IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.136 OF 2016

(Originating from the District Land and Housing Tribunal for Mkuranga in Land Appeal No. 30 of 2016)

HERBERT ROGERS MWAIMU ..... APPELLANT

VERSUS

ABDALLAH CHUMU YUSUFU ..... RESPONDENT

JUDGMENT

Date of Last Order: 28.06.2021

Date of Ruling: 20.07.2021

A.Z.MGEYEKWA, J

This is a second appeal. The matter originates from Vikindu Ward Tribunal in Civil Case No. 02 of 2016. At the centre of controversy between the parties to this appeal is a parcel of land. The appellate tribunal determined the matter and

The material background facts to the dispute are as follows: The respondent was the complainant at the Ward Tribunal, he successfully claimed ownership of a piece of land located at Ngunguti hamlet in Vikindu village within Mkuranga District. Dissatisfied, the appellant filed an appeal before the District Land and Housing Tribunal. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Mkuranga in Land Application No. 30 of 2016.

Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal for Mkuranga on four grounds of grievance; namely:-

1. *That the trial tribunal erred in law by failing to determine a fundamental issue of Jurisdiction which was one of the grounds of Appeal before it.*
2. *That the trial tribunal without any reason grossly erred in law by failing to consider and determine each and even ground of appeal raised.*
3. *That the trial tribunal further erred in law by failing to account any weight to the evidence tendered before it.*
4. *That the trial tribunal further erred in law by failing to provide the opinion of the assessors.*

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 21st April, 2021. The appellant's Advocate waived his right to file a rejoinder.

The appellant was the first one to kick the ball rolling. He opted to submit on one ground and dropped the remaining grounds. The appellant argued that the tribunal erred to rule that there was adverse possession, while the records show that the dispute between the parties started before 2016. He also blamed the District Land and Housing Tribunal for failure to consider and determine each ground of appeal.

The appellant continued to submit that the respondent admitted that the dispute existed since 2014. To support his submission he referred this court to page 2 paragraph 1 of the tribunal proceedings. It was his view that the issue of adverse possession was sustained without any justification. To bolster his submission he cited the case of **Moses v Lovegrove** (1952) QB, **and Hughes v Griffin** (1969) 1All ER 460 where it was held that:-

> "a person seeking to acquire title to land by adverse possession had to cumulatively prove the followings;-
>
> *f) That the statutory period, in this case, twelve years has lapsed*

g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period.

The appellant continued to argue that the Chairman wrongly observed that from 2004 to 2016 is twelve years, which under the doctrine of adverse possession the respondent became the owner of the suit land as lightly found by the trial tribunal.

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.

The respondent argued that the Ward Tribunal determined the fact in issue that the appellant wrongly sold the land which belonged to the respondent. He went on to state that the appellant trespassed into the respondent's land and sold it to Henrick Elimelick Mgaya. He further contended that since the respondent occupied the suit land since 2004 without being interrupted then by the time the appellant sold the suit land in 2016 he was barred by the law of limitation because the 12 years had lapsed.

The respondent valiantly argued that the appellant did not institute any dispute until 2016 when the respondent filed a suit at the Ward Tribunal.

On the strength of the above submission, the learned counsel for the respondent contended that the appellant failed to exercise his right (if any) rightly invoked by the tribunal and the appeal was rightly dismissed by the tribunal.

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' opinions were not recorded

I have gone through the handwritten proceeding of District Land and Housing Tribunal for Mkuranga 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 10th August, 2016 and on 20th August, 2016 the Chairman delivered the judgment and acknowledged on page 4 of his judgment that they concur with the

unanimous opinions of both assessors. 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. The act of the trial Chairman to record the assessors' opinion without record the same was contrary to Regulation 19 (1) of the Land Dispute Courts (The District and Housing Tribunal) Regulations, 2003 GN.174 of 2003. The Chairman has to require every assessor present at the conclusion of the hearing to give his opinion in writing before making his judgment and the opinion be recorded in the proceedings. The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be expressly indicated in the record. In the case of **Hamisa S. Mohsin v Taningra Contractor** Land Appeal No. 133 of 2009 where the Chairman did not indicate what opinioned, the judgment was null and void and in the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 it was held that:-

> "... the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued".

Equally, the Court of Appeal of Tanzania in the case of **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."

Similarly, in the case of **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."

The Court further held that:

"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in the view of the fact that the records do not show that the assessors were required to give them, we fail to understand how and at what stage they found their way into the Court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same has no useful purpose."

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. I shall not consider the remaining grounds of appeal as the same shall academic exercise.

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 Mkuranga in Appeal No. 30 0f 2016 in the following manner:-

(i) The proceedings in Appeal No. 30 0f 2016 and the orders made thereof are hereby quashed.

