IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 48 OF 2019

(Originating from District Land and Housing Tribunal for Karatu at Karatu in Application No. 34 of 2014)

JOHN MURRAY ..... APPELLANT

VERSUS

QURUS VILLAGE COUNCIL ..... 1ST RESPONDENT

THE REGISTERED TRUSTEES OF HIS HEALING HANDS AFRICA MINISTRY ..... 2ND RESPONDENT

JERY BACKS ..... 3RD RESPONDENT

JUDGMENT

2nd December & 16th December, 2020

Masara, J.

In the District Land and Housing Tribunal for Karatu (the trial Tribunal), the Appellant herein unsuccessfully sued the Respondents vide Application No. 34 of 2014 claiming for a piece of land measuring 10 acres (the suit land) which he claimed to be invaded by the Respondents. The Appellant claimed to have been allocated part of the suit land by the village council and the rest was allocated to him by his father in 2001. The second and the third Respondents on the other hand claimed to have been allocated land measuring 69.36 acres by the first Respondent on 25/3/2013. In its judgment delivered on 28/6/2019, the Tribunal declared the Respondents the lawful owners of the suit land. The Appellant's application was dismissed. The Appellant was dissatisfied by that decision, he has preferred this appeal

to this Court against both judgment and decree in a memorandum of appeal containing seven grounds of appeal as reproduced verbatim-

a) *That, the Honorable Chairman of the District Land and Housing Tribunal grossly erred in law and fact for not finding that the purported transfer of the land from the 1st Respondent to the 2nd Respondent was illegal, unlawful and inoperative and consequently the customary certificate of occupancy granted thereof was null and void;*
b) *That, the Honorable Chairman of the District Land and Housing Tribunal grossly erred in law and fact by declaring the Respondents lawful owner (sic) of the suit land;*
c) *That, the Honorable Chairman of the District Land and Housing Tribunal grossly erred in law and fact by denying the Appellant ownership of the suit land while there was ample evidence supporting ownership of the disputed land in his favour;*
d) *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and fact for improper analysis of evidence and thus arriving to a wrong and unfair decision;*
e) *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and fact by relying on evidence which was inconsistent with the pleadings;*
f) *That, the Honourable Chairman of the District Land and Housing Tribunal in erred in law and fact finding that there was no evidence of use of the disputed land by the Appellant;*
g) *That, the Honourable Tribunal Chairman of the District Land and Housing Tribunal grossly erred in law and in fact in discrediting the applicant's evidence without any legal justification.*

The Appellant prays that the judgment and decree of the trial Tribunal be quashed and set aside; the Appellant be declared the lawful owner of the suit land; the Respondents be ordered to pay the Appellant compensation for the loss of use of the suit land and the Respondents be ordered to pay costs of this appeal and those before the trial Tribunal.

At the hearing of this appeal, the Appellant was represented by Mr. Qamara Alloyce Peter, learned advocate while the Respondents were represented by Mr. Bungaya Matle B. Panga, learned advocate. The appeal was argued through filing of Written Submissions, a schedule which was complied with.

Submitting in support of the first ground of appeal, Mr. Qamara contended that the third Respondent applied for 100 acres of land and that he is an American working under work permit, and that it was proved by evidence and the tendered exhibit P2 that the third Respondent is an American. Citing section 20 of the Land Act, Cap 113 [R.E 2002] which prohibits foreigners from owning land in Tanzania save for investment purposes, Mr. Qamara insisted that the third Respondent being a foreigner was incapable to apply and be granted the 69.36 acres of land either for himself or for the second Respondents. He maintained that lack of capacity disqualifies a person form acquiring and disposing land title. He relied on the decision in the case of ***Farah Mohamed Vs. Fatuma Abdallah*** [1992] TLR 208 which held that "he who has no legal title to land cannot pass good title over the same to another".

Elaborating on the second ground of appeal, Mr. Qamara submitted that in his judgment, the Tribunal Chairman found all the three Respondents to be lawful owners of the suit land but in his view it was wrong as it was not supported by the pleadings. He argued that in their WSD, the Respondents did not pray to be declared the lawful owners of the suit land, rather they prayed that the appeal be dismissed and any other relief that the Tribunal

deemed fit to grant. He cited the decision of the Court of Appeal in the case of ***Anthony Ngoo and Another Vs. Kitinda Kimaro***, Civil Appeal No. 25 of 2014 (unreported) to buttress his argument.

