IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 284 OF 2021

(Arising from judgment and decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 279 of 2017)

HANNA SWAHIBA MAPALALA and **BENARD JAMES MAPALALA** as joint administrators of the estate of the late **JAMES MAPALALA.....APPELLANTS**

VERSUS

MONICA LWEBANDIZA.....RESPONDENT

Date of last Order: 28/4/2022
Date of Judgment: 18/5/2022

JUDGMENT

A. MSAFIRI, J.

Before the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (the trial Tribunal), the respondent lodged Land Application No. 279 of 2017 against the appellants alleging them to have trespassed on the respondent's land situated on Plot No. 404 Ursino North, Kinondoni Municipality in the City and Region of Dar es Salaam (the suit land). The respondent therefore claimed against the appellants for the following reliefs;

i. *Eviction of the appellant from Plot No. 404 Ursino North, Kinondoni Municipality DSM.*

ii. *Demolition of all structures erected to the suit premises.*

iii. *Costs of the application be provided for by the appellants.*

iv. *Any other relief(s) which the Tribunal may deem fit and just to grant.*

The appellants disputed the respondent's claim in their written statement of defence.

Having heard the parties, the trial Tribunal on 1/11/2021 decided in favour of the respondent and ordered the appellants to vacate from the suit land. Furthermore, the trial Tribunal ordered the appellants to pay the respondent USD 250 every month from 1/8/2013 to the date on which the appellants will vacate the suit land.

The appellants were aggrieved with the judgment and decree of the trial Tribunal hence they lodged the present appeal with four (4) grounds of appeal as follows;

1. *That the trial Tribunal erred in law and in fact in failing to give an opportunity to assessors and to opine as required by the law that*

opinion of assessors must be given publicly before the pronunciation of judgment thereto.

2. *That the trial Tribunal erred in law and in fact in deciding that issue of ownership was already determined by Kinondoni District Court at Kinondoni while the decision made did not declare the respondent as rightful owner of property which is situated at Plot No. 404 Ursino North Kinondoni Municipality, Dar es Salaam.*
3. *That the trial Tribunal erred in law and in fact in failing to assess, examine and scrutinize the evidence adduced by the appellants which stated clearly that the appellants herein were properly (sic) in the property which is situated at Plot No. 404 Ursino North Kinondoni Municipality Dar es Salaam.*
4. *That the trial Tribunal erred in law and in fact in awarding the payment of USD 250 per month to the respondent while there was no evidence adduced by the respondent justifying the payment of the awarded amount by the Trial Tribunal.*

On 15th March 2022, this Court ordered the appeal to be disposed of by way of written submissions whereas Messrs. Kusalika and Francis Mgare

learned advocates appeared for the appellant and respondent respectively. The order was duly complied with by the parties hence this judgment.

Submitting on the 1st ground of appeal, the appellant contended that the assessors were not accorded an opportunity to give their opinion. The appellant submitted further that in the judgment, the trial Tribunal is quoted to referring to the assessors' opinion but it has not been indicated as to when and where the assessors gave their opinion.

The appellant has referred the decision of the Court of Appeal of **Edina Adam Kibona v Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 Court of Appeal of Tanzania at Mbeya (unreported) in which the Court observed that the Chairman must require every assessor to give his opinion. It may be in Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed. The appellant contended further that as the law pertaining to the assessors' opinion was not complied with then the proceedings are null and void.

Replying on the first ground of appeal, the respondent contended that the appellant's argument is not supported by the trial Tribunal records because after hearing the parties, the trial Tribunal fixed a date for the

assessors to give their opinion and thereafter the Tribunal pronounced its judgment. The respondent submitted further that Regulations 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN 174 of 2003 (the Regulations) only requires the assessors' opinion to be given in writing and there is nowhere it is required such opinion to be pronounced in the presence of the parties.

The respondent submitted further that, demanding the assessors to give their opinion in the presence of the parties is to demand much from them suffice it to say that the only requirement is for the assessors to give their opinion in writing and the Chairman has to take into account the assessors' opinion while composing the judgment.

The respondent contended that the decisions referred by the appellant were decided before the inception into our laws the overriding objective principle in 2018 which requires courts of law or tribunals to decide cases on merits rather than on technicalities.

The appellant did not file any rejoinder.

Having carefully gone through the submissions of the parties, I have gone through the trial Tribunal's record, it is indicated that on 29th October

2021 was a date fixed for the assessors to give their opinion. It is indicated that the two assessors read their opinion and the matter was subsequently set for delivery of the judgment.

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 thoroughly gone through the trial Tribunal's record, although the documents were haphazardly arranged, I could locate 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. Hence it is for that reason the first ground of appeal lacks merits and it hereby dismissed.

However, I wish to point out that the respondent submitted that there is no requirement for the assessors to give their opinion in the presence of the parties rather they are required to give the opinion in writing and the Chairman has to take such opinion into account while composing the judgment. I differ with that view and I hold that it is a mandatory requirement that, to ensure openness and fairness it is imperative that the assessors' opinion be read in the presence of the parties.

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"*
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> *[Emphasis added]*

See also the recent decision of the Court of Appeal in **Emmanuel Oshoseni Munuo v Ndemaeli Rumishaeli Massawe,** Civil Appeal No. 272 of 2018 Court of Appeal of Tanzania at Arusha (unreported).

