IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL CASE NO. 33 OF 2022

(Arising from Land Application No. 3 of 2022 before the District Land and Housing Tribunal for Rukwa at Sumbwanga)

FAUSTINE KAKUSA.....APPELLANT

VERSUS

TITUS SINKALA.....RESPONDENT

JUDGMENT

20th May & 19th June, 2024

MRISHA, J.

In a bid to protest what he still believes to be his right in land, the appellant, **Faustine Kakusa** knocked the doors of this court and placed before it a petition of appeal with ten (10) grounds of grievance against the judgment and decree of the trial tribunal namely the District Land and Housing Tribunal for Rukwa at Sumbawanga, which can be paraphrased as follows: -

1. That, the honourable trial tribunal erred in law and fact for deciding the matter contrary to the law of limitation which is unjust in the eyes of the law,
2. That, the honourable trial tribunal erred in law and fact for deciding the matter without evaluating the strong evidence and exhibits produced by the appellant,
3. That, the honourable trial tribunal erred in law and fact for deciding the matter contrary to the laws,
4. That, the honourable trial tribunal erred in law and fact for deciding the matter by stating that the disputed land is not lawful owned by the appellant,
5. That, the honourable trial tribunal erred in law and fact for deciding the matter with bias which is unjust before the law,
6. That, the honourable trial tribunal erred in law and fact for deciding the matter by stating that the sale agreement between the respondent and Adam Kitambi was void from the beginning to the end,
7. That, the honourable trial tribunal erred in law and fact for deciding the matter by stating that the respondent failed to prove the ownership of the land in dispute,

8. That, the honourable trial tribunal erred in law and fact for deciding the matter contrary to the law while knowing that the dispute in relation to the disputed land had been disposed of back in 1998 with the appellant's late father one **Stanslaus Kakusa** being declared as the lawful owner of the same.
9. That, the honourable trial tribunal erred in law and fact for deciding the matter by stating what was not said by the appellant during hearing which is unjust in law.
10. That, the honourable trial tribunal erred in law and fact for deciding the matter by dismissing the application without considering the heavier evidence adduced by the appellant.

The respondent did not show up despite several efforts to find and serve him with a summons, to prove failure. Both the records of the trial tribunal and of this court, indicate clearly that the respondent has been reluctant to comply with court summons right from the beginning of the Land Application No. 3 of 2022 which is under scrutiny now before the court, thus making all cases before the lower court and in this court, be heard ex parte against him. Hence, the present ex parte judgment.

On the outset, I wish to opine in passing that even if he had predicted and perhaps believed that the end results of the game would be on his side, the respondent, **Titus Sinkala** would have not absented himself

deliberately at the pitch ground, as doing so is not fair and right for any good player who is committed to have always been involved in a fair play.

After all, a team which scores three (3) points due to none appearance of the opponent and without playing at all against the latter, would not have celebrated a victory of that kind better than the one which had an opportunity to collide with the opponent team for hardly ninety (90) minutes or so and score three (3) points and some goals thereby becoming a winner of the game.

I may add that like it has been the true and undisputed fact, that the referee is always the final sayer, he/she is the one who has the mandate to say who between the two contesting teams is a winner.

In the circumstance, it would, and I suppose so, be even difficult for the referee to feel better when confronted with a unique situation which would have compelled him/her to award the attending team with a three-point win just because the other team has deliberately chosen to disappear on the day scheduled for the match to be played and controlled by him.

I think this is quite similar to a Judge or Magistrate who is confronted with such situation where despite been served with a summons to

appear during the hearing of a particular case, one of the parties to the case before him/her deliberately absent himself/herself thereby causing the matter to be heard and disposed of ex parte.

Up to this juncture, it is my hope that the respondent and any other party of his calibre, would have realized the goodness and sensed the taste of being spontaneous to respect the court process by complying with court summons, appear before the court of law on the scheduled date, present his case and wait for the Judge/Magistrate to determine his case.

