IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 289 OF 2021

(Arising from judgment and decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 38 of 2015 - Hon. Mbilinyi- Chairperson)

GODFREY ELIAS NGULAI..... APPELLANT

VERSUS

CHARLES ALLY NKOBELWA.....RESPONDENT

Date of last order: 23/9/2022

Date of ruling: 6/10/2022

JUDGMENT

KADILU, J.

Before the District Land and Housing Tribunal for Kinondoni District, the respondent lodged land application No. 38 of 2015 against the appellant alleging him to have illegally occupied a house situated at Manzese Midizini, Kinondoni Municipality. The respondent prayed before the trial tribunal for the appellant to be ordered to vacate from the disputed premises. The appellant disputed the respondent's claim and in his written statement of defence, he claimed that the disputed premises belonged to their late father namely Elias Ngulai who died on 9/10/2010 and therefore

the disputed premises are now owned by the beneficiaries of the estate of the deceased.

After hearing the parties, the trial tribunal delivered its decision on 4/11/2021 in favour of the respondent. The appellant was ordered to vacate from the disputed premises also, the residential licence evidencing the appellant's ownership of the disputed premises was annulled by the tribunal. The appellant was aggrieved with the decision of the tribunal; hence he lodged the present appeal with 7 grounds of appeal as follows:

1. *The tribunal erred in fact and law for entertaining the dispute which had no jurisdiction as the same was time barred.*
2. *The chairperson of the tribunal erred in fact and law by total disregard of illegality and irregularity contained in the letter of administration by the applicant.*
3. *The tribunal erred in law and fact in entertaining oral evidence in reaching at the decision of the tribunal in total disregard of documentary evidence tendered by the appellant at the trial tribunal and exhibited in the records as exhibits "D2" collectively.*
4. *The chairperson of the tribunal erred in fact and law by usurping its powers in determining applicant's capacity in the suit also by recognizing 2 non existing administrators of the estate of the late Ally Warioba Nkobelwa.*

5. *The chairperson of the tribunal erred in fact and law for failure to determine the credibility of applicant and his witness at the time of hearing of the case.*
6. *The tribunal erred in fact and law for failure to appreciate the facts that the respondent proved his case to the hilt and on balance of probability.*
7. *The tribunal erred in fact and law for issuing the decree which is not in the language of the tribunal/court hence contravening mandatory provision of the law and bring confusion.*

The appellant therefore prayed for this appeal be allowed and the trial tribunal's decision to be quashed and set aside. When the appeal was called for hearing on 23/9/2022, Messrs Boaz Mosses and Barnaba Lugua learned advocates appeared for the appellant and the respondent respectively. The Court however after consultation with the learned advocates for the parties ordered the appeal to be argued by way of written submissions. The order was duly complied with. In his submission, the learned advocate for the appellant abandoned ground 4 of the appeal and combined grounds 2, 3, 5 and 6 and argued them jointly.

The first and last grounds of appeal were argued separately. Submitting on the first ground of appeal, the appellant contended that the dispute before the tribunal was lodged in 2015. On the other hand, the respondent

claimed for declaration that the dispute premises belonged to his late father who passed away on 10/8/1977. According to the appellant, counting from the date when the respondent's father passed away to the date on which the matter was lodged before the tribunal was 38 years.

To fortify his stance, the learned advocate for the appellant referred this court to Part I item 22 of the Law of Limitation Act [CAP 89 R.E 2019], which requires suits for recovery of land to be instituted within 12 years. It is further submitted by the learned advocate for the appellant that on 30/5/2019, the appellant's advocate notified the tribunal that the matter was time barred but the tribunal proceeded with determination of the matter.

On further submission, the learned advocate for the appellant was of the view that the issue of limitation is fundamental as it touches the jurisdiction of the court. To this, he referred to the decision of this court in **Mathew Martin v The Managing Director Kahama Mining Corporation** Civil Case No. 79 of 2006 (unreported). The learned advocate for the appellant stated that the tribunal ought to have invoked Section 3 (1) of the Land Disputes Courts Act to dismiss the application.

I could hardly grasp a clear response from the respondent on the point raised by the appellant that the matter at hand was instituted at the tribunal beyond the time limit. It can be said that the respondent has not submitted anything to counter the appellant's argument that the matter was time barred. I have gone through the entire record; it is not in dispute that the late Ally Nkobelwa (the respondent's late father) passed away on 10/8/1977 as evidenced by certificate of death which was admitted as exhibit P2. The matter before the tribunal was filed in 2015.

It follows therefore that, counting from the date the respondent's father passed away to the date the matter was instituted before the tribunal, 38 years have lapsed. The question that follows is whether the matter before the trial tribunal was time barred. I have objectively gone through the record particularly the application form which essentially is equivalent to the plaint, it was not stated clearly as to when the cause of action arose. It was not stated clearly as to when the appellant trespassed to the disputed premises.

