IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL No 2508 OF 2024

(Arising from the Land Application No 59 of 2022 from the District Land and Housing Tribunal for Singida at Singida)

DAUDI FANUEL OMARY.....APPELLANT

VERSUS

HELENA YOHANA.....RESPONDENT

JUDGMENT

Date of last order: 18/06/2024

Date of Judgment: 02/07/2024

LONGOPA, J.:

This is an appeal against an order of dismissal the appellant's case and declare the respondent as the rightful owner of land measuring 7 acres at Isuna B Village, Isuna Ward in Ikungi within Singida Region. The appellant claimed that he got the land through inheritance after his father's death in 2017.

On 8th December 2023, the District Land and Housing Tribunal for Singida entered judgment and decree in favour of the respondent with cost having found that the appellant failed to prove the case within standard required by law of balance of probability.

The appellant was aggrieved by the whole of the decision thus on 14th December 2023 instituted this appeal on the following grounds:

> *1. That, the learned Tribunal's Chairman erred in law and fact by relying on weak and contradictory evidence adduced by respondent whilst disregarding the strong and watertight evidence of the appellant.*
> *2. That, the trial Tribunal erred in law and fact by failing to examine the evidence adduced by the applicant.*
> *3. That, the admission, treatment and consideration of the opinion of assessors is questionable.*

Thus, on strengths of these grounds of appeal the appellant prayed for appeal to be allowed with costs.

On 18/06/2024 parties appeared before me for a viva voce submission on the appeal. The appellant enjoyed able legal services of Mr. Fred Kalonga, learned advocate and the respondent appeared in person fending for herself. Out of the three grounds preferred by the appellant only two were argued and the second ground on failure to the trial Tribunal to examine and evaluate the evidence of the appellant was formally abandoned.

It was Mr. Kalonga's submission that on the first ground of appeal that respondent in this appeal had a weak and contradictory evidence while the appellant had all strong evidence. It was incorrect for the trial Tribunal to decide in favour of the appellant as she informed the District Land and Housing Tribunal that the land in dispute was purchased by her husband from one Ndama. The source of ownership thus was through sale/oral purchase agreement.

It was appellant's version of story that this evidence contradicts with testimonies of DW 2 and DW 3. DW 2 stated that the disputed land belonged to one Salome Sumbu previously. DW 3 stated that the respondent or her husband did not buy the land from Ndama. This evidence of the respondent is so weak as the respondent failed to bring her husband who is the one allegedly to have purchased the same from Ndama and the respondent never tendered any evidence that her husband is sick thus could not ably appear before the trial Tribunal to testify.

Also, it was reiterated that the respondent failed to bring any witnesses from the family or clan of Mr. Ndama who is allegedly to have sold the land to the respondent's husband. This evidence remains to be incorrect, weak and unsubstantiated as DW 3 stated that the respondent's husband did not buy any land from Ndama.

In the judgment, the trial Tribunal's Chairman stated that the appellant failed to prove the source of ownership of the disputed land as to how he got the area. According to the appellant, it was the duty of the respondent to justify as there were vivid contradiction on her evidence.

The appellant submitted that the appellant managed to prove the way the disputed land was owned by his late parents and the same devolved to him. This was corroborated by PW 2 (SM 2), PW 3(SM 3), PW 4(SM 4) and PW 5(SM 5) who testified to have known the ownership of the disputed land. Accordingly, it is the appellant who proved the ownership of the disputed land as he showed the way that land came into his possession. The respondent's evidence was weak and contradictory to an extent that could not justify the respondent's ownership of the land.

Further, the appellant submitted that on the third ground relating to assessors whereby the trial Tribunal's Chairman failed to state the reasons for departing from the opinion of the assessors. It is true that under Regulations 24 of the District Land and Housing Tribunal Regulations the Chairman is not bound by the opinion of the assessors. Both assessors stated/opined that the appellant is the rightful owner of the land. The trial Tribunal's Chairman should have scrutinized the evidence well to reach to the same conclusion as the respondent is not the one who bought the land, failed to bring those allegedly sold the land. There were the contradictions on the respondent's witnesses. It is surprisingly that the trial Chairman decided against the appellant.

It is the appellant's prayer that this court be pleased to allow this appeal, set aside the decision of District Land and Housing Tribunal for Singida and declare the appellant as the rightful owner of the disputed land.

