

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 393 OF 2023

*(Arising from the Judgment and Decree of the District Land and Housing Tribunal for
Mkuranga District at Mkuranga in Application No. 37 of 2021)*

MUSA ALLY NYAMSINGWA.....APPELLANT

VERSUS

ANANGISYE WAZIRI SANGA.....RESPONDENT

JUDGMENT

28th November, 2023 & 28th February, 2024

L. HEMED, J.

The suit property is a piece of land located at Mivule area, in Mwanambaya village, Mipeko Ward, within Mkuranga District in Coastal region. At the District Land and Housing Tribunal for Mkuranga, the Respondent herein, **ANANGISYE WAZIRI SANGA** sued the Appellant **MUSA ALLY NYAMSINGWA** claiming ownership of the said suit land. He also sought for declaratory order that the Appellant is the trespasser to the suit landed property.

Through the written statement of defence, the appellant disputed the application and claimed ownership of the suit premises. The Appellant



averred to have purchased the same from the respondent herein back in the year 2009 in the presence of Kisemvule Village Authority as witness.

After having deliberated over the matter, the trial Tribunal, by the Judgment delivered on 17th August 2023, (**Hon. R.Mwakibuja, Chairperson**) found in favour of the respondent herein by declaring him owner of the suit landed property. Aggrieved by the said decision, the appellant opted to knock the gates of this court with a Memorandum of Appeal containing the following grounds-

"1. That the trial Chairman erred in law and in fact by failure to evaluate properly the evidence on record as a result arrived at wrong conclusion.

2. That the trial Chairman erred in law for failure to give reasonable weight to appellant's evidence (including documentary exhibits) and his witnesses, including undisputed facts from the appellant's evidence.

3. That the trial Chairman erred in law and in fact for failure to rule out that the respondent had sold the disputed premises to the appellant.

4. That the trial tribunal erred in law for conduct the proceedings with material irregularities."

The Appellant is thus praying for the appeal to be allowed to the effect that, he should be declared owner of the suit landed property.

The Appeal was argued by way of written submissions. Both parties were represented by advocates. Mr. **Hosea Chamba**, learned advocate acted for the Appellant while the Respondent enjoyed the service of Mr. **Alpha Ng'ondya**, learned advocate. I have noted that all submissions were promptly filed pursuant to the scheduling orders of the court.

Let me start with the 1st ground of appeal that the trial chairman erred in law and in fact by failure to evaluate properly evidence on record as a result arrived at a wrong conclusion. It was the submission of the counsel of the Appellant that ignoring or improperly interpreting evidence of DW1 and DW2 in so far as the issue of sale of the suit premises by the respondent is concerned. He averred that DW2 was a mere witness to the

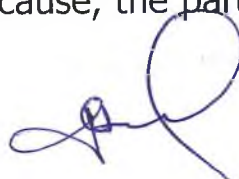


sale agreement that he could not retain a copy of it. According to him, by faulting his evidence as a witness simply because he had not produced a copy of the Agreement he witnessed, the trial chairperson improperly evaluated evidence on record.

He proceeded to argue that the crucial evidence of DW1 and DW2 that the respondent and his wife was not shaken by cross examination for it to be ignored. He put reliance on the decision of the Court of Appeal of Tanzania in **Shadrack Balinago vs Fikiri Mohamed@ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General**, Civil Appeal No.223 of 2017. He insisted that the trial tribunal having made a finding that the dispute is whether or not the respondent had sold the disputed premises to the appellant had to evaluate the available evidence and see whose evidence was heavier than that of another depending on the quality of evidence. He fortified his argument by the decision of this Court in **Hemedi Saidi v. Mohamedi Mbilu**[1984]TLR 113. In his view, evidence adduced by the Appellant had more quality than that of the Respondent.

Coming to the 2nd ground of appeal that the trial Chairman erred in law for failure to give reasonable weight to appellant's evidence (including documentary exhibits) and his witnesses, including undisputed facts from the appellant's evidence. The advocate of the Appellant argued that the trial Chairperson failed to give the appropriate weight of exhibit D1, D2 and D3. He insisted that, the said exhibits proved that Kisemvule Village Council recognizes the Appellant as the lawful owner of the disputed premises. According to the counsel for the Appellant, had the trial chairperson considered the weight of the said exhibit she would have reached to a different decision.

As to the 3rd ground that the trial chairman erred in law and in fact for failure to rule out that the respondent had sold the disputed premises to the Appellant. It was asserted that at the last line of page 12 of the typed judgment the trial chairman states that "*...Hakuna mauziano yeyote yaliyowahikufanyika kati ya mdai na mdaiwa kuhusiana na eneo la mgogoro...*" in his view, this was an error from the chairperson because evidence from the appellant and exhibits produced suggested that there was a sale of the suit properties between the parties. He added that the trial Tribunal's holding was erroneous because, the parties relationship was



centered at the disputed premises only. There was no any further evidence suggesting the parties relationship in connection to another property.