(ii) I remit the case file to the District Land and Housing Tribunal for Mkuranga, before a different Chairperson and the same set of assessors.

(iii) The matter to proceed at the District Land and Housing Tribunal for Mkuranga before another Chairman within 8 months.No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 20th July, 2021.

A.Z.MGEYEKWA

JUDGE

20.07.2021

Judgment delivered on 20th July, 2021 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

20.07.2021

Right of Appeal fully explained.

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 271 OF 2020

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Kilombero and Ulanga and Malinyi Districts at Ifakara, in Land Application No. 41 of 2018, by Hon. Kamugisha)

TABU MOHAMED SAADAN.....APPELLANT

VERSUS

ISSA MAGWILA (in person and in the capacity as the Administrator of Estate of the Late Minisha Mohamed.....**RESPONDENT**

JUDGMENT

Date of last Order: 04.08.2021

Date of Judgment: 11.08.2021

A.Z.MGEYEKWA

This appeal is against the Judgment and Decree of the District Land and Housing Tribunal for Kilomero / Ulanga at Ifakara, in Applications No.41 of 2018. The material background facts to the dispute are not difficult to comprehend. They go thus: The respondent on his own capacity and in the capacity of the administrator of the estate of Minisha

Saadan filed a suit at the District Land Housing Tribunal against the appellant calcimining for land ownership of the house situated at Lumemo area within Ifakara Township in Kilombero District. The respondent contended that the landed property was constructed in the clan land. He claimed that the ownership passed by survivorship from one generation to another and he is the current owner of the suit property. On her side, the appellant contended that the suit property belonged to her mother one Zuhura Issa Milandu who passed away. The appellant claimed that she is the administrator of the estate of the late Zuhura Issa Milandu. She claimed that her late mother has never been a licensee instead she occupied the suit property and build a permanent house therein.

After the determination of the case, the trial tribunal decided in favour of the respondent. The Chairman dismissed the appellant's claims and declared the respondent the lawful owner of the suit land on the ground that the applicant did not prove her ownership. Being aggrieved with the tribunal decision, the appellant came before this court praying for this court to allow the appeal, quash and set aside the Judgment and Decree of the trial tribunal with costs. The appellant raised six grounds of grievance, namely:-

1. *That, the District Land and Housing Tribunal erred in law and fact for holding that, the appellant's mother was a mere licensee despite the*

fact that, the respondent by his own will allocated his disputed land to the appellant's mother in 1970.

2. *That, the District Land and Housing Tribunal erroneously held in favour of the respondent despite the fact that the disputed land has been occupied by the appellant's mother in 1970.*
3. *That, the District Land and Housing Tribunal erroneously held in favour of the respondent despite the fact that the disputed land has been in possession of the Appellant for 20 years since the demise of the respondent's mother in law.*
4. *The trial District Land and Housing Tribunal erroneously held in favor of the respondent despite the fact that the appellant built a house for her Mother without any claim of ownership over the disputed land from the respondent.*
5. *That, the Chairman of the trial tribunal erred in law and fact for reaching judgment basing on inconsistent and contradictory evidence.*
6. *That, the trial District Land and Housing Tribunal failed to assess, analyze and evaluate evidence on record hence it came up with the wrong conclusions.*

The merit of the appeal was addressed by way of written submissions. When the matter was called for hearing on 17th March, 2021, the appellant enjoyed the legal service of Mr. Simon Lameck Mpina, learned counsel

while the respondent enjoyed the legal service of Mr. Barnaba Lugua learned counsel. The appellant filed his submission in chief on 16th April, 2021 and the respondent's Advocate to file a reply on 17th May, 2021 and the appellant's Advocate filed a rejoinder on 31st May, 2021. However, the respondent's Advocate for his own reasons filed his reply on 21st May, 2021 out of time without applying for extension of time. Therefore, this court proceeded to grant the appellant's Advocate request to determine the matter *exparte* against the respondent.

Supporting the appeal, the learned counsel for the appellant opted to combine and argue all grounds of appeal generally. On his view all grounds of appeal hinged on one question of proper analysis and evaluation of evidence. The issue for determination was whether the trial tribunal's judgment in favour of the respondent was supported by evidence.

The learned counsel for the appellant started with a brief background of the facts which led to the instant appeal which I am going to summarize his submission as follows;

He claimed that the disputed land originally belonged to the respondent. In 1970 the respondent gave his in law, the appellant's mother. She further submitted that the appellant's mother stayed in the suit land for a long time without any disturbance from the respondent until her demise in 1995. He

went on to state that after her demise, the suit land remained with the appellant for 20 years until 2016 when the dispute over the suit property erupted.

