revision--

avenues she had refrained from pursuing, thus implying her acquiescence to the judgment.

The appellant then turned his attention to the **second ground of appeal, arguing that the trial chairman had erred in law and** fact by entering a decision in favor of the 1st respondent and dismissing the entire application. He cited the principle that the party making allegations must prove them, referring to Section 110 of the **TANZANIAN LAW OF EVIDENCE CAP 6 R: E 2022.** He explained that the standard of proof in civil cases, including the present case, was on the balance of probabilities, as provided by Section 3 (2) (b) of the Tanzania Evidence Act, Cap 6 R: E 2022.

The appellant referenced several case laws to support this principle. He then asserted that he had successfully met the required standard of proof during the trial by presenting witnesses and exhibits to prove that the disputed property, Plot No. 391 Block "A," belonged to the late Omary Mzee Bakiri Mtumweni. He emphasized that he had demonstrated, on the balance of probabilities, that the sale agreement between the 1st respondent and Yunus Mpate Mussa had been nullified by the court, rendering it as if no sale had ever occurred.

He criticized the trial chairman for failing to acknowledge the nullification of the sale and for quoting irrelevant paragraphs in the judgment, which led to an erroneous decision. The appellant concluded that the 1st respondent's defense of not being aware of the existence of the judgment held no ground in law, as every person was presumed to know the

law, and ignorance of the law was not a valid defense.

The appellant stated that if the 1st respondent claimed not to be a party in Probate Appeal No 03 of 2014, these claims could not invalidate or overturn the decision in Probate Appeal No 03/2014. According to the appellant, in law, there are legal remedies available to individuals who claim an interest in a property but were not parties to the case. These remedies include seeking a revision or review.

On the **3rd ground of appeal**, the appellant argued that the trial chairman had erred in law and fact by rendering judgment without providing proper reasoning or evaluating the evidence and exhibits presented by the appellant during the trial. The appellant emphasized that a judgment must contain points for determination, the decision reached on those points, and the reasons for the decision. Failure to do so raised concerns about the judgment's validity. The appellant referred to **Order XXXIX, rule 31 of the Civil Procedure Code, Cap 33 [R.E 2019],** which mandated that judgments must include these elements. Furthermore, he cited the case **of Jeremiah Shemweta vs. Republic** [1985] TLR 228 to support his argument.

Lastly, on the 4th ground of appeal, the appellant asserted that the trial chairman had departed from the opinions of the assessors without justifiable reasons and had not recorded these opinions in the judgment. He explained that according to the law, when a land case is heard before the trial tribunal, the chairman must sit with assessors who are required to give their opinions before the chairman reaches a judgment. This requirement

was outlined in sections 23 and 24 of the **Land Disputes Courts Act, Cap. 216 [R.E. 2019] and in Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2019.**

The appellant stated that he was aware that the trial chairman is not bound by the opinions of the assessors. However, he emphasized that considering their opinion is mandatory and not discretionary. He pointed out that the trial chairman must consider the assessors' opinion and, if he wishes to depart from it, he must state and record the reasons for doing so in the judgment. The appellant cited Section 24 of the Land Disputes Courts Act, which outlines this requirement in mandatory terms.

The appellant expressed concern that in the present appeal, the trial chairman did not record the assessors' opinions in the judgment and failed to provide reasons for his departure from their opinions. He pointed out that this omission renders the entire decision and judgment null and void, as per previous court rulings on similar cases.

The appellant also argued that the trial chairman erred in applying authorities and case laws that were distinguishable and irrelevant to the case at hand. He asserted that the cases cited by the trial chairman did not address the specific circumstances of their case, where the High Court had nullified the sale of the disputed land.

He asserted that the cited cases dealt with scenarios where only the administrator's appointment was revoked, but the sales remained valid. In contrast, their case involved the nullification of the sale, making it distinguishable. The appellant concluded by requesting the court to nullify

the judgment and proceedings of the trial tribunal and allow the appeal with costs.

Ms. Ndemereje, learned counsel for the 1st and 5th respondents, stated that on the 1st ground of appeal, the Appellant insisted that this Honorable Court in PC Civil Appeal No. 03 of 2014 (exhibit P3) nullified the sale Agreement between the then Administrator and the 1st Respondent. She then proceeded to quote the wording of the Honourable Judge at page 10 of the typed script on the mission to persuade this Honourable Court that the sale agreement was not nullified.

Ms. Ndemereje explained that, at pages 9 and 10 of the Judgment, the District Land and Housing Tribunal for Mtwara resolved that it was not confirmed that the High Court had nullified the initial sale agreements, which is why it advised the new administrators to sue the former administrator and those who benefited from the deceased's assets through him. She argued that the Appellant was misinterpreting this decision and trying to convince the courts that the sale agreements had been nullified.

She further stated that this Honourable Court, in **Misc. Land Application No. 27 of 2018, provided a proper interpretation of the said Judgment** (Exhibit P3). In that matter, it was clarified that the Court did not nullify the contracts but issued directives for the newly appointed administrators to follow necessary procedures to rectify the distribution of properties. The Court suggested that this could be achieved by suing the buyers along with the revoked administrator in separate cases.

