

IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY
AT MTWARA

LAND APPEAL NO. 28 OF 2021

*(Originating from the decision of the District Land and Housing Tribunal for
Mtwara at Mtwara in Application No. 36 of 2012)*

JONATHAN NKYA.....APPELLANT

VERSUS

ISAYA GIBSON MATAMBO.....RESPONDENT

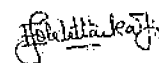
JUDGEMENT

19/7/2022 & 27/10/2022

LALTAIKA, J.

The appellant herein **JONATHAN NKYA** is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara at Mtwara (DLHT) in Land Application No. 36 of 2012. The impugned decision was delivered by Hon. H.I. LUKEHA, Chairman on the 20th day of July 2022.

Facts leading to the appeal are straightforward: In 2005 the respondent herein **ISAYA GIBSON MATAMBO** and his business partner one **STEVEN GONA**, came up with a business idea. The idea was to buy land suitable for investment in the hospitality industry their main target being coastal areas in Tanga and Mtwara regions. On 15.08.2005 the idea came close to fruition when the respondent purchased a piece of land measuring three acres at Mikindani in Mtwara Mikindani Municipality from the family of the late Awadh Bawaziri. The dream, however, would be pushed closer to oblivion due to protracted litigation on ownership of the land he had



purchased. This judgement is a culmination of ten years of protracted litigation.

According to the respondent, in September 2012 he received a phone call from one Abdallah Bawaziri a member of the Bawaziri family who had sold him the land, that his land had been encroached and that some unknown people were digging down to erect what looked like a foundation. Upon pursuing them with the assistance of *Mtaa Chairman* one Selemani Musa Mmandi, the labourers "vibarua" disclosed that they were instructed by one Jonathan Nkya, the appellant herein.

Several attempts were made to resolve the conflict. In 2009, for example, the appellant and the respondent allegedly met at City Garden in Dar es Salaam. The appellant produced a sale agreement dated 2009 indicating that he purchased a piece of land measuring 10 acres from one Hamisi Mduguma. The appellant tried to acquire the suit land from the respondent by exchanging it with three surveyed plots in Mtwara and a compensation of TZS 40,000,0000 in the pretext that he had entered a contract with a telephone company for erecting a telephone tower. Negotiations failed but the appellant continued encroaching the suit land.

Consequently, the respondent (then plaintiff) instituted a land case at the DLHT for Mtwara as alluded to above. The DLHT adjudged in favour of the plaintiff (now respondent). The appellant (then respondent) is dissatisfied. He has filed a memorandum of appeal to this court on the following grounds:

1. *That District Land and Housing Tribunal erred in law and fact by entertaining the matter without joining the seller of the land to the respondent.*



2. *That the honourable tribunal erred in law and fact in entertaining sale agreement between the respondent and PW5 as PW5 had no locus to sale the disputed land.*
3. *That trial tribunal erred in law and fact by relying on the exhibits tendered by the respondent without being read loudly after its admission.*
4. *That the tribunal erred in law and fact by deciding the matter in favour of the respondent without sufficient proof.*

When the appeal was called on for hearing, the appellant was represented by Adv. Alex Msalenge. The respondent on the other hand enjoyed the services of Mr. Gide Magila, learned Advocate. Parties jointly agreed to dispose of the matter by way of written submissions. The following schedule was ordered by the court to guide the parties. (i) Written Statement of Appeal 12/5/2022 (ii) Reply to the Statement of Appeal 25/5/2022 (ii) Rejoinder if any 6/6/2022 (iii) Mention for necessary orders 14/6/2022. That the parties complied with the order of the court, I want to thank the learned counsels profusely for their dedicated service to their clients and to this court.

Submitting in support of the appeal, counsel for the appellant Mr. Rainery Songea, whether by design or default, chose to take a rather long, windy, and uncharted road to the grounds of appeal.

The learned counsel averred that he was inclined, before going to the grounds of appeal, to highlight the illegalities contained in the proceedings for the purpose of putting the records clear. He went on to make a lengthy submission on what he termed illegality on the trial tribunal's failure to read out the report on visiting the locus in quo. He cited the case of **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed [1980] T.L.R. 29** to support his argument that the proper procedure was not adhered to by the trial tribunal.



As expected, Mr. Magila, counsel for the respondent was not amused by the unconventional approach adopted by his fellow learned counsel. He was quick to point out that in our jurisdiction, issues which are not featured in the memorandum of appeal cannot be raised during hearing unless there was a formal application to the court seeking leave to file supplementary grounds of appeal and such leave was granted. Short of that, Mr. Magila reasoned, the practice is likely to occasion injustice to the other party as he would be taken by surprise.

