IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

LAND APPEAL NO. 5302 OF 2024

(*Originating from the decision of the District Land and Housing Tribunal for Morogoro in Land Application No 32 of 2021*)

HALIMA JAPHET MAYUYA

(As the adminstratix of the estate of

the late Amina Msigalo Ntahosigaye ..... APPELLANT

VERSUS

ALQADIRIYA SALAMA CHILDREN CENTRE.....1st RESPONDENT

WILLIAM KASSIM ..... 2nd RESPONDENT

PAULO MATIMBWI ..... 3rd RESPONDENT

JUDGMENT

03/04/2024 & 23/05/2024

KINYAKA, J.:

At the District Land and Housing Tribunal for Morogoro, herein after "the Tribunal" the first respondent herein jointly and severally sued the appellant and both the 2nd and 3rd respondents over a 5 acres farm located at Makungu

Area within Rudewa Mbuyuni village in Kilosa District herein after "the land in dispute".

The brief facts leading to the appellant's institution of the present appeal as gleaned from the parties' pleadings presented at the Tribunal is that, on 14th February 2010, the 1st respondent purchased from the 2nd and 3rd respondents a parcel of land measuring 14 to 15 acres, in which 5 acres are now in dispute. Upon the completion of the sale agreement, the 1st respondent started cultivating on the land until the year 2021 when the appellant initiated the claims as to her ownership of the land in dispute prompting the 1st respondent to prefer Land Application No. 32 of 2021 at the Tribunal against the appellant and the 2nd and 3rd respondents as necessary parties claiming for the following reliefs:-

1. A declaration that the appellant herein is a trespasser onto the 1st respondent's land and that he be ordered to immediately vacate and leave vacant possession to the 1st respondent;
2. An order that whatever crops planted by the appellant during the time of trespass be ordered to remain as part of the 1st respondent's land under the principle of Quicquid plantatur solo, solo cedit;

3. The appellant and the 2nd and 3rd respondents be condemned to pay general damages to be assessed by the Tribunal;
4. Costs of the application be provided; and
5. Any other reliefs that the honourable tribunal would have deem appropriate to grant.

At the culmination of the trial, the Tribunal was convinced that the evidence of the 1st respondent was cogent and weighty compared to that of the appellant. It therefore declared the 1st respondent the lawful owner and the appellant was on the other hand declared a trespasser. The Tribunal further ordered the appellant to vacate the land in dispute and demolish all her structures and fittings on the land in dispute.

Unamused, the appellant channeled her grievances to this Court vide her memorandum of appeal dated 13rd March 2024 in which she presented five grounds of appeal as below:-

1. That the Trial District Land and Housing Tribunal for Kilosa erred in Law and Fact when blessed the purchasing transaction between the Respondents while the 2nd and 3rd Respondents failed totally to prove

ownership over the land in dispute therefore, they have no title to pass to the 1st Respondent herein;

2. That the trial District Land and Housing Tribunal erred both in law and fact when decided in favour of the 1st Respondent while she failed totally to prove her ownership over the land in dispute as well as her legal capacity to sue;
3. That the Trial District Land and Housing Tribunal erred both in law and fact when decided in favour of the 1st Respondent herein while the matter was instituted with ought being mediated by the Ward Tribunal since she did not tender a certificate for Mediation from the Ward Tribunal as required by the law;
4. That the Trial District Land and Housing Tribunal erred in law and in fact when decided in favour of the Respondents while their evidence was fully of ambiguity as well as contradictions;
5. That the trial District Land and Housing Tribunal erred in Law and Fact when decided in favour of the Respondents herein despite the fact that during site visit the 2nd and 3rd Respondents failed to show the actual size of the land which they claimed to have sold to the 1st Respondent herein; and

6. That the District Land and Housing Tribunal for Kilosa erred both in law and in fact when failed to consider the strong evidence adduced by the Appellant and her witnesses which was clearly and straight forward proving that the land in dispute belong to the Appellant's mother since 1970 after clearing the bush and obtained 14 acres as she consulted the leaders of the village government and thus since during her life time the Appellant's mother and her family have been in fully occupation of the same till 2021 when the 1st Respondent invaded the same.

It is worthy to note that by the orders of this Court dated 3rd April 2024, the hearing of the appeal was conducted by way of written submissions. It is on record that Advocate Kabula Barnabas filed and drew the appellant's submission in support of the appeal while the respondent's reply submissions were drawn and filed by Mr. Saul Sikalumba, also learned advocate.