On the other hand, the respondent argued that the trial Tribunal was correct to enter judgment and decree in the respondent's favour. The Tribunal declared the respondent as the rightful owner of the disputed land on strengths of the respondent's evidence. The records from the trial Tribunal are clear without any flicker of doubts. The witnesses did not state that the disputed land belonged to one Salome as alleged in the appellant's submission.

It was the respondent's prayer that this Court be pleased to dismiss this appeal as it has no merits at all. The same should not be entertained as it lacks merits. The costs of the case should be awardable to the respondent as appellant has been misusing the court's processes.

I have carefully perused the available records of the trial District Land and Housing Tribunal for Singida, and submissions made by the parties in light of the grounds of appeal. In so do doing I have decided to revisit the evidence on record to satisfy myself on the validity of the same. I am fortified by the decision in **Rashidi Abiki Nguwa vs Ramadhani Hassan Kuteya & Another** (Civil Appeal No. 421 of 2020) [2021] TZCA

658 (5 November 2021) (TANZLII), at page 6, where the Court of Appeal stated lucidly that:

> *While determining this appeal, we are alive to the principle that, being the first appellate Court, we are empowered to re-assess the evidence on record and draw our own inferences of facts.*

This Court is the first appellate Court in respect of this appeal therefore it is entitled to re evaluate the evidence of the trial tribunal and arrive at its own findings.

To address the two grounds of appeal, I shall commence with issue related to the assessors. The law on assessors in land matters before the District Land and Housing Tribunals is very lucid in this jurisdiction. It calls for active participation of at least two assessors who must give their opinion which should be read in court in presence of the parties before the decision is reached.

Hearing of the land disputes at the District Land and Housing Tribunal is governed by section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R. E 2019. It states that:

(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 judgment****.*

It is clear that composition of the Tribunal is only dully constituted if there is a Chairman, who is sitting with at least two assessors. These assessors are expected to sit throughout the proceedings of a particular case and the assessors have a vital role to play at the end of the proceedings before judgment is delivered. They should give opinion on the possible outcome of the case. However, trial tribunal's Chairman is empowered to decide in accordance with law while stating clearly the reasons for departure from the opinions of the assessors.

This was reiterated in Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN No. 173 of 2001 which provides that:

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.

In the case of **Elibariki Malley vs Salimu H. Karata** (Civil Appeal 67 of 2022) [2023] TZCA 226 (3 May 2023) (TANZLII), at pages 8-10, the Court of Appeal lucidly stated that:

> *From the provision, it is clear that a tribunal must be composed of at least a chairman and not less than two assessors. Besides actively and effectively participating in the process, the assessors' are required at the end of the hearing to give their opinion before the judgment is composed and delivered. The manner those opinions should be given has been provided for in Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003 (the Regulations). For ease of reference, the provision is provided below: "Notwithstanding subsection (1), the Chairman shall before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*
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> *In giving effect and interpreting Regulation 19 (2), the Court, in the case of **Edina Adam Kibona (supra)**, took the liberty to expound by broadly explaining the role of assessors when it stated that: "We wish to recap at this stage that in the trials before the District Land and Housing Tribunal as a matter of law assessors must fully participate*

and at the conclusion of the evidence, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give an opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed."

It is noteworthy, to state that in dealing with disputes at the DL & HT the Chairman has to read in tandem the LDCA and the Regulations. Based on the provision of section 23 (2) of the LDCA and regulation 19 (2) of the Regulations, the Chairman who sits with assessors, is undoubtedly required to comply conjunctively with four conditions: (i) that the assessors actively participate, (ii) that at the end of the hearing, each of the assessors files a written opinion, (iii) that the written opinion filed must be read over to parties before the judgment is composed and (iv) that those written opinions must be part of the record.

This illustrative decision of the Court of Appeal in essence provides for the composition of the District Land and Housing Tribunal, the role of the assessors and the modalities of participation of the assessors in administration of justice in all proceedings before the District Land and Housing Tribunal.

It is on record that proceedings of the District Land and Housing Tribunal for Singida in Land Application No. 59 of 2022 are lucid on the participation of assessors. First, throughout 13/03/2023 before the date when the evidence was commenced to be adduced, both assessors were present. The assessors appeared until 25/10/2023 when the defence case was closed. Second, the assessors were availed opportunity to actively participate by asking for clarification from the witnesses of both sides. Third, on 25/10/2023, the defence case was closed, it was ordered that the written opinion of assessors should be filed and the same shall be read on 22/11/202023.

