IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPEAL NO. 16 OF 2020

(Arising from the decision of Appeal No. 15 of 2020 of the District Land and Housing Tribunal of Moshi at Moshi, originating from Application No. 05 of 2019 of Kirongo Samanga Ward Tribunal)

DEOGRASIASI VICENT SHIRIMA ---------- APPELLANT

VERSUS

REDEMPTA VALENTINE TARIMO ---------- 1ST RESPONDENT

GENES VICENT KIMARIO ---------- 2ND RESPONDENT

JUDGEMENT

MUTUNGI .J.

The Appellant had initially in the trial tribunal sued the first respondent claiming for the suit land on allegation that he was given the same by his late father one Vicent Alphonce Bofuna in 2002. Further the said Vicent Alphonce Bofuna had purchased the suit land from one Ndewingia in 1980. He had thereafter built a brick house therein. He later learnt from his relative that there were people who had trespassed on the

suit land. In order to ascertain whether there was trespass he sent his own people, who were later unceremoniously sent away by the second respondent.

On the other side of the coin, the first respondent alleged she had exchanged her land with that owned by the second respondent (suit land). Her piece of land was at Gongo la mboto Dar-es-Salaam, Ulongoni B area. The second respondent claimed the suit land was given to him by one Nderingia Lakaringa in 1980. This happened after he had borrowed the said Nderingia Lakaringa money at different intervals and by 1997 the money had accumulated to Tshs. 12,400/=. In order to clear the outstanding amount, the said Nderingia opted to transfer his land (suit land) to the second respondent who ultimately exchanged the same with the first respondent's land at Dar-es-Salaam.

At the commencement of the hearing the trial tribunal was of the settled opinion, the second respondent should be joined as a necessary party. In the end the trial tribunal was of a firm decision that, in view of seven points highlighted by the sitting members, the appellant was the lawful owner of the suit land. The respondents were consequently aggrieved by the trial tribunal's decision and proceeded knocking at

the second tribunal's doors with three grounds of appeal. Essentially the same are: -

(1) That, the ward tribunal erred in law and fact by entertaining a matter which it has no jurisdiction.
(2) That, the ward tribunal erred in law and fact for failure to evaluate and consider the evidence put forward and exhibits tendered by the appellants.
(3) That, the ward tribunal erred in law for making a decision without clear legal reasoning.

After deliberations the appellate tribunal was of the finding, the trial tribunal's decisions was wanting in that, it had no clear reasoning. Further there being no proof of the value of the suit land then, the appellants' (now the respondents) argument that it was valued at Tshs. 10,000,000/= holds water. Conclusively the appellate tribunal made the following orders: -

(i) Appeal partly allowed.
(ii) The proceedings of trial tribunal and decision thereof are hereby quashed and set aside respectively.

(iii) Let this matter be heard as a fresh case before this tribunal.

The appellant is now before this court on three grounds of appeal as hereunder: -

(a) The District Land and Housing Tribunal's decision was erroneously based on three grounds raised by respondents herein in the Appeal No. 15 of 2020 of the District Land and Housing Tribunal to quash and set aside the decision of the Ward Tribunal without considering **section 45 of the Land Disputes Courts Act, Cap 216 [R.E. 2019]**; (read as one with the Written Laws Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018], governing substantive justice.

(b) The Honourable Chairman of the District Land and Housing Tribunal having found a lacuna (if any) in the decision or proceedings of the Ward Tribunal erroneously failed to invoke powers bestowed to it under **section 34(1) of the Land Disputes Courts Act, Cap 216[R.E. 2019]** instead the District Land and Housing Tribunal unnecessarily erred to order the matter be heard afresh; which is a wastage of time

and a room for evidence re-manufacturing which may occasion injustice to the appellant herein.

(c) The Honourable Chairman of the District Land and Housing Tribunal erroneously quashed and set aside the decision of the Ward Tribunal based on the assessor's opinion without giving reason(s) of differing with the other assessor's opinion which was in favour of the appellant herein thus contravening **section 24 of the Land Disputes Courts Act, Cap 216 [R.E. 2019].**

When the appeal was called up for hearing it was ordered the same be heard orally. The appellant was represented thereof by Mr. Alfred Sindato and the respondents by Miss Minde learned advocates respectively.

