IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 236 OF 2019

(From the decision of the District Land and Housing Tribunal of TEMEKE District at TEMEKE In Application No. 40 of 2018)

HAMIAL JAMAL *(Administrator of Estate of late SIKITIKO SWEDI)* ..... **APPELLANT**

VERSUS

ALLY SWEDI SABOUR ..... **RESPONDENT**

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

At the Ilala District Land and Housing Tribunal, the respondent herein successfully sued the appellant over ownership of a house with residential licence No. TMK/CHB/MNZ14/221 ("the suit property"). Aggrieved by the decision of the Tribunal, the appellant has lodged the current on the following grounds:

1. That, the trial Tribunal erred inlaw and facts to enter decision in favour of the respondent by unreasonably not affording the Appellant with his constitutional right to be heard.
2. That, the trial tribunal erred in law and facts to enter decision in favour of the respondent by relying on week evidence adduced by the respondent.

It was the appellant's prayer that:

1. An order that the decision of the trial Tribunal be quashed and set aside.
2. An order for the appellant be afforded his Constitutional right to be heard
3. That, the Respondent be ordered to pay general damages over and above the damages already suffered by the Appellant.
4. Costs of this case
5. Any other order (s) that this honourable court deems fit to grant in favaour of the Appellant.

By an order of the court dated 11/08/2020, the appeal was disposed by way of written submissions. The appellant's submissions were drawn and filed by the appellant in person while the respondent's submissions were drawn and filed by Ms. Aisha Ahmed Bwasheikh, learned advocate.

Starting with the first ground of appeal that the trial tribunal erred in law and facts to enter the decision in favour of the respondent by unreasonably not affording the Appellant with his constitutional rights to be heard. The appellant submitted that at the trial tribunal, only respondent was accorded the right to be heard by tendering documentary evidence and by bringing witnesses. That the appellant was not accorded the right to be heard, hence the trial Tribunal acted biasely which in turn resulted to injustice decision. He supported his submissions by citing the case of **M/S Darsh Industries Limited V M/S Mount Meru Millers Limited (Civil Appeal No. 144 of 2015) 2016 TZCA 144;** where the court held that:

" the trial court had failed to uphold the appellants right to be heard when it arrived at its decision and therefore violated a constitutional right.

He submitted that in the cited case, the court concluded that the decision could not be allowed and consequently nullified the impugned decision. He further cited the cases of **Rukwa Auto Parts and Transport Ltd V. Jestina George Mwakyoma Civil Appeal No. 45** and **Abbas Sherally and Another V Abul Fazalboy Civil Application No. 33 of 2002** where the position was emphasized. The appellant also cited the case of **Muro Investments Co. Limited VS Alice Andrew Mlela (Civil Appeal No. 72 of 2015) [2018] TZHC 24; (02 February 2018)"** where the Court held that:-

"The decision of the trial court giving rise to this appeal could not be allowed to stand on account of being arrived at in violation for the constitutional a right to be heard,. In the result the appeal was granted.

He argued that in the instant case, the trial tribunal failed to provide conducive environment for the Appellant to adduce the evidence and by so doing, the Appellant was denied the right to a fair trial. He concluded that owing to this, there was no way the chairman could have done justice to the Appellant.

In reply, Ms. Bwasheikh submitted that it is undisputed fact that right to be heard is a constitutional right. She however argued that during the hearing, the Tribunal chairperson followed all the procedure which are required to be considered during trial and that the appellants were also

present from the beginning up to the day when the judgment was delivered. She pointed out that in the judgment of the tribunal, the chairperson stated clearly that respondent who is the appellant in this case waived to adduce evidence and told the court to proceed with judgment. She argued that it meant the appellants had nothing to produce.

