IN THE HIGH COURT OF TANZANIA

AT TABORA

LAND APPEAL NO 27 OF 2018

(Arising from Nzega District Land and Housing Tribunal Land Application No 31 of 2016)

ALEX MSAMBUSI.....APPELANT

VERSUS

ABDALLAH MABULA.....RESPONDENT

JUDGEMENT

20th August & 6th March, 2020

BONGOLE, J.

This is an appeal arising from the decision of the District Land and housing tribunal of Nzega,at Nzega in Land application No.31 of 2016.

The facts leading to this appeal may be briefly stated as follows. Alex Msambusi herein after called "the Appellant" claims that the suit plot situated at Uchams Village Nzega District measured four acres has been trespassed by the Respondent Abdallah Mabula despite of several dement to the Respondent but he refused to obey hence the dispute at District land and housing tribunal, at Nzega.The case ended by dismissed with cost. The appellant aggrieved by the decision of the District Land and Housing Tribunal challenged on three grounds, namely that-

1. **That the learned tribunal chairman erred in law in proceeding with the hearing of the application with only one assessor.**
2. **That the learned chairman erred in law in holding that the appellant failed to establish his case on the balance of probabilities.**
3. **That the learned chairman erred in law in the evaluation of the evidence on record.**

Whereby the appellant prays for, appeal be allowed with costs, the judgment of trial tribunal be set aside.

At the hearing of the appeal the appellant enjoyed legal services of Ms.Theresia Fabian, learned Advocate whereas the Respondent appeared in person. The appeal preceded by way of written submissions.

On the 1st ground of appeal Ms Fabian submitted that section 23(i) (2) of the Land Disputes Courts Act Cap 216 RE 2002 provides that a District land and housing tribunal shall be properly constituted when held by a Chairman and not less than two lay assessors who must give their opinion before the chairman reaches his judgment in a particular application. The significance of sub paragraph 3 of section 23 of the said Act which provides as;-

> **"Notwithstanding the provisions of sub section (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".

She added that, a judgment of the tribunal will only be valid if there is an opinion of at least one assessor who was present at the commencement of the hearing of the application. That provision was violated by the trial tribunal at Nzega.The record of the application shows that at the commencement of hearing of the application on 06/10/2017 there were two lay assessors namely Mrs. Ester Munuo and Mr. Paul Milambo.The case came up for hearing again on 26/01/2018 the record of proceedings show that on that day there were no assessors when PW2 Mathew Nyonyoli Wawa testified before the tribunal. But on the same day when PW4 one REGINA JOHN was testifying it appears two lay assessors one Mzee Mihambo and one Mama Regina were present and had occasion to cross examine this witness.

She submitted further that the appellant had proved his claim over the disputed shamba on the required standard of proof, the appellant who testified as PW1 gave a clear account on how he purchased the 6.5 acre farm from one LUTONJA SUNZULA as per sale agreement which was tendered and admitted before the trial tribunal without objection from the respondent and marked as exhibit P1.

She added that, in 1991 the Appellant purchased another piece of land from one J.MABULA as evidueed by exhibit P2 which was also not objected by the respondent.

The appellant went further to proceed for an official survey of the farm and made official communication on the issue with Nzega District Council as evidenced by official documents which were tendered and admitted in the tribunal without objection from the respondent and marked as exhibit P3 .The trial chairman at page 4-5 of the typed copy of the judgment attacks the appellant's two sale agreements over the disputed farm on the ground that the transaction was witnessed by only one witness and the name of one of the sellers J.Mabula his name was not written in full. According to him such agreements were problematic. These two exhibits were received and admitted in the tribunal without objection from the respondent who was represented by two advocates.

Finally she concluded that, however there was no family member from his clan to support his allegation. Indeed at page 22 of the typed copy of the record of proceedings, at first the respondent alleged that he was given the land by his father in 1983 but later at the bottom of the page he assert that his father gave him the plot in 1988.The tribunal chairman concluded his judgment basing his decision on the question of credibility of witness and finds support in the unreported decision of the HIGH Court of Tanzania in the case of **YUSUPH KALABWE VS BARUHUNGA ATHMAN MISC LAND APPEAL NO.25/2012(**Bukoba registry unreported) which she said this case was also irrelevant to the circumstances relating to the dispute at hand.

In reply, with regard to the 1st ground of appeal, the Respondent submitted that no dispute the trial tribunal complied with the law, that is to say at the time of commencement of proceedings (on 06/10/2017) there were two assessors and their name were clearly stated at the proceedings

as required by section 23(2) of the Land Disputes Courts Act Cap 216 R.E. 2002 (hereinafter be referred to as "the Land Disputes Courts Act").

The proceedings reflects that throughout the hearing of the case at hand assessors were present and the Coram indicated their presence as correctly admitted by Appellant's advocate in his submission that lay assessors got an opportunity(ies) to impose questions to witness/witnesses.Failure of the tribunal to indicate names of assessors on Coram does not cause any miscarriage of justice to any party.

