

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND APPEAL NO. 21 OF 2021

(From the Decision of the District Land and Housing Tribunal of MOSHI
District at MOSHI In Land Case No. 96 of 2018)

EMILY JOSEPH MKAMBA.....1ST APPELLANT

VENANE EMANUEL MBOYA.....2ND APPELLANT

Versus

MICHAEL BENEDICT MBOYA.....1ST RESPONDENT

ISAYA RAPHAEL KIMATHI.....2ND RESPONDENT

JUDGMENT

Last Order: 9th Sept, 2021

Date of Judgment: 6th Oct, 2021

MWENEMPAZI. J.

The appellants Emily Joseph Mkamba and Venance Emmanuel Mboya sued the respondents Michael Benedict Mboya and Isaya Raphael Kimathi in the district land and housing tribunal of Moshi for trespassing in the suit land located at Kisowoni B Hamlet in Kindi Village Kibosho Moshi. The appellants claimed to be owners of the suit land since December 2013 without interruption until the year 2017 when the respondents invaded and started operations thereon by cultivating and stopping them from developing it.



They sought to be granted orders for vacant possession of the Suitland against the respondents, mesne profits and cost. After hearing from the parties, the tribunal entered judgment in favour of the respondents. Aggrieved by the decision the appellants have brought the present appeal before this court relying on ten grounds as enumerated in the memorandum of appeal. I will not reproduce the grounds in verbatim but I will consider them in the course of determining this appeal.

The appeal was argued by filing written submissions. Mr. Chiduo Zayumba learned counsel appeared and filed written submission on behalf of the appellants while Mr. Emmanuel P. Karia learned counsel appeared and filed written submission on behalf of the respondents. I have gone through the proceedings, judgment and the submissions filed carefully, I will thus discuss the grounds of appeal in the course of writing this judgment.

Submitting on the 1st ground of appeal which is in relation to declaring the respondents as owners of the suit land, Mr. Zayumba stated that the tribunal grossly erred to declare the Respondents lawful owners while the alleged ownership was derived from a person who had lost ownership in a competent court of law. He argued that the position of the law is as the Latin maxim that says ***nemo dat quo non habet***, (**No one gives who possess not**). He supported his argument with the Court of Appeal decision in the case of **Farah Mohamed vs. Fatuma Abdallah [1992] TLR 205** where it was held that he who doesn't have title to the land cannot pass good title over the same to another. He submitted that there is no dispute that the said Peter Sulia who is alleged to have sold the land to the respondents' father

/relative lost ownership of the land in Land Case Application No. 198/2009. He further submitted that there is no evidence that the decision of the tribunal had been reversed or overturned by a higher court to date. Thus, he prayed for the appeal to be allowed on this ground.

On the 2nd ground he submitted that the trial chairman erred by misinterpreting Exhibit P2 that is the judgment of District Land and Housing Tribunal in Application No. 198/2009. He submitted that the learned Chairman totally misunderstood the evidence adduced because the previous judgment in Application No.198/2009 is clear that Aloyce S. Mushi who was (PW3) at the trial won the previous case and was declared a lawful owner of the Suitland. He concluded that since the issue as to who between Peter Sulia and Aloyce Stanslaus Mushi is the lawful owner of the suit land had already been determined by a court of law and had never been overturned or reversed by any higher court, it was totally wrong for the learned chairman to disregard the previous judgment and award ownership to persons who claimed to have purchased from a person who loss a case.

Submitting collectively on grounds 3, 6 and 7 Mr. Zayumba stated that the Respondents evidence was very weak and totally useless even if there was no Exhibit P2 because of two reasons. (i) that there was no evidence at all how the person whom they alleged to be the previous owner acquired ownership of the suit land. There was no statement at all in the pleadings or in testimony. What was required in law was to show the vendor had legal capacity to sell the land. (ii) There was no evidence that the late Benedict Hamisi Mborow has ever been in possession of or used the Suitland up to

the time of his death. The learned counsel prayed for the appeal to be allowed on these grounds.

With respect to the 4th ground he submitted that the trial chairman erred by rejecting the appellants' argument made in final submissions presented without any reasons. He argued that the position of the law is that if a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same, and set out the reasons for rejecting or accepting it, otherwise, the decision becomes arbitrary one. To support this position the learned counsel cited the case of **Tanzania Breweries Limited vs. Anthony Nyingi** Civil Appeal No.119 of 2014 (TLSLR) 99.

