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

LAND APPEAL NO. 14 OF 2022
(Arising from Temeke District Land and Housing Tribunal in Land Application No.233 of 2018)

AHMED ABDULRAHMAN SHARIFF (Administrator of the Estate of the Late Zamzam Abdul Majid Othman) .....**1st APPELLANT**
JAMAL ALLY MALIMBIKA.....**2ND APPELLANT**

VERSUS

HAMIS OMARY KIVUGO (Administrator of the Estate of the Late Shida Athumani Vitendo).....**RESPONDENT**

Date of Last Order: 29.07.2022
Date of Judgment: 09.07.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by AHMED ABDULRAHMAN SHARIFF. He is appealing against the decision of Temeke District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 233 of 2018 (Hon. P.I. Chinyela, Chairman).

The appellant applied among other orders, for the Tribunal to declare him the lawful owner of the house registered as H/NA. 42 Plot NA 21, Block 21 Changani Street Temeke (the **suit house**). The application

was dismissed with costs. Being dissatisfied by the decision, the appellant has preferred this appeal with seven grounds reproduced hereunder:

1. *That, the tribunal erred in law and fact by deciding the matter in favour of respondent based on revision note, without considering that the said revision note in Misc. application No. 84 of 2011 was not a ruling of the court as it was entered without showing which decision was revised, no summons was issued to other party , was delivered without any order allowing to apply out of time as the revision order dated 22nd February 2013 was filed in this court if any in 2011, in challenging a decision entered on 30th November 2007 without any legal justification for such reliance.*

2. *That the trial tribunal erred in law and fact by determining the case based on respondents record without satisfying itself as to whether there was any decision entered in challenging its order in application No.107 of 2007, failure to consider the revision application was not any alternative to appeal to challenge the order entered by the tribunal chairman through appeal and not revision.*

3. *That the tribunal erred in law and fact by failure to consider that at the time of sale of the land in dispute from JUMA ALLY MALIMBIKA to ZAMZAM ABDULMAJID OTHMAN the said land was not part of the deceased asset (Shida Athumani) as it had removed from the probate matter on 27th may 2003 on the date when respondent was appointed an administrator.*

4. *That the trial tribunal erred in law and fact by failure to consider that the primary court ruling date 4th February 2008 in probate cause No.147 of 2003 was in contravention with the order of Judge Shangwa who confirmed the lower court decision that the issue*

regarding land in dispute was required to be determined by court of competent jurisdiction and the act of re trial by primary court was not so ordered but the tribunal proceeded to affirm such decision without any legal justification for such decision.

5. *That the trial tribunal erred in law and fact for failure to consider the opinion of both assessors that the suit house was legally sold by considering that the said house was sold by the legal person who had been received from the owner prior her death and it was not part of the deceased assets which was administered by the respondent.*

6. *That the trial tribunal erred in law and fact that the act of transferring the name from the appellants mother (deceased) to the respondent's name as the legal representative of Shida Athumani was so done illegally in contravention of the law as the notice was issued on 15th June 2015 for intention to transfer the said land but the transfer itself was affected on 15th April 2015, and this evidence has been left without any legal justification.*

7. *That the trial tribunal erred in law and fact by failure to comply with regulation 20(a) (b) and (d) of the land and housing regulations of 2003, and if it would have been considered could lead to different decision.*

The appellant prayed for the appeal to be allowed and the decision of the Tribunal be quashed and that the court order in Land Application No. 107 of 2007 be upheld, and further that and the respondent be ordered to hand over the house to the appellant.

The appeal proceeded by way of written submissions. My understanding of the submissions, by Mr. Enock was a bit difficult, however my take was that in determining Land Application No.233 of 2018 the Tribunal's main consideration was the presentation of Revision Note in Misc. Application No. 84 of 2011 whereby the appellants had resisted that such decision was never entered by this court. He said the Tribunal had no file which determined Land Application No.107 of 2007 to ascertain whether such order was granted or not. That the only file, Land Application No. 250 of 2008 was attached to the trial case file which is subject of this appeal. He said that if you go through the trial Tribunal's decision at page 8 and 9, the Tribunal admitted the decision in Land Application No.107 of 2007 delivered on 22/11/2007 as **Exhibit D5** and the Revision Note as **Exhibit D6** and if you count as from 22/11/2007 to 2011 when Misc. Application No.84 of 2011 was lodged as pointed out it was almost three years and above.

