IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 254 OF 2023

(Arising from Land Application No. 58 of 2021, of the District Land and Housing Tribunal for Ubungo)

HUSSEIN JUMA HASSAN..... APPELLANT

VERSUS

PHILEMON MWENDA.....1ST RESPONDENT

ANSELM MWENDA.....2ND RESPONDENT

MARY NJOWOKA.....3RD RESPONDENT

J U D G M E N T

Date of Last Order:10.08.2023
Date of Judgment:26.09.2023

T. N. MWENEGOHA, J.

The appellant, Hussein Juma Hassan, sued the respondents above named, jointly, for trespass into his land, measuring ¼ acres, located at Gogoni Street, Kibamba Ward, within Ubungo District, in Dar es Salaam, herein after called the suit land. The case was instituted before Ubungo District Land and Housing Tribunal, here in after called the Trial Tribunal, vide Land Application No. 58 of 2021. The Trial Tribunal after conclusion of the hearing, declared the 3rd respondent as a lawful owner of the suit land, having purchased the same from the 1st respondent.

Aggrieved by the impugned decision, the appellant sought the instant appeal, basing on the following grounds; -

1. **That, the Trial Tribunal erred in law and facts when considered the 1st respondent was a legal owner of the disputed land sold to the 3rd respondent without proof of ownership.**
2. **That, the Trial Tribunal erred in law and facts when decided the matter in favour of the respondents without considering evidence of local government chairman (PW2).**
3. **That, the Trial Tribunal erred in law and facts by denying Appellant's key witness right to be heard on the mere ground that, he was present during the hearing of the applicant's evidence.**
4. **That, the Trial Tribunal erred in law and facts by deciding the matter in favour of the respondents, while throwing away the opinion of the assessors without justifiable reasons.**
5. **That, the Trial Tribunal erred in law and facts for failure to conduct *locus in quo.***
6. **That, the Trial Tribunal erred in law and facts for failure to evaluate and critically analyse the evidence in records, hence reached to this decision.**

The appeal was heard through written submissions. Advocate Felix Fabian Mtunzi, appeared for the appellant, while the respondents were represented by Advocate Mluge Karoli Fabian.

Submitting on the 1st ground, Mr. Mtunzi was of the view that, the 1st respondent admitted in his testimony, to have sold the suit land to the 3rd respondent. He claimed to have inherited the same from his late father, Peter Mwenda. That, based on **Section 24 and 33 of the Probate and**

Administration of Estates Act, Cap 352, R. E. 2019, there is no proof that the 1st was granted probate or letters of administration for his late father's estate. Hence, he lacked the locus to dispose the said land to the 3rd respondent, as stated in **Longishu Memuruti versus William Memuruti, Misc Land Appeal No. 07 of 2016.**

He went on to argue on the 2nd ground that, the Trial Chairman was wrong to disregard the testimony of PW2, Mohamed Arobain, owing to the reasons that he was a local government leader of Gogoni where the suit land is located. He lived in the area since 1976, thus familiar with the entire area and knew the dispute between the parties very well.

On the 3rd ground it was argued that, the Tribunal denied Mr. Donato Peter Massawe the right to give his testimony, merely because he was present during the hearing of PW1's testimony. This was unprocedural and has infringed the right to be heard on part of the appellant, contrary to **Article 13(6) of the Constitution of the United Republic of Tanzania of 1977** as amended from time to time.

As for the 4th ground, the counsel for the appellant, faulted the Trial Tribunal for ignoring the mandatory provisions of **Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003.** That, the Trial Tribunal departed from the opinion of assessors without giving sufficient reasons.

Submitting further on the 5th ground, Mr. Mtunzi insisted that, the nature of the dispute compels the Trial Tribunal to visit the *locus in quo* before making its decision. That, the failure of the Trial Chairperson to see the necessity of visiting the *locus in quo,* led him to arrive at an erroneous decision. That, the position has been stated in number of authorities

including the case of **Avit Thadeus Masawe versus Isidory Assenga, Civil Appeal No. 6 of 2017(unreported).**

Lastly, on the 6th ground, Mr. Mtunzi maintained that, the Trial Tribunal failed to evaluate the evidence properly, hence arriving at a wrong decision. The records are clear that, the appellant is the one who bought the suit land from the original owner, I. P. Mwenda.

In reply, Mr. Mluge argued on the 1st ground that, there was no evidence produced at the Trial Tribunal, showing the suit land is the one which the late I. P. Mwenda sold to the appellant. The appellant relied on Exhibit P1 to prove that he purchased the said land from the late I. P. Mkenda, but the document in question does not properly identify the land sold to him. That, what is evident is that, the 1st respondent being one of the heirs, sold his interest in the estate of his late father, Ignatus Peter Mwenda. The whole land owned by the late Mkenda as per the records, comprised of 10 acres, which was then divided to his surviving heirs, including the 1st respondent. Therefore, the issue before the Tribunal was not about selling the deceased's property, but selling the inheritance the 1st respondent got from his late father. Therefore, the 1st respondent had right to sale the land to the 3rd respondent who built her dwelling house. Therefore, the **Longishu Memuruti versus William Memuruti** (supra) is distinguishable in the present appeal.

On the 2nd ground, it was the contention of Mr. Mluge that, under **Section 62(1)(a), (b) and (c) of the Evidence Act, R. E. 2019,** oral evidence in all times must be direct. PW2, Ally Mohamed Arobain, did not witness any agreement, rather he came to know the suit land upon existence of the dispute. He cannot be a reliable witness as far as the purported

transaction between the seller and the appellant is concerned. He was not there, therefore his evidence regarding the sale of the suit land to the appellant is hearsay.

On the 3rd ground, it was the argument by Mr. Mluge that, the Tribunal was correct to deny Mr. Donato Peter Massawe, the right to testify for the appellant. His presence in the Tribunal while the appellant was testifying before the Trial Chairperson, contravened with the separation rule. The said rule requires the witness who is not a party to the dispute(applicant/respondent) to be outside when the person who brought him or her is testifying in Court. If allowed to testify under such circumstances, his testimony would be as good as hearsay. Above all, the appellant was not prejudiced by the denial of Mr. Donato Peter Massawe to testify, as he had Exhibit P1 with him. It was his argument that, the law is settled that, cases are won on the strength of evidence and not a number of witnesses, as stated in **Yohanis Msigwa versus R (1990) TLR 148.**

Arguing on the 4th ground, Mr. Mluge maintained that, the Trial Tribunal's departure from the assessor's opinion in the impugned Judgment is plausible, of credence and in line with our jurisprudence, as provided for under **Section 24 of the Land Disputes, Courts Act, Cap 216, R. E. 2019.** The Trial Chairman gave reasons for the departure as his mind was centered on points of law and not factual issues. The departure is justifiable as stated in **Hamis Daudi Mlilwo versus Iman Baharia, Land Appeal No. 24 of 2020, High Court of Tanzania at Mbeya, (unreported).**

As for the 5th ground, Mr. Mluge submitted that, visiting a *locus in quo* is not necessary when the disputed land is clear. Therefore, the Trial Tribunal reached its decision upon being satisfied with the evidence before it and it needed not to have the impression from the locus in quo. He referred the Court to the case of **Sikuzani Said Magambo and Another versus Mohamed Roble, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania at Dodoma(unreported).**

And on the 6th ground, Mr. Mluge insisted that, there was no proof that the appellant purchased the land from the suit land from the late I, P Mwenda. That, Exhibit P1 did not describe properly the location of the ¼ acres of land sold to the buyer. Therefore, on balance of probabilities, the evidence of the respondents was stronger than that of the appellant.

In rejoinder, the applicant's counsel reiterated his submissions in chief.

I have considered the submissions of both parties. Also, I went through the records from the Trial Tribunal. The issue for determination is whether the appeal has merits or not.

In determining the merit or otherwise of this appeal, I will start with the 4th ground. On this ground, the appellant faulted the Trial Tribunal for deciding the matter in favour of the respondents, while disregarding the opinion of assessors, without any justifiable reasons. It is my opinion that these allegations are unfounded. The records are clear. Inference is made from last two paragraphs of page 9 to page 10 of the impugned Judgment, the learned Trial Chairman of the Tribunal, gave reasons as to why he disagreed with the opinion of Mr. Hendrick Bambo, the only assessor who heard the matter to its end. Further, the law is clear under **Section 24 of the Land Disputes, Courts Act, Cap 216, R. E. 2019,** that, the

Chairman of the Trial Tribunal is not bound by the opinion of assessors. In case of disagreement, he or she, should give reasons for his departure. For quick reference, let me reproduce **Section 24 the Land Disputes, Courts Act, Cap 216, R. E. 2019,** as follows; -

> *"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

Since the learned Chairman of the Trial Tribunal complied with this provision, it is immaterial whether his reasons for departure are justifiable or not, provided that they are given, his decision cannot be faulted for disregarding the opinion of assessors. Thus, the 4th ground is baseless and it is rejected accordingly.

Next, I will deal with the 5th ground, on the importance and necessity of visiting the locus in quo, as far as land disputes are concerned. The rules are settled, that, visiting a *loqus in quo* is not mandatory but necessary depending on the circumstances of the case. In the case at hand, based on the evidence on records, particularly Exhibit P1, visiting the *locus in quo* was useless. As stated by the counsel for the respondents in his submissions above, Exhibit P1 did not provide sufficient description of the land purported to have been sold to the appellant, in terms of where it is located or neighbors surrounding it if any on each side. Under these circumstances, it is hard to identify the land in question. With such evidence, going to visit the *locus in quo* in this case was to defeat it's purpose in law, which is to eliminate minor discrepancies with regard to the physical condition of the land in dispute. The visit is not meant to

afford a party an opportunity to make a different case from the one he led in support of his claim, see **Avit Thadeus Massawe versus Isdory Assega,** (supra). The 5th ground also is rejected for want of merits.

Now, I will consolidate the remaining four grounds of appeal (1,2,3 and 6) and discuss them together as they all relate to analysis and evaluation of evidence adduced by the parties at the Trial Tribunal.

In my settled opinion, the appellant failed to discharge his obligation of proving the case to the satisfaction of the Tribunal, hence it ruled against him as given under **Sections 110 and 111 of the Evidence Act, Cap 6 R. E. 2019** and also through the case of **Hemed Said versus Mohamed Mbilu (1984) TLR 113.** The appellant's evidence was weak, compared to that of the respondents. He was relying much on Exhibit P1, a purported Sale Agreement between him and the late I. P. Mwenda.

The said Exhibit has several issues concerning its authenticity. For instance, Anselm Mwenda, the 2nd respondent, denied to have witnessed the said Agreement. Apart from the Exhibit, the appellant's case was weakened by denial of right to testify of one of his witness by the Tribunal. The presence of Mr. Donati Massawe in Court while the appellant was giving his testimony, took away his right to testify for the appellant. This being due to the fact that, his testimony will not be direct, rather influenced by the appellant and possibly repeating what the appellant said while on stand. In other words, it will be hearsay. Therefore, the Tribunal was right to deny him that chance. PW2, on his part, new nothing about the sale of the land in dispute from the late I. P. Mwenda, to the appellant. All he knew was that there was a dispute existing between the appellant

and the respondents. His testimony cannot be used to determine the ownership issue over the suit land.

On the basis of these explanations, I find the Trial Tribunal did well in evaluation and analysis of the evidence placed before it during the Trial. Hence, I reject the 1,2,3 and 6th grounds of appeal.

In the event, the entire appeal is dismissed and the decision of the Trial Tribunal of Ubungo, vide Land Application No. 58 of 2021, is upheld, so are the orders that followed it with costs.

It is so ordered.

T. N. MWENEGOHA

JUDGE

26/09/2023