It is, however, unfortunate that what the respondent might have predicted and which probably prompted him to just distance himself from prosecuting his case believing that the final determination will benefit him, is going to be farfetched. This is fortified by the reasons to be assigned shortly.

Back to the present case, it should be noted that when the matter was called on for hearing, and upon it been proved that the respondent had deliberately absented himself, the appellant urged the court that the ex parte hearing of the present appeal be heard by way of written submission. His prayer was granted and he complied with the scheduled order of the court for him to file his respective written submission.

As indicated above, there were a total of ten (10) grounds of appeal raised by the appellant through his petition of appeal. However, I will not deal with all of them. I say so because having gone through those grounds and the records of the trial tribunal in respect of Land Appeal No. 32 of 2022 in which the appellant was a party, I have noticed that what the appellant (either himself or the one who drafted such petition for him) did, was to copy the ten (10) grounds of appeal used in the above latter case and pasted them on the petition of appeal related to the present case. That unexpected conduct made some of those grounds to be irrelevant to the present case.

Hence, I will not deal with them, rather I will deal with grounds number 2 and 8 which I find to be decisive and enough to dispose of the present appeal. While in the second ground, the appellant has complained that the honourable trial tribunal erred in law and fact for deciding the matter without evaluating strong evidence and consider the documentary evidence produced by the appellant, his complaint in the eighth ground, is that the trial tribunal erred in law and fact for deciding the matter contrary to the law while knowing that the disputed land in the year 1998 was declared by the Primary court to be the lawful properly of the appellant's late father one Stanslaus Kakusa.

Regarding the second ground of appeal, the appellant submitted that during the hearing of his application before the trial tribunal, he produced strong evidence which was supported by the attached copy of Civil Case No. 148 of 1998 between Slanslaus Kakusa vs Adamu Kitambi which was annexed with the applicant's application form as Annexture P-2.

It was his further submission that such piece of evidence which, according to him, proves that his late father one Slanslaus Kakusa was the owner of the said land before later releasing/giving part of it to him, has not been challenged in any court of law.

He added that the respondent led no evidence to challenge that evidence as he deliberately absented himself from the proceedings conducted by the trial tribunal.

Coming to the eighth ground of appeal, it was the submission of the appellant that in the course of his testimony before the trial tribunal, he proved ownership of the disputed land since he explained to the said land court how he acquired the disputed land and when he began to use it until the time the dispute between him and the respondent ensued.

In winding up, the appellant humbly prayed to the court that his appeal be allowed, the proceedings, judgment as well as the orders of the trial

tribunal be quashed with costs and the appellant be declared as the lawful owner of the disputed land.

The above being the submissions of the appellant in relation to his grounds of appeal, particularly the ones this court has find to be decisive ones, as described above, I am of the opinion that the issue that requires my determination is whether the present appeal has merits.

Having considered the appellant's complaint in the second ground, it appears to me that he has faulted the trial tribunal for its failure to evaluate the evidence (both oral and documentary evidence) adduced by him during the hearing of Application 3 of 2022.

The law is well settled that in making its decision, the trial court is duty bound to evaluate the evidence of both parties and come up with its findings on the issue (s); see **Stanslaus Rugaba Kasusura and Another vs. Phares Kabuye** [1982] TLR 338.

The appellant's complaint in the present case is as described above. In order to find out whether there is any merit in that complaint, I had to revisit the impugned judgment and noticed that actually the honourable learned trial chairperson omitted to analyse the evidence of the appellant in the way she ought to; hence, went contrary to the principle of law, as stated in the case of **Stanslaus Rugaba Kasusura** (supra).

I say so because the impugned judgment which is also unpaged, does not show anywhere if the learned trial chairperson took time to evaluate the evidence of the appellant together with his two witnesses namely Balbina Kakusa (SM2) and Terezia Kitambi (SM3) to see if the same was credible and sufficient to bear out the appellant in proving his claims against the respondent.

