IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.110 OF 2019

(Arising from the District Land and Housing Tribunal for Kilosa at Kilosa in Application No.20 of 2014)

CHRISTINA NJENJE ..... 1ST APPELLANT

PROTAS KAIHULA ..... 2ND APPELLANT

VERSUS

HELENA BENARD BAGALA ..... RESPONDENT

JUDGMENT

Date of Last order: 12.07.2021

Date of Judgment: 16.07.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is land ownership and possession of the suit premises. The decision from which this appeal stems is the Judgment of the District Land and Housing Tribunal for Kilosa in Application No.20 of

2014. The appellants filed this appeal after being granted extension of time to file an appeal out of time.

The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and the respondent are disputing over a piece of land. The respondent instituted a case before the District Land and Housing Tribunal for Kilosa applying for a declaration that that she is the lawful owner of the suit premise. The respondent also prayed for the appellant to give vacant possession of the suit premises.

On their side, the appellants (original respondents) lodged a joint written statement of defence denying the respondent's claims. Both parties brought their witnesses in court whereby the respondent claimed that the suit premises were allocated to them in 1992 and they build a house in 1992. After a while, they opted to sell the disputed plot to one Zakaria.

The village chairman (RW3) claimed that they declared the disputed plots as residential areas and the same were allocated to villagers including the appellant and respondent. RW4, a former village chairman testified to the effect that they allocated the disputed plot to the

appellants. To support her testimony the respondent tendered a letter from the District Commissioner, Probate case notice, and death certificate. The District Land and Housing Tribunal for Kilosa determined the matter and declared the respondent a lawful owner of the suit land and the appellant was ordered to vacate possession of the suit land.

Believing the decision of the District Land and Housing Tribunal for Kilosa was not correct, the appellant lodged this appeal on six grounds of complaint seeking to assail the decision of the District Land and Housing Tribunal. The grounds are as follows:-

1. *That the learned trial Chairman erred in law for making a decision in favour of the respondent on relying exhibits A3, (The letter from Kilosa District Commissioner), A4 (Probate Case Notice and A5 (Death Certificate whereas the same were tendered un-procedurally as required by law on tendering documentary evidence that, appellants were not asked to cross-examine it accordingly.*

2. *That the learned trial Chairman erred in fact in hold that the defence witness (RW3 one Mohamed Hamisi, the village Chairman) and (RW4 one Raulian Makongolo Haule) did make a contradictory testimonial as per paragraph 2 on page 4 of the copy of judgment while the same*

witnesses did under paragraph 15 and 16 of page 2 of the copy of judgment testified that " they allocated a plot to the 2nd respondent but he did not recall if they also allocated a plot to the 2nd respondent son and that the also allocated a plot to the 1st respondent (Christina Njenje) and her sister Zamda Njenje". That, the said facts does not negate the evidence of allocating both plots to the Appellant by RW3 and RW4 who by then were the village government officials.

3. *That, the learned trial Chairman erred in law on admitting exhibit A3 (The letter dated on 31/03/2016 from Kilosa District Commissioner) as per paragraph 6 at page 4 of the copy of a judgment and subsequently entered judgment in favour of the Respondent while the said District Commissioner failed to adhere a principle of natural justice in not summoning the Appellants so as to conduct a fair hearing on the complaint raised by the respondent and at the end to reach a proper decision.*

4. *That, the learned trial chairman erred in law in not holding the testimony adduced by RW3 and RW4 in relation to disputed matter whereas their testimonials were very crucial as they were the ones allocated the land plots and the documents (A3, A4, and A5) admitted*

to decide in favour of the respondents contained some discrepancies that create doubts beyond the shadow.

5. *That, the learned trial Chairman grossly erred in fact in holding that the respondent is a lawful owner of the disputed land plot whereas did contradict herself on exactly year when her husband allocated the said land by the village government as per paragraph 9 at page 3 of the copy of the judgment. The respondent testified that her husband allocated the land in dispute in 1987 while the village Government officials did testify to allocate the said land in 1992.*

6. *That, the learned trial Chairman erred, in fact, to justify that the Respondents land contained half an acre and subsequently entered a judgment in favour of the respondent without visiting at locus in quo so as to reach with soundness decision bear on mind that the same tribunal is not a surveyor who could justify an exact size of the disputed land as per paragraph 1 at page 4 of the copy of the judgment.*

When the appeal was placed before me for hearing on 12th July, 2021, both parties were duly served, however, the respondent did not enter appearance. In prosecuting this application the appellant appeared in person, unrepresented.

Following the prayer by the 2nd appellant to proceed *ex-parte* succeeding the absence of the respondent regardless of being served and as such it was revealed that the respondent was aware about the matter but opted not to appear in court, this court granted the prayer for the applicant to proceed *ex-parte*.

