IN THE HIGH COURT OF TANZANIA

(LAND ENVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 226 OF 2021

(Arising from Land Application No. 100 of 2017 before the District Land and Housing Tribunal at Kibaha)

SALIMA KIZABI ..... APPELLANT

VERSUS

BLANDINA SEMTEWELE (Administratrix of the Estate of the late Hamisi Hassan Chinduli) **..... RESPONDENT**

JUDGMENT

Date of the last Order: 19.08.2022

Date of Judgment: 25.08.2022

A.Z.MGEYEKWA, J

The appellant appealed to this Court following her dissatisfaction with the decision of the District Land and Housing Tribunal for Kibaha in Land Application No.100 of 2017 which was decided in favour of the respondent.

A brief background of the case relevant to this appeal is that the appellant had filed an application before the District and Housing Tribunal for Kibaha claiming ownership of the suit property whereas the tribunal Chairman ruled in favour of the respondent.

Dissatisfied, the appellant knocked on the gates of this Court with 11 grounds of appeal. The grounds of appeal can be crystallized as follows:-

1. *That, the trial Chairperson has erred in law and fact when she failed to consider that, the appellant is a lawful owner of the suit land.*
2. *That, the Trial Chairperson has erred in law and face when she admitted the respondent sale agreement invalid which was inadmissible.*
3. *That, Trial Chairperson has erred in law and fact when it based on annexure D4 in favour of the respondent which was fake and improper to be admitted before the trial tribunal.*
4. *That the trial Chairperson has erred in law and fact when it believes that, the respondent was given a right of occupancy consistent with Section 5 of the Land Registration Act (Cap 334 [R.E. 2022] something which was unjustified.*
5. *That, the Trial Chairperson has erred in law and fact when it holds*

that, the respondent is a lawful owner of the suit land contrary to the evidence adduced during the trial of this matter.

6. *That, the trial Chairperson has erred in law and fact when it decided this matter in favour of the respondent while the sale agreement cannot be executed before the Resident Magistrates Courts.*

7. *That, the Trial Chairperson erred in law and fact when it decided this matter in favour of the respondent despite discovering that, there was no tax invoice from the Government to prove the actual transaction of the sale agreement before the witnessed Court.*

8. *That, the Trial Chairperson has erred in law and fact when it decided this matter without regard that, the respondent obtained a letter of administration illegal.*

9. *That, the Trial Chairperson has erred in law and fact when it failed itself to identify the location over the suit land.*

10. *That, the Trial Chairperson erred in law and fact when it admitted the sale agreement of the respondent which was never stamped with stamp duty from the Tanzania Revenue Authority.*

11. *That, the Trial Chairperson has erred in law and fact when it failed*

to evaluate the evidence presented before it during the hearing and determination of this matter.

The hearing of the appeal was disposed of by way of written submission whereby the appellant was represented by Mr. Mutalemwa Bugeza learned advocate, while the respondent was represented by Mr. Dominicus Nkwera, learned advocate.

In his submission, Mr. Mutalemwa submitted that the appellant was the rightful owner of the suit land since 1971. He submitted that the appellant's father gave him as a gift and his evidence was corroborated by the evidence of PW2 who was the Street Chairman. He added that the Street Chairman testified to effect that the appellant is the lawful owner of the suit land and the same is demarcated by the late Gongi's land. Mr. Mutalemwa went on to submit that PW3 in his testimony established that, since 1990, he saw the appellant living in the suit land and developed the suit land. In his view, the appellant's evidence was strong compared to the weak evidence of the respondent.

The learned counsel for the appellant went on to submit that under sections 110 (1) (2) and 111 of the Evidence Act, Cap.6 [R.E 2019] the person who alleges has the burden of proof. He added that the

respondent had no claim of right over the suit land because she obtained and use a letter of administration illegally which did not bear her name.

On the second ground, Mr. Mutalemwa contended that the trial Chairperson has erred in law and in fact when she admitted the respondent sale agreement which was inadmissible. He further stated that there was evidence on record that, the appellant was living in a suit land since 1971. Thus, in his view, the respondent is a trespasser as his sale agreement (Exh.D2) could not be executed at Ilala - Dar es Salaam while the suit land was located at Mlandizi - Kibaha.

He further stated that the respondent failed to call the responsible officer who attested the sale agreement to prove its validity. He claimed that it was contrary to the law for a Resident Magistrate of Ilala, to attest the said agreement as he is not competent to prove the same. To buttress his position he cited the case of **Mohamed Said v Mohamed Mbilu** (1984) TLR page 113.

Mr. Mutalemwa further submitted that; the respondent was required to bring a witness who notarized the sale agreement since the appellant raised an objection when it was tendered thereto to prove to the contrary.

He claimed that since the sale agreement was wrongly admitted then the same ought to have been expunged from the tribunal's records.

Submitting on the 3rd ground, the learned counsel for the appellant stated that the trial Chairperson erred in law and fact when stated that the trial Chairperson erred in law and fact when decided in favour of the respondent because the Chairman in her decision was based on annexure D4 which was improperly be admitted before the tribunal. The learned counsel for the appellant contended that annexure D4 was admitted while it was a copy and not a genuine document contrary to section 68 of the Evidence Act, Cap.6 [R.E 2019].

