IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 42 OF 2020

(Originating from Land Application No. 26/2018 at Same District Land and Housing Tribunal)

FRANK .K. MBOGE ..... APPELLANT

VERSUS

FELICIAN HUGHO KIWALE.....RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant herein aggrieved by the decision in Land Application No. 26 of 2018 delivered by the District Land and Housing Tribunal dated 12th August, 2020, Same, has appealed to this Court on the following grounds in the Amended petition of appeal: -

1. *That the learned Chairman misdirected himself in delivering a judgment in favour of the respondent while there was no enough evidence showing that the respondent is the lawful owner of the suit premises.*

2. *That the learned chairman erred in law and fact to admit an affidavit regarding `names as exhibit P2 while it was not part of the evidence to be relied upon by the respondent and further that it was not shown to the appellant at the hearing.*
3. *The learned Chairman erred in law and fact by denying the applicant a right to further cross examine the respondent.*
4. *That the trial tribunal erred in law and fact by pronouncing a judgment without analyzing the evidence of both sides, the appellant's evidence was not put into consideration in as far as the suit land is concerned.*
5. *That, the trial tribunal erred in law and fact in entertaining the suit which was fatally defective as was litigated against the appellant who actually had no any locus stand to be sued under his own capacity.*
6. *That the learned chairman of the trial tribunal misdirected himself when he failed to appreciate the fact that the appellant herein has been in peaceful possession of the disputed land for a period of more than 40 years.*

The parties agreed to proceed by way of written submissions. The Appellant opted to submit 1st, 2nd and 3rd grounds of appeal independently and 4th and 6th ground of appeal jointly while the 5th ground was abandoned. The appellant was dully represented by Mr. Denis Sanka whereas the respondent was unrepresented.

The brief facts forming the genies of the dispute are that, the respondent herein instituted his application before the trial tribunal seeking to be declared the lawful owner of the suit land and costs of the application. His claims were pegged on the fact that, the said land belonged to his late mother (Mary Timotheo Kiwale) who had purchased the same from one Kavuta Mboge way back in 1980. Fate had it that in 1982 his mother passed on leaving behind her brother Hugho Timotheo Kiwale to take care of the said land. Since the care taker was too busy and had to travel to Dar-es-Salaam, he left the suit land in the care of one Sadiki Elisante Bondi.

Fate struck again and this time around Sadiki Elisante Bondi passed away in 2011. As a result the respondent had in 2013 to obtain letters of administration to administer his mother's estate. While in the process of collecting properties left behind by his mother, he found the

appellant on the suit land. He quickly claimed he had purchased the same. A series of cases followed which were instituted by the rival sides to be declared the lawful owners. Finally, the respondent managed to get judgment in his favour and proceeded to utilize the suit land which the appellant still claims to be his property hence this appeal.

Getting the court on the way starting with the 1st ground of appeal the appellant's counsel submitted, there was no proof of how the Respondent acquired the disputed land through probate and administration cause no. 92 of 2013. What simply happened is, after the respondent tendering Exhibit "P1" which is the letters of administration obtained from Probate and Administration Cause No. 92 of 2013 at Moshi Mjini Primary Court, the trial Chairman (through page 8 para ii of the judgment and para ii of the decree) declared the Respondent the lawful owner of the suit land. The appellant is left with the question whether one can acquire ownership just because he/she is an administrator.

In order to clear the air the appellant referred to section 2 of the Probate and administration of Estate Act which defines an administrator. This is a person appointed by the court to administer the estate of the deceased person

when there is no executor who is able or willing to act. Further, he adopted the meaning from Bryan .A. Garner, Black's Law Dictionary second pocket edition, St. Paul, MINN, 2001. It defines an administrator, as a person appointed by the court to manage the assets and liabilities of an intestate decent. From these definitions he commented, the respondent by virtue of being appointed the administrator of the estate of the late Mary Timotheo Kiwale is not enough evidence to prove his ownership over the suit land. The administrator was to be guided by Form No. V and VI submitted in the Primary Court as per Rule 10 of the Primary Court (Administration of Estate Rules GN 49 of 1971 which provides for the procedure to be followed to acquire the suit land. In support thereof Mr. Sanka cited the case of **Suzan .S. Warioba vs Shija Dalwa, Civil Appeal No 44 of 2017**.