Ms. Ndemereje acknowledged that the interpretation by **Hon. F.A.**

Twaibu, J in Misc. Land Application No. 27 of 2018 was not binding on other judges but pointed out the duty of judges not to lightly dissent from the considered opinions of their colleagues **to maintain consistency in legal decisions.** She argued that it would be difficult for the same Court to interpret the Judgment differently.

Regarding the status of the contract (Exhibit DI), Ms. Ndemereje concurred with the learned chairman that all contracts concluded between the removed administrator and other parties were legally binding. She highlighted that the fact that the disputed land was sold to the 1st Respondent was not disputed. She referred to section 101 of the Probate and Administration of Estate Act, Cap 352 RE 2019, which granted executors or administrators the power to dispose of property vested in them and noted that the 1st Respondent was a bona fide purchaser for value without notice.

Ms. Ndemereje cited the case of **Dativa Nanga versus Jibu Group Company Limited & Another, Civil Appeal No. 324 of 2020**, where it was affirmed that the first respondent was a bona fide purchaser for value without notice, having acted in good faith believing that the seller was the owner of the disputed property and that there was no fraud involved.

Ms. Ndemereje then moved on **to the second ground of appeal.** She noted that the Appellant claimed that the trial court had erred by not considering that he had proven his case to the required standards. Ms. Ndemereje emphasized that the genuine issue at hand was whether **PC Civil Appeal No. 3 of 2014 had nullified the contracts.** She referred to the interpretation of this judgment in Misc. Land Application No. 27 of 2018,

where it was clarified that the court did not nullify the contracts but provided directives to the newly appointed administrators. She argued that the Appellant had failed to prove to the required standards that the disputed land belonged to him as an administrator, and if he wanted a different interpretation of the judgment, he should have appealed against it.

She also pointed out that the number of witnesses and exhibits presented had no bearing on the case's credibility, and the relevant factors were the credibility of the witnesses and the relevance of the exhibits. She noted that a single document or witness could be sufficient to prove a case. Regarding Exhibit P13, Ms. Ndemereje argued that it was misconceived, and the Appellant had misled the Primary Court of Mtwara into issuing orders based on false information. However, the District Court of Mtwara had nullified all those orders and directed the Appellant to adhere to the directives of PC Civil Appeal No. 3 of 2014, rendering Exhibit P13 ineffective.

On the 3rd Ground of Appeal, Ms. Ndemereje addressed the Appellant's complaint that the trial Chairman had failed to reason and evaluate the evidence presented during the hearing, including all the exhibits and final written submissions. She pointed out that Order XXXIX rule 31 of the CPC RE 2019, which the Appellant had cited, was inapplicable in this case due to **regulation 10(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2019.** She explained that the CPC could only apply in the absence of specific regulations. Additionally, she argued that the failure to consider the filed final submissions was not prejudicial, as submissions were not part of the evidence. Moreover, she stated that there was no order requiring parties to

file final written submissions in this case, and the Appellant had not demonstrated any prejudice resulting from their absence.

Moving on to the 4th ground of appeal, Ms. Ndemereje asserted that the appellant had expressed dissatisfaction with the learned trial Chairman's decision, alleging that the Chairman had deviated from the opinions of the assessors without providing adequate reasons for such deviation. Ms. Ndemereje stated that they aligned themselves with the referenced regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2019, and section 24 of the Land Dispute Courts Act, 2002. She noted that the primary grievance here revolved around the alleged failure of the learned trial chairman to provide justifiable reasons for departing from the assessors' opinions.

Ms. Ndemereje further added that she found herself somewhat perplexed by this ground of appeal. In her considered view, the Appellant appeared to be conflating the act of providing reasons for departure with the manner in which a judgment is written. She pointed out that **it was now widely accepted that every Honorable Magistrate, chairman, or Judge had their own unique style of crafting judgments, with no universally agreed-upon format.** What remained of paramount importance, in her opinion, was that the judgment must align with the law, specifically, regulation 20(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2019.

Ms. Ndemereje emphasized that upon a meticulous examination of the Judgment rendered by the District Land and Housing Tribunal, it became

evident that the learned Chairman initiated the judgment by elucidating the rationale behind his departure from the assessors' opinions. She discerned no apparent deviation from the prescribed process. That, in essence, was the crux of the matter.

Transitioning to the **5th Ground of Appeal**, Ms. Ndemereje clarified that court cases were typically adjudicated based on the evidence presented in the records, rather than solely relying on the authorities cited by the Honorable Court. She stated that the terminology they often employed in such instances was that the cited cases could be distinguished. She further emphasized that the Honorable Court could not be deemed to have erred simply due to the authorities cited; instead, it had the prerogative to distinguish them appropriately.

In his **rejoinder submission, the appellant** pointed out that the respondents' submission seemed to rely on legal technicalities rather than focusing on merit and justice. The appellant stressed that courts of law are required to prioritize justice over legal technicalities, emphasizing the importance of not deciding in favor of the respondents based solely on such technicalities.