In support of the first ground of appeal, the appellant's learned advocate contended that at the Tribunal, the 2nd and 3rd Respondents did not bring any cogent evidence to support their ownership or tittle over the land in dispute before the disposition. He said, the said respondents failed to prove how and when their grandfather became the owner and occupier of the land

in dispute as no written document was produced by the 2nd and 3rd Respondents herein proving their bequeath over the land in dispute. On that basis, it was the learned advocate's conclusion that the 2nd and 3rd Respondents herein failed to-prove their title over the land in dispute on the balance of probabilities as well stated in the case of **Hemedi Saidi v. Mohamedi Mbilu TLR [1984] 114.**

As to the second ground, the appellant's learned counsel attacked the 1st respondent's application for want of proper description of the suit land as the same did not state whether the claimed 5 acres are part of the 15 acres alleged to have been purchased. Furthermore, she opined that, since the 2nd and 3rd respondents who sold the farm in dispute to the appellant failed to prove their title over the said farm, it was her view that automatically the sale agreement between them was illegal, and for that reason the 1st respondent herein failed to prove her ownership over the land in dispute.

Submitting further, Ms. Barnabas contended that the 1st respondent failed to prove her legal capacity to sue at the Tribunal as she did not tender any document proving the existence of the institution. According to her, it was important to establish that as an institution, the 1st respondent herein is duly

registered and had capacity to enter into the alleged agreement and sue in its capacity as such.

She averred that as one, Salama Maftah Zakaria, who stood on behalf of the 1st respondent failed to tender its documents of registration the same drew an adverse impression that she failed to prove the existence of the said institution as well as its legal capacity to sue in accordance with section 110 and 111 of the Evidence Act, Cap. 6 R.E. 2019.

In relation to the third ground, the appellant's counsel attacked the 1st respondent's application at the Tribunal for being incompetent and untenable since no certificate for mediation was tendered and admitted in evidence to prove the compliance to legal requirement provided under section 45 (4) of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2021.

Fortified by the holding in the case of **William Sulus v. Joseph SaMs.on Wanjanga, Civil Appeal No.193 of 2019 (2023) TZCA 92 (9 March 2023),** Ms. Barnabas asserted the parties were not mediated as the 1st respondent instituted her case without a certificate for mediation from the Ward Tribunal and that the same was not tendered in evidence before the Tribunal.

On the fourth and fifth grounds of appeal, it was the appellant learned counsel's argument that the 2nd and 3rd respondents never disclosed the names of the people who bequeathed them the farm in dispute. However, in their oral testimony, the respondents claimed to have acquired the farm in dispute through bequeath, but they never disclosed who they were. According to her, the same implies that the 2nd and 3rd respondents' account was contradictory.

She averred that the respondents also contradicted themselves and failed to plead on the size of the farm, as the 2nd and 3rd respondents in their joint written statement of Defence admitted the correctness of the description of the suit property given in the application but the 1st respondent's description for the 5 acres claimed in the application, does not tally with that' given in exhibit AE1.

Referring the case of **Barclays Bank (T) LTD v. Jacob Muro, civil Appeal 357 of 2019 (2020) TZCA 1875 (26 November 2020),** the counsel further attacked the 2nd and 3rd respondents for their nondisclosure of the size of the land in dispute hence making it uncertain as to what they owned and whether the 15 acres disposed was available for the disposition.

He added that the 2nd and 3rd respondents were not certain on the year upon which they were given the land in dispute, whereby the proceedings of the trial Tribunal reveal the 2nd respondent's testimony that he was given the same in 1997 but the 3rd Respondent when cross examined, he contended that he does not remember the year upon which they were given the farm in dispute.

She also complained that during site visit, all respondents failed to show the boundaries of the farm and that, the 1st respondent testified that her farm is not bordered with the farm of the appellant but the sale agreement indicate that the appellant is a neighbour in western part of the farm though she was written by her other name of Shida Mayuya and not Halima Mayuya. The counsel complained further that the respondents failed to adduce satisfactory evidence or provide tangible document to prove that they gave one acre to the appellant, and that even during site visit they did not show the one acre they alleged to have given the appellant. Buttressed by the case of **Sabarudin Othuman v. Malayan Banking Berhard (2018) 1LNS 357**, Ms. Barnabas attacked the sale agreement for not having the signature of the 3rd respondent.

On the sixth ground of appeal, the appellant's advocate submitted that the appellant who is the administratrix of the estate of her mother, who was the owner of the land in dispute, and the appellant's witnesses, proved on balance of probability that the land in dispute belonged to the appellant's mother since 1970 after clearing the bushes following her consultation with the village leaders. Relying on the case of **John Siringo and Twenty Others v. Tanzania National Road Agency and the Honourable Attorney General, Civil Appeal No. 171 of 2021) (2022) TZCA 489 (3 August 2022)**, the learned counsel averred that in law, the land allocation by the ten cell leader is lawful contrary to the holding of the Tribunal.