In the same vein, Mr. Qamara submitted that the decision of the trial Tribunal based on unrecorded opinion of the assessors, which has the implication that he did not consider the opinion of the assessors. In the absence of the assessors' opinion in the record, the counsel insisted, it implies that they did not give their opinion contrary to the law. Mr. Qamara cited the Court of Appeal decision in ***Ameir Mbarak and Another Vs. Edgar Kawhil***, Civil Appeal No. 154 of 2015 (unreported) which held that the opinion of the assessors must be on the record to prove whether the tribunal Chairman did consider them.

Elaborating the third ground of appeal, Mr. Qamara argued that exhibit P1 which was a gift deed executed on 14/1/2001 proved that the Appellant acquired the suit land from his parents. He maintained that exhibit P1 has the effect of transferring land from his parents to him as it was approved by the Village Office in 2001 as confirmed by PW3 who was the Village Executive Officer. It was also corroborated by the evidence of PW2 and PW4.

The fourth, fifth and seventh grounds of appeal are interrelated as they centre on the analysis and evaluation of evidence. Mr. Qamara submitted at lengthy contending that the trial Tribunal Chairman did not evaluate the evidence properly because had he made proper analysis of the evidence he

would have noted that the Respondents' witnesses failed to prove the legal capacity of the second Respondent to acquire and own land in the absence of the Certificate of Incorporation. Mr. Qamara added that had there been proper analysis of the evidence, the Chairman would have noted that the Respondents did not tender minutes of the Village Council and Village Assembly which allocated the land to the Respondents. He cited the case of ***Udagwhenga Bayai and 16 Others Vs. Halmashauri ya Kijiji cha Vilima Vitatu and Another***, Civil Appeal No. 77 of 2012 (unreported) to support his argument. According to Mr. Qamara, the Tribunal Chairman also failed to note that the suit land is not one and the same with that of Gidmaja Primary School, rather it borders the school in the Northern side. He added that in the absence of proper analysis of evidence, the Tribunal chairman concluded that the suit land was not developed while the evidence on record shows that the Appellant built a grass thatched house on the suit land, maintaining that the Chairman's judgment had full of personal impressions. Basing on the submission made, Mr. Qamara invited that Court to allow the appeal, quash and set aside the decision of the trial Tribunal with costs.

On his part, Mr. Panga prefaced his submission by raising a Preliminary Objection that the appeal is time barred. According to submissions, Mr. Panga contended that in the course of preparing his reply submission he noted that the appeal was filed outside the 45 days time prescribed by the law to file appeals in this Court. He cited section 41(1) and (2) of the Land Disputes Courts Act, Cap 216 [R.E 2019]. According to Mr. Panga, the judgment of the trial Tribunal dismissing Application No. 34 of 2014 was

delivered on 28/10/2019. The memorandum of Appeal in respect of this appeal was filed on 4/10/2019. He therefore concluded that the appeal has been delayed for 53 days after the lapse of 45 days provided by the law.

Mr. panga cited various court decisions to the effect that leave to appeal out of time cannot be automatic, rather it has to be sought through requisite application. In that regard the learned advocate cited ***Augustino Elias Mdachi and 2 Others Vs. Ramadhan Omary Ngaleba***, Civil Appeal No. 270 of 2017 (unreported); ***Tanzania Diaries Ltd Vs. Chairman Arusha Conciliation Board and Another*** [1994] TLR 33 and ***Kisioki Emmanuel Vs. Zakaria Emmanuel***, Civil Appeal No. 140 of 2016 (unreported).

In the alternative, responding to the first ground of appeal, Mr. Panga contended that it was the third Respondent who wrote the letter to the first Respondent applying for the land for the second Respondent for the purpose of building an orphanage centre. He added that the third Respondent testified that he was working for the second Respondent and the Customary Certificate of Title (exhibit D5) was issued to the second Respondent. He therefore concluded that the argument by the Appellant the land was allocated to the third Respondent who later allocated it to the second Respondent is highly misleading.

