IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 107 OF 2021

(Originating from Kinondoni District Land and Housing Tribunal in Land Application No.280 of 2014)

JOASH JOSHUA BUSHAMBALI.............................APPELLANT

VERSUS

ALI NASSORO NGONGOLO.........................1ST RESPONDENT
MOHAMED NASSORO NGONGOLO..............2ND RESPONDENT

Date of Last Order: 23.05.2022
Date of Judgment: 30.05.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by JOASH JOSHUA BUSHAMBALI. He is appealing against the decision of Kinondoni District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 280 of 2014 (Hon. R. Mbilinyi, Chairman).

At the Tribunal the applicant among other orders, was seeking to be declared the lawful owner of the land described as Plot No.452 Block G, Tegeta (**the suit land**). The Tribunal found the 2nd respondent and his sister as the legal owners of the suit land and the application was dismissed for lack of merit and the 1st respondent was ordered

to return the purchase price to the applicant. The appellant was dissatisfied with the decision of the Tribunal and has preferred this appeal with twelve grounds of appeal reproduced herein below:

1. *That, the trial chairperson erred both in law and in fact by deciding in favour of respondents while the contract entered between the appellant and the 1st respondent was valid before the eyes of the law.*

2. *That the trial chairperson erred both in law and in fact by accepting evidence given by the respondents who had no capacity to tender such documentary evidence.*

3. *That the trial chairperson erred both in law and in fact by not ordering a joinder of parties while there was a necessary party who was not in the proceedings in order to make a just decision.*

4. *That the trial chairperson erred both in law and fact by entering decision in favour of respondents to wit ordering the appellant to vacate the suit premises and demolish the house he has built in the landed property and respondents to pay back the sum of Tsh 2,000,000/= as consideration paid by the appellant on the landed property in 2001 without considering that the value of the monetary during the year 2001 is not the same with the value of the same amount that was awarded in the year 2014 and without considering developments made by the appellant and damages that were caused to the appellant are so high for the appellants plea to be satisfied.*

5. *That the trial chairperson erred in law and fact by entering a decision at the trial without the opinion of assessors and neither stating the date within which such chairperson departed from his official duties.*

6. *That the trial chairperson erred both in law and in fact by treating the contract as void while the contract was entered by appellant in good faith with the 1st respondent and the former made developments on the said landed property by building a house and living in it by acting to what was agreed in contract.*

7. *That, the trail chairperson erred both in law and fact by faulting the contract entered by the appellant with the 1st respondent and ordering that the appellant be reimbursed the amount of Tsh 2,000,000/= without even considering that the said amount was agreed and paid in 2001 and a house was already built by the appellant and is still living in the said premises for more than 14 years to date and he has no any other home to live in.*

8. *That the honourable chairperson erred both in law and fact in holding that the contract entered between the appellant and the 1st respondent was void while denying to consider the doctrine of estopel in law governing contract.*

9. *That trial chairperson erred in both in law and fact by not issuing a joinder of parties to the respondents while the respondents alleged that there was a sibling of the 2nd respondent to whom both the 1st respondent allegedly to have purchased the suit property in favour of them.*

10. *That the honourable trial chairperson erred both in law and fact by not considering that the appellant enjoyed the landed property e bought from the 1st respondent for more than 14 years and that's when the respondents started harassing the appellant on his house.*

11. *That the honourable chairperson erred both in law and facts in deciding in favour of respondents while*

according to defence of the respondents under paragraph 3 of the first respondents written statement of defence clearly the respondents agreed that the appellant and the 1st respondent did get in to the binding legal contract.

12. *That the trial chairperson erred both in law and fact in faulting the legal binding contract that was entered by the appellant and the 1st respondent without any legal justification to treat it as null and void.*

The appellant prayed for the court to allow this appeal with costs and quash and set aside the judgment of the tribunal.

This appeal proceeded by way of written submissions. Mr. Erick Aggrey Mwanri, Advocate drew and filed submissions on behalf of the appellant; while the submission in reply on behalf of the respondents were drawn and filed by Mr. Burhan Mussa, Advocate.