Mr. Mpina continued to argue that the appellant is an Administratrix of the estate of her late mother who died in 1995 leaving behind the suit property. It was his view that the appellant as a successor of her late mother is entitled to whatever belonged to her mother including the suit land that was granted to her mother by the respondent in which the applicant made some efforts to improve the house therein.

The learned counsel for the Appellant went on submitting that the suit land belonged to her as the successor of her late mother, who had obtained the same from the respondent for free. And that the appellant's mother was not a mere licensee to the respondent as there were no instructions from the respondent to the appellant's mother in possessing the suit land.

Mr. Mpina further lamented that had it been licensee to the respondent the appellant's mother and appellant herself would not have stayed in the suit land without any interference or directives from the respondent in which the appellant's stayed for more than 40 years. He added that and the appellant was in possession of the suit land for 20 years from the

demise of her late mother, hence that the issue of adverse possession comes in favour of the appellant.

On the strength of the above submission, Mr. Mpina faulted the trial tribunal decision for deciding in favour of the respondent because he had a better title to the suit property.

After a careful perusal of the record of the case and the final submissions submitted by both parties. In determining the appeal, the central issue is *whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Kilombero.*

In my determination, I will consolidate all grounds of appeal because they are intertwined. The appellant is complaining that the tribunal failed to analyse and evaluate the evidence on record. I have perused the respondent's evidence he claimed that he is the lawful owner of the suit landed property. He claimed that he allocated the disputed house to his mother in law as a licensee until she passed away. The appellant also claims that she is the lawful owner since her mother lived in the suit land for more than 20 years. Both parties agreed that the suit land originally belonged to the respondent one Issa Magwila, the respondent. It is the respondent who invited the appellant's mother to stay in his land upon the respondent being married to the appellant's sister. Therefore, as long as

both parties admitted that the respondent is the original owner, the appellant was duty-bound to prove that her mother was not a mere licensee by proving the transfer of ownership from the respondent to Zuhura Mirandu otherwise the issue of the appellant's ownership cannot arise.

The main issue for determination as discussed by the trial Chairman in Application No. 41 of 2018 is who is the lawful owner of the land in dispute? Reading the tribunal records, I have noted that the Chairman determined the matter on page 6 para 1 where he stated that:-

> *"In the absence of the clear evidence to prove disposition of the suit land from the applicant to the respondent's mother the same remains in the ownership of the applicant".*

I fully subscribe to the Chairman findings, the appellant was required to prove the disposition of the suit landed property from Issa Magwila to Zuhura Mirandu. I have perused the tribunal records, there was no evidence to show the transfer of ownership from the respondent to the late Zuhura Mirandu and there was no evidence to prove that transfer was effected from the late Zuhura Mirandu to Tabu Mohamed Sadan, the appellant. The appellant has admitted that the suit property belonged to her mother thus she has no legal base to claim ownership over a property that did not belong to her. There was a need for the appellant to adduce

sufficient evidence to show how the suit land was transferred from the respondent to the appellant's mother for the appellant to obtain a better title.

Additionally, I differ with Mr. Mpina observation that the appellant obtained the suit property after staying in the suit land for more than 20 years without being disturbed. The licensee used the suit land on behalf of the owner, therefore, there is no any automatic transfer from the licensee to the occupier. In other words, the late Zuhura Mirandu was a licensee, not an occupier, therefore, the doctrine of adverse possession is inapplicable in this case. It is worth noting that there is no time limit for the licensee to use the land until when the owner demands his land. Therefore, the appellant cannot come before this court claiming ownership over a piece of land that was not in her possession.

In my view, the appellant ought to have proved her ownership as to how the suit land was transferred from the respondent to her mother for the appellant to obtain a better title. Failure by the appellant to produce tangible evidence to prove her ownership of the suit land is marked failure to her side.

For the reasons given above and as stated earlier, one of the canon principles of civil justice is for the person who alleges to prove his allegation. The same was held in the case of **Abdul Karim Haji v**

Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Applying the above authority of the law, I do not think the appellant proved his claims to the required standard of the law.

For the aforesaid reasons, I am satisfied that, in the instant appeal, there are no extraordinary circumstances that require me to interfere with the District Land and Housing Tribunal for Kilombero findings. Therefore, I find that this appeal is without merit because the appellant did not prove to the required standards her ownership to the suit property. I therefore dismiss this appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 11th August, 2021.

A.Z.MGEYEKWA

JUDGE

11.08.2021

Judgment delivered on 11th August, 2021 via audio teleconference whereas both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

11.08.2021

Right of Appeal fully explained.