IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.24 OF 2021

(Originating from the District Land and Housing Tribunal for Lindi at Lindi in Application No.35 of 2020 before Hon. R.E. Mjanja, Chairman)

JEROME FRANK MAULANA..... APPELLANT

VERSUS

HASSAN MFAUME SAANANE.....1ST RESPONDENT

ALLY D. MAONA.....2ND RESPONDENT

JUDGMENT

12/4/2022 & 26/7/2022

LALTAIKA, J.:

The appellant, Jerome Frank Maulana, was the applicant in the Land Application No.35 of 2020 filed in the District Land and Housing Tribunal for Lindi at Lindi. The appellant claimed a suit premise of the value of Tshs.5,000,000/= situated at Naipingo Ward in Nachingwea District in Lindi Region against the respondents. The appellant bought the suit premise from the first respondent vide a sale agreement which was executed in two phases. The first phase was on 1.11.2017 and the second and final agreement was executed on 9.5. 2018.That in 2019, the second

respondent erected a "fremu" in the land which the appellant claims to be his.

Having learnt of such interference, the appellant's wife, having power of attorney, instituted a matter at the Naipango Ward Tribunal. Thereafter, the appellant challenged the decision of the Ward Tribunal which was nullified by District Land and Housing Tribunal for Lindi. Thus, the applicant decided to file the matter afresh at the District Land and Housing Tribunal against the respondents and claimed to be declared the rightful owner of the suit land/premise (fifth fremu) and the respondents as trespassers and the costs of the matter.

To prove his claim, the appellant was represented by his wife, Magret Abdallah Namkungu who hold a special power of attorney. In order to prove his claim against the respondents, the appellant called one witness and tendered four exhibits. The respondents, on the other hand, called one witness and tendered a sale agreement between the second respondent and Philipo Benjamini Mlowola (exhibit D1). After trial, the learned Chairman decided in favour of the respondents. Dissatisfied and aggrieved, the appellant has lodged this appeal comprised of five grounds of appeal to writ: -

1. *That the learned chairman of the District Land and Housing Tribunal erred in law and in fact by relying on the sale agreement*

tendered by the 2nd respondent while in actual fact the said sale agreement was never pleaded, served to the appellant.

2. *The learned chairman of the District Land and Housing Tribunal in reaching his decision grossly erred in law and in fact by relying on respondent's testimonies without due regard that the same were highly controverted.*
3. *The learned chairman of the District Land and Housing Tribunal erred in fact and at law by awarding the Respondent reliefs which were never pleaded nor asked by the respondent.*
4. *The learned chairman of the District Land and Housing Tribunal erred in fact and at law upon visiting the locus in quo to make a proper finding and ignoring the evidence of the questioned witnesses.*
5. *The learned chairman of the District Land and Housing Tribunal erred in fact and at law by failure to analyse the evidence properly hence reaching to unfair decision.*

The hearing of this appeal was, at the parties' mutual consent and order of this court to that effect, disposed of by way of written submission. Indeed, both parties complied with the scheduling order of the court issued on 8/3/2022.As per the submission of the appellant he opted to drop the first ground of appeal and substituted with a new ground which reads "the trial tribunal did not take into account the opinion of the assessors and that the same does not form part of the tribunal proceedings". The appellant went on and argued that the it is nowhere the opinion of the assessors to be found. He stressed that the impugn judgment mere features a statement that the trial chairman is in agreement with the opinion of the assessors but those opinions are nowhere to be seen. To substantiate his argument the appellant referred

this court to page 24 of the typed proceedings of the trial tribunal. He further contended that the proceedings of the tribunal shows that the assessors' opinion were read to parties however the tribunal's record is silent on the same. He further contended that the assessors' opinion ought to contain reasons for their opinion something missing in the impugn judgment.

With regards to the second and fifth grounds, the appellant submitted that page 5 of the impugned decision shows how the learned Chairman was convinced that the second respondent had purchased the said band a from one Philipo Benjamini which measured 9 meters. However, the appellant argued by referring to page 22 of the typed proceedings that during the site visit assessors measured the suit property 8.5 meters and not 9 meters as testified by DW2. He stressed that that is an inconsistency between the judgment, the testimony of DW2 and evidence which was taken at the site.

Moreover, the appellant submitted that according to the photos taken regarding the house disputed property (exhibit P4) and the testimonies of PW1 and PW2 were to the effect that is part of the purchased house. He emphasised that PW2 proved without doubt that during the purchase of the house he was an employee of the first respondent who sold the same to the appellant and was fully engaged to

show him the boundaries of the house which contained 3 residential rooms and five business frames (milango ya biashara) as per page 11 of the typed proceedings.

In addition, the appellant submitted that the testimony of PW1 was supported with the evidence of DW1 found at page 13 of the proceedings of the tribunal which confirmed that he sent PW2 to show the boundaries during the purchase of the suit premise. To fortify his argument, he quoted what DW1 (the first respondent) testified when was cross examined by the appellant's counsel as it is reflected at page 14. Therefore, the appellant argued that from the testimony of DW2 it was apparently clear that the fifth frame (banda) was part and parcel of the purchased house. He thus suggested that the first respondent is estopped from denying what he testified during the hearing.

Furthermore, the appellant argued that testimonies of the respondents and the tendered exhibits could not lead to dismissal of his claim on balance of probability. The appellant went further and argued that despite testimonies of DW1, DW2 and DW3 that the banda was purchased from Philipo Benjamini Mlowola he was not called to testify in the tribunal where he could prove ownership of the disputed Banda. To cement his argument, the appellant referred this court to the case of **Yosila Nicholous Marwa and 2 Others vs Republic**, Criminal Appeal

No.193 of 2016 where the Court emphasised that failure to call a material witness without assigning any reason thus the court may automatically draw an adverse inference to the party responsible to prove the allegation. He also stressed that the testimonies of DW1, DW2 and DW3 reveals that sale of the banda did not involve the appellant as it is reflected at page 15,18 and 20 of the typed proceedings of the tribunal.

Besides, the appellant submitted on the importance of exhibit P1(sale agreement between the appellant and first respondent) and exhibit D1(sale agreement of the banda between the second respondent and Philipo Benjamini Mlowola). In that regard, the appellant argued that exhibit P1 carries ingredients of sale agreement such that witnesses of both parties, execution date, witnessed by Public Notary, presence of the surrender of ownership document to purchaser and seller testified before the tribunal. He went further and argued that it is unlike exhibit D1 which even Philipo Benjamini Mlowola was not called to testify.

On the third ground, the appellant submitted by referring to the Written Statement of Defence of second respondent. He stressed that nowhere the second respondent prayed for the reliefs granted by the tribunal. Thus, he further stressed that it was wrong for the tribunal to grant the reliefs which were not asked by the second respondent. To buttress his

argument, he cited the case of **International Commercial Bank vs Jadcem Real Estate**, Civil Appeal No.446 of 2020.

Submitting on the fourth ground, the appellant argued that the guidance on visiting the locus in quo was recently stated in the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and Others**, Civil Appeal No.4 of 2018 CAT-Dar es Salaam at page 6 to 8. He further argued that the manner in which the proceedings were taken did not guarantee the right to be heard. The appellant contended that the findings on the locus in quo were not taken into account when the impugn judgment was composed.

In response, the respondent jointly filed their submission in reply contended that they never invaded and erected the unfinished fifth frame (banda) because the disputed banda is not his property rather the property of Philipo Benjamini who later sold the same to the second respondent.

Responding to the newly introduced first ground of appeal, the respondents argued that the ground is not among the grounds of appeal raised by the appellant in his memorandum of appeal. They stressed that they had no mandate to argue and discuss the same in his submission without obtaining leave of this court to substitute the first ground of appeal. In the light of that submission, they argued that the appellant

offended Order XXXIX Rule 2 of the Civil Procedure Code, [Cap.33 R.E. 2019]. The respondents went further and argued that since nowhere the appellant prayed for leave thus, he had no authority to argue for the new ground of appeal which disrespected the rules of procedure or law.

Alternatively, the respondent argued that the new ground lacks merits. They fortified they argument that the tribunal properly considered the opinions of assessors as it is reflected at page 24 of the typed proceedings. Disputing the new ground, the respondents stressed that sections 23(2) and 24 of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] directs assessors to give out their opinions before the chairman reaches the judgment and also the learned Chairman to consider the opinions of the assessors before giving the judgment. They insisted that all those requirements were complied with as it is reflected at page 24 of the typed proceedings of the trial court. In view of that submission, the respondents contended that there was no defect done by the chairperson of the tribunal in considering the opinions of the assessors.

Regarding the second and fifth grounds, the respondents submitted that the trial chairman properly analysed the evidence adduced by the parties and reached to a very fair decision. They further insisted that the respondents, their witnesses and exhibit D-1 sufficiently proved the claim by the appellant in the contrary. Furthermore, as per page 16 and 17 of

the typed proceedings of the tribunal the second respondent (DW2) testified that the on 22/3/2019 he bought the suit land from Philipo Benjamini and not from the first respondent as it was alleged by the appellant.

The respondents went further and argued that, DW2 managed to show the appellant's house which he purchased from the first respondent and his banda are two distinct buildings with different roofing and foundations. As per DW2, the boundary between his banda and the appellant's house is the CD library whereby the appellant overlapped and trespassed to his frame-banda claiming to be his. They also stressed that, the evidence of DW1 was corroborated with the evidence of DW1, DW3 (Hassan Mfaume Saanane) and Jawadu Lucas Martin the hamlet chairman of Naipingo village as reflected at page 13-15 and 18-20 of the typed proceedings. They further clarified that the site visit cleared the matter when it was assured that the appellant bought four frames only and the boundary between the appellant and the disputed frames (the fifth frame) was the CD library which the appellant was referring it as the fifth frame.

The respondents argued that the locus in quo is not necessary as it was stated in the case of **Akosile vs Adeye** (2011) 17MNWLR quoted with approval in the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and 7 Others**, Civil Appeal No.4 of 2018 CAT at Dar es Salaam.

Furthermore, the respondents contended that one appellant's witness testified by not including the area purchased by the second respondent (the suit land) as the area of the appellant. It was further that the site visit proved the existence of two different foundations and roofing. Also, the house sold to the appellant was quite different from the suit land. In that regard, the respondents argued that they adduced evidence which was heavier than that of the respondent and thus, the tribunal properly arrived at its conclusion. To buttress their argument, respondents referred this court to the case of **Hemedi Saidi vs Mohamed Mbilu** [1984] TLR.

Responding to the presence of inconsistency in evidence between the judgment, the testimony and proceedings especially what was discovered in the site visit about the size of the disputed frame. They generally submitted that that complaint lacks merit because the measurement testified by DW2 and the assessors during site visit were mere measurements not taken by the qualified surveyors. Thus, they contended that such inconsistence on 9m or 8.5m is a minor one which does not go to the root of the matter. They further stressed that the dispute is on ownership of the suit land and the reliefs claimed and that the size of the suit land was not in dispute. To substantiate their argument, they cited the case of **Shukuru Tunugu vs Republic,**

Criminal Appeal No.243 of 2015 which was quoted with approval in the case of **Felomena Peter Mawata@Taliyamale vs Abbas Anthony Kilumile and Deremsi Msena**, Land Appeal No.2 of 2021 HCT at Iringa (unreported) whereby the court stressed that the discrepancies must be sufficiently serious and must concern matters that are relevant to the issue being adjudicated to warrant and adverse finding.

Morover, the respondents submitted that in the case of **Said Ally Saif vs Republic**, Criminal Appeal No.249 of 2008 court stated that minor contradictions and inconsistencies on trivial matters which do not affect the case should not be made a ground on which the evidence can be rejected on its entirety. In line with that submission, the respondents argued that the contradiction raised by the appellant was minor and not an issue for determination.

