IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 356 OF 2023

(Originating from Kibaha District Land and Housing Tribunal dated 23/08/2023 in Land Applications No. 104 and 163 of 2017)

MARIAM MOHAMED KAMENYA.....1ST APPELLANT

ISMAIL MOHAMED KIWENE.....2ND APPELLANT

METUKATUS JOHN AMOS.....3RD APPELLANT

ABDALLAH RASHID SELEMAN.....4TH APPELLANT

JUMA IDDI alias KIBARAGASHIA.....5TH APPELLANT

JACOB GERALF alias KILUBWALUBWA.....6TH APPELLANT

BENEGO JOEL BUZIKA.....7TH APPELLANT

MOHAMED KIWENE .....8TH APPELLANT

SHAIBU ALLY KINOLO .....9TH APPELLANT

SELEMANI MOHAMED KAMUNOLE .....10TH APPELLANT

ABDALLAH SELEMANI KIWENE .....11TH APPELLANT

BOKASA DANKAN MWAKALUKWA .....12TH APPELLANT

REHEMA MOHAMED KINOLO..... 13TH APPELLANT

NASRA ADAM .....14TH APPELLANT

HADIJA OMARY LOGANI .....15TH APPELLANT

SAID RAMADHANI KUBWALAO.....16TH APPELLANT

ZEBEDAYO JOEL BUZIKWA .....17TH APPELLANT

SHABANI MRISHO KISEBENGO .....18TH APPELLANT

FATUMA KUHANGAIKA .....19TH APPELLANT

ALLY BUNYE .....20TH APPELANT

BEATRICE MANGALE .....21ST APPELLANT

YUSUPHU SUNZULE .....22ND APPELLANT

ANTHONY WILLIUM .....23RD APPELLANT

DAMIAN YUSTO .....24TH APPELLANT

ANDREA DANIEL MAPURI .....25TH APPELLANT

HADIJA ALLY .....26TH APPELLANT

FATUMA KINDAMBA .....27TH APPELLANT

MOHAMED MBONDE .....28TH APPELLANT

JAMALI MOHAMED MBONDE .....29TH APPELLANT

ABDU MOHAMED MBONDE .....30TH APPELLANT

HASSAN ISMAIL JUMA .....31ST APPELLANT

ANTHONY JOHN BULUYE.....32ND APPELLANT

GRACE JOHN .....33RD APPELLANT

PIUS DANIEL .....29TH APPELLANT

ERASTO MOSHA .....28TH APPELLANT

VERSUS

NAFTAL LUHWANO KISINGA.....1ST RESPONDENT

MATIKU NYAKALUNGU.....2ND RESPONDENT

JUDGMENT

13th to 17th November, 2023

E.B. LUVANDA, J

The First to Thirty Five Appellants inclusive, named above, were sued by the First Respondent above named along with the Second Respondent over a suitland of twenty three acres parcels of land located at Sagale Kambini street, Viziwaziwa Ward, Kibaha Township Council. At the conclusion of the trial, the First to Thirty Five Appellants herein were adjudged trespassers and ordered to

pay the First Respondent a sum of Tshs. 200,000/= each, as general damages for vandalization and impeding the First Respondent (who was decreed rightful owner) to carry out development thereon.

In the memorandum of appeal the Appellants raised twenty two grounds of appeal:-

1. That, the learned Chairman erred in law and in facts or not discovering the issue of non joinder of the Respondent's sellers.
2. That, the learned Chairman erred in law and in facts for giving victory to the Respondent while a person who sold the farm to him failed to prove purchases of the Land at issue.
3. That, the learned Chairman erred in law and in facts for not putting into consideration the crucial issue of location and description of the disputed farm for easy execution, if any.
4. That, the learned Chairman erred in law and in facts for not putting into consideration the issue of the size, demarcations and description of the portions of Land of each Appellant which he was alleged to have trespassed for easy execution, if any.
5. That, the learned Chairman erred in law and in facts and in facts for believing that the money for disposition were being received by the

Daughter of the seller to the respondent and handed over to the 1st Appellant.