The Appellant try to attack trial tribunal's proceedings that at the time DW2 and DW3 testified there was only one assessor; the court record show that on 29/03/2018 when DW2 testified, assessor was present and she was allowed to examined witnesses. Also at the time DW3 testified on 25/04/2018, the record shows that assessor was present and allowed to impose question to witness. The law under section 23(3) of the Land Disputes Court Act stipulated that:-

> ***"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. (underline supplied).***

The above cited provision provides for two conditions. **One**, it allows the chairman to proceed with one assessor if another is absent. **Two**, allows

the Chairman to proceed without any assessor only if at the commencement of proceedings were present.

The respondent added further that, on the said date (i.e. 25/04/2018) the tribunal visited the locus in quo and the coram indicated that assessor was present. If record shows that assessor was present even if his/her names was not mentioned, it does not mean they were absent. Again, the trial tribunal at page 14 of the typed proceedings gives reasons why the file assigned to the successor chairman and the reasons why Mama Ester Munuo did not proceeded with the hearing. This is the position of law that where there is only one assessor remains during the hearing, the chairman and the remain assessor will proceed and conclude proceedings.

The omission to write the assessor's name at the coram while their names indicated when examined witnesses does not cause any miscarriage of justice, thus it can be cured by the principle of the overriding objective brought by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018 which now requires the courts to deal with cases justly, and to have regard to substantive justice.

The respondent argued that, the 2nd and 3rd grounds of appeal, the Appellant submitted that he purchased the 6 ½ acre as indicated in exhibit P1.He further submitted that exhibit P1 and P2 were admitted without objection. Regarding these two grounds, the Respondent argues that the Appellant failed to proof his case in the standard required by law. The document to be admitted does not mean it must be used in making the decision in favour of the one who tendered it. The document can be admitted as exhibit but not qualified to support the claim of the one tendered the

same. The said exhibits (P1 and P2) do not indicates the measurement of the disputed land, or even the boundaries so as to proof that they are the very sale agreements as far as the dispute land is concern. That the trial tribunal correctly not relied to those exhibits because they do not reflect at all with the appellant's case as in paragraph 3 of his pleading/application he claims 4 acres of land while the two exhibits together with his testimonial talks about more than 4 acres. Furthermore that, exhibit P3 tendered by the Appellant to proof the cost sharing of surveyed land does not even bear his name. That was simple evidence on how the Appellant failed to proof his case.

He added that, It is cardinal principle of law that the trial court has a duty to consider the admissibility of the exhibit notwithstanding that its admissibility in evidence was/were not objected. The trial tribunal correctly did not consider exhibit P1 and P2 because they did not prove the Appellant's case as stated herein above.

He continued to maintain his position that, it was the full of doubt that if exhibit P1 used to buy 6 ½ acres as submitted by Appellant from Lutoja Sunzula how about exhibit P2? How many acres the Appellant bought from J. Mabula? All two exhibits do not reflex with the pleading (application) filed on 27/12/2016 by the Appellant.

That the application (pleading) filed by Appellant at trial tribunal at paragraph 6 (c) indicated that claiming the land/or the land in dispute is 4 acres but in his testimonial testified that the dispute land is about 6 ½ acres. PW2 testified that the dispute land is almost one acre while PW3 testified that he do not know the measurement. All witnesses failed to support the

application filed by Appellant that the disputed land is 4 acres. In another words evidence of all witnesses are in variance with plaint/application filed in trial court/tribunal.

He maintained that, It is trite principle of law that the parties are bound by their pleading as was stated by the Court of Appeal of Tanzania in the case of ***MAKORI WASSAGA Versus JOSHUA MWAIKAMBO and another*** [1997] TLR 88 where at page 94 the Court has this to say:-

> ***"in general and this is I think elementary a party is bound by his pleadings and can only succeed according to what has averred in his plaint and proved in evidence".***

That, there was no number of witness of relationship required in proving facts by either party to the proceeding. Section 143 of the Evidence Act [Cap 6 R.E 2002] (hereinafter the Evidence Act) provides that:-

> *"subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact".*

The Appellant's submission that no member of the family called by the Respondent as witness to proof his (Respondent's) facts, does not legally hold water he buttressed.

It is a duty of the one who allege to proof all facts exists as stipulated clearly in section 110 (1) and (2) of the Evidence Act. The Appellant with his witnesses failed to proof all facts of the case. The Respondent bring two witnesses apart from him, which gave evidence that disputed land is belong to the Respondent. DW2 hired the disputed land from the Respondent for almost 12 years without seeing the Appellant therein. DW2, the Kitongoji

(hamlet) Chairman, gave strong evidence that the dispute land is belonging to the Respondent and that all time of his leadership the disputed land was owned by the Respondent. This found at page 28 of the typed proceedings.

