IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO.08 OF 2020

(Originating from the District Land and Housing Tribunal of Songea in Land Case No. 243 of 2016)

DR. WADE ASYUKILE KABUKA..... APPELLANT

VERSUS

ASUMAN RASHID.....1ST RESPONDENT

ALLY AMIR.....2ND RESPONDENT

MAUA KIBONGE.....3RD RESPONDENT

ANDENDE DAMLA.....4TH RESPONDENT

JUDGEMENT

Date of Last Order: 08th June 2022
Date of Judgement: 16th August 2022

U. E. Madeha, J.

This appeal stems from the decision of the District Land & Housing Tribunal for Ruvuma (henceforth "the DLHT") whereby the Appellant herein sued the Respondents herein for recovery of land to wit PLOT NO.613 LDRA Block 'NN' (henceforth "the disputed land"), which he alleges that it is trespassed by the Respondents.

Before the DLHT, the Appellant claimed to be the legal owner of the disputed land as he bought the same from one Dr. Umilila Apaligwe Sengo in 2007 wherein it included an incomplete structure. To support his assertion, he called one witness (PW2, the land surveyor of Songea Municipal Council on behalf of the Land officer) and tendered several documentary evidence.

On their part, the Respondents brought two witnesses that is; (DW5 & DW6) and tendered one documentary evidence (a survey letter of the year 1980). Their arguments spanned on the point that the Appellant owns only a portion of the disputed land sold to him by Dr. Umilila Apaligwe Sengo (whereby Dr. Sengo was given the same by their late father in order to build a pharmacy). Thus, they were of the view that they are not trespassers and it was the Appellant who trespassed since he was trying to add a portion of land that he never bought. They stated that their late father gave Dr. Umilila a portion of land measuring 20mx20m where he wanted to build a pharmacy.

Upon conclusion of hearing the DLHT dismissed the application as it held that the Appellant is not the owner of the whole disputed land save a patch of land sized 20/20 metres that was given to Dr. Umilila

Apaligwe Sengo before selling the same to him and the Respondent's areas are within 60 meters from the rivers. The DLHT further declared that the Respondent have usufructuary right out of the same.

Displeased by such a finding the Appellant sought an appeal before this Court. His main grounds of grievance are such as:

1. *That the DLHT erred in law and fact as its judgement is contrary to the matter filed before it and the evidence adduced by the Appellant.*
2. *That the DLHT erred in law and fact for failure to consider the evidence adduced by the Appellant during the trial while its evidence was watertight than the Respondents.*

Basing on the above grounds, the Appellant requested this Court to allow the appeal, hence set aside both judgement and decree of the DLHT and further declare that he is the lawful owner of the disputed land (in the alternative the matter be tried de-novo) and issue any other relief as it may deem fit.

The Court scheduled hearing of the appeal to be in-terms of oral submissions. On the date set for hearing the Appellant was represented

by none other than the Learned Advocate Mr. Zuberi Maulidi. On the contrary, the Respondents appeared in person.

Mr. Zuberi Maulidi began his submission by praying that his grounds of appeal form part of his submission. Additionally, he suggested that both grounds are inter-related in such a way that they are based on the contention that the DLHT failed to evaluate the evidence. The Learned Counsel further submitted that the DLHT failed to evaluate the evidence on the record because the Appellant proved its case on the balance of probabilities.

That the Appellant tendered a certificate of right of occupancy, the sale, and the letter of transfer which clearly proves that he bought the disputed land from Dr. Umilila Apaligwe Sengo in the year 2007 thus he is the owner of the land as shown on page five (05) of the typed proceedings. The learned Counsel further argued that the Respondent failed to question PW2 as such they agreed to all his submission as stated in the case of **Josephine Daniel v DPP** Criminal Appeal No. 519 of 2019 Court of Appeal of Tanzania sitting at Mbeya (Unreported) on page fifteen (15). Moreover, He insisted that none of the Respondents managed to prove ownership of the disputed land.

