IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 172 OF 2022

(Originated from Land Application No. 58 of 2017 from the District Land & Housing Tribunal Babati at Babati)

HOTAY SAKWELI _____ **APPELLANT**

VERSUS

AKONAAY SIKUKUU SAKWELI _____ **RESPONDENT**

12/09/2023 **&** 24/11/2023

JUDGMENT

BADE, J.

The dispute in this appeal arises out of a contest for land that a grandmother has bequeathed to her grandson, surpassing in between the sons, one of whom is the father of the Respondent. The Appellant herein is one of the said aggrieved sons, who had unsuccessfully sued his nephew at the Land and Housing Tribunal of Babati at Babati (herein referred to as the Land Tribunal). He is preferring this appeal in further pursuance of the said right

to inherit the land from his mother, contesting further the bequeath to the grandson. He has preferred the following grounds of appeal, viz:

1. The learned Chairman of the trial Tribunal erred in law and fact as he delivered a judgment without recording and incorporating the opinions of the assessors who sat with him at the hearing.
2. The learned Chairman of the Tribunal misdirected himself in declaring the Respondent as the lawful owner of the suit land basing on a document purported to be a will while the same does not have the qualities of a legal will.
3. The learned Chairman of the trial Tribunal erred in law and fact as he delivered his judgment basing on a photocopy document.
4. The learned Chairman of the trial Tribunal erred in law and fact as in declaring the Respondent as the lawful owner of the suit land while the records as regards the respondent's evidence do not indicate:
   i) If the respondent's father was entrusted to take care of the suit land until the appellant turns the age of majority
   ii) How the possession of the suit land was transferred from the respondent's father to the respondent.

Bringing context to the matter, the Appellant is contesting for a piece of land measuring half an acre out of an acre of land that was wholly bequeathed *inter vivos* to the respondent. He contends that the respondent should only be entitled to half an acre, and the remaining half an acre should come to him by way of inheritance. He claims that he has been holding this land since 2002 without any interference, and had built himself a house and lived from 2002 to 2014 when the respondents invaded it and started cultivating around the house that he had built.

On the other hand, the Respondent countered that the land in question measuring one acre was bequeathed to him in 2006 by his grandmother, the late Pascalina Tlatlaa Ng'adi, who passed away in 2012. He further maintains that the house that the Appellant claimed to have built was already there, built and renovated by the late Pascalina Tlatlaa Ng'adi before she passed away. According to the Respondent, the Appellant moved into it in 2014 and started making trouble in 2015 when he prosecuted a Criminal Case No. 15/2015 against his father alleging trespass.

The parties were both unrepresented before the court, and did an oral submission on the grounds of appeal.

Supporting ground 1 of the grounds of appeal, the Appellant submitted that the Judgment of the Land Tribunal did not incorporate assessor's opinion, despite them being there throughout the trial.

Submitting on the second ground of appeal, the Appellant attacked the purported Will of her late mother as not being a will legally speaking as it is wanting in the requirements of the law. He questioned why the grandmother gave the land to the Respondent without any of the 4 children of the late Pascalina Tlatlaa Ng'adi knowing and being made witnesses to the said bequeath. He lamented that none of the relatives knew anything about the will. In his view, he contended that the trial Tribunal was wrong to rely on a document made by the Village leaders to declare the Respondent as the lawful owner of the disputed land.

Concerning ground 3 of the grounds of appeal, he disputed the reliance on a Photocopy document to decide the case. He chimes that there were no original documents that were brought in court, arguing that even though he had objected to the admission of the photocopied document, the trial court disregarded his objection and continued to admit and relied upon this document to declare the Respondent as the owner of the disputed property.

Arguing the 4th ground of appeal, he maintains that the evidence does not indicate if the respondent's father was entrusted to care for the suit land or how the possession of the suit land was transferred from the respondent's father to the respondent.

He explained that initially, the matter started with him suing the father, who is his blood brother. However since the respondent had attained the age of majority, the Land Tribunal substituted his name in 2017, offering that in 2006, when the will was made, the respondent was a tender child of 4 years old. He maintains that was the reason for him to sue his brother as he questioned how the transfer was effected from the father who was the caretaker of the disputed land to the son.

He concludes by urging this court to find the appeal with merits and quash the decision of the Land Tribunal which declared the Respondent the lawful owner of the suit land as being unjust and without merit.

Opposing the appeal, the Respondent on the other hand being a lay person, made no specific rebuttals on each of the grounds of appeal but rather maintained a general rebuttal on all grounds. He countered that the suit land was given to him by his father, having taken care of the land after the passing

away of his grandmother. He insisted that his father was passing it on to him after he had taken care of the land that was first bequeathed to him by the Appellant's mother who is his grandmother.

He wondered why the Appellant would not let him have peace while he indeed had his signature on the document that had bequeathed the said farmland to him together with the house in it, which had previously been built and belonged to his late grandmother.

