IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 217 OF 2019

(Originating from the District Land and Housing Tribunal for Kilosa at Kilosa in Application No. 25 of 2015)

BRAISON MWAKIHABA ..... APPELLANT

VERSUS

STEPHENY MWAKAPUMBE ..... 1ST RESPONDENT

DAUDI MWAKAPUMBE ..... 2ND RESPONDENT

JUDGMENT

Date of Last Order: 16.07.2021

Date of Ruling: 23.07.2021

A.Z.MGEYEKWA, J

At the centre of controversy between the parties to this appeal is a parcel of land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Kilosa in Land Application No. 25 of 2015 in which Stepheny Mwakapumbe, the first respondent was the applicant

2. *THAT, the Tribunal chairman erred in law and fact by issuing the judgment in favor of 1st respondent basing on fabricated Agreement which was not annexute on pleadings and not tendered and admitted in application.*
3. *That, the trial tribunal's judgment and proceedings are tainted with illegality for being presided over by more than two Assessors contrary to law.*
4. *That the trial Tribunal chairman failed to read over the assessor's opinion to the parties as required by law.*
5. *THAT, the trial Tribunal chairman erred both in law and fact for considering the fabricated and contradictor evidence adduced by the respondents and their witness on how the 1st respondent built the dispute house.*
6. *THAT, the Trial Tribunal chairman erred in law and fact by reaching its decision for misleading himself that he appellant who is the 1st respondent was supposed to prove the application filed by 1st respondent at the trial tribunal; against of the mandatory principle of evidence that he who alleged must prove his case.*

7. *THAT, the trial Tribunal chairman erred in law and fact by ignore the material evidence adduced by appellant and his witness in the trial tribunal.*
8. *THAT, the trial Tribunal chairman erred in law and fact by not considering that the 2nd respondent in trial tribunal is not true lather than fabricated evidence because on previous land cases on the same dispute house from ward tribunal up to high Court the 2nd Respond net claiming the ownership of the same house.*
9. *THAT, the trial Tribunal chairman erred in law and fact by declared the 1st respond the lawful owner of the house and land while the 1st responded does not pray to be lawful owner of the dispute house in his application.*
10. *THAT, the trial Tribunal chairman erred in law and fact his application. respond the lawful owner of the house while the 1st respondent did not prove the ownership of the dispute house in his evidence.*
11. *THAT, the trial Tribunal chairman erred in law and fact by declared the 1st respondent the lawful owner of the house while time barred.*
12. *THAT, the trial Tribunal chairman erred in law and fact by pronounce Judgment and Decree without pronounce the right of appeal to the parties.*

13. *THAT, the trial Tribunal having failed to properly examine, evaluate, analyze the gravity and weight of evidence on record.*
14. *THAT, the trial Tribunal erred in law and fact by pronouncing the defective judgment for being that the decision in judgment and Decree does not tally is totally differ in decision.*

When the matter was called for hearing before this court on 20th April, 2021, the court ordered the parties to argue the appeal by way of written submissions whereas, the appellant's Advocate filed his submission in chief on 26th May, 2021 and the respondent Advocate filed his reply on 25th June, 2021 and the appellant's Advocate filed a rejoinder on 08th July, 2021.

The appellant was the first one to kick the ball rolling. He started with a brief background of the facts which led to this appeal which I am not going to reproduce in this appeal. The appellant abandoned the ninety, twelfth and fourteenth grounds and consolidated the first, eighth and eleventh grounds. He combined the third, fourth. Again, he consolidated the second, fifth, sixth, seventh, tenth, and thirteen grounds.

On the first, eighth, and eleventh grounds, the appellant complained that the Chairman erred in law and fact by not considering that the matter at the

trial tribunal is Res judicata since the land dispute was determined to its finality at Kidodi Ward Tribunal in land Case No. 12/B/K/2009 and the first respondent was a witness. He claimed that the tribunal faulted itself by believing in fabricated evidence since the second respondent from the Ward Tribunal to the High Court claimed for land ownership over the same house. He also faulted the tribunal for declaring that the first respondent is a lawful owner of the disputed house while the matter was time barred.