The learned advocate contended further, the respondent failed to prove ownership in terms of size and boundaries as seen at page 19, 23 and 25. In the application it is depicted the disputed land is measuring 44 by 97 by 32 by 91 paces. The sale agreement tendered by Respondent showed it is half of seventy acres and the words *"nusu sabini"* meaning 70 by 35 paces which is half an acre. The

witness Yusuph Salim (PW2) stated it is half acre less or greater and Juma Salim PW4 said it is one acre. It follows therefore the sale agreement is not inconformity with the boundaries mentioned in the application. The learned advocate concluded by suggesting, the trial Chairman misdirected himself in deciding in favor of the Respondent in absence of sufficient evidence.

Submitting on the 2nd ground of appeal as far as the affidavit is concerned, the learned advocate argued it is observed at page 11 to 12 of the proceedings, it was only the sale agreement which was tendered that was served/shown to the Respondent to object but the affidavit regarding names was not placed before the respondent. Despite the anomaly it was admitted together with the sale agreement and marked collectively as Exhibit "P2".

The learned advocate contended he is alive that the law allows production of any material at any stage of the proceedings before the conclusion of hearing not annexed or produced earlier at the first hearing but regulation 10(3) (a) of Land Disputes Courts (The District Land and Housing Tribunal Regulation G.N no. 174 of 2003 requires the tribunal to ensure it is served to the other party

before admitting it. The Appellant was denied such right when the affidavit was tendered and to make matters worse the right to cross examine on the same was curtailed.

In so far as the 3rd ground of appeal is concerned it was submitted, page 15 showed that on 24th July 2019 the applicant's counsel prayed to recall PWI for further cross examination in terms of section 147(4) of Evidence Act, Cap 6 R.E. 2002. The prayer was not granted for the reason that the Evidence Act is not applicable in the tribunal. Despite the said ruling yet the Chairman proceeded in terms of the principles and rules provided for under the Evidence Act especially section 147. The counsel was of a firm view that, the tribunal was to act fairly while administrating justice.

The 4th and 6th grounds of appeal were submitted together to the effect that, the Chairman failed to analyze the evidence of both sides. It is the requirement the law for any adjudicator in the process of determining the rights of the parties to give reasons for the decision so reached by analyzing, evaluating and assessing credibility of the witness. The learned advocate cited the case of **Stanslaus Rugaba Kasusura and the Attorney General vs Phares**

Kabuye 1982 TLR 338 and invited the court to the holding that the remedy is to order a retrial.

The learned advocate further asserted, the decision by the tribunal was based on the perception and not evidence adduced. At page 34 of the proceedings the appellant had explained that he had been using the suit land since 1979 and for that he owned it peaceful for more than 40 years. This piece of evidence was to be considered as far as ownership is concerned. As if not enough, the Appellant tendered a judgment of Appeal No. 9/2014, Land Review No. 16/2015 from Same District Land and Housing Tribunal and a judgment from Kihurio Ward Tribunal of Shauri No. 6/2017 to prove there was uncertainty of the size of the disputed land. Be as it may, the Respondent waited until the care takers (Hugho Timoth Kiwale and Said Elisante Bondi) who passed on in 2012 and 2011 respectively) to raise claims despite the fact that he had already attained the age of majority to claim the suit land from them.

The learned advocate reminded the court that, being an Appellate Court had a duty to re-analyze and re-evaluate the parties' evidence as held in the case of **Ndizu Ngasa vs Masisa Magasha [1999] TLR 202.**

In conclusion the learned advocate prayed the appeal be allowed by quashing and setting aside the whole judgment delivered by the trial tribunal.

On the other side of the coin, the respondent expounded he was appointed the administrator of the estate of his late mother and he is still todate in the process of collecting the deceased properties, the suit land being one of such properties. He concurred with the Appellant that there were several cases that dealt with the suit land and the purpose was to collect the properties of the deceased as he could not execute the estate without collecting the same. He stated that form no. V and VI were submitted in Moshi Urban Primary Court on 20/08/2014 and signed by the court on 22/08/2014. The disputed land is not in the list because the dispute arose when the Respondent visited the area in the process of collecting the deceased's properties. For that he concluded, the Chairman justly decided in his favour by declaring him the owner.

