IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND APPEAL NO. 36 OF 2023

(Originates from District Land and Housing Tribunal of Mlele in Land Application No. 13 of 2022)

MASABI CHOGABHUKI ..... 1ST APPELLANT
JIHUMBI MLEKWA ..... 2ND APPELLANT
HENDAGI SINGAMAGAZI ..... 3RD APPELLANT
MUYUNJIWA CHOGABHUKI ..... 4TH APPELLANT

VERSUS

ZAWADI SAMSON MAYAYA ..... 1ST RESPONDENT
CONSOLATHA LUCAS NZUNDA ..... 2ND RESPONDENT

JUDGMENT

MWENEMPAZI, J.

In this appeal the appellant is aggrieved by the decision of the District Land and Housing Tribunal of Mlele, both the Judgement and decree in Land Application No. 13 of 2022 delivered by Hon. G.K. Rugalema (chairman). They have filed a memorandum of appeal with the following grounds of appeal, namely:

1. That, the trial tribunal erred in law by receiving and hearing the application which was not properly mediated at the Ward Tribunal per

requirements of the law, worse enough the certificate of mediation didn't form part of the trial tribunal records.

2. That, the trial tribunal erred in law and fact to decide in favour of the Respondents while the evidence testified by the 1st Respondent on hearing date was different from cause of action stated on the application.
3. That, the trial tribunal erred in law and fact to entertain the suit which didn't join the necessary parties.
4. That, the trial tribunal erred in law by allowing the 1st Respondent to testify and stand on behalf of 2nd Respondent without following the required procedure.
5. That, the trial erred in law and facts to decide again the dispute replying on exhibit ZS 3(**Hati Miliki ya Kimila Na. MLDC/KBN/005)** which has been the subject of discussion in previous disputes involving 1st Respondent and the 1st Respondent lost the battle in the same.
6. That, the trial tribunal erred in law by its failure to take the testimony of witnesses per the requirements of the law.

The appellants prayed for this appeal to be allowed and that the Judgment and Decree of the trial Tribunal be quashed and set aside respectively;that costs of this appeal be borne by the respondents. The appellants prayed for any other relief(s) that this Honorable court shall deem fit and just to grant.

At the hearing the appellant the 1st , 3rd and 4th appellant were present in person and the 1st Respondent was also present. The appellants were being represented by Mr. Laurence John, learned Advocate and the respondents were being represented by Mr. Elias Kifunda, learned Advocate. Hearing proceeded orally in the Judge's chamber sitting at the Resident's Magistrates' Court of Katavi at Mpanda.

At the very beginning of the submission by Mr. Laurence John – Advocate informed this court that they will submit on the grounds of appeal at the trot. Starting with the first ground of appeal, the counsel submitted that it is a requirement of law as provided for by section 45(4) of the ***Written Laws Miscellaneous Amendment Act, No. 3 of 2021*** which amended ***section 13 of Land Courts Disputes Act, [Cap 216 R.E 2019]*** that the District Land and Housing Tribunal will hear and determine a dispute after the same has passed through mediation in the Ward Land Tribunal.

The section uses the words "shall" which by virtue of section 53 of the Interpretation of Laws Act, Cap. 1 R.E 2019 it means that mediation is mandatory. The matter under scrutiny is not indicated it was mediated and that the said mediation failed. The record shows there was a letter which was seeking that there be mediation, which letter was addressed to the Ward Land Tribunal. The secretary of the Ward Tribunal of Kibaoni Ward wrote a letter informing the Advocate for the appellants that dispute was registered at the Ward Tribunal of Kibaoni and the Tribunal ruled against the Respondents. The appellants appealed to the Ward Tribunal of Kibaoni again. The Ward tribunal has failed to re-open and hear the matter afresh.

The law at section 18(1) of Land Disputes Courts Act, [Cap 216 R.E 2019] denies any advocate to appear or act on behalf of any party in the Ward Tribunal. In this case, the advocate initiated the mediation. There was no proper mediation as required by law. Even the documents were not tendered so that the court can act upon them.