On photos taken by the appellant, the respondents disputed the photos on the ground that they were taken by the appellant. They further maintained that the only evidence to clarify the same is from DW1 who tirelessly explained that he did not sell the disputed area to the appellant rather it is belonged to Philipo Benjamini who in turn sold it to the second respondent. In that premise, the respondents submitted that the appellant had ill motive and was also duty bound to prove the allegation that he bought the banda from the first respondent. To substantiate their

argument, they referred this court to the case **of Lamshore Limited and J. S Kinyanjui vs Bizanje 12K.VD. K** [1991] TLR 330.To that end, the respondents submitted that the appellant totally failed to prove that he bought the suit land from the respondents. They referred this court to the often-quoted book Sarkas's Law of Evidence,18th Edition,2014 at page 1896.

On exhibit D1, the respondents argued that it is not true that the sale agreement tendered by the second respondent did not feature important ingredients of a valid contract. If that was the case, the respondents argued, the appellant's counsel ought to have objected its admissibility or cross examined on the authenticity of the exhibit D1. To that end, the respondents submitted that the appellant's complaint on sale agreement should be disregarded.

Responding to the complaint on failure to call a material witness one Philipo Benjamin Mlowola without any assignment of reason during trial, the respondents argued that the cited case of **Yosisla Nicholaus Marwa** by the appellant is distinguishable. They clarified that in Yosila, a watchman namely Isack Mpangala was alleged to have been threatened and injured by robbers, hence his presence in court was important to prove the offence of armed robbery. They went further and argued that in the present case Philipo Benjamini was out of reach since, they alleged,

he had passed away. However, the respondents argued that the presence of the sale agreement, DW1, DW2 and other defence witnesses sufficed to establish the defence case.

On the third ground that the respondents were awarded reliefs never pleaded or prayed for, the respondents were of the view that those reliefs were correctly awarded since they emanated from issues framed during trial. They argued further that the case of **International Commercial Bank Limited** is irrelevant in the matter at hand since in that case the plaintiff was awarded general damages without praying for the same in his plaint unlike the present case. To that end, the respondents submitted that the arguments in support of the appeal by the appellant lacked merit in its entirety. They prayed this court to dismiss the appeal with costs.

In rejoinder, the appellant argued firstly on the additional ground that he obtained the copies of the proceedings on 8th March 2022 and that is when he noted that there was lack of assessors' opinions in the proceedings of the tribunal. Regarding applicability of Order XXXIX Rule 2 of the CPC, the appellant argued that it is not applicable in appeals originating from the District Land and Housing Tribunal as the latter are governed by the Land Disputes Courts Act, No.2 of 2002. Furthermore, the appellant stressed that the respondents have strongly admitted that assessors' opinions were not in the record of the tribunal.

On the second and fifth grounds, the appellant maintained that DW1 had admitted that he sold the entire area to the appellant including the fifth Banda. With regards to the site visit, the appellant argued that the size of land in question the appellant maintained that what was seen in the site visit and what the chairman confirmed were totally different. He further stressed that contradictions and inconsistencies were not minor as the respondents had argued.

Regarding the sale agreement, the appellant submitted that his counsel could not object since authenticity was not an issue rather the contention hinged on the assertion that the sale agreement lacked weight to enable this court to rule in favour of the respondents. On failure to call Philipo Benjamini, the appellant argued that the assertion on his death was not in the tribunal's records and the same was merely a statement from the bar. In addition, the appellant maintained that the respondents ought to have called even the administrator of the estate of Philipo Benjamini who could testify if real Philipo Benjamini had sold the band to the second respondent. On reliefs the appellant maintained that the tribunal exceeded its powers by granting something which the respondents did not pray for. To that end, the appellant reiterated what he submitted in chief.