6. That, the learned Chairman erred in law and in facts for not putting into consideration the need of the consent of disposition by the 1st Appellant as the wife.
7. That, the learned Chairman erred in law and in facts for her failure to put into consideration the allegations and testimonies of the 1st Appellant that she acquired the farm after being given by her late father before even getting married to the 1st Respondent seller.
8. That, the learned Chairman erred in law for blessing the purported disposition of one acre by the Daughter of the 1st Appellant although she was not consented by her mother who is the 1st Appellant.
9. That, the learned Chairman erred in Law for trusting the cooked sale agreements and blessed them which consist of a lot of shortcomings.
10. That, the learned Chairman erred in Law for rejecting the truth that the 1st Respondent purportedly bought the farm latter that the truth that the 1st Appellant had been there since her childhood and she was given the same by her late father.
11. That, the learned Chairman erred in law and in facts for not discovering the reasons why the 1st Respondent sellers were not brough for

testimonies and why those who sold land to the 1st Respondent's seller were not called for testimonies.

12. That, the learned Chairman erred in law and in facts for blessing the disposition of 17 acres to the 1st Respondent without the presence of evidences.

13. That, the learned Chairman erred in law and in facts for not properly scrutinizing the purported sale agreements which went through the hands of the former Chairman of Mtaa, PW2, Martha Francis as they were full of shortcomings who also pretended to be present during the disposition while it was no so.

14. That, the learned Chairman erred in law and in facts for believing the hearsay testimonies of PW3, who was not present even during the purported dispositions.

15. That, the learned Chairman erred in law and in facts for not putting into consideration the uniformity and resembrence of evidence of the Appellants.

16. That, the learned Chairman erred in law and in facts for not discovering or for rejecting to put into consideration the inconsistence of the testimonies of PW1 and DW10 pertaining of the years of purchasing the farm by the 1st Respondent.

17. That, the learned Chairman erred in law and in facts for not discovering the inconsistence of the testimonies of DW10 and DW11 on the issue of a farm which the 1st Appellant was given by her late father and for the failure of evidencing if the 1st Appellant sold her farm which she acquired from her late father.

18. That, the learned Chairman erred in law and in facts for tilting the testimony of the 1st Appellant that after being married she shifted to the 1st Respondent's residence while the 1st Appellant in the one who welcomed her husband after the said marriage.

19. That, the learned Chairman erred in law for tilting the evidence or testimony of the 1st Appellant who disowned other person and confirmed only nine (9) Appellants.

20. That, the learned Chairman erred in law for overlooking the pleadings which openly stated the way the 1st Appellant gave portions of disputed land to the 2nd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th, 17th, 18th, and 34th Appellants.

21. That, the learned Chairman erred in law and in facts for calling the DW10 as a famous person in the locality while during the cross examination he admitted to here not been present when the 1st Appellant was getting married to the purported 1st Respondent's seller.

22. That, learned Chairman erred in law and in facts for not discovering that it was error to the proceedings to involve the assessors in cross examining the witness.

It is to be noted that when the appeal was called for hearing on 09/10/2023, the appeal is respect of the First Appellant, was marked withdrawn following her prayer and wish to step down on medical ground and aging, having lingered in court corridors for eight years.

Mr. Saiwello T.J. Kumwenda learned Counsel for Second to Thirty Five Appellants abandoned ground number eleven. The learned Counsel submitted for ground number one, that the First Respondent did not sue the late Mzee Kinolo's Administrator of his estate Mwanahawa Mohamed Kinolo (alleged unlawfully sold her mother's farm to the Second Respondent, without her mother's consent), Joseph Nyakyome Warioba. He submitted that a sale agreement annexure MN – 1 shows Marth (sic, Martha) Francis signed as executive officer, while she was a chairperson, argued she signed on behalf of Oliva Kissaka and used a rubber stamp of executive officer, according to the learned Counsel, it creates doubt.

