

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 62 OF 2022

MARTIN THOMAS TEMU1ST APPELLANT

MARIA BARTAZARI MOSHA2ND APPELLANT

VERSUS

HELLEN HERMENCE MGHASE RESPONDENT

(Appeal against the Judgment and Decree of the District Land and Housing Tribunal of Moshi at Moshi dated 28th day of September, 2022 in Application No. 186 of 2017)

JUDGMENT

15th May & 4th July, 2023

A.P.KILIMI, J.:

The parties in this appeal are contesting in respect to the Suit land measures 55 meters long and 35 meters wide which is located at Faru hamlet, Kilema Pofu Village, Kilema Kusini ward in Moshi District.

The said contest gave rise to the respondent mentioned above filed an application before District Land and Housing Tribunal of Moshi at Moshi, praying for the following reliefs;

- i. A Declaration that the Applicant is a lawful owner of the suit land described in paragraph 3 of this application.
- ii. A declaration that, the Respondents are trespassers of the suit land.

- iii. An order that, the applicant must be paid a compensation of Tshs. 3,000,000 by the respondents for the building which they demolished.
- iv. Permanent injunction restraining the Respondents, their servant, agents' workmen, assigns and whomsoever will be acting through the respondent from entering and carrying out any activity (s) on the land.
- v. An order that all the structures constructed on the suit land by the first Respondent be demolished and removed at the expense of the Respondent.
- vi. The first Respondent pay the Applicant's costs of and incidental to the Application.

According to the particulars gleaned from the pleadings at the Tribunal, the respondent alleges that she is the lawful owner of suit land which she purchased from one Eliminatha August Mosha on the 8th day of October 2014. The said land initially was owned by the second appellant one Maria Baltazar Mosha along with other portions of land. It was on the year 1997 the second appellant sold the suit land to one Eliminatha August Mosha who after using it peacefully for 18 years sold it to the respondent mentioned above, that was the year 2014. Then, after purchasing the suit land the respondent started to effect various development on the suit land including construction of dwelling house thereon.

The respondent further pleaded that later, on 14/04/2017 the second appellant trespassed the suit land whereby she then sold it to the first

appellant together with her piece of land which was adjacent to the suit land. Later, on 9th day of October 2017 the first appellant moved in the suit land and demolished a foundation of 4 rooms building which the respondent was on construction. The said demolished building worth Tshs. 3,000,000 which the respondent also claimed at the tribunal to be compensated by the appellants.

In response to the above, it was pleased by the second appellant at the tribunal that, Elimanata August Mosha had no authority to sale the said land since she never has been the owner of the said land in dispute, she also disputed that no development had been made therein, and she never trespassed to it, but she lawful sold it to the first appellant. Then both parties at the tribunal procured witnesses and documentary evidence to prove their case therein. The Trial Tribunal having considered their claims and evidence decided in favor of the respondent and declared her a lawful owner of the suit land, second, declared all appellants are trespassers and should vacate therein. Third, advised the first appellant to claim his money back which was used to buy the said land from the first appellant and fourth, granted costs of the case be paid by the appellants.

The appellants dissatisfied with the above Tribunal's decision and orders thereto, the appellants have appealed to this court basing on the following ground(s):

1. That, the Chairman of the Trial Tribunal who partly presided over the matter and composed the impugned Judgment grossly erred both in law and fact as proceedings, judgment and decree of the trial tribunal were fraught with procedural predicaments/irregularities, illegalities and discrepancies.
2. That, the Chairman of the trial Tribunal erred both in law and fact for failure to find that Eliminata Augustine Mosha (PW1) had no a legal title or a good title over the Suitland to pass to the applicant (now respondent herein).
3. That, the Chairman of the trial Tribunal erred both in law and fact for failing to evaluate evidence (s) which proved the 1st appellant as rightful owner of the Suitland.
4. That, the Chairman of the trial Tribunal erred both in law and fact for failure to evaluate evidence from record that (applicant now respondent's) to prove facts covering PW1 is originality of ownership of the Suitland.
5. That, the Chairman of the trial Tribunal erred both in law and fact to order compensation of TZS 3,000,000/= (an estimated value of the whole building) without visiting the locus in que as prayed and noted in page 32 of trial tribunal proceedings to clear doubts as to whether such demolition was done on the whole building or just four lines bricks-built foundation was demolished or not.

