IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 262 OF 2020

(Originated from the decision of District Land and Housing Tribunal Ilala in Land Application No. 139 of 2013 Dated 02nd December 2020)

KABOYA PASTORY HENRY (Administrator of Estate of the late Hadija Kondo) ..... **APPELLANT**

VERSUS

THARCIS ALOIS SAMBUA ..... **RESPONDENT**

JUDGMENT ON APPEAL

Date of Last Order: 20/09/2021 &
Date of Ruling: 12/10/2021

A. MSAFIRI, J:

The appellant KABOYA PASTORY HENRY as Administrator of Estate of the late Hadija Kondo has filed to this Court the memorandum of appeal which contained twelve grounds of appeal seeking for the following orders;

1. *This Appeal be allowed.*
2. *That all judgment, decree and orders of the District Land and Housing Tribunal be quashed and set aside.*
3. *That the Appellant be declared the lawful owner of the disputed House.*
4. *That any disposition, sale or transfer of disputed house by the Respondent be declared null and void.*

5. *That the Respondent leave vacant possession of the suit land immediately.*
6. *The Respondent be ordered to pay the petitioner cost in this Court and in the Court below.*
7. *Any other Relief (s) Honourable Court may deem just and equitable to grant.*

This matter originates in District Land and Housing Tribunal where the applicant sued the respondent Tharcis Alois Sambua over ownership of the suit property located at Ilala Mchikichini House No. 25/15, claiming that the suit property belongs to the estate of the late Hadija Kondo who occupied it since 1970. While on the other side the respondent claimed to have acquired the suit property as a gift from Mwajuma Mussa out of her natural love and affection. The trial Tribunal Chairman declared the respondent the lawful owner after finding that the late Mwajuma Mussa had the good title to pass to the respondent.

When the matter came for Mention on 12th May 2021, the Court ordered the appeal to be argued by way of written submissions. On the date of filing submissions, the appellant appeared in person, unrepresented while the respondent was represented by Advocate Sisty Massawe.

According to submission in support of this Appeal, the appellant had these to say; on the 1st ground of appeal, the appellant submitted that, the Chairman of the trial Tribunal erred by ignoring the opinion of assessors and rely on Exhibit D1 which was not witnessed by competent witness. In his opinion, allowing the respondent to file two affidavits of the late Mwajuma Mussa while he was not an administrator of estate, it

was an error which led the trial Tribunal to the wrong conclusion and ultimately making a defective judgment to the detriment of the appellant. He stated further that the evidence of PW1, PW2, PW3, PW 4 and also DW3 witnesses proves that the disputed property belongs to the late Hadija Kondo.

Arguing for grounds 2,3,4,5 and 6 as combined by appellant, he stated that the trial Tribunal failed to evaluate evidence raised by the appellant which is strong evidence especially on reliability of the documentary evidences produced before it. The trial Tribunal has ignored the fact that the respondent testified to have been given the suit land by the deceased on 12/11/1997 while DW2 Alexanda Kashasha told the court that the affidavit was signed on 14/11/1987, other witness seems not to be aware that the respondent was gifted the suit property by the deceased Mwajuma Mussa. In his opinion it is the appellant who reside in the suit property from 1950 to 2011 when the cause of action arose while the respondent became tenant from 1985 to 1991.

The appellant argued further that the documentary evidence produced by the respondent especially exhibit D1 which is the affidavit of Mwajuma Mussa Msemba dated 12/11/1997 or 14/11/1987 is contrary to Order XIX Rule 3(1) of the Civil Procedure Code Cap. 33 R.E 2019, and the same violates section 8 of the Notaries Public and Commissioner for Oaths Cap. 12 which required the Notaries Public and Commissioners for Oath to state the date and place where the Oath was made while the said affidavit does not show place and time upon which it was made. In his opinion the fact that there is Certificate of Death of Hadija Kondo and her Will bequeathing her children and her grandchildren is a proof that the disputed property belongs to Hadija Kondo. He further added that the

respondent failed to prove that Probate Cause No. 67 of 2004 was dealing with House No. 265 and 0.147 which is different to the house in dispute No. 25/15.