Ms. Bwasheikh submitted further that the appellant, who was then the respondent, was having such right to be heard and the same was accorded to him but he waived the right by rejecting to adduce evidence in the tribunal even though he was present physical. She argued that for the interest of justice, the chairperson made his decision according to the available evidence adduced by the applicant in that suit. Citing Article 107B of the Constitution of the United Republic of Tanzania, 1984 (as amended from time to time) she argued that even if the right to be heard is there, but the person should not violate the right of others. She submitted that in order for the court to do justice, it proceeded to pronounce judgment as per article 107 B.

Ms. Bwasheikh submitted further that during the hearing of the Application the appellants were having and advocate who cross – examined all the witness brought by the applicant. Further that every documentary evidence which was tendered before the tribunal was admitted. That when the appellants were ordered by the Tribunal to bring their witnesses and other evidence, they refused. Further that when the tribunal was framing issued, the advocate for the appellant informed the tribunal that the respondents (appellant herein) would call five witnesses and eventually the appellants neglected to be represented by their advocate with no reason

and the informed the tribunal they will stand alone in that suit. She quoted part of page 7 of the judgment of the tribunal where the Chairman wrote:

"The respondent refused to make defense, hence this tribunal closed the defense and proceeded to fix the judgment"

She concluded that this ground is baseless and the appellant is just lying before the court that their right to be heard was violated while the same was accorded to them.

Having perused the records of this appeal, I find it necessary that I first address the first ground of appeal which challenges the tribunal's decision on the ground of violation of the fundamental right to be heard. If need be, I will then address the remaining grounds of appeal. As for this ground, I have gone through the records of this appeal and found that contrary to what the appellant alleges, he was actually afforded a right to be heard and only refused on a mere ground that he has no trust with the trial Chairman.

As correctly pointed out by Ms. Bwasheikh, the conduct of the appellant means the appellant had waived his right to defendant his case. This cannot be concluded that the Chairperson denied him his right to be heard as the records also show that the Chairman of the tribunal had given his verdict on the appellant's application for the Chairman's recusal. Therefore the proper remedy to have been taken by the appellant was to appeal against the Chairman refusal to recuse himself and not his act to refuse to adduce evidence on his defence because by doing so, he acted in contempt which could also be safely concluded that he waived his right to give his

defence and there was no violation of his right to be heard. The first ground therefore lacks merits and is hereby dismissed.

Having made those findings, in the normal course, I would have proceeded to determine the remaining grounds of appeal, however, today is different as in due course of the perusal of the records, I have noted some discrepancies in the way the proceedings of the tribunal were conducted. For instance, from the 24/07/2019, 20/08/2019, 17/09/2019 and 10/10/2019, the record is silent on who were the members that sat to determine the matter. The record show that on the 10/10/2019 the assessors' opinion was read over to the parties but the quorum is silent on who were the members that read their opinion.

Further to the above, although during the hearing of the applicant's case and in the judgment the records show that there were two assessors, there is only one opinion of the assessors that was filed. The same is titled *"Maoni ya Washauri wa Baraza"* and it is signed by only one member. The opinion of the other member is absent on the record. This irregularity is fatal as it contravenes the Section 19(3) of the Regulations which requires each of the assessors that sat in the trial to give their opinion in writing. But in the records, there is an opinion of only one assessors and no reason adduced of the absence of the other assessor's opinion. Owing to this irregularity, I have no choice but to nullify the proceedings (see the cases of **Edina Adam Kibona VS Absolom Swebe (Sheli), (Civil Appeal No.286 of 2017) [2018] TZCA 310; (10 December 2018)** and **Elizabeth Omary Mpopo vs. Andalumu Khand Mudhat, Land Appeal**

No.27 of 2017) [2020] TZHC 1200; (06 May 2020) where the position was held.)

Having made the above findings, I hereby nullify the proceedings of the tribunal and set aside the subsequent judgment and decree therefrom. This file is remitted back to the trial tribunal to be heard de-novo before another Chairman and a new set of assessors. Costs shall follow cause in the outcome of the subsequent trial.

Dated at Dar es Salaam this 11th day of December, 2020

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S.M MAGHIMBI

JUDGE