**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 1 OF 2022**

*(Arising from judgment and decree of the District Land and Housing Tribunal for Temeke at Temeke in Land Application No. 214 of 2017 dated 20th December 2021)*

**MOHAMOOD AHMED.....APPELLANT**

**VERSUS**

**JAFFARI HUSSEIN.....1ST RESPONDENT**

**IDD ATHUMANI ABDI.....2ND RESPONDENT**

*Date of last order: 10/5/2022*

*Date of Judgment: 31/5/2022*

**JUDGMENT**

**A. MSAFIRI, J.**

Before the District Land and Housing Tribunal for Temeke District at Temeke (the trial Tribunal), the 1st respondent instituted land application No. 214 of 2017 against the appellant and the 2nd respondent, seeking for reliefs *inter alia* to be declared a bona-fide purchaser of a landed property described as Parcel of Land No.TMK/BUZ29/303B located at Buza Makangarawe, Temeke Municipality (the suit premises).

The appellant and the 2nd respondent disputed the 1st respondent's claim in their respective written statements of defence. In addition, the appellant raised a counter claim against the 1st respondent in which he claimed to be the lawful owner of the suit premises and furthermore prayed for *mesne profit* at the tune of Tsh. 20,000,000/= arising from the 1st respondent's occupation of the suit premises.

Having heard the parties, the trial Tribunal on 20/12/2021 decided in favor of the 1st respondent and declared him to be the bona-fide purchaser of the suit premises. The trial Tribunal further declared the sale agreement between the appellant and 2nd respondent over the suit premises to be invalid. The counter claim raised by the appellant was also dismissed for lack of merits.

The appellant was aggrieved with the judgment and decree of the trial Tribunal hence he lodged the present appeal with seven (7) grounds of appeal as follows;

1. *That the trial Tribunal erred in law and in fact by declaring the 1st Respondent to be the lawful owner of the suit property without considering the fact that the 1st respondent was the one who* Ads.

*breached the agreement of sale of the disputed property by failure to pay the purchasing price.*

2. *That the trial Tribunal erred in law and fact by declaring the 1st respondent to be a bona-fide purchaser without taking into consideration of the fact that he does not qualify to be the same.*
3. *That the trial Tribunal erred in law and fact by declaring the 1st respondent to be the lawful owner of the suit property without considering the fact that the appellant was a bona-fide purchaser of the suit property, hence the latter should have been declared the lawful owner of the suit property.*
4. *That the trial Tribunal erred in law and fact by failure to write assessors' opinion in the proceedings and judgment and nowhere he explained as to why he decided to depart from the assessors' opinion if any was given in the presence of the parties.*
5. *That the trial Tribunal erred in law and fact by admitting evidence regarding the respondent's business partnership and went on to decide on the basis of that piece of evidence without taking into consideration that the same were not pleaded in the 1st respondent's land application and wasn't registered.* Aells.

6. *That the trial Tribunal erred in law and fact by failing to evaluate the evidence adduced by the appellant and 2nd respondent and went on to formulate its own evidence which was not adduced by the parties to the suit, hence arriving at the wrong decision.*
7. *That the trial Tribunal erred in law and fact by failing to follow the due procedures in the trying the case (sic) hence arriving at the wrong decision.*

On 28th March 2022, this Court ordered the appeal to be disposed of by way of written submissions whereas Maunda Raphael and Kambibi Kamugisha learned advocates appeared for the appellant and the 1st respondent respectively. The 2nd respondent had no legal representation. Parties duly complied with the scheduling order hence this judgment.

Before going to merits of the present appeal, it is imperative to state a brief background. The 1st and 2nd respondents have known each other since 1998 in which the 1st respondent owned several motor vehicles hence he employed the 2nd respondent as a supervisor. It transpired later that, the 1st respondent sold his motor vehicles and he teamed up with the 2nd respondent and started another business of food and drinks at Mwembeyanga, Temeke.

It was claimed by the 1st respondent that, through their business they managed to buy a piece of land situated at Buyuni, Ilala in 2008 and later on they purchased another piece of land situated at Buza in 2011 (the suit premises). According to the 1st respondent, through the profit collected from the business he was running jointly with the 2nd respondent, they constructed a house on the suit premises although it was not finished. Although they jointly purchased the landed property as indicated, the same were registered/purchased in the name of the 2nd respondent. The 2nd respondent seemed to disagree with 1st respondent by stating that the landed property in question the suit premises inclusive are his personal property which he duly acquired in his own name.

