IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPEAL NO. 01 OF 2023

(C/F land Appeal No.27 of 2021 at District Land and Housing Tribunal for Moshi at Moshi originating from Application No. 88 of 2021 at Mabogini Ward Tribunal)

ZAINA MUSA…… APPELLANT

VERSUS

PILI SELEMANI……..RESPONDENT

JUDGEMENT

Date of Last Order: 30.08.2023
Date of Judgment: 03.10.2023

MONGELLA, J.

This is a second appeal originating from the decision of Mabogini Ward Tribunal (WT, hereinafter) in Land Case No. 88 of 2021 and Land Appeal No. 27 of 2021 before the District Land and Housing Tribunal for Moshi (the Tribunal).

In brief, the respondent, who is the mother-in-law of the appellant, filed a complaint before Mabogini Ward Tribunal seeking for the WT to order for her return to the suit land. She claimed that the suit land belonged to her, but was chased therefrom by the appellant. After hearing the parties, the WT found the suit land belonging to the

respondent. It thus ordered the appellant to let the respondent return to her home for both of them to live together. Aggrieved, the appellant filed an appeal before the Tribunal on three grounds being:

1. *That the trial Ward Tribunal erred in law and facts in failure to ascertain that the suit land belongs to the Appellant as her and her late husband one Bakari Hassan Sabatele were given the suit land by Pili Selemani (Respondent and mother of Bakari Hassan Sabatele) when they got married and indeed, they constructed a house therein.*

2. *That the trial Ward Tribunal erred in law and fact in not giving the Appellant rights to call witnesses who in fact could have testified and justify her ownership of the suit land beside the trial ward tribunal in its decision adduced that there is no need to call witnesses*

3. *That the trial Ward Tribunal erred in law and facts in failure to recognize that the Respondent has her own house in his own land in which the Appellant supported her in construction of a house therein.*

The appeal was found without merit and dismissed with costs. Still aggrieved, she filed this second appeal on the following grounds:

1. *That the appeal tribunal erred in law and fact for not declaring the appellant lawful owner of the suit land as the land was given to her and her late husband by the respondent.* (sic)

2. *That the appeal tribunal erred in law and fact for failing to entertain ground Number Two of memorandum of appeal raised by the appellant during appeal without giving reason for that effect.* (sic)

3. *That the appeal tribunal erred in law and fact by failing to recognize that the appellant was denied her right to call witnesses during trial to testify on her behalf as this amounts to unfair trial.*

4. *That the appeal tribunal erred in law and fact to entertain the dispute with serious material irregularities.*

She thus prayed for the court to quash the Tribunal decision, declare her the legal owner of the suit land, to grant her costs of the suit and to grant her any other relief it deems fit.

The appeal was resolved partly by written submissions by the appellant and oral submissions by the respondent following their prayers, which were granted by the court accordingly.

Arguing on the 1st ground, the appellant averred that it was apparent on record that she testified that the land was given to her and her late husband by the respondent. That, such testimony was not disputed by the respondent during trial and hence ought to have been taken as true. She averred that the trial tribunal's assertion that she had admitted the suit land to have belonged to the respondent is unfounded as there was no testimony provided to support the same. She however did not dispute that the land was formerly owned by the respondent only though she still maintained that the respondent had given the land to her and her late husband.

The 2nd, 3rd and 4th grounds were argued collectively. Submitting on the grounds, she contended that the appellate Tribunal failed to entertain the 2nd ground of appeal without giving reasons. She was of view that the appellate Tribunal failed to recognize that she was denied the right to call witnesses during trial to testify on her behalf rendering the trial unfair. She averred that although the appellate court is not obliged to consider all grounds of appeal, it is supposed resolve all complaints raised in the appeal either separately or jointly. In support of her stance, she cited the case of **Revocatus Mugisha vs. The Republic** (Criminal Appeal No. 200 of 2020) [2022] TZCA 63 TANZLII.

Arguing further, she averred that the appellate Tribunal did not discuss the 2nd ground of appeal which raised a point of law, but only stated the same. She added that the WT did not accord the

parties the right to call witnesses thereby denying them the right to fair trial. She considered that a violation of **Article 13 (6) (A) of The Constitution of the United Republic of Tanzania** rendering the proceedings a nullity. She cited the case of **Emmanuel Richard @ Humbe vs Republic** (Criminal Appeal 369 of 2018) [2021] TZCA 111 TANZLII, arguing that the WT erred in closing the case for the parties instead of letting them close their own cases by stating that they did not intend to call further witnesses. She thus prayed for this court to allow this appeal with costs and nullify the proceedings of the two lower tribunals.

