IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 166 OF 2016

(Originating from Civil Case No.29 of 2003 of the District Court of Morogoro)

FABIAN MTALI.....APPELLANT

VERSUS

EFREM MTALI.....RESPONDENT

Date of Last Order: ***13/07/2018.***
Date of Judgment: ***30/07/2018.***

JUDGMENT.

I. ARUFANI, J.

This appeal arises from the decision of the District Court of Morogoro at Morogoro given in Civil Case No. 29 of 2003 dated 17th day of October, 2013. Briefly the appellant and the respondent in this matter are blood relatives as they share the same mother and father. Their dispute is on the ownership of the land situates on Plot No. 153, Block "U", Sultan area in Morogoro Municipality which was left by their late father, Paulo Mtali who passed away in 1981.

The respondent who was the plaintiff before the trial court stated that, he is the lawful owner of the land in dispute as after the demise of their late father their family members convened a

meeting in 1995 and agreed to hand the land in dispute to him in a consideration of Tshs. 200,000/= which was distributed to all of the ten children of the deceased.

On the other hand the appellant who was the defendant before the trial court stated that, the house in dispute belongs to him as it was distributed to him by the administrator of the estate of his late father who was appointed by Chamwino Primary Court through Probate Casue No. 42 of 2007. After hearing the evidence from both sides the trial court declared the respondent the lawful owner of the land in dispute and ordered the appellant to remove his buildings he had constructed on the land in dispute and find another place to construct them. The appellant was aggrieved by the decision of the trial court and decided to challenge the same by coming to this court with the following grounds:-

1. The trial magistrate erred in law and fact to entertain the suit and declare the respondent as the lawful owner of the disputed house based on weak, poor and unfound evidence.

2. The trial magistrate erred in law and fact in ignoring and disregarding completely the evidence of the appellant and

his witnesses in his judgment which would have helped him to reach into a fair decision.

3. The Trial Magistrate erred in law and fact in determining the matter in favour of third party by basin on criminal case No. 512/2003 which is not proper and caused unfair decision against the appellant.

4. The trial Magistrate erred in law and facts in discussing and basin on Probate matters to reach into decision which was not within its jurisdiction.

While the appellant was represented in this appeal by Miss Mariam Kapama, learned advocate the respondent was represented by Mr. Samson Rusumo, learned advocate. The counsel for the parties prayed and allowed to argue the appeal by way of written submission. The learned counsel for the appellant opted to argue the first, second and fourth grounds of appeal together and argued the third ground of appeal separately.

She argued in relation to the said three grounds of appeal that, the trial court erred in deciding the matter in favour of the

respondent as the evidence of the respondent was weak, poor and unfounded. She stated that, the evidence of the respondent failed to prove his claim to the standard required by the law and referred the court to section 115 of the **Evidence Act**, Cap, 6 R.E 2002 which states that, in any civil proceedings when any fact is especially within the knowledge of any person the burden of proving the facts is upon him.

The learned counsel for the appellant stated that, there is no evidence adduced before the trial court to establish there was probate cause opened in 1981 by Eugenia. She stated that, neither the mentioned Eugenia was called to testify before the trial court nor letters of administration to appoint her as an administratrix of the estate of her late father or a copy of an inventory was produced in court to establish there was such a probate cause and the mentioned person was appointed administratrix of the estate of the deceased. She stated that, the respondent failed to establish how he was given the house in dispute by members of their family.

The learned counsel for the appellant stated that, the trial court based its decision on the minutes purported to have been signed by the appellant as a party in the family agreement to give the disputed house to the respondent while that distribution was

unlawful. He stated that, the trial court was supposed to direct itself on illegality of the previous distribution of the house of the deceased to the respondent done by the members of the family while they had no mandate or power of doing so. She submitted that, the estate of the deceased would have been distributed by only the appointed administrator of the estate of the deceased. To support her submission she referred the court to the case of **Farah Mohamed V. Fatuma Abdallah** [1992] TLR 2005 where it was stated that, he who has no legal title to the land cannot pass good title over the same to another.

The learned counsel for the appellant stated further that, the learned trial magistrate ventured into discussing the decision made in Probate Cause No. 42 of 2007 while he had no jurisdiction to discuss the same and based her decision on the said Probate cause. She argued that, the trial magistrate was supposed to direct the respondent the proper forum to challenge the decision made in the said Probate Cause if need arose. The learned counsel contended that, the appellant's evidence and that of his witnesses that the disputed house belong to him and was allocated to him by the administrator of the estate through Probate Cause No. 42 of 2007 were not considered.

The appellant's learned counsel argued in relation to the third ground of appeal that, the appellant filed a counter claim, claiming damages suffered due to the act of the respondent and his companion seizing the keys of his business place. She argued that, the respondent argument that he was not found guilty on the said wrongful act does not exempted him automatically from being liable in a civil case. Finally she prayed the court to revisit the proceedings and judgment of the trial court and allow the appeal by quashing the judgment and set aside orders made by the trial court and be awarded the costs of the appeal.