In view of the above, the Appellants herein pray to this Court, the proceedings, judgment and decree of the trial Tribunal be quashed and nullified in its entirety, costs be granted and any other relief this court deem fit.

In disposing this appeal, Mr. Alfred Sindato appeared for the appellants, while Mr. Erasto Kamani represented the respondent. Both counsels acceded for written submissions and with the leave of this court, the schedule of filing the same was made and I thank them for the timely research and compliance of the schedule issued, however, their submissions will be referred in due course whenever necessary for attainment of justice of this matter.

Mr. Sindato started by praying to abandon the fifth ground of appeal, and for the remaining four grounds of appeal, he has stated they comprises of two limbs; the first limb being the first ground of appeal covering procedural irregularities, illegalities and discrepancies, and the second limb being the 2nd, 3rd and 4th grounds of appeal covering failure or errors on evidence evaluation. Therefore, he opted to argue first ground of appeal separately and then second, third and fourth will be consolidated.

Mr. Sindato reminded this court to consider that there is always a presumption that court record accurately represents what happened hence the same should not be lightly impeached, to insist his observation he has referred the case of **Halfani Sudi vs. Abieza Chichili** [1998] TLR 527,

Paulo Osinya vs. R [1959] EA 353 and **Shabir F. A. Jessa vs. Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported).

He further continued to argue for the second, third and fourth grounds that the impugned judgment left major issues undetermined, hence reached the decision on his own assumptions and belief, to support this stance he referred, first, circumstance shown at page 9, second paragraph, whereby the trial tribunal judgment raised issue to the effect that, whether the second respondent sold the suit land to Eliminata or gave the said land as overseer and invitee for only farming.

Then he submitted that in second circumstance is shown at page 11, second paragraph of the trial tribunal judgement whereby the chairman erred in evidence evaluation when he assumed facts in favor of the applicant that, no any witness on part second respondent at the trial testified did not sell the said land. Which contradict the evidence of second respondent thereat when she said she gave it to Eliminata Mosha to care and later she sold in 2017 for Tshs.7 millions.

In the third circumstance, Mr. Sindato argued that the trial chairman erred on evidence evaluation by not considering the evidence of (OW3) one

Sisti Gregory Mosha, a clan member of Mosha Clan who testified in chief that Eliminata used the land as overseer thus she was having no authority to sell. And in fourth circumstances said is when this witness was cross examined and said Maria did not sell the said land but invited Eliminata for mere farming.

In the fifth circumstance Mr. Sindato argued that the tribunal fail to evaluate evidence of witness Aloyce James (OW4) who said that he asked Eliminata who replied that she exchanged the said land by goat and money and show a piece of paper to that exchange, he further said this was supported by evidence of OW5 who said no sale without writings.

Thereafter, basing on the above circumstances, Mr. Sindato submitted that, in terms of section 100(1) of the Evidence Act, Cap, 6 R.E. 2022 the oral evidence of Eliminata Augustine Mosha cannot supersede the documented evidence of the first appellant which portrays that the disposition of the Suitland was made in writing and admitted in evidence before the trial tribunal. Thus, he said Eliminata had no legal title over the suit land, to pass it to the respondent herein. To buttress his observation, the counsel referred the case of **Ombeni Kimaro vs. Joseph Mishili T/A Catholic Charismatic Renewal**, Civil No.33 of 2017(CAT DSM),

Melchiades John Mwenda vs. Giselle Mbagu (administratrix of estate of the late John Iphet Mbagu and 2 others Civil appeal No. 57 of 2018 CAT (Unreported) and **Farah Mohamed Said vs. Fatuma Abdallah** (1992) TLR 205.