In winding up, the learned counsel maintained that the appellant herein and her witness adduced cogent evidence proving that the appellant's late mother and her husband obtained the land in dispute through clearing the bush way back in 1970, and that they had been in long use of the land in dispute without any interruption from any person and that even after their death, the appellant and her relatives have been in occupation of the same. Putting reliance on the submissions, Ms. Barnabas prayed that this Honourable Court be pleased to allow the present appeal with costs.

On his part, the learned counsel for the respondents opposed all grounds of appeal presented by the appellant. In resisting the first ground, Mr. Sikalumba cited the case of **Hemed Said v. Mohamed Mbilu (1984) TLR 113** and that of **Joachim Ndelembi v. Maulid Mshindo & 2 others Civil Appeal No. 106 of 2020** and substantiated that the proof of acquisition of land is not always by documentary evidence and hence the appellant's claim that the 2nd and 3rd respondents had no good title since there was no document tendered, is unfounded.

He attacked the appellant's counsel for raising a new issue in the second ground of appeal as to the description of the land in dispute and the 1st respondent's capacity to sue. He cited the cases of **Hassan Bundala @ Swaga v. Republic, Criminal Appeal No. 386 of 2015, Farida & Another v. Domina Kagaruki, Civil Appeal No. 36 of 2006, William Ramadhan Mapesa v. Chausiku Manyasi Mtani, Civil Application No. 270 of 2002** which cemented on the position that a new matter raised on appeal should not be allowed.

Resisting the third ground, it was Mr. Sikalumba's submission that section 45(4) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2021 does not require a certificate of failure to mediate the parties to be tendered

but rather for the Tribunal to be sure that the Ward Tribunal issued the certificate for its failure to settle the matter amicably and as in the case at hand, where the Rudewa Ward tribunal issued a certificate for failure to mediate the matter between the parties and the same was annexed to the application.

In regard to the 4th and 5th grounds of appeal, the counsel for the respondents in responding to the claim that the 2nd and 3rd respondents did not disclose the names of the persons who bequeathed them the land in dispute contended that the respondents made it clear that they were allocated the land by their parents and hence disclosure of the names was irrelevant under the circumstances.

As to the claim that the 2nd and 3rd respondents failed to describe the size of the land they sold to the 1st Respondent, it was Mr. Sikalumba's argument that the land in dispute was clearly ascertained in the application and during the *locus in quo* visit.

In reply to the claim that the 2nd and 3rd Respondents failed to say exactly the year in which they were given the land they sold to the 1st respondent, the learned counsel averred that the fact that the 3rd Respondent failed to remember the year while the 2nd and 3rd respondents remembered the same

cannot be termed as a contradiction. In his view, the contradiction could have occurred in case each respondent mentioned a year different from what had been mentioned by the other.

As to the complaint that the 3rd respondent didn't sign the contract of sale of the land, it was the learned counsel's firm opinion that so long as they both agreed to have sold the disputed land to the 1st respondent, nothing affects the validity of the said agreement and if it was an issue then the appellant's counsel would have challenged the same during trial and not at this stage.

Against the sixth ground of appeal, Mr. Sikalumba submitted that the 1st respondent is the owner of the land in dispute and she has been in use of the same since the year 2010 without any interruption from anybody.

He further attacked the appellant's evidence for being contradictory in respect of the acquisition of the land by the appellant's parents. On the other hand, he embraced the judgment of the Tribunal for being based on evidence received from both parties and their respective witnesses that was weighed and evaluated before the 1st respondent's lawful ownership of the land in dispute was established.

Finalizing his submissions, the learned counsel was of the profound opinion that the appeal is without any merit and thus implored the Court to dismiss the same with costs.

In her rejoinder, the appellant's counsel insisted that no cogent evidence was adduced by the 2nd and 3rd respondents herein to prove on how they became owners of the land in dispute and that they failed to prove title over the land in dispute therefore they had no good title to pass to the 1st respondent.

As to the claim that the appellant raised a new ground of appeal that ought to have been raised as a preliminary objection at the Tribunal, the learned counsel vehemently disputed the later and argued that there were no need of raising a preliminary objection over the point which ought to have been proved during hearing, since in her view, raising the same as preliminary objection could not dispose the mater to its finality as well stated in the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributers (1969) EA on page 700.** She insisted that the 1st respondent totally failed to prove on essential point as to the legal registration of her institution as well as description of the land in dispute.

As to the 1st respondent's omission to tender a certificate of mediation, Ms. Barnabas maintained that the Tribunal violated the law by deciding the matter in the absence of the said certificate whose tendering could have provided the opposite party an opportunity to challenge its validity during cross examination. She stressed that the 1st respondent herein totally failed to prove her ownership over the land in dispute as required by the law and pressed for the appeal to be allowed with costs.