Mr. Enock further said that the said Revision Note (**Exhibit D6**) in Misc. Application No.84 of 2011 does not show which decision was required to be revised but rather indicated the date of decision that it was delivered on 22/11/2007 and its order being issued on

30/11/2007 but there is nothing as to whether there was leave to file the said revision. He said that revision application was initiated by the respondent in this appeal who was being represented by Jerome Msemwa, Advocate. He said that our legal system allows a party who is aggrieved by the decision of the Tribunal to file appeal and where there exists no right of appeal then a party can file review or revision. He said that even revision has its limitation of time within which to file and according to section 3 (1) of the Law of Limitation Act Cap 89 RE 2019, any application filed out of time should be dismissed and the position was discussed in the case of **Bank of Tanzania vs. Said A. Marinda & 30 Others, Civil Reference No. 3 of 2014.**

Mr. Enock went on saying that the Tribunal's decision was nullity as it had no power to deal with the issue of ownership of the land as the same was dealt with in Land Application No.107 of 2007. That Application No.250 of 2008 was withdrawn after recognizing that the decision in Land Application No. 107 of 2007 confirmed the sale therefore there was no need of proceeding with the case. He said that the 1st appellant had applied to the court for considering that the land at issue be handled to him as administrator of Zamzam.

On the second ground of appeal, Mr. Enock said that the Tribunal in Land Application No. 233 of 2018 did not consider the correctness of the record tendered by respondent purported to be the decision of this court. he said that the act led to unfair decision. He said **Exhibit D6** was not a genuine court record, as all efforts to get the file Application No. 84 of 2011 purported to be determined by Hon. Judge Mutungi proved failure. That even the file for Application No.107 of 2007 was never found. That the respondent waived his power to appeal, and the revision was not made by the court itself. In such a situation, he said, the respondent had to obtain leave of the court to file the application out of time. However, the respondent's application was admitted.

On the third ground of appeal, Mr. Enock submitted that, the Tribunal had confirmed the sale in Application No.107 of 2007 and the land was transferred to the purchaser's name in 2008 prior to the decision of the Primary Court in 2008 for the second time, though there was no order for retrial. He insisted that the suit house was not part of the deceased estate.

On the fourth ground of appeal, he submitted that the Tribunal in determining Land Application No 233 of 2018 considered the decision of the Primary Court delivered in February 2008 despite the fact that the Primary Court had no jurisdiction to entertain it. He said that the decision entered in that regard is *res judicata,* that is why the District Court of Temeke in Civil Revision No.23 of 2016 had ordered the matter to be dealt by the Land Tribunal as per Hon. Judge Shangwa's decision. That the District Court was unaware that the Revision Note in Application No.84 of 2011 was filed after 3 years without leave of the court.

On the fifth ground, Mr. Enock reiterated that the land in dispute was not part of the assets which was administered as from the date of appointing the respondent as administrator until when the said land was disposed to the 1st appellant's mother. That the respondent had no power over the land in dispute after being removed from administering the estate.

Mr. Enock submitted on the sixth ground that despite the fact that there is no court which declared the respondent to be owner of the suit land the matter was already determined by the Tribunal in 2007,

and that the land was legally sold to the 1st respondent's mother and the transfer was conducted on 15/04/2015 at 11:40 am based on the application which was tendered by HAMIS OMARY KIVUGO as administrator of Shida Athumani through the notice. That it was issued on 05/06/2015 and within a period of 30 days the caveat registered by the 1st appellant would lapse unless the order from the High Court is presented for that purpose.