On the same note, Mr. Zuberi Mauridi submitted that this appeal arises from land case No. 234 of 2016 before Songea District Land and Housing Tribunal. Whereas, the Appellant had filed two (02) grounds of appeal as seen in the memorandum of appeal supporting this appeal. Moreover, he prayed that the grounds of appeal to be adopted as part of his submissions. The Appellant Counsel contended further that, a far as the evidence is concerned, the presented evidence was contradictory in nature that is in the court's judgement. In regard to that, the District Land and Housing Tribunal did not consider the evidence presented by the witnesses. In his opinion, the Appellant has proved his case to the required standards, that is, in the balance of probabilities. Moreover, he has proved that he is the owner of the disputed land. To add to it, he stated that when reading the proceedings of the District Land and Housing Tribunal, pages three (03) and four (04), the Appellant stated at the tribunal that he is the real owner of the disputed land situated at Makambi. In fact, the Counsel elaborated that, he bought the land from one person called Dr. Sengo in the year 2007. In proving this case, the following exhibits were tendered in the tribunal which are; the Certificate of rights of occupancy and the letter of the transfer of the disputed area. Furthermore, he elaborated that all the exhibits were

received in the Tribunal as exhibit P1 as shown on page five (05) of the proceedings. The learned Counsel contended that; there is no need to expunge the appellant's evidence. He further argued that the Respondent did not ask any questions while the land surveyor was giving his evidence. Therefore, they have concurred with the evidence presented as stated in the case of **Josephine Daniel v. DPP Criminal Appeal** No. 519 of 2019 CAT Mbeya page 15 unreported case. He argued further that, the chairperson of the District Land and Housing Tribunal failed to consider the evidence given by the respondent. Strange as it may sound, all the Respondents failed to explain in Court that they were the rightful owners of the land. He said, DW1 claimed that the disputed land belongs to his late father. Unfortunately, he failed to state that he was claiming the land as an administrator of his father's estate.

He further contended that the Respondent failed to bring even a single witness so that he could give evidence of the ownership of the disputed land. Eventually, the learned Counsel further argued that; The third (3rd) Respondent stated that he was given the area or the land by Binti Maua as stated on page fifteen (15) of the Tribunal proceedings. In a nutshell, he insisted that going through the evidence of DW4 on pages

sixteen (16) and seventeen (17) there was nothing concerning the area or that particular piece of land.

Moreover, he asserted that, the chairman of the District Land and Housing Tribunal did not consider the evidence given by the Appellant and gave his decision contrary to the evidence available/present. As a result, the reason for the decision was that the certificate of the rights of occupancy as a Tribunal exhibit that shows the measurement of the area. The learned Counsel further submitted that, exhibit P1 tendered in Tribunal was to prove the measurement of the disputed plot of land and to ascertain sixty (60) meters from the river. That, the alleged disputed land which the Appellants own is not within sixty meters from the river, the key person who is supposed to prove that fact was the land officer who was issued the certificate of the title deed to the Appellant. He added, to decide whether the Respondent is within sixty (60) meters from the river or not. then the Tribunal has to issue an order for visiting the locus in quo and additional evidence.

Mr. Zuberi Mauridi further contended that; the land was allocated in the year 1988 whereby the law which requires a person to skip sixty (60) metres for the allocated land was enacted in the year 2004

whereby the disputed land was already allocated. Moreover, the learned Advocate added that after visiting the locus in quo it become apparent that all the Respondents are within sixty (60) meters from the river bank. For that purpose and according to the evidence tendered by the land officers the disputed land is within sixty (60) meters from the river bank. The Counsel further contended that all the land occupied by the Respondent that is about 1600 squares kilometres is the property of the Appellant.

Finally, Mr Zuberi, prayed that this to Court stay the appeal and issue an order for additional evidence by applying the decision made in the case of **Avit Thadeus Massawe v Isidory Assenga,** Civil Appeal No. 6 of 2017 Court of Appeal of Tanzania at Moshi (Unreported). where the Court had a similar scenario and decided to order the Trial Court to take additional evidence. Specifically, they prayed to visit the locus in quo to clear up the contradiction as to the location of the disputed land. That, as far as the locus in quo is concerned, the trial Tribunal will be able to ascertain apart from other issues such as the issue of boundaries, the actual size of the land, and the location of the disputed land.

On their response, the Respondent's side, the first (1st) Respondent was absent hence the appeal was heard ex-parte against him. The second (2nd) Respondent contended that from the first (1st) date this appeal was filed he objected to the evidence of the land officer that the said evidence given by the Appellant is not valid. This is because they said that in the western side there is a road in fact there is no road but in real sense, that side has a river called the Makambi river. That is, the sixty (60) meters from on the river. In the northern side, they claimed that there was a road before but in reality, the so-called road or the existing road is a new road that was only developed last year. In that view, people that were sent to visit the disputed area went on the 22nd, they went again on the 25th. Surprisingly they brought a false sketch. In regard to that, they resided there since the year 2015. Thus, he stated that he was satisfied with the decision of the District Land and Housing Tribunal. That, the first (1st) Respondent had bought the land from one person called Sengo, the owner of the land was his father and the first (1st) Respondent is not the trespasser in that regard the evidence of the third (3rd) Respondent was due to the facts that: he rejected the evidence tendered as they denied them the rights to be heard.