In his submission, Mr. Mwanri gave a brief background of the matter, and he then submitted on the first, sixth, eighth, eleventh and twelfth grounds together. He said on 1/3/2001 the appellant entered into a valid Sale Agreement with the 1st respondent. That the 1st respondent told the appellant that he owned the suit land as a guardian of the 2nd respondent and his sister who was not part of the proceedings at the Tribunal. He said the documents pertaining to the land were not

shown to the appellant in 2001 when they signed the agreement with the 1st respondent. He said the appellant purchased the suit land in good faith that it belonged to the 1st respondent. That the appellant was a bonafide purchaser as he paid consideration and the Chairman should have taken this in consideration. He relied on the case of **Evarist Peter Kimathi & Another vs Protas Lawrence Mlay, Civil Appeal No.3 of 2000 (CAT-Arusha)** (unreported). He argued further that the 1st respondent should have been estopped by the doctrine of estoppel under section 123 of the Evidence Act, CAP 6 RE 2019. That he should have been estopped to go against what he had previously agreed and promised to do on his side. To support his position, the learned Counsel relied on the case of **Trade Union Congress of Tanzania vs. Engineering Systems Consultants Limited & 2 Others, Civil Appeal No. 51 of 2016 (CAT-DSM)** (unreported).

Mr. Mwanri added that the proceedings of the Tribunal show that the applicant and the 1st respondent entered in the agreement but the 1st respondent denied such facts. He said that the 1st respondent denied having signed the two agreements (**Exhibits P1** and **P2**) with the applicant and the said contracts were properly tendered at the

Tribunal. Counsel submitted that the 1st respondent knowingly lied that he had no relationship business with the appellant during the alleged sale. He said that official search (**Exhibits P3** and **P4**) revealed that there were no records from the said plot which were in dispute. That it was the duty of the respondent to show the Tribunal how he had the purported Letter of Offer. However, he said that the Chairman proceeded to rule in favour of respondents by relying on documents which never proved that the respondents owned the suit land. He said through **Exhibit D1** the Commissioner for Lands wanted to give the Title to the 1st respondent's children and the Title to the said letter shows that the 1st respondent was the rightful owner of the suit land. That it was not shown by the Tribunal when the guardianship of the 1st respondent ceased and when the minors took over the suit land. That the Tribunal was therefore wrong in holding that the contract between the appellant and respondent was void. He said there was no document in the proceedings at the Tribunal that showed that the 1st respondent owned the Title as the guardian of the minors. He insisted that the appellant purchased the suit property for more than 13 years.

On the fourth and seventh grounds, Mr. Mwanri said that the grounds are centred on the value of compensation awarded by the Tribunal to the appellant. He said the appellant has been staying in the suit property from 2001 to the 3/10/2018 when the decision was entered. He said the refund to the appellant by the 1st respondent as ordered by the Tribunal indicates that there was a valid contract. However, he said that, from 2001 to 2018 the amount cannot be the same as even the value of the property at the pleading is more than TZS 40,000,000/=. He relied on section 73 of the Law of Contract Act CAP 345 RE 2019 and added that the 1st respondent should have compensated the applicant/appellant adequately. He said that the suit property is now more than TZS 200,000,000/=and that the court should consider the anomalies by the Tribunal in awarding compensation to the appellant.

On third and ninth grounds, he submitted that the documentary evidence by the 1st respondent were doubtful when tendered during trial. He said **Exhibit D1** was not supposed to be tendered by the 1st respondent because there was no other documentary evidence that he relied upon with regards to the ownership of the suit land. He said even the 2nd respondent during the trial stated that the 1st respondent

bought the suit land for him and his sister one Mwanamgeni. That the 2nd respondent stated that he was 39 years old and his sister was 36 years old. He said the sister was not included in the suit as the suit land was owned jointly with his brother the 2nd respondent.

On the tenth ground, Counsel stated that the appellant has enjoyed the suit land and has not been disturbed by the 1st and 2nd respondents since 2001. That when the 1st respondent signed the contract in 1st March 2001, the 2nd respondent was 23 years old as he was born in 1978 according to the evidence by the 2nd respondent, so during the sale they were no longer minors. He said the evidence given by the 1st respondent that he sold the suit property in 2001 when they were minors and that in 2012 he was still seeking consent from them after he received the Ipad value at TZS 600,000/= cannot stand. He said there was no need of consent since the 1st respondent was the rightful owner of the suit property and not the 2nd respondent nor his sister. That the said children of the 1st respondent had interest in the said property but were not the rightful owners. That if they had any claim, they should have instituted the claim against the 1st respondent. He said that appellant had adverse possession against the respondents as he enjoyed the property without disturbance for

more than 12 years. Counsel relied on the case of **Abishai Nyamwenya Mwebi vs Jones Abuto, Civil case No.88 of 2011,** High Court of Kisii Republic of Kenya and the case of **Bhoke Kitang'ita vs Makuru Mahemba, Civil appeal No.222 of 2017 (CAT– Mwanza)** (unreported).

On the fifth ground of appeal, Mr. Mwanri said that there were two assessors on the first day of hearing, that is Prof. Kulaba and Mwiru. That thereafter they were on and off and Mr. Mwiru never finished up the hearing of the case. He gave examples that on 05/10/2017 only Prof. Kulaba was present. That on 09/10/2017 the Chairperson sat without Assessors. That on the very same date the Chairman ordered site visit to be on 22/01/2018 at 12:00pm but on that date the matter was adjourned to 19/03/2018 at 12:00pm; and on that nothing was shown to have transpired. That on 20/03/2018 there was a proceeding showing a picture purported to be the suit land with no explanation as to what happened or who drew the same. That on the same date the matter was set for judgment on 20/03/2018 without the presence of the parties. Mr. Mwanri said there is nothing to show that on 20/03/2018 parties were notified of the said date. The matter was thereafter adjourned for several times to 14/09/2018. It is not

shown in the proceedings when Mr. Mwiru ceased to appear and for what reasons. He said that the proceeding does not reflect as to when Prof. Kulaba gave his opinion, but the judgment shows that he gave his opinion and the same was read over to the parties. He insisted that nowhere in the proceedings that shows that the assessors gave their opinion before setting the judgment date. He relied on the case of **Amer Bank Corp Ltd & another vs Edgar Kahwili, Civil appeal No.154 of 2015 (CAT-Iringa)** (unreported). He said that the Chairman did not follow the required procedures under section 23 (2) of the Land Disputes Courts Act, Cap 216 RE 2019 and the Land Disputes Courts Act (District Land and Housing Tribunal) Regulations, 2002, GN. No. 274 of 2003. He pointed out that neither of the parties or their witnesses were present in the site to show that indeed they visited the site. That further the proceedings do not show who was present on the date of visit. He relied on the case of **Jovent Clevery Rushaka & Another vs. Bibiana Chacha, Civil Appeal No.236 of 2020 (CAT-DSM)**(unreported). He said since the procedures were not followed then the decision of the Tribunal was tainted with illegalities. He thus prayed for this court to allow the appeal with costs and quash the decision of the tribunal and declare the appellant the rightful owner of the suit property.

In reply Mr. Burhan said that, on the first, sixth, eighth, eleventh and twelfth grounds are in respect of the Sale Agreement. He said that the Sale Agreement between the appellant and the 1st respondent was not lawful as the 1st respondent had no good title to pass to the appellant. He said appellant ought to have conducted an official search before entering into the Sale Agreement. That all searches conducted in 2012 and 2014 did not reveal that the 1st respondent was the lawful owner of the suit property. The appellant did not even communicate with Kinondoni Municipal Council Land Officers as directed to know who was the owner of the suit land. He said **Exhibit D1** proves that the 1st respondent was a mere guardian.

Mr. Burhan said the appellant's Counsel at page 7 of his submission stated that the 1st respondent was informed by the Ministry of Lands, Housing and Human Settlement to surrender the ownership document in respect of the suit land to the Ministry so as to change ownership from his guardianship to the names of his children. He said this alone proves that he was holding it under guardianship. Thus, he said the 1st respondent had no title to pass. That he did not seek the consent of the beneficiaries in selling the suit land therefore the sale

agreement was a nullity. He said that the suit land was registered however there was no transfer documents, no application for approval, notification for disposition and even the sale agreement itself was vague.

On the fourth and seventh grounds, he said that there is nowhere in the proceedings or judgment that the appellant was ordered to vacate the suit premises or demolish the structure he built. That the Tribunal only dismissed the application and ordered the 1st respondent to return the purchase price he received from the appellant. He said that it was the only remedy available on the part of the appellant since the 1st respondent had no legal title to pass.

On third and ninth grounds, Mr. Burhan submitted that it was not the duty of the Tribunal to order joinder of parties as the application was filed by the appellant who upon studying the respondents defence was supposed to apply for joinder of parties if it was necessary. He said the appellant was duty bound to choose whom to sue.

Counsel further submitted on the tenth ground that the law is settled that the suit for recovery of land should be instituted within 12 years.

That the Sale Agreement was executed in 2001. That appellant failed to prove all factors for adverse possession, one being that the adverse possessor must have no colour of right to be there other than his entry and occupation. He said the appellant entered the suit land on the basis of purchasing it from the 1st respondent and not by mere entry and occupation. That even the suit land was not abandoned as it was under guardianship of the 1st respondent who executed the Sale Agreement. He relied on the case of **The Registered Trustees of the Holy Spirit Sisters Tanzania vs. January Kamili Shayo & 136 Others (CAT-Moshi)** (unreported).

