IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 49 OF 2022

(Originating from the District Land and Housing Tribunal for Mpanda at Katavi in Application No. 48 of 2022)

MICHAEL VALELI KIPOTO.....APPELLANT

VERSUS

EFREMU TOBIAS KAZIWENI.....RESPONDENT

JUDGMENT

4th August & 29th September, 2023

MRISHA, J.

This is an appeal against the ex-parte judgment and decree of the District Land and Housing Tribunal for Mpanda at Katavi in Application No. 48 of 2022 which was grounded on 31.10.2022 before the said trial tribunal. In the trial tribunal, the appellant sued the respondent one Efremu Tobias Kaziweni for allegedly invading his 4 ½ acres piece of land (the suit land) and began cultivating crops therein at different times starting from the year 2019. According to the records of the trial tribunal the suit land is located at Mamboyo Hamlet in Karema Village which is within Tanganyika District of Katavi Region, and it is estimated to worth 1,200,000/= Tanzanian Shillings.

It appears that after admitting the applicant's/appellant application, the learned trial chairman ordered a summons to be served to the respondent for him to appear on 23.06.2022 at 0900 hours before the trial tribunal for hearing of the said application. The said summons reached to the respondent who responded by writing behind such document that he could not be able to attend on that date because he was sick.

Having received the said summons with the respondent's reply, the learned trial chairman adjourned the matter until on 12.07.2022 for hearing. On that date the applicant/appellant appeared, but the respondent did not appear before the said trial tribunal. Then, before hearing commenced, the learned trial chairman wrote the following as part of the said tribunal's proceedings: -

> *"**Baraza**: Shauri hili linasikilizwa upande mmoja kwakuwa mjibu maombi ameshindwa kufika kutokana na hali yake..."*

Thereafter, the learned trial chairman framed three issues for determination and began to record the evidence of the applicant/appellant who apart from testifying orally, also tendered what he alleged to be a sale agreement which was admitted by the trial tribunal as exhibit MK-1, as it appears at page 6 of the trial tribunal's typed proceedings.

It is also on records that on 06.10.2022 the appellant closed his case and the learned trial chairman adjourned the appellant's case until on 27.10.2022 for the trial tribunal to visit the *loqus in quo*. The typed proceedings of the trial

tribunal also show that on that date the appellant did not appear, but this time the respondent appeared and was afforded an opportunity to testify before the said tribunal, then after gathering evidence from the respondent and other persons, including one Isabela Damas Kapita whom the applicant mentioned as one of the vendors who sold the suit land to him, the learned trial chairman adjourned the case until on 31.10.2022 for summing up of the case.

It appears that on such particular date no summing up was done, but the learned trial chairman received the opinions of the gentlemen assessors who opined that the suit land which was sold twice to the applicant, is belonging to the respondent, then before delivering judgment, the learned trial chairman wrote the following words:

"Amri

Hukumu inasomwa leo mbele ya Mjibu Maombi pasipokuwepo Mwombaji. Mjibu Maombi ni Mtu Mzee (sic), Mwombaji hakufika barazani Makusudi kwasababu alitaka kupoteza muda...,

Imesainiwa

G.K.R

31.10.2022"

Following the above order by the learned trial chairman, an ex-parte judgment was delivered in favour of the respondent on the ground that the applicant

was the one who trespassed into the suit land because the procedures of selling the suit land to him, were not certain meaning that he did not comply with the procedural requirements which require the Village Council to witness the sale agreement of the land. As a result, the learned trial chairman dismissed the appellant's application with costs and declared the respondent as the lawful owner of the suit land.

It is due to the above decision, that the appellant decided to come to this court in order to challenge the decision of the trial tribunal by fronting six grounds of grievance as follows: -

1. That, the trial tribunal erred at law by deciding in favour of the respondent who produced no documents nor oral submission proving ownership over the suit land.
2. That, the trial tribunal misdirected itself to hold that the vendor did not sign the sale agreement and that the same was forged while the same was property (sic) signed by Isabela Kapita who was one of the Vendor (sic) who testified before the trial tribunal and confirmed the authenticity of the sale agreement.
3. That, the trial tribunal erred at law to hold that the appellant failed to prove his claims while in actual fact the appellant proved his case in accordance with the standard required by law.