In his reply the learned counsel for the respondent stated in relation to the first, second and fourth grounds of appeal that, in 2005 misunderstanding arose between the children of the late Paulo Mtali in relation to his properties whereby few children of the deceased included the properties of the respondent in the estate of the deceased. Among the properties included in the estate of the deceased were farm at Kiloka and a plot at Sultan area in Morogoro Region. The respondent's learned counsel argued in relation to the house on Plot No. 153, Block U, Sultan Area within the Municipality of Morogoro which is the subject matter in this appeal that, the house belong to the respondent.

He said the whole members of the family of the deceased agreed and consented the house to be transferred to the respondent at the payment of Tshs. 200,000/= and that was established by the evidence of the witnesses called by the respondent before the trial court. He argued that, the issue as to whether there was a Probate cause relating to the administration of the estate of the deceased filed in court between 1981 to 2007 did not affect the judgment of the trial court as the issue before the trial court was on the legality of the ownership of the house in dispute which the District Court determined the same in favour of the respondent. As for the third ground of appeal the learned counsel for the respondent stated that, the matter was determined to its finality by the court with competent jurisdiction whereby the applicant was acquitted and no appeal was preferred to the High Court. Finally he prayed the appeal to be dismissed with costs.

The court has carefully considered the submission of the counsel for the parties and gone through the proceeding and judgment of the trial court and find in relation to the first, second and fourth grounds of appeal which were argued together by the counsel for the parties that, as stated at the outset of this judgment

the center of dispute of the parties in this matter is the ownership of the land situates on Plot No. 153, Block "U", Sultan Area in Morogoro Municipality. The court has found the mentioned house was left by the late Paulo Mtali who was the father of the parties in this matter and he passed away in 1981.

That being the center of dispute between the parties the court has considered the submission by the learned counsel for the appellant who stated the trial court determined the case in favour of the respondent basin on weak, poor and unfounded evidence and find that, the evidence of the respondent in relation to his ownership to the land in dispute is to the effect that, after the death of their late father the land in dispute was given to him in 1995 by all members of their family on consideration of payment of Tshs. 200,000/= which was distributed equally to all members of the family. The respondent stated that, the land was given to him by the members of the family after seeing they were unable to pay for the costs of the land and it had a lot of debts. The above stated averment of the respondent is supported by the evidence recorded in the proceedings of the trial at page 58 of the typed proceedings where he stated that:-

"When it was in the year early 1995 my young brother, Fabian Mtali advised me that because I was working at Morogoro area and I had no house and because the banda at Sultan area was in the hands of the family it was good for me to ask the family so that they could have gave it to me because even the costs to pay for the said plot was a problem and there was a lot of credits (sic). After that advice on 22/09/1995 we all met at home Kiloka on the funeral of the daughter of our sister. When we met our young brother Fabian said that it was good time to talk about the advice he gave me as we were 8 children who are Suzana Paulo Mtali, Henrica Paulo Mtali, Rose Paulo Mtali, Theobald Paulo Mtali, Efraim Paulo Mtali, Fabiani Paulo Mtali, Yusta Paulo Mtali and Julietha Paulo Mtali. We all agreed that the said plot be given to me but not free, that I had to give them compensation ... my brother Theobald Mtali said that ... I had to

pay Tshs 200,000/= so that we could finish the all problems. I agreed to pay the said amount."

The above evidence of the respondent was supported by the evidence of Neema Shabani Kambaya, and Filbert Endrew, who testified as (PW2) and (PW3) respectively and both of them said the respondent is their uncle. The respondent's evidence was also supported by the evidence of his sister Rose Paulo Mtali who testified as 2nd third party in the case. In addition to that there is an agreement which was signed by five siblings of the respondent including the appellant himself to show they agreed to hand the land to the respondent and the said agreement was admitted in the case as an exhibit P1. The court has found all the above stated evidence explains how the respondent acquired the land in dispute.

The court has found on the side of the appellant his basis of the ownership to the land in dispute is that he was allocated the same by the administrator of the estate of his late father, one Theobald Paulo Mtani who was appointed on 8th day of November, 2007 by Chamwino Primary Court via Probate and Administration Cause No. 42 of 2007 to be the administrator of the estate of his late father. The evidence of the appellant to that effect is supported

by the evidence of the said Theobald Paulo Mtali who testified before the trial court as DW2. The other witnesses called in the side of the appellant to support his position were Majuto Nasibu, DW3 and Vivian Joseph, DW4.

Upon considering the evidence of the above witnesses the court has failed to agree with the submission of the learned counsel for the appellant that the case was determined in favour of the respondent on weak, poor and unfounded evidence. The court has arrived to the above finding after seeing the evidence of the respondent that the land in dispute was handed to him by all members of his family in 1995 was more plausible compared to the evidence of the appellant and his witnesses who testified as DW2 and DW4 and said the land was not given to the respondent by the member of his family.

