IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 242 OF 2020

(Arising from Land Application No. 42 of 2020)

FRANCIS JULIAN LUKINDO.....APPELLANT

VERSUS

WILHEM SYLIVESTOR ERIO.....1ST RESPONDENT
DANIEL MUSTAPHA.....2ND RESPONDENT
GREYSON KAJUNA.....3RD RESPONDENT
MAGARE HEZRON.....4TH RESPONDENT
FRANK DANIEL.....5TH RESPONDENT

J U D G M E N T

Date of last Order:02/12/2021
Date of Judgment:28/02/2022

T. N. MWENEGOHA, J:

Francis Julian Lukindo, the appellant herein, dissatisfied with the decision of the District Land and Housing Tribunal for Kibaha at Kibaha (Trial Tribunal) vide Land Application No. 42 of 2016 is now appealing to this Court with the following grounds,

1. That the Honorable trial Tribunal erred in law and fact by reaching into a decision in favor of the Respondents without considering that the dispute land was lawful owned by the Appellant, in the assessment of the evidence tendered and as a consequence thereof her Judgment, Decree and Orders are contrary to law and against the weight of evidence.

2. The Honorable Chairman erred in law and in fact in failing to evaluate evidence on record and erred further by failing to give reasons for his decision that the property in dispute is 2.5 acres.

3. That the trial Court failed to take into consideration that witness for the respondents had their own interest by proceeding to determine the matter without having regard to the mandatory requirement of neutral witnesses.

The appeal was conducted by way of written submissions whereby the appellant was represented by Gasper Henry, Advocate while the respondent was represented by Goodchance R. Lyimo, Advocate.

In his submission in support of appeal Mr. Henry began submitting on the second ground of his appeal that *the Honorable Chairperson erred in law and in fact in failing to evaluate evidence on record and erred further by failing to give reasons for her decision that the property disputed is 2.5 acres.*

He submitted that they have considered it essential to commence with this ground of appeal simply because the lower Court has miserably misapprehended the substance, the nature and the quality of the evidence, hence calling this appellate Court to look at the evidence and make its own finding of facts. He cited the case of **Deemay Daat & 2 Others vs R [2005] TLR 132** where the Court considered at the of lower Court evidence and made its own finding of facts.

He added that in light of the above principle used in the cited case the trial Tribunal judgment did not deal with all facts and evidence which were given at the trial. He alleged that the Tribunal failed to address the size of the land as the discussion was that of 3.5 acres of land but in her decision the Chairman discussed only about 2 ¼ acres which in reality the land in dispute

is 3.5 acres. He submitted further that the trial Tribunal deliberately negated all necessary facts which were recorded by the Tribunal in the proceedings and delivered a judgment based on matters outside the proceedings. He therefore invited this Court to look at the evidence and make its own finding of facts.

In his submission the appellant alleged further that some defects are evidence in the judgment such as at page 4-8 of the typed judgment of the Trial Tribunal where the trial Chairperson stated that she took into consideration the Applicants evidence however there is no paragraph that considered the evidence of Second Applicant, and wondered how the Tribunal reached its conclusion without even hearing the person who alleged.

He pointed another defect to be mix up of the facts and questioned that if the 1st applicant bought the land since 1992 why did he decided to start selling in 2012. He argued that the trial Chairperson missed a point by holding that it was right for the First Applicant to prove Sale Agreement documents while in reality it is not his property.

He also submitted that the Trial Tribunal should have held that the 2nd and 4th Applicants should have sued the seller. He added that also at page 10 of the judgment that the Respondent was not given a chance to bring witnesses to testify, thus he was denied his right to be heard.

He then proceeded to argue the 1st and 3rd ground of appeal together and submitted regarding the assessment of evidence that it is clear that the trial Tribunal did not correctly assess the evidence given by the parties hence resulted for the Judgment to be considered bad in law.

He referred to page 9 of the judgment, and argued that the trial Chairperson did not state who is Second Applicant, and referred to no name or anything

to identify the second applicant, to him this indicates that the evidence given by the parties was not properly assessed and that Second Applicant never tendered his evidence.

He also referred to Paragraph 2 of page 13 of the Judgment, that the trial Chairperson did not state the names of the individual who cross examined the Applicants or even the Respondent. He submitted that it is important in the writing of the Judgment for every stage of hearing to be given enough weight in the assessment of evidence. Therefore, page 13 of the Judgment is enough proof of failure of the Chairperson in analyzing of the evidence tendered by parties.

