

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 55 OF 2021

(Arising from Land Application no. 12 of 2021 at Maswa District Land and Housing Tribunal)

ELIAS SALUM.....APPELLANT

VERSUS

GAYILA GESA.....RESPONDENT

JUDGMENT

29th July, 2022

MATUMA, J;

The respondent successfully sued the appellant in the District Land and Housing Tribunal for Maswa at Maswa for recovery of two (2) acres of Land situated at Ng'oma hamlet, Nyashimba village, Badi Ward within Maswa District in Simiyu region.

The respondent at the trial tribunal alleged that he bought the suitland from one Mabonyesho Lyasi in 2004 while the appellant alleged to have bought it on 28/7/2015 from one Mashaka Lameck for 12 cows.

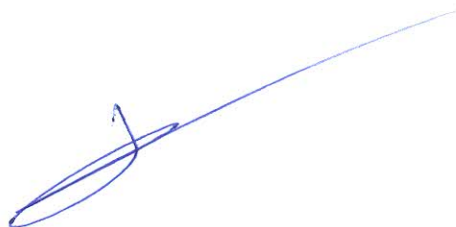
After a full trial, the trial tribunal found that the respondent was the lawful owner of that suitland the decision of which aggrieved the appellant hence this appeal with five grounds whose major complaints are;

- i) *That the trial tribunal erred to rely on the evidence of Kwangu Nima (PW2) who was not the vendor of the suitland to the appellant.*

- ii) *That the trial tribunal erred to entertain the suit without a necessary party (Mabonyesho Lyasi) either as a party to the suit or as a witness.*
- iii) *That the trial tribunal erred to receive and rely on secondary evidence by the respondent.*
- iv) *That the burden of proof was wrongly shifted to the appellant.*
- v) *That the trial tribunal erred to entertain the suit as a fresh one instead of requiring it to come as an appeal.*

At the hearing of this appeal both parties were present in person and had the services of Mr. Jacob Somi and Mr. Shabani Mvungi learned advocates respectively. Mr. Jacob Somi in addressing the first ground of appeal submitted that, it was wrong for the trial tribunal to rely on the evidence of Kwangu Nima (PW2) who infact did not sell the suitland to the appellant as the real vendor was Mashaka Lameck. Responding on that ground, Mr. Shabani Mvungi submitted that PW2 was the proper witness as she was the owner of the suitland and had sent her son Mashaka Lameck to sell it to the appellant but the appellant having bought it expanded the boundaries into the area of the respondent which was not sold to him.

On my side I find the first ground with merits. It is in evidence throughout the records that it was Mashaka Lameck who sold the suitland to the Appellant. Mashaka Lameck was better positioned to explain whether in selling the land to the appellant, the suitland was inclusive or not and if inclusive whether he owned it or had whatsoever authority to sale it to the appellant.



The evidence of Kwangu Nima was not enough to resolve the dispute between the parties.

In fact she repeatedly claimed against the appellant that she was yet paid the purchase price balance which are three cows while the appellant claimed to have bought the land from Mashaka Lameck and paid the purchase price fully. Therefore PW2 had an interest to serve and her evidence ought to have been taken with a great caution.

PW3 Zengo Lameck the son of PW2 had similar interest to serve. He claimed that they sold the land to the appellant but the appellant did not finish paying the purchase price to date; PW2 Kwangu Nima, Page 5 and 6 of the proceedings;

"I sold my land to the respondent for a total of ten cows, he paid seven as advance. There remained three and we agreed to put the sale in writing once he completes when time came for him to complete he said that he was not ready....."

"We did not put the sale in writing as the respondent had not completed....."

PW3 Zengo Lameck at page 7 of the proceedings;

".....akasema ng'ombe zilizobaki atazitoa mwaka unaokuja na tutaaandikishana atakapomaliza lakini hajanipa mpaka leo."

With such extracts, PW2 and PW3 have clear interest to serve because the appellant himself and his witness testified that he bought the suitland from Mashaka Lameck and paid 12 cows with no remaining balance.

In fact DW3 Fabian Mahambo 54 years old gave a neutral evidence for both parties which ought to carry heavy weight in determination of this suit.

He testified that the suitland and the other thereat was originally owned by his father Mahambo. That Mahambo divided his land into two and sold them to mwanasindoma and Mabonyesho Lyasi. Then Mwanasindoma sold that which he purchased to Mashaka Lameck who in turn sold it to the appellant.

On the other hand Mabonyesho Lyasi sold his purchased land to the respondent whom he knew by the name of Christopher Gesa.

In that respect Mashaka Lameck sold his land and not as an agent of PW2. It was wrong to determine the suit relying on the evidence of PW2.

That takes me to the second ground in respect of necessary parties. While Mr. Jacob Somi learned advocate contended that Mabonyesho Lyasi was a necessary party in the suit or atleast be called as a witness, Mr. Shabani Mvungi learned advocate contended that PW2 was enough.

In the circumstances of this case both Mabonyesho Lyasi who sold the suit land to the respondent and Mashaka Lameck who sold the same to the appellant were necessary parties.

They were the one who could resolve the dispute by each establishing his lawfulness in the ownership of the suitland before passing it to their respective buyers who are the parties herein.

The Respondent in instituting the suit at the District Land and Housing Tribunal ought to have joined all these necessary parties because

he was aware that the appellant claimed ownership thereof by way of purchase from Mashaka Lameck. This is because there dispute started at the village level and then to the Ward level before getting into the District Land and Housing Tribunal. His total neglect to join Mashaka Lameck as a necessary party calls for adverse inference against him. He ought as well to call Mabonyesho Lyasi to establish whether he really sold him the land including the one in dispute.

The evidence of PW2 that she did not own the land extending to the one in dispute even if we believe her to have been the owner of the said land, was not an evidence to the effect that the one in dispute was really sold by Mabonyesho Lyasi to the respondent. I therefore allow the second ground as well.

The 3rd ground of appeal that the trial tribunal erred to receive and rely on secondary evidence should not detain me much because there is oral evidence on record from both parties that both the appellant and the respondent bought their respective lands. The dispute is on encroachment into either one's boundaries.

Therefore the secondary evidence is hereby expunged but that does not negate the sale and purchase to either party. See; ***Loitare Medukenya V. Anna Naraya, Civil Appela no. 7 of 1998*** in which the Court of Appeal held that oral evidence can as well support a sale.

The 4th ground that the trial tribunal erred to shift the burden of proof when it held that the appellant did not bring his vendor was counter argued by Mr. Shabani Mvungi in that the trial tribunal did not shift the burden of proof.



I agree with Mr. Jacob Somi learned advocate that indeed, the trial tribunal shifted the burden of proof to the appellant. At the trial tribunal, it was the respondent who instituted the suit claiming ownership thereof. In terms of **sections 110 (1), (2) and 111 of the Evidence Act, Cap. 6 R.E 2019** he who alleges existence of a certain fact must prove that such fact exists.

In this case it was the respondent who alleged to have bought the suitland from Mabonyesho Lyasi. He was him therefore to prove not only that he bought the suitland from Mabonyesho Lyasi but also that Mabonyesho Lyasi owned it legally and had title to pass to him.

In the case of **Jumanne s/o Chimpaye V. Daud Mohamed Nkwaje (Administrator of the estate of the late Mohamed Nkwaje) Misc. Land Appeal no. 4 of 2020**, High Court at Kigoma, I had an opportunity to observe and rule out that even when purchase has been sufficiently proved, the buyer would still owe a duty to prove that his vendor had a better title to pass it to him.

In this case it was not enough for the respondent to prove that he bought the suitland from Mabonyesho Lyasi. He ought to go further and establish that Mabonyesho Lyasi had a better title thereof to pass it to him.

He could have done so by bringing the said Mabonyesho Lyasi to acknowledge first whether he sold him up to the area in dispute and two, that he had better title thereof. The two potential aspects were not established on the balance of probabilities. Therefore it was wrong for the trial tribunal to adjudge the suit against the appellant merely because he did not bring his vendor.

The appellant had no duty to prove the respondent's case although such vendor was as well important as I have said earlier. With this observations, I allow this ground as well.

The 5th ground is without any merit because the decision of the Ward tribunal was quashed on appeal and the suit started afresh. As to why the respondent did not start the suit afresh in the Ward tribunal and instead decided to start it in the District Land and Housing Tribunal, was a matter to be raised and determined in the trial tribunal.

I therefore agree with Mr. Shabani Mvungi that this ground is uncalled for and accordingly dismiss it.

In the final analysis, and with the available evidence or record, the appellant had heavier evidence than that of the Respondent and as a matter of law ought to have won the case.

The respondent brought PW2 and PW3 supra as his witness but none of them claimed to have owned the suitland which is alleged to have been trespassed or that to have any knowledge as to how it got into the hands of the respondent.

They gave evidence showing their bad blood with the appellant as I have said.

The respondent did not bring his vendor to establish the two aspects I have demonstrated supra on whether he sold the land extending to the dispute one and whether he had a better title thereof.

On the other hand the appellant had strong evidence from his witnesses supporting his case.

DW2 Misana Daudi 76 years old is the neighbour to the suitland. He testified on how they tried to resolve the dispute between the parties herein by requiring them to bring their respective vendors whereas the appellant brought him but the respondent did not.

DW2 witnessed the appellant buying the suitland and new that the land belonged to that particular vendor;

"Nilikuwepo kwenye makabidhiano mdaiwa aliponunua eneo."

The evidence of DW2 was corroborated by that of DW3 the son of the original owner who explained thorough on how the land passed titles from his late father Mahambo into several hands and finally to the parties herein. In respect of the suitland he affirmatively stated that it belonged to Mashaka Lameck;

"Kati yako na Mashaka mwenye eneo ni Mashaka."

When he was asked by the assessor Mr. Shambulilo he testified;

"ninalifahamu vizuri eneo la mgogoro. Nimezaliwa na kukulia hapo. Eneo hili ni la mdaiwa."

The appellant was further corroborated by DW4 Mr. Lunija Shada the village chairman. In trying to resolve the dispute they visited the suitland and found that the respondent had fixed a new boundary. They thus required the respondent to bring he who sold him but he did not do so. Instead he rushed to institute a case to the tribunal to pre-empt the amicable settlement by the village.

On his party the appellant had brought his vendor who confirmed to have sold the suitland to the appellant as his own property;

"Mimi hapa nathibitisha kuwa Mashaka aliuza maana alisema mbele yangu na wewe ulikuwepo wakati anasema hivyo."

Page 16 of the proceedings. With all these evidences I find that the trial tribunal wrongly entered judgment in favour of the respondent. I therefore quash the judgment of the trial tribunal and set aside the decree thereof.

The appellant is hereby decreed as the lawful owner of the suitland.

This appeal is allowed with costs.

It is so ordered.




A. MATUMA
JUDGE
29/07/2022