My careful perusal on the evidence of the appellant who testified as SM1, as well as the one adduced by SM2 and SM3, reveals pretty well that the evidence that the disputed land has been in possession of the appellant since the year 1986 when it was given to him by his late father one Stanslaus Kakusa, which came from the appellant during trial, was corroborated by all witnesses who came after the appellant during trial.

The same was not disturbed by the respondent who as I have indicated above, deliberately absented himself during trial. That in my view, persuades me to find merit in the complaint raised by the appellant through his second ground of appeal. This is because his evidence which was corroborated by his two witnesses, clearly depicts that the appellant's evidence was watertight and credible, thus worth to be believed by the trial tribunal. The omission to reevaluate the same, justifies that the learned trial chairperson made the erroneous findings.

Again, having revisited the proceedings of the trial tribunal along with the impugned judgment, I noted another anomaly which is that despite the appellant's application form to show that the former had drawn the attention of the trial tribunal that he had annexed with his Application Form a copy of Primary Court Judgment at paragraph 5 (a) (v) (1) of his application, the learned trial chairperson did not bother to evaluate such documentary evidence.

According to the appellant's evidence, the said evidence was important as it proves that the disputed land used to be his late father's property because one Adam Mtuka Kitambi whom the respondent claimed to have purchased the disputed land from, loosed the land dispute case as opposed to the appellant's father who was declared to be the lawful owner of the disputed land back in 1999 vide Civil Case No. 148 of 1998.

It appears that the above evidence is what prompted the learned trial chairperson to enter judgment for the respondent for the reason that the outcome of the said decision show that it was the appellant's late father who was the owner of the disputed land; hence, the appellant's claims that the same belongs to him are not true.

Unfortunately, the trial tribunal's proceedings are silent whether either the learned trial chairperson or any of the gentlemen assessors who sat

with her in hearing land application the subject of the present appeal, sought some clarification from the appellant as to why he claims to be the owner of the disputed land while there is a judgment which names his late father as the owner of that properly.

I think that was the right time for the learned trial chairperson and the said gentlemen assessors to examine the appellant and his witness on such fact, who throughout their testimonies, maintained that the disputed land belongs to the appellant. In the circumstance, I am constrained to hold that the appellant's second ground of appeal has merit.

Coming to the eighth ground of appeal in which the appellant has complained that the trial tribunal erred in law and fact for deciding the matter contrary to the law while knowing that the disputed land in the year 1998 was declared by the Primary court to be the lawful properly of the appellant's late father one Stanslaus Kakusa, I think this cannot make me to spend much time to address it.

As it has already been pointed out by the court in the course of addressing the second ground of appeal, it is plain that among the evidence the learned trial chairperson omitted to evaluate before

arriving to her findings, was the documentary evidence produced by the appellant.

In my considered opinion, such omission was a gross error because despite the fact that the said documentary evidence thwarts the respondent from justifying his claims that he purchased the disputed land from one Adam Mtuka Kitambi, failure by the learned trial chairperson to evaluate it indicates that she denied the appellant's right to be heard which not only led to miscarriage of justice on the part of the appellant, but also contravened one of the fundamental principles of natural justice which goes by the Latin phrase, *"Audi alteram partem"* and cemented by Article 13 (6) (a) of the Constitution of The United Republic of Tanzania, 1977 as amended from time to time. It is due to the foregoing reasons, that I am also constrained to hold that the eighth ground of appeal by the appellant, is also meritorious.

It follows, therefore, that owing to the reasons which I have endeavoured to assign herein above in the course of determining the only issue whether the present appeal has merits, it is my settled view that the answer to such issue has to be given in the affirmative, as I hereby do.

In the light of the foregoing reasons, I allow the instant appeal with costs, quash the impugned judgment of the trial tribunal, set aside the orders made thereto, declare the appellant as the lawful owner of the disputed land and order the respondent to vacate immediate from the disputed land.

Order accordingly.

A.A. MRISHA
JUDGE
19.06.2024

DATED at **SUMBAWANGA** this 19th day of June, 2024.

A. A. MRISHA
JUDGE
19.06.2024