Citing the Court of Appeal of Tanzania case of **BAHARI OILFIELD SERVICES FPZ LTD vs PETER WILSON, Civil Appeal No.157 of 2020** (Unreported) Mr. Magila emphasized that parties are bound by their pleadings. The learned counsel went on to refer this court to a handful of other cases of the Apex Court probably as a way of showing emphasis. Here are some of the cases he cited: **ERNEST SEBASTIAN MBELE vs SEBASTIAN MBELE and TWO OTHERS**, Civil Appeal No.66 of 2019 (Unreported), **TANZANIA TOBACCO PROCESSORS LIMITED vs THE COMMISSIONER GENERAL TRA**, Civil Appeal No.174 of 2019 (unreported).

It is the position of this court, as articulated by Mr. Magila, that parties are bound by their pleadings even at this appellate stage. Allowing haphazard raising of issues at any stage is like riding a rudderless ship. The ocean is too vast that getting lost in the middle of nowhere is almost guaranteed. I do not have to waste time on this clearly misplaced interjection. I will therefore proceed to consider the grounds of appeal as I hereby do.

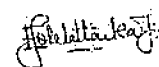


Submitting on the first ground, Mr. Songea averred that the trial tribunal erred in law and fact by entertaining the matter without joining the seller of the land. It is the learned counsel's submission that the applicant who set the case in motion has a duty to select who to sue. However, reasoned the learned counsel, in land disputes it is important whoever claims the land that has been obtained from buying the seller of that piece of land be joined as a party in the suit. To support his argument, Mr. Songea cited the case of **Juma B. Kadala vs. Laurent Mnkande 1983 TLR 103 (HC)** and the Court of Appeal decision in **National Housing Corporation vs. Tanzania Shoe Company and Others 1995 TLR 251 (CA)**

Mr. Songea concluded his submission on this ground by emphasizing that in our jurisdiction the buyer ought to be joined as a party in the case rather than a witness as blessed by the trial court. This is because, averred Mr. Songea, court orders do not bind witnesses.

Moving on to the second ground of appeal, it is Mr. Songea's submission that the trial tribunal erred in law and fact in entertaining the sale agreement between the respondent and PW5 as PW5 had no *locus standi* to sell the disputed land.

The argument of the learned counsel is that since the disputed land is a part of the farm bought in 1959 by one Awadhi Said Bawadhir who passed on in 1983 and since then the late Bawadhir's family did not appoint administrator of the estate to date, PW5 had no power under the law to dispose the said piece of land to the respondent without being appointed to be an administrator of the estate of the late Awadhi Said Bawadhir as he had no locus standi to act on the same.

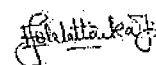


To support his contention, the learned counsel referred this court to the case of **Godbless Jonathan Lema vs Musa Hamis & 2 others**, civil appeal No. 47/2012, CAT at Arusha and **Lujuna Shubi Ballonzi Senior vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203.

Submitting in support of the fourth ground of appeal, Mr. Songea contended that the tribunal decided the matter in favour of the respondent without sufficient proof. Expounding on his argument, the learned counsel averred that in the tribunal, the respondent claimed to have bought the suit land from the family of Awadhi Bawadhir. However, reasoned Mr. Songea, the piece of land cannot be sold to a family but to an individual person.

He went on to assert that the fact that the land was bought from the family of Awadhi Bawadhir supplemented his submission that the property belongs to the late Awadh Bawadhir. He emphasized that if the respondent wished the court to believe otherwise he was required to substantiate the same. To support his argument, Mr. Songea cited the case of **Lamshore Limited and J. S. Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330 **East African Road Services Ltd v J. Davis & Co. Ltd** [1965] EA 676 at 677 as well as **Abdul Karim Haji V. Raymond Nchimbi Alois and Another**, [2006] TLR 419.

It was time for counsel for the respondent. Responding to the first ground of appeal, Mr. Magila was quick to point out that in his reasoned opinion, the grounds lacked merit and should be dismissed. It is Mr. Magila's submission that in the instant matter, the sellers to the respondent have never repudiated the said sale and have always been supportive to the respondent. The learned counsel averred that PW5 ABDALLAH BAWAZIR a



member of the Awadhi Bawazir's family who jointly sold the land in dispute to the respondent appeared before the tribunal in both incidents of full hearing of the matter to finality and was supportive to the tribunal in identifying the boundaries of the land in dispute.