Now things went smoothly until 2013 when it was alleged that the 2nd respondent applied for a loan from EFC Microfinance and he pledged as security the suit premises. Having defaulted in paying the loan, the respondents concluded an agreement to dispose the suit premises and the 1st respondent agreed to purchase the property through an agreement concluded on 25/2/2013 and witnessed by PW2. Through the said agreement, the 1st respondent agreed to purchase the suit premises at TZS 30,000,000/= whereby there was a debt owed to the 2nd respondent at the

tune of TZS 11,400,000/=, a sum of TZS 10,000,000/= was paid on the date of signing of the said agreement and TZS 8,600,000/= was to be paid on or before 30/10/2013.

The 1st respondent was later arrested in 2013 after being accused of murder but was released in 2017. It was during the 1st respondent's incarceration that the 2nd respondent disposed of the suit premises to the appellant in June 2016. Upon being released the 1st respondent took over the suit premises and it is where he has been living since 2017. The 1st respondent demanded the ownership documents from the 2nd respondent so that he could transfer the suit premises in his name but the 2nd respondent refused to surrender the documents the fact which culminated to the filing of the application before the trial Tribunal.

I have gone through the submission in support and rival to the grounds of appeal, in determining them I propose to begin with grounds 4 and 7 of appeal. These grounds have been consolidated and jointly argued by the appellant.

Submitting on grounds 4 and 7, the appellant contended that the assessors' opinions were not stated on both the proceedings and the

judgment of the trial Tribunal. Similarly the reasons for consideration or departure from the assessors' opinions were not stated which is a requirement of the law.

The appellant has cited the decision of this Court in **Matilda Matigana v Peter Kiula & 3 others** Land Appeal No 197 of 2020 in which the Court underscores that reasons to depart from the opinions of the assessors have to be stated.

On reply, the 1st respondent contended that the appellant's claims are not true because the trial Chairperson considered the assessors' opinion in the judgment hence the legal procedure was complied with. The 1st respondent submitted further that the trial Chairperson was not bound by the opinion of the assessors.

As to the 2nd respondent he supported the appeal in its totality.

Having carefully gone through the submissions of the parties and the trial Tribunal's record, it is indicated that 24th August 2021 was a date fixed for the assessors to give their opinion. It is indicated that the two assessors namely Zella Chuma and Joseph Mwaisongela read their opinion and it was

summarized by the learned trial Chairman and thereafter the matter was subsequently set for delivery of the judgment.

According to section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 R.E 2002 [now R.E 2019] provides for composition of the District Land and Housing Tribunal in the following terms: -

*1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.*

*(2) The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment".*

I wish to observe that the form and language in which the assessors are required to give their opinion is also provided under Regulation 19 (2) of the Regulations which provides:

*"Notwithstanding sub-regulation (1) the Chairman shall before making his judgment, require every assessor present*

*at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"*

I have gone through the trial Tribunal's record, and I have seen the assessors' opinion in writing. Each copy of the opinion was also signed by the respective assessor. Hence apart from the fact that the opinions were read in the presence of both parties as clearly reflected on the record, the same was issued in writing. What is mandatorily required by Regulation 19 (2) of the Regulations is that firstly the opinion must be in writing and the said opinion must be delivered before the judgment in the presence of the parties.

That requirement was underscored in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017(unreported), cited in **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported) the Court of Appeal of Tanzania while dealing with an akin situation had this to say:

*In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, ... they must actively and effectively participate in the proceedings so as*

*to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing,* ***such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion*** *and whether or not such opinion has been considered by the Chairman in the final verdict" [Emphasis added]*

I am of the settled mind that there was substantial compliance with Regulation 19 (2) because not only the opinion was issued in writing but also was read in the presence of the parties. Now the appellant's assertion that the assessors' opinion weren't stated is not supported by the record. Moreover I wish to point out that there is no requirement for the assessors' opinion to be reproduced in the judgment.

As to whether the assessors' opinions were considered by the trial Chairperson, it is on record that the two assessors unanimously opined that the 1st respondent's claims had no merits hence he should be ordered to vacate from the suit premises. However the learned trial Chairperson

disagreed with the assessors' opinion and the reason by the learned Chairperson was to the effect that the suit premises has already been disposed to the 1st respondent as per the agreement which was executed between the 1st and 2nd respondents. Hence according to the trial Chairperson, the 2nd respondent could not legally dispose the suit premises to the appellant.

