IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 272 OF 2019

(Arising out of Application no. 5 of 2018 of the District Land and Housing Tribunal for Mkuranga at Mkuranga)

YUNUS JUMA LILINGANI.....APPELLANT

VERSUS

CLAUD JAMES NHALIMA.....RESPONDENT

JUDGMENT

Date of last Order: 26/7/2021

Date of Judgment: 30/9/2021

T.N. MWENEGOHA, J:

The appellant herein filed a suit at the District Land and Housing Tribunal at for Mkuranga at Mkuranga (the tribunal) claiming to be the lawful owner of two acres located at Tambani Ward, Kisemvule. The suit was exparte against the respondent herein following his failure to enter appearance despite of being served by affixation and publication. The tribunal in its findings dismissed the application with no orders as to costs. Aggrieved by the decision of the tribunal, the appellant on 13th December, 2019 lodged five grounds through memorandum of appeal complaining that:

1. The trial tribunal Chairperson erred in law by her failure to incorporate and consider judiciously the opinion of the assessors in the judgment.
2. The trial Chairperson erred in law and in fact in holding that the appellant did not prove his ownership of the suit land.
3. The trial Chairperson erred in law and in fact by her failure to analyze the appellant's cogent evidence.
4. The trial Chairperson erred in law and fact by her finding that ownership of land is proved by identification of one's neighbors.
5. The trial tribunal erred in law and in fact in holding that the appellant's case was chilled by non-joinder of the vendors.

The appellant prayed for the appeal be allowed with costs.

When the appeal was called on for hearing before Hon. Judge Kalunde, the appellant appeared with the proof of service showing that the respondent was duly served but never appeared. Consequently, it was ordered to proceed exparte against the respondent. The appeal was also ordered to proceed by way of written submission.

Now, Hon. Kalunde has been transferred to another working station and the case was assigned to me and upon my perusal I find that the submission has been filed as scheduled, thus this judgment.

The appellant was represented by Benjamin Kalume, learned counsel, whereas in his submission in support of appeal he argued seriatim as hereunder.

On the first ground of appeal he submitted that it is a trite law and procedure that every proceeding in the tribunal be heard with the aid of two assessors as per section 23(1), (2) and (3) of the Land Disputes Courts Act, cap 216 R. E 2019 (Land Disputes Courts Act). He added that their opinion are required to be incorporated and be shown in the judgment of the tribunal as per Rule 19(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 which requires the assessors be present at the starting of the hearing to the conclusion and give their opinion and the same be part of the judgment. He added that failure to follow that procedure amounts to the consequences which are clearly addressed by the court in the case of **Bernard Sembula v Tabia Mbeveta, Land appeal No. 30 of 2020 High Court of Tanzania, district Registry at Mbeya (unreported)** which cited the case of **Tumbone Mwambeta v Mbeya City Council, Land Appeal No. 25 of 2015, Court of Appeal of Tanzania at Mbeya (Unreported)**. He quoted the said part.

He submitted further that as it can be seen from the judgment of the tribunal, there is nowhere in the judgment that the Chairman of the tribunal included and considered the opinion of the assessors for which is against the law that requires the opinion of assessors. He reiterated that the involvement of assessors is mandatory and failure to follow the same is fatal and amounts to miscarriage of justice. It was his submission that such omission nullifies all former proceedings and decision. He referred to the case of **Edina Adam Kibona v Absolom Swebe(Sheli) Civil Appeal No. 286 of 2017, Court of Appeal of Tanzania at Mbeya (Unreported)** to accord his argument more weight.