On the second ground of appeal, the appellant faulted the trial Tribunal for deciding that the issue of ownership of the suit land was already determined by Kinondoni District Court while in that decision there is nowhere the respondent was declared a lawful owner. The appellant has

submitted at length, faulting the propriety of the District Court proceedings for not joining the necessary parties.

The respondent on reply submission contended that the issue of ownership had already been determined by the District Court and the respondent was declared as a bonafide purchaser. As to the non-joinder of parties, the respondent submitted that if the appellant was aggrieved with the judgment of the District Court he ought to have appealed against the same.

In determining the 2nd ground of appeal, I have gone through the judgment of the District Court of Kinondoni at Kinondoni (the District Court) which was tendered before the trial Tribunal. It is on record that the appellant instituted a Civil Case No. 171 of 2003 before the District Court against the respondent herein in which among other reliefs, the appellant prayed to be declared as a rightful owner of the suit land.

It is on record that, the appellant had occupied the suit land but sometimes later he decided to give a portion of it to one Timoth Joseph Kassella (the appellant's brother). This was done after the appellant had written to Kinondoni Land Office requesting for the land to be subdivided.

The request for such subdivision was granted and therefore two plots with No. 403 and 404 were formed. The appellant occupied plot No. 403 while his brother aforementioned occupied plot No. 404.

It is on record that Timoth Joseph Kasella sold his land i.e. plot No. 404 to Jambo Freight Limited. But sometimes later Jambo Freight Limited sold the said land to the respondent on 25/7/2002. Hence it is the plot No. 404 which formed the basis of the dispute both at the District Court as well as the trial Tribunal.

Now having heard the parties, the District Court delivered its judgment on 31/10/2007 in which the appellant's case was dismissed for failure to prove the same. On page 11 of the typed judgment which was tendered before the trial Tribunal, the respondent's status in respect of the suit land was a bonafide purchaser. Now the appellant did not bother to appeal against the judgment of the District Court.

Hence anything arising from the said judgment remained unchallenged todate. The contention by the appellant that Timoth Joseph Kassella and Jambo Freight Limited were not joined in the matter before the District

Court is misconceived as the appellant ought to have challenged that decision if at all was aggrieved as rightly argued by the respondent.

The appellant has suggested this Court to follow its earlier decision of **Juma B. Kadala v Laurent Mnkande** [1983] TLR 103 in which it was held that for the suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary part. Non joinder will be fatal to the proceedings.

I am unable to agree with the appellant because as I have stated before he ought to have challenged the decision of the District Court on appeal. Hence the question of ownership over the suit land was finally determined by the District Court. It is for that reason the second ground of appeal is hereby dismissed.

The appellant combined grounds three and four and argued them together, the appellant submitted that there was no evidence that the respondent was supposed to own the suit land and it was not proved how the respondent acquired the same. Furthermore, the appellant contended that the order for payment of USD 250 per month was not justified. The appellant submitted at length that the matter at hand is res-judicata as it

was already determined in Civil Case No. 171 of 2003 before District Court of Kinondoni at Kinondoni, therefore the remedy available for the respondent was to file an application for execution before the District Court.

Replying on grounds 3 and 4, the respondent contended that the issue of ownership was completely determined by the District Court in which it was held that the respondent was a bonafide purchaser of the suit land and how she came into the possession of the suit land was not an issue for determination by the trial Tribunal.

Regarding the issue of payment of USD 250 per month, the respondent submitted that since the appellant trespassed over the respondent's land, it was proper for the trial Tribunal to order payment to the extent of USD 250 per month from the date of trespass.

I wish to begin with the order of the trial Tribunal for payment of USD 250 per month from 01/3/2013. I have gone through the trial Tribunal's record, in the application which essentially is equivalent to the Plaint, there is nowhere the respondent prayed for the payment of USD 250 per month. The said order was passed by the learned Chairperson. Hence the issue for

my determination is whether the trial Tribunal was justified in ordering the appellant to pay USD 250 per month without the said relief being prayed for and proved by the respondent.

It is on record that the learned trial Chairman passed the said order without assigning any reason for awarding the said amount worse still in USD. By doing that, be it not among the issues for determination by the parties and without affording the parties the chance of being heard, the trial Tribunal ventured on illegality. For such amount to be granted the same ought to have been pleaded and strictly proved by the respondent. Hence the order for payment of USD 250 passed by the trial Tribunal is hereby quashed and set aside.

Regarding the contention as to how the respondent acquired the suit land has already been covered while dealing with the second ground. Finally on the issue that the matter before the trial Tribunal was res judicata, I hold that since the issue of ownership of the suit land had already been determined by the District Court, the relief for eviction by the respondent before the trial Tribunal was a distinct cause of action because for the matter to be res judicata among the elements to be established is that the reliefs in the former and subsequent suits must be on the same

reliefs. In the matter before the District Court only the issue of ownership was determined. The issue of eviction was never raised hence it was proper for the respondent to file a fresh matter before the trial Tribunal.

In upshot and for the foregoing reasons save for the order of the trial Tribunal against the appellant to pay a sum of USD 250 every month from 1/3/2013 which I have quashed, the rest of the grounds of appeal are dismissed. I will not make an order as to costs.

It is so ordered. Right of appeal explained accordingly.

Dated at Dar es Salaam this 18th Day of May 2022

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A. MSAFIRI,

JUDGE