He cited the case of **Nelson vs. Attorney General. Civ. Appeal No. 24 Of 1999 (Court of Appeal of Tanzania)** (Unreported), where among other things the Court had this to say was: -

> *"...a judgment must convey some indications that the Judge or Magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion has been ignored."*

He submitted that failure to give analysis of evidence therefore, renders the Trial Chairperson's judgment null and void. It was his submission that the evidence given by the Appellant herein was not properly assessed on record. He provided that this is evidenced further in Paragraph 2 of Page 14 of the Judgment in which the trial Tribunal stated that; *the Respondent had no evidence tendered to prove that his parents purchased the suit land.'*

It was his submission that due to failure in evaluating the evidence given by the parties at the trial Tribunal by the Chairperson, then there is a need of reevaluation of evidence, which should be done before this Court for purpose

of ensuring fair trial.

It was the appellant's further submission that as the trial Chairperson has failed to evaluate evidence on record, she has therefore erred, further by failing to give reasons for her decisions. He submitted that the Chairperson did not answer the issue of who is the lawful owner and left the matter hanging without analyzing the evidence produced by both sides. As a result, no conclusion was given with regard to that issue as evidenced at page 15 - 17 of the Judgment where there were no reliefs granted and no conclusion if the suit has been dismissed or not.

He then cited **Order XX Rule 4 of The Civil Procedure Code [Cap 33 R. E. 2002] and Order XX Rule 5 of The Civil Procedure Code [Cap 33 R. E. 2002]** and proceeded to pray that this Court set aside the entire proceedings of District Land and Housing Tribunal for Kibaha at Kibaha vide Land Application No. 42 of 2016 and issue and an order for trial De Novo and the Appellant's original prayers be granted.

In reply Mr. Lyimo started by responding to the second ground of appeal submitted and argued that the Respondents refutes all submissions made regarding this ground and submits that, the lower Tribunal did evaluate the evidence on record and reached to safer findings that the disputed land is measured 2 ¼ (Two Acres and Quarter) acres and not allegedly 2.5 acres by the Appellant.

He added that the basis of the lower Tribunal findings was corner- stoned vide exhibit P1 (sale agreement dated 7th November, 1992 between the 1st Applicant/Respondent herein and one Rashidi Lukombe who was the lawful owner by then) which had disclosed the size of the suit land and it was later fortified through the testimony of PW2 a very close ally of the said seller as can be garnered from pages 4 in 1st paragraph, 5 in 2nd paragraph, 6 in 3rd

paragraph and the holding at pages 13 and 14 of the said typed decision.

He added further that a plea was made regarding 2nd Respondent's (2nd applicant in the Tribunal) inability to proceed with matter due to his other engagement which prayer was granted and his case was dismissed as can be seen at 2nd paragraph 7th page of the decision and thus his evidence was not taken aboard as indicated by the Appellant.

Regarding the contradiction of time of sale, as to whether it was 1992 or 1993 and that the allegedly owner was dead and thus his estate was to accord probate administration he replied that no contradiction whatsoever was made and that the trial Tribunal was satisfied by the testimony of PW2 that the seller Rashid Lukombe is a deceased by now and not at the material time of execution of the said agreement. Further, regarding the time of sale, the Tribunal was of the view that if the sale was executed in 1992 between the 1st Applicant and Rashid Lukombe, the said Lukombe had nothing to transfer the same to the Appellant's father (even his name was not disclosed) under the doctrine embodied in Latin Maxim Nemo Dat Quod Non Habet and in obedience to the judicial pronouncement of the case of **Farah Mohamed vs. Fatuma Abdallah 1992 TLR 208.**

On the question that the other respondents should have sued the 1st Respondent he replied that cause of action is the fundamental root upon which the claim is based against the violator and thus it is on this basis the Applicant/Plaintiff form an opinion and decide as to who is to be impleaded in a suit under the principle of *DOMINUS LITIS* (to mean the Applicant/Plaintiff is the one to decide who to sue) and that he cannot be forced to sue a person who they does not wish to sue as also celebrated by *Odungas' Digest on Civil Case Law and Practice Vol. Ill at page 3055* and *Mula Code of Civil Procedure by Sir Dinshan Fardunji Mulia, 18th Ed, 2011 at*

page 1521 in which Mulla holds as follows;

> *"Plaintiff is the dominus litis, he cannot be compelled to sue a person whom he does not claim any relief....."*

He added that since the other Respondents were not in tag of war or in rival of ownership with the 1st Respondent over the suit land, there was no need of them to sue him but rather suing the Appellant for his trespass action and hence this salient feature is unwarranted.