In respect of grounds 7 and 12, he submitted that, the fact that the respondent has failed to produce the two witnesses who has witnessed and signed the said affidavit of gift by the late Mwajuma Mussa proving that he was given the suit in dispute, renders the affidavit defective. He further stated there is no dispute that the family of the late Hadija Kondo continue to live in the house after her death. But, the respondent has failed to prove when he started to live in the disputed house after the death of Hadija Kondo until the cause of action arose. He submitted that all these points makes the evidence of the respondent weak. He cited the Case of **Emmanuel Abraham Nanyoro vs. Paniel Ole Saitabau (1987) TLR 47** and **Hemedi Said vs. Mohamed Mbilu (1984) TLR 113.**

For grounds 8, 9 and 10, the appellant submitted that Exhibit D2, D3 and D4 was produced as secondary evidence(photocopies) and that **the appellant claim of ownership of House no. 25/15 while the affidavit of the late Mwajuma Mussa deceased shows the House to be No. 265 therefore, House No. 25/15 is not House No. 265.**

For ground 11, the appellant submitted that, the Will of Hadija Kondo dated 1994 is valid and was signed by competent people according to the law. He made reference to Rule 1 and 2 of the Third Schedule of the Local Customary Law (Declaration) (No. 3) G.N. No. 380 of 1963. Under Rule 19 of the same schedule, it is provided that a written will must be

witnessed by two witnesses and one of the witnesses must be a clan member.

Replying to the appellant's submission in chief, Advocate Massawe for the appellant stated thus; for the 1st ground of appeal, he argued that the trial Tribunal Chairman is not compelled to rely on opinions of the assessors as provided for under section 24 of the Land Disputes Courts Act Cap. 216.

He further contended that, the Death Certificate of Hadija Kondo was forged to show she died in 1996 while DW 3 and DW 4 testified that Hadija Kondo died on 1993 and exhibit P3 is a forged document since it cannot be traced on the RITA's records, the Government institution which is the custodian of the Register of Death Certificates among other duties.

He further argued that if the disputed property belonged to Hadija Kondo why the appellant being the relative did not object when Kulwa Khalfan included the same in the estate of the late Mwajuma Musa? And when the respondent demolished the former wooden house and constructed modern house in 1980's why the late Hadija Kondo did not object? In his opinion, the respondent is the rightful owner of the disputed property therefore the trial Tribunal's decision should be upheld.

For grounds 2,3,4,5 and 6, the learned counsel replied that it is the duty of the trial Tribunal to weigh the evidence submitted before it and not anyone else. The whole evidence of both parties was adduced before the Tribunal and weighed properly hence arrived to a just decision, the document related to the late Hadija Kondo were forged and admissibility of the respondent's evidence were never challenged. The affidavit of the

late Mwajuma Mussa was never challenged so is Exhibits D1 to D5 and D9.

The counsel for respondent combined grounds 7, 8, 9, 10 11 and 12 of the Appeal and stated that, this is the Land Court and not the Probate Court therefore all the grievances which arose from the administration of the estate must be dealt with in the Probate Court. The contentions between the parties herein was on the disputed house. The appellant alleges that the disputed property forms part of the estate of the late Hadija Kondo while the respondent alleges that the disputed house was given to by him by the late Mwajuma Mussa.

He supported the argument of the trial Tribunal that the evidence of the Will of the late Hadija Kondo was torned apart by counter evidence of DW3 and DW4. The burden of proof was on the appellant side and since he failed to discharge his duty, he cannot blame the court.

In rejoinder the appellant repeated the arguments stated in the submission in chief.

Having gone through the submissions for and against this Appeal, together with the records of the trial Tribunal, it is my humble opinion for the 1st ground of appeal that I agree with Mr. Massawe that as per section 24 of the Land Disputes Act Cap 216, the Hon. Chairman is not bound to follow assessors opinions while giving his decision. However, the law requires him to reflect the reasons for differing with the same in his judgment. Section 24(supra) states as follows:

> *"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"

In the instant matter the Hon. Chairman has given the reasons for differing with opinion of assessors given before the trial Tribunal and the same can be reflected at third paragraph, page 21 of the trial Tribunal's judgment to this Appeal. I find this ground to have no merit.

I would like to note that the remaining grounds will be determined generally, this is not a new phenomenon as the same has been addressed by the Court of Appeal Tanzania in the case of **Melita Naikiminjal & Loishilaari Naikiminjal vs. Sailevo Loibanguti** (1998) TLR 120 at page 130 where Hon. Nyalali J. (as he then was) said;

"We are however, of the considered opinion that the appellate court so long as it grasps the essence of the case before it, has discretion to summarize the case and the grounds of appeal for purposes of conciseness and clarity..."

AND in the case of **Malmo Montagekonsult AB Tanzania Branch vs. Magret Game,** Civil Appeal No. 86 of 2001, where his Lordship Mroso J, (as he then was) said;

"In the first place, an appellate court is not expected to answer issues as framed at the trial. That is the role of the trial court. It is however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It, may, if convenient, address the

*ground **GENERALLY,** or address the decisive ground of appeal only or discuss each ground separately."*

In the strength of the above settled principle and for the purpose of clarity, I have noted that the remaining grounds of appeal challenges evaluation of evidence by the trial Tribunal.

