

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

LAND APPEAL CASE NO. 46 OF 2021

(Originating from District Land and Housing Tribunal for Singida at Singida in Land Application No. 41 of 2021)

HADIJA SAIDI..... APPELLANT

VERSUS

GODFREY MGETA ATHUMANIRESPONDENT

JUDGMENT

13/09/2022 & 20/10/2022

KAGOMBA, J

HADIJA SAIDI ("the appellant") has filed this appeal raising five grounds to challenge the decision of the District Land and Housing Tribunal for Singida at Singida ("the trial Tribunal") which was made in favour of GODFREY MGETA ATHUMANI ("the respondent").

Before going into the details of this appeal, I find it necessary to briefly state the facts thereof. The respondent herein instituted a suit in the trial Tribunal against the appellant herein as the 1st respondent, and one Daudi Hassan Mbugha, as the 2nd respondent. He was claiming for ownership of a parcel of land measuring 12.85 Metres North, 9.50 Metres South, 19 Metres East and 19 Metres West, located at Utemini street, Utemini Ward within Singida Municipality ("the suit land").

The said Daudi Hassani Mbugha readily admitted the claims against him in his Written Statement of Defence. For that reason, he was withdrawn

from the suit and the respondent's claims were to be proved against the appellant only. The suit was heard whereby the respondent called six witnesses to prove his claims while the appellant brought five witnesses to her defence.

The respondent, testifying as SM1, told the trial Tribunal that he was the lawful owner of the suit land, having bought the same from the said Daudi Hassani Mbugha. He tendered a sale agreement which was admitted as exhibit P1. He testified further that, after having bought the suit land he continued with the processes of surveying the same, only for the appellant to invade the land where he started to produce blocks therein, hence this dispute.

The testimony of the respondent was supported by SM2 -Hamis Juma, SM3- Mugenyi Senge, SM4- Joseph Petro, SM5- Mwafundi Hassani Mbugha and SM6- Mwarabu Selemani, whose testimonies, among other things, was to the effect that the suit premises belonged to the late Hassani Mbugha and that after his death the land was inherited by his son, Daudi Hassani Mbugha, who sold the same to the respondent.

The appellant testifying as SU1, told the trial Tribunal that the suit premises belonged to her husband Mohamed Abubakari Satu, who was given the same by his father-in-law one Juma Ngabu in the year 2008. That, the family, inclusive of her co-wife whose father gave the suit land to their common husband, decided to fabricate bricks and continued to build a house therein until when they were told by the local leaders that they have invaded the suit land.

SU2- Mohamed Abubakari Satu, the husband, supported the testimony the appellant, confirming that he was given the suit land by his father-in-law, the late Juma Ngabu, in the presence of Tatu Juma Ngabu (another wife of SU2) and Hamis Juma Ngabu. SU3- Abdala Juma Ngabu, testified that he was informed by his father, the late Juma Ngabu, that he had given the suit land to his daughter Tatu Juma Ngabu, and that after two days, the late Juma Ngabu handed over the suit land to Tatu Juma Ngabu and her husband. SU4-Hamis Mahiki Mbiaji and SU5 - Omari Hema Mughenyi, on their part, testified that the land belonged to Juma Ngabu who transferred the same to his daughter Tatu Juma Ngabu.

The trial Tribunal having heard the witnesses from both sides, decided in favour of the respondent herein and declared him as the lawful owner of the suit land. The appellant, being aggrieved by that decision, came before this court for determination of her appeal.

During hearing of the appeal, both parties were represented by learned advocates. Mr. Onesmo David appeared for the appellant, while Ms. Zahara Chima represented the respondent.

Before arguing the appeal, Mr. David pointed out that there was an irregularity in the admission of exhibits P1 and P2. He said, the trial Tribunal admitted those exhibits without causing the same to be read in the Tribunal, hence, they lacked legal force. To cement his contention, he cited the case of **Bulungu Zungu V. R**, Criminal Appeal No. 39 of 2018, CAT, Shinyanga, and prayed the Court to expunge the two exhibits from records and their evidential value be disregarded.

Turning to the grounds of appeal, starting with the first and the second grounds jointly, Mr. David submitted that the respondent sued a wrong party before the trial Tribunal, who lacked *locus standi*. He contended that the owners of the suit premises were Mohamed Satu and Tatu Juma Ngabu who ought to be sued. That, even the witnesses for the respondent testified to the effect that they didn't know the appellant, and that the respondent had no any relief to seek against the appellant. He cited Order 1 Rule 3 of the Civil Procedure Code [cap 33 R.E 2019] and the case of **Peter Mpalanzi V. Christina Mbaruka**, Civil Appeal No. 153 of 2019, CAT, Iringa to support his submission.

