IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 19 OF 2018

(C/F Application No. 21 of 2016 District Land and Housing Tribunal of Moshi District at Moshi)

SEVERINI NDASKOI MOSHA ..... APPELLANT

Versus

HUBERT KISANGA ..... RESPONDENT

Last Order: 3rd December, 2019
Date of Judgment: 06th March, 2020

JUDGMENT

MKAPA, J:

The appellant Severini Ndaskoi Mosha filed Land Application No. 21 of 2016 before the District Land and Housing Tribunal of Moshi (the trial tribunal) praying for a number of reliefs. One of the relief sought was a declaration that he is the lawful owner of plot No. 47 Block "G" (the suit land) situated at Himo urban area within Moshi district The appellant was represented by his wife Laura Tesha through a power of Attorney as himself was indisposed (abroad). Brief history leading up to this appeal is that, appellant applied for allocation of the suit land from the Director of Moshi Municipality

and upon consideration he was allocated the suit land. In the process of acquiring the said suit land he followed the relevant procedure and in 2008 he was issued with a Certificate of Right of Occupancy which was admitted at the trial tribunal as Exhibit P1. The applicant further applied for a building permit and the same was granted, and the trial tribunal admitted it as Exhibit P3. He also paid land rent, receipts of which were admitted as Exhibit P4. When the appellant was in the process of developing the suit land, she found the respondent's house situated in the same suit land. Respondent claimed to have owned the suit land from 1988 until 2008 when he was told that his plot was allocated to the appellant.

The trial tribunal decided in favour of the respondent to the effect that, evidence shows he was the initial owner and was yet to be compensated to prove fair re-location. Aggrieved, the appellant preferred this appeal listing the following grounds;

1. That the trial tribunal erred in law and fact in relying his decision on incurable irregularities in proceedings and judgment accordingly.
2. That, the trial tribunal erred in law and fact in disregarding appellant's strong evidence and base his decision by relying on respondent's weak and contradictory evidence.

3. That, the trial tribunal erred in law and fact in constituting itself into a witness of facts for failure to apply independent mind to the dispute.
4. That, the trial tribunal misdirected itself in law and fact on the burden and standard of proof in civil cases.

At the hearing, Mr. Dominicus Nkwera, learned advocate appeared for the appellant while Mr. Eliakunda Kipoko also learned advocate represented the respondent. Both parties consented to dispose of the appeal by filing written submissions.

In support of the appeal, Mr. Nkwera submitted that the appellant's representation through power of attorney at the trial tribunal is questionable since no miscellaneous application was filed at the trial tribunal to acknowledge such representation. He cited Regulation 4 of the land disputes Courts (the District Land and Housing Tribunal) Regulations, GN 174 of 2003 states;

> *"The applicant or his representative may in addition to the application form submit to the tribunal chamber application"*

It was Mr. Nkwera's contention that based on the above provision, respondent's fundamental right to be heard on whether he agrees on such representation or not was violated and renderers the decision tribunal's void. Supporting his argument he cited the case

of **Ridge V Baldwin** (1963) 1. Q. B 539 and **Mohamed Kitwana V Mohamed Mang'uro** PC Civil Appeal No. 193 of 2004. Mr. Nkwera averred further that, since there was violation of procedure, Laura Tesha had no mandate to represent the appellant hence the whole proceeding and judgment of the trial tribunal were null and void.

Contesting the validity of assessors' involvement at the trial tribunal's proceedings, learned counsel argued that, throughout the proceeding there were different sets of assessors namely T. Temu and J. Mmasi, J. Mushi and S. Mchau, Temu and Mushi and in other hearing there was no assessors at all. Mr. Nkwera cited the case of **Mathias Kitonga V Ndala Masimbi** (1999) TLR 390 where the court held that;

> *"An assessor who has not heard the evidence in a trial is incompetent"*

It was Mr. Nkwera's further argument that, since the assessors who heard PW1 Laura Tesha's testimony were different from the ones who cross examined her, this irregularity faulted their involvement in the trial. He further argued that, their opinion is also not reflected in the proceedings, failure of which is fundamental irregularity which goes to the root of a trial. Supporting his argument he cited

the case of **Chadiel Mduma V Denis Mushi** Civil Appeal No. 41 of 2013 CAT (Unreported). Mr. Nkwera further added that, sitting with different set of assessors during the tribunal proceedings is a violation of section 23 (2) and 24 of the Land Disputes Courts Act, Cap 216 R.E. 2002 which requires assessors to give their opinion before the chairman reaches his judgment.

Mr. Nkwera further submitted that, the trial chairman disregarded appellant's strong evidence and that of his witnesses especially PW2 Muhsin Rajab Kirua (land officer) which proved sufficiently how he obtained legally the tittle deed of the suit land, instead he relied on respondent's weak evidence which did not prove how he acquired the suit land and decided in his favour. It was Mr. Nkwera's further contention that, all land belongs to the Government, the appellant was granted ownership after fulfilling all the requirements needed while the same was not proven on the side of the respondent.

