

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 120 OF 2021

(Originating from Land Application No 133 of 2020 at the District Land

and Housing Tribunal for Mara at Musoma)

NYEGORO RUBUBHI APPELLANT

VERSUS

THEOPISTA RUHUMBIKA RESPONDENT

JUDGMENT

14th March and 30th March, 2022

F. H. MAHIMBALI, J.:

The appellant having filed a land suit at the DLHT of Musoma, has been aggrieved by its decision in which it decreed the respondent as the lawful owner of the suit land in dispute.

The facts of the case can be put this way. The appellant claims possession of the said land from 1999 to 2007 where she fell sick and sent to traditional doctors at Musoma rural for medication, leaving her land to one Tabu Masole. That in 2008, the said Tabu Masole had left to

Bunda looking for green pasture where she temporarily left the said suit land in the superintendence of the respondent. That on 6th February 2009, it is alleged that VEO of Busirime had forged documents establishing that Tabu Masole had sold the said land to the respondent.

On the other hand, the respondent claims ownership of the said land as sold to her by the daughter of the appellant and that the said daughter attempted to grab back the said land from her but could not succeed as it was ruled in her favour.

The interesting thing in this case, after the said Tabu Masole had failed to claim the said land by her own name, her mother now filed this suit but donated power of attorney to the said Tabu Masole to claim the said land.

Having heard the evidence of the case, the trial DLHT ruled in favour of the respondent. This aggrieved the appellant, thus the basis of this appeal, namely;

- 1. That the trial tribunal failed to consider evidence adduced by the appellant that she is the legal owner of the disputed Land; the same was not challenged by the respondent.*

2. *That the said daughter of the appellant had no legal right to sale disputed Land since she was not the owner of the dispute Land; hence the purported sale is illegal.*
3. *That the trial chairman failed to evaluate the evidence of witnesses from both sides the respondent agree that she purchased the said Land from Tabu Masore the daughter of the appellant without legal authority,*
4. *That the trial chairman grossly misdirected when said that the appellant lodged her case from back door, the Appellant lodged this case before the trial Tribunal as per this Tribunal's decision that Tabu Masore had no locus stand; this was clearly stated in District land and Housing Tribunal decision; application No. 160 of 2019*

During the hearing of the appeal, the appellant was represented by Mr. Makongo, learned advocate, whereas the respondent fended for herself.

Arguing first the second ground of appeal, Mr. Makongo submitted that as per evidence in record, the respondent is said to have purchased the said land from Tabu Masole who is the daughter of the appellant. This fact is undisputed by the respondent (see page 2 of the typed judgment of the DLHT). He argued that, as per law, the said seller (daughter of the appellant) had no legal mandate of selling the same for want of good title. First, there was no evidence that the said seller had

been authorized by the appellant to sell the said land. Nor the respondent prayed that the said Tabu Masole be joined as party to the case. Therefore, there is no evidence that the said Tabu Masole sold the land in dispute to the respondent nor authorization by the appellant to the said Tabu Masole. According to the evidence, it is undisputed that the ownership of the said land had been vested to the appellant. Therefore, it is his candid view that the appellant is the lawful owner of the said land in dispute. By this submission, he clarified that the 2nd and 3rd grounds of appeal have been well taken into board.

With ground no 4, it is his view that the DLHT failed to apprehend the facts of the case and evidence and thus arrived at a wrong verdict. As per page 3 of the typed judgment, the argument that there ought to have been joined the said Tabu as party or made a witness of the said case it does not make sense. As there was no dispute between the appellant and the said seller, then it was not necessary to make her a party or witness on that finding.

He submitted further that, more facts of this dispute establish that the said Tabu had instituted the case against the respondent up to High Court but lost on legal aspect that the competent party is not Tabu but the appellant. This then, is the genesis of this present case at the DLHT.

The findings of the trial chairperson (last page) that the appellant filed this case upon the finding that the front door had been closed, so she wanted to use the rear door, it is not clear which is rear door and which one is rear door. His observation is this, the Hon. chairperson didn't apprehend the facts and evidence of the case well in respect of this case, thus led to miscarriage of justice.

He concluded his submission by saying that, since the affidavital testimony/evidence by the appellant at the DLHT remained uncontested, therefore it is his humble submission that this appeal be allowed with costs.

In replying to the submission by the appellant's counsel, the Respondent submitted that the said Tabu is the daughter of the appellant. She wonders that now is the holder of power of attorney of the said appellant. She tried to persuade that, this Tabu had sold the said plot to her, unfortunately she turned back against her and sued her but unsuccessfully. This appeal is thus hopeless and just time consuming added the Repondent. By the phrase that the front door had been closed and now came by the rear door, simply means that the appellant first sued her through her daughter. After she had failed, is now emerging herself. This is the called rear door.

Having heard the rival submissions from both parties, the important issue here for determination is whether the appeal is meritorious. The determination of this issue will then make a finding as to who between the appellant and the respondent is the rightful owner of the disputed land.

As per witness statement of the appellant at the trial tribunal, deponed that she is the owner of the said piece of land situated at Busirime Hamlet in Busirime village within Butiama District as she purchased the said land on 17th November, 1999 from one Julius J. Joke Magari under fiduciary relationship for a consideration of TZs 30,000/=. That the said transfer was witnessed by Sabatho Mafuru, Hamis Magoma, Sabu Charles, Tabu Masore and Rubhubhi Raphael. That after the said purchase, she continued occupying the same until 2007 when she fell sick and taken to Majita for traditional medication where she left the said plot under the charge of Tabu Masole – her daughter. She deponed further that, in 2008 her daughter as was shifting to Bunda, the said daughter (Tabu Masole) invited the respondent to use the said suit land temporarily for both residential and agricultural purposes only on her behalf. It was then surprising as to her when she came to learn in 2009 that the said land was then mistakenly granted to the

respondent allegedly sold by Tabu Masole. She denies mandating anyone including the said Tabu Masole to sell the said plot to anyone. She claims possession of the said land by the respondent by any agreement not known/sanctioned by herself is void ab initio.

On the other hand, the respondent in her written witness statement in reply to the appellant's written witness statement deponed that, what she knows, the said land was sold to her by Tabu Masole who is the daughter of the appellant at a price of 700,000/=. Unfortunately, the said Tabu Masole is now the holder of power of attorney for the appellant. That after the said purchase, the said Tabu Masole preferred a land suit against her in grabbing the sold land. She stood firm at the DLHT of Musoma where she won the said case. When she appealed before the High Court Mwanza, the said Tabu lost the appeal for want of locus standi. She wonders to find her now suing on behalf of her mother for the same plot decreed by the DLHT of Musoma that the said land is hers.

In her further testimony, she wondered why the said Tabu didn't testify on her behalf that she didn't sell the said land to her or say that she handed it to her on trust when she left for Bunda. As there is no proof that the said appellant purchased the suit land from Mr. Julius,

why then the said Julius didn't testify on her behalf? She considered the appeal as frivolous.

The short of this case's facts, is lack of sufficient evidence from the appellant if all that she deposed in her witness statement is true. There is no evidence from Tabu Masole (her own daughter) that she truly received instructions from her mother (the appellant) that she supervised the said farm and that she later handed it over to the respondent temporarily on her behalf. Had there been evidence from the said Tabu that she just handed over the said suit land to the respondent, the deposition of the appellant would have made sense against the respondent. Since victory in civil suits is given to the party with weightier evidence, in the circumstances of this case, it is more questionable as to why the appellant didn't sue both the respondent and the said Tabu Masole (her own daughter) if she alleged to have sold it unlawfully to the respondent. As the said Tabu is not sued or made the witness of the appellant, I wonder how could the appellant expect a favourable verdict in the absence of proof. Had there been an establishment that the said Tabu just handed over the suit land to the respondent just for use and not on sale, the forgery allegation would have been possible. Considering the fact that the said Tabu who is now

the holder of power of attorney of the appellant attempted to sue the respondent on claim of ownership of the same land before the DLHT and eventually High Court, all unsuccessfully, it is wonderful now how can the appellant establish ownership in the absence of concrete proof. On the other hand the respondent cannot in the current position between her and Tabu to use Tabu as her witnesses she has turned hostile against her.

In the circumstances of this case, I concur with the Hon. Trial Chairperson that the appellant has now come by the rear door seeking for the same remedy which Tabu Masole had attempted to seek against the respondent through the front door that has been closed. The same could yield, had there been sufficient proof of ownership of the said land by the appellant against Tabu and that of Tabu against the respondent. Where one claims possession of the said land by purchase, then it is equitable that the vendor should be a party to the case. In the instant matter, it was inevitable that Tabu should either have testified on behalf of the appellant (her mother) or jointly sued with the respondent for wrongly selling the said land. Otherwise, it is hard to believe if the claimant is really the appellant or other persons in her behalf. Only a party whose evidence is heavier than the other, is the one who must win

and not otherwise (See also **Hemed V. Mohamed Mbilu** [1984] TLR 113). In the current matter where there is no evidence by the said appellant leaving the said suit land to Tabu Masole and also that of Tabu Masole leaving land to the Respondent, then the possibility that the said land might have been belonged by the appellant, the chances are highly improbable. Alternatively, the respondent's story is more plausible and convincing unless dully rebutted by the appellant's daughter one Tabu Masole who now happens to be her legal representative.

All that said, the appeal is dismissed with costs for being devoid of any merit.

DATED at MUSOMA this 30th day of March, 2022.



F.H. Mahimbali
Judge

Court: Judgment delivered this 30th day of March, 2022 in the presence of the both parties and Mr. Gidion Mugo, RMA.

Right of appeal is explained.

F.H. Mahimbali
Judge

30/03/2022