Contesting the second ground of appeal, Mr. Panga argued that among the issues framed, the first issue was *'who is the lawful owner of the suit land'*, therefore the Tribunal Chairman was right to declare the Respondents as the

lawful owners of the suit land. He distinguished the case of ***Anthony Ngoo*** (supra) stating that no new issues were brought in the instant case. Responding to the issue of missing the assessors' opinion in the record, Mr. Panga contended that it is was a new ground that has been raised without leave of the Court. Nevertheless, he argued that no injustice was occasioned even if the assessors opinions were not in the record of the trial Tribunal. He fortified that Regulation 19(2) of G.N 174 of 2003 does not suggest the assessors to write their opinion in the Tribunal proceedings but on separate papers as they did in the case at hand.

Submitting on the third, fourth and seventh grounds of appeal, Mr. Panga faulted exhibit P1 which was relied by the Appellant contending that it was still clean maintaining that it was manipulated. He added that exhibit P1 was not even signed by the Hamlet Chairman. Further, Mr. Panga stated that the evidence tendered showed that the Appellant's father was allocated only five acres of land.

In response to the fifth ground of appeal, Mr. Panga fortified that the holding of the trial Tribunal emanated from the observation at the *locus in quo* whereas the Appellant was unable to distinguish his land and the school land. He insisted that the trial Chairman was right to so hold notwithstanding the fact that it was not the sole basis of the decision. On the sixth ground of appeal, Mr. Panga contended that the suit land was never developed as it was reserved by the Village as testified by DW3 and DW4. The Appellant's house was erected during the night and it was in the cause of the dispute.

On the account of the submission made, Mr. Panga prayed that the appeal be dismissed with costs.

In his rejoinder submissions, Mr. Qamara challenged the Preliminary Objection raised, submitting that the Respondent's P.O was raised by surprise in his reply submission without prior notice to the Appellant. He therefore prayed that it be struck out. Mr. Qamara insisted that the Respondent's advocate was misguided as he based his objection on the date when the judgment was delivered, that is 28/6/2019, and the date of filing this appeal, 4/10/2019. He maintained that in computing time for filing appeals originating from the District Land and Housing Tribunal, resort should be made to section 52(2) of the Land Disputes Courts Act, Cap 216 [R.E 2002] which allows the application of the Law of Limitation Act, 1971. That in computing the period of limitation prescribed for an appeal, section 19(2) of the Law of Limitation Act, Cap 89 [R.E 2002] excludes the period of time for obtaining the requisite documents of appeal, which include the copy of judgment/order and decree. In this respect he cited the case of ***The Registered Trustees of the Marian Faith Healing Centre @Wanamaombi Vs. The Registered Trustees of Catholic Church Sumbawanga Diocese,*** Civil Appeal No. 64 of 2007 (unreported). He insisted that the impugned decision was delivered on 28/6/2019, the typed copies of the proceedings, judgment and decree were issued to the Appellant on 23/8/2019 when the decree was issued. He therefore concluded that the Appellant's appeal was on time.

Before dealing with the merits of the appeal, I find it imperative to first determine the Preliminary Objection raised by Mr. Panga. According to Mr. Panga, the appeal is time barred for being filed after 53 days from the date the judgment was delivered. He cited section 41(1) and (2) of the Land Dispute Settlements Act, Cap 216. On his part, Mr. Qamara contested the argument relying on section 19(2) of the Law of Limitation Act, Cap 89 which excludes the time spent in obtaining the requisite documents of appeal in computing time.

It is true, as submitted by Mr. Panga that the provision providing for the time within which to file appeal to this Court on decisions originating from the District Land and Housing Tribunal in the exercise of its original jurisdiction is section 41 of the Land Disputes Courts Act, Cap 216 [R.E 2019], which for easy reference provides:

> *"(1) Subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceeding from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.*
> *(2) An appeal under subsection (1)* ***may be lodged within forty five days after the date of the decision or order****.* (emphasis added)

