IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

LAND APPEAL NO. 55 OF 2023

(C/F Land Application No. 38 of 2019 before the District Land and Housing Tribunal for Karatu at Karatu)

BETWEEN

TITO NADE.....APPELLANT

VERSUS

AMALTI BASSO.....RESPONDENT

JUDGMENT

15/2/2024 & 01/03/2024

KIWONDE, J.

The appellant, Tito Nade, having been aggrieved by the decision of the District Land and Housing Tribunal for Karatu (herein referred to as the trial tribunal) in Land Application No. 38 of 2019 delivered on the 20th day of July 2023, lodged the present appeal armed with eight (8) grounds of appeal namely: -

1. That, the trial tribunal proceedings are a nullity for non-compliance with the entire Regulation 12 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174/2003.

2. That, the trial tribunal proceedings is (sic) nullity for tribunal assessors and tribunal Chairman assumed the role of adverse party by conducting cross-examination to some of the witnesses instead of asking questions for clarification.
3. That, the judgement in Land Application No. 38/2019 is bad in law as the tribunal Chairman did not through (sic) analyse or evaluate evidence adduced by both sides while composing Tribunal judgment.
4. That, the proceedings before the trial tribunal is (sic) rendered nullity for failure of Tribunal Chairman to record evidence of all witnesses in a narrative form.
5. That, the Tribunal Chairman wrongly relied on written statement of defence by the present respondent while it was filed contrary to the dictate of Regulation 7 (1) (a) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations GN No. 174/2003.
6. That, the assessors' opinions are not reflected in both tribunal proceedings and judgment, hence entire tribunal proceedings is (sic) vitiated.
7. Tribunal Chairman wrongly misapplied the law on time limitation and *res judicata* in deciding Land Application No. 38/2019.

8. That, decision reached by the tribunal is unfair for denial of the right to be heard on issues raised by Tribunal Chairman while composing judgment.

   The appellant prayed the proceedings and judgment of the trial tribunal be set aside (sic) and the appeal be allowed with cost.

To appreciate the context of this appeal, it is convenient to recount, *albeit* briefly, the background of this matter. The appellant filed an application against the respondent on the claim that, he is the lawful owner of the land in dispute measuring 115 lengths with 58 widths situated at Kansay Kati Sub-Village, Kansay Village within Kansay Ward. He alleged that he obtained the disputed land after being allocated by his father-in-law Geriya Yerro in 1995 who bought 3 acres from Yona Basso in 1990. The appellant stated further that he has been using the said land peacefully until 2018 when the respondent trespassed into part of it which is ¾ acre. Among others, the appellant sought for reliefs that, he be declared as lawful owner of the disputed land and the respondent herein to be declared as trespassers and be ordered to pay damages at the total of Tshs. 10,000,000/= and Tshs. 594,300/= as compensation for harvesting his maize.

However, the respondent disputed the application on the reason that Geriya Yerro had no good title to pass the same to another person. He argued further that the land purchased by Geriya Yerro from Yona Basso is different from the disputed land.

Also, the respondent argued that there was another Land Case No. 7 of 2003 between Geriya Yerro and the respondent herein was declared the lawful owner of the disputed land and the same was handled over to the respondent herein by Monduli District Court in execution.

At the conclusion of the trial, the trial tribunal decided in favour of the respondent, thus, this appeal.

On 7th December 2023, it was agreed by the parties and ordered by the court that the appeal be argued by way of filing written submissions and both sides complied with the order.

In his submissions in-chief, the counsel for the appellant, one Felichism Baraka abandoned the 1st ground of appeal and argued the remaining seven (7) grounds as presented in his memorandum of appeal.

Submitting on the 2nd ground of appeal, the counsel for the appellant said the trial tribunal's proceedings from 18/9/2020 to 19/11/2020 are a nullity since the assessors and the chairman assumed the role of

adverse party by conducting cross-examination of the witnesses contrary to section 147 (1) of the Law of Evidence Act, Cap 6 (R.E 2019). He was of the view that since the assessors and the chairman asked the questions before re-examination, they were cross-examining the witnesses instead of asking questions for clarification, so, it was unfair trial. To support his argument, he referred this court to the case of **Eligi Valence @ Marandu @ Msoro and Another v. The Republic**, Criminal Appeal No. 41/ 2017 (CAT at Arusha).

As to the 3rd ground of appeal, the counsel for the appellant submitted that the trial tribunal did not properly evaluate the evidence of both sides. He argued further that after summarizing the evidence of both parties, the trial Charman concluded that the case was *re judicata* based on Land Case No. 7 of 2003 but based on the evidence of the respondent alone. The counsel added that the appellant proved his claim that he was using the disputed land since 1999 when he was given by his father-in-law, and he is aware with the case between his father-in-law and the respondent herein, but it has nothing to do with this case. He argued that since AW2 (relative of the respondent) who is also a former Ward Executive Officer, and AW4 (former sub-village chairman) supported his testimony that the disputed land belongs to the appellant

and that the respondent was already given his ¾ acres, his claim was proved on the balance of probabilities. More to that, he stated that the documentary evidence tendered by the respondent does not support his claim that he was given 5 acres of land and he failed to explain why the appellant was not sued in 2003 while he was already occupied the land. Thus, he prays for this ground to be found with merit.

Concerning the 4th ground of appeal, the appellant's counsel submitted that the trial tribunal's chairman erred in law by failure to record the testimony in a narrative form contrary to Orde XVIII Rule 5 the Civil Procedure Code, Cap 33 (R.E 2019) which is applicable to tribunal via section 52 of the Land Disputes Courts Act, Cap 216 (R.E 2019). He added that the evidence not recorded in a narrative form became difficult to understand what was communicated by the witness, hence the appellant was prejudiced.

Arguing the 5th ground of appeal, the counsel for the appellant said that the respondent's written statement of defence was submitted at the tribunal on 20/9/2019 instead of 10/9/2019 without being given extension of time to file the same out of the prescribed time. He was of the view that the said act was contrary to Regulation 7 (1) (a) of the

Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No.174 of 2003.

Regarding the 6th ground of appeal, it was Mr. Baraka's submission that the opinions of the assessors were not recorded in the proceedings nor in the judgment as required by the law. He added that the opinion of Mr. John Akonaay bears no date of preparation and delivery. He argued that failure to record the proceedings means the trial Chairman sitted without assessors. He referred this court to the case of **Moto Matiko Mabanga v. Ophir Energy PLC and 6 Others**, Civil Appeal No. 119 of 2021 (CAT). In respect to the 7th ground of appeal, Mr. Baraka complained that the issue of adverse possession is inapplicable since the appellant did not become the owner of the land as adverse possessor. Thus, he argued item 22 to the 1st schedule of the Law of Limitation Act, Cap 89 (R.E 2019) is inapplicable.

On the last 8th ground of appeal, Mr. Baraa complained that it was wrong for the trial tribunal to raise a new issue of *res judicata* and use it to determine the case without giving the parties the right to be heard which caused miscarriage of justice. He cited the decision in the case of **Peter Ng'homango v Attorney General**, Civil Appeal No. 114 of 2011.

In reply to the submissions in-chief, the respondent submitted in opposition in respect of the 2nd ground of appeal that after going tough the whole proceedings of the trial tribunal, there was nowhere the trial Chairman and the assessors conducted cross- examination or raised new facts. Rather, they were only asking questions for clarifications based on what was testified by the witnesses only. He contended that the act of questioning the witness before re-examination does not mean they were cross-examining them. So, this ground of appeal is without merit.

With regard to the 3rd ground of appeal, the respondent argued that the judgment was well composed according to the law and the evidence was properly evaluated and analysed. He stated that the judgment contained brief facts, points for determination, finding of issues, decision, and reasons for the decisions. The judgment was in favour of the respondent based on the strong oral and documentary evidence submitted before the tribunal. So, he submitted that Rule 20 of GN No.174 of 2003 was not violated by the trial tribunal.

Replying to the 4th ground of appeal, the respondent submitted that Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 and section 52 of Cap 216 (R.E 2019) were not violated by the trial chairman while recording the testimony of the witnesses. He was of the view that the

law restricts the recording of the testimony in a form of question and answers which was not the case in our case.

When he was responding to the 5th ground of appeal, the respondent argued that this issue was never raised at the trial tribunal hence cannot be raised at this stage.

In response to the 6th ground of appeal, the respondent argued that the opinions of assessors were read aloud to the parties and the same were recorded to form part of the proceedings. Thus, there is no violation; all of the cited cases need to be distinguished and the ground be dismissed for want of merit.

Finally, as to the 7th and 8th grounds of appeal, the respondent stated that the issue of *res judicata* and time limitation were pleaded and dealt with in the proceedings and the tribunal was correct to determine them. He was of the view that as the disputed land is part of the land which was previously litigated in 2003, this is why the principle of *res judicata* was considered. On the issue of adverse possession, the respondent said item 22 of the Law of Limitation Act, Cap 89 merely sets time limit to file suit to recover land. The respondent prayed this appeal be dismissed with cost.

There were no rejoinder submissions.

From the written submissions, grounds of appeal and the available evidence on the trial tribunal's records, the main issue for determination is whether the appeal has merits or otherwise.