Submitting on the 5th ground Mr. Zayumba stated that the chairman erred to declare the respondents' lawful owners of the disputed land while the 1st respondent was an administrator of the estate of his father and the 2nd respondent never claimed ownership of the Suitland. He argued that the respondents prayed for dismissal of applicants' claim, they did not pray to be declared lawful owners or the Suitland be declared to be part of the estate of the deceased. He argued that the relief granted by the tribunal was never prayed and the tribunal had no legal capacity to declare an administrator rightful owner. He thus prayed for the appeal to be allowed on that ground and the order declaring the respondent rightful owners be quashed and set aside.

On the 8th ground Mr. Zayumba submitted that the Appellants were not required in law to sue the person who sold land to them (PW3). He contended that since the said seller Aloyce Stanslaus Mushi did not refute

the sale to the Appellants and also, he had not trespassed into the land he had already sold, the Appellants had no cause of action to sue against him. Thus, prayed for the ground to be allowed.

With respect to the 9th ground, he submitted that since there were two portions of land divided by PW3 and sold to two different persons their size could not have been the same therefore it was the chairman who contradicted himself in deciding and not the Appellant's witnesses.

Finally on the last ground he submitted that the same is interrelated with grounds number 3,6 and 7 that the chairman did not properly evaluate the evidence adduced on record. That the chairman wrongly dismissed the Appellant's claim of ownership of the suit lands having purchased from a person who had won a case in a judicial proceeding before the same tribunal. On the basis of his submission, he prayed for the appeal to be allowed with cost.

Submitting in reply Mr. Karia learned advocate for the respondents stated that with respect to the 1st ground of appeal the appellants failed to prove their case on balance of probability. He argued that PW3 who purported to have sold the land to them testified that he sued one Peter Sulia at the District Land and Housing Tribunal vide Application No. 198/2009 which was decided in his favour. He further testified that Peter Sulia appealed to the High Court vide Appeal No. 5/2011 but he tendered Misc. Land Case No. 12/2011 instead of Appeal No. 5/2011 which could be a proof as to whether the application was reversed or upheld. Thus, the learned counsel submitted



that PW3 failed to establish how he became the owner of the Suitland thus being capable of sale or transfer the same to the appellants.

On the 2nd ground of appeal the learned counsel submitted that it could be difficult for any trial court to award ownership in the scenario at hand with absence of either ruling of Appeal No. 5/2011 or execution order, hence the trial chairman was right in his decision and for that reason he prayed for this ground of appeal to be dismissed.

Responding to grounds 3, 6 and 7 Mr. Karia submitted that in the trial case, the Appellants' witnesses contradicted each other on the size of the Suitland which made the trial tribunal to draw adverse inference to the Appellants and their witnesses contrary to what was testified by the Respondents and their witnesses especially the village leaders. With respect to the issue that there was no evidence at all how the Peter Sulia, acquired ownership of Suitland, he submitted that Peter Sulia acquired the Suitland by purchasing the same as evidenced on the **Exhibit D2**. He submitted further that according to (DW3) Peter Sulia acquired the Suitland from Kaminde and then sold the same to Benedict Mborow. It was thus his argument that the respondents tendered and testified strong evidence on how Peter Sulia acquired ownership of the Suitland. Regarding the issue of burden of proof, the learned counsel submitted that the burden lied with the Applicants since they were the ones asserting that the respondents are not owners of the Suitland. He thus prayed for the grounds to be collectively dismissed for lack of merit.



With respect to the 5th ground that the learned counsel submitted that the Respondents are both beneficiaries to the estate of the late Benedict Mboro because the 1st respondent apart from being administrator, he is also a younger brother of the deceased and the 2nd respondent is the son of the deceased. Thus, he submitted that the respondents are beneficiary to the Suitland, it was thus right for the tribunal to declare them the lawful owner of the property.

In the alternative the learned counsel submitted that based on the provision of **Section 45 of the Land Disputes Courts Act**, [CAP. 216 R.E 2019] it will be unjust for the court to reverse the Judgment of the District Land and Housing tribunal on reason that the trial chairman declared the respondents the owner of the Suitland. He contended that this minor technicality could not be used to quash and set aside the trial proceedings and judgment. He thus prayed for this ground of appeal to be dismissed for lack of merit.