It is trite law that, when a matter is based on the weight of evidence, it is the trial Court or trial Tribunal which is better placed to evaluate evidence than the appellate Court/Tribunal which merely reads the records. This position was held in a number of cases including the case of **Ali Abdallah Rajab vs. Saada Abdallah Rajabu and others [1994] TLR 132** whereby it was held that:

"Where the decision of a court is wholly based on the credibility of the witnesses, then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record".

In line of the above authority, I will focus on the evidence available on record during the trial. The evidence gathered from the court record is in accordance with the contents of the pleadings of both parties, testimonies and exhibits. I am convinced that, the strength of this dispute is centered on the two documents namely **EXHIBIT P3** which is the purported written Will of the late Hadija Kondo titled "Wosia" dated 06/06/1994 bequeathing her children and grandchildren House No. 25 Mchikichini and **EXHIBIT D1** which is the purported affidavit of the late Mwajuma Musa Msemba titled "Hati ya Kiapo" dated 12/11/1997,

evidencing one Mwajuma Musa Msemba, out of natural love and affection, gave the respondent House No. 265 located at Mchikichini.

There is no evidence which will justify ownership of disputed property other than these two documents. I have examined the two documents and I have noted that there is variance of description of the disputed house particularly on the number of the disputed house. On the plaint/ Application form filed by the applicant at the trial Tribunal, the description of the disputed house is No. 25/15. On Exhibit P3, the Will of Hadija Kondo, the disputed house is House No. 25. On Exhibit D1 the affidavit of Mwajuma Musa Msemba, the disputed House is No. 265. On the judgment of trial Tribunal, the disputed house is described as House No. 25/15. In his analysis of evidence, the Hon. Chairman analysed the evidence of the respondent who stated that, the disputed House is now No. ILA/MCK/ILK/25/15 but previously it was known as number 385 and also number 265 and that all changes of the numbers was due to changes of Tax collectors. At page 21 of the Chairman's judgment, he stated;

> *"According to the evidence tendered by the Respondent and the Applicant, I have weigh them and found that the respondents evidence is stronger and coherent than the Applicant's evidence.* ***Exhibit D1*** *is the Affidavit which shows the Respondent was given the suit House by the Late Mwajuma Musa..."*

From the totality of the submissions, the fundamental issue that calls for determination by the Court remains to be whether on the evidence adduced at the trial, the presiding Chairman was justified to find that the

suit property is located at Ilala Mchikichini Area House No. 25/15 and that the same belongs to the respondent.

According to the circumstances surrounding the matter, the trial Tribunal was faced with a conflicting evidence of the parties with regard to the proper location of the suit property. Surprisingly, the trial Chairman left the matter at that. In his findings and judgment he did not give description of the house in dispute in order to avoid the ambiguity or controversy which could arise regarding the number of the disputed house. Furthermore, the variance of the number of the disputed house gave a chance to the appellant to challenge the description of the disputed house through grounds 8 and 9 of this Appeal. The appellant is contending that the House No. 265 which is purported to be legally owned by the late Mwajuma Musa Msemba and was gifted to the respondent is different from the house No. 25 which was owned by the late Hadija Kondo and was bequeathed to her children and grandchildren.

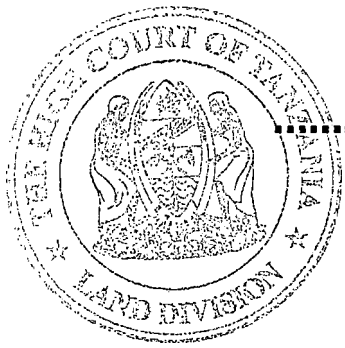
Basing on that analysis, I am of the view that it was the duty of the trial Tribunal to give proper description of the disputed premises. I am also of the opinion that, although the visit of the locus in quo is not mandatory and is the discretion of the court, according to the circumstances surrounding this dispute, this was a case fit for the court to visit the location of the suit premises..

Failure to consider the description of the suit according to the pleadings and state it clearly in the findings, judgment and decree, the trial Tribunal risks a possibility of issuing non executable orders or else the order issued would be chaotic or almost impossible to execute and that is not the purpose of Court orders.

Therefore, in such circumstances, I have no option but to invoke my inherent powers under section 43 of the Land Disputes Courts Act, Cap 216 and remit the file on this matter to the District Land and Housing Tribunal for Temeke before the same Chairman who presided on the matter with an order that the trial Tribunal should take additional evidence on confirmation of the proper location and description of the disputed property and write the new judgment basing on that evidence together with the pleadings on record. The appeal is partly allowed. Considering the circumstances, I make no order for costs.

It is so ordered.

Dated at Dar es Salaam this 12th Day of October 2021.



A. MSAFIRI

JUDGE