The appeal was opposed by the respondent. In reply, she stated that the house in dispute is hers. That, her son was once married and after quarreling with his wife, he came back home and lived with her in her house. That, she had previously allowed her daughter to reside in the suit land with her husband until when they got their own place. After her daughter and her husband found a place to live, they left the suit land. She then took over the grass made room they had built as the roof to her house was leaking. She did that while planning to rebuild her destroyed room. She said that the appellant's husband started supervising the rebuilding of the room and by the time the appellant was married, one room had been completed. That, they added another room under the same arrangement that the appellant and her husband shall leave when they obtain their own place. That, unfortunately the appellant's husband fell ill and died while undergoing treatment.

The clan had a meeting whereby the clan members told the respondent that the place was hers, but she could live with the appellant if she wanted and the appellant shall leave the house if she re-marries. However, she said, when the relatives dispersed, the appellant refused to live with her and wanted her to leave claiming that the house was hers. The respondent was then taken in by one of her grandchildren. The respondent added that there several meetings were called to resolve the dispute, but were unfruitful. She was thus advised by local government leaders to file a case in court whereby she filed a case in the WT and won the same. The appellant appealed but lost, hence this appeal.

She averred further that she had several children who, she raised in that land, which she acquired after her husband died. That the land was given to her by a certain widow who also passed through similar problems as hers.

On the 3rd ground, she averred that the WT saw that she admitted that the house and land was hers and asked the appellant if there was a necessity to call other witnesses. In that respect, she had the stance that the appellant was not denied any right to call witnesses. She prayed for this court to help her get her home back and dismiss the appeal.

Rejoining, the appellant averred that the respondent raised new evidence in her submissions which is not permitted on appeal. That, the facts about her husband building a room in the suit land and

the fact that she refused to live with the respondent are all new evidence and thus should not be relied upon by this court. She supported her stance with the case of **Lightness Damian and Others vs. Said Kasim Chageka** (Civil Application No. 450 of 2020) [2022] TZCA 713 TANZLII.

She refuted the assertion that she was given an opportunity to call witnesses and averred that the same was not on record of the WT. She argued further that there is no point in time that she refused to call witnesses. That, it was the WT which stated that there was no need for parties to call witnesses. She maintained that the WT did not accord her the right to call witnesses to prove her case and that was an error. She again cited the case of **Emmanuel Richard @ Humbe vs. the Republic** (supra) to cement her point.

In conclusion, she maintained that she never admitted that the respondent is the owner of the suit land as asserted by the WT and the respondent, which is apparent on face of the WT record. She maintained her prayer for the appeal to be allowed with costs.

I have considered the submissions of both parties and the lower tribunals' record. It is trite law that the second appellate court should refrain from interfering with the concurrent findings of the two lower courts except where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. See:

Helmina Nyoni vs. Yeremia Magoti (Civil Appeal 61 of 2020) [2022] TZCA 170 TANZLII.

In resolving this appeal, I shall first address the 2nd, 3rd and 4th grounds of appeal in which the appellant alleged there were material irregularities in the proceedings of the WT whereby the appellant was denied the right to call witnesses. The respondent, on the other hand, disputed the assertion that the appellant was denied the right to call witnesses. She averred that the WT saw that the appellant had admitted that the land and the house belonged to her and asked her if there was necessity to call further witnesses.

In the appellate Tribunal judgment, it is clear that this issue was not discussed and determined despite summarizing submissions of both parties on the same. The appellate Tribunal only proceeded to determine the appeal on one issue as to "*who is the rightful owner of the suit land.*" This issue did not address the irregularity in proceedings of the WT, to wit, the failure to accord parties the right to call witnesses, which was and is still complained of by the appellant. Such omission was a material irregularity that caused injustice to the parties.

According to **section 43 of the Land Disputes Courts Act [Cap 216 RE 2019]** this court is bestowed with supervisory powers over the proceedings of the District Land and Housing Tribunal and may therefore step in to resolve the undetermined issue.

It is apparent on record that the matter was first referred to the WT on 17.06.2021 whereby the respondent alone attended the proceedings and stated her claim. The appellant was summoned to appear on 24.06.2021. On the material day, the WT recorded the statement of both parties starting with that of the respondent then followed the appellant. It is not indicated as to what orders the trial tribunal made thereafter, but it is seen that on the same day, the WT delivered its judgment.