Challenging trial tribunal's decision, learned counsel submitted further that, the trial chairman reproduced facts that, the respondent has been living in the suit land with his family and he has never been compensated while throughout the proceedings, no such evidence was adduced. On the strength of his submissions, Mr. Nkwera prayed that the appeal be allowed, trial tribunal's

decision be set aside and this court declare appellant as lawful owner of the suit land.

Responding to the appellant's submission, Mr. Kipoko for the respondent submitted that, the appellant failed to prove whether the certificate of tittle was lawfully procured since there is no proof of publication of planned area over the suit land and further that, according to PW2, there is no proof that customary owners and the public in general were involved and since the respondent was never compensated the alleged re-location was illegal as held by the trial tribunal. The fact that respondent was never compensated because he was not there is just a mere misconception and an afterthought.

Mr. Kipoko averred further that, the law governing survey and allocation of lands is the **Land Act, Act No. 4 of 1999** read together with the **Town and Country Planning Act** Cap 355 R.E. 2002. Supporting his argument, he cited the case of **Fatuma Awadh Said El Hind V Salima Ali** 1987 TLR 156 where the Court of Appeal held that;

(i) *"The legislation provides for two kinds of publication. The publication under section 27 refers to the declaration by the Minister that, he intends to apply provisions of the third schedule. Secondly, after he*

has prepared the scheme he must deposit a copy of such scheme at a place deemed appropriate and a notice of such of deposit must then be published in the Gazette, to enable members of the public to inspect it;

(ii) Since the ... Master plan was drawn up and implemented in contravention of the Town and Country Planning Ordinance, any actions purportedly taken under it were unlawful."

Mr. Kipoko finally argued that, it is a legal requirement under section 8 (3) and (4) of Cap 335 that declaration of planning area shall be preceded by;

a. *Favorable response at a public hearing or hearings in the area conducted by the planning authority;*
b. *Resolution by planning authority recommending declaration of planning area; and*
c. *Positive recommendation by a regional secretariat of the respective region.*

4. *A copy of every order made under this section, together with a map of the area, shall be posted by the relevant planning authority at such public places within the planning area"*

It was Mr. Kipoko's argument that the appellant failed miserably to prove that mandatory legal requirements were adhered hence the alleged allocation is illegal, the learned counsel thus prayed that this court affirms trial tribunal's findings and dismiss the appeal.

In his brief rejoinder, the learned advocate for the appellant reiterated his stance in submission in chief.

Having considered arguments of counsel for both parties, from the outset, is undisputed that the suit land was occupied by the respondent when the appellant was granted ownership of the same. From the testimonies adduced at the trial tribunal, respondent was found at the suit land which he claimed to own since 1988 customarily. The appellant in his testimony never disclosed who the customary owner of the suit land was before it was surveyed.

In her testimony, PW1, appellant's wife and PW2 land officer testified on how the appellant applied for and was granted Right of Occupancy and the visitation to the area or surveyed the same, however there was no report evidencing their findings. Had they done so, it is my considered opinion that they would have taken necessary action to acquire the tittle in a more peaceful manner. Further that, PW2 Land officer, never pointed out that either during

the grant of Right of Occupancy the suit land was vacant or it was occupied and such occupier was re-located and compensated forthwith. The respondent, on the other hand, adduced evidence to the effect that, he has been owning the suit land customarily and he was officially given the same by a person known to him as Mr. Nicholas way back in 1990 and in the event he was to pave way for town/city planning he would have been re-located and compensated, but that was not the case.

The appellant has further failed to establish on what basis was he allocated the suit land and later registered as the owner thereof without etablishing if at all the suit land was occupied before. Since the original owner DW1 who was entitled to compensation before the land could be re-allocated to any person was not compensated, I have found no reason to fault the trial tribunal's findings. I am of the settled view that that the entire process that allocated the suit plot to the appellant was unlawful, and all the documents purporting to grant ownership to the 1st appellant are null and void.

Before I make any further determination, It is noteworth to point out that, this is a dispute on double allocation, since the suit land was allocated by District Executive Director, the same was supposed to be necessary party to this dispute for it was unlawful for them to allocate the suit land without considering whether the

occupier had tittle or owned it customarily. If the respondent is the rightful owner of the suit land, the allocator should either re-allocate the appellant another place or compensate him in accordance with the law. For the reasons discussed, I allow the appeal, nullify the whole proceeding and decision and the trial tribunal and order the matter to be filed afresh with all the necessary party/parties joined so that parties' rights can judiciously and justly be determined.

Due to the nature of the case I give no orders as to cost.

Dated and delivered at Moshi this 6th day of March 2020

S.B. MKAPA

JUDGE

06/03/ 2020