

TANZANIA / JUDGMENT

seif khamis seif vs nassormohamed ibrahim 2022 tzca 372 17 june 2022

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IN THE COURT OF APPEAL OF TANZANIA AT ZANZIBAR (CORAM: LILA. J.A.. MWANDAMBO, 3.A. And MASHAKA, J.A.^ CIVIL APPEAL NO. 99 OF 2021 SEIF KHAMIS SEIF.....APPELLANT VERSUS NASSOR MOHAMED IBRAHIM..... RESPONDENT (Appeal from the Judgment of the High Court of Zanzibar at Vuga) (Sewed. J.^ dated the 16th day of July, 2019 in Civil Appeal No. 20 of 2019 JUDGMENT OF THE COURT 1st & 17th June, 2022 LILA, J.A.: The parties to this appeal, Mr. Seif Khamis Seif, the appellant herein and Mr. Nassoro Mohamed Ibrahim, the respondent, were parties to a suit instituted by the latter before the Land Tribunal for Zanzibar sitting at Koani (the Tribunal). The contest was over ownership of a piece of land (a shamba) located at Mchangani in Central Unguja District the size of which was not disclosed but of the estimated value of TZS. 300 Million. In his plaint, the respondent claimed that the appellant had trespassed into that land bequeathed to him as part of his share of the deceased's estate. The appellant, in his reply, stoutly disputed the claim alleging that he inherited the disputed land from his ancestors as wakfu. The respondent was successful and was declared the rightful owner of disputed land. The appellant was aggrieved and his appeal to the High Court was dismissed. Still aggrieved, he has preferred this second appeal. Both sides led evidence seeking to convince the trial Tribunal that it had superior title over the disputed land. The respondent, through himself (PW1), Haji Ramadhan Vuai (PW2), Vuai Juma Vuai (PW3) and Assaa Jaffar (PW4) led evidence that the land belonged to the respondent and the appellant was a stranger in that area who had trespassed into the eastern part of the respondent's land to which neither of them borders him. He produced the wakfu document (N1), proceedings and a copy of a judgment establishing that he won a case against other trespassers (N3) as exhibits. The appellant (DW1), on his part, claimed that the disputed land belonged to his parent who bought it and planted trees over it after which he inherited it. He tendered the sale agreement (SI) as exhibit. His claim was supported by Ali Rehani Ali (DW2), Kassim Hassan Khamis (DW3), Ahmeid Junedi (DW4), Vuai Ali (DW5), Uwesu Mbaraka Mwinyi (DW6), Khamis bin Seif Khamis (DW7) who, on the same strength, flowed that the 2 appellant's claim was untrue. The Tribunal visited the disputed land and at the conclusion of the trial it found in favour of the respondent stating that he had managed to prove its claim. The appellant's effort to challenge the Tribunal's decision and have the verdict overturned through an appeal to the High Court was unsuccessful. The High Court (Suwed, J.) concurred with the findings of the

Tribunal. He relied much on exhibits tendered, N1 and SI, and held that exhibit N1 preceded exhibit SI and the latter bore similar boundaries as those indicated in the petition. The appeal was thereby dismissed. Before us, the appellant has fronted three grounds of grievances seeking to impugn the High Court decision:-

- (i) That the High Court erred in upholding the decision of the Tribunal without considering his rights over the disputed land. (ii) That the High Court erred when (it) failed to appreciate that the assessors were not properly involved during hearing of the matter thus rendering both its judgment and that of the Land Tribunal nullity. (iii) That the High Court had all reasons to quash and set aside the judgment of the Land Tribunal following contravention of section 8(1) of the Land Tribunal Act, No. 7 of 1994 as amended by section 7 of the Land Tribunal (Amendment) Act No. 1 of 2008." Whereas the appellant had no legal representation when he appeared before us for hearing of the appeal, the respondent who was also present in Court had the services of Mr. Suleiman Salim Abdulla and Mr. Khamis Ibrahim Khamis, both learned advocates. Being a layperson, the appellant could not sufficiently amplify his grievances before us as he simply adopted his grounds of appeal and asked the Court to reconsider the available evidence and determine the appeal in what he said to be a proper and just manner. However, on our prompting on the complaint regarding involvement of assessors, he maintained that they were not properly involved without elaborating. Appearing somehow uncertain, he argued that the same set of assessors presided over the case till its finality. Responding to the appeal, Mr. Abdulla started with the issue of assessors and was not hesitant to concede that there were changes of assessors during the trial but he was of the view that such is a common phenomenon before the Tribunal. When the Court referred him to sections 7 and 37 of the Land Tribunal Act No. 7 of 1994 (the Act) which provides that the composition of the Tribunal is the chairman and two assessors and the decision of the Tribunal is that of the majority, Mr. Abdulla was agreeable that it would be proper if only the assessors who participated throughout the trial were the ones to participate in the decision making. He was, however, firm that the Tribunal's decision was not faulty because of the changes of assessors because, before giving their respective opinions, they were taken through the summary of the evidence by the presiding chairman. Our overall consideration of the grounds of appeal and the record of appeal leads us to a conclusion that the issue on assessors' involvement is decisive in this appeal. The trial of the suit, the record of appeal tells, was held by the Tribunal with the aid of assessors. Both sections 5 and 7 of the Act enact that as a mandatory requirement. Those provisions, in explicit terms, provide that a Tribunal is properly constituted when presided over by a chairman and two assessors. In the language of those provisions, a proper panel is formed by the chairman and two assessors. They provide:- We begin with section 5:- "5(1). The panel shall consist of a chairman and two assessors which shall hear the dispute over which the tribunal has jurisdiction as set out in section 13. Then section 7 provides:- "7(1). The Land Tribunal shall have a chairman, who shall be the chief administrative officer and preside in all hearings and as many assessors for each District as are necessary to deal with the disputes of that District.