In the said judgment, the WT summarized the testimonies of both parties and gave its decision. Prior to giving its orders it explained that it did not find the need for witnesses to be called because the appellant had admitted that the suit land belonged to the respondent, but the house was hers and her husband's. It stated:

> "Baada ya baraza kusikiliza wote mdai na mdaiwa baraza halikuwa na haja ya kuita mashahidi kwani mdai amekiri kwamba eneo lile ni mali yake na mdaiwa pia anakiri kwamba eneo lile ni mali ya mdai ila nyumba ni mali yake na mume wake."

Clearly, the WT was of the considered view that the appellant admitted that she was not the owner of the suit land making the matter non contentious thereby needing no witnesses to be called. The underlying question is therefore whether the appellant's statement was an admission that the suit land belonged to the respondent.

Observing the WT record, the alleged admission is not vividly seen. The appellant admitted to her and her husband being invited to part of the suit land by the respondent. While at the suit land they built their home by erecting one room after the other. That, was before her husband demised. This is evident in her statement whereby she stated:

> "…Mama mkwe akasema tuhamie nyumbani kwake ili tuwe karibu lakini nyumba aliyokuwa nayo ilikuwa haitoshi kuishi pamoja na mama ndipo mama akatupatia eneo la kujenga na tukajenga chumba kimoja tukahamia mwaka 2004, tukaendelea kuongeza chumba kimoja kimoja kwa kadiri ya …"

She also complained that the respondent wanted to take over the home she lived with her husband and that she even claimed her 700 bricks, which she and her husband had used to build their home, alleging that she wanted her children to use the same to build her a house and when they built another house she refused to go into that house. This is also recorded in her statement whereby she stated:

> "… ilipofika 2018 mama akanipeleka ustawi wa jamii akidai niondoke nimuachie nyumba kwani mtoto wake ameshakufa. Mama akaendelea kusema kwamba kuna tofali zake 700 ambazo tulitumia kujenga nyumba yetu anazihitaji ili ajengewe nyumba na Watoto wake ..."

She further stated:

> "… tukaendela kujenga kwa nguvu na chumba kimeishaisha bado mlango na madirisha ila mama hataki tena hicho chumba bali anataka nyumba yangu ninayoishi.

The above excerpts clearly show that the appellant did not admit to the claim that the suit land belonged to the respondent. Even the respondent herself did not admit to the house belonging to the appellant and her husband. Her claim was always that both the house and the suit land belonged to her. This shows there were disputes as to both ownership of the suit land on which the house was built. In the circumstances, the WT was therefore required to list the controversial matters between the parties and let the parties bring their witnesses to prove their claims.

The failure of the trial tribunal in observing the contentious issues and awarding the parties the right to call witnesses denied the parties the right to a fair hearing as enshrined under **Article 13 (6) (a) of the Constitution of the united Republic of Tanzania, 1977** which states:

> "To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
>
> (a) **when the rights and duties of any person are being determined by the court or any**

> **other agency, that person shall be entitled to a fair hearing** and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

Where the right to fair hearing has been violated, the proceedings are rendered a nullity. This was well expounded in **David Mushi vs. Abdallah Msham Kitwanga** (Civil Appeal 286 of 2016) [2022] TZCA 535 TANZLII, whereby the Court of Appeal stated:

> "It is a cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing as is the case in this matter, such decision is rendered a nullity and cannot be left to stand. The Court has consistently taken that stance in various decisions."

The Court further cited the case of **Abbas Sherally and Another vs. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002, in which it held:

> "The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

In the foregoing, I find that the omission to allow parties to call their witnesses and was a fatal irregularity in proceedings as it violated

their right to be heard. As such, I herein nullify the entire proceedings of Mabogini Ward Tribunal in Land Case No. 88 of 2021 and the District Land and Housing Tribunal for Moshi at Moshi in Land Appeal No. 27 of 2021.

According to the records of the trial WT, the dispute was filed on 17.06.2021 whereby the amendments made to **section 13 of the Land Dispute Courts Act** by **section 45 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, G.N. No. 5 of 2021** had not come into force. Noting that the same had altered the jurisdiction of the WT in adjudicating upon matters filed before it, this matter shall not be remitted to the WT, instead the parties are free to file a fresh matter in the District Land and Housing Tribunal in compliance with the relevant laws. Considering the relationship between the parties and the injustice occasioned to both parties by the lower tribunals, I make no orders as to costs.

Dated and delivered at Moshi on this 03rd day of October 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA