

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 47 OF 2021

1. SHILINDE BUKOYE }**APPELLANTS**
2. PAULO MAYUNGA BUDEDE }

VERSUS

NDUNYA MWANDU.....RESPONDENT

[Appeal from the Decision of District Land and Housing Tribunal for Maswa
at Maswa.]

(J.T. Kaare, Chairman)

dated 19th day of August, 2021
in
Land Application No. 81 of 2021

JUDGMENT

25th April & 28th June, 2022.

S.M. KULITA, J.

This is an appeal from the District Land and Housing Tribunal for Maswa. In a nut shell, the Respondent herein, filed a land application at the District Land and Housing Tribunal for Maswa, claiming that the 2nd Appellant has trespassed into his land.

The records show that, the Respondent was in custody since 2013 up to 2019 following an accusation of murder offence. It was the Respondent's evidence that, after he was released from jail, is when he found out that, his house is being occupied by the 2nd Appellant.

Following non-appearance of the 1st Appellant, the case at the trial Tribunal was heard *ex-parte* as against him. In his defense, the 2nd Appellant claimed that, during the time that the Respondent was in jail, he (Respondent) gave consent to his brother (the 1st Appellant) to sell the disputed land. It was this time, when he (2nd Appellant) bought the same and entered into the said disputed land with a house thereon.

The trial proceeded, at its end, the Respondent became successful, and further, the trial tribunal ordered the 2nd Appellant to vacate from the disputed land.

Aggrieved with that decision, hence, this appeal with mainly two grounds; **One**, that the trial tribunal erred for not considering the 2nd Appellant's evidence, **two**, that the trial tribunal erred for not ordering the refund of his Tshs. 3,000,000/=, being the purchase price for the disputed land.

The Appeal was heard on 25th of April, 2022. Both parties appeared in person.

Submitting in support of the appeal, the Appellant opted to adopt his grounds of appeal to stand as his submissions. The same procedure was adopted by the Respondent, who prayed for his reply to the grounds of appeal to stand as his reply submissions.

I have taken into consideration both parties' submissions, the available records and the rival issues as well. I am prepared to determine the grounds of appeal one after the other, in seriatim.

Concerning the complaint that the 2nd Appellant's evidence was not considered by the trial tribunal, the Respondent replied that, it is a lie. According to the case of **AUGUSTINO SAMSON v. THE REPUBLIC, CRIMINAL APPEAL NO. 254 OF 2014, CAT at MBEYA**, non-considering of the defense evidence is wrong. It is the duty that the trial court is ought to have done. If that is not done by the trial court, the first appellate court is required to step into the shoes of the said trial court and re-evaluate the evidence.

In the case at hand, in order to ascertain whether the 2nd Appellant's evidence was considered or not, I had to go through the trial tribunal's

proceedings and its decision. In it, I found the herein bellow quoted wordings from the judgment; -

"Kwanza hakuna ubishi kwamba kabla ya kuanza mgogoro huu eneo la mgogoro lilikuwa ni la mdai. Hakuna ubishi pia kwamba mdai alipata tuhuma za mauaji na akakamatwa na kukaa gerezani kwa muda wa karibu miaka saba. Pia hakuna ubishi kwamba mdai wa pili alinunua eneo la mgogoro katika kipindi ambacho mdai alikuwa gerezani. Najua kwamba kuna hoja imetolewa na mashahidi wa mdai wa mdai mwenyewe kuwa mdai alitoa idhini kwa mdogo wake ambaye ni mdai wa kwanza, auze eneo la mgogoro ili apate pesa za kusaidia kumtoa mdai jela. Maelezo haya, kama walivyoeleza washauri wa baraza katika maoni yao, hayana Ushahidi wa kutosha. Nina maoni hayo kutokana na ukweli kwamba, kwanza, hakuna ubishi kwamba mdai hakuwepo wakati mdai wa kwanza na mdai wa pili wanafanya mauziano na kuandaa kielelezo cha hati ya mauziano ambacho mdai wa pili amekitoa hapa barazani.

Kuna maelezo kwamba mdai alitoa idhini kwa mdogo wake, mdaiwa wa kwanza, kuuza eneo lake. Hoja hii pia haina ushawishi wa kutosha. Hii ni kwasababu hata kama maelezo hayo yangukuwa kweli bado kulikuwa na uwezekano wa kumpelekea mdai hati ya mauziano ili aisaini kuonesha ushiriki wake katika mauzo hayo. Ikumbukwe kwamba alikuwa mahabusu tu na kama waliweza kumtembelea ili kumjulua hali, sioni sababu ya wadaawa na mashahidi wao kushindwa kumfuata kwa nia ya kuandikishana mkataba wa mauzo kama ni kweli alikuwa ametoa idhini ya kuuza eneo lake.”

The above quoted paragraph shows that, in its decision, the trial tribunal considered the defense evidence that, the 2nd Appellant bought the disputed land, and that he bought it while the Respondent was in jail. Further that, the Respondent authorized his brother who is the 1st Appellant to sell the disputed land. And that, the 2nd Appellant executed the sale contract of the disputed land with the 1st Appellant. These are the words of the defense side (2nd Appellant herein) at the trial tribunal. Hence, the defense evidence was considered.

What actually, the trial tribunal did is not to side with the 2nd Appellant, particularly on the issue of the Respondent's consent to sell the disputed land. On this issue, I see no point to fault the trial tribunal. This is because; **first**, the 2nd Appellant had a chance to execute contract of sale with the Respondent directly, but he did not. **Secondly**, the 2nd Appellant did not tender to court any document like Power of Attorney purporting to authorize the 1st Appellant to sell the disputed land on behalf of the Respondent. Tendering a contract of sell that has been signed by the Respondent's brother, in itself does not prove that the Respondent consented on it. On that account, as the 2nd Appellant's evidence was considered, I see no point to fault the trial tribunal. Hence, no need of this appellate court to step into its shoes and re-evaluate the evidence. I therefore declare that this ground of appeal by the 2nd Appellant lacks merits.

On the last ground of appeal, that the trial tribunal was to order refund of the purchase price, the records at page 12 of the typed proceedings of the trial tribunal show that the 2nd Appellant tendered the sale contract of the disputed land (Exhibit P1) without first laying the foundation. Further, the said document was not given to the other party to ascertain whether there was an objection on its admissibility or not.

These are procedural irregularities. With these irregularities, Exhibit P1 cannot be acted upon. On that note, the court cannot be certain on the amount which was a purchase price. For that matter, the trial tribunal was right for not ordering the refund of Tshs. 3,000,000/= to the 2nd Appellant. The 2nd Appellant, if he so wishes, should institute a fresh case against the 1st Respondent, claiming for a refund of his purchase price.

All said and done, as all grounds of appeal have failed, I proceed to dismiss the same for being unmeritorious.

Order accordingly.



S.M. KULITA

JUDGE

28/06/2022

DATED at **SHINYANGA** this 28th day of June, 2022.



S.M. KULITA

JUDGE

28/06/2022