It is in principle of law that annextures cannot be acted upon unless they are tendered as evidence. That was the position in the case of **Patrick William**

Magubo Vs. Lilian Peter Kitali, Civil Appeal No. 41/2019, Court of appeal of Tanzania at Mwanza at page 13.

> *"Annextures are not evidence and the court cannot act upon them".*

The counsel for the appellants submitted and argued that there was no proper mediation to make the case entertainable by the District Land and Housing Tribunal.

On the 2nd ground the counsel for the appellants submitted that Parties are bound by their own pleadings. That position is clarified in the case of **EX-B.8356 SGT Sylveter Nyanda Vs. Inspector General of Police and Another [2014] TLR 234.**

In this case, the respondents bought a piece of land from Jihumbi Samike and Saida Laponya; the land was 73 acres. But in the evidence of Zawadi Samsoni Mayaya testified that he bought the dispute land alone. This was different from the pleadings. The District Land and Housing Tribunal ought to have ignored the evidence. Once this evidence is removed, there is no other evidence which can entitle the respondent a piece of land.

On the 3rd ground of appeal, that the trial tribunal erred for failure to join necessary parties. In item 6(a), the applicants said the land was bought from Saida Luponya and Jihumbi Samike. However, Saida Luponya was not joined as required by law. In the case of **Juma B. Kadala Vs. Laurent Mkande [1983] TLR 103**: -

> *"In a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant; non joinder will be fatal to the proceedings".*

In another case, **Claud Roman Shikonyi Vs. Estoni A. Baraka and 4 Ohers [2019] T.L.R. 192** failure to join a necessary party is fatal and the remedy is to nullify the whole proceedings.

On the 4th ground, the tribunal erred in law by allowing the 1st Respondent to testify and stand on behalf of 2nd Respondent without following the requisite procedure.

The case was instituted by two persons, the respondents herein named. According to typed proceedings both applicants were present (page 1). Thereafter, the 2nd applicant has never appeared at the tribunal. According to the law, if the 1st applicant wanted to represent the 2nd applicant he must

have been first issued with the power of attorney. That was not done. The counsel stated that they are submitting that the 1st Respondent had no *locus standi* to represent the 2nd Respondent. He invited this court to look at the case of **Lujuna Balonzi Vs. Registered Trustees of CCM [1996] TLR 203.**

> *"Any person standing in court must show that his rights have been infringed.*

The 1st respondent was duty bound to tender power of attorney in court so that he can represent the 2nd respondent in the dispute.

Also, the Civil Procedure Code, Order III Rule 2(a) [Cap 33 R.E 2019] allows a holder of a power of attorney to act on behalf of another party.

In the case of **Mtwa Merimeri Mhewa Vs. Israel Mujuni Mambo and Another,** Land Appeal No. 50/2022, High Court of Tanzania at Mbeya (Tanzilii) at page 6 – 8. Since the prosecutor of the case had no power of attorney, the representation was void *ab initio.*

The irregularity is serious because even the evidence was tendered by the 1st respondent. The proceedings of the case (at page 11) read as follows:

"Mwombaji wa kwanza anamwakilisha mwombaji wa pili kwa kuwa ni mgonjwa".

On 5th and 6th ground, the counsel for the appellants submitted that the evidence was not taken according to the law. Evidence means both oral and documentary evidence. The exhibits which were tendered were not read over in the tribunal after they had been received. Exhibits like ZS -1, ZS-2, ZS -3 and MCA, H1; failure to read exhibits denied the appellants to know the contents of the exhibits, which were tendered. The remedy has been pronounced in the case of **Pobinson Mwanjisi and 3 Others Vs. Republic [2003] TLR 216** is to expunge from the record including HATI YA KIMILA (EXHIBITS ZS 3). Once the evidences are expunged there is no other evidence to give an award in favour of the respondent.

