IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT SUMBAWANGA

MISC. LAND APPEAL NO. 08 OF 2020

(From the decision of the District Land and Housing Tribunal of Katavi at Mpanda in Land Appeal No. 28/2019 Mamba Ward Tribunal No. 01/ 2019)

NZENGA SALU..... .....APPELLANT

VERSUS

SINGU CHANGU.....RESPONDENT

JUDGEMENT

25th July – 01st September 2020

MRANGO, J

The appellant has preferred this appeal challenging the judgement and decree of the District Land and Housing Tribunal for Katavi at Mpanda which was delivered on 10th of October 2019 against the respondent herein. The same is originated from Mamba Ward Tribunal.

At the Ward Tribunal (henceforth the trial tribunal) the respondent herein sued the appellant over trespass on the disputed piece of land measured six (6) legs of width and 26 legs of length. The dispute was determined in favour of the respondent. Aggrieved by such decision the

appellant unsuccessfully appealed to the District Land and Housing Tribunal for Katavi (henceforth the appellate tribunal) as it maintained the decision of the Ward tribunal. Dissatisfied by the outcome of the decision the appellant has lodged this appeal to this court with a petition of appeal comprised of three (3) grounds of appeal as summarised hereunder;

1. **That the first appellate tribunal erred in law and fact for failure to accommodate properly and legally the opinion of assessor's in reaching to its decision hence the judgement is bad in law.**
2. **That the first appellate tribunal erred in law and fact by upholding the decision of the trial tribunal having found that the trial tribunal was biased against the appellant.**
3. **That the trial tribunal erred both in law and fact by giving the decision which compounded the dispute instead of resolving it.**

When the appeal was called on for hearing both parties were represented. The appellant being represented by Mr. Deogratius Sanga – learned advocate while the respondent was represented by Ms. Neema

Charles – learned advocate. Ms. Neema Charles prayed to argue the appeal by way of written submission. Mr. Sanga conceded. Each party filed their respective written submission as scheduled and ordered by this court.

In support of the appeal, Mr. Deogratius Sanga, learned advocate for the appellant before submitting in respect of the grounds of appeal made a brief history of the matter. He narrated that the appellant herein acquired the disputed land through purchasing the same from one Omary Joseph in a year 2006 and has been in total and uninterrupted possession and exclusive use of the same for the period of thirteen (13) years. He further narrated that on his surprise in 2019 upon lapse of over 13 years from the date of his acquisition, the respondent sued him before Mamba Ward Tribunal claiming ownership over the disputed land wherefore upon hearing the matter the Ward tribunal delivered a confusing decision which instead of resolving the dispute compounded the same. Being dissatisfied, the appellant appealed to the District Land and Housing Tribunal for Katavi at Mpanda which instead of noticing a number of serious irregularities which if would have been properly dealt with would render the whole of such proceedings nullified as they emanated from nullity proceedings. He said despite of all that, the 1st appellate tribunal again while under total

misguidance upheld the nullity decision of the trial ward tribunal, thus the appellant for such fact has preferred this an appeal.

With regard the first ground, Mr. Sanga submitted that the proceedings of the appellate tribunal are vitiated and its judgement is bad in law for failure to accommodate properly and legally the opinion of assessors on the basis as hereunder elaborated.

Learned advocate Sanga submitted that it is trite principle of law that where the trial tribunal has been conducted with the aid of the assessors they must actively and effectively participate in the proceedings by being afforded with chance to give their opinion and such opinion be availed to and read in presence of parties before taken and used by the Chairman in the composition of judgement. He said failure to properly accommodate the opinion of assessors renders the proceedings vitiated and the judgement nullity. Mr. Sanga said the position is provided under **section 23 (1) and (2) of the Land Dispute Courts Act, Act No. 2 of 2002 together with Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003** and the same was praised by the Court of Appeal decision of **Sikuzani Said Magambo & another versus Mohamed Roble, Civil Appeal No.**

197 of 2018, unreported, the court dealing with the similar situation at page 10 and 11 held that;

> "It is therefore our considered view that, since the record of the tribunal does not show the assessors were accorded the opportunity to give the said opinion, it is not clear to how and at what stage opinion found their way in the Tribunal's judgement. It is our settled view that, the said opinion was not availed and read in the presence of parties before the said judgement was composed.
>
> On the strength of our previous decision cited above, we are satisfied that the pointed omissions and irregularities amounted to a fundamental procedural errors that have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and the entire before the tribunal."