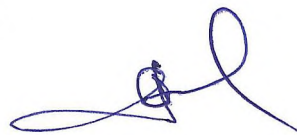
The last ground of appeal was to the effect that the trial tribunal erred in law for conducting the proceedings with material irregularities. It was submitted that the trial tribunal conducted proceedings with material irregularities. According to the Appellant's advocate, only one assessor gave the opinion before the chairperson composed her judgment. He insisted that this was fatal and contrary to section 23(1) of the Land Disputes Courts Act,[Cap.216 RE 2019] which requires the Chairman to sit with two assessors. In his opinion, the reason that one assessor retired before composing her opinion does not make sense and not condoned by the court. By opinion of a single assessor, it cannot be said that the judgment of the trial Tribunal was delivered in compliance of the law. Reliance was put in the decision of this Court in **Iddi Mnyau vs. Edward Mugwe Mugendi**, Land Appeal No.258 of 2021, **Hosea Andrea Mushongi (Administrator of estate of the late Hosea Mushongi) vs. Charles Gabagambi**, Land Appeal No.66 of 2021 and in **Masoya Mahemba vs. Nyasuma Kihaga**, Land Appeal No. 41 of 2021. He ended praying the appeal to be allowed.



In reply, the learned counsel for the Respondent argued in respect of the 1st ground of appeal that the trial chairperson was right in her decision for not considering the testimony of DW2, the Chairman of the Village Council of Kisemvule because he failed to supply a copy of the Sale Agreement which was concluded in his office. In his opinion, since transaction was concluded in DW2's office then a copy must have been kept in the office of DW2.

He argued further that evidence adduced by the Respondent was consistent to what he pleaded in the Application. The learned counsel added that what DW1 and DW2 adduced was in contravention to what was pleaded in the WSD of the Appellant and thus such evidence was to be ignored. He relied on the decision of the Court of Appeal of Tanzania in **Yara Tanzania Limited vs Ikuwo General Enterprises Limited**, Civil Appeal No.309 of 2019 on the principle that parties are bound by their own pleadings.

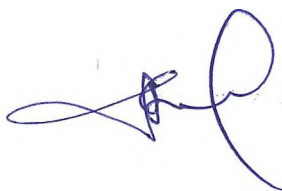
As regard the 2nd ground of the tribunal's failure to give reasonable weight to the documentary evidence, the learned counsel contended that the appellant's tendered exhibits contravened the written statement of



defence and thus had no evidential value. According to him, the documentary evidence tendered by the Appellant were referring property not in dispute. He was of the view that the trial Tribunal was right to disregard them.

The 3rd ground of appeal was on the failure of the trial Tribunal to rule out that the respondent had sold the disputed premises to the appellant. It was argued that exhibits tendered by the appellant during trial had nothing to do with the land in dispute. The counsel for the Respondent was of the view that all exhibits tendered were not referring to the disputed landed property. He prayed the court to disregard the 3rd ground of appeal.

The last ground of appeal was on the trial tribunal to conduct proceedings with material irregularities. It was argued that the trial Chairperson was justified to proceed to conclude the proceedings with the remained assessor because it is permissible under section 23(3) of the Land Disputes Courts Act. He prayed to disregard the 4th ground of appeal.



In rejoinder submissions, the counsel for the Appellant reiterated his submissions in chief. He insisted the appeal to be meritorious and worth to be allowed.

Having gone through the rival submissions, it is apt to deliberate on the merit of the grounds of appeal. I have opted to combine the 1st, 2nd and 3rd grounds of appeal because they are all related to evaluation of evidence and failure to rule out that the Respondent sold the suit land to the Appellant. I have noted from the record of Land Application No.37 of 2021 before the trial Tribunal that, two issues were framed as follows:

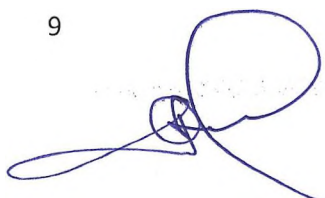
"1. Je mdai ni mmiliki halali wa eneo lenye mgogoro

2. Je kuna nafuu yoyote kwa wadaawa."

Informally, the above issues can be translated as follows:-

1. Whether the applicant is the lawful owner of the suit land.
2. To what relief are the parties entitled.

It should be noted that, the herein Respondent was the Applicant at the trial Tribunal who instituted the suit against the herein Respondent



claiming ownership of the suit landed property. It was the duty of the Applicant to prove his claims of ownership of the suit land pursuant to section 110(1) of the Evidence Act, [Cap.6 R.E 2019] which provides thus:-

"110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

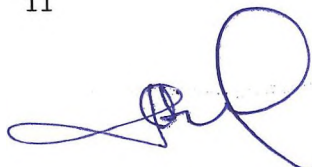
To prove his claims, the Respondent herein called three (3) witnesses. PW1 was one Leila Fred Chabuma, the Chairperson of Mwanambaya - Mivule Village Council who testified to know the Respondent herein as the owner of the suit landed property. PW2, one Moshi Ally Othman, testified to be the son of the late Ally Mohamed Othman the person who sold the suit land to the Respondent. The Respondent testified before the trial Tribunal as PW3, where he tendered several documents including the original copy of the Sale Agreement he used to purchase the said piece of land from the late Ally Mohamed Othman (exhibit P1).