He said that the respondent had transferred the title deed over the land based on false information as the land had been declared to be the 1st appellant's mother (deceased) by the Tribunal and the act of the respondent applying and transferring the land in his name was in violation of the High Court Order in Application No.107 of 2007.

On the last ground he submitted that the Tribunal in reaching its decision did not consider the submissions and arguments by the parties as such the decision was nullity. He said the Tribunal did not consider the historical background of the matter, and if it had done so the decision could have been different. He relied on the case of **Fatuma Idha Salum va. Kjhalifa Kjhamis Said [2004] TLR 423**

and **Edwin Isdori Elias vs. Serikali ya Mapinduzi Zanizibar [2004] TLR 297** He prayed for the appeal to be allowed with costs.

In reply, Mr. Godfrey Alfred on behalf of the respondent said that the centre of the appellants' submission is based on the Revision Note. He said that it is not true that in determining the case the Tribunal based only on the Revision Note. He said that the Tribunal analysed various evidence adduced by both parties. That the evidence by the appellant was too weak and as per the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 133** the party who has strong evidence must win. He added that, when the respondent tendered the said Revision Note, the appellants were present but they never challenged it during cross examination. That challenging the same at this stage is meaningless. That the appellants admitted in their submissions that the Tribunal did not have the file for Land application No.107 of 2007 but there is no law compelling the Tribunal to do so.

On the second ground Mr. Alfred said the appellant is complaining that the documents tendered in particular **Exhibit D6** was forged. He said forgery is a criminal offence and this court is not empowered to deal with criminal offence. That all appellants were served with the

said documents but have not filed any criminal complaint over the document. He said that it is improper to raise such allegation at this stage.

On the third ground, Mr. Alfred said the property in dispute was sometimes back owned by Shida Athumani Vitendo (now deceased), and the respondent is the administrator of the estate of the late Shida Athumani Vitendo since 2003. He said one of the properties of the estate is the house in dispute (**Exhibit D4**) which shows that the 2nd respondent illegally sold the suit house to the mother of the 1st appellant on 28/10/2007 while the said house was part of the estate of the deceased since 2003 while the 2nd respondent was not an administrator of the estate. He said that the sale of the suit house between the 2nd appellant and the mother of the 1st appellant was quashed as proved by **Exhibit D6** and therefore the Tribunal was correct to declare that the 2nd appellant had no power to sell the suit house to the mother of the 1st appellant.

On the fourth ground, Mr Alfred said that, Land Tribunals do not have powers to nullify the proceedings of the Primary Court as far as probate matters are concerned. He said there is a judgment by Hon.

Judge Shangwa directing that land matters be filed in the appropriate courts. However, the respondent has never filed any case concerning land matters in the Primary Court. He further said that the Tribunal only considered the decision of the Primary Court in probate matters and not something else. He said that this ground of appeal is baseless.

He submitted on the fifth ground that the Chairman of the Tribunal is not bound to consider opinion of assessors. He is only bound to give the reasons for his departure from the opinion given by the assessors. He relied on section 24 of the Land Disputes Courts Act, Cap 216 RE 2019.

Replying to the sixth ground Mr. Alfred said that the decision in Land Application No. 107 of 2007 which blessed sale between the 2nd appellant and the mother of the 1st appellant was quashed according to **Exhibit D6**. That the suit land remained to be the property of the late Shida Athumani Vitendo where the respondent is the administrator of the said estate. That the respondent managed to make transfer to his name through the Ministry of Lands. He said the 1st appellant was notified but he never filed a caveat.

On the last ground, Mr. Alfred submitted that, there is no Regulation 20 (a) (b) (d) of the Land and Housing Regulation as cited by the appellants. Rather there is Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. That regulation 20 (1) (b) (c) and (d) the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides for the contents of the judgment. That a judgment shall consist of a brief statement of facts, findings on the issues and a decision and the reasons for the decision. That the same was adhered to from page number 1 to 2 and 14 to 19 of the typed judgment. Submissions were analysed under page 11 to 13 of the typed judgment. He prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Enock reiterated his main submission.