It is a position in law under Order XVIII Rules 5 of Civil Procedure Code, [Cap 33 R.E 2019] that the evidence in court must be taken in a narrative form and at the end the Magistrate is supposed to endorse. In the case of **Christian Ndenje Vs. G4 Security Solution Ltd,** Labour Revision No. 10/2022 (the case is not reported but found in tanzlii). In the case it was held that:

"The evidence being recorded in a question and answers for was a fatal irregularity meaning that Christian Lucas Ndenje didn't respond to the question. This therefore intimates that there was no credible evidence from the cross-examination section upon which the CMA could base its award. The infraction is fatal and the option of remitting the file back to CMA for a fresh cross- examination is, in the interest of justice, the appropriate way forward."

In the typed proceedings, the evidence was not taken in narrative form. That is contrary to law. Also, there was no certification from the magistrate. The counsel for the appellant submitted that the proceedings are vitiated and must be nullified.

He therefore prayed for the appeal to be allowed with costs; that the judgment of the trial tribunal be quashed and orders set aside and also for any other relief this court may deem it just to grant.

In reply to the submission in chief, Mr. Elias Kifunda – Advocate starting with the 1st ground of appeal that the ground has no merit. The chairman of the

District Land and Housing Tribunal considered letter by the counsel, and that can be seen in the letter from the Ward Tribunal dated 26/05/2020. In that letter, the ward tribunal certified that they have failed to deal with the dispute. Until when the ward tribunal wrote a letter, the dispute had stayed for 120 days.

The law is obvious was submitted *section 45(4) of written Laws (Miscellaneous) Act, 2021,* the section has a proviso that where the tribunal will stay with the dispute beyond thirty (30) days, the aggrieved party may take the dispute to the District Land and Housing Tribunal for hearing and the District Land and Housing Tribunal shall proceed. In the case **of Isa Idd Kauzu Vs. Ally Abdallah Koko and Another,** Land Appeal No. 8 of 2022 High Court of Tanzania at Mwanza where the dispute stays in the ward tribunal for more than 30 days, then parties may take the dispute to the District Land and Housing Tribunal.

> *"...the proviso gives a leeway that in case the ward tribunal fails the expiry of thirty days from the date the dispute was instituted, the aggrieved party may proceed*

to institute the land dispute without the certificate from the ward tribunal".

The learned counsel submitted that it was the respondent's humble submission that the dispute was properly entertained in the District Land and Housing Tribunal.

On the 2nd ground of appeal, the counsel for the respondent submitted that also the ground has no merit. The counsel submitted further that the evidence which was adduced by the 1st respondent was compatible with the pleadings.

On the 3rd, 4th and 6th ground the counsel submitted that it is not true that the vendors were necessary parties. This is because, the respondents did not trespass. They were not in the farm. The respondents sued the appellants that they have trespassed. The 1st respondent adduced evidence on his behalf and as the representative of the 2nd respondent. In the District Land and Housing Tribunal its procedure is different; there was no need of power of attorney. Rules allow the applicant to be represented. And if there are irregularities, they cannot be a good reason to vary the decision of the District Land and Housing Tribunal. The counsel submitted that this is

because it has not been seen that there is any right, which has been breached.

The respondents had a tittle of the farm in dispute. According to section 45 of Land Disputes Courts Acts. The court cannot invalidate the decision of the District Land and Housing Tribunal. The counsel prayed to refer to the case of **Livingstone Michael Mushi Vs. Asha Magoti Magere & Others,** Civil Application No. 247/08 of 2022: -

> *"Tittle is exclusive evidence of ownership."*

The counsel prayed that the grounds (3rd, 4th and 6th) be dismissed.

On the 5th ground: The ground also has no merit. Even if the tittle was discussed in other sessions, but the tribunals had no jurisdiction to hear and determine the dispute for a registered land.