Mr. Sindato on the outset submitted on the complaint as regards the appellate tribunal upholding one of the assessor's opinion and differing with the other without giving reasons. In his settled opinion this is in contravention of **section 24 of the Land Disputes Court Act, Cap 216 R.E. 2019 read together with Regulation 19(2) G.N. 174/2003.**

The counsel contended further, in terms of **section 24 (supra)** the tribunal chairman is mandatorily required to seek for

opinions from the sitting assessors otherwise their presence will be useless. In the circumstances the decision of the tribunal by relying on a decision which the chairman did not give reasons for his departure therefrom, then it was a Nullity.

Be as it may, the decision which basically was a re-trial order, cropped up out of a misevaluation of evidence. The appellate tribunal had stated a value of the suit land basing merely on assumption in due disregard of a valuation report from a registered valuer. It was the advocate's settled opinion that a land measuring ¾ of an acre, found on unsurveyed and undeveloped area can in no circumstances fetch Tshs. 10,000,000/=. On this reasoning, the third ground is to be allowed.

As regards the first ground, the counsel underscored the principle behind a re-trial order. To this he invited the court to the case of **Fatahel Manji vs. Republic (1966) E.A. 344**. The court or tribunal is only to order a re-trial where the same is not likely to cause injustice to either party. The counsel expounded, there is evidence that was before the trial tribunal, where the respondents tendered a forged Sale Agreement and computer generated photocopies. In the event the re-trial order is effected, this will provide room to

the respondents to fill in gaps in their case to the extent of re-manufacturing the forged documents. This could in the process prejudice the appellant's rights. The highest court of this land in the case of **Ng'angi Dwaruda Gidabayokta vs. Republic, Criminal Appeal No. 245/2017 (unreported)** did decline to order a re-trial once there were gaps in the prosecution case.

Submitting on the last ground, the learned advocate stated, the appellate tribunal in this matter had a noble duty to read, re-evaluate and re-assess the trial tribunal's evidence together with the exhibits tendered. This duty is bestowed on the appellate tribunal by law coached in **section 34(1) of the Land Disputes Court Act, (supra)**. The duty would ultimately lead the appellate tribunal to cure the anomalies and come up with its own decision. He supported his arguments with the authorities found in the cases of **Abdallah Rajab vs. Saada Abdallah Rajab and others [1994] TLR 132** and **D. R. Pandya vs. Republic [1957] E.A. 336**. If at all this court is of a different decision then in line with the findings in the case of **Hassan Mzee Mfaume vs. Republic [1981] TLR 167 and Pandya's case (supra)** should proceed to quash and set aside the District

Land and Housing Tribunal's judgment and uphold the trial tribunal's decision.

In response thereto, Miss Minde was of the view that, it is not that the chairman in the event he/she departs from the opinion of an assessor is to give reasons for each assessor's opinion. All that the chairman is to do is to hear both opinions and if he/she decides to depart then should give reasons generally. In this matter the chairman did give reasons and then proceeded to determine the value aspect of the land in dispute.

Submitting in relation to the findings of the appellate chairman on the pecuniary jurisdiction, the learned counsel quickly stated the same was justified. The learned counsel argued, the land in 1980 was sold for Tshs. 12,000/=, if valued at the time the dispute was instituted would definitely fetch more than Tshs. 3,000,000/= well above the trial tribunal's pecuniary jurisdiction. The proceedings in view thereof were a Nullity.

On the first ground, the learned advocate elaborated, there was no evidence tendered to support the Sale Agreement tendered by the respondents was forged neither was there

any objection to the tendering of the same. To the contrary the appellant did not tender any documentary evidence to prove the suit land was owned by his father. The appellant's witnesses were contradicting each other which was enough proof that the appellant's acquisition of the suit land was highly questionable.

Lastly the respondent's counsel submitted, the re-trial order was geared at establishing the rights of the parties. It is intended to put the record right for the interest of the conflicting sides. It is on these basis that the appeal be dismissed.

In rejoinder, the appellant's advocate reiterated his submission in chief.

After due consideration of submissions by the parties and the lower tribunal's records, I find the issue which need the court's determination ***is whether this appeal has merits or otherwise.***

The Appellant's advocate is condemning the Chairman for failure to give reasons for differing with one assessor's opinion and instead supported the issue of retrial as opined by the other assessor. I took time to pass through the Appellate

tribunal's judgment, for ease of reference the chairman at page 2 to 3 stated: -

"Both parties opted to argue this Appeal by way of written submission.

