IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 50 OF 2019

RAMADHANI MTULIA MWEGA ..... APPELLANT

VERSUS

SHAWEJI SALUM MNDOTE ..... 1ST RESPONDENT

ISMAIL NAMTAKA ..... 2ND RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for Mkuranga District at Mkuranga)

Dated the 19th day of February, 2019

in

Application No. 36 of 2015

JUDGMENT

S.M. KALUNDE, J.:

The appellant, **Ramadhan Mtulia Mwenga**, was the defendant in **Land Application No. 36 of 2015 ("the application")**. He was sued at the District Land and Housing Tribunal for Mkuranga District at Mkuranga **("the tribunal")** by the respondents herein, Shaweji Salum Mndote and Ismail Namtaka.

Briefly, the present dispute arose as follows, the respondents filed the application at the tribunal claiming to be lawful owners of a piece of land situated at Kipoka Village in

Rufiji District, Coast Region **("the suit land")** the first respondent claimed to be a lawful owner of a portion measuring 3 to 4 acres of the suit land while the second respondent claimed to own a portion measuring 13 acres. The respondents contended that the appellant invaded the suit land in 2013 and claimed to be a lawful owner. Thus, the respondent sought for judgment and decree as follows:-

(i) That the applicants be declared as the true owners of the suit land;

(ii) The respondent to pay costs;

(iii) General damages of the time of Tshs.10,000,000/= for demolishing of their houses; and

(iv) Any other relief as the tribunal may deem fit and just to grant.

In his defence, the appellant claimed that none of the respondents has been the rightful owner of the suit land at any given time. He contended that his family has been at all times, the true owners of the suit land. He vehemently objected to the application and prayed that the application be dismissed with costs.

For purposes of determining the dispute, on 12th July, 2016 at the first hearing, the tribunal framed three issues for determination. The issued were:

1. Whether the application the lawful owners of the suit land;
2. Whether the respondent has unlawfully demolished the applicants houses; and
3. To what reliefs are the parties entitled to.

Having heard the evidence of the two witnesses for the respondent herein and applicants at the trial Court, **Shaweji Salum Mndote (PW1)** and **Ismail Namtaka (PW2)**; and three witnesses for the appellant/respondent, **Ramadhani Mtulia (DW1), Yusuph Said (DW2)** and **Khamis Abdallah Machonja (DW3)**. The trial Tribunal granted the application with costs.

In his six (6) page decision, the Chairman of the Tribunal **(Hon. A.R. Kirumbi)** summarized the evidence in five pages and delivered it decision in two paragraph. In the first paragraph the chairman summarized the opinion of assessors in the following terms at page 5 of the typed judgment).

> *"The opinion of the wise assessors is that the lawful owner of the disputed land is the respondent because the trespasser were seven (7) but five trespassers excluded*

themselves from the case because they were not having enough evidence to show the ownership of the land or properties."

The tribunal then went on to make the following conclusion (see page 6 of typed judgment):

"According to the evidence adduced, the applicant are the lawful owners of the suit land on the bases of being in long and peaceful occupation of the same since in 1960's and they cleared the virgin land to establish the suit land. The respondent alleges that the land belongs to his descendants, but he has failed to bring any evidence to that effect.

Therefore, this application is granted with costs. It is so ordered.

Sgd: A.R.Kirumbi,

Chairman."

That was all about the trial tribunal's analysis of evidence and determination of the issues framed for resolution of the dispute between the parties.

The appellant was aggrieved by the decision of trial tribunal hence this appeal which is predicated on five (5) grounds as follows:

1. That the learned trial Chairperson erred in law and in fact by failure to evaluate and analyse evidence off both parties;

2. The learned trial Chairperson erred in law and in fact in deciding to ignore the evidence tendered by the appellant's witnesses in reaching to his decision;

3. That the learned trial Chairperson erred in law by making a decision basing on the evidence of the respondents only;

4. That the learned Chairperson erred in law in refusing to admit the Ward Tribunal Judgment via case between the appellant against Saidi Masunya, Ally Ndubwai and Rajab Kisonyo that proved the ownership of the land in dispute; and

5. That the learned trial chairperson erred in law by failure to allow the appellant to file his final written submissions.

After the conclusion of lodgment of the pleadings and supply of the record of the trial tribunal, the court ordered the appeal to be disposed by way of written submissions. **Mr. Lutufyo Mvumbagu**, learned advocate drew and filed submissions of the appellant. Unrepresented the 1st respondent filed his own submissions and hence this judgment.

At the outset the counsel for the appellant Mr. Mvumbagu, proposed to abandon the 5th ground of appeal. In a bid to arm his appeal with even stronger missiles, the counsel went on to consolidate the 1st, 2nd and 3rd grounds. The appellant submissions on the consolidated ground were extensive, however, for the reasons which shall become apparent herein, I will direct my mind on the appellant main complaint that the trial Chairperson erred in failure to evaluate and analyze evidence of both parties.

Submitting in support of the first ground, Mr. Mvumbagu faulted the decision of the trial chairman for disregarding the appellant's evidence and giving a decision without assigning reasons. The counsel went on to argue that, the chairman failed to evaluate the evidence advance by the appellant and his witnesses before deciding in favour of the respondent. Mr. Mvumbagu reasoned that, as an umpire, the Chairman should have considered evidence by both parties and decide in favour of a party whose evidence is sufficient on the balance of probabilities. In his view, had the chairman properly analyzed the evidence presented he should have come into a different decision. For the above reason the counsel insisted that the decision of the tribunal be set aside and the same be entered in favour of the appellant.

