IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 264 OF 2020

(Arising from Ilala District Land and Housing Tribunal in Land Application No. 310 of 2018)

ABDALLAH HASSAN MINDUVA.....APPELLANT

VERSUS

MICHAEL JOHN WEREMA.....1ST RESPONDENT
AMOS KIRATO.....2ND RESPONDENT
BONIFACE MATIKO.....3RD RESPONDENT
KALEBU RANGE.....4TH RESPONDENT
HATUNGA DAUDI MDINI.....5TH RESPONDENT
YOHANA DANIEL.....6TH RESPONDENT

Date of last Order: 31.01.2022
Date of Judgment: 08.02.2022

JUDGMENT

V.L MAKANI, J

This appeal is by ABDALLAH HASSAN MINDUVA. He is appealing against the decision of Ilala District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 310 of 2018 (Hon. L.R. Rugarabamu, Chairperson).

At the Tribunal the matter was dismissed, and the respondents were declared the legal owners of the suit land namely the plot located at Kivule area, Ilala Municipality, Dar es Salaam City (the **suit land**).

The appellant was dissatisfied with the decision of the Tribunal and has filed this appeal with seven grounds reproduced hereinbelow as follows:

1. *That the trial chairperson grossly misdirected himself both in law and fact in declaration the respondent the legal owners of the suit land the tendered documents notwithstanding.*

2. *That the trial chairperson went astray in holding that the appellant herein failed to prove ownership of the sluit land given the documents he tendered and the witnesses who testified in his support.*

3. *That the trial chairperson offended the law in failure to assign reasons for differing with the unanimous opinion of the assessors who found that the respondents are trespassers at the suit land as they are not known to the Local Government of the area.*

4. *That the trial chairperson hurriedly decided the case on the issue of boundaries as shown by PW2 and DW3 without taking into consideration the entire evidence adduced hence cause injustice to the appellant.*

5. *That the trial chairperson vividly failed to enter judgment against the 3rd and 6th respondents in favour of the appellant who did not appear to defendant the case for no good reason for their non-appearance.*

6. *That the trial chairperson miserably failed to evaluate the evidence before him and in the even reached a wrong decision causing injustice to the appellant.*

7. *That the ten sell (sic!) leader who signed the respondents tendered documents should have been called to support them short of that their testimonies remains unsupported hence legally unfounded.*

The appellant prayed for the appeal to be allowed with costs.

With leave of the court the appeal was argued by way of written submissions. Mr. Galikano, Advocate drew and filed submissions on behalf of the appellant and submissions in reply were drawn and filed by Mr. Phillip L. Irungu, Advocate.

In arguing the appeal on behalf of the appellant, Mr. Galikano consolidated the first and second grounds, and the fourth and the sixth grounds. The remaining grounds, that is, the third, fifth and seventh grounds were argued separately.

As for the first and second grounds, it was argued that since the issue before the Tribunal was ownership of the suit land, the Chairperson should have seriously considered the documents that were tendered specifically the Sale Agreement (**Exhibit P1**) and a bundle of documents (**Exhibit P2** collectively). He said these documents were tendered by the appellant to prove ownership of the said suit land. He went further to submit that Wairanga Wambura Chacha (**PW2**) testified to prove that he was the seller of the suit land to the

appellant and that he bought the same from Mohamed Omary Masakara (now deceased) and Mariam Omary Masakara (**PW5).** He said the testimony of Masoud Ally Omary cemented the issue of legal ownership of the suit land. Mr. Galikano went on saying that **PW4** witnessed the sale from the original sellers that is **PW5** and his brother at the office of the local authority. He said procedures for sale by the appellant were followed as this was unsurveryed area because the local authority (**Serikali ya Mtaa**) was engaged.