I have dispassionately considered the court records, grounds of appeal and rival submissions by both parties. I am inclined to state that the appeal is an interesting one in my opinion. It is born out of a family's quest for justice, now stands as a testament to their determination to uphold the rightful distribution of their father's estate and to preserve the **legacy of**

unity represented by the disputed house in Plot No 391, Block A Chikongola, Mtwara town.

My task as the first appellate Court has been to reevaluate the evidence presented in the trial tribunal. This position has been stated by the Court of Appeal in many decisions such as in the case of **Gaudence Sangu vs Republic** (Criminal Appeal No. 88 of 2020) [2022] TZCA 784 (7 December 2022) at page 7 and observed that:-

> *"...It is trite law that the first appellate court has a duty to re-evaluate the evidence on record which is more or less are hearing of the case except for the fact that, unlike the trial court, it does so through reading the transcript of proceedings without hearing witness as they testify which explains why the assessment of demeanour of witnesses is in the domain of a trial court. See: **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported). In doing so, the first appellate court may concur with the finding of fact made by the trial court or come to its own findings."*

My first reaction is that the learned trial Chairman although he was indeed concerned with a Land related dispute and not a Probate and Administration of Estate matter which is beyond his jurisdiction chose to ignore a lot of relevant issues presented to him by way of testimonies of the witnesses. It is a trite law that in civil cases, the burden of proof is on the one who alleges, and the standard of proof is on the balance of probability. This implies that a party who has a legal burden bears the evidential burden. For instance, in the case of **Charles Christopher Humphrey Richard Kombe T/a Humphrey Building Materials vs Kinondoni Municipal**

Council (Civil Appeal No. 125 of 2016) [2021] TZCA 337 (2 August 2021) Court of Appeal of Tanzania discussed this issue extensively by referring to the commentaries from the selected cases in India by the learned authors of Sarkar's Laws of Evidence, 18th Edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis at page 1896 whereby the Court at page 15 stated:

> *"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. ...The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...."*

It appears to me that the learned Chairman wanted the appellant to prove the negative which, as provided by the learned author quoted above, is incapable of proof.

Regarding the first ground of appeal, the appellant I agree with the appellant that this Court **had nullified all sales conducted by Yunus Mpate Mussa**, including the sale of the disputed land. The respondents' arguments that this court had not nullified the contracts but had only provided directions to newly appointed administrators are, to me, a mere exercise in futility to play with words and use technicalities to the detriment of Justice.

His Lordship Mzuna J. (as he then was) did indeed concur with the two courts bellow and proceeded to nullify the sale. That Judgement dated the 6th day of March 2023 remains a binding Court decision. The orders therein must be obeyed as in a country that respects the rule of law. In **SUBRATA**

ROY SAHARA V. UNION OF INDIA (2014) 8 SCC 470, the Supreme Court of India stated as follows:

> *"Disobedience of orders of a court strikes at the very root of the rule of law which the judicial system rests. Judicial orders are bound to be obeyed at all costs. Howsoever grave the effect may be, is no answer for noncompliance of a judicial order. Judicial orders cannot be permitted to be circumvented."*

I must emphasize that His Lordship Mzuna's orders and directives can only be varied or nullified by the Court of Appeal of Tanzania. I have not read this Court's "interpretation" in **Misc. Land Application No. 27 of 2018** asserted by Ms. Ndemereje but I am fortified that unless varied by the Court of Appeal the plain meaning of the words in Hon. Mzuna's Judgement must be enforced without fault. To borrow the words of Romer L.J. in **HADKINSON V. HADKINSON** [1952] 2 All ER 567

> *"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged.* ***The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."***

The two grounds of appeal are, in my opinion, capable of disposing of the entire appeal. The rest of the grounds which are too specific on the form and content of the Judgement of the learned Chairman of the Tribunal and the way he handled, or rather evaluated evidence presented to him do not add value to the present matter.

What I consider a real challenge is the way forward after this appeal given the fact that parties have been in court since 2015. I am tempted to think that the appellant is partly to blame for unending litigation. This is because, I have **carefully read (and reread) His Lordship Mzuna's Judgement** and nowhere does it suggest that the appellant needed to go to the DLHT. In fact, the Judgment categorically provides that the appellants could **"seek assistance of the Primary Court"** in enforcing the orders therein.

It is so unfortunate that the appellant went to the DLHT and the DLHT failed to consider the bigger picture. The tribunal allowed itself to be misled by erroneous interpretation of the *ratio decidendi* of this Court and left out what the real concern of the litigants. It cannot be overemphasized that the DLHT issued a totally erroneous decision that attempted (albeit in vain) to jettison concurrent findings of the Primary Court, District Court, and this Court. The three Courts remain on the same page regarding the illegality of actions conducted by the respondent herein.

All said and done, the appeal is hereby allowed with costs. I proceed to nullify the proceedings of the DLHT for Mtwara and set aside all orders emanating therefrom.

It is so ordered.

E.I. LALTAIKA

JUDGE

29/09/2023

Court

Judgement delivered this 29th day of September 2023 in the presence of Mr. Stephen Lekey, Advocate for the 1st and 5th respondents and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE

29/09/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE

29/09/2023