In the case of **Adam Pascal Mlangi Vs. Maria Julius,** Misc. Land Appeal No. 24 of 2020, High Court of Tanzania at Sumbawanga. This court held that:

> *"Ward tribunals cannot have jurisdiction on a registered land."*

The counsel for the respondent prayed therefore that this court finds the appeal to have no merit and dismiss the same with costs.

In rejoinder the counsel for the appellants, Mr. Laurence John – Advocate submitted as follows: On ground 1 that, the letter was not part of the record. It was just an annexture. It cannot be acted upon by the court.

On ground 4, the counsel submitted that it is not true that in the District Land and Housing Tribunal there is no need of power of attorney. The District Land Housing Tribunal is bound to follow procedure on representation.

Also, that the tittle deed was not received according to law. It has no value as evidence that is it should be expunged. Once the same is expunged, there is no evidence to assist the respondents. The counsel submitted that the cases which have been cited starting with the case of **Livingstone Michael Mushi,** (supra) are not applicable under the circumstances.

He submitted that the counsel for respondent has referred to section 45 of Land Disputes Courts Acts. He argued that deficiencies he has listed are fundamental to the justice of the case. Failure to read exhibit deprived the appellants to know contents of exhibits.

Also, prosecution of the case without having *locus standi*. It is fatal. The counsel submitted by reiterating the submission in chief and also that he prayed the appeal to be allowed with costs.

I have read the record of the trial tribunal as well heard the counsels for the appellant and the respondent when they were submitting on the appeal in this court. For the contents of the submission in this appeal I have summarized and included in this judgment. In my view, the issue for consideration is whether the appeal has merit to deserve it being allowed as prayed by the appellants. I believe, the answer to the question will be found after looking at the grounds of appeal individually.

On the 1st ground of appeal, the counsel for the appellant has submitted that the district land and housing tribunal heard and determined the dispute prematurely as the dispute was not yet mediated in the ward Tribunal as required by law. In this regard he referred to section 13 of the Land Disputes Courts Act, Cap. 216 R.E.2019 as amended by section 45(4) of the Written Laws Miscellaneous Amendment Act, No. 3 of 2021

The counsel submitted that in the record it shows the advocate wrote a letter to the chairman of the Ward Tribunal requesting the impugned dispute to be

mediated by the ward Tribunal. The chairman replied back with the letter which essentially shows the dispute was not mediated before being taken to the District Land and Housing Tribunal for hearing and determination. The counsel submitted that it is a violation of the mandatory requirement which makes it invalid. The counsel for the appellants added that it is was also wrong for the advocate to represent the respondents in the Ward tribunal while the law does not allow that. He prayed that the appeal be allowed basing on the deficiency he has pointed out.

The counsel for the respondent submitted that the mediation was done and the chairman of the Ward Tribunal wrote in the letter to certify that they failed to settle the matter. He referred this court to the letter dated 26/05/2020. This point however, was controverted by the counsel for the appellants that the letter referred to was not tendered in the trial tribunal as an exhibit thus it cannot be relied upon.

In my consideration, I have no doubt that the advocate wrote a letter requesting the dispute be mediated by the Ward Tribunal. He did not enter appearance in the trial tribunal as it is reflected in the submission by the

counsel for the appellants. Section 13(4) of the Land Disputes Courts Act, Cap. 216 R.E 2019 provides that:

> *"Notwithstanding subsection (1) the District Land and Housing Tribunal shall not hear any proceeding affecting the title to or any interests in land unless the ward tribunal has certified that it has failed to settle the matter amicably:*
>
> *Provided that, where the ward tribunal fails to settle a land dispute within thirty days from the date the matter was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal."*

In the submission, the counsel for the respondent has submitted that the letter was written after the dispute had stayed in the Ward Tribunal for 120 days. Relying on the proviso above, I think it was reasonable for the respondents to file the dispute in the district land and Housing tribunal. Under the circumstances, I do not take the submission by the appellants be a valid one. The 1st ground of appeal is therefore dismissed.