I have gone through the submissions by Cousel for the parties and the record of the Tribunal. The main point for consideration is whether this appeal has merit.

It is undisputed fact as submitted by the appellants and the respondent that the suit house was originally owned by the late Shida

Athumani. The 2nd appellant was his son who alleged to have been bequeathed the said house by his late mother in 1999. The respondent alleges to be the administrator of the estate of the late Shida Athumani. However, as per the 2nd appellant the said suit house was at the time of the death of Shida already bequeathed to him so it cannot be under the estate of the late Shida Athumani and therefore he properly sold it to Zamzam Abdul Majid Othman. In other words, the appellants' arguments are that the suit house was already given to the 2nd appellant before the death of Shida Athumani. The respondent claim on the other hand is that the suit house is part of the estate of the late Shida Athumani. And since he is the administrator of the estate of the late Shida Athumani, then he is the owner of the said suit house.

As established hereinabove, the original owner of the suit house was the late Shida Athumani. In my view, the issue is who between the 1st appellant and the respondent legally succeeded ownership of the suit house. Directions to the conflicts over the suit house was given in PC. Civil Appeal No.2 of 2004 between Juma Ally Mlaimbika (2nd appellant herein) vs. Hamis Omary Kivugo (Respondent herein) where Hon. Judge A. Shangwa (as he then was) directed that the dispute

on ownership of the suit house be referred to the courts of competent jurisdiction by the respondent herein who is the administrator of the estate of the late Shida Athumani. In 2008 Zamzam A. Othman (whom the 1st appellant administers his estate) filed Land Application No.250 of 2008 against Juma Ally Malimbika (the 2nd appellant herein) and Hamis Omari Kivugo (respondent herein) however she withdrew the said application and maintained that the suit house was legally bequeathed to 2nd appellant herein and sold to Zamzam A. Othman. Land Application No.233 of 2018 at the Tribunal was therefore the proper case to determine the lawful owner of the suit house as per the direction of the High Court Hon Judge Shangwa, J in PC Civil Appeal No.02 of 2004.

Now, was the 2nd appellant legally bequeathed with the suit house to warrant him to sell the same to Zamzam A. Othman who was then succeeded by the 1st appellant? If the answer is in the affirmative, then respondent shall have no right over the suit house and if it is to the negative then automatically the respondent has a right over the suit house as a Legal Representative. The records purport to show that the late Shida Athumani, allegedly by an affidavit, bequeathed the suit house to the 2nd appellant. However, since the suit house is

registered as H/NA.42 Plot NA 21, Block 21 Changani Street Temeke, it was thus expected the late Shida Athumani would have soon after bequeathing the said suit house transfer it to the 2nd appellant under the required procedures. To the contrary there is no such transfer from the late Shida Athumani to the 2nd appellant, but only the transfer from the 2nd appellant to Zamzam A. Othman from whom the 1st appellant claims to be the administrator. This means that title to the land never changed nor passed to the 2nd appellant, it remained the property of the late Shida Athuman of which the respondent is the administrator of her estate. And as was said in the case of Farah Mohamed vs. Fatuma Abdallah [1992] TLR 205:

> *"who does not have legal title to land cannot pass good title over the same to another..."*

As established above, title did not pass from Shida Athuman to the 2nd appellant, subsequently, the 2nd appellant did not have good title to pass to Zamzam A. Othman. With these observations, it is my considered view that the Tribunal was not at fault in holding that the suit house is the property of the late Shida Athumani and in the circumstances the respondent deserves to have administration of the said suit house. All other objections by the appellants regarding the genuineness of the documents submitted at the Tribunal ought to

have been raised early at the trial in the Tribunal and not at this appeal stage.

In the result and for the reasons above, there is nothing to fault the decision of the Tribunal. The appeal is thus without merit and is dismissed with costs.

It is so ordered.

V.L. MAKANI
JUDGE
09/08/2022