Regarding the first ground of appeal, Mr. Sindato submitted that the Chairman of the trial Tribunal who partly presided over the matter and composed the impugned judgement grossly erred both in law and fact as proceedings, Judgement and decree of the trial tribunal was fraught with following procedural irregularities, illegalities and discrepancies; First irregularity, proceedings of the trial tribunal in pages 5 -8 contravened **Regulation 12 of the Land Disputes (The district Land and Housing Tribunal) Regulations 2003**, which put mandatory, that at the commencement of hearing, the trial Tribunal Chairman before framing of issues did not read out and explain contents of the application to the respondents (now appellants herein). Therefore, is saying the trial Tribunal Chairman's oversight of such procedure offended the cardinal principle of fair trial hence such proceedings became unfair and prejudicial to appellants.

Second irregularity, proceedings of the trial tribunal from pages 16 to 44 was erroneously presided over by Hon. P. I Makwandi Chairman, who recorded evidence from PW2, PW3, PW4, PW5(respondent herein) and PW6 and in so doing he contravened Order XVIII Rule 10(1) of the Civil Procedure Code Cap 33 RE 2022] and principles made by the court of appeal of Tanzania in **Charles Chama and 2 others vs. The Regional Manager, TRA & 3 others**, Civil appeal No.224 of 2018 and **Leticia Mwombeki vs. Faraja Safarali & 2 others**, civil appeal No.133 of 2019 (both unreported), **Oysterbay Villas Limited vs. Kinondoni Municipal Council**, civil appeal No.173 of 2017 (both unreported). Therefore, the counsel contended that failure to observe the law, then the successor chairperson had no jurisdiction to hear the matter without assigning reasons for his taking over of proceedings which had already been commenced by his fellow Chairperson Hon. T.I Wagine who initially drew issues and recorded evidence of PW1(Eliminata).

Mr. Sindato further pointed out that in third irregularity, the trial Chairman of Tribunal contravened Section 47(1) read together with section 5(a)(i) of **Stamp Duty Act** Cap.189 RE 2019 for wrongly admitting the Sale Agreement (Exhibit P1) of PW5 the applicant therein (now respondent) which

was illegal and ingenuine. So, he prayed the same be expunged from the record, to fortify his view he invited this court to refer the case of **Zakaria Barie Bura vs. Theresia Maria John Muburi** (1995) TLR 211.

The learned counsel also averred on fourth irregularity that, the trial Chairman offended Sections 8 and 9 of the Registration of Documents Act Cap. 117 [RE 2019] for admitting unregistered Sale Agreement [Exhibit PI] which he said one, is inadmissible in Court for want of proof of registration and, two, the title or interest in the plot should not passed to the buyer (PW5) for want of proof of registration. Hence, Exhibit P1 worth nothing as regards to evidential value.

In Fifth irregularity, Mr. Sindato contended that the purported Sale Agreement [ExhibitP1] between applicant (now respondent) and Eliminata (PW1) for which the trial Chairman based his decision was full of discrepancies, also the sale agreement bears the office stamp of Mwenyekiti wa Baraza la ardhi Kata ya Njia Panda instead of Kitongoji Chairman's Stamp who testified as PW3 and who was the leader of where the land situated. Then the counsel invited me to hold that trial Chairman erred to decide that the applicant (now the respondent) is the owner of the Suitland without a proper support of documentary evidence.

In conclusion Mr. Sindato urged this court not to opt for the order of re-trial because under the circumstance of this matter, it will open rooms for respondent to fill gaps of the documentary evidence, will waste time and it will occasion justice to the appellants herein. To support this position the counsel referred the case of **Jumbo Abdallah vs. Republic** Criminal Appeal No.205 of 2015 (unreported).