He went on to submit that Stephen Mwakapumbe in 2008 sued Daud Mwakapumbe and Braison Mwakyaba at the Ward Tribunal of Kilosa whereby the trial tribunal decided in favour of Braison Mwakyaba. He further claimed that after the tribunal decision there was no any appeal, but Daudi Mwakapumbe filed a suit land as a lawful owner at Kidodo Ward Tribunal whereby Stephen Mwakapumbe was a witness in Land Application No.12/8/K/2009. He complained that he tendered the two judgments before the District Land and Housing Tribunal but the tribunal did not consider the said documentary evidence hence reached unfounded and illegal judgment for entertaining a case out of time and the same was *res judicata*.

The appellant urged this court to step into the shoes of the trial tribunal and dismiss the matter with costs. Insisting he stated that he has developed

the suit land for 12 years from 2000 to 2015 and the first respondent at the Kidodi Ward Tribunal testified that the second respondent is the lawful owner of the suit land in Land Case No. 12/B/K/2009 and the Ward Tribunal decided in favour of the appellant and the second respondent was ordered to pay the appellant a compensation.

The appellant continued to submit that dissatisfied, the respondents filed an appeal at the District Land and Housing Tribunal for Kilosa the same was dismissed for being time barred. Then, the respondents filed a Land Appeal No. 72 of 2013 before this court the same was dismissed. He lamented that all those cases prove that the matter was res judicata and time barred. The appellant claimed that all parties are biological brothers, however, the first and second respondents changed their names in Land Application No. 25 of 2015 for the reason that they are escaping the limitation of time to file a case and to show that the matter was not Res judicata.

It was the appellant's further submission that the Land Application No.25 of 2015 before the District land and Housing Tribunal is time barred because the first respondent filed the case after 15 years from the date when the dispute arose and he did not file any appeal. He urged this court to find that

the said application was hopeless time barred since the suit to recover land is 12 years limit. To buttress his position he referred this court to section 3 Part I subsection 22 of the Law of Limitation Act, Cap. 89.

On the third and fourth grounds, the appellant complained that the trial tribunal judgment and proceedings are tainted with illegality for being presided over by more than two Assessors contrary to the law and the chairman did not read over the assessor's opinion to the parties as required by the law. The appellant submitted that there was no any opinion of assessors that was recorded before the parties hence contravene the legal requirement of the law. Fortifying his position he referred this court to the case of **Taudos Delile (Administrator of the estate of the late Leonard Delile) v Donata Lutego**, Misc. Land Appeal No. 21 of 2018 HC at Mbeya.

Submitting on the second, fifth, sixth, seventh, tenth, and thirteenth grounds, the appellant complained that the trial tribunal findings were not based on proof of the case. He lamented that the law requires the one who alleges must prove as stated under section 110 (1) and (2) of the Law of Evidence Act, Cap.6 [R.E 2019]. He went on to state that the findings of the Chairman were that the house in dispute is the property of the first

respondent at the same time the appellant was alleged to have trespassed the house in dispute while the first respondent did not prove how he constructed the said house. He further stated that the appellant tendered documentary evidence to prove how he constructed the house in dispute and called witnesses who testified in his favour and he tendered all the previous decisions of tribunals and this court.

On the strength of the above submission, the appellant beckoned upon this court to allow the appeal with costs.

The respondents' confutation was strenuous. The learned counsel for the respondent came out forcefully and defended the trial court's decision as sound and reasoned. The respondents came out forcefully and defended the trial tribunal's decision as sound and reasoned.

Submitting on the first, eighth, and eleventh grounds, the respondents valiantly argued that the appellant grounds are baseless because the matter was not resed judicata because the parties were the same at the tribunal. The respondents went on to state that the dispute was on land ownership and the house built thereto whereby the second respondent was declared the lawful owner of the disputed plot and the appellant was ordered to

compensate the respondent. To support their submission they referred this court to the Kikodi Ward Tribunal Application No. 17 of 2008. They went on to state that for the matter to be res judicata it has to fulfill the ingredients stipulated under section 9 of the Civil Procedure Code Cap.33 [R.E 2019].

The respondents insisted that the crucial issue was on ownership of the disputed landed property whereby the evidence on record revealed that the same belonged to the second respondent. They went on submitting that the appellant has not directed himself correctly on the issue of time limitation. They stated that since the year 2000 until 2015 is 15 years however, the same does not apply in the matter at hand because the appellant was not a trespasser but an invitee. They added that the parties are siblings of the same parents thus occupancy was not an issue because all of them were on good terms. They added that the adverse possession principle is applied when there is no interference, which has not been the case in the matter at hand because parties were in agreement.