Replying to the 2nd ground of appeal as far as the admission of the affidavit of the names is concerned, he clarified the affidavit and the sale agreement were admitted collectively as Exhibit "P2" and were shown to the Appellant who did not cross examine when he was given a

chance to do so. As per Regulation 10(3) (a) cited by the Appellant, the affidavit was annexed to the pleadings when he instituted his application. Commenting on the complainant on the infringement of the right to cross examine on the affidavit tendered, it is shown at page 12 of the typed proceedings of the trial tribunal that the appellant was given an opportunity to do so.

Reacting to the 3rd ground of appeal on the issue of denial for further cross examination, the Respondent submitted as per page 12 and 13 of typed proceedings, the Appellant's advocate who appeared for the first time on 24th July 2019 was denied such opportunity for the reasons advanced by the trial tribunal based on legal requirements.

Regarding the 4th and 6th grounds of appeal on failure to analyze the parties' evidence, he responded that, the evidence was well analyzed as per the case of **Stanslaus Rugaba Kasusura** cited by appellant's advocate. At page 6 and 7 of the tribunal's judgment both parties evidence was thoroughly analyzed. When the evidence was evaluated it was found the evidence of the Respondent was heavier as compared to that of the appellant. It is not true that the Appellant peaceful possessed the suit land since 1980. The sale agreement was dated 30/03/1980 as

per exhibit PI. From that it is not correct for the Appellant to state that he possessed the land for 40 years because the said land was by then in the hands of Juliana Timotheo Kiwale which was later entrusted to Hugho Timoth Kiwale and Sadiki Elisante Bondi who passed away in 2012 and 2011 respectively. The Respondent's conclusion on this point was that, from 1980 to 2012 is about 32 years which includes what the Appellant included in the 40 years he had spent on the suit land. This is an indication that he had all along been the owner even before the appellant's claims.

Submitting on the uncertainty of the size of the suit land which was compared to the size of suit land stated in several files (No. 9/2014, Land Review 16/2015 from Same District Land and Housing Tribunal and Shauri No. 6/2017 from Kihurio Ward Tribunal), the Respondent elaborated, the previous cases (cited) have all been quashed and set aside and for that there is nothing to rely upon.

In the upshot, the respondent was of a settled view that all grounds lack merits and he prayed this court dismisses the appeal with costs and proceeds to confirm the decision of the trial tribunal.

Having considered the grounds of appeal and submissions of both parties, I find two issues need to be determined in this appeal: -

1. ***If there were procedural irregularities in the proceedings.***
2. ***Whether the evidence was properly evaluated by the trial chairman.***

The issue of procedural irregularity will cover the 2nd and 3rd grounds of appeal while the 2nd issue will cover 1st, 4th, and 6th grounds of appeal.

On procedural irregularities, the Appellant complained on the manner the disputed Affidavit was introduced and consequently admitted in evidence. The appellant submitted the said document was not in the list of documents to be relied upon and more so was not given an opportunity to object or otherwise to cross examine on the same. The court has visited the law and found the Land Disputes Courts (The District Land and Housing Tribunal) Regulation G.N No. 174 of 2003 is not silent as far as the admission of documents in the tribunal is concerned. Under **Regulation 10(1) (2) (3) (a) and (b)** it is provided for the same. For ease of reference it is quoted as hereunder: -

"10(1) The tribunal may at the first hearing, receive documents which were not annexed to the pleadings without necessarily following the practice and procedure under the Civil Procedure Code,1966 or the Evidence Act, 1967 as regards documents."'

(2) Notwithstanding sub-regulation (1) the Tribunal may at any stage of proceedings before the conclusion of hearing allow any party to the proceeding to produce any material documents which were not annexed or produced earlier at the first hearing.