The above finding of the court is backed by the fact that, the evidence recorded in the proceeding of the trial court shows there is no dispute that the respondent started living in the land in dispute from 1995 the year he stated to have been handed the land in dispute. There is also no dispute that the appellant came to the land later on after being invited by the respondent and conducted his business on the land up to 2003 when their dispute

started. Moreover the court has found exhibit P1 which the respondent said is the agreement for the family to hand to him the land in dispute shows the appellant is among the members of the family signed the said agreement.

The court has found the argument by the learned counsel for the appellant that the learned trial Magistrate erred in relying on exhibit P1 which the appellant and his witnesses denied to have participate in preparing it and find that is mostly based on assessment of credibility of the witnesses testified before the court which the trial court was in a better position than this court to determine the same. The above view of this court is supported by what was stated in the case of **Ali Abdallah Rajab V. Saada Abdallah Rajab and Others** [1994] TLR 132 where it was stated that:-

> *"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

The court has considered the argument by the counsel for the appellant that the family of the late Paul Mtali had no power to give the land in dispute to the respondent as the same was supposed to be given to the rightful heir of the deceased by only the administrator of the estate of the deceased. The court has come to the view that, although I agree with the position of the law stated in the case of **Farah Mohamed** (supra) that who has no legal title to the land cannot pass good title over the same to another but in the circumstance like the one in the case at hand that principle cannot be applied appropriately. The court has come to the above finding after seen that, it cannot be proper to say where members of the family who are entitled to inherit from the deceased agreed together to give the property to one of them and make the person given the property to belief in the agreement and worked on it as it was done by the respondent, they can turn out and relied on the said principle to take away what they gave to their fellow without entering into another agreement to rescind the former agreement to avoid injuring their fellow.

To allow such a situation to occur it will be contrary to what is provided under section 123 of the Evidence Act, Cap 6 R.E 2002 which provides that:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."

The court has found the evidence adduced before the trial court shows after the family of the deceased agreed to give the land to the respondent they required him to pay Tshs. 200,000/= which he paid and it was distributed to each member of the family. The act of the appellant and some of the members of the family including DW2 who was appointed as administrator of the estate of the deceased in Probate cause No. 42 of 2007 of Chamwino Primary Court to turn out and said the respondent is not entitled to own the land in dispute while they had already taking his money and allocate the land in dispute to the appellant is not only unjustifiable but also contrary to the above quoted provision of the law.

The court has considered another argument by the counsel for the appellant that the trial court erred in discussing the Probate cause No. 42 of 2007 and find though it is true that the trial court referred to the said matter while in the course of evaluating the evidence adduced before the court but there is no way the trial court would have avoided to discuss the said matter because it was extensively referred by the parties in their evidence and it was also used by the appellant as a basis of establishing his right to the land in dispute. This make the court to find this argument has no merit.

There is another argument raised in relation to the existence or none existence of Probate cause opened in 1981 by Eugenia Paulo Mtali which the counsel for the appellant said there is no evidence adduce to establish the same and come to the finding that, it is not true that Eugenia was not called as she was called and testified before the trial court as a first third party. Therefore if the appellant wished to establish anything through that party he had a chance to do so through cross examination when she testified before the court.

With regards to the third grounds of appeal whereby the learned counsel for the appellant is faulting the decision of the trial court which dismissed the counter claim of the appellant on the

ground that, as the respondent was acquitted in the said criminal case his claim cannot stand. The court has considered the submission by the learned counsel for the appellant and the decision made by the trial Magistrate in relation to the said ground and come to the finding that, despite the fact that DW3 and DW4 said in their testimony to have seeing a quarrel which led into the keys of the business place of the appellant to be taken but the court has found the trial court rightly found as the respondent was acquitted in the criminal case levelled against him it cannot be said the court would have found him liable in the counter claim of the appellant.

To the view of this court in order to succeed the appellant was supposed to establish the said event occurred and he suffered the claims he was claiming from the respondent. In the premises the court has found the argument made to this court by the counsel for the appellant has not been able to convince this court the trial court erred in any how in the decision it arrived in relation to the said ground of appeal.

Basin on what has been stated hereinabove the court has found there is no convincing submission made to this court by the appellant's counsel which managed to satisfy the court the grounds

of appeal filed in this court by the appellant have managed to establish the trial court erred in its decision. In the upshot the court has found the appeal of the appellant is devoid of merit and the same is hereby dismissed in its entirety. As this matter is involving relatives the court has found proper to order each party to bear his own costs. Order accordingly.

Dated at Dar es Salaam this 30th day of July, 2018.

I. ARUFANI
JUDGE
30/07/2018

COURT:

Judgment delivered in chamber today 30th day of July, 2018 in the absence of both parties who have failed to appear in court for long time. The parties to be notified the decision of this court.

I. ARUFANI
JUDGE
30/07/2018