Having keenly gone through the appellant's memorandum of appeal, submissions of both parties as well as the records of appeal, in my view, the pertinent issue for deliberation by this Court is whether the appeal has merit. For the purpose of convenience, I will start determining the point of law raised on the 3rd ground of appeal as to the 1st respondent's institution of the matter before the Tribunal without accompanying the certificate of mediation from the Ward Tribunal, and if need arises, I will jointly determine the 1st, 2nd, 4th, 5th and 6th grounds of appeal as they all revolve around the appellant's complaint as to the Tribunal's improper evaluation of the evidence adduced by the parties during the trial.

I have traversed the trial tribunal records as regards to the 3rd ground of appeal. Admittedly, nowhere in the proceedings of the Tribunal did I find the

tendering of the certificate for mediation from the Ward Tribunal evidencing that before reaching the Tribunal for adjudication, the matter was mediated at the Ward Tribunal as per the requirement under section 13(4) of the Land Disputes Court Act, Cap. 216 hereinafter "the LDCA" as amended by section 45 (c) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2021 which provides:-

> *"Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title or any interest in land unless the Ward Tribunal has certified that it has failed to settle the matter amicably"*

My thorough perusal of the Tribunal's records reveal the existence of the said certificate attached to the application that instituted the 1st respondent's claims against the then respondents at the Tribunal. In her submission, the appellant's counsel complained that the said certificate was not tendered as evidence hence abrogating the requirement of the law which implies that the parties were not mediated.

While I find sense in 1st respondent's contention that section 13(4) of the LDCA has not pressed for the requirement that the certificate must be tendered in Tribunal, and that what is required of the Tribunal before

determining the dispute preferred before it is to establish that the parties were mediated at Ward Tribunal, but a plethora of decision including that in the case of **Patrick William Magubo v. Lilian Peter Kitali, Civil Appeal No. 41 of 2019**, set a contrary view. In the said case, the Court of Appeal was confronted with akin situation in which the certificate from marriage certificate board instituting a matrimonial proceeding was annexed to the petition without the same being tendered in evidence. The Court instructively held:-

> *"We are mindful of the fact that in his submission, Mr. Kahangwa though, admitted that the certificate from the Board was not tendered in evidence, he argued that the same being a public document, the trial court was expected to take judicial notice of the same under section 59 of the Evidence Act. With profound respect, we are unable to agree with Mr. Kahangwa on this point,* ***because the issue of parties' referring their matrimonial dispute to the Marriage Conciliation Board before filing a petition for divorce in the court, is a mandatory requirement of the law. Therefore, that document was***

required to be tendered and admitted in evidence."

[Emphasis added]

Equally, in its recent decision in the case of **National Microfinance Bank PLC & Another v. Lello Laurent Sawe, Consolidated Civil Appeals No. 385 "A" & 339 of 2021,** the Court of Appeal emphasized on the above position of law as below:-

"Trite law is that a document which is not admitted in evidence does not form part of the evidence and cannot be acted on to determine the rights of the parties even if it is in the record or annexed to the pleadings, a position well elaborated in Court's decision in the case of Shemsa Khalifa & Two Others v. Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012 (unreported), where the Court observed thus: -

"We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this led to a grave miscarriage of justice"

In the present matter, even by assuming that it was not mandatory for the certificate to be tendered, the fact that parties were mediated and the mediation failed was not pleaded at all in both the application and the amended application lodged before the Tribunal on 6th December 2021 and 14th June 2022, respectively. The certificate attached to the application was also not referred in the application and the amended application.

In my view, failure by the 1st respondent to plead on the failure by the Ward Tribunal to mediate the parties prior to instituting the suit before the Tribunal and the existence of the certificate imply that there was no proof that requirement under section 13(4) of the LDCA was complied with.

From the above analysis, the third ground of appeal succeeds. I find and hold that the proceedings in Land Application No. 32 of 2021 before the District Land and Housing Tribunal for Kilosa was conducted and judgement entered without jurisdiction, in the absence of proof evidencing the Ward Tribunal's failure to mediate the parties that would entitle the Tribunal to hear the application before it.

Consequently, I proceed to nullify the entire proceedings of the District Land and Housing Tribunal for Kilosa in Land Application No. 32 of 2021. I further

quash the resultant judgment and set aside the subsequent orders stemming therefrom.

With the above holding, I find no necessity of determining the remaining grounds of appeal.

Considering the nature of the decision that has not determined the merit of the dispute between the parties, I make no order as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 23rd day of May 2024.

H. A. KINYAKA

JUDGE

23/05/2024