Mr. Galikano said the Chairperson in his judgment relied so much on the evidence of **DW3** one Halima Mohamed Athumani the reason BY the Chairman was that **DW3** was very conversant with the suit land. He said **DW3** never witnessed the sale agreement between her father and **PW2.** He said **DW3** said she bought the suit land from one Mohamed Athumani Mohamed in the presence of her daughter Kulthumu, but **Exhibit D2** tendered by **DW2** does not show the presence of Kulthum or **DW3** but Rashid Pivael. He said the finding of the Chairperson (page 6 of the judgment) that **DW3** was a reliable and credible witness was legally wrong because **DW3** has never been witness to the alleged Sale Agreement (**Exhibit D2**). He called for

the court to fault the findings of the Chairman because even Kulthum was not a witness to the Sale Agreement.

Mr. Galikano observed that he had no doubt that the evidence by the appellant was heavier than that of the respondents. He said the other respondents bought the suit land from the 5th respondent (**DW2**) who purported to have bought the suit land from the late Mohamed Athumani Mohamed in the year 2000. He said to support his evidence. said his witness was Kulthum but instead he called **DW3**. He said it is arguable and legally true that at the time of disposition of the suit land **DW2** had no title to pass. He said the burden of proof was on **DW2** to prove that he had good title and it passed to the respondents but he did not successfully discharge this duty to warrant victory and so the matter was wrongly decided. He said it is the law that who alleges must prove and this was not the case with **DW2**. He relied on the case of **Barlia Karangirangi vs. Asteria Nyalwambwa, Civila Appeal No. 237 of 2017 (CAT-Mwanza)** (unreported). He said the appellant bought the suit land in 2000 prior to the 1st and 2nd respondents (who bought their land in 2016) and the 4th respondent (2015). The 3rd and 6th respondents did not enter appearance. For the

reasons submitted Mr. Galikano prayed for these grounds to be allowed.

As for the fourth and sixth grounds of appeal, Mr. Galikano said the Chairperson failed to properly evaluate the evidence regarding the boundaries. He said when the Tribunal visited *locus in quo* the **PW2** and **DW3** showed the boundaries which resulted to the same suit land which **PW2** said to have bought and all respondents found themselves within the suit land. He said the Chairperson did not record anything that transpired during the visit of *locus in quo,* however, in his judgment there are findings as to the outcome of the visit. He said the chairperson did not read over his findings to the parties and/or asked for clarification from the parties. He said this is contrary to the principles stated in the case of **Avit Thadeus Massawe vs. Isidory Assenga, Civil Appeal No. 6 of 2017 (CAT-Arusha)** (unreported). He said the Chairperson did not abide to the principles in this case, so the findings ought to be faulted. He also pointed out that parties are bound by their prayers but in the joint defence by the respondents there was no prayer for them to be declared the lawful owners of the suit land. He relied on the case of **Pasinetti Adriano vs. Gi Ro Gest Limited & Another [2001]**

TLR 89. He thus said the declaration of ownership in favour of the respondents was thus wrong.

As for ground three, Mr. Galikano said the Chairperson did not assign reasons for departing from the opinion of the Assessors as per section 24 of the Land Disputes Court Acrt CAP 216 RE 2019. He said though the Chairman is not bound by the opinion of the assessors, but he has to give reasons as was said in the case of **Paschal Joseph Mayengo vs. Salum Shabn Makisinza, Land Appeal No. 33 of 2018 (HC-Tabora)** (unreported). He said the Chairperson did not play his role as per the law and so his observations were against the law and should be faulted and consequential orders be issued accordingly.

As for ground five, Mr. Galikano said the Chairperson failed to enter judgment in favour of the appellant as against the 3rd and 6th respondents despite that they did not enter appearance and the case proceeded ex-parte against them. He said it is not known if the claim against them was dismissed or allowed. In that regard, Mr. Galikano said the appellant was denied a legal right without any reasons and

so the legal consequences requires that the appeal should be decided for the appellant.