On the fourth ground, Mr. Mutalemwa submitted that the trial Chairperson has erred in law and fact in believing that, the respondent was given a right of occupancy as per section 5 of the Land Registration Act, Cap. 334 [R.E 2019] something which was unjustified.

As to the sixth ground, he contended that the trial Chairperson erred in law and fact when it decided this matter in favour of the respondent while the sale agreement cannot be executed before the resident magistrates' courts.

Submitting on the seventh ground, Mr. Mutalemwa, the trial Chairperson has erred in law and fact when it decided this matter in favour of the

respondent despite discovering that, there was no tax invoice from the Government to prove the actual transaction of the sale agreement before the witnessed Court.

On the tenth ground, Mr. Mutalemwa contended that the trial Chairperson erred in law and fact when she admitted the sale agreement of the respondent which was never stamped with stamp duty from the Tanzania Revenue Authority. He further stated that it is settled law that the sale agreement is admissible as evidence before the trial tribunal or any competent Court of law if it has been stamped, failure to do so, offended the mandatory requirement of section 47 (1) of the Stamp Duty Act, Cap.189 which provides that:-

> " *No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive authenticated by any such person or by any public officer unless such instrument is duly stamped."*

The learned counsel for the appellant went on to submit that the sale agreement was admitted while there was no tax invoice from the Resident Magistrates Courts of Ilala at Dar es Salaam where the said sale agreement is alleged to have been executed.

Submitting on the eighth ground, Mr. Mutalemwa contended that the trial Chairperson erred in law and fact when she decided this matter without regard that, the respondent obtained a letter of administration illegally.

On the strength of the above submission, the learned counsel for the appellant urged this court to declare the appellant lawful owner of the suit and allow the appeal with cost.

In response, Mr. Dominicus Nkwera argued that it is realistic that the trial land tribunal decided correctly that the land in dispute was owned legally by the late Hamis Hasan Chinduli, and the appellant has no any legal claim concerning the disputed land that she owned it. He further stated that the appellant failed to prove how her late father owned the suit land and did not tender any documentary evidence to prove the same. He added that the appellant failed to summon any witness to prove his case given instead his testimony was mere words.

The learned counsel for the respondent continued to argue that there was no any evidence from the appellant before a trial land tribunal in regard to the boundaries of suit land in dispute. He contended that the appellant in her pleadings did not state how her late father came into possession of the suit land before he gave it to the appellant in 1971. He claimed that

the appellant only argued that her late father cleared the forest and it was a new fact that was not pleaded. To fortify his submission he cited the case of **Jovent Clavery Rushaka and another vs. Bibiana Chacha**, Civil Appeal No. 236 of 2020 the Court of Appeal of Tanzania at DSM (unreported) at 16 page para 2, the Court held that:-

> *"That generally a party should not be allowed to travel beyond their pleadings. Parties are bound to take all necessary and material and material facts in support of the case set up by them in their pleadings."*

The learned counsel for the respondent contended that the appellant's evidence was very weak and she was required to prove her case before a trial tribunal that she is the lawful owner of the suit land. To cement his submission he cited the case of **Dr. A Nkini & Associates Limited v National Housing Corporation**, Civil Appeal No. 72 of 2015. (unreported), the Court of Appeal of Tanzania held that:-

> *"The settled law is that he who wants the court to consider that certain fact exists, has the duty to adduce evidence to that effect. ... This section is based on the rule i.e. incumbit probation qui dicit non qui negat; the burden of proving a fact rests on the party who substantially asserts the issue and not upon the party who denies*

it, for a negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reasons"

Mr. Nkwera also cited the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & another** [2006] TLR 419, Court of Appeal of Tanzania sitting at Zanzibar held that:-

"It is an elementary principle that he who alleges is the one responsible to prove his allegation."

The learned counsel for the respondent did not end there, Mr. Nkwera insisted that the sale agreement between the late Hamis Hassan Chinduli and the late Ally Seleman Gongi entered in 2004 (Exh. D2) is a valid sale agreement and met all the requirements of the valid contract, hence, it was admissible before the court of law and the respondent could tender the said document as per section 64 (1) of the Evidence Ac,t Cap. 6. To bolster his submission he cited the cases of **Robinson Mwanjisi and others v R** [2003] TLR 218, **R v Charles Abel Gasirabo@ Charles Gasirabo & Others, C**riminal Appeal No. 358 of 2019 CAT at Dar es Salaam (unreported).