3. *The tribunal* ***shall*** *before admitting any document under sub-regulation (2)*

a. ***Ensure that a copy of the document is served to the other party***

b. *Have regard to the authenticity of the document (Emphasis mine).*

The provision is coached with the word **shall** emphasizing that it is mandatory for any document to be shown to the adverse party before admitting it as an Exhibit. The aim of the legislature was to accord the adverse party a right to

cross examine or to raise issues if any. Coming back to the proceedings before the Tribunal as far as the affidavit of the names is concerned it is reflected at page 11 to 12 of the typed proceedings. The affidavit was not even tendered by the Applicant. It is not known how it came to be admitted together with the sale agreement. More importantly the appellant was not given an opportunity to object or admit or to cross examine on the same whilst it had not been annexed to the application.

As per the regulation cited earlier, the law does not provide for the procedures when the document is tendered and the adverse party objects the admission of an exhibit but case law does. This is what the appellant was praying for. In the case of **Hai District Council & Another vs Kilempu Kinoka Laizer &15 Others; Civil Appeal No. 110 of 2018 CAT-Arusha** among other things it provides that when the opposite party objects to admission of exhibit, it is upon the said party to start submitting in support of his/her objection then reply from the person who intends to tender the exhibit followed by rejoinder from the one who raised the objection, failure of which vitiates the proceedings because if offends the principle of natural justice.

The issue is whether the irregularity observed by the appellant can vitiate the whole proceedings. The fatality of any irregularity depends upon whether or not it occasioned a miscarriage of injustice. If it has occasioned a miscarriage of justice is incurable. To answer this, I ask myself if at all this document (affidavit) was of much importance or a vital document to the case. I find the affidavit was a necessary document to cure the discrepancy in the sale agreement which bears the name of Juliana Timoth Kiwale while the letters of administration bear the name of Mary Timotheo Kiwale.

The respondent purported the two names were used by the deceased inter-changeably. These documents (*sale agreements and letter of administration*) were necessary documents to the Applicant (now Respondent) as he listed them in Form No. 1 showing the suit land was owned by his late mother. Without a flicker of doubt the irregularity occasioned a miscarriage of justice. The Appellant was curtailed his right of hearing and a fair trial specifically on the issue of ownership forming the subject matter of the dispute. For that there was a procedural irregularity as far as the process of admitting the affidavit was concerned.

Another procedural irregularity was the denial for further cross examination of PWI after the witness had testified. In order to comprehend what transpired during the hearing, I had to revisit the record. On 26/6/2019 the trial tribunal had taken judicial notice that the appellant had engaged an advocate vide a letter dated 21/6/2019. When Advocate Denis Sanka appeared on 24/7/2019 he prayed PW1 be recalled for further cross-examination and on 29/8/2019 the tribunal made a ruling to the effect that, once the counsel had invoked the application of section 147 (4) Evidence Act, Cap 6 R.E. 2019, the same is inapplicable in the trial tribunal hence the tribunal was not properly moved. Having ruled so, the honourable chairman proceed with the hearing and refused to recall PW1.

The court is alive with the dictates of natural justice where a right of representation is one of its tentacles. Further it is known world-wide that courts or tribunals are fountains of justice. In that regard these should not be bound by technicalities in dispensation of justice. The trial chairman should have dealt with the issue of recalling PW1 with the same spirit and let the appellant's counsel have his day in the tribunal.

Be as it may, the trial chairman had relied on the amendment as per section 20 of Act No. 2 of 2002. I have taken pains to go through the amendment which in fact is referring to the inapplicability of the Civil Procedure Code Cap 33 R.E. 2019 in the tribunals and the same does not oust the application of the Evidence Act (Supra).

In the end, the court rests, there were procedural irregularities, which vitiate the whole proceedings. I find no need of discussing or re-evaluating the evidence, since the end result will only amount into an academic exercise once the proceedings were irregular.

All said and done, I find since the irregularities are fatal, the judgment, decree and proceedings are accordingly nullified. I hereby order a retrial before another chairman and parties be accorded a fair trial. Each party to bear own costs.

It is so ordered.

B. R. MUTUNGI
Judge
29/4/2021

Judgment read this day of 29/4/2021 in presence of both parties.

B. R. MUTUNGI
Judge
29/4/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
Judge
29/4/2021