IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

LAND APEAL NO. 92 OF 2020

(Arising from the Decision of the District Land and Housing Tribunal of Iramba District at Kiomboi in Land Application No. 42 of 2018)

MONIKA LAZARO

(Administrator of Estate of Late Lazaro Mkumbo).....APPELLANT

VERSUS

MARIAM NAFTARI .....1ST RESPONDENT

GODFREY MKUNGU.....2ND RESPONDENT

(Administrator of Estate of Late Mwani Mwinjuka Mpinga)

JUDGMENT

18/8/2022 & 31/10/2022

KAGOMBA, J

A petition of appeal bearing three grounds was filed by the appellant, **MONIKA LAZARO,** being the Administratrix of the Estate of Late Lazaro Mkumbo, to challenge the decision of the District Land and Housing Tribunal for Iramba at Kiomboi (the "Tribunal") in Land Application No. 42 of 2018, where the appellant's application was dismissed with costs.

At the Tribunal, the appellant, who was then the applicant, sued the respondents herein over ownership of a land parcel measuring 2½ acres or about 12 *Nkwa*, which she claimed to have been bought by her late father, Lazaro Mkumbu, a part of which the respondents allegedly encroached. It was not disputed that the appellant's father bought a parcel of land from the Late Mwani Mwinjaku Mpinga, in whose name the 2nd respondent has been sued. It was alleged by the appellant that the 1st respondent trespassed into a parcel measuring about 40 paces in width and 80 paces in length, fell down trees while saying it was accidental, but went on planning seeds on the encroached parcel, an act that was reported to the Village Executive Officer (VEO) by the appellant.

The dispute was first lodged for determination at Ntwike Ward Tribunal, but apparently for jurisdictional reasons, the same was heard and determined by the Tribunal. After a full trial, evidence for the respondents was found weightier than the applicant's. Hence, the Tribunal dismissed the application with costs as aforesaid and decided that each party be entitled to their own land parcel with *Mlundi* tree as the boundary. This decision is what has aggrieved the appellant resulting into this instant appeal.

The appellant's three grounds of appeal are as follows:

1. *That, the Tribunal erred in law and in facts by pronouncing judgment in favour of respondents without visiting locus in quo, to see the disputed boundaries.*

2. *That, the Tribunal erred in law and in facts by pronouncing judgment in favour of respondents without opinions of the assessors being read over as a legal requirement.*

3. *That, the Tribunal erred in law and in facts by pronouncing judgment in favour of respondents without considering that the evidence of the appellant was strong compared to weak evidence of the respondent.*

On the date of hearing of this appeal, Mr. Lucas Komba, learned Advocate represented the appellant, while the respondents fended for themselves.

In arguing the appeal, Mr. Komba preferred to begin with the 2nd ground of appeal and then he argued on the 1st and 3rd grounds jointly. In expounding the 2nd ground of appeal, Mr. Komba submitted according to the proceedings, the opinions of the assessors were not read over to the parties.

Mr. Komba added that when the opinions of the assessors are read over, it is a legal requirement that the Chairman has to record the same in the proceedings. He cited the case of **Eng. Justin D. Rweyemamu v. James Rugakingira & 3 Others**, Land Case Appeal No. 61 of 2021, High Court, Bukoba, wherein several Court of Appeal decisions were referred to the effect that the opinion of the assessors must be recorded in the proceedings.

On the 1st and 3rd grounds of appeal, Mr. Komba submitted that the appellant's evidence was heavier than that of the respondents in that; the appellant purchased the land, he had been using it all along. He argued that DW3 who witnessed the sale of the land, did not disclose the boundaries and neither did he state clearly to whom the disputed land belonged.

Mr. Komba further argued that while the border is said to be a certain big tree, the respondent witnesses failed to show where exactly was that big tree located, hence it was imperative for the Tribunal to visit *locus in quo* as per advice of the assessors stated in the Tribunal's judgment. He prayed the court to allow the appeal with costs.

In reply, the 1st respondent opposed the appeal. In respect of the 2nd ground of appeal the 1st respondent submitted that, as per her recollection, the opinions of the assessors were read over in the Tribunal. She added that the respondents had no control over the recording of the trial proceedings, hence, they should not lose their right for that reason.

With regard to the assessors' opinion that the matter be referred back to the Ward Tribunal for site visiting, the 1st respondent expressed her surprise, submitting that it was the appellant himself who sought the transfer of the case to the Tribunal.