Having gone through the records of the tribunal, grounds of appeal and submission for and against. Now, I am in the position to determine the appeal. From the very outset it is important to settle the issue of additional ground of appeal brought and argued by the parties without leave of the court. Indeed, the appellant's petition of appeal did not feature what the appellant brought during submission in chief as additional ground. It goes without hesitation that the appellant contravened Order XXXIX Rule 2 of the Civil Procedure Code which reads:

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> *"2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by The Civil Procedure Code [CAP. 33 R.E. 2019] leave of the court under this rule:*
>
> *Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."*

In the same line of reasoning, I decline to accede to what the appellant had submitted that the Civil Procedure Code does not apply on

matters originating from the District Land and Housing Tribunal. For clarity and interest of justice, I paraphrase the section as follows: -

> *"51. Practice and procedure*
> *(1) In the exercise of the respective jurisdictions, the High Court and District Land and Housing Tribunals shall apply the Civil Procedure Code Cap. 33 and the Evidence Act Cap. 6–*
> *(a) subject to regulations made under section 49 may accept such evidence as is pertinent and such proof as appears to be worthy of belief, according to the value thereof and notwithstanding any other law relating to the adduction and reception of evidence;*
> *(b) shall not be required to comply or conform with the provisions of any rule of practice or procedure otherwise generally applicable in proceedings in the appellate or revisional court, but may apply any such rule where it considers the application thereof would be advantageous to the exercise of such jurisdiction.*
> *(2) Notwithstanding subsection (1), the Minister may, where inadequacy to the laws cited under subsection (1), circumstances allow, make regulations prescribing the rules of evidence and procedure to be applied."*

In light of the above observation, it was important for the appellant to seek leave of this court to add or substitute or amend his petition of appeal. Since the appellant did not seek leave to substitute the first ground of appeal appearing in the petition of appeal with the additional ground argued on submission, it goes without saying that this court will not determine it as aforesaid and instead I will determine the grounds of appeal as they appear in the petition of appeal.

Apparently, as the first appellate court, I am entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision see the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009, **Leopold Mutembei v. Principal Assistant Registrar of Titles; Ministry of Lands, Housing and Urban Development and the Attorney General**, Civil Appeal No. 57 of 2017 and **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported).

For reasons that will become clear in due course, my determination of the grounds of appeal will commence with the fourth ground. On this ground, the appellant complained that the tribunal did ignore the evidence gathered at locus in quo and complained about the way evidence was taken at locus in quo. After my thorough scrutiny of the typed proceedings of the tribunal particularly from page 22 to 24 I have noted that the proceedings of the locus in quo run short of the requirements of the law as they lack administration of oath to witnesses who adduced evidence in the locus in quo and no record on the observation, view, opinion or conclusion of the tribunal including drawing of a sketch plan, if necessary. See, **Kimonidimitri Mantheakis vs Ally Azim Dewji and Others**, (supra) and **Bongole Geofrey and Four Others vs Agnes Nakiwale**, Civil Appeal No. 0076 of 2015 (CAT).

I am aware that the purpose of locus in quo is to enable the court or tribunal to see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects. See, **Avit Thedeus vs Isidory Assenga,** Civil Appeal No.6 of 2017 (unreported). In the light of that observation, this court finds that the proceedings on the locus in quo by the tribunal did not meet the instructions of the Court of Appeal stated in the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and Others**, (supra) hence, I vitiate them. The question which pokes my mind is whether the evidence adduced by witnesses during trial can enable this court to proceed with re-evaluation. The answer is affirmative.

On the second and fifth grounds, the complaint is on inconsistencies on the evidence and failure to make proper analysis of the evidence adduced which led to unfair decision. It is pertinent to visit the evidence of PW1 and PW2 against the evidence of defence. The testimony of PW1 as it appears at page 5 and 8 respectively. It is apparently clear that the appellant purchased a house and "banda la biashara" vide exhibit P2 and P3. It can also be noted that the dispute is not over the whole land or house purchased by the appellant.