On the third and fourth grounds, that the assessor did not give their opinion. The respondent valiantly submitted that the judgment was composed in accordance with Regulation 19 (2) of the Land Disputes Court

(the District and Housing Tribunal). They argued that the appellant did not give any evidence to show that the assessors did not give their opinion. Insisting, they contended that the assessors gave their opinion before the composition of the judgment. They stated that these grounds are devoid of merit.

With respect to the second, fifth, sixth, seventh, tenth, and eleventh grounds, that the tribunal decided the matter based on fabricated evidence, the respondents did not prove their case and the tribunal erred to decide that the first respondent was a lawful owner of the disputed property. The respondent contended that the evidence adduced at Kidodi Ward tribunal was in favour of the first respondent and he was declared the lawful owner of the suit property. They lamented that the appellant has no justification in any color to claim ownership over the disputed house since all the material evidence are in favour of the respondents. To buttress their position they referred this court to the last page of the tribunal judgment.

On the strength of the above submission, the respondents beckoned upon this court to uphold the trial tribunal decision and find that all grounds of appeal are devoid of merit and dismiss the appeal.

In his brief rejoinder, the appellant reiterated his submission in chief. He had nothing new to rejoin rather the appellant insisted that the Village Land Council is a court of law thus its decision is a valid judgment and the same was not overruled todate. To support his position he invited this court to go through the decision of this court in the case of **Ominde Sweta v Robert Manyama**, Land Appeal No. 120 of 2000 HC at Musoma. The appellant claimed that he was not a party to the purported decision of the Kidodo Ward Tribunal and the same decision was not tendered at the District Land and Housing Tribunal but the same is raised at this stage of appeal. He urged this court to ignore the respondents' written submission and its annexure thereto. In conclusion, the appellant urged this court to allow the appeal with costs.

Having heard the submissions of both parties simultaneous with carrying a thorough review of the original record, I wish to state from the outset that I wish to begin with the third and fourth grounds which in my view, if decided in the positive, are sufficient to dispose of the entire appeal for reasons which will unfold in the course. I have gone through the original proceedings and I fully subscribe to the appellant's submission that the assessors' opinion were not recorded

I have gone through the handwritten proceeding of District Land and Housing Tribunal for Kilosa specifically on the last pages the records do not show that the assessors stated their opinion instead the Chairman proceeded to set a date for delivering a judgment on 20th April, 2017 and on 20th April, 2017 the Chairman delivered the judgment. It is not seen anywhere the assessors being invited to issue their written opinion as required under the law, However, the two assessors; Poromoka and Mary Paul written opinions were placed in the District Land and Housing Tribunal file.

Furthermore, the records reveals that the assessors opinion were not read over before the as required under the law. The appellant complained that there was no any opinion of assessors that was recorded before the parties hence contravene the legal requirement of the law. I am in accord with the appellant that as long as the assessors' opinion were not read over to the parties' means there is a possibility that the assessors' opinion were not recorded before the parties. Filing the assessors' written opinion without acknowledging that the same were read over before the parties is fatal because the parties had a right to know the nature of the assessors' opinion.

The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be read before the parties. In the **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

> *"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment is composed...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 Page 4 of 6 or not such opinion has been considered by the Chairman in the final verdict." [Emphasis added].*

Inspired by the incisive decisions quoted above, applying the same in the instant appeal, it is evident that a fundamental irregularity was committed by the tribunal Chairman. In view of the aforesaid, I find the third and fourth grounds of appeal merited and it is sufficient to dispose of the appeal and as such, I shall not belabour on other grounds raised by the appellant.

From the above findings and analysis, I invoke the provision of section 43(1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Kilosa in Application No. 25 of 2015 in the following manner:-

(i) The proceedings in Application No. 25 of 2015 and the orders made thereof are hereby quashed.

(ii) I remit the case file to the District Land and Housing Tribunal for Kilosa, the Chairman to compose a new judgment.

(iii) The matter to proceed at the District Land and Housing Tribunal for Kilosa before another Chairman and same set of assessors.

(iv) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 23rd July, 2021.

A.Z.MGEYEKWA

JUDGE

23.07.2021

Judgment delivered on 23rd July, 2021 via audio teleconference whereas both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

23.07.2021

Right of Appeal fully explained.