Paragraph 6 (a) of the application form which requires facts constituting the claim to be adduced therein, does not tell much. It is very brief as it

only reads that, "*Ownering (sic) the house without proper authority from the owners and responsible people.*" The respondent should have disclosed such facts as to when the cause of action arose for the purposes of determining whether the matter was well within time. In absence of such facts from the record, it is difficult to rule that the matter before the tribunal was time barred.

The appellant has submitted that time frame to file suits for recovery of land is 12 years. I do not have doubts with that settled principle of law, but the question is when does that period of 12 years start to run? I am of the settled mind that the period started to run not on the date the respondent's father passed on, rather, when the appellant took over the disputed premises. This is so because the issue in dispute was appellant's illegal occupation of the disputed premises. Therefore, as there were no facts stating clearly when such occupation by the appellant started, it is difficult to sail along the appellant's claim. Consequently, the first ground of appeal is without merit and it is hereby dismissed.

The appellant argued jointly grounds 2, 3, 5 and 6 as they are faulting on non-evaluation of evidence on record. The appellant has submitted at length faulting the tribunal's Chairperson for not evaluating properly the

evidence on record reaching to erroneous decision. The appellant contended that, letters of administration tendered before the tribunal was nothing, but forgery as the same shows that it was issued on 8/6/2009 but at the footing it shows that it was issued on 9/6/2008.

Similarly, the appellant has faulted the family meeting whose minutes was tendered by the respondent (exhibit P3), but he was not among the members who attended the said family meeting, and there was no any other member who was summoned before the tribunal to testify about what transpired in that meeting. It was further contended by the appellant that there was no any other documentary evidence that was tendered by the respondent to prove that the disputed premises belonged to the estate of his late father.

On further submission by the appellant, he contended that he had overwhelming evidence to prove his ownership over the suit premises as he tendered a residential licence which was acquired by his late father (exhibit D2). However, the tribunal nullified such residential licence. The appellant submitted further that; the tribunal nullified the residential licence without giving parties chance to address it whether it was obtained

by fraud. It is worth noting that, as submitted by the appellant, the issue on how the said licence was obtained was not among the issues raised.

In totality, the appellant submitted that it was wrong for the tribunal to declare the respondent the lawful owner of the disputed premises. On reply, the respondent contended that there was sufficient evidence to prove that his late father was the lawful owner of the disputed premises and the appellant's father was a mere licensee in the suit land as his stay was limited only to keep the suit premises safe and hand the same to the beneficiaries of the deceased's estate.

The respondent contended further that such evidence was supported by PW1 as well as the minutes of the family meeting which was tendered as exhibit P1. On the allegations that the letters of administration to the respondent had different dates, the respondent submitted that the letters of administration were issued on 8/6/2009 and it was signed on the 9/6/2009. On rejoinder the appellant essentially reiterated his submission in chief.

In determining grounds 2, 3, 5 and 6 of the appeal, the appellant is faulting the findings of the trial tribunal contending that there was no

sufficient evidence tendered before it by the respondent to prove that he is the lawful owner of the disputed premises. As this court is sitting on the first appeal, it has powers to reassess the evidence on record tendered before the tribunal and where there is any non-direction or misdirection of the evidence on record, this court may come with its own findings.

Starting with the claims that there was no documentary evidence tendered by the respondent to warrant the tribunal to declare him a lawful owner of the disputed premises, I have gone through the record apart from exhibit P3 which are minutes of the family meeting dated 22/10/1977 and the letter dated 23/8/2005 written by one Tabu Ally to the chairperson of the local government, there is no any documentary evidence or exhibit tendered before the tribunal to establish that the respondent's late father was the owner of the disputed premises.

I have carefully gone through exhibit P3, minutes of the family meeting in which some of the deceased's properties were identified to be one house with six rooms. In that meeting, members were informed that the house in question was left under the care of one Elias Ngurai who was the deceased's grandson. It is discerned from the minutes of that meeting that

after deliberation, it was resolved the property left by the deceased should be owned by two children of the deceased namely Charles Ryaka Ally Mkoberwa and Taabu Ally Mkoberwa. The relevant part of the minutes of the family meeting reads:

"Baada ya wajumbe kutafakari kwa muda mrefu ndipo wote kwa kauli moja walifikia uamuzi kuwa, mali iliyoachwa na marehemu iwe mali ya watoto wake yaani Charles Ryaka Ally Mkoberwa na Taabu Ally Mkoberwa ***na si vinginevyo****.* [Emphasis added]."

In resolving this issue, the learned Chairperson of the tribunal had this to say on page 8 of the typed judgment:

"Kutokana na ushahidi uliotolewa na PW1 na PW2 na vielelezo P1 P2, na P3 Baraza limejiridhisha kwamba mali yenye mgogoro ilikuwa ya marehemu Ally Warioba Nkoberwa na baadae kupewa warithi ambao ni Charles Ally Nkoberwa na Tabu Ally Nkoberwa. Baba yake mjibu maombi aliruhusiwa na wanaukoo kuishi katika nyumba hiyo kama mlinzi baada ya kifo cha Ally Warioba Nkoberwa."