- (2) The chairman shall be considered as a member of the judiciary\ as an ordinary employee of the Judiciary Department and shall receive the pay and other benefits equal to a Resident Magistrate." Examined closely, the quoted provisions bear semblance, particularly on the constitution of the Tribunal, with section 23(2) of the Land Disputes Courts Act, Cap. 216 R.E, 2002 (the LDCA) which provides that:- "(2) The District Land and Housing Tribunal shall be duly constituted when held by a chairman two assessors who shall be required to give out their opinion before the chairman reaches judgment." [Emphasis added]. 6 Expounding on participation of assessors in decision making in the light of the above provision, the Court in the case of Mariam Ally Ponda vs Kherry Kissinger Hassan [1983] TLR 2, held that: "(i) An assessor who has absented himself for part of the trial cannot afterwards be permitted to participate in the determination of the proceedings." In yet another case, faced with a situation where assessors who did not participate throughout the trial were permitted to participate in the decision making which is identical to the present one, in John Masweta
- v. General Manager MIC (T) Ltd, Civil Appeal No. 113 of 2015 (unreported), the Court categorically stated that:- "We are of the view that it was wrong to allow an assessor who had not heard the testimonials and observed the demeanour of previous witnesses who testified earlier in a trial". All those authorities have emphasized the importance of an assessor who shall participate in the decision making to be the one who has participated throughout during the trial. In the instant case, Mr. Abdulla has readily conceded that there were changes of assessors in the course of the trial. The record bears out that the assessors by the names Mr. Hassan and Mr. Ayoub sat with the chairman on 08/02/2017 when the respondent (PW1) testified but on 22/02/2017 when PW2 and PW3 testified Mr. Ayoub absconded and Mr. Mkanga took over his place. Again, on 06/12/2017, when PW4 testified the assessors were Mr. Ayoub and Mr. Ameir. Yet, from 21/02/2018 until the judgment was delivered, the assessors changed and Mr. Mkanga and Mr. Hassan presided over the case. Their respective opinions were then recorded after a summary of the evidence was rendered to them. They were of the unanimous opinion that the appellant was a trespasser. It is evident that neither of the assessors participated throughout the trial of the petition. Mr. Mkanga and Mr. Hassan who participated in the determination of the rights of the parties had the disadvantage of not having heard and seen all the witnesses for both sides. They could not therefore effectively give fair and just opinions which would enable the Tribunal to justly determine the petition. The situation is more serious here because, as opposed to the position in the LDCA where under section 24, the chairman is not bound by the assessors' opinions but is obligated to 8 give reasons for differing with them, in the Act the decision of the Tribunal is that of the majority save in questions of law where the chairman has a decisive vote. That is in accordance with section 37 of the Act which provides "37. AH decisions of the Tribunal, whether the final judgment or interim matter, shall be made by majority vote of the three members of the panel, the chairman and two assessors. However, the chairman shall have a deciding vote in all questions of law." It becomes obvious therefore that the Tribunal acted in contravention of the provisions of sections 5 and 7 of the Act. The irregularity is fatal and renders the proceedings before the Tribunal a nullity. We are reinforced in that position by

our earlier pronouncement in the case of Emmanuel Christopher Lukumai v. Juma Omari Mrisho, Civil Appeal No. 21 of 2013 (unreported) where it was at issue that the Tribunal was not properly constituted hence violating the provisions of section 23 (1), (2) and (3) of the LDCA which is substantially identical to section 7 of the Act, and the Court held that:- "The said omission goes to the root of the matter and it occasioned a failure of justice and there was no fair trial. We say so since the law was contravened as the Tribunal was not properly composed which cannot be validated by the Chairman as he alone does not constitute a Tribunal." {Emphasis added} [See also the case of Emmanuel Oshoseni Munuo v. Ndemaël Rumishaeli Massawe, Civil Appeal No. 272 of 2018 (unreported)]. By analogy, the decision arrived at by the Tribunal in the instant case, cannot be said to have been the decision of a properly constituted panel of the Tribunal. Having emanated from nullity proceedings and judgment, the subsequent proceedings before the High Court and the judgment in Civil Appeal No. 20 of 2019 are also a nullity. In the event, we accordingly allow the appeal, quash and set aside the entire proceedings and decision of the Tribunal and the proceedings and judgment of the High Court which concurred with the findings of the Tribunal. We consequently order the record of the Land Tribunal to be remitted back and the petition be tried de novo before another chairman with another set of assessors according to the law. Each party shall bear its own costs. DATED at ZANZIBAR this 16th day of June, 2022. S. A. LILA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The Judgment delivered this 17th day of June 2022 in the presence of Appellant in person and Mr. Khamis Ibrahim Khamis, learned counsel for DEPUTY REGISTRAR COURT OF APPEAL li

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