IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

LAND APPEAL NO. 62 OF 2020
(Originating from the District Land and Housing Tribunal for Kiteto, Application No. 2 of 2016)

JULIUS MUNGURE *(Suing as the Administrator of the Estate of the late* **Wilfred Ndetaulwa Mungure**) ..... **APPELLANT**

Versus

MWARABU KITISHA ..... **RESPONDENT**

JUDGMENT

2nd July & 9th July, 2021

Masara, J.

The late **Wilfred Ndetaulwa Mungure** sued **Mwarabu Kitisha** (the Respondent) in the District Land and Housing Tribunal for Kiteto (the trial Tribunal) for trespassing into his land measuring 35 acres which land is located at Mbigiri Village, Partimbo Ward, Kiteto District within Manyara Region (the suit land). The trial Tribunal dismissed the application reasoning that the Appellant failed to prove his ownership over the suit land. From the records availed to this Court, **Wilfred Ndetaulwa Mungure** (the Appellant's father) fell sick prior to delivery of the judgment of the trial Tribunal. He did not recover. He died on 9/3/2020. After his death, **Julius Mungure**, the Appellant herein, filed this appeal in the capacity of administrator of the estate of the deceased's estate. The late Wilfred Ndetaulwa claimed to have bought the suit land from the family of the late Dr. Makoi. The Respondent on the other hand claimed that the land is not his own property but was using it after he was so authorised by the authorities of Kimana Village and that the suit land was part of the Village land. It was temporarily given to him for pastoralist purposes. The trial Tribunal upheld the Respondent's version and ruled that the piece of land did not belong to the Appellant. The Appellant was dissatisfied. He preferred this appeal on three grounds couched in the following terms:

a) *That, the honourable chairman of the Tribunal erred in law and fact by failure to determine the matter on merit before the Honourable Tribunal;*
b) *That, the Honourable chairman erred in law and fact by failure to consider the Certificate of Customary Right of Occupancy which prove the ownership of the Appellant herein; and*
c) *That, the Honourable chairman of the Tribunal erred in law by issuing problematic, unreliable and problematic (sic) judgment.*

At the hearing of the Appeal, the Appellant was represented by Mr. Mathias Nkingwa, learned advocate while the Respondent was represented by Mr. Pastor Florence Kong'oke, learned advocate. Hearing of the appeal proceeded through filing written submissions. At the hearing of the appeal, the learned advocate for the Appellant dropped the 1st and 3rd grounds of appeal. He submitted only on the 2nd ground of appeal.

Mr. Nkingwa submitted that the Appellant owned the suit land through a Customary Right of Occupancy as provided under section 27 the Village Land Act, Cap. 114 [R.E 2019]. According to Mr. Nkingwa, section 5(8) of the same Act protects rights of a person owning land under customary certificate of occupancy even when that land is subjected to division in the formation of a new village. He stating that the Appellant's land was wrongly taken by Kamana village following the setting of new boundaries between Kamana Village and Mbigiri Village. He fortified that the certificate of occupancy showing that the Appellant was issued to him with a piece of land measuring 55 acres in 2013. The learned advocate further stated that as that certificate of occupancy was not contested by the Respondent both in his testimony and in the Respondent's written statement of defence, the trial Tribunal should have ruled in favour of the Appellant, since the certificate of the right of occupancy is a prima facie evidence of ownership of the suit land. He insisted that nothing was tendered as documentary evidence warranting the decision that the land in dispute belonged to the Respondent as the owner or trustee of the suit land. He implored the Court to allow the appeal.

Contesting the appeal, Mr. Kong'oke submitted that the alleged certificate of right of occupancy sought to be relied on by the Appellant was neither admitted as exhibit nor was it made part of the trial Tribunal proceedings. He contended that documents that are not tendered in evidence during trial cannot form part of the proceedings, citing the Court of Appeal decision in ***Ismail Rashid Vs. Mariam Msati***, Civil Appeal No. 75 of 2015 (unreported). Mr. Kong'oke, supported his assertion with the statement made by the trial Chairman in the judgment that the Customary Right of Occupancy was not tendered as exhibit. He urged this Court to dismiss the appeal with costs.

In rejoinder submission, Mr. Nkingwa amplified that the trial Chairman took cognizance of the Customary Right of Occupancy in the Tribunal proceedings and judgment. He made reference to section 45 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] which states that land Tribunals are exempted from strict adherence to the principles of evidence and procedure in admission and rejection of evidence. Mr. Nkingwa concluded that as the certificate of occupancy was made known to all parties including the Tribunal, it was worth to be considered as evidence of the Appellant's proof of ownership of the suit land.

I have guardedly considered the trial Tribunal records and the rival submissions of the advocates for the parties. The main issue for consideration is whether this appeal should be allowed on the ground stated.

