IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 214 OF 2020

(Arising from Land Application No. 87 of 2013 from the District Land and Housing Tribunal for Kibaha)

JOSEPH JOSEPH MZERU
SAMWEL SINDA } .... **APPELLANTS**

VERSUS

AISHA ATHUMANI MZERU .... **RESPONDENT**

JUDGMENT

Date of Last order: 06.12.2021

Date of Judgment: 10.12.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Msata village at Chalinze within the Pwani Region. The decision from which this appeal

stems is the judgment of the District Land and Housing Tribunal in Application No. 87 of 2013.

The material background facts to the dispute are not difficult to comprehend. They go thus: Aisha Athumani Mzeru, the respondent claimed that she is the lawful owner of the land in dispute. Her father one Mzee Athuman Mzeru gave it to her. Joseph Joseph Mzeru, the 1st appellant is the respondent's brother who was entrusted to take care of the suit land and allowed to cultivate seasonal crops. On the contrary, the 1st respondent in 2013 without any colour of legal right sold the suit land for Tshs. 6,000,000/= to the 2nd respondent. It is alleged that the 1st respondent had no title over the suit land and hence had nothing to pass or dispose of the suit land to any person.

The respondent decided to lodge a case at the District Land and Housing Tribunal for Kibaha for declaration orders that she is the lawful owner of the suit land, the 1st respondent had no legal title of the suit land to dispose of to anyone, the purported sell of the suit land by the 1st respondent to the 2nd respondent is unlawful hence null and *void ab initio*. The District Land and Housing Tribunal for Kibaha determined the matter

and found that the respondent is the lawful owner of the suit land, hence the 1st respondent had no title to pass to the 2nd respondent and any transaction entered between the 1st and 2nd respondent was null and *void abinitio*.

Believing the decision of the District Land and Housing Tribunal for Kibaha was not correct, the appellant lodged a petition of appeal containing seven grounds of appeal as follows:-

1. *That the trial Court erred in law and facts for only determining application by one only assessor in his judgment leaving with another assessor undetermined thus reaching to an unjust and erroneous decision.*
2. *That the District Land and Housing Tribunal erred in law and facts for its failure to discover that were misc. joinder of parties in the application after raised by the Appellant was sold the disputed Land by two people Respondent and Mwajuma Athumani Mzeru who were given by his late father through in heritance whose was not part of the proceedings (Mwajuma Athumani Mzeru).*

3. *That the District Land and Housing Tribunal Chairman erred in law and facts for deliberately ignoring and write uncorrected the evidence adduced by Appellant before trial Court and refused to exercise the duty of a District Land and Housing Tribunal which made his reach wrong conclusion.*
4. *The trial Court erred in laws and fact by not visit the disputed Land after testimony of the Roman Kazidi to refused to know Appellant sold the disputed Land to the Samwel Sinda.*
5. *The District Land and Housing Tribunal erred in law and facts by not considering that the previously owner was the late Athumani Mzeru and Mwajuma Athumani Mzeru whose inherited the suit lad on 2004 and sold the suit land on 2005 to the Appellant while Mwajuma Athumani Mzeru was not part of the proceeding in trial Court.*
6. *That the District Land and Housing Tribunal Chairman erred in law and in fact the misdirected himself and refused to exercise the duty of atrial tribunal to record evidence of the Appellant when changed the suit land by Samwel Sinda to take another land and was agree before trial Court.*

7. *That the District Land and Housing Tribunal Chairman erred in law and in fact by not discover that Respondent and Mwajuma Athuman Mzeru were owners through inheritance from his father; therefore, Respondent have not right to sue the Appellant only without including Mwajuma Athumani Mzeru.*

When the matter was called for hearing before this court on 17th November, 2021, the appellant and the respondent appeared in person, unrepresented. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant filed his submission in chief on 24th November, 2021 and the respondent filed his reply on 01st December, 2021 and the appellant filed a rejoinder on 06th December, 2021.

The appellant in his written submission started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. The appellant opted to combine the third, fifth, and sixth grounds and argue them together. He argued the first, second, fourth, and seventh grounds separately.

On his first ground, he complained that the trial Chairman determined the matter with only one assessor without stating any reason contrary to section 23 (1), (2), and section 24 of the Land Disputes Courts Act, Cap.216 [R.E 2019]. The provision of the law empowers the District Land and Housing Tribunal to determine the matter with two assessors. To bolster his position he cited the case of **Chadiel Mduma v Denis Mushi**, Civil Appeal No. 41 of 2013 at Dar es Salaam (unreported).

