IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 192 OF 2021

(Originated from the decision of District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 135 of 2013 Dated 19th August 2021)

BENETA YOHANA MCHACHA..... APPELLANT

VERSUS

JUSTIN HAMIS FOKORO ..... RESPONDENT

JUDGMENT

Date of Last Order: 02/03/2022 &
Date of Judgment: 28/03/ 2022

A. MSAFIRI, J;

In this appeal, the appellant is dissatisfied with the decision of the District Land and Housing Tribunal for Kinondoni (herein as trial Tribunal), in Land Application No. 135 of 2013 dated 19th August 2021 where the appellant was the respondent.

The historical facts on the record reveals that, on 19th April 2013 the respondent filed a suit at the trial Tribunal against the appellant seeking for the orders among others, that the eviction be issued to the respondent from the suit property which he claimed to have purchased from the appellant. The trial Tribunal agreed with the respondent and declared him a lawful owner of the suit property located at Bunju A, Kizota street, within the Municipality of Kinondoni with registration No. BJN/BNA/1803 and the

appellant was ordered to be evicted. The appellant was aggrieved so she has appealed against the whole decision raising two grounds namely;

1. *That, the Honourable Chairman erred in law and in fact for failure to evaluate properly the evidence on record.*
2. *That, the Honourable Chairman erred in law for making decisions without the presence of the assessors and their opinions.*

By the order of the court which followed the consent of the parties, the appeal was disposed by way of written submissions. Before this court the appellant drew and filed her submissions in person while learned advocate Khalid Sudi Rwebangila represented, drew and filed the submissions for the respondent.

Submitting on the first ground of appeal, the appellant stated that, the trial Chairman failed to evaluate the evidence on record. That the appellant never sold the house in dispute to the respondent but used the same as a security for taking a loan amounting to three million shillings on 23/10/20212 for paying school fees for her child. That she tried to repay the amount but respondent refused. Surprisingly the trial Court entered judgment in favour of the respondent without taking into consideration the testimony of the defence side.

She further added that, she testified before the trial Tribunal that the loan agreement was altered whereby the front page of the said agreement was removed and substituted to make it look as a sale agreement. But the trial Tribunal failed to determine this issue.

For the second ground, the appellant submitted that, the Chairman erred in law for deciding the case without presence of the assessors. She made reference to page 17 of the judgment of the trial Tribunal where the Chairman explained why there was no opinion of assessors on record and opted to proceed without them basing on Section 24 of the Land Disputes Courts Act Cap 216 R.E 2019. In her opinion, Section 23 of Cap. 216 provides for the mandatory requirement of assessors' opinion who participated in the case and on failing to do so, the proceedings, Judgments and orders made by the Chairman should be nullified and order re- hearing according to section 43 (1)(b) Cap.216. She cited the case of **Edna Adam Kibona vs. Absalom Swebe (Sheli),** Civil Appeal No. 286 of 2017 CAT (Unreported). She argued that failure to have assessors' opinions contravenes Section 19 (2) of Cap. 216. She prayed that the decision of the trial Tribunal be quashed and set aside.

In reply to the two grounds of appeal, advocate Rwebangila submitting for the first ground of appeal, he argued that, from the evidence on record there is no doubt that the respondent's evidence was heavier than of the appellant according to Sections 110 and 111 of the Law of evidence Act, Cap. 6 R.E 2019. That, the respondent proved to have purchased the suit property from the appellant at a consideration of Tshs. 27,000,000/=, by producing Exhibit P1, hence, the burden of proof was left on appellant side to discharge which she failed to do so.

For the second ground he submitted that, in the case at hand under section 23(1) and (2) of Cap. 216, the trial Chairman was bound to finalize the proceedings with the aid of minimum of two assessors and in the event either of them was unable to attend the trial, the trial Chairman was obliged to proceed with the remaining assessor. And in the event both

assessors could not turn up, obviously the trial Chairman is allowed to proceed alone to the conclusion of the matter as provided for under Section 23 (3) of Cap. 216 R.E 2019. In Mr. Rwebangila's opinion, this ground has no merit.