As for the seventh ground, Mr. Galikano said the tendered documents by the Respondent were not supported by evidence/testimony of ten cell leaders and or advocates who signed them and no reason(s) were advanced for not calling them. He said this legally leaves a lot to be desired. He said the ten cell leader who signed the documents was within reach but was not called and no reasons were assigned. He said the court is therefore called to draw adverse inference for the respondents not calling the said ten cell leader. He relied upon the case of **Aziz Abdallah vs. Republic [1991] TLR 71**. He prayed for the appeal to be allowed with costs and the appellant be declared the lawful owner of the suit land.

In submissions in reply, Mr. Irungu said he who alleges must prove. He said in this case the appellant was called upon to prove on balance of probabilities and to the satisfaction of the court that he is the rightful owner of the suit land. According to the Tribunal the rightful owners were the respondents. He said the appellant's witness did not tender any document to prove or show that he lawfully purchased the

suit land from Mohamed Omary or Mariam Omary Masakalama and the appellant also failed to prove if these people had lawful title. He said Mariam Omary Msakalama failed to prove on how her late father acquired the suit land. This meant Mariam did not have lawful title to sell the land to **PW2**. He observed that **PW2** even gave different description of the suit property to what the appellant himself described in his testimony. He said the confusion showed that the appellant failed to prove the case and he asked how could **PW2** describe the suit land differently from the appellant while he was the seller of the said suit land. Mr. Irungu went on to say that **PW2** testified that the suitland was 3 acres while **PW3** Masoud Ally Omary said it was 35 acres. He said the contradictions show that the appellant failed to establish ownership of the suit property. Mr. Irungu said even when the parties visited the *locus in quo* the appellant showed different boundaries and size of the suit land differently from the seller Gwailanga.

Mr. Irungu said the argument that the Chairman did not state what transpired on *locus in quo* is misleading because the proceedings show that the *locus in quo* was visited and **PW2** and **DW3** demarcated the suit land. He said the learned Counsel misinterpreted

the case of **Avit Thadeus Massawe** (supra). He said the Chairman looked into the land and he cleared all the doubts in the conflict.

Mr. Irungu also pointed out that it was right for the Chairperson to declare all the six respondents lawful owners of the suit land because the appellant wanted the land of all the six respondents. He said the case of **Painetti Adriano** (supra) is applicable if there was a new issue that was raised on trial.

Mr. Irungu said the ground that the Chairperson did not give reasons for departing from the opinion of the assessors and that he did not record the opinion has no merit because the proceedings on 27/10/2020 reflects that the opinion of the assessors was delivered before the appellant and his advocate. He said having recorded the opinion he gave reason for differing to the opinion, he thus said the law was complied with. He prayed for this ground to be dismissed.

As for the ground that the Chairperson hurriedly decided on the case, Mr. Irungu said according to section 119 of the Evidence Act CAP 6 RE 2019 the appellant had a duty to prove that the property in possession of the respondent was indeed owned by the appellant. He

said the fact that the 3rd and the 6th respondents did not present their case was an advantage to the appellant. He said the appellant failed to exercise his duty under section 110(6) of the Evidence Act that the land was indeed trespassed.

As for the ground that the ten-cell leader ought to have been called to give evidence, it is Mr. Irungu's argument that the Chairperson considered who between **PW2** and the **DW2** had good title to dispose the suit land to the appellant. He said the presence or absence of the ten-cell leader cannot help anything. He concluded by praying for the appeal to be dismissed with costs for lack of merit.

In rejoinder Mr. Galikano reiterated what he stated in the main submissions and emphasized that there was failure by the Tribunal to properly evaluate the evidence which led to wrong decision vis a viz the pleadings which were before it. He said it was legally wrong for the Tribunal to award ownership to the respondents as no counterclaim was filed as they had only prayed for the application to be dismissed. He reiterated the prayers for the appeal to be allowed and the appellant be declared the lawful owner of the suit land.

Having gone through the records of the case and the submissions from both parties, the main issue for determination is whether this appeal has merit. The 1st, 2nd 4th and 6th grounds of appeal are on the weight of evidence, thus they will be discussed together, the rest of the grounds shall be dealt with separately.