Mr. Kalume jointly argued second and third ground of appeal and provided that the two grounds involve matters of evidence. He submitted that civil case is proved on the balance of probability which is based on weight of evidence as per section 119 of the Evidence Act Cap 6 R.E 2019. He pointed at page 3 of the tribunal's judgment where the Chairman contended that the applicant had brought six sale agreements before the tribunal, which were tendered to show that the applicant is the lawful owner of 25 acres of the land and the suit land being inclusively a part of the 25 acres. He submitted further that the Chairman failed to consider the sale

agreements from different people which established the ownership of the land. He added that on the other hand, the respondent never tendered any evidence to prove that he is the owner of the suit land in question. Hence the respondent failed to establish his ownership of the land. He quoted the case of **Hemed Said v Mohamed Mbilu (1984) TLR 113** which stated *"...a person whose evidence is heavier than that of the other is the one who stands to win."*

He submitted that on the other hand the honorable Chairman failed to consider evidence of the appellant and that this is fatal as he was required to take all evidence and put them into consideration for the interest of justice. He insisted further that consideration of the sale agreements was crucial as they are exhibit on how the respondent had trespassed into the appellant's land and exceeded boundaries.

On the fourth ground of appeal, he submitted on the Chairman using hearsay evidence contending that what was said by the neighbors concerning the suit land cannot be used as independent evidence as it is a supplement which is there to demonstrate or support what was testified in the court room. It was his contention that the fact that the appellant had shown proof by tendering sale agreements as evidence and had confined

with the ambits of Evidence Act and proved to the balance of probability, then what the neighbours identified was not paramount to the extent of dismissing the application at all.

He went further and explained that the land that was given to the appellant is unregistered land for which to prove the ownership required production of sale agreements for which the appellant had a proof of and had tendered before the tribunal. It was his submission that it is evident the tribunal closed its eyes to the truth of the matter by not considering that identification by neighbours cannot be used as an independent evidence. He concluded that the suit land is unregistered land hence cannot be proved by producing certificate of occupancy and that is why the appellant produced the sale agreements to show the ownership of the suit land and not otherwise.

On the fifth ground of appeal, it was appellant's submission that Order I Rule 9 of the Civil Procedure Code Cap 33 R.E 2002 (CPC) clearly indicate that not joining the vendor in the case is not fatal to the extent of dismissing the application because the vendor had already transferred their interests and no longer in possession of the said land. Thus there was no point of joining them at all. To cement this point he referred the case of **Eliya**

Minyango v Selestine Bitamaka, Land Appeal case No. 55 of 2015, in High Court of Tanzania, the District Registry Bukoba at Bukoba (Unreported).

Having gone through submissions and records of this case I find that the issue for determination is whether the appeal has merits.

This first ground of appeal touches the assessor's opinion. It is Mr. Kalume's argument that the assessor's opinion was not incorporated in the judgment and thus a fatal defect. He invited this Court to nullify the Tribunal's decision.

After examining the records, particularly the judgment, indeed I find that the judgment does not incorporate the opinion of the assessors.

Regulation 19(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 provides that,

> *"Notwithstanding sub regulation (1) the Chairman shall, before making his judgment, require* ***every assessor present*** *at the conclusion of hearing to give his opinion in writing and the assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili" (Emphasis supplied)"*

You may note that from the quoted part of the provision it requires all assessors present to give their opinions in writing. Moreover, the number of assessors required in the proceeding of the tribunal is clearly stipulated in section 23(1) of the Land Disputes Courts Act:

*"The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than **two assessors**."*

Section 23 (2) of the Land Disputes Courts Act states further that,

"The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment"

The record from the tribunal encorporate one opinion of assessor one Fortunata Mkullia. The record is silent why there is only one opinion of assessor while the law requires them to be two.

Moreover, the whole judgment is silent on recognition of assessor's opinion while section 24 of the Land Disputes Court Act, require the Chairman to state the opinion of the assessors and in case he differs with them he should state his reasons, the said provision read as hereunder:-

"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion"

Due to the above observations, I am in agreement with Mr. Kalume that the decision of the tribunal is tainted with irregularities and hence it jeopardize justice. In that note, I hereby nullify the decision of the tribunal for such irregularity and order the matter to be tried denovo. It is further

ordered that the said proceeding to be chaired by a different Chairman and with different set of assessors.

Since the first ground of appeal has been found to be meritious, I find no need to discuss the remaining grounds as has the first ground has the effect of determining the whole appeal.

In conclusion, having made the above findings, I find the entire appeal to have merits, no orders as to costs.

Dated at **Dar-es-Salaam** this **30th** day of **September, 2021**

T.N. MWENEGOHA
JUDGE