In addition, Mr. Sanga submitted that according to the proceedings of the first appellate tribunal as seen from its first to the last page, the tribunal was composed in accordance with the law as it involves one Chairman with assessors namely: W. Chambi and B. Milundwa and it is

those assessors who chaired the tribunal from the genesis of the matter to the finality of the proceedings.

Moreover, he argued that the entire proceedings of the first appellate tribunal the assessors were neither accorded with the opportunity to give their opinion nor their opinion were availed to and read in presence of the parties as the law requires despite the fact that they formed part to the tribunal's proceedings as required under the law and the awareness of the Chairman as to the existence of section 23 (1) and (2) of the Land Disputes Court Act, Cap 216 and Regulation 19 (1) and (2) of the Land and Housing Tribunal Regulations.

Mr. Sanga further submitted that it is clear that the first appellate tribunal immediately after finalizing hearing the matter scheduled judgement date and delivered the same on the scheduled date without even accorded the assessors with chances to give their opinion not availing and or reading the said opinion in presence of parties.

Moreover, Mr Sanga submitted that despite the fact that assessors were not properly and or legally accommodated by the trial court in its proceedings, by neither not being availed and read to the parties nor even featured in records of the proceedings, the chairman without any good

cause, assumed the same by reading her acknowledgement in the judgement, the act which amounted to procedural error and vitiated the whole of the proceedings. In the above cited case of **Sikuzani Said Magambo & another versus Mohamed Roble**, the court held;

> "Therefore, in our considered view, it is unsafe to assume the assessor which is not on record by merely reading the acknowledgement of the Chairman in the judgement. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgement and this was a serious irregularity."

Learned advocate Sanga was of the view that taking the serious irregularities and illegalities seen to have been done by the chairman as he submitted herein, while guided with the provision of the law cited, he humbly prayed for this court to find merit in the first ground and reach to the conclusion that the whole of the first appellate tribunal's proceedings are vitiated and thus its judgement is nullity and therefore the same deserve to be nullified to its entirety with costs.

With regard the second ground, Mr Sanga invited this court to join hand with his strict view that the trial tribunal was at fault in upholding the trial tribunal's proceedings and decision which is a nullity for being bias against the appellant as the same was made contrary to the principle of natural justice hence both trial tribunal and first appellate proceedings are null and void.

Mr. Sanga held the above position by saying it is trite principle and the requirement of the law under **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977**, that every person should be entitled with fair trial and right to be fully, effectively and properly heard when his rights and or duties are determined by the court of law. To cement his position, Mr. Sanga cited several decided cases including **Mbeya Rukwa Autoparts and Transport ltd versus Jestina Goerge Mwakyoma TLR 251**, the case of **Director of Prosecutions versus Sabinis Inyasi Tesha and Raphael J. Tesha 1993 TLR 237**, CA in which in these two cases Mr. sanga submitted that the court emphasised that right to be heard is cardinal principle of natural justice and that no person should be condemned unheard. If a person denied with right to

properly be heard such omission renders the whole of the proceedings nullity.

It is his strict view that fair/right to be heard includes right to bring witnesses and the court accord such witnesses with right to fairly give their testimonies from their own accord without neither influencing them nor bulling them. He argued that the act of the court to influence, force or mistreat the witness during the time of giving his testimony is tantamount to unfair trial.

He submitted that it is undisputed that as stated at page 4 of the appellate tribunal judgement that the trial tribunal decision was made contrary to the cardinal principle of natural justice by denying the appellant with fair trial following the act of imposing fine to one of the appellant's witness one Matoboki at the middle of the proceedings. He found proper to reproduce the specific party of page 4 of the first appellate judgement;

> "I think by imposing the fine to the appellant and his witness at the middle of the trial tribunal was not right. The above provision of the law guide it to its decision but at the end as provided so under section 17 of the same law."

He is of the view that the first appellate tribunal upon discovering such serious illegality in the trial tribunal decision, in his view it ought to nullify the said entire proceedings for being nullity, upholding the same renders also the decision of first appellate tribunal nullity and thus deserved be nullified too. Hence he prayed for the court to find merit in his second ground of appeal by declaring both the proceedings of the trial tribunal and the appellate tribunal nullity.