Mr. Magila emphasized that in essence, absence of the seller of the suit land would not vitiate the proceedings and as such his absence would not in the circumstances and as per the law require dismissal of the proceedings.

It is the respondent's submission that joinder of the seller to the respondent was not mandatory for the following reasons:-**One**, non-joinder of the seller did not occasion any failure of justice in proceedings at the trial Tribunal and **two** the seller one ABDALLAH AWADHI was involved as a witness and testified as PW5 therefore the legal requirement of involving a seller as a necessary party to the suit was met by inviting him as a witness.

To support his argument on the first reason Mr. Magila referred this court to the case of **HAMIS SALUM KIZENGVS MOSES MALAKI SEWANDO & 18 OTHERS** (Land Appeal No. 51/2019) OPIYO, J HC-DSM (unreported). To support the contention on the second point, Mr. Magila cited the case of **HAIRU MTILI v. ABDALLAH** Misc. Land Appeal Case No. 27/2018, HC at Mtwara (Unreported) where his Lordship F.A Twaib, J at page 4 last para and page 5 first paragraph stated:

"Therefore, since the purpose of requiring the seller to be joined is for him to have an opportunity to be heard and assist the court in resolving the matter in dispute, I am of decided view that the purpose was adequately achieved when the seller appeared at the tribunal and gave



evidence, which evidence was relevant in resolving the matter in dispute.”

The learned counsel concluded his submission on this ground by reiterating the position of the law as provided for under **Section 45 of the Land Disputes Courts Act, [CAP 216 R.E 2019]** that protects decisions of the Tribunal from being reversed or altered unless such a decision has clearly *occasioned a failure of justice*.

On the second ground of appeal, counsel for the respondent quickly pointed out that in his opinion, the appellant was missing a point regarding the status of PW5 as the seller of the suit land. Mr. Magila forcefully submitted that it is very apparent in the proceedings of the trial Tribunal that PW5 is a member of Awadhi Bawazir's family who jointly sold the piece of land to the respondent. The learned counsel insisted that the suit land was given to the seller by the previous owner (their late father AWADHI BAWAZIR) when he was still alive therefore an issue of probate cannot arise, and it is unfounded since the suit land was disposed by the previous owner when he was alive, and the title immediately shifted to the donee.

The learned counsel concluded his submission on this ground by emphasizing that since the suit land was handed over to the sellers by their father when he was still alive, an issue of locus standi together with all authorities cited by the appellant are irrelevant as there is no issue of probate on the matter. He argued that this ground of appeal is devoid of merits and deserves to be dismissed. Although the appellant abandoned the 3rd ground of appeal, the respondent chose to address it to set the record clear. For avoidance of unnecessary wastage of time, I also choose not to deal with the same.



Responding to the fourth ground of appeal, Mr. Magila contended that in the case at hand, the issues for which the balance of probability was tested were: - (1) Who is the lawful owner of the land in Dispute (2) Reliefs thereof. Since the main issue was who is the lawful owner of the land in dispute, reasoned Mr. Magila, both parties had the burden of proof on ownership of the suit land and they lined up Witnesses to fulfill their obligation in terms of **Sections 100 to 112 of the Evidence Act, 1967.**

The learned counsel went on to submit that in answering issue No.1 various aspects were considered including but not limited to proof of how the land was acquired before being sold to the parties. The respondent on his part, averred Mr. Magila, tendered the Contract of Sale from Salmin Katuma to Awadhi Bawazir dated 1959 adding that it is from this large parcel of land that the piece of land in dispute emanated.

The learned counsel averred further that at the trial tribunal, respondent's witnesses PW1, PW2, PW3, PW4 & PW5 gave overwhelming evidence which led the tribunal declaring the respondent as the lawful owner of the land in dispute.

The learned counsel concluded his submission on this last ground by referring to the case of **HEMEDI SAIDI Vs MOHAMED MBILU (1984) TLR 113**, also cited by the appellant's counsel, where the court held inter alia that the person whose evidence is heavier than that of the other is the one who must win.

Having dispassionately considered submissions by both parties, my next task as the first appellate court is to evaluate the entire evidence of the lower court and should circumstances permit, come up with my own



interpretation and verdict. The respondent (then plaintiff) called five witnesses. The witnesses were Isaya Gibson Matambo (PW1), Musa Selemani Mnandi (PW2), Mohamed Ally Mtota (PW3), Mussa Jongo (PW4) and Abdallah Awadhi (PW5). Furthermore, the respondent tendered a total of six exhibits. The exhibits include the Power of Attorney and receipts-exhibit P1 collectively, sale agreement and its receipts-exhibit P2 collectively, Pictures of the respondent and Abdallah Bawaazir-exhibit P3, letters from mtaa Chairman-exhibit P4, reply letter by PW2-Exhibit P5 and Hati ya Mauziano of a farm of 1959 for Selimini Katuma- exhibit P6.