On the weight of the appellant's evidence vis a vis the respondents', she submitted that the witnesses for the respondents were around during

the sale of the land in dispute and they spoke the truth. She insisted that the border for the land in dispute is a *Mlumbi* tree and not the *Mduguyu* tree.

The 2nd respondent joined hand with the 1st respondent in opposing the appeal. He submitted that there was no irregularity in the proceedings of the Tribunal as the opinions of the assessors were recorded, as shown in the impugned judgment.

On the 1st and 3rd grounds of appeal, the 2nd respondent dismissed the claim that the appellant's evidence was heavier. He said, the appellant's witnesses were not around during the sale of the land in dispute, hence they adduced hearsay evidence.

Regarding the necessity for the Tribunal to visit *locus in quo*, the 2nd respondent argued that since the dispute is about a border identified by two types of trees, there was no need to visit for just seeing those trees.

It was the 2nd respondent's further submission that since there is no dispute that the land in dispute was sold by the Late Mwani Mwinjuka Mpinga to the Late Lazaro Mkumbo for Tsh. 160/= in 1978, and those who witnessed the sale have testified that the border was a *Mlumbi* tree, the appeal and all complaints by the appellant were untenable. For these reasons, he prayed the court to uphold the decision of the Tribunal and dismiss the appeal with costs.

Mr. Komba, briefly rejoined by maintaining his submission in chief. He said that the opinions of the assessors were not recorded and read before the Tribunal, which was an irregularity. He added that since the border tree was no longer there, it was wise for the Tribunal to visit *locus in quo.*

Having considered the appellant's submissions and after perusal of the proceedings and judgment of the Tribunal, there are two issues to be determined. Firstly; whether the opinions of the assessors were not read before the Tribunal as alleged by the appellant in the 2nd ground of appeal. The second issue is whether the appeal has merit.

While contemplating on the issue framed above, the court is alive to the fact that this being the first appellate court, it is duty-bound to re-valuate the evidence adduced during trial and come up with court's own findings about the case. (see **Mapambano Michael @ Mayanga v The Republic**, Criminal Appeal No. 268 of 2015, CAT at Dodoma, available at www.Tanzlii.org)

As the appellant's advocate opted to start arguing the second ground of appeal, I also find it proper and convenient to start with the said ground of appeal. The filed second ground of appeal reads:

> *"**That**, the District Land and Housing Tribunal for Iramba at Kiomboi erred in law and in facts by pronouncing decision in*

favour of respondents without ***opinions of the assessors were not read over*** *the parties as legal requirement".*

[**Emphasis on the words in the third to fourth line is added**]

While submitting on the above quoted ground of appeal, Mr. Komba stated that according to the trial proceedings, particularly on 11/8/2020, the opinions of the assessors were not read over to the parties in the Tribunal. He then added that when the opinions of the assessors are read, it is a legal requirement that the Chairman has to record the same in the proceedings, which he did not. The respondents replied that the opinions of the assessors were read, and any mishap in the records of the Tribunal should not cause them suffer.

I have followed closely the learned advocate's submission. It appears to me that what he submitted is substantially different from what is pleaded in the second ground of appeal. It was the appellant's argument in this ground of appeal that the "***opinions of the assessors were not read over".*** The advocate's oral submission on this ground introduces a new argument altogether, that the opinions of the assessors were not **recorded**.

Certainly, reading and recording are not the same. And certainly, the advocate was unlawfully arguing a new matter not pleaded and thereby taking the respondents by surprise. It is trite law that parties are bound by their own pleadings. In **Astepro Investment Co. Ltd v. Jawinga Co. Ltd,**

Civil Appeal No.8 of 2015, (unreported), the Court of Appeal stated that it is;

> *"...a cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings".*

I have read both the typed and original proceedings of the Tribunal. It is my finding that on 11/8/2020, the matter came up for reading of assessors' opinions. The original Tribunal proceedings reads:

> *"Tribunal-The matter is coming for reading of assessor's opinions.* ***They are ready and read out to the parties****".*
>
> [Emphasis supplied]

Apparently, in the typed proceedings, the words "read out", were mistakenly written "read not". Probably, this typographical error is what mislead the appellant to think that the proceedings were not read over, leading to the second ground of appeal as drafted and presented above.

It is therefore my firm finding that the opinions of the assessors were read over to the parties, although the appellant, who was the applicant before the Tribunal, was absent. Since parties are bound by their own pleadings, the court considers only the issue of reading of the assessors'

opinions, as pleaded, and not of its recording. For this reason, the first issue is answered in the negative.