Fourth, on 22/11/2023, both assessors read their opinion in presence of both the applicant and respondent. Mr. N.K. Kyaruzi opined that: "Ninashauri Mwenyekiti wa Baraza Kutoa ushindi wa shauri hili kwa Mleta Maombi Daudi Fanuel Omari." Ms. F.A. Kilongo similarly opined that: Nashauri Mwenyekiti wa baraza ampe ushindi mleta maombi Daudi Fanuel Omari. Essentially, both assessors opined in favour of awarding the judgment and decree to the applicant who is the appellant in this appeal.

Basically, from the available record of the trial Tribunal, there is active participation of the assessors which is undoubtedly non questionable. They participated fully throughout the proceedings.

The only basis of lamentation by the appellant is the stage post reading of the opinion of assessors. It is the views of the appellant that such opinion was not given sufficient consideration by trial Tribunal's Chairman after having reached a different conclusion opposed to the opinion of the assessors.

It is settled law that the Chairman is not bound by the opinion of the assessors, but he is duty bound to state reasons for not accommodating the opinion of the assessors. In the case of **Tubone Mwambeta vs Mbeya City Council** (Civil Appeal No. 287 of 2017) [2018] TZCA 392 (5 December 2018) (TANZLII), at pages 11-12, the Court noted that:

> *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 the instant 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. *We are fortified in that account by section 24 of the Land Disputes Courts Act, which categorically provides: "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."*

As expressly stated under the law, the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the Tribunal, it embraces giving their opinions before the determination of the dispute. As such, their opinion must be on record.

In the instant appeal, the trial tribunal Chairman having considered the opinion of the assessors, he departed from the opinion of both assessors. Analysis of the trial Chairman in pages 3-5 of the judgment revealed the following: first, that the evidence of the applicant was contradictory as PW 1 testified to have been inherited the land from his father who inherited it from the applicant's grandfather in 1966. This evidence was not supported by any other appellant's witnesses. Second, other applicants witnesses testified that applicant's father did clear a virgin land himself and did not inherit it. Third, the way the land in question passed from the appellant's father to the appellant has been established.

It was the trial tribunal's observation that having demonstrated the discrepancies, the applicant's evidence was weak and contradictory. The Tribunal reiterated three main principles. First, where doubts are created in the evidence, the same should be resolved in favour of the opposite party. Second, parties are bound by their own pleadings. The applicant had alleged that the source of ownership originates from inheritance from his grandfather. The evidence from other witnesses is different. Third, he who alleges must prove.

On page 6 of the judgment on strengths of those aspects, the trial Chairman departed from the opinion of the assessors that applicant was entitled to the verdict of the court. It was trial tribunal's view that appellant failed to prove his case.

It is settled view of this Court the trial tribunal's chairman correctly analysed the evidence on record and was entitled to conclude the matter by departing from the opinions of both assessors. There reasons for such departure were lucidly expounded in the judgment. As such, the 3rd ground of appeal on admission, treatment and evaluation of the assessors' opinion is preferred without any cogent merits. I proceed to dismiss that ground forthwith.

On the first ground of appeal related to weak and contradictory evidence of the respondent compared to that of the appellant, the

guidance may be quickly found in the principle in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) (TANZLII), at page 14, the Court of Appeal stated that:

> ***It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.*** *If any authority will be required on this, a statement by Lord Denning in* ***Miller v. Minister of Pensions*** *[1937] 2 All. ER 372 will be sufficient to emphasize the point and we think we can do no better than reproducing the relevant part as under: "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency*

as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not... "(At page 340). ***It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case*** *(Emphasis supplied).*

The available record of the trial tribunal indicates that the appellant herein is the one who instituted that land application. He is the one who wished that the Tribunal to grant the orders, namely: first, that the applicant is the lawful and rightful owner of the disputed land. Second, an order against the respondent and his family not to interference with peaceful enjoyment of the land of the applicant. Third, costs of the application be borne by the respondent. Fourth, any other relief(s) that the tribunal would deem fit and just to grant.

That being the case, it is my settled view that in the circumstances it was the duty of the appellant to prove that he was entitled to the decision of the case. The appellant was duty bound to establish with precision way

through which the land in question came into his ownership. At pages 4-5 of the judgment, trial tribunal's chairman categorically observed that parties are bound by their pleadings and that evidence of the applicant was contradictory as the appellant indicated that source of ownership of that disputed land is inheritance. It was PW 1 testimony that he inherited it from his father who inherited it from appellant's grandfather. Other witnesses of the appellant stated that appellant's father is the one who cleared virgin land. There were discrepancies on the source of the ownership on the appellant's side. It was not possible for the same piece of land being cleared as a virgin forest/land by the appellant father and appellant's grandfather at different times.