Responding to the above submissions, Mr. Kamani in regarding ground No.2, 3 and 4, contended that it is not true that the trial chairman failed to evaluate the evidence on record and that if he had evaluated it he would have noted that Eliminata August Mosha (PW 1) had no good title over the land which she sold to the respondent herein as the record of tribunal clear shows that the trial chairman evaluated properly the evidence of both parties from page 9 up to page 11 of the tribunal's judgment and correctly found out that Eliminata had lawfully purchased the suit land from the second appellant herein One Maria Bartazari Mosha and she therefore had a good title in that land. Therefore, there is no any circumstances in the decision of the tribunal which show that the trial chairman erred in evaluation of evidence on record.

In respect to issues raised, Mr. Kamani contended that it is apparent on the tribunal's record that all of the relevant issues and, or evidence narrated by the counsel of the appellants were resolved and properly evaluated by the trial chairman. Therefore, it is not true for example that the trial chairman left the issue undetermined, as whether the second respondent sold the suit land to Eliminata or she gave it to her just to take care of it. It is very clear in paragraph 2 of page 10 of the tribunal's judgment that this issue was very well determined. The trial chairman made it clear that the second respondent sold the suit land to Eliminata August Masha in 1997. Also, the tribunal put clear that the concern that Eliminata had been given that land just to take care of it the trial chairman found that evidence was a hearsay evidence which is in admissible in law.

Mr. Kamani further contended that the trial chairman a evaluated the evidence of Maria Bartazari Masha (DW2) and found the same unreliable and untrustworthy. This is when at the mediation meeting which was held on 4/6/2017, Maria (DW2) agreed to pay back a sum of Tsh.180,000/= which she had been given by Eliminata but Eliminata refused to receive it. Then trial chairman drew an inference that Maria Bartazari Masha was lying because she failed to explain what was another purpose of getting that

amount of money from Eliminata if she had not sold the suit land to her, considering that the said mediation meeting had been convened to resolve the dispute concerning the suit land between Maria (DW2) and Eliminata (PW1). Another doubt by the chairman was that no one could believe that Maria Bartazari Mosha could sell the suit land secretly without informing Eliminata August Mosha while it was still under her care taking.

In regard to the assertion that if oral sale agreement was there without written Agreement then that agreement is invalid, Mr. Kamani contended that, there is no legal requirement that all sale agreements concerning un registered land which is owned customarily like the suit land should be in writing. Therefore, he invited this court to consider assertions by DW4 and DW5 was not evidence but opinion and belief, therefore, the trial tribunal was not obliged to evaluate and rely on the same.

In the said sale, Mr. Kamani argued that, the two met and discuss terms and conditions of the sale agreement in relation with the suit land and that on that meeting Maria and Eliminata agreed the consideration of that land to be Tshs. 180,000 with a goat which was paid in installments. The trial chairman made it clear that this evidence was not challenged or objected

to by the appellants herein. Therefore, it was right when the tribunal concluded on page 10 of the judgment that according to evidence on record it is obvious that the second respondent/ appellant sold the suit land to Elimanata in 1997.

Submitting in respect to the first ground of appeal, Mr. Kamani argued that from the commencement of the hearing the contents of the application were read and explained to the parties who then denied them all. It was after that denial when issues were framed. He further said that even if it is found that the trial chairman omitted to record that he read and explained the contents of application, that cannot be the reason for quashing proceedings, judgment and decree of application No. 186 of 2017 as suggested by the counsel for the appellants. This is because Section 45 of the land Dispute courts Cap. 216, makes it clear that no decision or order of the District Land & Housing tribunal which shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing unless such error, omission or irregularity had in fact occasioned a failure of justice. Then Mr. Kamani submitted, that omission, if any did not occasion failure of justice that is why

their advocate has not mentioned or explained that there was any loss of justice on the part of the applicant.