Countering the argument that he presented a photocopied document in place of the required original document, he maintained that his uncle is well aware that the original document was given to the primary court in Babati in the prosecution of the criminal case that the appellant had previously preferred against his father disputing the same ownership and alleging criminal trespass. He insists that during the trial, they could not obtain the original copy, the Land Tribunal had closed the respondent's case, but still they made a copy for it to be brought to the Land Tribunal, as the Primary Court had retained the original copy.

The Respondent urged this court to find the appeal without any merit and dismiss the same with costs, so he can be let to enjoy his land.

The Appellant had nothing to add in Rejoinder despite being afforded the opportunity to so do.

Having heard the parties' submission, I had dispassionately perused the handwritten record of the Land Tribunal and the typed judgment, and had observed that the court is called upon to determine whether the Land Tribunal had relied upon an inadmissible document to reach its decision and whether the assessors' opinion were not recorded and incorporated in the judgment. I propose to start with the second issue in response since its based on the law, and if the said issue will be answered affirmatively, I might not need to determine the first issue as it will not save the day.

The mandatory requirement of sections 23 (1), (2), and 24 of the Land Disputes Court Act, Cap. 216 R.E. 2002 (the Act). This provision requires that in adjudicating land matters before the Tribunal, the Chairman sits with the aid of assessors, who are vested with the mandate to participate by asking questions and giving their opinion in writing before the Chairman proceeds to compose a decision of the Tribunal. And all these must be reflected on the record of proceedings. Besides, where the Chairman disagrees with the opinion of the assessors, he must record the reason thereof.

In my perusal of the record which is handwritten, I have found the following record in the instant case, which I reproduce for effect:

"Tarehe 22//6/2022

AKIDI - K. C. NGONYANI – M/KITI

Bw. Barie

Bi Sulle - Washauri

Mleta Maombi - Yupo

Mjibu Maombi - Yupo

Baraza : Maoni ya Mjumbe Hamida Mkwella na Joseph Hyera yamepokelewa leo mbele ya Mleta Maombi na Mjibu Maombi.

Amri: Hukumu tarehe 29/6/2022

Signed

22/6/2022

So despite the judgment complying with the provision of section 24 of the Act which requires the Chairman to take into account the opinion of the assessors without being bound by it, and give reasons for differing with such opinion, the record do not depict if the same were read out to the parties at

the Tribunal, neither do record reflect on what has been said by the assessors other than finding the written opinions of the assessors on file.

The Judgment of the Tribunal has incoprporated the said opinion in its decision as per page 4 of the typed Judgment which says:

> " Kuhusiana na hoja ya kwanza inayohusu umiliki wa ardhi yenye mgogoro wajumbe wa baraza hili bi Hamida Mkwella na Bwa, Joseph Hyera walikuwa na maoni yanayofanana kwamba mjibu maombi ndiye mmiliki halali wa ardhi ya eka moja aliyopewa na bibi yake Pascalina Tlatlaa Ng'adi. Nakubaliana na maoni hayo."

In fairness though, the record does not support the said incorporation as there is no record on the proceedings on whether the same were read out to the parties after they were received. The Court of Appeal sitting in Mwanza in the case of **Peter Makuri vs Michael Magwega,** Civil Appeal No. 107 of 2019 where the Court stated in the absence on the record of the opinion of assessors, it is impossible to ascertain if they did give any opinion for consideration in composing the judgment of the Tribunal, quoting in approval with **Emmanuel Christopher Lukumai vs Juma Omari Mrisho,** Civil Appeal No. 21 of 2013.

As it happens, the finding of omission to record and incorporate assessors opinion might be on a technical side, I feel compelled to consider and test it against the provisions of section 45 of the Land Disputes Courts Act Cap 216 RE 2019 to appraise myself if the defect can be cured particularly referencing the decision of the Court of Appeal in the case of **Yakobo Magoiga Gichere vs Peninah Yusuph,** Civil Appeal No 55 of 2017 where the Court insisted on the overriding objective and do away with procedural technicalities unless such error or omission or irregularity or imporpoer admission or rejection of evidence has in fact occasioned a failure justice.

I am of the settled mind that the omission by the Land Tribunal to record in the proceedings what the opinion of the assessors were or wether they were read out to parties is incurable and can not be saved by the overriding objective as it has occasioned a failure of justice as raised in the grounds of appeal.

I therefore invoke the revisonal power of this court to nullify the proceedings and set aside the Judgment and the Decree of the Tribunal delivered on.

As a way forward, I order the matter to be remitted back to the Tribunal for the proceedings to incorporte the assessors opinion, the same be read out to parties and then compose a Judgment.

For the interest of justice, the Chairperson should expedite the matter.

Since the irregularity is not resulted out of the parties, I order no costs to either of the parties.

It is so ordered.

DATED at **ARUSHA** this **24th** day of **November 2023**

A. Z. Bade
Judge
24/11/2023

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **24th** day of **November 2023**

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
24/11/2023