It is apparent from the judgment that when the Chairman was analysing evidence, he heavily relied on the demeanour of the witnesses especially those who were present at the *locus in quo.* However, as correctly observed by Mr. Galikano, the judgment and the record of the proceedings do not correspond to support the Chairman's analysis of the evidence.

At page 11 of the typewritten judgment of the Tribunal it was stated in part as follows:

> *"The evidence available do not clearly give the answers and as such I had to look at the demeanour of the witnesses and what transpired when the parties and their key witnesses did testify on locus in quo. On my considered view I was very much convinced with the testimony given by DW4 (Halima Mohamed Athuman) as to me she seemed to be very conversant with the suit premise, neighbour's plot around and the back history, while PW2 (Gwailanga Wambula Chacha) demarcated/indicated a premise at locus in quo different from that which the applicant did indicate. PW2 was the vendor of the suit premise to the applicant and as he*

such was crucial witness for the Applicant's case to succeed..."

The record of the Tribunal on the date of the visit to the *locus in quo* is as follows:

03/07/2020
Coram: *L. Rugarabamu – Chairman*

Members: *Mwakaksya & Fanisa*

Applicant: *Present/Galikano, Adv.*

Respondents: *1st -*
2nd -
3rd - Mr. William Musobi, Adv.
4th -
5th -
6th – Absent

C/C:

Tribunal:
The case is for the Tribunal to visit locus in quo for the PW2 and DW3 to demarcate the premise which they testified for. The PW2 and DW3 ae present and ready for. So, I order the witnesses to proceed.

Tribunal:
The Tribunal has visited the locus in quo and PW2 and DW3 demarcated the premises.
Hearing of the remaining witnesses for defence case on 30/07/2020

Sgd. Rugarabamu, Chairman
03/07/2020

It is apparent that the record above does not reflect what the Chairman has stated in the judgment. The record does not state how the suit land was demarcated and what **PW2** and **DW3** testified when they were at the *locus in quo* or otherwise if there were any other thing that transpired in respect of the parties and their advocates at the site. The records as they are do not support the assertions of the Chairman in the judgment. In other words, what the Chairman stated in his judgment is not from the records, and therefore cannot be relied upon. If at all the Chairman wanted to apply the evidence given at the *locus in quo* in his analysis of the evidence, then the record ought to have shown that indeed such evidence was given by **PW2** and **DW3**.

Clearly, the facts as observed in the judgment are from the Chairman's own making as the record is silent. Subsequently, there is no record of evidence taken at the *locus in quo* this is contrary to the principles set out in the case of **Avit Thadeus Massawe** (supra). In this cited case the Court quoted the case of **Nizar M.H. vs. Gulamali Fazal Janmohamed [1980] TLR 29** where in the latter case it was stated:

> *"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as my have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof; when the court re-reassembles in the court room, all such notes should be read out to the parties and their advocates, and comments amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to evidence in court given by the witnesses. We trust this procedure will be adopted by the courts in future."*

The Tribunal did not follow the principles as set out above and as previously stated, since the Chairman relied on the testimony and demeanor of the witnesses during the visit at the *locus in quo* then the records of the proceedings ought to have supported and justified the analysis which was given by him. As the visit at the *locus in quo* was not properly conducted then it is apparent that the evidence was not properly analyzed. In that regard this ground has merit.

Now, what would be the remedy for this irregularity? In many instances the remedy for any irregularity is re-trial. However, I am convinced that in this case the best option would be for the Tribunal

to conduct a proper site visit in terms of **Avit Thadeus Massawe** (supra) and make analysis of the evidence obtained from the site visit vis a viz the evidence on record and then make a proper decision therefrom.

For the reasons above, I shall not dwell on the other grounds of appeal as this ground alone suffices to dispose of the appeal.

In the result, the appeal is allowed with costs. The judgment of the Tribunal is hereby quashed and set aside. The file is hereby returned to the Tribunal for conducting proper site visit and composing another judgment before another Chairperson.

It is so ordered.

V.L. MAKANI
JUDGE
08/02/2021