With regard the third ground of appeal, Mr. Sanga submitted that the trial tribunal in its decision at last page made the decision which instead of determining the issue of ownership of the disputed land, compounded the dispute by holding that the trees planted on the disputed land and the house built thereto are property of the appellant and the disputed land be the property of the respondent, the act which is contrary to the principle of law as per the Roman law doctrine of **quicquid plantatur solo solo cedit** which means everything attached to the land is part of the land as it is revealed that in the last page of the decision of trial tribunal, he quoted;

> "Hivyo shamba ni mali ya mlalamikaji nyumba na miti ni mali ya malalamikiwa."

The house and trees at issue are part of the disputed land under the doctrine referred herein above, in the premise therefore, he said the trial tribunal had to make its decision to the effect that both disputed land and the said houses and trees to be of either of the parties in the dispute and not divide them as it did. The act of dividing them renders its judgement as nothing like no judgement in the eyes of law at all as it compounded a dispute instead of resolving the same. The appellate tribunal upheld the nullity decision of the trial tribunal despite the fact that parties raised that issue to its attention, hence he said the same deserved to be nullified.

Mr. Sanga insisted that it is a rule of thumb that while dealing with issue of ownership over the disputed land, the court is duty bound to determine ownership and not to divide the same as done by the trial tribunal which was upheld by the appellate court. The position was in the case of **Hemed Said versus Mohamed Mbilu [1984] TLR 3** and **Shilalo Masanje versus Lubulu Ngatenya [2001] TLR 372** in both of these cases, the court while dealing with the issue similar to this case at hand held that, the duty of the court is not to divide the dispute land between parties but to determine ownership.

In concluding, Mr. Sanga submitted that base in his substantive submission with cited position of the law, he humbly invited this court to find merit in his appeal and accordingly allow it by nullifying the proceedings of both tribunals and quashing their entire judgement together with all its subsequent orders with costs.

In reply, Ms. Neema Charles, learned advocate for the respondent made first brief background of the matter by submitting that the respondent herein legally acquired the said disputed land in 2003 which purchased the said land from Lunilija in 2003 and possessed the said land for 16 years without any interference from the appellant, the dispute raised after the appellant breached the agreement between them as the appellant was just an invitee to the said land. Ms. Neema found it proper to reproduce the content of the proceedings at page 1 and 2 as follows;

> "Namshtaki Bwana Nzenga salu kwa kosa la kukiuka makubaliano yetu ya kumwazima shamba wakati anatafuta shamba lake."
>
> **ESTA**: Hilo shamba ulipataje
>
> **JIBU**: Nilinunua kwa masasila
>
> **UPILIPILI**: Je una mashahidi kuwa hilo shamba ulinunua kwa masasila?

JIBU: Ushahidi upo

2. Pembe za shamba hilo wana tambua kuwa ni shamba lako?

JIBU; Wanatambua

3. Hilo shamba ulinunua mwaka gani?

JIBU: 2003 ukubwa ekari 64

Ms. Neema submitted that it is trite principle of law that an invitee cannot exclude his host whatever the length of his occupation. The position was held in the case of **Samson Mwambene versus Edson James Mwanyigili [2001] TLR 1**, HC;

> "The appellant was an invitee ex gratia of James on the land in dispute. As this court has consistently held no invitee can exclude his host whatever the length of his occupation."

Ms. Neema further submitted that the appellant was invited to the respondent suit land cannot exclude his host whatever the length of his occupation in alternative if it is true that the appellant bought the said land from Omary Joseph on 2006 why failed to call upon the Omary Joseph (seller) of the said land in order to testify the said sale agreement or even

produce the land sale agreement as exhibit to testify the land sale agreement but the appellant failed to do so.

Responding to the first ground of appeal, Ms. Neema conceded with the ground as she submitted that the opinion of assessors is the matter of law and not practice. That she said the assessors are required in law to give out their opinion before the Chairman reaches the judgement failure to do so render the whole proceedings and judgement of the tribunal nullity.

She was of the firm view that since the irregularities and illegalities seen to have been done by the chairman as submitted by the learned counsel for the appellant she prayed for the court to enter trial de novo the proceedings and judgement of the District Land and Housing Tribunal for Katavi.

Ms. Neema, with regard the second ground of appeal, she submitted that the trial tribunal was not biased since all parties were allowed to bring their witnesses, the respondent had his witness and the appellant had two witnesses and both parties have given right to be heard and proved their case on balance of probability and the evidence of the respondent was stronger than evidence of the appellant, that is why the tribunal declared the respondent as lawful owner of the disputed land.