With due respect, I am of the opinion that the findings by the learned Chairperson were improper. I state so because firstly, there is nowhere the clan meeting authorized the appellant to stay in the deceased's house as a watchman. Likewise, the minutes of the clan meeting leaves a lot to be desired on this point. It is the respondent alone as a participant in the said

meeting who testified before the tribunal. No any other person who participated in the said meeting was called to testify.

I am much alive with the settled principle of law that no particular number of witnesses is required to prove a certain fact, but unique circumstances of this matter suggests that more witnesses from amongst those who attended the meeting would be called to testify before the tribunal to support the respondent's case. The trial tribunal observed further at page 9 of the typed judgment that:

"PW2 aliishi katika nyumba anakiri nyumba ni ya marehemu Ally Warioba Nkoberwa na pia alishuhudia kikao cha familia walipomruhusu baba wa mjibu wa maombi Elias Ngulai kuishi katika nyumba hiyo."

I have gone through the minutes of the meeting, but I could not see the name of P2 namely, Ally Mohamed Fungo. Similarly, there was no explanation from the minutes as to the location and size of the house left behind by the respondent's late father whether it is the same house that formed the dispute before the tribunal or not. More importantly the appellant's father did not participate in the said meeting. Therefore, there

was no sufficient evidence to establish that the dispute premises were kept under care of the appellant's father.

From the totality of the evidence on record, there was no evidence tendered to prove how the respondent's late father acquired the disputed premises. PW2 testified before the tribunal that the respondent's father purchased the disputed premises from one Abdallah Mtakaye. But there was no sell agreement tendered before the tribunal to establish that the respondent's father had purchased the disputed premises.

Next, I will turn to address the claim by the appellant that the learned Chairperson erred in nullifying the residential licence which evidenced the appellant's ownership of the disputed premises. In nullifying the residential licence tendered by the respondent and admitted as exhibit D2, the learned Chairperson had this to say on page 8-9:

"...leseni ya makazi aliyoitoa mjibu maombi kielelezo namba D2 kwa ujumla wake ilipatikana isivyo halali ikiwa ni mbinu za Elias Ngulai kujipatia mali kwa njia ya udanganyifu."

No doubt in arriving to such conclusion the Chairperson of the tribunal erred. This is because there was no proof that indeed the appellant's father

had obtained the disputed premises by false pretence. Rightly as submitted by the appellant, the validity of the residential licence was not among the issues for determination. I therefore find merit on the joined grounds 2, 3, 5 and 6 of appeal. Had the learned trial chairperson evaluated the evidence on record properly, she would have arrived to a different conclusion.

On the last ground of appeal, the appellant faults the decree arising from the judgment of the trial tribunal for being signed by Hon. L. Rugarabamu as a successor Chairperson while the matter was determined by Hon. Mbilinyi and there was no reason assigned as to why the said decree was not signed by the trial chairperson. The appellant contended further that such omission vitiates the decree as it does not agree with judgment. He therefore prayed the decree be quashed. The appellant's arguments on the last ground of appeal have not been countered by the respondent. It is not in dispute that decree of the tribunal was signed by Hon. L. Rugarabamu and it has been indicated that she signed as successor Chairperson. The appellant maintained that the learned Chairperson who heard the matter to finality has not been transferred hence, it was improper for the successor Chairperson to sign the decree.

Much as I agree with the appellant that the decree has to be signed by the Chairperson who presided over the matter, under Order XX Rule 8 of the CPC [CAP 33 R.E 2019], the decree could be signed the successor Chairperson. Under the said provision, the successor may sign such a decree where the predecessor has vacated the office. Whether or not the predecessor Chairperson had vacated the office, it is a matter to be proved by evidence. Unlike where there is a takeover of proceedings by another Judge or Magistrate reasons must be stated for such taking over on the proceedings, signing of the decree alone by a successor Chairperson is quite a bit different as there is no room to give reasons because the proceedings cannot be reopened. Suffice it to say the last ground of appeal lacks merit and it accordingly dismissed.

In the upshot and for the foregoing reasons, I find merit on the joined grounds 2, 3, 5 and 6 of appeal. The appeal succeeds. Judgment and decree of the tribunal are hereby quashed and set aside. The appellant is declared a lawful owner of the disputed premises. Each party to bear his own costs.

It is so ordered.

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KADILU, M.J.,

JUDGE

6/10/2022

Judgment delivered on the 6th Day of October, 2022 in the presence of Mr. Michael Kayombo, learned Advocate for the Appellant holding brief for Mr. Boaz Moses, Advocate and the Respondent appearing in person.

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KADILU, M. J.

JUDGE

6/10/2022.