On the ground that, Hon P.J. Makwandi did not show reasons when he took over from honourable Wagine, Mr. Kamani contended that this again did not occasion any miscarriage of justice to the appellants as at that time, it is the respondent who was in the process of adducing evidence and not the appellants. Then he referred section 45 as above and added that, since that omission accessioned no any failure of justice, it cannot be the reason for quashing the proceedings and judgment of the tribunal.

On irregularities concerning admissibility of sale agreement of the respondent, Mr. Kamani contended that, since the appellants did not challenge it to be admitted during the hearing, they are stopped from questioning its admissibility at this stage. To fortify this stance, the counsel invited me to refer the case of Abbas **Kondo Gede vs. Republic**, criminal appeal No. 472 of 2017 at page 20 which quoted with approval from the decision of Supreme Court of India in **Malanga Kumar Ganguly vs. Sukumar Mukherje**, AIR 2010 Section; 1162. Mr. Kamani further concluded that, if at all this court find that, it was illegal for the trial tribunal

to admit it, the remedy available is to expunge it from the record and not to nullify the whole proceedings and judgment as suggested by the counsel for the appellants. Then prayed this appeal be dismissed with cost.

In his brief rejoinder, Mr. Sindato vehemently disputed all respondent's counsel arguments and submitted that, counsel for the respondent has conceded that the Sale Agreement (Exhibit P1) of PW5 be expunged from this court's records. Two, Counsel for the respondent has conceded to all procedural irregularities, illegalities and discrepancies availed save that he is asking for a mercy which he seriously dispute it. The counsel further said those illegalities pointed are prejudicial to appellants as they go to the root of the matter and they cannot be salvaged by section 45 of Land Disputes Court Act, Cap. 216 [RE 2022].

I have considered the rival submissions of both counsels and the entire record of trial tribunal; I find convenient to start with the first ground of appeal. The appellant counsel in this ground has alleged by pointing out five irregularities he thinks the trial tribunal did not observe them. Having entirely scanned them, I wish first to deal with second irregularity raised by appellant counsel which said that the successor chairperson had no jurisdiction to hear the matter without assigning reasons for his taking over of proceedings

which had already been commenced by his fellow Chairperson. In his reply the counsel for respondent contended that, this act did not occasion any miscarriage of justice to the appellants as at that time, it is the respondent who was in the process of adducing evidence and not the appellants. The he sought the salvage of section 45 of the land Dispute Courts Act Cap.16 and said it cannot be the reason for quashing the proceedings and judgment of the tribunal.

In my view, the point to be consider in respect to above arguments, is whether the failure to assign reasons for successor chairman occasion miscarriage of justice. I am mindful, indeed there are reasons which I also subscribe to be important, which prevent the trial Judge to continue with the trial include death, transfer or other cause and this is what numerous cases have stated must be brought to the attention of the parties before the continuation of the hearing.

Before I go further, I find it appropriate to reproduce Order XVIII Rule (10) of the CPC which provides that: -

"10 (1) Where a judge or magistrate is prevented by death; transfer or other cause from concluding the trial o f a suit, his successor may deal with any evidence or memorandum taken down or made

under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it "

From this provision, it is now settled in our jurisdiction, a successor presiding officer is required to state reasons for doing so. By so doing enables the parties to assess whether they wish to continue with the trial despite of the evidence tendered before the coming of successor presiding officer or they wish to start afresh their evidence already tendered. The rationale of this procedure is to ensure that the credibility of witnesses is assessed by the magistrate or judge who records the evidence. This stance in our land was stated in the case of **Ms. Georges Centre Limited vs. The Attorney General and Ms. Tanzania National Road Agency**, Civil Appeal No. 29 of 2016 (unreported), when the Court of Appeal held that:

"The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same Judicial Officer unless it is not practicable to do so. For one thing... the one

who sees and hears the witness is in the best position to access the witness credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

According to the record of the trial tribunal this case was heard consecutively by four learned Chairpersons. It started with Hon. T.J. Wagine who heard one witness, Iliminata Augustine Mosha (AW1), then at page 19 of the typed proceeding of the tribunal entered another presiding Chairperson, Hon. P.J. Makwandi who proceeded to hear witnesses PW2, PW3, PW4, PW5 and PW6 without assigning any reasons why he came in as presiding officer. At page 44 of the typed proceeding another Chairperson on Hon.J.F. Kanyerinyeri took the matter and did exercise his duty by assigning reason for taking over, he then heard DW1 and DW2. Later as shown at page 49 of the typed proceeding came in another chairperson Hon. R. Mtei who proceeded with the remaining witnesses DW3 and DW4 and composed a judgment, he also assigned reason for taking over the matter.

Therefore, according to above, it was the second chairperson who did not assign reason his take over to the matter, by then one witness PW1 who

in my view is one of the key witnesses in this matter was already tendered evidence before the preceded chairperson, not only that he was the only chairperson heard all remaining claimant witnesses. As per above law and the case cited, I am of considered opinion the second successor magistrate above mentioned lacked authority and jurisdiction to proceed with the trial and consequently all such proceedings before him were nullity. (See the cases of **Abdi Masoud Iboma and 3 others vs. Republic**, Criminal Appeal No. **116** of 2015, and **Mariam Samburo (Legal Representative of the late Ramadhani Abas) vs. Masoud Mohamed Joshi and Two Others**, Civil Appeal No.109 of 2016 (both unreported), in the latter case, the Court of Appeal held that;

"in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced on record of appeal We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity".

As observed above counsel for the respondent sought a refuge to the provision of section 45 of the Land Disputes Act Cap.216 and for purpose of this argument, I wish to reproduce it hereunder;

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."

I have keenly considered the law which requires the Successor presiding officer to assign reason as stated hereinabove, I am settled that such omission of successor Chairman not to assign reasons occasioned a failure of justice of this matter at the tribunal, thus the provision above does not salvage the respondent in this appeal as the Mr. Kamani asserted.

In the circumstances, I have considered the all-remaining grounds, I am settled and it is my finding this ground has merit to the above extent and is sufficient to dispose of this appeal, therefore, I find no need to consider and determine the remaining grounds of appeal.

In the end result, I invoke revisional jurisdiction of this court under section 43 (1)(b) and (2) of the Land Disputes Courts Act Cap 216 R. E 2019 and I proceed to nullify the entire proceedings before the second successor Chairperson from 12/5/2020 to 26/3/2022, consequently this affect the entire Judgment and subsequent orders which I also declare them nullity.

In view of the above, this is the fit matter to be ordered for retrial, but Mr. Sindato advised that this court that is not proper to do under the circumstance of this matter as, since it will open rooms for respondent to fill gaps of the documentary evidence, will waste time and it will occasion justice to the appellants herein. To support his point, he referred the case of **Jumbo Abdallah vs. Republic** Cr. Appeal No.205 of 2015 (Tanzlii).

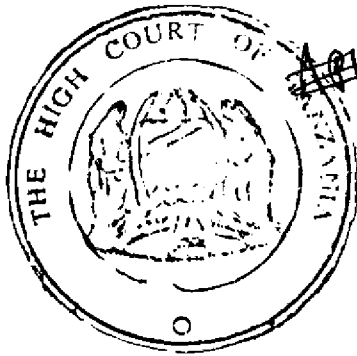
Be it as it may, I would have done likewise. However, the circumstances of this matter dictate the taking of a different course. First of all, as seen already there is a dispute need to be settled, thus the court need to exercise its constitutional duty to settle disputes and not to run from them, this enshrines significance of administration of justice. And, second, those documentary evidence stated this court in this appeal did not reach them, therefore there are still undecided.

Therefore, in my opinion and having regarded the circumstances of this matter at the tribunal, I think justice dictates I should order re-trial, which I order forthwith.

In the circumstances no any order as to costs granted.

It is so ordered.

DATED at **MOSHI** this 4th day of July, 2023.



A. P. KILIMI
JUDGE
4/7/2023