IN THE HIGH COURT OF THE UNITED REPUBLI OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
LAND APPEAL NO.49 OF 2023
(Originating from MASWA District Land and Housing Tribunal in Land Application No.32 of 2022)

SADO NCHALLA .....APPELLANT
(The administrator of the estate
of late NCHALLA MIKEMBO)

VERSUS

1.PAGI KINASA JILASA
2.ZENZE MAJANGITO
3.NDAKI BUGALAMA
4.MAHONA GUMHA
5.SHINDIA NDEMELA
6.SHINJE MAJANGITO **.....RESPONDENTS**
7.SENI GAKUNDA
8.NKINGA DOTO
9.KWANDU GUMHA
10.SHINDAYI MAHONA

JUDGMENT

8th & 14th November 2023
F. H. Mahimbali, J.

The appellant claims to be the legal heir (administrator of the estate) of the late Nchala Mikembo. That during the life time of the said Nchala Mikembo, prior to 1998 had been possessing land located at Songambele hamlet within Mwabunyunge Village in Ipililo Ward within Maswa District totaling 48 acres. His neighbors are Tuju Ndoma, Jongela Manuke/Mbugano

Lubango, Majangito and Ilomela river on north, south, East and Western side respectively (the suit land). The estimated value of the said land is 40,000,000/=

According to the statement of claim by the appellant at the trial tribunal, averred that the 1st Respondent's father (Kinasa Kwilasa) who also was the applicant's father in law was permitted using the said land temporarily for cultivation. That following the death of the said Nchala Mikembo in 1998, is where the fracas started. The said shamba was left under the care of one Busanda Nchala who also died in 2015. It is from the death of the latter, where then the 1st respondent came in and sold the parcels of land to the other respondents. Upon his appointment as administrator of the estate, the applicant then commenced this suit against the respondents claiming the suit land as being the estate of the late Nchala Mikembo and that the sale of the said land from the 1st respondent to the rest was void abnitio. He thus prayed that the suit land be declared as lawful estate of the deceased Nchala Mikembo the claims the respondents resisted as they lawfully purchased from the first respondent who was not available during the trial of the said suit.

Upon a full hearing of the suit, the trial tribunal decreed against the appellant by dismissing his suit as his claims being frivolous and unestablished while blessing the sale agreement between the 1st respondent and the rest of the respondents as being lawful and that the title had lawfully passed to them.

The appellant has been dissatisfied by the decision of the trial tribunal which ruled in his disfavor. He has appealed to this Court armed with a total of three grounds of appeal; namely:

1. *That the trial chairperson erred in law and facts by deciding the matter in favour of the respondents herein without considering and determining the second framed issue on the legality of the alleged sale of the disputed land between the first respondent and the rest of the respondents.*
2. *That the learned trial chairperson erred in law and facts by deciding the matter for the respondents without any evidence from the alleged sellers on the title they held over the disputed land and in disregard of the evidence from the appellant (Applicant) that the first respondent was entrusted to take care of the land for the owner thereof.*

3. *That the learned trial chairperson erred in law and facts in deciding the matter for the respondents without considering that the first respondent or any person other than the owner thereof could not pass a better title over the disputed land than himself had by sale to another person.*

On these grounds of appeal, the appellant herein prays before this Court to allow the appeal with costs and be declared the lawful owner of the disputed land.

During the hearing of the appeal, the appellant was self-represented and had nothing material to add save that his grounds of appeal be adopted by the court as they are and form part of his submission and that his appeal be allowed with costs.

On the other hand, the respondents who resisted the appeal, had the legal services of Mr. Masunga learned advocate.

With the first ground of appeal he submitted that it is not true that the DLHT failed to consider that the second issue on the legality of the sale between the 1st Respondent and the rest of the respondents. There is ample evidence (testimony of DW2 – DW10) of page 10-34 of the typed

proceedings) which tells how the Respondents were in possession of the said land from 1998 and that they have been in active use from that time without any disturbance. Thus, the second framed issue was well considered by the DLHT (page 5 of the typed judgment).

On the second ground of appeal, he also opposed it arguing that there was no sufficient evidence to warrant the verdict as contended. As per page 5 -7 of the typed proceedings, it is clear that the appellant's evidence is weaker and unconvincing to entitle her victory.

That she had been away for 22 years from the use of land and the respondents on the other hand testified that they have been in active use since 1994. Thus by 2022 when this suit commenced, the respondents had already been in active use for more than twelve years (12- 20 years).

He added that, it is trite law that parties are bound by their pleadings. As per para 4 of the appellant's plaint, claims that she had left her land to the control of Mr. Busanda Nchalla who died in 2015. If that is true, where was Nchalla and the appellant when the respondents started occupation of that area in 1994.

Therefore, in balancing the scales of justice between the appellant's evidence and that of the respondent, the DLHT was satisfied that the respondent's evidence was heavier than that of the appellant.