On the issue of right to be heard he submitted that the Appellant was afforded right to be heard including presenting his intended witnesses during the trial but for reason reserved to himself he slept on his right as for several occasions, the Tribunal had been lenient enough adjourning the matter at his instances whereby thereafter the Hon Chairperson decided to take a firm control of the proceedings and continued with the matter inter-parties as can be grasped at page 10 of the typed decision.

He then cited the case **Halfani Sudi vs. Abieza ChichiBi [1998] TLR. 527** where it was held that:

> *(i) "A Court record is a serious document; it should not be lightly impeached.*
>
> *(ii) There is always a presumption that a Court record accurately represents what happened."*

He therefore invited this Court to dismiss this ground with costs for being baseless as the evidences were filtered and evaluated in accordance with the law and therefore no misdirection and misapprehension of evidence ever committed by the trial Tribunal in the whole of its decision.

Replying in support of the 1st and 3rd ground of objection he submitted that these grounds are not differently with the 1st ground of appeal as the same

are tilting on failure to assess evidence, and more so, extends to the issue of ownership, reliefs and points for determinations. It was his submission that the lower Tribunal had assessed the evidence regarding ownerships of the suit land and undoubtedly ruled that the suit land is owned by the 1st Respondent, 3rd Respondent and 4th Respondent pursuant to the evidences and testimonies given during the trial as can be obtained vide Exhibits P1, P2 and P3 and been held at pages 12 and 16 Clause 2, 3 and 4 of the said decision which the tribunal was persuaded by PW1, PW2 and PW5.he submitted further that ownership of the Appellant was assessed to the great significant and the Tribunal was of the firm stand that the Appellant had failed to rebut the Applicants' case as there was no iota of evidence before the tribunal substantiating and proving his father's purchase of the suit land and no deed of gift was ever tendered to support his evidence in line with Section 64 (1) (a) of the Land Act Cap 113 R. E. 2019 which entails reducing the agreement for disposition of land into writings.

He submitted that the Appellant failed to tender evidence in proving ownership and therefore were disregarded to form part of the record of the Tribunal for being un-admitted as evidence in obedience to Order XIII Rule 4(1) and Rule 7(1) and (2) of the Civil Procedure Code Cap 33 R. E. 2019 and also as enumerated by Hon Justice Mgonya J. in Land Appeal No; 112/2017 between **Maynard Lugenja and Kinondoni Municipal Council & Another (Unreported)** at pages 5 and 6 of the typed decision and the case of **Godbless Jonathan Lema vs. Mussa Hamisi Mkanga And 2 Others, Civil Appeal No. 47 Of 2012 (Unreported)** where it was held that;

> *"Annexures attached to the plaint or written statement of defense are not evidence".*

He submitted further that throwing a glance at the record and the application pleading, it is undeniable fact that the cause of action pursued is trespass by the Appellant in the entire suit area which affected all the Respondents and the reliefs claimed were to issue declarations of trespass against the Appellant and ownership of the Respondents and hence, the Respondents had common cause of action against the Appellant which the application was fit case for determination by the said Tribunal.

He concluded by praying this Court to dismiss the appeal with costs and uphold the Tribunal's decision.

In rejoinder Mr. Henry began by reiterating his submission in chief and added that despite the fact that it is not the Appellant's duty to remind the Tribunal that property was owned by his father as the documents tendered before the Tribunal were direct proof the matter was supposed to be attended by an Administrator of JULIAN KIBINDO LUKINDO that the sentence of FRANCIS JULIAN LUKINDO in Swahili *"Shamba tuliachiwa na baba yetu"* was enough for Chair Person of the Tribunal to direct Administrator to attend in that Tribunal.

Having heard submission from both parties, I know have to determine whether the appeal has merits.

My analysis will be guided on the mode of argument opted by the parties, whereas I will begin with the 2nd ground of appeal then 1st and 3rd grounds of appeal together.

On the 2nd ground of appeal *that the Honorable Chairman erred in law and in fact in failing to evaluate evidence on record and erred further by failing to give reasons for his decision the property dispute is 2.5 acres,* Mr. Henry challenged the decision of the trial Tribunal for failure to evaluate evidence,

he pointed what he thought is a weakness on the Court in evaluating the respondent's evidence. He also addressed this Court on the fact that he was not given the right to be heard. To this Mr. Lyimo denied vehemently and argued to support the decision of the Tribunal.