According to the testimonies of both parties the dispute lies on one room of the banda la biashara commonly known as "fremu". As per

evidence of PW1 and PW2, PW1 had purchased the land from DW1 comprised of both the house and the banda la biashara. However, the evidence of DW2 and DW3 shows that the fremu in dispute was owned by one Philipo Benjamini who sold it to DW2 vide exhibit D1.

The evidence of DW1 shows that Philipo Benjamini was the first person to construct a building and left his building unroofed which in turn DW1 asked Philipo Benjamini to roof it and use it for his music purposes. DW1 made such request before he sold his landed property to the appellant. After the sale, DW1 gave the area he was temporarily assigned to by Philipo Benjamini to the appellant.

Based on that evidence, it appears to me that DW1 had sold the *banda la biashara* or the fifth fremu to the appellant while knowing that the same did not belong to him. That piece of evidence is corroborated with evidence of DW3. DW3 as the hamlet chairman witnessed both sale transactions between PW1 and DW1 and between DW2 and Philipo Benjamini. In fact, gauging the credibility of DW3, I have noted that DW3 is a credible witness because he firmly testified that there were two areas owned by two different persons. The frames were different since the four fremu had its own foundation while the disputed fremu has the separate foundation. DW3 added that the disputed area was previously owned by Juma Rashid before it was conveyed to Philipo Benjamini.

It is also noted that DW3 participated in the building of both buildings in dispute. It is not in dispute that he was paid by two different persons. Even the evidence adduced by DW2 and DW3 clearly shows that PW1 and DW2 were separate by a narrow gap "mpenyo". The foundation of the fremu appears in different shapes because the foundation of appellant's fremu when compared to that of DW2 is at low level.

Even though the learned Chairman misquoted the measurement obtained at the locus in quo of 8.5 metres, the misquote does not change anything in dispute. I find it as a minor anomaly which is not fatal because the issue of determination is who own the suit fremu or kibanda cha biashara. It is a settled law that not every contradiction or discrepancy on witness's account is fatal to the case.

Minor discrepancies on details due to normal errors of observation, lapse of memory on account of passages of time, or due to mental disposition such as shock and horror at the time of occurrence of the event could be disregarded as opposed to fundamental discrepancies that are not expected of a normal person counts which has the effect of discrediting a witness. See, **Kivula William & Another vs Republic,** (Criminal Appeal 119 of 2020) [2021] TZCA 279. I am of, therefore, of the settled view that the appellant had the duty to investigate the area he

purchased before the purchase (i.e., the buyer beware "caveat emptor" disclaimer).

I am also of the firm view that DW1 was an invitee to the land that belonged to Philipo Benjamini and it does not matter if he did unexhausted improvement. It is a cardinal principal that an invitee cannot own land to which he was invited to the exclusion of his host whatever the length of his stay. See, **Magoiga Nyankorongo Mriri vs Chacha Moroso Saire,** (Civil Appeal 464 of 2020) [2022] TZCA 343 and **Musa Hassani vs Barnabas Yohanna (Legal Representative of the late Yohanna Shedafa),** Civil Appeal No.10 of 2018 (unreported).

In line with the above position of the law, it was wrong for DW1 to include the suit land as part and parcel of the land and house sold to the appellant while he knew that he had merely asked for temporary use of the suit land from Philipo Benjamini. To this end, I find the tribunal correctly decided in favour of the second respondent.

This brings me to ground three. I am not going to take long deliberating on this complaint because the tribunal was guided by the issues framed before the parties. The determination of issues depent on the evidence adduced by both parties. Since the tribunal was convinced by the evidence of the respondents, it was right to declare the second

respondent as the rightful owner of the fifth fremu. I find this ground equally unmerited.

All said and done, save to the extent indicated, the appeal stands dismissed. I make no orders as to costs.

It is so ordered.

E.I. LALTAIKA

JUDGE

26.7.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 26th day of July 2022 in the presence of Magreth Abdallah Namkungu, representative of the appellant and the respondents.

E. I. LALTAIKA

JUDGE

26.7.2022