The third (3rd) Respondent further contended that; whenever they wanted to ask questions, they were rejected them. Also, the fourth (4th) Respondent objected the Appellant's evidence. Moreover, he stated that the Appellant is also within sixty (60) meters. She stated that she was satisfied with the decision made by the District Land and Housing Tribunal.

As a matter of fact, all the Respondents (save the first Respondent who was absent) conceded to the prayer of additional evidence by the Appellant's Counsel. They stated that, if the Appellant will be granted that right, they would also have the option of contributing additional evidence as well.

In rejoinder, Mr. Zuberi Mauridi submitted that there was no need to deny the evidence presented by the Land Officer. On the same note, on the western side of the property there is a river and not a road as per the evidence given by the land officer. Meanwhile, the Respondents had the right to ask questions but did not exercise that right. He argued further that, he bears no doubts about the piece of land owned by the Appellant in which it was surveyed and found to be within sixty (60) meters of the river.

Ultimately, he requested their prayer be granted by visiting the locus in quo, as the existing evidence is insufficient to determine the matter accurately to its finality and if allowed such evidence will assist the Court in making a fair and just determination of the appeal.

Thus, after a thorough perusal of the records from the DLHT the decision in **Avit Thadeus Massawe Case** (supra) plus the directions under *section 42 of the Land Disputes Courts Act [Cap 216 Revised Edition 2019]* this Court was contended that the Appellant's prayer regarding staying the appeal whilst ordering the DLHT to visit the locus in quo is appropriate and justified under the circumstances.

This is so because, apparently there was no evidence in relation to the area, size or demarcation of the land bought by the Appellant. Moreover, there was no evidence depicting the actual plan, mapping or design of the disputed land. Thus, this Court stayed the appeal and ordered the DLHT to collect additional evidence by visiting the disputed land immediately. Consequently, the case record was remitted to the District Land and Housing Tribunal for additional evidence.

As a matter of fact, the DLHT arranged to visit the locus in quo and summoned a total of three (03) witnesses who were none other

than; Simithes Malola the Land Officer and two (02) land surveyors namely, Karim Msemo and Zainabu Salum Chambulilo (two of them showed up in the locus except for Zainabu Salum Chambulilo). They testified as follow:

Mr. Simithes Malola under an oath briefly testified that the disputed land was initially surveyed in the year 1988 and leased to one Dr. Umilila Apaligwe Sengo for thirty-three (33) good years. By the year 2007 Dr. Umilila Apaligwe Sengo submitted the following transfer documents (which are the application for approval of disposition, notification for disposition, spouse consent to disposition of land, and transfer of the right of occupancy) which shows that he intended to transfer the disputed land to Dr. Wade Asulike Kabuka. However, Mr. Simithes Malola stated that the transfer process of the disputed land is still incomplete since payments are incomplete.

Mr. Karim Msemo affirmed and briefly stated that the disputed land (613 DRA, Kitalu NN, with 1666 Metres at MAKAMBI) was surveyed and given to Dr, Sengo. That, the survey was conducted by the Regional Office before it was officially termed as a Municipal. He described the

measurements and borders of the disputed land. Lastly, he added that if measured, the disputed land is within sixty (60) meters.

Ms. Zainabu Salum Chambulilo affirmed and stated that she is responsible for surveying, map sketching, and resolving disputes. In that regard, she said that the disputed land was initially surveyed in the year 1988 as a result it was given to Dr. Umumila Apalile Sengo. lastly, she described the measurement and boarders of the disputed land and tendered its sketch map which was thereon admitted as Exhibit P2.

Afterward, the DLHT concluded the additional evidence and forwarded the case file to this Court. Upon receiving the same, this Court was still dissatisfied with the evidence in its totality since there were still lacking actual measurements and map if not a plan of the disputed land and its surroundings. Thus, for the interest of justice, it opted to revisit the locus in quo in presences of the parties, land officers concerned together with some of its staffs. Consequently, this Court was able to gather further evidence more especially in regard to the measurements of the plot and thereafter set a judgment date.