The evidence of respondent was to the effect that respondent and her husband have been using that land throughout since 1967. It is only in 2022 when the appellant started to claim that such land belonged to him.

I cannot agree with the submission of the counsel for appellant that respondent's evidence was weak and contradictory. The case is established by strengths of evidence of the party who desires the court to enter judgment and decree. As I have pointed out that it was the appellant who instituted the case, thus, it was his duty to prove the case. As the Court of Appeal had guided in the **Paulina Samson Ndawavya (supra)** that burden of proof does not shift to the adverse party if the party who is duty bound to prove has not established the case.

The appellant in cross examination stated that his father passed on 2016 which resulted into the appellant to own the land from 2017. PW 2 on the other hand stated that in 2015, the appellant father informed his children including the appellant that upon his demise, the suit land shall be owned by them. It was PW 2 evidence that it is the appellant husband who cleared the virgin land in 1970. PW 5 stated that appellant father was using the land prior to 1967 and in 1968 shifted to another village.

Totality of this evidence leave a lot to be desired. First, it appears that the appellant was not given the land as gift intervivos. The reasons are simple and straight forward that appellant testified to have started using the land after death of his father in 2017. This falls short of the mandatory conditions of grant through gift *intervivos*, namely: First, intention to give the land. Second, acceptance of the same by the recipient. Third, the effective occupation of the land by the recipient or donee. These aspects fall within the principle in the case of **Hamis Sultan Mwinyigoha vs Zainabu Sultan Mwinyigoha** (Civil Appeal No. 447 of 2020) [2024] TZCA 150 (29 February 2024) (TANZLII). At pp. 5-6, the Court stated that:

> *We have therefore underscored in the context of this case that, validity of a gift essentially lies on the intention to give and acts incidental to that intention which may include the physical handing over of the gift. See Micky*

Woodley, Osborn's concise Law Dictionary (supra) at Page 200-201. It is also essential and paramount for the gift to be voluntary on the part of the donor and without any element of consideration on the part of the donee. As per the commentaries contained in Justice Y.V. Chandrachud, P Ramanatha Aiya Concise Law Dictionary, 3rd Edition, Lexis Nexis Butterworths Wadhwa, page 493; love, affection, spiritual benefit and many others may enter into the intention of the donor to give or make a gift. In the law of property therefore, three elements must exist for a gift to be legally valid. ***One is, as alluded to above, intent to give by the donor, two, delivery of the gift to the recipient, the donee and three, is the acceptance of that gift by the donee. These three elements, by any standard, are exhibited by way of evidence, no more no less.*** *It is to say, in the instant appeal, there must be evidence proven on balance of probabilities that the late Sultan Mwinyigoha granted the suit property to the appellant by way of a gift.*

Though PW 2 stated that the land was given intervivos, there is no evidence to substantiate that fact. PW 1 who is the appellant stated lucidly that he stated using the land after death of his father. There is nowhere indicating that there was any intention to give the land intervivos, the

donee accepted the same from the donor and that there was effective occupation of land by the donee. All these aspects are missing from the appellant's evidence.

Second, appellant testimony that he became owner of the land after his father's death is not supported by any evidence from appellant's witnesses revealing there was any probate/administration cause of the estate that resulted into the land being allocated to the appellant as one of the rightful heirs of the estate of the late Fanuel Omary.

Third, PW 5 contradicts categorically the evidence of PW 2. According to PW 5, the appellant father used the up to 1967/ 1968. Thereafter, the appellant's father entrusted the land to Francis Msaghata. PW 3 stated to have been allowed to use the land in 1974 to 1975. PW 2 stated the land was given to PW 3 sometimes before 1974 as that year is when it was returned. The evidence is divergent. It cannot be reliably applied to find the appellant as the rightful owner of the disputed land.

It is my settled view that the appellant failed to prove the case on the required standard of proof on balance of probabilities. The trial Tribunal was correct to enter judgment and decree in favour of the respondent. The third ground of appeal in the circumstances must collapse for lack of merits.

In totality of the events, the appeal is destitute of merits. The appellant failed to prove the case against the respondent as the evidence of the appellant was weak and contradictory. The evidence tilted in favour of the respondent. It shall stand dismissed with costs.

It is so ordered.

DATED at **DODOMA** this 2nd day of July 2024.

Longopa.

EELONGOPA
JUDGE
02/07/2024