IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 238 OF 2020

(Appeal from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application No. 260 of 2015)

GODFREY BUBERWA.....APPELLANT

VERSUS

PELAGIA BUBERWA.....RESPONDENT

J U D G M E N T

Date of last Order: 03/12/2021
Date of Judgment: 07/02/2022

T. N. MWENEGOHA, J.

This appeal originated from emotional story where mother's tears are flowing over her own child; crying for a foul play over her son. She claims that the respondent, being her elder son was entrusted with overseeing family matters in particular overseeing the wellbeing of his own mother. It was alleged that he was entrusted with money sent from appellant's other son living in the United states of America (USA) for the purpose of acquiring land and building a house for his mother, which indeed he purchased but in his own name and later acquired vacant possession of the house constructed.

When one hears such an emotional cry from a mother, no doubt emotions overflow. This emotion is captured on page 6 of the Judgment of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (The

Tribunal) where the Chairman is of the view that to withhold the son's (defense) evidence will be to go against the African Tradition. The Chairman emphasized that according to Haya traditions instructions from parents to children cannot be ignored.

The Chairman proceeded to grant application in favor of the mother who was the applicant at the Tribunal. Dissatisfied by the Decision of the Tribunal, the appellant(son) preferred this appeal with the following grounds;

1. **That the Tribunal erred in law and in fact in granting the application without sufficient proof.**
2. **That the tribunal erred in law and in fact in shifting the burden of proof.**
3. **That the Tribunal erred in law and in fact in failing to evaluate, analyze or wrongly analyzing evidence thus reaching a wrong and in supportable conclusion.**
4. **That the Tribunal erred in law and in fact in invoking and applying to its decision irrelevant considerations that were not part of evidence.**

He therefore prayed for the following reliefs,

i. **The appeal be allowed.**
ii. **The judgment and decree of the Tribunal be reversed and the appellant be declared the owner.**
iii. **Costs of this appeal be borne by the respondent.**
iv. **Any other relief.**

By order of this Court dated 17/11/2021 I directed the parties to argue this appeal by way of written submissions, whereby the appellant's submission was drawn and filed by Amini Mshana, Advocate and the respondent's submission was drawn and filed by Samuel Shadrack Ntabaliba, also an Advocate.

In his submission in support of the first ground of appeal Mr. Mshana began by citing **Section 110 of the Evidence Act, cap 6 R. E. 2019** and submitted that the burden of proof lies on the one who alleges a fact to be true and who will fail if no evidence is given. He submitted that in an attempt to discharge the burden of proof the respondent (applicant in the Tribunal) was required to discharge the burden of proof by proving her case as required by the law. He submitted that apart from mere words the respondent did not tender a single document to show and prove how she acquired the land, the price at which the land was purchased, the size of the land, any unexhausted improvement on the land and any connection with the suit land apart from living as invitee of the respondent. He added that even PW1 who alleged to have sent money from abroad did not produce a single document of his stay in USA and no documentary proof to show that he sent the money from USA.

He added that on the contrary the appellant who had no burden of proof produced Sale Agreement and Tanesco and Dawasco Bills admitted as Exhibits D1 and D2 collectively. He added further that the appellant also presented his sister (DW2) who witnessed the sale.

On the second ground of appeal that the Tribunal erred in law and in fact in shifting the burden of proof, Mr. Mshana argued that as submitted earlier the burden of proof lies on the respondent. He quoted the assessor's

opinion and submitted that the burden of proving that the respondent was evicted or chased away from the suit land was upon the respondent.

On the third ground of appeal that the Tribunal erred in law and in fact in failing to evaluate, analyze or wrongly analyzing evidence thus reaching a wrong and unsupported conclusion, Mr. Mshana submitted that the opinion of the assessor which was accepted and relied upon by the Tribunal shows that there was contradiction in defense with regard to the reasons as to why Amani went to USA, Amani's character, process of purchase of the suit land, construction of the house and family relationship. He submitted that the opinion has no factual truth as per evidence adduced and it is legally baseless. He challenged the opinion of assessor that the assessor could say whatever she wanted as she was entitled to her opinion. He added that the problem is when it was taken wholly bait, hook and sinker by the Tribunal.