4. That, the trial tribunal erred at law by assuming the role of the Respondent instead of umpire.
5. That, the Trial tribunal misdirected and hence erred at law by giving its judgment in Application 48/2022 instead of Application 30/2022 hence it reached a wrong conclusion.
6. That, the whole trial was null and void due to procedural irregularity as only one assessor participated during the hearing of the Appeal but three assessors visited the locus in quo while two assessors participated during giving final assessment.

Due to the above grounds, the appellant has urged this court to declare that the suit land is his property and that he be awarded costs of this appeal. As it happened at the trial tribunal, the respondent did not appear when the instant appeal was called on for hearing, though at this time, it is claimed that he refused to sign the summons of the court. In the circumstance, the appeal was heard ex-parte. Hence, this judgment.

Submitting before the court, the appellant stated that he filed his memorandum of appeal with this court on 21st November, 2022. Hence, he prayed the same to be adopted by this court so that they can form part of his submission in chief stating that the grounds of appeal contained in his memorandum of appeal, are self-explanatory. Having so submitted, the appellant implored me to allow his appeal with costs.

On my part I have carefully gone through the grounds of appeal as they have been raised by the appellant herein, and I have also gone carefully through the entire proceedings as well as the judgment of the trial tribunal, together with the appellant's submission which is very brief, may be due to the fact that being a layman, he had nothing more to add rather than opting to let the present appeal be dealt with accordingly by this court, as per the law.

Having done so, I am of the view that the issue that calls for determination is whether the present appeal has merit. Before, I determine that issue, I should say at this juncture, that as a matter of procedure the appellate court is bound to consider all the grounds of appeal raised by the appellant and come up with its decision; See **Francis Mtawa vs Christina Raja Lipanduka & 2 Others**, Civil Appeal No. 15 of 2020 CAT at Dar es Salaam(unreported).

However, the exception to the above general rule is where the appellate court finds it convenient to either address the grounds of appeal generally, or address decisive ground of appeal only which can enable it to dispose of the appeal before it; See **Malmo Montagekonsult AB Branch v. Margret Gama**, Civil Appeal No.86 of 2001 (unreported). In that case the Court of Appeal stated that:

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even*

then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately."

From the above decision of the Apex Court, it is obvious that sometimes the appellate court can address the grounds of appeal either generally or choose to address the decisive ground of appeal only where it sees convenient to do so.

As I have alluded before, there are six grounds of appeal which, as a matter of procedure, are supposed to be addressed by this being the first appellate court. However, I find it convenient to address only the sixth one which appears to be the decisive ground of appeal.

Through the said ground of appeal, the appellant has complained that the whole trial was null and void due to the procedural irregularity as only one assessor participated during the hearing of the Appeal, but three assessors visited the locus in quo while the two assessors participated during giving final assessment.

It is a trite law that visiting the locus in quo, has the same status as hearing of the case; See **Hamis Waziri vs Mwanaid Salimu**, Misc. Land Appeal No. 13 of 2020(unreported).

This means the chairman of the trial tribunal must ensure that the tribunal to which he presides over, is properly constituted before the hearing of the land case before him takes off. Also, under regulation 19(3) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 it is provided that:

> *"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 my reading of the above provision of the law, it is crystal clear that the said regulation is coached in mandatory terms to the extent that failure by the learned trial chairman to sit with the same assessors who were present at the conclusion of hearing is fatal as it vitiates the whole proceedings; See **Hamis Waziri vs Mwanaid Salimu** (supra).

Now reverting back to the case at hand, it appears to me that the complaint by the appellant that the whole trial before the trial tribunal was null and void due to the fact that there was a change of assessors at the hearing of his application, is unfounded. This is because at all times the learned trial chairman sat with the same set of assessors, save for some days when the case had to be adjourned either due to absence of either the applicant or the learned trial chairman, which is not fatal.