It should be noted that the trial Chairperson is not bound by the assessors' opinion provided that reasons to the effect have to be stated. In the present matter, as I have stated before, the reasons for departing from the assessors' opinion were stated. Whether the reasons by the learned trial Chairperson were correct or not is a separate aspect. Suffice it to say there was substantial compliance with the law regarding delivery of the assessors' opinion. Consequently the 4th and 7th grounds of appeal are without merits and are hereby dismissed.

The appellant has consolidated grounds 1, 2, and 3 together as they are interrelated. The appellant faults the trial Tribunal in its findings that the 1st respondent was a bona-fide purchaser of the suit premises. The appellant submitted that he purchased the suit premises from the 2nd respondent on 3rd June 2016 after having conducted official search at Temeke Municipal

and respective local government where the suit premises are situated and he found that the suit premises were registered in the name of the 2nd respondent. The sale agreement and the residential licence were tendered as exhibit D1 and D2 respectively.

The appellant submitted further he was informed by the 2nd respondent that the suit premises were pledged as security for loan with EFC Microfinance and by that time the outstanding loan amount was TZS 20,000,000/=. Hence, the 2nd respondent disposed of the suit premises to the appellant at the tune of TZS 35,000,000/= whereby a sum of TZS 20,000,000/= was paid directly to EFC Microfinance so as to discharge the mortgage over the suit premises and the other TZS 15,000,000/= was paid to the 2nd respondent.

The appellant submitted further that he was never told anything about the 1st and 2nd respondents' business arrangements over the suit premises. Hence the appellant contended that trial Tribunal should have declared him as the bona fide purchaser and not the 1st respondent.

The appellant submitted that although there was an agreement between the 1st and 2nd respondents in which the suit premises were to be

purchased by the 1st respondent at the consideration of TZS 30,000,000/= it is the 1st respondent who breached the agreement for not paying the remained balance of TZS 8,600,000/= hence the 2nd respondent was justified in disposing the suit premises to the appellant. The appellant has referred to me the case of **Millan Richard v Ayub Bakari Hoza** [1992] TLR 385 in which it was held that;

*"Failure to pay the balance of the price within the two months stipulated in the agreement constituted breach."*

On reply, the 1st respondent contended that he agreed to purchase the suit premises at the consideration of TZS 30,000,000/= and he had already paid a sum of TZS 22,000,000/=. The 1st respondent readily conceded that he did not pay the remained balance of TZS 8,000,000/= because he was arrested for allegations of murder from 2013 to 2017. The 1st respondent submitted further that the agreement entered between the appellant and the 2nd respondent was void because it was induced by the EFC bank staff however he could not mention his/her name.

The central issue for my determination in respect of grounds 1, 2 and 3 of the appeal is whether the learned trial Chairperson was legally correct

in declaring the 1st respondent as a bona-fide purchaser of the suit premises. In determining this issue, it should be reckoned that the assessors unanimously opined that the 1st respondent be ordered to vacate the suit premises. Also it should be borne in mind that the 1st respondent had attempted to purchase the suit premises in 2013 prior the same to be disposed to the appellant in 2016.

The trial Tribunal declared the 1st respondent as a bona fide purchaser of the suit premises after referring to the case of **Suzana S. Waryoba v Shija Dalawa,** Civil Appeal No. 44 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) in which a bonafide purchaser is defined as;

> *"A bona-fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, a bona fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not purchaser, and the purchaser would be allowed to retain the property"*

In another decision referred to by the appellant in his submission, **Evarist Peter Kimathi & another v Protas Lawrence Mlay** Civil Appeal No. 3 of 2000 Court of Appeal of Tanzania at Arusha, (unreported) the term bona-fide purchaser while referring to **Black's Law** Dictionary was defined to mean;

> *One who has purchased property for value without any notice of any defects in the title of the seller, and one who pays valuable consideration, has no notice of outstanding rights of others and acts in good faith"*

Now there was no reason assigned by the learned trial Chairperson as to why the 1st respondent was a bona-fide purchaser of the suit premises. It has not been stated as which defects the suit premises had that were not made known to the 1st respondent prior purchasing the suit premises. The 1st respondent was very much aware of the existence of the loan with EFC Microfinance and that's why together with the 2nd respondent planned how to settle the loan. After all the agreement for purchasing of the suit premises between the 1st and 2nd respondents was never accomplished because the 1st respondent did not pay the whole

purchasing price the fact which was readily conceded by the 1st respondent.