On my part, the key issue for determination in this appeal is whether the DLHT correctly evaluated the evidence on record and

reached a valid conclusion. As per the findings of this Court, the same is answered partially in the affirmative. This is because the DLHT failed to gather crucial evidence that being evidence of some key witnesses (the land officers responsible) and visiting the locus in quo.

On the other hand, it is my considered view that the decision of the DLHT was correct to the extent that the Appellant herein is not the owner of the disputed land. This is due to the reason that, from the record there is no substantial and complete proof that the Appellant does own the disputed land. Records from the DLHT depict that the Appellant tendered among other documentary evidence, a letter of offer to Dr. Umilila Apaligwe Sengo and not his own. It is worth noting that conclusive proof of ownership of that particular surveyed land is evidenced by a certificate of title/title deed. The fact that the Appellant lacks such a title deed he cannot be termed as the owner of the land.

Besides, among other documentary evidence, the Appellant did not tender a sale agreement (see section 64 (2) of the Land Act and FORM 38) to prove that Dr. Umilila Apaligwe Sengo consented to transfer his land to him. As a matter of fact, the Appellant's Learned

Counsel submitted that the Appellant tendered a sale agreement. However, this is quite false as the records contain no such evidence.

Section 64 (1) of the Land Act Cap 113 [Revised Edition 2019] accentuates that, all contracts for the disposition of a right of occupancy must be in writings for them to be enforceable by the law/operative. The said section 64(1) provides that:

> *"A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if- (a) the contract is in writing or there is a written memorandum of its terms; (b) the contract or the written memorandum is signed by the party against whom the contract is ought to be enforced"*

Based on the afore guidance, the alleged transfer of the disputed land to the Appellant herein is not effective since it is not in compliance with the mandatory requirement of the law. To add to it, on page four (04) of the typed proceedings from the additional evidence as gathered by the DLHT, Mr. Simithes Malola (the court's witness) testified that although, Dr. Umilila Apaligwe Sengo submitted some forms for transfer, the transfer is still in the process meaning it is not complete. In other

words, the recognized lawful owner of the disputed land is still Dr. Umilila Apaligwe Sengo and not the Appellant. In the case of **Farah Mohamed v Fatuma Abdallah [1992] TLR 205**, the Court was of the unanimous view that a transferee of an invalid transfer was deemed incapable of acquiring title and, therefore did not have a title pass.

On the issue of whether the Respondents are trespassers to the Appellant's land, I am quick to learn from the sketch (as drawn by the Land officer) of the disputed land when visited by this Court, that it is vivid that Ally's (the 2nd respondent), Maua's (the 3rd respondent) and Andende's (the 4th respondent) houses are within sixty (60) meters from the riverbank and Saidi's house extends out about only three (03) meters from the range of sixty (60) meters from the river bank. Moreover, the Appellant's house is eighty-nine (89) meters away from the riverbank thus far from the Respondents and not even within the said sixty (60) meters.

As much as the sixty (60) meters are concerned, the Respondents' houses being within the sixty (60) meters of the river bank is illegal. This is as per *Section 57(1) of the Environmental Management Act, 2004* which prohibits human activities in certain areas including river banks

within sixty (60) meters. For easy reference, the said section is hereby quoted verbatim:

> *"Subject to subsection (2), no human activities of a permanent nature or which may, by their nature, likely to compromise or adversely affect conservation and, or the protection of ocean or natural lake shorelines, river banks, water dam or reservoir shall be conducted within sixty metres"*

In light of the above law, the Respondents' houses rest on the usufructuary right as correctly declared by the DLHT hence they cannot be called trespassers to the Appellant's alleged bought land. Furthermore, this Court is of the found view that the Appellant has no legal mandate to evict the Respondents from such areas.

Towards that end, I reiterate that the DLHT in one way or another failed to evaluate the evidence on record thus, come up with a valid conclusion. Under the principle of he who alleges must prove as embodied in *section 110 of the Evidence Act, [Cap. 6 of the Revised Edition 2019],* it was incumbent upon the Appellant to prove that he claims an effective or enforceable title thus he is lawful owner. Had he done so, this appeal would be close to having merits otherwise his

complaint stands as an afterthought. The Appellant is further advised to diligently complete his land purchase in accordance with the law.

Conclusively, in view of what I have endeavoured to highlight hereinabove, this appeal is hereby dismissed entirely with cost to the Appellant. It is so ordered.

DATED at **SONGEA** this 16th Day of August 2022.

U.E. MADEHA

JUDGE

16th August 2022