As the record shows, it is true that the judgment of the trial Tribunal was delivered on 28/6/2019 and the appeal was filed on 4/10/2019. However, the judgment, proceedings and decree of the impugned decision were issued to the appellant on 23/8/2019. On that account, I am in agreement with Mr. Qamara that in computing time for filing appeals, time spent in obtaining requisite documents for appeal is excluded, as provided under section 19(2)

of the Law of Limitation Act, Cap 89 [R.E 2019]. The case of ***The Registered Trustees of the Marian Faith Healing Centre @Wanamaombi*** (supra) is instructive in this aspect as it was held:

> *"In view of what we have endeavoured to show above, and in the light of section 19(2) (supra), it follows that the period between 2/5/2003 and 15/12/2003 when the appellants eventually obtained a copy of the decree ought to have been excluded in computing time. Once that period was excluded, it would again follow that when the appeal was lodged on 19/12/2003 it was in fact and in law not time barred."*

In the light of the above position of the law, it suffices to hold that the period between 28/6/2019, when the impugned judgment was delivered, and 23/8/2019, when the Appellant was issued with the copy of decree which is a mandatory document in filing appeals, is excluded in computing time for appeal purposes. Counting from the date the decree was made available to the Appellant to the time the appeal was filed on 4/10/2019, the appeal is not time barred as submitted by Mr. Panga.

The contention raised by Mr. Qamara that Preliminary Objection is misconceived for being raised in the reply submission in the absence of Notice is, in my view, misconceived because an objection as to time and jurisdiction are legal issues which can be raised at any stage of the proceeding. In this aspect I am guided by the Court of Appeal decision in ***The DPP Vs. Bernard Mpangala and 2 Others***, Criminal Appeal No. 28 of 2001 (unreported), where it was observed:

> *"Admittedly,* ***limitation is a legal issue which has to be addressed at any stage of proceedings as it pertains to jurisdiction.*** *However, parties have to be given a right of hearing,*

especially as in this case where there was a need to give some explanation and even to tender proofs." (emphasis added)

In the appeal under determination, it is true that the Respondents' counsel raised the Preliminary Objection in his reply submissions. However, the Appellant's counsel had opportunity to address on the same as he did in the rejoinder submissions. The absence of notice does not make the Preliminary Objection illusory considering that the Appellant's counsel had an opportunity to consider and reply to it in the rejoinder submissions. Basing on the above analysis, it is the finding of this Court that the appeal was filed within the prescribed time. I therefore overrule the Objection.

Having so held, I now turn to the merits of the appeal. In the first ground of appeal, Mr. Qamara contended that the third Respondent being a foreigner is not legally entitled to apply and own land in Tanzania. Mr. Panga on the other hand submitted that the third Respondent did not apply for the land for himself rather he did so for the second Respondent.

According to the evidence on record, The Registered Trustees of His Healing Hands Africa Ministry was registered under Societies Act on 2/4/2011. This was testified by DW6 and DW7, and it was proved by exhibit D2 which is the Certificate of Registration. Further, the said Ministry was incorporated under the Trustees Incorporation Act on 11/4/2012, as testified by DW7 and DW6. This is also proved by exhibit D3 because had it been the contrary, the Administrator General would have not granted the Consent to acquire land. Upon registration and Incorporation, a registered Trustee acquires capacity

to own property including land but on conditions set out by the Administrator General. This is provided under section 8 of the Trustees Incorporations Act, Cap 318, which provides:

> *"8.* **Effect of incorporation**
> *(1) Upon the grant of a certificate under subsection (1) of section 5 the trustee or trustees shall become a body corporate by the name described in the certificate, and shall have–*
> *(a) perpetual succession and a common seal; (b) power to sue and be sued in such corporate name;*
> *(c)* ***subject to the conditions and directions contained in the said certificate to hold and acquire, and, by instrument under such common seal, to transfer, convey, assign and demise, any land or any interest therein in such and the like manner, and subject to the like restrictions and provisions, as such trustee or trustees might, without such incorporation, hold or acquire, transfer, convey therein, assign or demise any land or any interest****."* (emphasis supplied)

In the light of the provision above, the Registered Trustees of His Healing Hands Africa Ministry being dully registered and incorporated under the laws of Tanzania, has power to apply for and own land. DW6 testified, and so DW7 that the third Respondent is just a trustee in the Ministry, including other members he mentioned.