This can be inferred at pages 2,6 and 7 of the typed proceedings where it is revealed that the assessors who sat with the learned trial chairman at the hearing of the applicant's application, were B. Mlundwa and W. Chambi. However, although it appears that the appellant has somehow missed a point in defending his sixth ground of appeal, yet I find that the same still remains to be a soundful ground of appeal when addressed in a different angle.

I am saying so because while revisiting the typed proceedings as well as the impugned judgment of the trial tribunal, I noticed some serious irregularities committed by the learned trial chairman which I find pertinent to be addressed by this court.

First, despite showing at page 2 of his judgment that the applicant/appellant sworn in before adducing his evidence, that is not what the said trial chairman did. The above court's observation is fortified by what the learned trial chairman recorded at 3 of the trial tribunal's typed proceedings, and I propose to reproduce the relevant part as hereunder:-

"KESI UPANDE WA MWOMBAJI INAANZA KUSIKILIZWA:

SM1, JINA: Michael Valeli Kipoto."

UMRI:49

KAZI: Mkulima

MAKAZI: Karema

KABILA: Mfipa

DINI: RC.

Mwaka 2029 (sic) alinunua Shamba ekari 4 ½ kwa Elizabeth Dama Kapita na Zabera Damas Kapita, kupitia Ofisi ya Mwenyekiti wa Kitongoji, na Mwaka huo alianza kulifanyia kazi kwa kupanda Mazao ya kudumu.

-Mwka (sic) 2021, alitokea Efrem Kaziweni na kudai kuwa eneo hilo ni a (sic) kwake, baada ya kufika Baraza la Ardhi la Kijiji kwa ajili ya Usuluhishi ulifanyika kinyume na Utaratibu aliomba kuambatanisha Nyaraka.

Imesainiwa
G.K.R
12.07.2022"

The above excerpt not only shows that the learned trial chairman omitted to take oath of the applicant/appellant before recording his evidence, but also reveals another anomaly which is to record the evidence of a witness in a second person singular form (like "*...he bought a farm*"), instead of the witness's own words which is normally supposed to be recorded in the first-person singular form (like "*...I bought a farm*".

The practice of courts of law in countries like ours which follow the adversarial system, is that normally a judge of a magistrate will compose his/her

judgment in a second person form because at that time he will be referring to what the witness said before the trial court during trial.

I had spent some time to read both the Land Disputes Courts Act, Cap 216 R.E 2019 (the LDCA) and The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 in order to see if the said laws provide for the manner of recording evidence before the District Land and Housing Tribunal, but I found none. However, it is my settled opinion that such lacuna should not be taken for granted by the trial chairmen and/or chairpersons who have been bestowed with powers to dispense justice through inquiring and determining land disputes in the land courts they preside over.

In a normal circumstance, it does not sound well to find a witness's evidence is recorded in a quite unusual form as it has been observed in this appeal in regards to the records of the trial tribunal. If that is to be left aside unresolved, then it will be difficult to grasp the authenticity of witness's evidence in our courts of law. Hence, it is a high time, I suppose, that something needs to be done in order to cure such absurdity.

Coming to the anomaly that the learned trial chairman omitted to take oath of the applicant/appellant, it is a trite law that every witness who testifies before a court or law or any decision-making body should do so upon his/her oath or affirmation been taken by the trial magistrate or judge. Luckily, there is a plethora of authorities in our legal system on that legal aspect.

For instance, section 4(a) of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] (the OSDA) provides that:

> *"4. Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
>
> *(a) Any person who may be lawful examined upon oath or give or be required to give evidence upon oath by or before a court;*
>
> *(b) ,,, N/A"*

The above provision of the law makes it mandatory that the witness who is called upon to adduce evidence before a court of law or any decision-making body like the land tribunal in this case, must do so under oath, and I may add that where the witness is a Muslim, then he/she should adduce evidence upon his affirmation be taken by the trial judge, magistrate or a chairman as the case may be.