On the 2nd ground of appeal, the appellants are faulting the evidence by the respondents that it was not compatible with the pleadings. In expanding the point, the counsel for the appellant has relied on the case of ***EX-B.8356 SGT Sylveter Nyanda Vs. Inspector General of Police and Another [2014] TLR 234*** for the argument that parties are bound by their own pleadings. He submitted that the witness, the 1st respondent testified that he bought the dispute land alone. This was different from the pleadings wherein he pleaded that the respondents jointly bought a piece of land from Jihumbi Samike and Saida Laponya; the land was 73 acres. He opined that the District Land and Housing Tribunal ought to have ignored the evidence.

On the ground, the counsel for the respondents submitted that the evidence which was adduced by the 1st respondent was compatible with the pleadings. I am aware of the position laid down by the case of **Makori Wassaga Versus Joshua Mwaikambo & Another [1987] Tlr 88** the Court said: -

> *"A party is bound by his pleadings and can only succeed according to what he has averred in his*

plaint and proved in evidence; hence he is not allowed to set up a new case."

I have cross-checked the position with the record of the trial court. On the point complained of by the appellant that the evidence was not compatible with the pleadings. I think, with all due respect to the submission by the counsel, the evidence was not that far from the pleadings thought it may have fell short of the standard. Under the circumstances I dismiss the ground outright, it has no merit.

On ground 3 of appeal, the appellants have complained that Said Luponya who is alleged to have sold the land to the Respondents was not made a party to the suit and they have argued that it was fatal. The counsel prayed that the proceedings be nullified relying on the case of ***Claud Roman Shikony vs. Estoni A. Baraka and 4 others, [2019] T.L.R.192.*** The counsel for the Respondents has submitted that it is not true that the vendors were necessary parties. This is because the Respondents did not trespass. They instead sued the appellants that they have trespassed.

In my opinion, the appellants claim to be owners of the land which the respondents as well allege to have bought from Jihumbi Samike and Saidi

Luponya is a problem/dispute to be resolved by involving sellers and buyers. Although there is a customary certificate of title which was tendered, the fact that the appellants claim ownership of the same land comprised in the certificate of title, shows there may be possibilities of there being mix up of boundary/demarcations. The latter scenario may have been the cause for the dispute now pending. With what I have just said, presence of both Jihumbi Samike and Saidi Luponya from whom the respondents bought the land is a necessity which cannot be avoided to resolve the dispute.

In the case of ***Juma B. Kadala vs. Laurent Mkande [1983] T.L.R.103*** it was held that:

> *"In a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant; non-joinder will be fatal to the proceedings"*

The way forward under the circumstances where the applicant did not join the seller and appellants did not apply for him to be joined, the trial tribunal had a separate and independent duty to have Said Luponya also joined. Refer: ***Tang Gas Distributors Ltd vs. Mohamed Salim Saidi and Two***

others, Civil Revision No. 6 of 2011 and Claud Roman Shikonyi vs. Estoni A. Baraka and 4 others, [2019] T.L.R.192.

At this point, I find the appeal has merit and hold that the proceedings were vitiated and obviously, there are possibilities of occasioning injustice if at all the matter will be left to stand as it is. In my view, there is no need to deal with the rest of the grounds of appeal as the same will have nothing to change the position set by not joining the seller, Said Luponya in the application during trial.

I therefore find that for the interest of justice the proceedings are nullified, judgment quashed and decree set aside, order that Saidi Luponya be added as the respondent in the application and the matter be heard de novo by another competent chairperson. No order is issued as to costs.

Dated and signed at Sumbawanga this 6th day of June, 2024

T.M. MWENEMPAZI

JUDGE

Judgment delivered virtually 6th day of June, 2024, appellants being at Usevya Primary Court, Mlele District and the respondents absent.

T.M. MWENEMPAZI

JUDGE

06/06/2024