I am of the settled opinion that it was the appellant who was the bona-fide purchaser of the suit premises. The reason to this finding is that he was only made aware of the pending outstanding loan with EFC at the tune of TZS 20,000,000/= which he duly paid and the other amount of TZS 15,000,000/= was paid to the 2nd respondent. The appellant was not aware if there was an attempt to dispose the suit premises to the 1st respondent. He had no notice as whether the 2nd respondent had received part payment from the 1st respondent being the purchase price of the suit premises. Hence clearly the appellant purchased the suit premises without notice of any claim of interest from the 1st respondent over the suit premises. Hence I find merits in grounds 1, 2 and 3 of the appeal.

I will determine grounds 5 and 6 as they are all about failure of the trial Tribunal to analyze the evidence on record. The appellant contended that the trial Tribunal admitted evidence regarding the respondents' business partnership while the same were neither registered nor pleaded. The appellant further contended that the trial Chairperson considered annexures JH1 & JH2 which were not even tendered as exhibits during the

trial. Moreover the appellant contended that such documents were not admissible for non compliance with the Stamp Duty Act [CAP 189 2019]. As failure to analyze the evidence on record, the appellant faults the trial Tribunal for not taking into account the evidence of the appellant and the 2nd respondent. Similarly the appellant contended further that the trial Tribunal did not take into account the fact that it is the respondent who breached the agreement for not paying the outstanding amount at the tune of TZS 8,600,000/=.

The 1st respondent's reply in respect of grounds 5 and 6 of the appeal is that, the trial Tribunal evaluated the testimony and exhibits tendered before it as required by the law. The 1st respondent further contended that the appellant ought to have challenged the admissibility of the documents before the trial Tribunal.

I will begin with the propriety of what has been named as exhibit AN-1 and AN-2, which are annexure, JH1 and JH2. These two documents have been relied upon heavily by the learned trial Chairperson to base his decision. I have gone through the record but I could not see where exhibit AN-1 was admitted as documentary evidence. Similarly the agreement entered between the respondents on 1/1/2013 was admitted as exhibit

AN2. Although the document dated 1/1/2013 can be found in the record the same was never endorsed by the learned trial Chairperson. It is for that reason I hold that nothing was properly admitted as exhibit AN1 and AN2. The said documents were wrongly admitted and relied upon by the learned trial Chairperson.

As to the issue of not properly analyzing evidence on record, I agree with the appellant that the learned trial Chairperson did not analyze the evidence on record particularly whether the 1st respondent was entitled to be declared a bona-fide purchaser of the suit premises.

I have noted another aspect which was not taken into consideration by the learned trial Chairperson. It is on record that 1st respondent had agreed to purchase the suit premises at the tune of TZS 30,000,000/=. He managed to pay a sum of 21,400,000/= whereas 11.4 M was set off and 10,000,000/= was paid in cash. The 1st respondent did not pay the full amount as TZS 8, 600,000/= remained unpaid. This fact is being admitted by the appellant and the 2nd respondent both at the trial Tribunal as well as in the present appeal. For instance the 2nd respondent (DW1) while being re-examined by his advocate had the following to say;

*"The sale of the house between me and the applicant was made February 2013. It was at the tune of* TZS *30M. The mode of payment was by set off* TZS *11.4M and he paid* TZS *10M cash. There remained* TZS *8.6M which was to be paid before 30/10/2013... By 30/10/2013 the applicant had not paid the said amount on the reason best known to him..."*

I am of the settled mind had the learned trial Chairperson evaluated and analyzed the evidence on record he would have come to a different conclusion, that because the 1st respondent had not paid the purchase price in full, the 2nd respondent was entitled to dispose of the suit premises to the appellant. However as the 2nd respondent had received some money from the 1st respondent purposely to purchase the suit premises, the 2nd respondent ought to have refunded to the 1st respondent the sum of money he had received because the suit premises could no longer be sold to the 1st respondent.

Since the 1st respondent paid a sum of TZS 21,400,000/= to the 2nd respondent as purchase price of the suit premises, however 11,400,000/= was a set off of the debt owed to the 2nd respondent, fact which is

conceded by the 2nd respondent, hence the 1st respondent is entitled to be refunded TZS 21,400,000/=.

Consequently this appeal has merits. The judgment and decree of the trial Tribunal are hereby quashed and set aside. In lieu thereof judgment on appeal is entered as follows;

i. *The appellant is declared as a bona-fide purchaser of the suit premises.*

ii. *The 2nd respondent is hereby ordered to refund to the 1st respondent a sum of* TZS *21,400,000/= (twenty one million four hundred thousand shillings only) being an amount which was paid by the 1st respondent to purchase the suit premises.*

iii. *No order as to costs.*


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**A. MSAFIRI.**

**JUDGE**

**31/5/2022**