IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 34 OF 2022

(Originating from the District land and Housing Tribunal for Karatu,

Application No. 6 of 2018)

JOHN QAMUNGA ..... 1ST APPELLANT

EZEKIEL JOHN ..... 2ND APPELLANT

REGINALD QAMUNGA ..... 3RD APPELLANT

VERSUS

ERIKA QAMUNGA ..... RESPONDENT

JUDGMENT

13/02/2023 & 20/03/2023

KAMUZORA, J.

The Appellants herein were aggrieved by the decision of the District land and Housing Tribunal for Karatu (henceforth "the trial Tribunal") which ruled in favour of the Respondent herein. In the trial Tribunal, the Respondent sued the Appellants for trespassing into her piece of land measuring one acre, located at Huduma hamlet, Kilimatembo area within Karatu District (henceforth "the suit land").

Facts of the dispute giving rise to this appeal as decerned from the record go as follows: The Respondent was married to Qamunga Saqweret

in 1988 as a third wife. They were blessed with five children and her husband died in 2006. The 1st and 3rd Appellants are the children of the late Qamunga Saqweret, born to the 1st and 2nd wives and the 2nd Appellant is the grand child of the late Qamunga Saqweret. After their marriage, the Respondent lived with her husband in the suit land, where she found the first wife (mother of the 1st Appellant) who relocated to his son's house (Safari Qamunga) and later passed on.

After the death of her husband, the Respondent continued living in the suit land until 2018 when the Appellants trespassed thereon and built a house. According to the Respondent's testimony before the trial Tribunal, she was the only surviving wife of the late Qamunga. That, the Appellants requested to build a prayer hall (Banda la ibada) which the Respondent consented but on the contrary, they constructed a house. She further testified that all the wives of the late Qamunga were given their plots and farm (shamba). She maintained that she lived with her husband until his demise in the disputed property. It was her account that after the death of her husband, the suit property was left to her as her share from her husband, terming it as her matrimonial property as she lived there for 30 years prior to the dispute.

On their account, the Appellants claimed that the suit land belonged to Marietha Gaudensi Qamunga, the first wife of the late Qamunga and

mother of the 1st Appellant. According to their testimonial accounts, the suit land was allocated to the late Qamunga Saqwere and his first wife Marietha Qamunga by the village council in 1974. They further demonstrated that after being married by the late Qamunga in 1988, the Respondent was invited to live in the first wife's house until her husband built her a house. That, Marietha consented and she went to live at his son's house. That, later, Marietha Qamunga claimed her house through elders, but to no avail. That, the dispute was referred to the village office but it was barren of fruits. That, Marietha being denied repossession of her premises, cursed the Respondent before her death in 2008. That, the Respondent herein apologized before the deceased's corpse to exonerate herself from the curse. That, following Marietha's death and during pendency of the dispute in the trial Tribunal, Joseph Qamunga applied for and was granted letters of administration of her mother's estate on 28/03/2018. That, in the administration of Marietha's estate, the suit land was allocated to the 2nd Appellant as beneficiary. That, all the three Appellants admitted that they entered in the suit land in 2017 and built what they termed as 'kibanda cha ibada'. They sought to evict the Respondent from the suit land because she was allocated her own piece of land.

After full trial, in a judgment delivered on 13/12/2021, the trial Tribunal was sufficiently convinced that the Respondent managed to prove the claim on the required standard. She was declared the lawful owner of the suit land and the Appellants were declared trespassers and ordered to give vacant possession of the suit land. The Appellants were also ordered to pay costs of the case. Following that decision, the Appellants were seriously aggrieved, hence this appeal which has been prefaced by the following grounds of appeal:

a) *That, the trial Tribunal erred in law and fact when it failed to properly analyse the evidence from both sides especially the evidence adduced by PW1 and PW2 on the boundaries of the suit land hence reached into a wrong conclusion;*
b) *That, the trial chairman erred in law and facts and totally misdirected himself on the principle of law, based on the law of Limitation Act, Cap. 89 [R.E 2019], 1st schedule, item 22;*
c) *That, the chairman of the trial Tribunal erred in law and facts by making a judgment without recording the assessors' opinion in writing as it is required by the law contrary to section 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003; and*
d) *The trial chairman erred in law and facts by allowing the assessors of the Tribunal to cross examine witnesses and not asking questions for clarification.*

Based on the above reproduced grounds of appeal, the Appellants prayed that the appeal be allowed with costs, the decision and order of the trial Tribunal be quashed and set aside and any other relief this Court deems just and fit to grant. At the hearing of the appeal, the Appellants were represented by Mr. Kizito Thomas, learned advocate whereas the Respondent was represented by Mr. Samwel Welwe, learned advocate. It was parties' prayer and the Court acceded that the appeal be disposed of through filing written submissions.

In support of the 1st ground of appeal, Mr. Kizito submitted that the Respondent when cross examined she admitted that she was invited by the first wife of the late Qamunga, the original owner of the suit land. She further admitted that the first wife relocated and handed over the suit land as testified by the 3rd Appellant in the trial Tribunal. According to Mr. Kizito, an invitee cannot own land which he/she was invited despite the long time he/she stays in that land. To back up his argument, he relied on the Court of Appeal decision in **Laurent Mwango'ombe Vs. Tatu Haji Mwambishile**, Civil Appeal No. 358 of 2019 (unreported). He insisted that the Respondent will continue to be an invitee of Mr. Qamunga's first wife and cannot as such assume better title. It was counsel's further submission that the Respondent failed to adduce evidence leading to when and how the suit land was handed over to her

by the first wife as she claimed. Further, there were contradictions on the boundaries of the land owned by the Respondent making it difficulty for one to understand the piece of land owned by her between the one she lives on currently and the one that belonged to the first wife.

Expounding the 2nd ground of appeal, Mr. Kizito averred that the trial Tribunal erred by invoking adverse possession principle while deciding the case. He accounted that mere long use of the land does not entitle a person or an invitee ownership of the said land. To reinforce his contention, he referred the English decisions in **Mosses Vs. Loregrove** (1952) QB 533 and **Hughes Vs. Griffin** (1969) AA ER 460. He maintained that invoking the doctrine of adverse possession prejudiced the Appellants because the elements which need be proved in adverse possession were not proved. Further that, the issue of limitation was neither pleaded nor prayed for by any of the parties, therefore determining the case based on the limitation denied the parties the constitutional right to be heard.

Elaborating the 3rd ground of appeal, counsel for the Appellants asserted that opinions of the assessors were neither solicited nor reflected in the Tribunal proceedings, but they were referred in the decision. He maintained that the record does not show whether the assessors were accorded opportunity to give their opinion thus, he wondered how they found their way in the Tribunal judgment. It was his view that in the

absence of clear record, it suggests that the said opinion was entered in the judgment after or during composition of the judgment contrary to section 23(1) and (2) of the Land Disputes Courts Act, cap. 216 [R.E 2019] (henceforth 'LDCA').

Substantiating the 4th ground of appeal, Mr. Kizito submitted that by allowing the assessors to cross examine witnesses instead of asking questions for clarification, the chairman contravened section 177 of the Evidence Act, Cap 6 [R.E 2019] (henceforth 'TEA'). It was his view that questions put to witnesses by the assessors went beyond seeking clarification to the extent of being cross examination of the witnesses. In his view, that anomaly vitiated the trial. Based on the above submission, Mr. Kizito urged this Court to allow the appeal with costs.

Resisting the appeal, Mr. Welwel in the first ground submitted that the Respondent being the wife of the late Qamunga was not an invitee in the disputed land rather the owner as it was part of the matrimonial property jointly between her and her late husband. He fortified that the Respondent was married by the late Qamunga in 1988 and she has been living in the suit property as her matrimonial home. That, there was no evidence that the first wife owned the suit land. That, being dully married to the late Qamunga, and as long as they lived together in the disputed land, the Respondent acquired title to the land as co-owner. He accounted

that since the Respondent has been owning the suit land from 1988, the burden was upon the Appellants to prove that she is not the owner, referring section 119 of TEA.

On the second ground of appeal, learned advocate contended that since it was undisputed that the Respondent lived in the suit land for a period of 30 years, since 1988, the dispute by the Appellants could not be entertained since they are barred by the law of limitation which provides for 12 years period to recover land. Further that, there was no evidence if the said first wife of the late Qamunga sued the Respondent at any point in time hence, an attempt by the Appellants cannot be compromised as they are barred by the law of limitation.

Submitting on the third ground, Mr. Welwel amplified that assessors' opinion was put in writing forming part of the Tribunal record. That, their opinion was reflected in the judgment therefore thoroughly considered by the trial chairman.

Regarding the last ground of appeal, it was Respondent's counsel submission that assessors who participated at the hearing of the dispute only asked questions for clarification and did not cross examine the witnesses as counsel for the Appellants purports. Mr. Welwel prayed for dismissal of the appeal with costs for being devoid of merits.

After going through the record of the lower Tribunal, the grounds of appeal and submissions for and against the appeal by both learned counsel for the parties, I will determine the appeal basing on the grounds of appeal. In so doing, I will first deal with the 3rd and 4th grounds which are based on the propriety of the proceedings before I revert to the 1st and 2nd grounds which are based on the evidence.

Starting with the 3rd ground of appeal, the Appellant's counsel, Mr. Kizito contended that assessors did not give their opinion but such opinion was recorded in the judgment. On his part, Mr. Welwe argued that assessors gave their opinion and the same was featured in the judgment. Now the question is whether assessors gave their opinion or not.

The manner in which the assessors are required to give their opinion is provided for under Regulation 19(2) the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2002, G.N No. 174 of 2003. Regulation 19(2) states as follows:

> *"19 (2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgment,* ***require every assessor present at the conclusion of hearing to give his opinion in writing*** *and the assessor may give his opinion in Kiswahili," (Emphasis added)*

In **Edina Adam Kibona Vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported), the Court observed as follows:

"... as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19(2) of the Regulations, ***the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing****. It may be in Kiswahiii:* ***That opinion must be in the record and must be read to the parties before the judgment is composed.*** "[Emphasis added]

It is clear from the above provision and the cited authority that the assessor's opinion must be in writing. In my perusal to the trial Tribunal proceedings, I encountered written opinion of only one assessor Mrs. R. Panga dated 09/11/2021. There is no written opinion of the other assessor Mr. J. Akoonay who participated at the hearing of the dispute. In the typed proceedings at page 34, it shows that on 08/12/2021 two assessors including John Akonaay were in attendance and they read their opinions before the Tribunal. With that observation, I agree that all assessors gave their opinion. The fact that the written opinion of John Akonaay could not be found in record is not in itself a conclusion that he never gave his opinion as it may be a missing or misplaced document. This is because in its decision the Tribunal also acknowledged that both assessors read their opinion and the Tribunal considered opinion of both assessors in its decision meaning that it was there. In my considered view, although Mr. J. Akoonay's opinion was not featured in the record, the proceedings and

judgment prove that it came into the attention of the trial Tribunal and it was well considered. That being the case, it is my considered view that the trial was conducted with the aid of two assessors as required under the law. I therefore find no merit in the 3rd ground of appeal.

On the 4th ground of appeal, it was Mr. Kizito's contention that the assessors who participated at the hearing of the dispute cross examined the witnesses instead of asking questions for clarification. He relied on section 177 of TEA. In order to resolve counsel's complaint, I will reproduce the provision relied upon. Section 177 of TEA provides:

> *"In cases tried with assessors, the assessors may put* any questions to the witness, *through or by leave of the court, which the court itself might put and which it considers proper."*

Dealing with similar complaint and interpreting the requirement of the above provision, the Court of Appeal in the case of **Samwel Japhet Kaaya Vs. Republic**, Criminal Appeal No. 40 of 2017 (unreported), had the following to say:

> *"We have closely examined the record of the trial court proceedings in the record of appeal concerning cross examination of witnesses by assessors. Admittedly, we note that this is one of the case in which assessors were allowed to cross examine the witnesses for the prosecution and the defence throughout the trial.* ***What is more apparent in the proceedings is that assessors cross-examined witnesses before a party who***

called them made re-examination. *Ordinarily, as it has been a practice even where assessors put questions to witnesses as required in terms of section 177 of the Evidence Act,* ***they must do so after re-examination.*** *In our respectful opinion, this was highly irregular and in essence, the irregularity fundamentally prejudiced both parties to the case." (Emphasis added)*

From the above authoritative decision, assessors may put up questions to the witnesses only after re-examination. According to the trial Tribunal proceedings, throughout the trial, the assessors asked questions before re-examination. That is violative of the above provision of the law because it amounts to further cross examination. The rationale behind the above principle was restated in the case of **Kulwa Makomelo and 2 Others Vs. Republic**, Criminal Appeal No. 15 of 2014 (unreported) where it was held as hereunder:

"... The assessors are part of the Court; and the Court is supposed to be impartial. Since under section 146 (2) of the Evidence Act Cross examination is an exclusive domain of an adverse party, by allowing the assessors to cross-examine witnesses, the Court allowed itself to be identified with the interests of the adverse party, and therefore ceased to be impartial. By being partial the Court breached the principles of fair trial now entrenched in the Constitution."

The fact that witnesses in the trial Tribunal were asked questions soon after cross examination and before re-examination by those who

summoned such witnesses, it is apparent that they assumed the role of the adverse party. Further, as submitted by counsel for the Appellants, questions asked by the assessors were not in the nature of seeking clarification, rather aimed at contradicting the witnesses hence, defeating the role of assessors in the trial. Since the evidence of witnesses from both sides was taken in contravention of the law, there is no gainsaying that the trial was vitiated. Therefore, the 4th ground of appeal is merited.

Having found merits in the 4th grounds of appeal, it sufficiently disposes the appeal. I find no apparent reasons for determining the 1st and 2nd grounds of appeal. I take this course because those grounds are based on evidential matters which cannot be determined having found that the trial was vitiated.

Consequently, I find the appeal merited. As the proceedings of the trial Tribunal were vitiated, the resultant judgment and orders as well has no legs to stand on as it stems on a nullity. I therefore nullify the proceedings of the trial Tribunal and proceed to quash and set aside the judgment and decree emanating therefrom. The file is remitted back to the trial Tribunal for a fresh trial before another chairperson with new set of assessors. Taking into account that the anomaly was attributed by neither of the parties, I make no order as to costs.

DATED at **ARUSHA** this 20th day of March, 2023.

D. C. KAMUZORA

JUDGE