On the third and fifth grounds of appeal, Mr. David questioned the absence of the testimony of a material witness, one Daudi Hassani Mbugha, who allegedly sold the suit land to the respondent. It was Mr. David's contention that the said Daudi Hassani Mbugha, being dropped as a party to the suit, it was necessary for him to be called by the respondent to adduce evidence on his status of ownership that enabled him sell the suit land to the respondent.

Regarding the fourth ground of appeal, where the appellant pleaded undisturbed long stay on the suit land for over 12 years, Mr. David contended that since it was proved, during trial, that the appellant had been in occupation of the suit land since 2008, and that in 2001 when they approached the relevant authority to legalize their ownership, they were told that the suit land was not belonging to any person, therefore, the principle of adverse possession under section 33 of the Law of Limitation Act, [Cap 89 R.E 2019] should apply, in the circumstances. For these grounds, Mr. David

prayed for the appeal to be allowed and the decision of the trial Tribunal be quashed with costs.

Ms. Chima, on reply, didn't deny that exhibit P1 and P2 were not read before the Tribunal during trial. However, she prayed the Court not to expunge the exhibits arguing that it was not stated how the appellant was affected by that omission. She distinguished the case of **Bulungu Zungu (supra)** arguing that the practice in criminal cases was different from civil cases.

Replying to the first and second grounds of appeal, Ms. Chima contended that the appellant was the proper party to be sued as she admitted in her Written Statement of Defence that she was in joint ownership of the suit land with her husband. She added that the case of **Peter Mpalaenzi** cited by Mr. David was distinguishable because the respondent, being the plaintiff in the suit, was the master of his case and could not be compelled to sue a person against whom he has no claim.

On the third ground, where lack of testimony of Daudi Hassani Mbugha as a material witness was raised, Ms. Chima contended that calling that witness would be wastage of time as he already admitted claims against him in his Written Statement of Defence. She contended further that the testimony adduced by respondent and his witnesses were reliable unlike that of the appellant which were weak and had gaps.

Ms. Chima further argued that the appellant's act of not calling one Tatu Hamis Ngabu, who is said to be the owner of the suit premises, draws

an adverse inference to the appellant as per the holding of the Court in **Hemed Said V. Mohamed Mbilu** (1984) TLR 113. For that reason, she argued that the 3rd and 5th grounds of appeal have no basis.

On the fourth ground of appeal, regarding adverse possession, Ms. Chima contended that adverse possession could not apply as the appellant was not a trespasser. She reckoned that the appellant alleged that the suit premises was owned by her husband who obtained the same from his father-in-law. Ms. Chima contended further that allegation of undisturbed possession of the suit land for more than 12 years was downgraded by the strong evidence of the respondent who proved that the appellant had never owned that land. For these reasons, she prayed the court to dismiss the appeal with costs and uphold the decision of the trial Tribunal.

In his rejoinder, Mr. David reiterated his prayer to have exhibit P1 and P2 expunged from trial Tribunal's record. He also reiterated that the appellant was not a proper party to be sued.

On applicability of the doctrine of adverse possession, Mr. David urged the Court to re-evaluate the same and come up with its own findings. He thus maintained his prayer that the appeal be allowed with costs.

Before embarking on the substantive grounds of appeal, let me first comment the issue of irregularity in admission of exhibit P1 and P2 raised, in passing, by Mr. David. There is no dispute that the said exhibits were not read out in the trial Tribunal. It is the position of the law that an exhibit has to be read out after its admission. See, for example, the decision of the Court

of Appeal in **Frank John Libanga @Lampard and Another v. Republic**, (Criminal Appeal 55 of 2019) [2021] TZCA 146 (29 April 2021) where another decision of the Court of Appeal in **Shabani Hussein Makora v Republic**, Criminal Appeal No. 287 of 2019 was referred to, in which it was stated:

"It is settled law that, whenever It is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibit because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision."

In considering the above position of the law in perspective, I am inclined to hold that what matters the most, in the circumstances of this appeal, is whether the appellant was prejudiced by such failure to have the exhibits read out and whether, in absence of such exhibit, the respondent's case would have collapsed in favour of the appellant. I shall demonstrate in due course the implication of this argument in the entire case.

Having remarked as above with regard to the cited irregularity in admission of exhibits, there are, in my views, four issues to be determined in this appeal, thus:

- (1) Whether the appellant was not proper party to be sued for lacking *locus standi*.
- (2) Whether failure to call Daudi Hassan Mbugha as a witness affected the respondent's case,
- (3) Whether failure to read out the exhibits P1 and P2 affected the respondent's case, and;
- (4) Whether the doctrine of adverse possession is applicable to the appellant's case.

On the first issue above, it is undisputed fact from the trial records that the appellant is the person who was found building a house in the suit land. She did not counter such fact in her testimony. It is for this reason the respondent had the right to sue her for invading into the suit land. It is not as difficult as rocket science to find how the cause of action arose against the appellant.