The learned counsel for the respondent continued to argue that the sale agreement (Exh.D2) tendered at the trial tribunal was not fatal since it was attested in 2004 by the Resident Magistrate attested and at that they were not hindered by law to attest documents. He added that the law was amended in 2021 whereas the Resident Magistrates were prohibited to attest contracts. Fortifying his position he refereed this Court to the case of **Haruna Chakupewa v Patrick Christopher Ntalukundo**, PC Civil Appeal No. 10 of 2021 HC at Kigoma (unreported), the Court held that:-

> *"And if I were to add a word for future guidance, I could say this, magistrates are commissioners for oath. In their capacity as commissioners for oath, they can attest affidavits and documents. Attestation of documents includes sale agreements, but I think, this should be left to advocates to avoid future embarrassments to the magistrate and the court."*

Mr. Nkwera went on to submit that the respondent's exhibits admitted before a trial tribunal was properly admitted, thus, in his view the appellant's counsel submission is baseless.

On the strength of the above submission, Mr. Nkwera beckoned upon this court to dismiss the appeal with costs.

After a careful scrutiny of the case file, I noted a point of law whereas I called the learned counsels to address the court. After a glance at the trial proceedings, I noted that the suit commenced with the assistance of two assessors namely Happiness Kihampa and Ubwa Ramadhani. However, the records reveal that the assessors were not present on 2nd May, 2019 during the defence hearing of DW2, and on 22nd February, 2021 when DW5 testified and on 18th June, 2020 during the defence hearing of DW4 only one assessor Happiness Kihampa was recorded present.

Mr. Nkwera submitted that both learned counsels were present during the hearing of the case at the tribunal and he remember that all assessors were present from the beginning of hearing the case to the end.

As pointed out earlier, the trial proceedings record clearly shows that the tribunal commenced with a set of assessors, however, the Chairman proceeded with hearing the defence case of DW2, DW4 and DW5 without yet they were allowed to give gave their opinion while they were not involved in hearing some of the witnesses. In a recent case of **B.R.Shindika t/a Stella Secondary School v Kihonda Pitsa MakaroniIndustries Ltd**, Civil Appeal No.128 of 2017, the Court of Appeal cited with approval the case of **Ameir Mbarak and Another v Edgar Kahwili**, Civil Appeal No.154 of 2015 (unreported), the court was

confronted with a situation where the assessors were not present at different stages of the trial. In the case of **B. R. Shindika** (supra) the Court of Appeal of Tanzania held that:-

> *"... trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the conduct of the trial. In other words, cases tried with the aid of assessors had to be concluded with the same set of assessors..."*

In respect of the obtaining legal consequences, the Court in the cases of **Winiel Mtui & 3 Others v Stanley Ephata Kimambo & Another**, Civil Appeal No. 97 of 2015 & **Samson Njarai & Another v Jaco B M Esoviro**, Civil Appeal No. 98 of 2015 (all unreported) stated that: -

> *"The consequences of unclear involvement of assessors in the trial renders such trial a nullity."*

Applying the above holding of the case, the same applies in the case at hand that the quorum of members who participated in hearing the case from the commencement of the case was not the same and the record reveals that on other days the Chairman proceeded with the hearing without stating any reason.

Inspired by the above legal position to which I fully subscribe, I hasten to hold that in the instant case the involvement of the assessors was unclear hence, the irregularities discussed in the instant case are fatal and render the proceedings and judgment of the District Land and Housing Tribunal nullity.

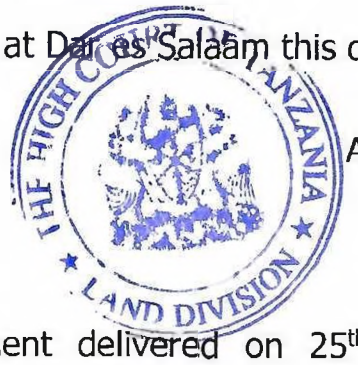
Following the above findings and analysis, I do not see any reason to determine the grounds of appeal.

The above finding sufficiently disposes of the appeal. Consideration of other complaints raised will not affect the above finding. I according refrain from delving into them.

In the event, I proceed to invoke this court power of revision bestowed upon this court under section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] and nullify, quash the judgment of the District Land and Housing Tribunal and set aside the orders thereof. I also quash the proceedings from 2nd May, 2019 and I order the file of the District Land and Housing Tribunal for Kibaha in Land Application No.100 of 2017 to be remitted to the District Land and Housing Tribunal for Kibaha for retrial before another Chairman with competent jurisdiction. Mindful of the long time the matter has taken in court, I direct the trial to be expedited and be heard within six months from today. Each party shall bear its own costs.

Order accordingly.

Dated at Dar es Salaam this date 25th August, 2022.

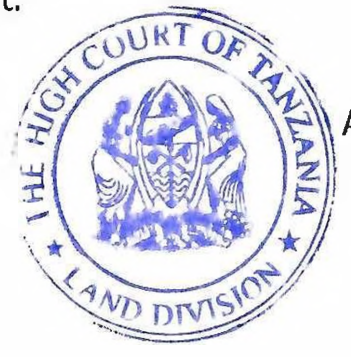


A.Z.MGEYEKWA

JUDGE

25.08.2022

Judgment delivered on 25th August, 2022 in the presence of Mr. Domininitus Nkwera, learned counsel for the respondent was remotely present.



A.Z.MGEYEKWA

JUDGE

25.08.2022