Lastly on the third ground that the DLHT failed to consider that the 1st respondent had no better title to pass the same to the respondents, he submitted that as per testimony of DW2 (page 12 of the typed proceedings) who is his neighbour to the father of the 1st respondent and the testimony of DW7 (page 21 of the typed proceedings) testified very well how the said land was being owned by the 1st respondent's father and not the father of the appellant. All this was corroborated by the testimony of DW10 (page 26-27 of the typed proceedings).

Therefore, the disputed plot lawfully transferred to the respondents as opposed to the appellants' contention/claims.

With this submission, it is his humble submission that the appeal is unmerited as the appellant failed to establish her claims in the legal standards as per law. Thus, this appeal be dismissed with costs.

In her rejoinder submission, she had nothing more to add save reiterating her submission in chief that her evidence was heavier and credible

than theirs. In essence she insisted that the said land is hers and does not belong to the respondent as claimed and decreed.

That was all about the appeal's hearing. However, upon perusal of the trial record, the parties were referred to the proceedings of 18th April 2023 (at page 35-36 of the typed proceedings) of the DLHT to establish whether the assessors' opinion were read over and reflected into the proceedings and whether it was proper.

The appellant Ms Sado Nchalla had nothing material for her input. However, Mr. Masunga learned advocate for the respondents, honestly submitted that the proceedings didn't reflect what actually transpired on the said assessors' opinions. They ought to have been reflected into the proceedings in brief what they opined. Thus, he submitted that all that transpired is therefore a nullity.

In consideration of the parties' submissions for and against the appeal as summarized above, I am now obliged to consider whether the appeal is brought with sufficient cause. Since there is a legal issue as raised by the court on legality of the said proceedings and the resulting judgment for failure to incorporate the tribunal assessors' opinions, I have to consider it first and digest whether there is anything to comment on that.

I shall start by considering the issue of the assessors' involvement in the hearing of the case before the Tribunal. Section 23 (1) and (2) of the Act provides thus:

> "(*1) The District Land and Housing Tribunal established under section 22 shall be composed of one* ***Chairman and not less than two assessors.***
>
> *(2) The District Land and Housing Tribunal shall be duly constituted when held by a* ***Chairman and two assessors*** *who shall be required to give out their opinion before the Chairman reaches the judgment"*

According to this provision, the Tribunal is properly composed when it is comprised of a Chairman and not less than two assessors. Moreover, the assessors are required to give their opinion before the Chairman reaches the judgment. Regulation 19 (2) of the Regulations provides thus:

> *"Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*

This provision states clearly that at the conclusion of the hearing, the Chairman is obliged to require every assessor present to give his opinion in

writing. Now, upon perusal of the record of appeal, I have found that when the hearing was closed on 18th April 2022, the Chairman just remarked that the assessors have given their opinions, but the same were not made part of the proceedings as to what they opined. In his judgment, the Chairman did not even indicate that he had considered the opinion of assessors if at all they submitted the same. In a similar situation like the instant case, in the case of **Ameir Mbarak and Azania Bank Corp Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) the Court of Appeal stated thus:

> "*Therefore, in our considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the Chairman in the judgment In the circumstances, we are o f a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity.*"

See also **Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 (unreported), **Zubeda Hussein vs Kayagali vs Oliva Gaston Luvakule & Another** (Civil Appeal 312 of 2017) [2021] TZCA 162 (3 May 2021). 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. This requirement was not explicitly complied with in the instant case. To underscore this position of the law, in the case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017 (unreported) where the opinion of assessors was not reflected in the record but only referred in the judgment of the Tribunal, the Court stated thus:

> *"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. Unfortunately, this did not happen in this case. We are increasingly of the considered view that, since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the*

opinion and whether or not such opinion has been considered by the Chairman in the final verdict."

Additionally, before the Chairman reaches the final verdict, he is supposed to consider the opinion of the assessors though not bound by it but should give reasons for such differing with such opinion. This is the requirement under section 24 of the Act which provides thus:

"*In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

Therefore, in order to comply with this provision of law, the Chairman should receive the opinion of assessors and consider it in the judgment. Consequently, on the strength of the law and the cited authorities, I find that the failure by the Tribunal Chairman to involve the assessors in reaching the decision vitiated the proceedings and judgment of the Tribunal and the effect is to nullify the proceedings as I hereby do pursuant to section 43 (1) of the LDCA, Cap 216 R.E 2019.

As to the way forward, I thus order a retrial of the case before a different a Chairman and a new set of assessors at the option of the appellant

if still desirous of the said dispute. As the issue leading to the determination of this appeal was raised by the Court suo motto, I make no orders as to costs.

DATED at SHINYANGA this 14th day of November, 2023.

F. H. MAHIMBALI

JUDGE

Ruling delivered today the 14th day of November, 2023.in the presence of the appellant and respondent and Ms Beatrice, RMA, present in Chamber Court.

THE HIGH COURT OF TANZANIA

F.H. MAHIMBALI

JUDGE