The Appellant's contention that the land was granted first to the third Respondent who later transferred it to the second Respondent is not backed by evidence. The testimonial accounts of all witnesses in the Respondents' side were at one that the suit land was allocated to the second Respondent. This is also evidenced by exhibit D4 which is the Customary Certificate of Occupancy.

I should add a disclaimer here that I am mindful of the fact that foreigners are prohibited from owning land in Tanzania, save under the umbrella of the TIC for investment purposes. This is provided under sections 19(2) and 20 of the Land Act, Cap 113 [R.E 2019] and section 18(1) (a) of the Village Land Act, Cap 114 [R.E 2019]. I also agree with the Appellant's counsel that the third Respondent is an American, thus a foreigner. But from the evidence on record, I do not agree with him that the third Respondent was allocated land in Tanzania. The land was allocated to the second Respondent who has power to own land after the consent by the Administrator General as per exhibit D3. For those reasons, I do not see merits in the first ground of appeal.

Regarding the second ground of appeal, the Appellant's counsel contended that the Tribunal chairman did not consider the opinion of the assessors. On his part Mr. Panga was of the opposite view. He stated that there was no injustice occasioned for failure to record the assessors' opinion in the proceedings. The provisions governing procedure in the District Land and Housing Tribunal as properly cited by Mr. Panga is section 23 (2) and (3) of the Land Disputes Courts Act and Regulation 19(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2002, G.N No. 174 of 2003.

I have revisited the trial Tribunal records; it appears that the opinions of the assessors are reflected at page 12 of the typed judgment where the Tribunal Chairman stated that the assessors he sat with, Mr. Peter Mushi and Mrs

Rukia Panga, both of them opined in favour of the Respondents. Also, the Tribunal record shows that the two assessors gave their opinion on 28/2/2019 and 26/2/2019 respectively. I am in agreement with the Appellant's advocate that although the trial chairman did sit with assessors who as well gave their opinion, their opinions were not read to the parties prior to composing the judgment. The importance of recording the assessors' opinion in the Tribunal's record and reading them to the parties prior to composing judgment was emphasized by the Court of Appeal in ***Edina Adam Kibone Vs. Absaloom Swebe (Sheii),*** Civil Appeal No. 286 of 2017 (unreported) where it was held *inter alia*:

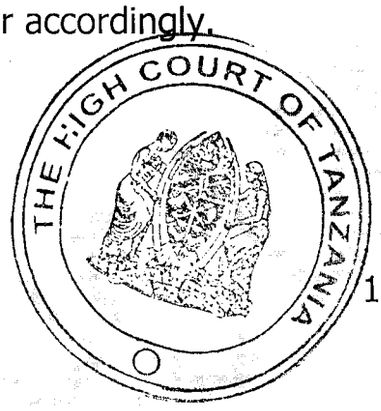
> *"For avoidance of doubt, we are aware that in the instant case the original record has the opinion of the assessors in writing which the chairman of District Land and Housing Tribunal purports to refer to them in the judgment. However, in view of the fact that the record does not show the fact that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record.* ***And in the further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose.***" (emphasis added)

According to the authority above, the purpose of reading the opinion to the assessors before judgment is prepared is to enable the parties to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict. Failure to adhere to the procedure above stated vitiates the proceedings of the Tribunal. In the appeal under determination, that procedure was skipped by the Tribunal chairman. The record does not show whether the opinion of the assessors was read to the parties before composing the judgment. This irregularity alone has

occasioned injustice. It renders the whole judgment and decree of the trial Tribunal a nullity. It is my considered view that the second ground alone sufficiently disposes the appeal. I therefore see no reason to dwell on the other grounds.

For the reasons advanced and authorities cited, I invoke the revisional powers conferred to this Court under section 43(1)(b) of the Land Disputes Courts Act to nullify the entire proceedings, judgment and the decree of the trial Tribunal. I hereby order that, if parties are still interested, the suit be refiled and heard afresh before the Tribunal constituted by a different Chairman and a new set of assessors. As the errors cannot be attributable to any of the parties, I make no orders as to costs.

Order accordingly.



Y. B. Masara
JUDGE
16th December, 2020