Evidence of the Appellant was that, he purchased the suit land from the Respondent in 2009. He could not produce the Sale Agreement on



allegation that the same was burnt by fire in 2011. He relied on the police loss report (exhibit D1) as a proof thereof together with the introduction letters of the Village Executive Officer of Kisemvule Village (exhibits D2 & D3). I have examined the exhibit D1, the Police Loss Report and found that, one Naimi Narnabas Dyer procured it. The said Report does not state the location of the land subject matter of the Agreement. Again, what was said by DW1 in his oral testimony was inconsistent to the content of the loss report. In the oral testimony, DW1 testified that the said Sale Agreement was burnt in 2011 while in the loss report the document got lost on 2nd January, 2010. Therefore, exhibit D1 does not refer to the purported lost Sale Agreement of the suit landed property.

Principally, in comparing evidence of the two parties before the trial Tribunal, the Respondent's evidence appeared to be heavier than the one adduced by the Appellant herein. The 1st Respondent tendered the original Sale Agreement of the suit land, the question is, if at all the Appellant had purchased the title over land from the Respondent, why the said Sale Agreement (exhibit P1) was not handed to him? This implies that, there was no such transaction conducted between the parties. Additionally, the Appellant did not even manage to prove the mode of payment of the

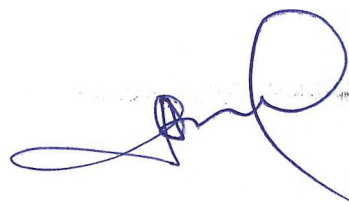


alleged purchase price of the suit land. Failure to prove that he paid the purchase price, the trial court could not be moved to rule that the Appellant purchased the suit land from the Respondent. In **Hemedi Saidi v. Mohamedi Mbilu** [1984] T.L.R 113 the court had this to say:

"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."

In the instant case, the trial chairperson well evaluated evidence on record and according to the available evidence; it was inevitable for the Appellant to lose the battle. The quality of evidence adduced by the Respondent had more weight than the one given by the Appellant. From the foregoing, I find the 1st, 2nd and 3rd grounds of appeal to have no merit.

In the 4th ground of Appeal, the Appellant is faulting the decision of the of the trial Tribunal for being composed by the opinion of one assessor. In the opinion of the learned advocate of the Appellant, it was contrary to section 23(1) of the Land Disputes Courts Act [Cap.216 R.E.216] which requires the assessors who presided over with the chairman to determine the matter to give their opinion. In his view, the reason given by the trial

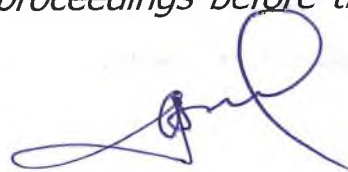


chairperson that one assessor had retired before composing her opinion does not make sense and not condoned by the court. The observation of the learned advocate for the Appellant have drawn me to think, what has to be done if the assessor or assessors who participated in the trial pass on before the conclusion of the matter? To answer this question let me start by pointing out what the law provides generally. Under section 23(2) of the Land Disputes Courts Act (supra), the chairman is required to sit with two assessors who will have to give their opinion before the chairperson composes the judgment. It provides thus:-

*"(2) 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.**"* [Emphasis added]

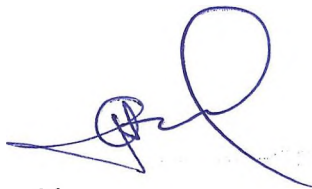
The above section provide for the general rule that the chairman must sit with two assessor who must give their opinion before the judgment is composed. However, there exception to that general rule provided under subsection (3). It provides thus:-

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the



Tribunal, **either** or **both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.** [Emphasis added]

The above provision permits the chairperson to proceed to conclude the proceedings notwithstanding the absence of the assessor or assessors who were present at the commencement of the proceedings. In the present matter, one assessor retired before the conclusion of the matter. Upon retirement, an assessor ceases to have powers conferred to him or her and thus cannot perform the function of an assessor. In the instant case, it is no way the assessor who retired could be called to finalize the case after the retirement date. In the circumstance of this case, the trial chairperson had no option other than to invoke the provision of section 23(3) of the Land Disputes Courts Act, [Cap.216 R.E 2019] to proceed to conclude the matter with the remained assessor.



From the foregoing, I find that the trial Chairman acted within the parameters of the law. There is no any irregularities committed by the trial Tribunal. The 4th ground of appeal has no merit.

In the final analysis, I find no merits in the appeal. The same is thus dismissed with costs. Order accordingly.

DATED at DAR ES SALAAM this 28th February 2024.




L. HEMED

JUDGE