In reply, to ground number one Mr. Frank A. Chundu, learned Counsel for Respondents submitted that a complaint of non joinder does not hold water, because the testimony of DW9 (Second Respondent herein) proved that the

deal for buying land was concluded prior the demise of late Mohamed Kinolo. He submitted that Mwanahawa Mohamed Kinolo never sold any portion of land to the Second Respondent, arguing was a mere witness to the transaction of sale by her father (late Kinolo) in the presence of her mother the First Appellant. He submitted that Joseph Nyakyoma Warioba testified as DW12, who asserted to have been given three acres by the Second Respondent and later disposed it by sale to the First Respondent, arguing DW12 was not a necessary party. He cited the case of A**bdulatif Mohamed Hamis vs. Mehboob Yusuph Othman & Another,** Civil Revision No. 6/2017. He submitted that the Appellants did not object admission of the alleged sale agreements neither cross examined on the issue raised at the appeal. He cited the case of M**artin Misara vs. The Republic,** Criminal Appeal No. 428/2016 CAT.

To my view, the ground of non rejoinder is an after thought. Going by the records of the tribunal, nowhere it was raised. It is the law that objections on the ground of non rejoinder must be raised at the earliest opportune. This is the import of Order I rule 12, of the Civil Procedure Code, RE 2019, I quote,

> *"All objections on the ground of non rejoinder or mis rejoinder of parties shall be taken at the earliest possible opportunity .....and any such objection no so taken shall be deemed to have been waived"*

The alleged people some were mentioned in paragraph 5(a) (i) of the application, and the Appellant did not seize an opportunity to raise it at the trial. As such it is taken as good one as having been waived.

Above all it is the law that no suit shall be defeated by reason by non joinder, see Order I rule 9 Cap 33 (supra).

In his submission the learned Counsel for Appellant did not vindicate if at all those people were necessary party within the two test propounded in **Abdulatif Mohamed** (supra).

Regarding, title and rubber stamp of the attesting officer in annexure MN-1, which was admitted as exhibit P1. The record of the Tribunal reflect that when it was tendered by PW1 (First Respondent) on 19/06/2019, it was admitted without any objection or reservation from the learned Counsel for Appellants and questions for cross examination were not forthcoming from that angle. In that way it is deemed that the Appellants accepted truth of the facts mentioned therein, see **Martin Misara** (supra).

Regarding illiterate of Kinolo alleged signed annexure MN – 211, unfortunate the alleged annexure MN-**211** was not pleaded or mentioned. This findings take into board ground number nine, and thirtneen. Therefore ground number one, nine thirteen, are dismissed.

Ground number two, the learned Counsel for Appellant submitted that all farms which were acquired by the First Respondent were from the Second Respondent, argued the purchasers are full of doubts, for the latter failed to prove how he acquired the First Appellant's farm from the First Appellant's husband who died in 2002 but sale agreements were backdated down to 2001, under the ringleader of Hassan Omary. He submitted that the farms were sold without the consent or knowledge of the First Appellant.

In reply to ground number two, the Counsel for Respondents submitted that the First Appellant who does not support this appeal was present when the late Mohamed Kinolo sold the farm to the Second Respondent, where she exhibited demarcations of the land to the Second Respondent, citing the testimony of DW9, DW10, DW11, and DW12. He submitted that when the First Respondent lodged a complaint of trespass to the hamlet council, the First Appellant (DW1) acknowledged the sale of the disputed land to the Second Respondent, citing the testimony of PW3, DW10, DW11. He submitted that the First Appellant has no title over the disputed land.

This complaint of ground is without substance. The Second Respondent who testified as DW9 vindicated on how he acquired the seventeen acres of land by way of purchase from the late Mohamed Kinolo in piece meal on 30/05/2001, 08/06/2001, 02/02/2002 as per sale agreement exhibit D1, and on 26/12/2006

exhibit D4 which consideration for purchase was received by the First Appellant, under a total consideration of Tshs 530,000/= and on 13/09/2005 the First Respondent purchased three acres from the daughter of the First Appellant hailing from Tunduru one Mwanahawa Kinolo after obtaining a consent and assent of the First Appellant as per exhibit D5, which three acres are not in disputed.

On the other hand, the First Appellant (DW1) who claimed ownership under personal capacity alleged to have been given seventeen acres by her biological father one Mohamed Kamenya. However, DW1 was contradicting, at first she asserted ownership of seventeen acres.

On cross examination by the counsel for First Appellant, DW1 stated that in a case No. 163/2017 she sued claiming twelve acres, later changed a story that she is claiming fourteen acres after disposing three acres. Also at first DW1 was portraying that she is the one who vended the three acres to the First Respondent, later changed a story saying it was disposed by her daughter.