That the evidence of the Appellant is full of discrepancies and contradictions. All three witnesses contradicted each other, to mention few but major, in size/measurement and boundaries of the disputed land. These two major contradictions show how Appellant's evidence was weak and weigh no value to prove his case he said.

May I salute the insightful and persuasive submissions made by both sides.

I will start with the first ground as to whether the trial tribunal erred in law in proceeding with the hearing of the application with only one assessor. The composition of the Tribunal is stated under section 23(1) and (2) of the Land Disputes Courts Act (supra) which provides;

> *(1) The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.*
>
> (2) *The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment.*

The underlined expression significantly shows that, a dully constituted Tribunal is that which is composed by the chairman and a minimum of two assessors. The chairman alone does not constitute the tribunal. The involvement of assessors as required under the law also gives them mandate

to give opinion before the chairman composes the decision of the tribunal. In case of absence of the assessors the law gives following direction as specified under section 23(3) of the Land Dispute Courts Act, (***supra***).

The cited provision indicates that, at least one of the assessors must be among the assessors who must be in attendance throughout the trial so as to enable the assessors to make an informed and rational opinion. The consequences of unclear involvement of assessors in the trial renders such trial a nullity.Moreover,the consequences of allowing the assessor to avail opinion while he has not heard all the evidence were articulated in **JOSEPH KABUL VS REGINAM(1954-55)EACA Vol.XX1-2** Where the court said;

> *"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity"*

In the present matter, the judgment of the tribunal at page 4 of the record reflects as follows

> *"The only one lay assessor Mama Regina Nicolaus was invited so as to opine as the other lay assessor Mzee Paul Mihambo is no longer the Tribunal Member as his tenure of service had come to an end,so he is unable to opine. So Mama Regina Nicolus opine in favour of the Applicant that trespasser to the land'*

When the trial commenced on 06/10/2017,from page 8 to 12 the present assessors were Mrs. Ester Munuo and Mr.Paul Mihambo.On 14/12/2017 the assessor present were Mrs Regina Nicholus and Mr.Paul Mihambo.As the record speaks Mama Ester Munuo retired but the record is silent as to the absence of the other assessor Paul Mihambo.Thus from that date the hearing proceeded with only one new assessor who was not present

at the commencement of the hearing of the application, which is contrary to the provision of section 23(1)(2) and (3) of the Land Disputes Courts Act(supra).

I have carefully considered if the omission is curable as suggested by the Respondent under the principle of the overriding objective brought by the written laws (Miscellaneous Amendments) Act No.8 of 2018.

With respect, I am not in agreement with the Respondent because the omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial.

Having read the both submissions, I confirmed my concern that, in the course of trial, the Tribunal Chairperson was irregularly aided by different sets of assessors. The irregular procedure did contravene the peremptory requirement of section 23(3) of the Land Disputes Courts Act, Chapter 216 of the Revised Edition of 2002(the Act)

As I have vividly demonstrated, in the proceedings under my consideration, there was an unwarranted replacement of assessors. The replacement offended the clear provision of the law which I have extracted and will alone, suffice to vitiate the trial proceedings of the Tribunal. But, as I have intimated, the other shortcoming is in the fact that the opinions of the assessors are not reflected upon the record. The noncompliance is, again, in breach of section 23(2) of the Act which provides: - "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.

On the issue of locus in quo, I am mindful of the fact that there is no law which forcefully and mandatory requires the tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial. Some of the said guidelines and procedures were clearly articulated by Court of Appeal in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed [1980] TLR 29**, where the Court, inter alia stated that:-

> **" When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter... When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future [Emphasis added]."**

See also the recent decision of the Court of Appeal in **Avit Thadeus Massawe v. Isidory Assenga, Civil Appeal No. 6 of 2017** (unreported) where the above guidelines and procedures were reinstated.

Now, in the case at hand, as intimated earlier, at best the record of the Tribunal's proceedings only indicated that on 25/04/2018 the Tribunal conducted a visit at the locus in quo without more details. It is therefore not clear as who participated in the said visit and whether witnesses were re-cailed to testify, examined and/or cross examined, as no notes were taken and the Tribunal never reconvened or reassembled in the Tribunal room to consider the evidence obtained from that visit. I am therefore in agreement with the appellant that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by the Court of Appeal in **Nizar M.H. Ladak, (supra).** It is therefore my considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties.

I do not entertain a heck of doubt that the cumulative effect of the recited irregularities is to vitiate the trial proceedings. In fine, I hereby nullify the entire proceedings of the Trial Tribunal. It is further ordered that the case be heard afresh before another Chairperson and a new set of assessors.

S.B. BONGOLE

JUDGE

06/03/2020

Judgement delivered under my hand and seal of the Court in Chambers, this 6/03/2020 in the presence of Ms. Joyce Mkwabi and Agness Majura for the Respondent and the Applicant in person.

S.B. BONGOLE

JUDGE

6/03/2020

Right of appeal explained.

S.B. BONGOLE

JUDGE

6/03/2020