To begin with, Mr. Kong'oke faulted the Applicant's advocate for relying on the Customary Certificate of Occupancy that was not tendered and admitted as exhibit. On his part, Mr. Nkingwa contended that the certificate was made known to all parties therefore the Tribunal was right in applying it in its

deliberations. He insisted that the certificate was not objected in the Respondents' written statement of defence.

I do agree with Mr. Kongóke that from the trial Tribunal records, the Customary Certificate of Occupancy was not tendered and admitted as evidence. The purported certificate was only attached on the application form and it was referred at paragraph 6(b)(1). There is nothing in the proceedings suggesting that it was tendered and cleared for admission as exhibit. Any document that is sought to be relied as exhibit, it ought to be cleared for admission as it was held in ***Joel Mwangambako Vs. Republic***, Criminal Appeal No. 516 of 2017 (unreported), where it was held:

> *"As conceded by Mr. Mtenga to the complaint in the fourth ground of appeal, rightly so in our view, the cautioned statement (Exhibit P.1) was improperly admitted just as was the case with the other five exhibits (Exhibits P.2 - P.6), rendering all of them liable to be expunged. That was so because none of them was cleared before admission and that the contents of the documentary exhibits were not read out, leaving the appellant oblivious of the substance thereof."*

Second, a document sought to be relied on as exhibit has to be endorsed as exhibit. That was stated by the Court of Appeal in ***AAR Insurance (T) Ltd Vs. Beatus Kisusi***, Civil Appeal No. 67 of 2015 (unreported), where the Court observed:

> *"Two, once the exhibit is admitted, if it is in civil proceedings, it must be endorsed as provided under O.XIII, R4 of the CPC."*

The Court of Appeal in the case of ***Godbless Jonathan Lema Vs. Mussa Hamis Mkanga and 2 Others***, Civil Appeal No. 47 of 2012 (unreported), while referring to its previous decision in ***Sabry Hafidhi Khalfan Vs. Zanzibar Telecom Ltd (Zantel) Zanzibar***, Civil Appeal No. 47 of 2009 (unreported) it held:

> *"We wish to point out that annextures attached along with either the plaint or written statement of defence are not evidence. Probably it is worth*

mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annextures are not evidence."

In the circumstances of the case at hand, the Tribunal chairman referred to the Certificate of Occupancy at page 3 of the trial Tribunal's judgment, where he stated:

"It is undisputed fact that the applicant's land is located at Kimalaunga suburb in Mbigiri Village. This fact is proved by the evidence adduced by Pw.1 and Pw.2 together with the evidence of Pw.3 which was supported by the copy of the Customary Right of Occupancy attached to the application filed though it was not tendered as exhibit in this matter. The said Certificate of right of Occupancy shows that in 2013 the applicant's from (sic) was surveyed and issued certificate. In the said certificate it was started (sic) categorically that the applicant's farm is located at Mbigiri Village and it measures 55 acres. Therefore, the applicant has no any piece of land which falls within Kimana village"

From the above quote, it is apparent that the Tribunal chairman was aware that the Customary Certificate of Occupancy was not tendered and admitted as exhibit, but for unknown reasons, he proceeded to make use of it in determining ownership of the suit land. The Tribunal chairman in that regard committed a material error. It suffices to quash the decision, which was based on a document that was not admitted as exhibit, therefore not part of the proceedings.

Secondly, a close perusal of the trial Tribunal record shows that there was another irregularity. I note that the opinions of the assessors were not read to the parties prior to composing the judgment. It is a requirement of the law, and this Court has been insisting time and again, that before composing a judgment, opinion of the assessors must be read to the parties. The Court of Appeal in the

case of ***Sikuzani Saidi Magambo and Another Vs. Mohamed Roble***, Civil Appeal No. 197 of 2018 (unreported) guided as follows:

> *"In the matter at hand, as we have vividly demonstrated above and also alluded to by both counsel for the parties, when the chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgement It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgement was composed."*

Failure by the Tribunal chairman to read opinion of the assessors to the parties amounts to a material irregularity which suffices to nullify the entire proceedings of the trial Tribunal. The two above pointed irregularities sufficiently dispose the appeal. Since the proceedings of the trial Tribunal are marred with material irregularities, the appeal itself cannot be left to stand.

Consequently, I hereby invoke revisional powers conferred to me under Section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] to quash and set aside the judgment and proceedings of the trial Tribunal. Either of the parties if still interested, is at liberty to file the claim in the Tribunal, but such case if filed shall be heard by another chairman and a new set of assessors. Considering the fact that the ailment was attributed by neither of the parties, each party shall bear their own costs.

Order accordingly.

THE HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
9th July, 2021