While the appellant (then respondent) called four witnesses. The witnesses were Jonathan Wilisaha Nkya (DW1), Haji Suleiman Abdallah Likolo (DW2), Hamisi Ismail Mdunguma (DW3) and Laura Nchambi Daudi (DW4). Likewise, he tendered a total of two exhibits which include a Certificate of Occupancy- exhibit D1 and Sale agreement between DW1 and Mnduguma -exhibit D2. I am convinced that the learned Chairman analyzed the evidence tendered before him in accordance with the law of evidence and consciously provided the reasoning for all major issues that emanated from the same. In doing so, none of the party's rights were jeopardized. In other words, no injustice was occasioned.

I have gone through record of the tribunal, and it is envisaging that PW5 at page 25 of the typed proceedings told the tribunal that his father Mzee Bawaziri passed away in 1983 and before he died, he handled over the farm to his children including PW5 and the farm which was handled over include the piece sold to the respondent. In fact, at page 27 PW5 was cross examined by Mr. Songea and his answers were rectified by PW5 at page 28



of the typed proceedings when he was re-examined by the counsel of the respondent. The witness remained unshaken and maintained what he testified in chief. With respect, I convinced that PW5 was a credible witness. It is also my finding that PW5 had locus standi to sell the suit land which was bequeathed to him and to other children of his father to the respondent. Furthermore, PW5 tendered exhibit P6 to show how and when the suit farm was obtained.

To this end, I subscribe what the learned counsel for the respondent has submitted that the issue of locus standi as well as probate are irrelevant to the matter at hand. Therefore, I am of the settled view that this ground is devoid of merit hence, it is dismissed.

On whether the tribunal erred in law and fact by deciding the matter in favour of the respondent without sufficient proof, it is trite law that he who alleges has a burden of proof as per **section 110 of the Evidence Act [Cap. 6 R.E. 2022]**. In civil cases, the standard of proof is on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. The Court of Appeal in the case of **Paulina Samson Ndawavya vs Theresia Thoamasi Madaha**, Civil Appeal No.45 of 2017, CAT-Mwanza (unreported) defined what amount to proof on balance of probability by reproducing the statement of Lord Denning in **Miller v. Minister of Pensions [1937] 2 All. ER 372**

The evidence further shows that DW1 tried to settle the matter with the respondent out of court in Dar es Salaam several times. This evidence signifies that DW1 knew that he bought the area which was already under



the ownership of PW1 since even the evidence of the WEO proof that DW1 had approached him. Furthermore, the evidence of the Chairman of Magengeni street (PW3) denied having participated in witnessing the sale agreement between DW1 and DW3.

The evidence on the *locus in quo* moreover, is very clear that DW1 failed to show the boundaries of the suit land while the respondent and his witnesses did show all the boundaries. It is also my finding that what PW5 testified in the tribunal before going to the *locus in quo* is exactly what he testified in *locus in quo* on the size of the farm, marks of boundaries and the neighbours of each side of the suit land. (See page 28-34 of the impugn judgment.)

Before I pen off, I am inclined to say albeit in passing that two things are intriguing in this appeal. First, there is overwhelming evidence that the suit land belongs to the respondent Mr. **ISAYA GIBSON MATAMBO**. Secondly, the sum total of the grounds of appeal filed by the appellant can be interpreted as a rather aggressive and unjustified attempt to direct this court to technicalities and lose sight of justice. For example arguing that land cannot be sold to a family but to an individual person may sound logical only to the extent that it does not turn this court into a High School debating club.

The overwhelming evidence that the suit land belongs to the respondent, viewed against the many years spent in litigation and all the technicalities involved throughout the trial is a timely reminder of the 10th commandment given to the Israelites on Mount Sinai through Moses:



Exodus 20: 17 "**You shall not covet your neighbor's house** [Read Your neighbor's land].

In the upshot, I hold that this appeal lacks merit. Consequently, the same is hereby dismissed in its entirety. Costs follow the event.

It is so ordered



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

27.10.2022

Court

This judgement is delivered on this 27th day of October 2022 under my hand and the seal of this court in the presence of Mr. Issa Chiputula, Advocate who has appeared for both appellant and respondent



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

27.10.2022

Court

The right to appeal to the Court of Appeal of Tanzania is duly explained.



E.I. LALTAIKA

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JUDGE

27.10.2022

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