Also, in a number of years court of records in this country have been declaring that the omission to take a witness's evidence under oath/affirmation is fatal and vitiates the proceedings before the trial court; See **Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 and **Catholic University of Health and Allied Sciences vs Epiphania Mkunde Athanace**, Civil Appeal No. 257 of 2020(both unreported).

In the latter case, the Court of Appeal stated that:

"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."

I am aware that section 4(a) of the OSDA which I have referred above, is qualified in the sense that for it to be applied in mandatory terms, there should not be any provision to the contrary in any other written law which provides for the manner of recording evidence before the court.

However, since neither the LDCA nor the Land Disputes Courts Regulations, 2003 has a provision which goes contrary to what has been provided for under section 4(a) of the OSDA, I am of the settled opinion that even the judicial officers presiding over in the District Land and Housing Tribunal are duty bound to ensure that they take oath/affirmation of the witness before starting to record the witness's evidence.

In the present appeal, it is apparent that the learned trial chairman did not take oath of the applicant/appellant before recording his evidence as it has been shown above, and if that is not enough, it is also on record that even after paying visit to the locus in quo. He even did not do so after paying a visit to the locus in quo when recording the testimonies of persons who testified before him, including the respondent who appeared and testified before him. This is shown at page 8 of the trial tribunal typed proceedings where the learned trial chairman wrote the following: -

"...Kauzeni: Eneo la Mgogoro alipata kwenye Serikali ya Kijiji alipewa na Kamati...

Imesainiwa
G.K.R
27/05/2022"

Suffice it to say that since the learned trial chairman omitted to take oath of witnesses before recording their testimonies, the proceedings before the said tribunal were vitiated by his omission which consequently prejudiced the parties' case.

Another irregularity I have noticed after going through the records of the trial tribunal, is that the learned trial chairman did not append his signature at the end of the evidence adduced by the applicant/appellant, as shown in the original casefile regarding Application No. 48 of 2022; although the typed proceedings at page 3 depicts that he appended his signature.

In my view, the typed proceedings of the court stem from the original casefile in sense that the one who prepares a typed proceedings for the use of the appellate court, is expected to be honest by making sure that he/she types exactly what was recorded by the presiding officer of the court; otherwise, the typed proceedings cannot be helpful for the appellate court to arrive at the just decision.

At this juncture, I would like to remind and advise all judicial officers who are preparing the court records for the use of the appellate court and/or general public, to ensure that they also take time to go through the typed court proceedings to be dispatched to the appellate court before certifying the same as true copies of the original. In order to do so successfully, they may also adopt one of the so-called Judge Painter's Rules which is to the effect that, *"Edit, Edit and Edit Again"*, in order to avoid unnecessary typological errors or omissions, ensure that the typed proceedings are correct and contain the actual witness's evidence they recorded during trials.

With the above being said, it is therefore, my conviction that what the learned trial chairman did was an incurable irregularity as underscored by the Court of Appeal in a number of cases including, but not limited to the case of **Sabasaba Enos @Joseph vs Republic**, Criminal Appeal No. 411 of 2017 which was referred in the case of **Iringa International School vs Elizebeth Post**, Civil Appeal No. 155 of 2019 (all unreported) whereby the Court of Appeal was emphatic that:

> *"a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings"*

As I have intimated above, the learned trial chairman did not append his signature at the end of the testimony of the applicant/appellant, nor did he do

so after recording the testimonies of the respondent and other person who testified before him at the locus in quo.

Thus, given the said omission and considering the principles of law stated in the above cases, I am of the considered view that the omission by the learned trial chairman to append his signature at the end of the testimony of the applicant/appellant and the rest of the witnesses who testified before him, was fatal to the proceedings before the trial tribunal.

The other apparent irregularity is that at the locus in quo the learned trial chairman proceeded with hearing of the applicant's case interpartes without complying with the procedural requirement to be followed in the event the respondent does not appear on the date fixed for hearing.