On the last ground that the Tribunal erred in law and in fact in invoking and applying to its Decision irrelevant considerations that were not part of evidence, Mr. Mshana challenged the applicability of Haya customs and use of words in the ratio decidendi that he failed to understand its meaning. To him most of the words used had no meaning in the dictionary and some were found in google that led to results that were not connected to the Judgment.

In reply to the first ground of appeal that the respondent did not tender any single document proving ownership of the suit land, Mr. Ntabaliba started by giving brief summary of how witnesses testified in the Tribunal and how the series of event took place. It was his submission that the appellant was trusted as the brother and no records were kept on the money transferred and also taking into consideration that the transaction

took place in 1999 while the dispute arose in 2015. He added that the appellant was trusted as a family member to receive money from PW1 in order to purchase land and build a house. However, after purchasing the land he wrote his own name and at that time because he was trusted, no one questioned or requested a copy of Sale Agreement.

Mr. Ntabaliba combined the 2nd, 3rd and 4 ground of appeal and replied on them together that the money sent to the appellant was for specific purpose, to build their mother's house, which is the suit premises. He added that the testimonies of PW2, PW3, PW4 and PW1 suffice to disprove documentary evidence tendered by the appellant because he was trusted, hence tempering with the document to write his name was very easy.

On the opinion of the assessor, he submitted that the opinion of the wise assessor was well analyzed basing on the testimonies which rendered the matter to end in favor of the respondent. He reproduced the contradiction pointed out by assessor for defense witnesses and joined hand with her and added that the applicant's witness was very clear on how the appellant was trusted by the family to act on behalf of the mother and the family as the whole.

Mr. Ntabaliba supported the move by the Chairman of the Tribunal to apply Haya Tradition Suo motto as they were in consideration by Tribunal by passing because of the appellant's tribe.

No rejoinder was filed.

Having heard submissions from both parties the issue for determination is whether the Appeal has merits.

Starting with the first ground of Appeal *that the Tribunal erred in law and in fact in granting the application without sufficient proof,* Mr. Mshana argued that there was no sufficient proof brought by the respondent herein to prove their case. He submitted that the record shows that the respondent brought no evidence to support her claim but rather her four children and one relative to prove that the money was sent from USA. They did not show how the money was sent or how the land was bought. Whereas the appellant produced Sale Agreement (Exhibit D1) and utilities receipt showing to be in his name (Exhibit D2). He also brought a witness to a Sale Agreement being her own sister.

In such circumstances the appellant has more weight in proving his case. It is a trite law that one with heavier evidence is the one who must win. This was held in the case of **Hemed Said vs. Mohamed Mbilu 1984 TLR 113 HC,** in which the court said:

> *"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".*

I am in agreement with the position that the burden of proof is on the party who alleges as pers **Section 110 of the Evidence Act** (supra) where the provision provides that

> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts* ***must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact, it is said that the ***burden of proof lies on that person****. (Emphasis is mine).*

The applicant who is the respondent herein was duty bound to prove that she owns the land in dispute. She had the duty to provide witnesses and evidence to support her claim. Failure to that the court may draw inference that she had none. This position is found in the case of **Aziz Abdallah v R [1991] TLR** it was stated as follows;

> *"The general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

The position is clear that the duty of the prosecution's side is to provide witnesses who are able to testify on the material fact and to provide evidence to prove their case, failure to bring that evidence the Court my draw inference that one has none.

Now the fact that the respondent herein had nothing to tender to prove her case while the appellant had evidence and presented the same before the Tribunal, means that the respondent herein had not discharged her duty given under **Section 110 of the Evidence Act** (Supra) on her burden to prove. As a result, I find that the appellant's evidence was heavier than that of the respondent and thus, must win. Having said that I find the first ground of appeal to have merit.

On the second ground of Appeal, that the Tribunal erred in law and in fact in shifting the burden of proof, Mr. Mshana had reproduced assessor's opinion and made it the center of his discussion. This Court finds that discussing the assessor's opinion is an academic exercise and hence will not dwell on it. Therefore, this ground has no merit.

On the third ground of Appeal that the Tribunal erred in law and in fact in failing to evaluate, analyze or wrongly analyzing evidence thus reaching a wrong and unsupportable conclusion, Mr. Mshana alleged that the Tribunal has relied on the opinion of the assessor which was wrong. He pointed out that the assessor is a layman and is entitled to her own opinion and proceeded to point several items highlighting such opinion. On this regard Mr. Ntabaliba submitted that the opinion of the wise assessor was well analyzed basing on the testimonies which rendered the matter to end in favor of the respondent.