More important, as alluded by the learned trial Chairman, DW1 who braged that the seventeen acres are her personal property, but on cross examination by the learned Counsel for First Respondent, she conceded that after marrying the late Mohamed Kinolo, the later took her to his home at his area, where they lived

for their entire life until when the late Mohamed Kinolo met his demise and was buried thereat on the suit land.

In that way, it cannot be said that the First Appellant had any personal title to the suit land. Above all, in exhibit D5, where it reflect a final instalment was paid to make a grand total of Tshs. 580,000/= for purchase of fourteen and half acres of land instead of seventeen acres (as per DW9, the First Appellant had encroached and disposed two and a half acres to one Nicodemo Namajeje, where DW9 condoned), in that document exhibit D5, the First Appellant appended her thumb print. As such, the argument that the First Appellant did not consent or was not involved, is a misplaced idea. This findings takes into board grounds number five, six, seven, eight, ten, fifteen, eighteen. Therefore ground number two, five, seven, eight, fifteen, eighteen are dismissed.

Ground number three and four, the learned Counsel for Appellants submitted that the location is not well explained or described in the application, arguing it is contrary to Order VII rule 3 of Cap 33 (supra), Form No. 1 paragraph 3 First Schedule in the Land Disputes Courts Act, Cap 216 R.E. 2002.

In reply, the learned Counsel for Respondents submitted that the disputed land was known to parties, arguing that even in the decree the details of the disputed land is explanatory and cannot cause any confusion.

It is to be noted that the requirement as to the description of the immovable property as envisaged under rule 3 of Order VII Cap 33 9supra) is for identification purpose.

Herein, the Tribunal visited the *locus in quo* and made the following observation,

> *"Baraza limeona eneo moja lenye mgogoro ambalo kila upande unadai ni la kwake hivyo hakuna ubishani juu ya eneo la mgogoro"*

In other words, the question as to the description and location of the suit land is not at issue. Therefore ground number three and four are dismissed.

Ground number twelve, the learned Counsel for Appellants submitted that the learned Chairman blessed the disposition of seventeen acres while no sale agreement giving genuine purchase.

In reply, the learned Counsel for Respondent submitted that the argument that sale agreements tendered were not genuine is not substantiated, arguing the Appellants failed to establish how the same were not genuine. He submitted that they were not objected or cross examined on the genuiness, arguing it is an after thought to raise it at appeal.

This ground is unmerited. The sale agreement dated 10/03/2014 for eight acres was tendered and admitted as exhibit P1, without objection. A sale

agreement dated 10/03/2014 for three acres, was objected on a different ground, the argument of genuiness was not forthcoming, likewise a sale agreement dated 10/03/2014 for six acres. In totality exhibit P1, P2, P3, the First Respondent purchased a total of seventeen acres. Therefore, the argument of genuiness is taken as an after thought. Ground number twelve is dismissed.

Ground number fourteen, the learned Counsel for Appellants submitted that one Evatus John Mahuwi facilitated forgeries in the locality.

In reply, the learned Counsel for Respondents, submitted that the allegations are unfounded and not backed by evidence on record.

According to the Tribunal record, the said Evastus John Mahuwi testified as PW3, and his role was a mere mediator. PW3 was cross examined at length by the Counsel for the Appellants, however the question of forgery was not forthcoming. Indeed the learned Counsel for Appellants did not state the particulars of the alleged forgery. Therefore ground number fourteen is dismissed for being an afterthought.

Ground number sixteen and seventeen, the learned Counsel for Appellants faulted the testimony of PW1 and DW10 arguing contradicted on the year when PW1 purchased land, arguing PW1 said in 2013, DW10 said in 2001,

while DW12 sold the land to PW1 in 2014 and not 2013. Also faulted the testimony of DW10 and DW11, being malicious and variancy on that DW10 said the farm was trespassed in 2015, DW11 said the farm of the First Appellant was close to DW11.

In reply, the learned Counsel for Respondent submitted that, there is no inconsistency between DW10 and DW11 which can be established to go to the root of the matter.