I have gone through the written submission and the records of the Trial Tribunal.

I have also gone through the assessor's opinion.

Both assessors who sat with me (Mrs Sarah Mchau and Mrs Sara Lukindo) had different opinion.

The first assessors (Mrs Sarah Mchau) opined that this Appeal has no merits and be dismissed with costs. She opined and I quote: -

> *"Kwa maoni yangu ni kwamba naungana na maamuzi ya Kata kuwa mrufaniwa ana haki na eneo la mgogoro na Rufaa hii itupwe kwa gharama"*

The second Assessors (Mrs. Sara Lukindo) opined that the Appeal be partly allowed by ordering re- trial. She opined and I quote;

"Kwa kifupi maombi haya yatupwe bila gharama na kwa maoni haya yafunguliwe upya baada ya kufuata taratibu za mabaraza ya Kata na vigezo vizingatiwe na baraza lenye uwezo wa kutoa haki"

I have gone through the above opinion.

Let me point out that I agree with the second Assessors opinion that the trial Tribunal gave a decision without a clear legal reasoning*"(Emphasis added)*

The condition of giving reasons for differing with assessor's opinion is provided for under **section 24 of Land Dispute Courts Act (supra)** that: -

"24. In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."

The above provision provides a mandatory condition for the Chairman to give reasons for differing with assessors opinions. In the findings of the Chairman though he did not directly give conclusive remarks as to why he differed with one assessor

but it shows that he differed for the reason that the judgement *(which seems to be understood by the Sara Mchau who opined in favour of the Appellant)* lacked legal reasoning. He was thus not in the position to go by the trial tribunal's decision. It follows the honourable chairman had adhered to the dictates of section 24 (supra).

Coming to the second issue of retrial, the Appellant's counsel challenged the same for the reason, it contravenes the law, will likely cause injustice and open room for the respondents to fill gaps in their case. Miss Minde on her side stated that there is no evidence of the forgery and a re-trial will give an opportunity to the parties to establish their claims.

As properly submitted by the respondent's learned advocate, a retrial is to be ordered only where the interests of justice demands so. While discussing the issue of retrial, The Court of Appeal sitting at Dar es Salaam in the case of **Shabani Madebe vs Republic, Criminal Appeal No. 72 OF 2002** quoting with approval the case of **Merali and Others versus Republic (1971) HCD n. 145** held: -

"... It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal."

It is worthwhile to consider the reasons advanced by the Chairman in ordering a retrial. The chairman had found lack of legal reasoning was one of the reasons for retrial. I have warned myself as a second appellate court, I should not usurp the functions of the first appellate tribunal by dealing with factual issues or step into the shoes of the Ward Tribunal since these are obligations of the first appellate tribunal. Further **section 45 of Land Dispute Court Act** provides the Ward Tribunal's decision or order are not to be reversed or altered on appeal or revision on the ground of any error, omission or irregularity in the proceedings before or during the hearing or in such decision. The foregoing notwithstanding, the trial tribunal's "judgement" which decided the rights of the parties on the disputed land, the same had to be understood and tackle the issues raised unless otherwise it will be subject of reversal. In view thereof I hereby reproduced the same for the sake of clarity.

"Kutokana na maelezo pamoja na ushahidi wa pande zote mbili Baraza limejiuliza maswali yafuatayo: -

1. *Mtu anaweza kujenga nyumba kwenye eneo lisilo la kwake bila kulalamikiwa.*
2. *Je inawezekanaje mtu kutoa pesa 1997 na kupata shamba kwa pesa aliyotoa 1997 mwaka 1980 ndipo apokee shamba.*
3. *Shahidi namba maja wa walalamikiwa Roki Makibonya alieleza kuwa pesa ilitolewa 14,000/= wakati akiona huku mlalamikiwa namba mbili Genes Vicent Kimario akisema alitoa kidogo kidogo hadi kufikia 12,400/=.*
4. *Hati iliyoletwa na upande wa walalamikiwa ya ununuzi wa shamba kati ya Genes Vicent Kimario nan DEWINGIA Lakaringa haina mhuri wowote wa Ofisi ya Serikali.*
5. *Kati ya mashahidi walioandikwa na kusaini hati ya mauziano ya shamba kati ya Genes Vicent Kimario na Ndewingia Lakaringa mmoja amekataa kuwa hakuhusika wala saini iliyopo hapo si yake ambaye ni Fedinandi Fidelisi.*
6. *Katika hati ya mabadilishano ya eneo kati ya Genes Vicent Kimario na Redemta Valentini Tarimo ni eneo moja tu la mkabidhi lililotajwa ukubwa wake na majirani*