Arguing on the second ground, the appellant contended that the District Land and Housing Tribunal failed to discover that there was a misjoinder of parties in the application. He claimed that the appellant stated that the disputed land was sold to two people; the respondent and Mwajuma Athuman Mzeru, both of them were given the pieces of land by their later father as a portion of the inheritance. He added that Mwajuma was n0ot part of the proceeding while she sold the suit land in corroboration with the respondent,

Submitting on the third, fifth and sixth grounds, he contended that the District Land and Housing Tribunal Chairman erred in law and facts for deliberately ignoring and writing uncorrected evidence. He went on to

submit that the tribunal stated that the respondent is the lawful owner of the suit land having been given by her father while her father passed away and the respondent did not tender any document to prove that her later father gave her the said suit land. He further claimed that the respondent and Mwajuma Athumani Mzeru inherited the suit land after the death of their father.

The appellant continued to claim that the Chairman misdirected himself and refused to exercise the duty of trying to record evidence of the appellant when changed the suit land by Samwel Sinda to take another land with consideration of Tshs. 6,00,000/=. He added that the tribunal incorrectly recorded that the 2nd respondent defaulted appearance and the matter proceeded *exparte* against him.

On the fourth ground, the appellant contended that the tribunal erred in law and fact by not visiting *locus in quo* the disputed land after the testimony of Romani Kazidi refused to know the appellant while he was a witness in the Sale Agreement when the appellant sold the disputed land to Samwel Sinda on 26th June, 2014. He added that the appellant and Romani Kazidi are neighbour in East and North. He stated that the

respondent claims only one acre and leaves 2 acres which is owned by the appellant for many years. The respondent went on to submit that the tribunal was faced with conflicting evidence of the parties concerning the proper location of the suit land and the Chairman did not describe the boundaries of one acre and three acres which were owned by the appellant.. he added that according to the circumstance of the case it was important to visit locus in quo.

As to the seventh ground, the appellant simply submitted that the District Land and Housing Tribunal erred in law and fact by no =t discovering that the respondent and MWajuma Athumani Mzeru are owners through inheritance from their late father who passed away in 2004. He insisted that both of them were required to sue the appellant since they were not administrators of the estate of their late father. He added that the respondent did not produce any document to prove her ownership of the piece of land measuring one acre located at Msata village. Stressing the appellant claimed that who claims the property of the deceased person is required to be appointed by the court of the law. To buttress his position

he cited section 100 of the Probate and Administration of Estate Act, Cap.352 [R.E 2019].

On the strength of the above submission, the respondent beckoned upon this court to allow quash and set aside the decision of the trial tribunal at Kibaha District Land and Housing Tribunal in Application No. 87 of 2013 and allow the appeal with costs.

Opposing the appeal, the respondent from the outset submitted that the appeal is demerit. He opted to combine the third, fifth and sixth grounds of appeal and argue them together because they are intertwined. He also potted to argue the first, fourth and seventh grounds separately.

On the first ground, the respondent was brief and straight to the point. He argued that the issue of the Chairman considering the opinion of one assessor in his judgment leaving another assessor is not true. The respondent stated that section 24 of the Land Disputes Courts Act, Cap.216 [R.E 2019] allows the Chairman to take into account the opinion of assessors but he is not bound by it, except that he shall give reasons for differing with such opinion. He added that the records reveal that the Chairman agreed with the assessor. He also referred this court to section

23 (3) of the same which allows the Chairman to continue with proceedings when both or one assessor is absent and may continue and conclude the proceedings notwithstanding such absence.

Submitting on the second ground, the respondent contended that the appellant is complaining that the tribunal erred in law and fact for its failure to discover that there was a misjoinder of parties. He referred this court to Order 1 Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019] and argued that the law entails that it is an option and not mandatory to join a party in the suit. He went on to submit that the on the circumstances, the court is conferred with the power to where necessary order for a separate trial as provided for under Order 1 Rule 2 of the Civil Procedure Code Cap.33 [R.E 2019]. Stressing, he contended that the provision of the law is clear that the rights of one plaintiff cannot be prejudiced because other parties have failed to prosecute their claims before the court, a separate trial in an option in which one can pursue his rights before the court of law.

He valiantly contended that saying there was a misjoinder of parties is misconceived and against the I Order 1 Rule 9 of the Civil Procedure

Code, Cap.33 [R.E 2019]. He stated that it is the discretion of the court on how to deal with this matter. It was his view that this ground does not stand as provided under the provision of the law.