Submitting in respect to the third ground of appeal Ms. Neema said it is trite principle of law that a ground which was not raised in the first appellate tribunal cannot be raised in second appeal for the first time. To bolster her position she cited the case of **Alfred Nyaoza versus Salvatory Mwanambula, Misc. Civil Application No. 03 of 2002**, HC, Sumbawanga, unreported at page 10, it was observed thus;

> "In so far this issue do not feature and was not deliberated to be among issues in the appeal before the District Land Tribunal, although it was later on taken up as one of the grounds and discussed in appeal before this court suo moto by my sister (Hon. Khady, J) there is no way such an issue can now be included."

She prayed for this ground of appeal be rejected as it was not raised in the first stage of an appeal in the tribunal.

Ms. Neema in making an assumption that the ground of appeal is proper before this court, she submitted that the learned counsel for the appellant misled this court by using the Latin maxim that anything attached to the land is part of the land. She was of the strong view that such maxim is applicable in disposition and not in invitee/lease agreement in land. She said the appellant decision to plant trees and built house to the respondent

land was contrary to their agreement, hence the maxim not applicable in this case.

Lastly, Ms. Neema prayed for the appeal be dismissed with costs and order trial de novo.

Having considered the grounds of appeal as submitted by the learned advocate for the appellant as well the reply to the grounds of appeal as submitted by the learned advocate for the respondent. The issue before this court is whether the present appeal has merit.

Addressing the complaint that the proceedings of the appellate tribunal failed to accommodate the opinions of assessors before writing of the judgement, this court see it proper to revisit the law guiding the composition of the District Land and Housing Tribunal. The same is provided under **Section 23 of the Courts (Land Disputes Settlement) Act, No. 2 of 2002** which provides thus;

> **23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.**

> **23(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgement.**

Also, the same position is reflected in the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003**, where **Regulation 19** provides;

> 19 (2) **Notwistanding Sub-regulation (1) the Chairman shall before making his judgement require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.**

Thus, my reading of the above cited section of the Act, and its regulation, obviously it is mandatorily for the assessors sitting with the Chairman to give out their opinions at the conclusion of the hearing of the matter before Chairman making/composing his judgement, that entails

also, such opinions given by assessors are to be read out in the presence of parties before the judgement is composed by Chairman.

My scrutiny of the appellate tribunal's proceedings it reveals that Hon. Chairperson of the appellate tribunal upon concluded hearing of the matter on 24. 09. 2019 did not accord the assessors to give out their opinions as required by the law, and on such material date Hon. Chairperson scheduled the matter for judgement on 01. 10. 2019. It appears also, on such date the judgement was not pronounced as scheduled but was postponed until on 10. 10. 2010. However, the purported written opinions of assessors appear to have written on 01. 10. 2019 where the proceedings does not reflect that on such date the assessors gave out their opinions. However, the same was assumed and incorporated by Hon. Chairman in her judgement.

Therefore, it goes without dispute that the assessors at the Appellate Tribunal were neither accorded the opportunity to give out their opinion at the conclusion of the hearing nor their opinion availed and read in the presence of the parties as rightly submitted by the learned advocate for the appellant as well conceded by the learned advocate for the respondent.

With the above in mind and as per the position in the case of **Sikuzani Said Magambo & another versus Moahamed Roble** (supra) cited to me by learned advocate for the appellant, failure by the Hon. Chairperson to accord assessors with the opportunity to give out their opinion has occasioned serious irregularity which renders the entire appellate tribunal's proceedings and its judgement a nullity as the requirement is mandatorily as per cited law above.

Having said so, I may say Hon. Chairperson has made an error which goes to the root of the matter and the same may suffice to dispose of this appeal without discussing the remaining grounds of appeal.

In the premise, the appeal is allowed. The the proceedings and judgement of the appellate tribunal are nullified by this court and for the interest of justice the matter is to be remitted back for trial de novo. No order as to costs is made.

It is so ordered.

D. E. MRANGO

JUDGE

01.09.2020

Date	-	01.09.2020
Coram	-	Hon. D.E. Mrango – J.
Appellant	-	Present in person
Respondent	-	Absent/without notice
B/C	-	Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 1st day of September, 2020 in presence of the Appellant in person and in the absence of the Respondent without notice. Both Advocate – Absent – without Notice.

Right of appeal explained.

D.E. MRANGO

JUDGE

01.09.2020