I have gone through the records of this appeal and the submissions of both opposing parties. I will determine the merit of this appeal basing on whether the trial Tribunal did evaluate all the evidence brought before it before reaching the decision for the matter in dispute. In the case of **ALLY ABDALLAH RAJABU VS SAADA RAJABU [1994] TLR 132** it was held that;

> *"Where the decision of the case is wholly based in credibility of witness/evidence then it is the trial court which is better placed to access their credibility than an appellate court which merely reads their scripts of records."*

Therefore, my assessment of evidence will be based on the records of the proceedings and the analysis of the evidence by the trial Chairman. The issue is whether the appellant who was the applicant, managed to demonstrate the existence of facts which she asserted, and succeeded to discharge the burden of proof by proving that those facts exist. Section 110 (1) of the Evidence Act Cap 6 R.E. 2002 provides that;

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that facts exist."*

Does the evidence on record supports and establishes the appellant's claims? I am of the view that, the appellant's evidence on record does not sustain these claims as averred by her.

As correctly observed by the Chairman, the appellant was duty bound to prove that the respondent did not buy the house in dispute but she put the same on security for loan and that there was a loan agreement between them. However, there is no document showing that there was a loan agreement of Tshs. 3,000,000/= between the parties so that to disprove what has been stated in Exhibit P1 on record. Or as correctly argued by Mr. Rwebangila, there is no documentary evidence on the side of the appellant suggesting that there was a loan agreement between appellant and respondent and the suit property was used as security for the loan.

Furthermore, it is trite law in land disputes, that the conclusive proof of ownership of a property is a document. The respondent has proved ownership of the suit property by producing Exhibit P1. Exhibit P1 is a sale agreement which shows that the suit property was purchased from the appellant on 23rd October 2012 and the same was witnessed by the appellant's children and also witnessed by the Commissioner for Oath one Daudi J. Malima.

The appellant argued that the front page of Exhibit P1 has been changed from the loan agreement to the sale agreement. I do think that the appellant tried to raise the issue of forgery but going through both pages of the Exhibit P1 there is nowhere it reflects that the first page of agreement has been changed. At page 2 of Exhibit P1, the appellant signed as "Muuzaji" and her children as witnesses were referred as

"Mashahidi wa Muuzaji". Also, during the trial, the appellant admitted that she signed the agreement as "Muuzaji" although she maintained that it was a loan agreement.

In such circumstances, it was expected of the appellant to produce her copy of the purported loan agreement to contradict the evidence of the respondent, but she failed to do so. I find that her argument that she did not sell the house in dispute has no basis and I dismiss the first ground of appeal.

On the argument that the assessor's opinion was not considered, appellant submitted that Section 24 of the Land Disputes Act requires the trial Tribunal to take into account the opinion of assessors, something which she argued that the Chairman failed to do. Advocate Rwebangila argued that on page 4 and 17 of the typed judgment, the Chairman pointed that there was no assessors' opinion since assessors were not present at conclusion of the trial due to death and retirement. I would like to reproduce the words under paragraph 6 and 7 of the judgment where the Chairman gave reason on the absence of assessors' opinion;

> **"Siku shauri linaanza kusikilizwa, niliketi na wajumbe wawili ambao ni A. Kinyondo na Bi. Monica Kimwaga kwa kadri ya matakwa ya Kifungu 23 (2) cha Sheria Sura ya 216 .....Hata hivyo wajumbe hawa hawakushiriki mpaka mwisho kutokana na sababu mbalimbali ikiwemo kufariki na kukoma muda wa uteuzi. Hivyo nimeendelea na utatuzi wa shauri hili bila**

ya uwepo wa wajumbe kwa mujibu wa kifungu 23 (3) cha Sheria Sura ya 216...."

These words makes it clear that the two assessors were unable to give their opinion in writings as required by the provisions of Section 24 of Cap 216 since they were not able to proceed with the matter up to the conclusion of the case for the reasons of death and retirement. The law under Section 23 (3) of Cap. 216 provides for the circumstances where the assessors are absent, the Chairman can invoke the cited section and proceed without the aid of assessors. However the reasons should be reflected in his judgment which was done in the judgment as already observed in paragraphs 6 and 7. I also find this ground to have no merit and I dismiss it.

On those findings, I see no reasons to interfere with the decision of the trial Tribunal. The appeal before me lacks merits and is hereby dismissed with costs.

It is so ordered. Right of appeal explained.

Dated at Dar es Salaam this 28th Day of March 2022.

THE HIGH COURT ★ LAND DIVISION ★

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A.MSAFIRI

JUDGE