wanaolizunguka lakini eneo la mkabidhiwa linalodaiwa kuwepo Dar es Salaam halijatajwa ukubwa wala majirani.

7. *Katika hati ya mabadilishano ya eneo kati y a Genes Vicent Kimario na Redemta Valentini Tarimo imerejea uhalali wa eneo moja kuwa lilinunuliwa tarehe 3/12/1980 kwa Ndewingia Lakaringa kwa 12,400/= lakini eneo la pili ambalo ilikuwa muhimu litajwe kwenye hati kuwa lilipatikanaje na uhalali wa kulimiliki lakini haikufanyika hivyo.*

HUKUMU

Kutokana na sabau saba (7) za hapo juu Baraza limeona kuwa mmiliki halali wa eneo hilo ni Deograsias Vicent Shirima na hivyo rufani iko wazi kwa pande zote kwa muda wa siku (45) arobaini na tano kuanzia siku ya kutolewa Hukumu na Baraza."

On the face of it the above decision is vague. There is no explanation as to how the seven points raised relate to the final determination, so called "Hukumu". The judgement was to speak for itself and not for the parties to interpret and draw conclusions. The statement like "*Mtu anaweza kujenga nyumba kwenye eneo lisilo la kwake bila kulalamikiwa*" or "*Je*

inawezekanaje mtu kutoa pesa 1997 na kupata shamba kwa pesa aliyotoa 1997 mwaka 1980 ndipo apokee shamba is subject to multiple conclusions. The statements are hanging and give no meaning to the dispute. The "Hukumu" itself leaves a lot to be desired. There are no explicit reasons to justify the "Hukumu". There was obviously injustice to the parties. Mr. Sindato had suggested, the appellate tribunal could have invoked the powers vested to it under section 34(1) of the Land Dispute Court Act (supra) and come up with its own findings. I ask myself how could the same be done while the judgment is vague? With that kind of judgment it was difficult for the appellate tribunal to invoke those powers. It was thus proper for the appellate tribunal to order a re-trial.

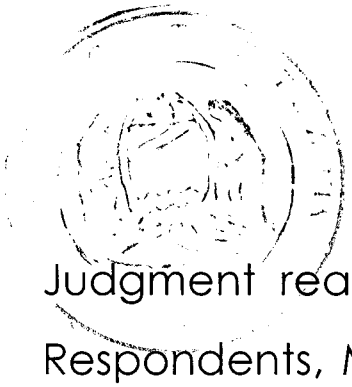
There was the issue of jurisdiction raised by the appellant, in that the appellate tribunal had decided the trial tribunal had no jurisdiction simply out of guess work. The appellate tribunal had stated: -

> *"Therefore in lack of valuation report, the appellants' arguments that land is valued at Tshs. 10,000,000/= holds water!"*

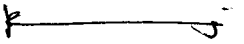
I am in all fours with the appellant's counsel that what was decided was simply grounded on assumption. There was no evidence at all on the value of the land. Be as it may, it was the duty of the trial tribunal to receive such evidence. Even though glancing through the trial tribunal's record the issue was not a disputed fact during the trial.

All said and done the appeal is partly allowed to the extent explained in the judgment. The appellate tribunal was right to quash and set aside the trial tribunal's judgment, decree and orders thereto. In the event the parties are at liberty to file a fresh case before a competent tribunal with the requisite jurisdiction. Given the circumstances of the case each party is to bear own costs.

B. R. MUTUNGI
JUDGE
12/8/2021



Judgment read this day of 12/8/2021 in presence of the Respondents, Mr. Sindato for the Appellant and Miss Minde for the Respondents.



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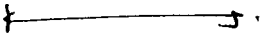
RIGHT OF APPEAL EXPLAINED.



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