In response, the 1st respondent argued that, before the tribunal both parties were afforded an equal opportunity to present their evidence in support of their respective cases. Upon presentation of evidence the trial tribunal evaluated the said evidence and arrived at its decision after consideration of the facts and the applicable law.

Having gone through the records and the decision of the tribunal I am satisfied that the tribunal did not only fail to evaluate and analyze the evidence before, but it also practically failed determine all framed issues. As pointed out above two issues were framed for determination: namely *(1) whether the application the lawful owners of the suit land; (2) whether the respondent has unlawfully demolished the applicant's houses; and (3) To what reliefs are the parties entitled to.* Having heard the parties, the entire decision of the tribunal was summarized in one paragraph. That is:

> *"According to the evidence adduced, the applicant are the lawful owners of the suit land on the bases of being in long and peaceful occupation of the same since in 1960's and they cleared the virgin land to establish the suit land. The respondent alleges that the land belongs to his descendants, but he has failed to bring any evidence to that effect."*

That constituted the entire consideration of the appellant and the respondent's case at the tribunal, as well the evaluation and application of the relevant principles of law by the tribunal. The defence case was entirely ignored and never referred to or weighed against the applicant's case. The position of the law is that, generally failure or improper evaluation of evidence inevitably leads to wrong or biased conclusions resulting into miscarriage of justice. From that premise, it has been held that failure to consider the defence case is fatal and usually vitiates the decision. See **Bahati Kabuje vs Republic** (Criminal Appeal No.252 of 2014) [2015] TZCA 221; (12 August 2015).

The case of **Leonard Mwanashoka v R**, Criminal Appeal No. 226 of 2014 (unreported) provides some useful guidelines on what does consideration of, or evaluation of evidence entail. In that case it was stated thus:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

As observed, in the present case, in its six (6) page judgment, the trial tribunal **(Hon. A.R. Kirumbi)** summarized the evidence in five (5) pages and delivered it decision in a

single paragraph. By any standard the said paragraph, is in no way an evaluation of evidence. The least it can be said to be a summary of the finding, not even an analysis of the respondent's evidence. One would have expected that it this stage the tribunal should have considered the probative value and weight of the evidence proffered by the applicant and the respondents. This was a serious misdirection as it deprived the appellant of having his case properly considered.

But that was not all, as pointed out above three issues were framed, one of those was **whether the respondent has unlawfully demolished the applicant's houses**. The issue was meant to resolve the claim of general damages of Tshs.10, 000,000/= being compensation for demolishing the appellants houses. That was not covered in the one paragraph decision of the tribunal.

It is an elementary principle of pleadings that each issue framed should be resolved. In **Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others** (Civil Appeal No.239 of 2017) [2020] TZCA 1889; (11 December 2020) the Court of Appeal stated that:

> *"... a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of **Alnoor Shariff Jamal** (supra) cited to us by Mr.*

Chamani and ***Sosthenes Bruno and Another v. Flora Shaun, Civil Appeal No. 81 of 2016*** *(unreported)."*

In the present only the first issue was answered in favour of the respondents. Mindful of the above position of the law, I am satisfied that the omission by the Chairman of the tribunal rendered the said judgment defective. The next question would be what happens to the present case. The position of the law is that, if the tribunal had decided all the issues whether wrongly or right, this Court would have stepped into the shoes of the tribunal and re-evaluate the evidence and make its own findings. However, I am mindful of the position that, I can only do so once a decision has been made and not in a situation where no decision was rendered by the tribunal. That seems to be the communication from **section 41** and **46** of **the Land Disputes Courts Act, Cap. 216 R.E. 2019**. The respective sections read:

"41.-(1) Subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceeding from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.

(2) An appeal under subsection (1) may be lodged within forty five days after the date of ***the decision*** *or order:*

Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days." [Emphasis mine]

Further to that **section 46 of Cap. 216** highlights the powers of this Court on appeal, the section reads:

"The High Court shall in the exercise of its appellate jurisdiction have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence and whether additional evidence is taken or not, to confirm, reverse, amend or vary any manner ***the decision*** *or order appealed against." [Emphasis mine]*

From the wording of the above sections, it is patently clear that the powers and jurisdiction of this Court on appeal emanating from the District Land and Housing Tribunal are limited consider and examine matters that have been considered and decided by the tribunal in its decision. Therefore, for an appeal to lie before this Court, there must be a decision handed down by the tribunal. In absence of a decision this cannot exercise its appellate jurisdiction.

The above view was considered by the Court of Appeal in the case of **Mantra Tanzania Limited v. Joaquim Bona Venture**, Civil Appeal No. 145 of 2018 (unreported) where the Court observed that: -

"On the way forward it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter."

A similar view was adopted by the Court of Appeal in the case of **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 (unreported) where the High Court failed to determine a framed issue and as a result, the parties' controversy was left unresolved. Having considered that situation, the Court observed that: -

"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore allow the appeal and quash the decision..."

That said and done, I am satisfied that the omission done by the trial tribunal rendered the decision of the tribunal fatally defective, I thus quash the judgment of the tribunal in **Land Application No. 36 of 2015** delivered on 19th February, 2019 and set aside the orders thereto. This alone is sufficient to dispose of the appeal, I will therefore not consider the remaining grounds.

As a way forward, I remit the case file to the tribunal for it to render a decision after having considered and determined all the issues framed for resolution of the dispute between the parties. The appeal succeeds as explained above. In the circumstances, I make no order for costs.

Order accordingly.

DATED at **DAR ES SALAAM** this **23rd** day of **JULY, 2021**.

S.M. KALUNDE

JUDGE