On the fifth ground, Mr. Burhan said that at page 8 of the judgment one assessor Mr. Mwiru retired from serving the Tribunal before conclusion of the matter. That the situation has a backup in section 23 of the Land Disputes Courts Act, where the Chairman has the discretion to proceed with one assessor in case one or both members of the Tribunal who commenced the matter are absent. He said on 14/09/2019 when the judgment was delivered there was no requirement of reading over the assessors' opinion to the parties. That the requirement was imposed by the Court of Appeal recently in 2020. On site visit, he said that the Tribunal visited the site as shown

on page 8 of the judgment. He prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Mwanri reiterated his main submissions and added that the 1st respondent did not tender any document that purport him to be the legal owner of the suit land as a guardian and there is no document on record to show ownership of the property of the 1st and 2nd respondent. He said non tendering of these documents brings so many doubts as to why and how such move was an option to the respondents.

I have gone through the record of the Tribunal and submissions by Counsel for the parties. The main issue for determination is whether this appeal has merit. I will start with the fifth ground on the procedural irregularities that were raised by the appellant.

Mr. Mwanri for the appellant raised a concern about the site visit. I have taken time to go through the handwritten proceedings of the Tribunal, and on 19/03/2018 the records show that the applicant was present in person and one Hussein appeared for the 1st respondent and held brief of Mr. Burhan for the 2nd respondent. Mr. Hussein then

informed the Tribunal that the matter is for site visit and he is ready to proceed. However, the appellant (then applicant) informed the Tribunal that his Advocate was at the High Court. Then the Chairman scribbled the word "cite" (whatever that meant) and there was no order that was given. There is a presumption according to the records that the site visit was conducted on 20/03/2018. The proceedings of that day are quoted herein below as follows:

> *"On cite:*
> - *Kibanda cha chumba kimoja constructed in 2001 & fence.*
> - *Foundation in 2014.*
> - *Sand for construction.*
> - *Bricks.*
>
> *Order: Judgment 31/05/2018 at 14:00pm*
>
> *Signed*
>
> *20/03/2018*
>
> *NB: There is also a shabbily drawn sketch map of the site*

It is apparent from the above that on the date of the alleged visint there was record to reflect the parties who attended the site visit. What is clear from the record is the last order and signature of the Chairman dated 20/03/2018, and the date that the judgment was set to be delivered on 31/05/2018. The site visit purported to have been conducted by the Tribunal, do not conform with the mandatory prerequisites stated in the case of **Nizar M.H. vs. Gulamali Fazal**

Janmohamed (1989) TLR 29 and **Jovent Clavery Rushaka** (supra) where the court stated:

> "*when a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any and with much each witnesses as may have to testify in the particular matter....*"

In **Jovent Clavery Rushaka** (supra) the Court of Appeal cited with approval its own case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & 14 Others, Civil Appeal No.4 of 2018** (unreported). In the said case the Court of Appeal highlighted the importance of site visit that:

> "*...for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to; one, ensure that all parties, their witnesses and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo. Three, allow cross examination by either party, or his counsel. Four, record all the proceedings at the locus in quo. Five record any observation, view, opinion or conclusion of the court including drawing, a sketch plan, if necessary, which must be made known to the parties and advocates, if any*"

As it can be observed, the procedure for site visit by the Tribunal was highly irregular.

On the issue of the assessors, Section 23 (2) of the Land Dispute Courts Act clearly states that:

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

Again, the records of the Tribunal do not indicate as to when the opinion of assessors was received and whether they were read over to the parties before judgment delivery. The record shows that the attendance of assessors was not successive, in that at times, the Chairman sat alone and at times the assessors were present. In other words, the assessors were not always present thus not fully involved throughout the proceedings.

Further, although the Chairman can proceed with one remaining assessor to the end of the trial by virtue of section 23(3) of the Land Disputes Courts Act, but there is no record of the absence of one of the assessors throughout the proceedings and reasons for such absence. The retirement of one of the assessors was only mentioned in the judgment. In this regard, we cannot state that the Tribunal was duly constituted, and we cannot state that the assessors were fully involved in the proceedings because as stated above, their attendance was visibly inconsistent (see the case of **Ameir Mbarak**

and Another vs. Edgar Kahwili, Civil Appeal No. 134 of 2015 (CAT-Iringa) (unreported). In the result, I agree with Mr. Mwanri that indeed the proceedings at the Tribunal had irregularities which in my view are fatal to the proceedings.

The two discussed points above are meritorious and are enough to dispose of the whole appeal. I shall not dwell on the other grounds of appeal.

Having discussed the above cumulative irregularities, what is the available remedy? It is trite law that where ther are incurable irregularities then the proceedings must be nullified. Subsequently, the proceedings of the Tribunal are hereby nullified and the judgment and decree are quashed and set aside. It is further ordered that the matter be heard afresh before another Chairperson and a new set of assessors. In consequence therefore, the appeal is allowed, and each party shall bear own costs.

It is so ordered.

V.L. MAKANI
JUDGE
30/05/2022