At this point I wish to note that it is legally allowed for the Chairman to agree with the opinion of the assessor. However, in the case at hand what the Chairman did was to reproduce the whole opinion of the assessor in the Judgment and proceeded with one paragraph thereafter endorsing the same. The Chairman did not analyse the evidence but rather relied on the assessor's findings and analysis.

This style of drafting Judgment has forced me to refer on Judgments of the Tribunals and their contents. I have gathered that **Regulation 20 of the Land Disputes Court (The District Land and Housing Tribunal) Regulation G.N No. 174/** provides that;

> *"The judgement of the Tribunal **shall** always be short, written in simple language and **shall** consist of:*

(a) a brief statement of facts;

(b) findings on the issues;

(c) a decision; and

(d) reasons for the decision".

In law when the word **"SHALL"** is used it implies that it is not a discretion. **Section 53 (2) of the Interpretation of Laws Act, R. E. 2019** provides that,

> *"It implies that Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

Thus, the above provision issuing a guideline in Judgment writing does not provide for reproducing word to word copying and pasting what the assessor has opined. The Chairman was expected to give his findings on the issue and the reason for his Decision. He did not analyse the evidence presented to him. The Chairman was to take into account the opinion of the assessor (see section 24 of the Land Disputes Courts Act, cap 216 R. E. 2019) and not to reproduce it verbatim. Therefore, this ground has merit.

In addressing the fourth ground which states that, the Tribunal erred in law and in fact in invoking and applying to its Decision irrelevant considerations that were not part of evidence, it was Mr. Mshana's argument that the Chairman invoked tradition customs to arrive at his Judgment. That no issue was framed and no evidence adduced on the issue of Haya African customs, but yet the Tribunal addressed them in the

Judgment. Mr. Ntabaliba supported the Suo motto act of Tribunal to apply Haya Custom.

Passing through the records of this Appeal, specific at page 6 of the Judgment the Chairman stated that;

> *"Apparently I do concur in its entirely* ***the plesiosaur findings*** *of the Court despite of the* ***respondent's malicious pleads*** *that the suit house personally belongs to him.*
>
> *In my humble view, withholding defense evidence, will be a pliancy* ***to African Traditions****. In* ***"Haya" traditional customs the instructions*** *(sic)* ***from the parent to the child goes under pliability****. They don't think of* ***plexors in any dealings.***
>
> *I therefore* ***humbly pleased*** *the Assessor's finds were wisely opined" (emphasis supplied)*

The Chairman stressed the importance of respecting Haya Tradition especially where a mother instructs a child. Indeed, such a reflection raises no doubt that the Chairman had addressed Haya Traditions and Customs and it reflects that his Decision was influenced on the same. I therefore agree with the appellant that Haya Customs and Traditions was not an issue raised and moreover parties were not given right to be heard on the matter, contrary to requirement of law. I am in agreement with the cited case of **Wages Joseph Nyamaisa vs. Chacha Muhogo,** Civil appeal No. 161 of 2016 where Court of Appeal referred to the case of **Margwe Erro,**

I further note that Haya Customs and Traditions was not the law applicable to the matter which was before the Chairman. He was duty bound to answer who is the lawful owner of the suit premises and to what reliefs parties are entitled to. The two issues are purely legal.

In addition to that Mr. Mshana has complained of the words used in the Judgment that he failed to adduce its meaning from any dictionaries and upon turning to Google he received different meanings such as Plesiosaur to mean a type of dinosaur, pliability to mean a muscle flex and Plextor to mean a doctor's harmer with rubber head to test reflexes.

I am of the opinion that a Judgment must communicate to the intended readers, being the parties holding stake of what is contained therein. It is therefore essential that it is written and communicated in simple language that will reveal the message intended to be communicated.

With all aforesaid, I find the appeal to have merit. The Judgment of Kinondoni District Land and Housing Tribunal is hereby reversed and the appellant is hereby declared owner.

On issue of costs, the fact that the parties are blood related, the appellant being the son of the respondent, I make no order as to cost.

Right of Appeal Explained.

THE HIGH COURT OF TANZANIA * LAND DIVISION *

T. N. MWENEGOHA
JUDGE
07/02/2022