On the other hand, the appellant's defence during trial, though contradictory, also supported the fact that she was rightly sued by the respondent. Although in one occasion she contended that the suit land belonged to her husband, in another occasion in her testimony she contended that the same was jointly owned by herself together with her husband. Her witnesses gave a different version of testimony that the suit land belonged to one Tatu Juma Ngabu. If the appellant's testimony was to be believed, that she owned the suit land, she cannot be heard complaining why she was sued by the respondent who challenged her ownership. For these reasons, I find that that the appellant had locus standi in the

circumstances and was properly sued. The first issue is therefore answered in the negative.

As to the second issue, the appellant's advocate has argued that Daud Hassani Mbugha who allegedly sold the suit land to the respondent, was supposed to be called by the respondent as a material witness. The trial proceedings are clear on the fact that the said Daudi Hassan Mbugha was in first place sued as the 1st respondent to the suit. However, having admitted the claims against him in the Written Statement of Defence (WSD) he was withdrawn from the suit and was not called to testify in support of the respondent's case. Ms. Chima for the respondent, found the calling of Mr. Mbugha as a wastage of time as he had already admitted the claim against him in the WSD. The respondent's advocate further relied on the sufficiency of evidence by the rest of the witnesses who testified for the respondent.

In considering the above contention, I have perused the evidence adduced by the respondent and his witnesses during trial, and I am of the view that such evidence, put on a scale, was strong enough and more reliable to prove respondent's ownership of the suit land even in absence of the testimony of the said Daudi Hassani Mbugha. The evidence shows that the suit land was owned by the late Hassan Mbugha after whose death the same was inherited by his son, Daudi Hassani Mbugha, who sold it to the respondent. On the other side, the evidence adduced to support the appellant's case was contradictory and unconvincing. It raises serious questions as to how the appellant got ownership of the suit land and why it was not her husband or her co-wife who were flag bearers, in this case, if

the land ownership originated from the late Juma Ngabu, the father -in -law of the appellant's husband.

SM2 Hamisi Juma, 82 years old, who testified for the respondent, categorically denied that his father, the late Juma Ngabu, was the owner of the suit land. He supported the respondent that the suit land originally belonged to Hassan Mbugha. SM5 Mwafundi Hassani Mbugha, 75 years old, testified that the suit land belonged to her father Hassani Mbugha and in 1977 it was given to Daudi Hassani Mbugha, who in turn sold the same to the respondent. Additionally, the respondent who testified as SM1 was able to prove that he obtained the land from Daudi Hassani Mbugha through a sale agreement dated 06/03/2020 which was admitted as exhibit P1, without any objection from the appellant.

Since proof of civil cases is measured on preponderance of probabilities, in the light of the evidence on record, the trial Tribunal was absolutely right to enter judgment in favour of the respondent. Under such circumstances, failure to call Daudi Hassani Mbugha as a witness didn't weaken the respondent's case, hence the second issue is answered in the negative too.

The above determination of the second issue necessarily addresses the consequences of irregularity in admission of the exhibits P1 and P2, which is the third issue in this appeal. In a plethora of authorities, when an exhibit is expunged, the court would look to the remaining evidence to see if it would support the claimant's case. As demonstrated above, the respondent's case was solidly supported by strong evidence of SM2 Hamisi Juma and SM5

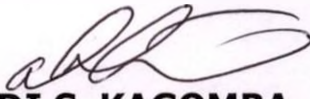
Mwafundi Hassani Mbugha, among others. SM5, for example, clearly testified that the suit land was given to her brother Daudi Hassani Mbugha who sold it to the respondent. The said testimony of SM5 was powerfully corroborated by SM4 Joseph Petro, 59 years old, and SM6 Mwarabu Selemani, 87 years old, both being very familiar with the suit land as long term residents of the area. For this reason, the prayer to expunge the two exhibits is not only rendered inconsequential but becomes purely academic.

Turning to the fourth and last issue regarding the appellant's invocation of the doctrine of adverse possession, it is my opinion that for the doctrine to apply it was the duty of the appellant to firstly prove that she was actually in peaceful occupation of the suit land for over twelve (12) years, which she didn't. Secondly, the appellant who claimed that the suit land belonged to her husband and thus prayed the court to pronounce her husband as the lawful owner, cannot be heard to claim ownership as an adverse possessor herself. The claim of adverse possession is being desperately tossed as an afterthought. The same cannot stand for being unsupported by any evidence.

In the final analysis, I find no reason to fault the decision of the trial Tribunal. The same is accordingly upheld. Since the appeal is without any merit, I dismiss it with costs.

Dated at Dodoma this 20th day of October, 2022.




ABDI S. KAGOMBA

JUDGE