My findings to this will be brief as I have gone through the record of this appeal and the records reveals that the applicants presented five witnesses including the 1st, 3rd and 4th respondents herein. It is also noted that the 2nd Respondent testified that he witnessed the first sale of land to the 1st Respondent herein when it was one whole area before it being divided into small plots which were sold to other Respondents. This narrative was backed up with three sale agreements presented to Court.

On the other hand, the Respondent who is the appellant herein was the only witness who testified in the Trial Tribunal and he did not tender anything to back up his narrative. He alleged to be given the suit land by his father, however, he did not tender any evidence to the effect or to prove that his father owned the said land. There isn't even a proof that his father is now deceased.

It is clear from the above that the Trial Chairman guided by **Section 110 of the Evidence Act cap 6 R. E. 2002** which shift the burden of proof to the one who alleges and taking into consideration to the available evidence proceeded to give judgment in favor of the respondents herein. It is evident that the evidence and testimony presented by the respondents herein was heavier that of the appellant herein and they proved their allegations.

It seems the Chairman used the cardinal principal in measuring weight of evidence, weighed the evidence presented before him and the one with heavier evidence was pronounced to be the winner. This position was well

stipulated 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 have gone through the records and they reveal that the appellant was given an opportunity to present his witnesses and evidence to prove his case before the Tribunal. He promised to present them but failed to do so in two consecutive sessions without sufficient reasons. This made the Chairman TO close his case and proceed for judgment. Thus, the appellant was granted his right to be heard however he did not exercise it. The Trial Tribunal was forced to presume that the appellant had nothing to present. This presumption is commonly known in the Court as held in the case of **Aziz Abdallah v R [1991] TLR.** In the said case 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."*

Also, in the case of **Hemedi Saidi (supra)** it was observed that;

> *"Where for undisclosed reasons, a party fails to call material witnesses on his side, the Court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests"*

Despite the weakness in evidence tendered if at all exist, when weighing the

evidence between the two parties the respondents herein still have strong evidence compared to the one presented by the appellant herein. The Trial Tribunal would have no any other option than to grant the application as the respondents' evidence carried more weight than that of the appellant.
Having said this, I find the appellant 2nd ground of appeal to have no merit.

Regarding the 1st and 3rd ground of appeal that *the Honorable trial Tribunal erred in law and fact by reaching into a decision in favor of the Respondents without considering that the dispute land was lawful owned by the Appellant, in the assessment of the evidence tendered and as a consequence thereof her Judgment, Decree and orders are contrary to law and against the weight of evidence* and that
the trial Court failed to take into consideration that witness for the respondents had their own interest by proceeding to determine the matter without having regard to the mandatory requirement of neutral witnesses,
I agree with Mr. Lyimo that this ground is centered on assessment of evidence and the relief granted. To recap, Mr. Henry challenged the Chairman for not properly analyzing evidence, and that the Chairman did not state who is the 2nd applicant, and that there is no answer as whether the application is dismissed or what.

On the issue of whether the Chairman analysed evidence properly, my findings to the 2nd ground have already addressed this point, and moreover, the record is clear that the applicants at the trial Tribunal presented their case and their witnesses testified before the trial Tribunal while the Respondent did not prove any of his allegation at the Tribunal, the decision would have been different if he would have presented anything to disprove the applicants evidence. It is trite law that in proof of ownership in disputes where a competing party has a document for proof and another party has

nothing, then the holder of the document would have more weight. The appellant herein had no evidence/document to substantiate his case.

The appellant further alleged not to understand the findings of the Court, whether the application was dismissed or not. For easy reference I am reproducing the finding of the Trial Tribunal,

> *"In the light of above findings, I hereby issue the following disposal orders in the suit;*
>
> 1. *The applicants' application has merits, the same is allowed with costs to the 1st, 3rd and 4th applicants"*

The above quoted part of the judgment speaks for itself that the application was found to have merits and it was allowed. The trial Tribunal went further to grant relief to the 1st, 3rd and 4th applicant as they prosecute their case. Thus, the two grounds have no merits.

Having said that I find the appeal to have no merits and it is hereby dismissed with costs.

It is so ordered.

Dated **at** Dar-es-Salaam this **28** day of **February, 2022.**

T. N. MWENEGOHA

JUDGE