With respect to the third, fifth and sixth grounds, the respondent contended that the issue that was left undetermined by the trial tribunal was who is the lawful owner of the suit land which was determined and evidence reveals that the respondent is the lawful owner of the suit land. He submitted that the appellant did not adduce or prove that he is the lawful owner of the suit land. Addressing the issue of non-joiner of one Mwajuma Athumani Mzeru. She argued that the respondent testified to the effect that that was a settlement between the appellant and the witness which was not a matter for determination by the tribunal.

As to the fourth ground, the respondent argued that visiting locus in quo was not vital since the issue of the size of the suit land was not in dispute. She referred this court to the two issues framed by parties and the issue of size was not among the issues for determination. The respondent did not contend on the size but ownership and agreed on one acre of the land

that was his lawful piece of land. She added that the appellant raised the issue on two acres that he had sold to the 2nd appellant but the same was not stated in the pleadings, thus, it is a new issue. To support her submission she cited the case of **Mohamed A. Issa v John Machela**, Civil Appeal Np.55m of 2013 (unreported).

On the last ground, the respondent contended that the dispute at the tribunal was a lad dispute not a probate matter and no one was contesting on who was administrator of the estate of the late Athumani Mzeru. She claimed that this is a new ground that was not raised at the trial tribunal.

On the strength of the above submission, the respondent urged this court to dismiss the appeal for lack of merits with costs.

Reiterating what he submitted in submission in chief, the appellant insisted that only one assessor wrote his opinion and the same was not read in the presence of the parties. Insisting, he claimed that these irregularities are fatal and caused injustice thus the same renders the whole proceedings of the trial tribunal a nullity. To support his submission he seeks refuge in the case of **Edina Adam Kibona v Absolon Aswebe (Shally)**, Civil Appeal No. 286 of 2017. The respondent went on to argue

that the other irregularity is when the assessor, Mama Kalandamy who was the only assessor who sat with the Chairman from the hearing of the case up to finality opined contrary to the requirement of section 23 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) of 2003. He also cited the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No. 287 of 2017.

On the strength of the above submission, the appellant beckoned upon this court to quash the decision of the tribunal and allow the appeal.

Having summarized the submissions and arguments by both learned counsels, I am now in the position to determine the grounds of appeal before me. In my determination, I will consolidate the second and seventh grounds, the third, fifth and sixth grounds because they are intertwined. Except for the first and fourth grounds which will be argued separately in the order they appear.

On the first ground, the appellant complained that the trial Chairman determined the matter with only one assessor without stating any reason

contrary to section 23 (1), (2) and section 24 of the Land Disputes Courts Act, Cap.216 [R.E 2019] and the opinion was not read in the presence of the parties.

I have perused the Tribunal proceedings and noted that this ground is related to the composition of the District Land and Housing Tribunal in hearing a case. Section 23 of the Land Disputes Courts Act, Cap.216 [R.E 2019] provides that:-

> *" 23.-(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors. (2) 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. (3) Notwithstanding the provisions of subsection (2)."*

The records reveal that on 14th February, 2017 when the matter was called for hearing, the Chairman sat with one assessor; Mama Kalandamy. As rightly pointed out by the appellant that the law requires the Chairman at the beginning of the hearing of the case to sit with not less than two assessors. Again, the law requires each assessor to give

her/his opinion in writing. In the case at hand, only one assessor submitted her opinion in writing which reveals that the Chairman sat with only one assessor. However, it seems that her opinion was not read in the presence of the parties. The record shows that the assessor wrote his opinion on 23rd March, 2018, and the judgment was delivered on 27th March, 2018 without stating that the assessor's opinion was read in the presence of the parties. the Court of Appeal of Tanzania 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 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 after 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 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 a fundamental irregularity was committed by the tribunal Chairman. Thus, there is no proper judgment before this Court for it to entertain in appeal. I shall not consider the remaining grounds of appeal as the same shall be an academic exercise after the findings I have made herein.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Kibaha in Land Application No.87 of 2013 in the following manner:-

(i) The Judgment, Decree, and Proceedings of the District Land and Housing Tribunal in Land Application No. 87 of 2013 are quashed.

(ii) I remit the case file to the District Land and Housing Tribunal for Kibaha for retrial before another Chairman in accordance with the law.

(iii) I direct, the case scheduling be given priority, hearing to end within six months from the date of Judgment.

(iv) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 10th December, 2021.

A.Z.MGEYEKWA

JUDGE

10.12.2021

Judgment delivered on 10th December, 2021 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

10.12.2021