In his submission the appellant started his onslaught by generalizing all the six grounds of appeal. He argued that the trial tribunal did not comply with the procedure of tendering documents. The respondent complained that the appellants were not afforded right to examine the said documents and were not asked whether the same should be admitted. He went on to submit that it is mandatory requirement under the law for an adverse party to examine and put questions on any document before its admission. To substantiate his submission he referred this court to Order XIII Rule 1 (1) of the Civil Procedure Code Cap.33 [R.E 2019]. The appellant further lamented that the trial tribunal made an unfair decision against the respondent on relying on a letter issued by the District Commissioner which convinced the Chairman to prove that the respondent was the lawful owner of the suit land without considering that the District Commissioner has no jurisdiction to determine land matters.

To support his position, the 2nd appellant cited section 3 (2) of the Land Disputes Courts Act, Cap. 216

The appellant went on to submit that the former village chairman testified to the effect that he was involved in allocating the plots in disputes. RW4 testified that they allocated the disputed plot to the appellants. He valiantly submitted that the village chairmen's evidence was genuine because they were the ones who managed and allocate the village land. The appellant went on to claim that failure for the Chairman to consider the appellant's evidence vitiated the appellant's rights. To bolster his position, the appellant referred this court to the case of **Michael Haishi v Republic** [1992] TLR 92.

The appellant did not end there, he continued to complain that the tribunal was required to visit *locus in quo* before concluding the matter in order to make sure that justice is seen to be done.

On the strength of the above submission, the appellant beckoned upon this court to find that the tribunal erred in law and fact to conclude that the respondent is a legal owner of the suit land. He urged this court to consider the grounds of appeal and allow the appeal with costs.

Before the determination of the grounds of appeal, I called upon the appellant to address the court on the point of law which I have discovered while composing the judgment. The record reveals that the assessors were not given an opportunity to state their opinion. The appellant had nothing to say rather he left it upon the court to decide.

I have gone through the tribunal judgment particularly on page 3 the Chairman considered the opinion of assessors. He stated that: "...both assessors sat with me (Mrs. Mariam Lila and Mr. Othman Simba) had the same opinion that the applicant has failed to prove her claims against the respondents. They further opined that the applicant's claims to be dismissed with costs". The original tribunal proceedings indicate that on 13th July, 2016 the Chairman recorded that the assessor will state their opinion.

However, the records are silent the handwritten proceeding also does not show that the assessors stated their opinion instead the Chairman continued to record the witnesses evidence and proceeded to set a date for delivering a judgment on 13th October, 2016, the question to ask is where the Chairman has obtained the assessors' opinion to consider them in his judgment. It is not seen anywhere the assessors being invited to

issue their written opinion as required under the law, or the said opinion being read before the parties and recorded in the proceedings as required under the law. It is the requirement of the law as provided under Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. 174 of 2003, that the Chairman has to require every assessor present after hearing the case to give his opinion in writing before making his judgment and the opinion be recorded in the proceedings.

In the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 it was ruled that the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued. The Court of Appeal (CAT) in **Ameir Mbarak and Azania Bank Corp Ltd v Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) held that: -

> *"Therefore in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of a considered view that assessors did not give any opinion for consideration in the*

preparation of the Tribunal's judgment and this was a serious irregularity."

In **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported) ,the Court of Appeal of Tanzania held 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 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 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."

Applying the above authorities and the facts on record in this appeal, it is obvious that a fundamental irregularity was committed by the Tribunal Chairman. He was obliged to record and take into consideration the opinion of assessors as provided under Section 24 of the Land Disputes Courts Act, Cap 216, R.E. 2002, and under Regulation 19(1) and (2) of

the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. 174 of 2003. (See also the case of General Manager Kiwengwa Stand Hotel v. Abdallah Said Musa, Civil Appeal No. 13 of 2012 (unreported) which also insisted on the opinion of assessors to be recorded and considered.

Consequently, for the interest of justice, I quash the judgment and decree of the District Land and Housing Tribunal for Kilosa. I find it prudence to remit the case file in Application No. 20 of 2014, before a different Chairman, same set of assessors to record the assessors' opinion and compose a new judgment. I shall not consider the remaining grounds of appeal as the same shall academic exercise after the findings I have made herein. Since the issue was raised *suo motu* by the Court, I make no orders as to costs.

Order accordingly.

Dated at Dar es Salaam this date 16th July, 2021.

A.Z.MGEYEKWA

JUDGE

16.07.2021

Judgment delivered on 16th July, 2021 in the presence of the appellant and in the absence of the respondent.

A.Z.MGEYEKWA

JUDGE

15.07.2021