On the 8th ground Mr. Karia submitted that the Appellants were required to sue the person who sold land to them (PW3). He argued that the seller was a necessary party to the case as he failed to convince the court how he became the legal owner of the Suitland. He was of the view that probably if sued the seller could bring witness who could establish his ownership of the Suitland. Failure of which made the whole case unproved on the balance of probability.

With respect to the 9th ground of appeal regarding appellants testimonies being heavily contradictory, the learned counsel submitted that the Applicants never described the size of Suitland as required by the law relating

to pleadings. He submitted further that in the same pleadings the size of suitland is not stated anywhere, thus, description of the Suitland was not clearly stipulated as required, however, in the hearing every witness came up with his own size of the suitland, thus he argued that the Appellants' testimonies were heavily contradictory. The learned counsel prayed for the appeal to be dismissed.

In the rejoinder submission Mr. Zayumba reiterated his submission in chief and added that being an officer of the court the learned counsel for the Respondents is duty bound to assist the court to arrive to a proper decision, and not to attempt to twist justice and waste the precious time of honorable court. He submitted that the issue of how PW3 became the owner was concluded and determined in application No. 198/2009 (Exh.P.2). He argued further that the law is very clear as demonstrated in the cited case of **SEBASTIAN NGIMBWA vs THE MINISTER FOR LANDS AND THE ATTORNEYGENERAL** Civil Appeal No.28 of 2003 (unreported) cited in the case of **SAMWEL EZEKIEL MWAISUMBE vs FAIZINDUSTRIES LTD** Land Case No.57 of 2012 HC at Dsm, that once a court had determined ownership there is no room to question the same ownership in another case, unless the decision is varied in a higher court. He thus submitted that the Respondents did not acquire any ownership from the said Peter Sulia, since the later lost ownership of the suitland in 2010.

Mr. Zayumba also submitted that the principle of substantial justice cannot be used to defeat mandatory provisions of law thus the Chairman erred by declaring the Respondents lawful owners something which they had never



prayed as a relief. He also submitted that the trial chairman did not only grant reliefs which were not pleaded but also assumed jurisdiction which he did not have that of distributing estate of a deceased person to his heirs. Mr. Zayumba argued that the error of unlawful assuming jurisdiction cannot be protected by principle of substantial justice or overriding objective because they are not minor technicalities. In the end Mr. Zayumba prayed for the appeal to be allowed.

The merits and demerits of this appeal lies on the issue as to whether ownership of the suitland was established. The appellants argued on their 1st ground of appeal that the trial chairman erred to declare the respondents as lawful owners while their deceased father purchased land from a person who had lost a land case in judicial proceedings. The respondents claimed that the suitland was the property of Benedict Hamis Mboro who purchased the same from Peter Sulia. The appellants argued that the suitland was initially owned by one Aloye Stanslaus Mushi who also testified at the tribunal as (PW3). The appellants argued that PW3 had successfully sued one Peter Sulia over ownership of the suitland and the judgement land case was tendered as evidence. The respondents on the other hand did not bring any evidence to show whether the said decision Exh.P2 was varied by a higher court. In absence of any other evidence to show that the decision was reversed by a higher court, then I find that Exh.P2 is conclusive evidence that PW3 had better title and the opposite is also true that one Peter Sulia had no better title. To this point the law is very clear as submitted by the appellants that the principle is no one can give what they do not have. The cited case of **FARAH MOHAMED vs. FATUMA ABDALLAH** [1992] TLR 205



is very relevant in the present scenario. Since the respondents failed to prove that the deceased had better title having derived his ownership from the person who lost title in a case as proved by Exh P2, I find that the chairman erred in his decision and thus I agree that the first ground of appeal has merit.

Having answered the first ground in affirmative, I see no reason in discussing the other grounds since this one ground is enough to dispose the entire appeal.

In light of the above, I find this appeal meritorious and I hereby allow it with costs.

Dated and delivered at MOSHI this 28th OCTOBER, 2021




T. MWENEMPAZI
JUDGE

Judgement delivered in Judge's Chamber in the presence of the 1st appellant and Mr. Chiduo Zayumba, their advocate and the 1st Respondent who was in person.




T. MWENEMPAZI
JUDGE