That can be inferred at page 8 of the trial tribunal typed proceedings which show that the learned trial chairman recorded the evidence of the respondent as shown hereunder: -

> *"**Kauzeni**: Eneo la Mgogoro alipata kwenye Serikali ya Kijiji (sic) alipewa na Kamati..."*

Also, at page 7 of the said proceedings the coram of the trial tribunal show that on 27.10.2022 both parties were present, but the applicant was not afforded an opportunity to cross examine the respondent. It should be remembered that initially the learned trial chairman ordered the applicant's

application to be heard ex- parte. To justify his order, the learned trial chairman wrote the following words as can be inferred at page 2 of the typed proceedings: -

> *"**Baraza:** Shauri lipo kwaaajili ya kusikilizwa Mwombaji yupo tayari...Shauri hili linasikilizwa Upande Mmoja kwakuwa Mjibu Maombi ameshindwa kufika kutokana na hali yake."*

In a literal meaning, the above excerpt means that the learned trial chairman ordered the applicant's application to be heard ex-parte because the respondent failed to appear on the date fixed for hearing due to his condition. However, the learned trial chairman did not clarify which condition precluded the respondent from appearing on that hearing date, or did he show that the respondent did not furnish the Tribunal with good cause for his absence.

Considering what the learned trial chairman had written in the above excerpt, the nagging questions which emerges here can be where did he get those words that the respondent failed to appear due to his condition on 12.07.2022 during the hearing of the applicant's application? Again, if we are to assume that on that particular date the respondent did not furnish the trial tribunal with good cause of his absence and therefore the tribunal was justified to have ordered the applicant's application to he heard ex-parte, was it correct for the learned trial chairman to proceed with the hearing of the said

application interpartes on 27.10.2022, while he had previously ordered the same to be heard ex-parte?

It is due to those unanswered crucial questions, that I persuaded to find that the learned trial chairman misdirected himself when he proceeded with hearing of the applicant's application instead of ordering otherwise, if he had enough reasons to believe that there were sufficient reasons to do so.

With all due respect to the learned trial chairman, what he did was a misconception and misplacement of the law which regulates trials in the District Land and Housing Tribunal (the DLHT). The law is very clear on what the DLHT is supposed to do before allowing the respondent whose absenteeism leads to an order of ex- parte hearing, to enter his defence and/or testify before the DLHT.

I would like at this moment, to remind the learned trial chairman about a proper procedure to be followed when he is confronted with a similar situation, as observed above. Regulation 11(2) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides clearly that:

> "*(1) ,,, N/A*
>
> *(2) A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1),* ***within 30 days***

apply to have the orders set aside, *and the Tribunal may set aside its order if it thinks fit so to do* ***and in case of refusal appeal to the High Court*** *[Emphasis added]*

By virtue of the above provision of the law, it is crystal clear that there are two remedies available to the respondent, as the one in this case, who is dissatisfied with the order of the Tribunal; **first**, he may apply to the same Tribunal within 30 days that the DLHT be pleased to set aside its ex-parte orders, and **second**, in case the such tribunal refuse the respondent's application, then he may appeal to the High Court against the refusal and/or dismissal order of the DLHT.

In the case at hand, the records are silent as to whether the respondent applied to the trial tribunal to have it set aside its previous ex-parte order. In the circumstance, it was not correct for the learned trial chairman to proceed with the hearing of the applicant's application interpartes as if no ex-parte order had been made by him before, and which was not set aside by the tribunal he was presiding over.

From the foregoing reasons, the above main issue is answered positively that the present appeal has merit. I therefore, allow it to the extent herein stated above. In consequence thereof, I nullify the entire proceedings of the trial tribunal, quash the impugned judgement of the trial tribunal, set aside the orders made thereto and order the original casefile to be remitted back to the

trial tribunal for it to conduct a retrial of the applicant's case in compliance with the applicable relevant laws and procedure.

As for the costs, I am aware that the applicant has prayed for them as part of his reliefs. However, considering the fact the trial tribunal contributed to the above pointed flaws, I refrain from making any order as to costs. Each party to party to bear its own costs in this court and the lower court.

Order accordingly.

A.A. MRISHA
JUDGE
29.09.2023

DATED at **SUMBAWANGA** this 29th Day of September, 2023.

A.A. MRISHA
JUDGE
29.09.2023