However, I wish to make an observation here that according to the Tribunal's case file, opinions of both assessors, namely; Mr. Kiula and Mrs. Shimba are forming part of the record. Mr. Fanuel E. Kiula recorded his opinion on 25/07/2020, advising the matter to be referred back to the Ward Tribunal to make visit to the *locus in quo*. Mrs. Mshimba wrote her opinion on 30/7/2020 giving similar opinion as her fellow assessor, albeit with different angle of observation. Importantly, both opinions were written and available in Tribunal's records, were read over to the parties before the judgment was composed and delivered by Tribunal Chairman on 25/8/2020. It is also clear that the same were duly considered by the Chairman in his judgment. With these facts, I would distinguish the decision in **Eng. Justin D. Rweyemamu v. James Rugakingira & 3 Others (supra),** taking comfort in the principle that each case has to be decided according to its own facts and obtaining circumstances.

Of particular importance, again, is the fact that the Tribunal Chairman differed with the opinion of the assessors, but in compliance with the law, he assigned reasons for so doing. He stated in the impugned judgment that he could not abdicate the adjudication of the suit presented before him to the Ward Tribunal, which had no jurisdiction over the matter. I have no reason to fault his decision

According to the evidence adduced during trial, the suit is about encroachment, with each side blaming the other side for transgression. It was alleged that the respondents had trespassed into part of the 12 *Nkwa*, which appellant said it was about 40 paces in width by 80 paces. The respondents alleged that the appellant had encroached by 4 *Nkwa*. The reason for each side's allegation is that the other party has exceeded the set border.

PW2 Bernard Msengi gave evidence that the border of the land in dispute was marked by a tree called *Mduguyu* which dried and fell down due to wind. This was the only witness who testified about the border mark for the appellant. His testimony was however, opposed by DW1 Mariam Naftali, the 1st respondent who said she grew up in the land where the dispute arose. She conceded that her grandmother sold the land parcel to the appellant, but the border was not *Mduguyu* but *Mlundi* tree, and that the appellant exceeded the boundary by about 4 *Nkwa*.

The rest of the evidence was, substantially, on whether the border was the *Mduguyu* tree or the *Mlundi* tree. Since DW2 Godfrey Mpanda Mkungu, a son of the seller and DW3 Emmanuel Msengi were present during the said undisputed sale of the land, their evidence that the boundary was *Mlundi* tree and not the *Mduguyu* tree, was found to be the most credible.

I have keenly read the evidence as adduced by witnesses for both sides, and its evaluation by the Tribunal. It is an established principle that,

a party will win a case, he who adduces stronger evidence than the opposite party. None of the appellant's witnesses was present during the sale. No documentary evidence was adduced by the appellant, during trial, as to what was the agreed boundary, between the seller and the buyer of the land in dispute. Under such circumstances, the evidence adduced by the appellant's witnesses taken as whole, was basically hearsay. It couldn't therefore defeat the testimony of DW2 and DW3, who were undisputedly present during the sale of the land in dispute and in setting of its boundary. The tribunal was, therefore, correct to afford much weight to the evidence of DW2 and DW3, who were the only eye-witnesses.

In his rejoinder, Mr. Komba argued that since the evidence of the tree was no longer there, it was wise for the Tribunal to visit the site. I think, this argument emanates from the evidence of PW2 Bernard Msengi who testified that the *Mduguyu* tree had dried up and fell down. However, since the Tribunal was satisfied by the evidence of DW2 and DW3 that the boundary was not the *Mduguyu* tree but the *Mlundi* tree, I think, the urge for the site visit is watered down. In any case, the visit to the *locus in quo* is, in law, not mandatory. It is a need-based procedure applicable in exceptional circumstances. In **Nizar M. H. Ladak v Gulamali Fazal Janmohamed**, Civil Appeal No. 9 of 1980, Mustafa, JA observed;

> *"It is only in exceptional circumstances that a court should visit a locus in quo, as by doing so, a court unconsciously takes the role of a witness rather than an adjudicator."*

Since there is no any other *Mlundi* tree mentioned in the evidence, the boundary of the *Mlundi* tree mentioned by the Tribunal, cannot bring confusion in execution of the Tribunal's decision. For this reason, the second issue is also answered in the negative.

Consequent upon the above determination of the issues raised, the entire appeal is without merit and is accordingly dismissed. As the parties are neighbours, I make no order as to costs.

It is ordered accordingly.

Dated at Dodoma this 31st day of October, 2022.

ABDI S. KAGOMBA

JUDGE