In the 2nd ground of appeal, it is true that the chairman of the trial tribunal allowed the assessors to pose questions to the witnesses immediately after cross-examination then followed by the re-examination as seen in the proceedings dated 18/9/2020 to 19/11/2020. However, the assessors did not cross-examine the witnesses, rather, they questioned them. The law does not provide for when this has to be done. It has been a practice that questioning of a witness by assessors be done after re-examination. The test here is prejudicial effect to the appellant. In this appeal, it is not stated if the appellant was prejudiced by assessors questioning witnesses before re-examination. The appellant merely said by so doing, it amounted to cross-examination, which I find not. For that reason, this ground appeal is found without merit.

As to the 3rd ground of appeal, the main complaint was the failure by the trial tribunal chairman to evaluate evidence on records. It is now settled legal principle that the first appellate court, if it is satisfied that the evidence was not properly evaluated or analysed, can re-evaluate the entire evidence on record and come up with its own finding. The

position is buttressed by the decision in the case of **Makubi Dogani vs. Ngodongo Maganga**, Civil Appeal No. 78 of 2019, Court of Appeal of Tanzania and **Philipo Joseph Lukonde vs. Faraji Ally Saidi,** Civil Appeal No. 74/2019, Court of Appeal of Tanzania sitting at Dodoma (unreported).

In the appeal at hand, having taken time and revisited the records of trial tribunal, I have noted that the evidence was properly evaluated and analysed by the trial tribunal. As a result, I find the 3rd ground of appeal is wanton of merits too.

The 4th ground of appeal centres on the failure to record evidence of witnesses in a narrative form. It is clear from the records that the evidence was recorded in narrative form save the answers during cross-examination which the chairman recorded in bullet form. In my view, this is a minor error which does not vitiate the entire proceedings and decision of the trial tribunal. Thus, this ground of appeal crumbles.

Concerning the 5th ground of appeal, the counsel for the appellant said the written statement of defence of the respondent was filed out of the prescribed time as required by Regulation 7 (1) (a) of the Land Disputes Courts (District Land and Housing Tribunals) Regulations, GN No.174 of 2003. However, this fact was not raised and or determined at the trial

tribunal. Being a new fact, this appellate court cannot entertain it at this stage. This position of the law was stated in the case of **Hassan Bundala @ Swaga vs The Republic** (Criminal Appeal 386 of 2015) [2015] TZCA 261 (23 February 2015) (Tanzlii).

For this reason, the 5th ground of appeal is dismissed for lack of merits.

Besides that, the 6th ground of appeal, is all about the alleged non-reflection of the opinions of assessors in the proceedings and the judgment. However, upon going through the records of the trial tribunal, I found that the opinions of the assessors were made in writing, filed in the trial tribunal, read aloud before the parties on 8/6/2023 and considered by the tribunal chairman found at page 7 of the typed judgment.

The argument that the opinions of Mr. John Akonaay, do not bear date, I find it not fatal and it does not vitiate proceedings and or decision of the trial tribunal for the omission did not prejudice the appellant in any way. So, the 6th ground of appeal is devoid of merits.

Finally, on the 7th and 8th grounds of appeal, the appellant's counsel was of the argument that the trial tribunal chairman raised the new issues of time limitation, adverse possession and *res judicata* in the course of composing judgment without giving the parties the right to be heard. It

is settled principle of law that where the court or tribunal raises new issue(s) during preparation of judgement, it must recall the parties to address on the matter as a matter of right to be heard.

Apart from that, the court or tribunal should not bring in extraneous matters not pleaded or addressed by the parties. In determining the dispute before it, has to confine itself to the issues raised. In **Ex-B.8356 S/sgt Sylivester S. Nyanda v. The Insepector General of Police & Another** (Civil Appeal 64 of 2014) [2014] TZCA 215 (28 October 2014) (Tanzlii).

In the present appeal, the fact as to when the cause of action accrued and that the matter had been determined (*res judicata*) were pleaded under paragraph 6 of the Application No.88 of 2019 and even during hearing of the matter, parties testified to that effect. It cannot be certainly said that these were extraneous matters and that the parties were deprived of the right to be heard.

On the issue of adverse possession, this was discussed by the chairman of the trial tribunal at page 7 of the judgment. This was said in the course of determining the issue as to who was the lawful owner of the suit land. But the trial tribunal chairman based his decision on the time limitation to institute suit to recover land citing item 22 of the First

Schedule to the Law of Limitation Act, Cap 89 (R. E 2019). So, the chairman did not base solely his decision on the principle of adverse possession.

In the event, this appeal lacks merit, and it is hereby dismissed with cost.

Dated at **Arusha** this 1st March 2024

F. H. KIWONDE

JUDGE

01/03/2024

Court: Judgment is delivered in chamber in the presence of Miss. Leticia Leonard, counsel holding brief of Mr. Felichism Baraka for the appellant, the respondent and Maryciana Mgasa (RMA) this 1st March 2024 and the right of further appeal to the Court of Appeal is explained.

F. H. KIWONDE

JUDGE

01/03/2024