To my view, the argument of the learned Counsel for Respondent is a correct stance, those discrepancies even if are there, are too minor, cannot be taken as a serious concern for argument or adjudication. In fact there are outrightly ignored.

Regard malice by DW11, particulars of the alleged malice were not disclosed, the learned counsel was merely alleging. Ground number sixteen and seventeen are dismissed.

Ground number nineteen, the learned Counsel for Appellants submitted that during the hearing the First Appellant did not agree to know the thirty Five Respondents in the suit, but recognized and admitted to had given land to only nine people. In ground number twenty, he submitted that in the judgment of the Tribunal there is a paragraph which says that there is

nowhere the First Appellant stated that she gave the portion of farms to the second, fifth sixth seventh, eighth, nineth, tenth, eleven, twelveth, fourteenth, seventh, eighteenth and third fourth, Appellants.

The provision of rule 11 of Order XXXIX of Cap 33(supra) by implication envisage elements or a situation where the High Court may summarily dismiss the appeal after hearing the Appellant or his advocate without even serving a notice of hearing to the Respondent or his advocate. To my view the two grounds above, were lodged without sufficient grounds of complaint.

It is unknown as to what the learned Counsel for Appellant is appealing for. Therefore grounds number nineteen and twenty are dismissed for want of substance.

Ground number twenty two, the learned Counsel for Appellant submitted that Cap 216 (supra) do not provide anywhere that the assessors duty among others is to cross examine witnessed in the course of hearing, citing section 23(1) of Cap 216 (supra). He submitted that DW1, DW2, DW3, First and Second Appellant were cross examined by assessors before they were re examined by the party who called them, arguing it was fatal. He cited the case of **Ally John & Others vs. Republic,** Criminal Appeal No. 179/2021 CAT.

In reply, the learned Counsel for Respondents submitted that the Appellant have failed to establish how assessors cross examined witnesses, or failure to air out whether answers given by the witnesses proved that they were indeed cross examined. He submitted that it is the position of the law that the role of assessors is to seek clarifications in evidence and nothing else. He distinguished **Ally John** (supra), that it was based on the Criminal Procedure Act, while the matter at hand the procedure is set out in the Cap 216 (supra).

For the sake of clarity, generally examination of witness is predominantly governed by Part II of the Evidence Act, Cap 6 R.E. 2022, which set out how, by who and at what time or stage a witness be examined in chief, cross examined and re examined, these forms are available to the party who calls a witness or by adverse party, see section 146 Cap 6 (supra). However, questions by assessors fall under a distint section or part, that is Part V of Cap 6 (supra), which is having a single section 177, I reproduce,

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper"*

Going by the records of the Tribunal, nowhere suggest assessors cross examined or asked questions in the nature of cross examination. The records

of the Tribunal reflect that assessors were merely invited to ask questions for clarification. Unfortunate the law cited above, is silent as at what stage assessors will be invited to ask questions. However section 177 Cap 6 (supra), must be read together with section 176(2) Cap 6 (supra), which provide,

> *"The court may, in order to discover or to obtain proper proof of relevant facts, ask any question it desires, in any form, at any time of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order nor, without leave of the court, to cross examine any witness upon any answer given in reply to any such question"*

Therefore to my view, a mere fact that assessors were invited to ask questions prior re examination, is not fatal. Above all, the learned Counsel for Appellant did not say how it was prejudicial or detrimental to his clients' case. In **Ally John** (supra), the proceedings were vitiated and trial was nullified, for reason among others that assessors were allowed to cross examine witnesses, which is not the case here. Therefore it is slightly distinguishable in that respect.

In totality, the appeal is without merit, the verdict by the Tribunal including an order for payment of general damages a sum of Tshs 200,000 for each Appellant, which was not subject for the appeal, is upheld.

The appeal is dismissed with costs.

E. B. LUVANDA
JUDGE
17/11/2023

Judgment delivered through virtual court neither attended by Mr. Saiwello T.J. Kumwenda learned Counsel for Second to Thirty Five Appellants nor Mr. Frank A. Chundu learned Counsel for Respondents, only the Second Appellant appeared in person.

E. B. LUVANDA
JUDGE
17/11/2023