

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 75 OF 2021

(Originating from Application No. 38 of 2020 of the District Land and Housing Tribunal for Mbeya at Mbeya)

ALOISI MAGANA@ KIPILIPILI APPELLANT

VESRSUS

GIDION MWANGOSIRESPONDENT

JUDGMENT

Date of last order: 07/12/2022

Date of judgment: 21/02/2022

P.D NGUNYALE J.

This appeal arises from the judgment and decree dated 7th September 2021 of the District Land and Housing Tribunal for Mbeya at Mbeya in Application No. 38 of 2020 in which the appellant sued the respondent over ownership of a piece of land measuring two (2) acres situated at Ulunda – Imalilo Ward area in Mbarali District within Mbeya Region.

Briefly the appellant claimed to be the owner of the two acres of land after clearing virgin land since 1975, it was alleged that in 1990 the suit land was taken by NAFCO and in 2009 the suit land was given to another investor Fadi Moja when now the appellant started to reclaim his ownership and in 2017 was given the said two acres, he tendered exhibit P1(receipts for water channel excavation) and exhibit P2(Ward Secretary letter dated 05/11/2019).

Chikoti Sunga (PW2) supported the appellant's story in that in 1975 the appellant was given a virgin land by Isdori Malanji (now deceased) and in 1990 the land was taken by NAFCO.

In defence, the respondent claimed to be the owner of 1.9 acres initially 3.9 which he bought from Mkapwa in 1990, two acres was taken by NAFCO. The respondent story was supported by Jonas Samwel Matayo (DW2) Jeremia Kidasi (DW3) and Wile Kilindu (DW4) who testified that the whole land of the appellant was taken by NAFCO and the respondent remained with 1.9 acres. Upon full trial, the Chairman declared the respondent the lawful owner and dismissed the application with costs. Aggrieved the appellant filed five grounds of appeal namely;

- 1. That the trial tribunal erred both in law and fact to hold in favor of the respondent without considering that the respondent failed to tender the sale agreement before as exhibits of proving his ownership;*
- 2. That the trial tribunal erred both in law and fact to hold in favor of the respondent by failure to consider that the respondent failed to bring before it a material witness one Mkapwa Masimba Mgale who sold a suit land to him;*
- 3. That the trial tribunal erred both in law and fact to hold in favor of the respondent by failure to record and to consider the opinion of second assessor one Sunday in both the proceedings and judgment;*
- 4. That the trial tribunal erred both in law and fact for failing to evaluate well the evidence adduced by the appellant and his witness before the trial tribunal on balance of probabilities thereby reaching to wrong decision; and*
- 5. That the appellate tribunal erred in law and fact in deciding the suit land in favour of the respondent while lacked clear evidence in proving ownership of the land in dispute.*

When the appeal was called for hearing, the appellant appeared in person while the respondent was represented by Aman Mwakolo of Mwakolo and company advocates. Both parties agreed to dispose the appeal by filing written submission and the schedule was complied with. In his submission 1st and 2nd grounds were joined and submitted together, 4th and 5th were also consolidated while 3rd ground of appeal was withdrawn by the appellant.

Submitting on 1st and 2nd ground the appellant submitted on competence of the suit for failure to join the seller one Mkapwa Masimba Mgale as a necessary party by citing the case of **Christina Jalison Mwamlima and Another versus Henry Jalison Mwamlima and Six Others**, Land Case No. 19 of 2017 HC Mbeya(Unreported) and Order1 rule 10 of the Civil Procedure Code [Cap 33 R: E 2019]. He contended that the seller was a necessary party without him the court could not effectively and completely settle all question involved in the suit. The appellant also had an issue with failure by the respondent to tender purchase agreement of the suit land. He added that although the seller is dead the respondent ought to call administrator or clan member to trace title of the seller. He cited the case of **Farah Mohamed v Fatuma Abdallah** [1992] TLR 205 to support the argument.

Regarding the consolidated 4th and 5th grounds, the appellant submitted that the tribunal relied on weak defense evidence as the respondent had failed to prove that he bought the suit land by tendering sale agreement. He contended that his ownership traces its root from clearing virgin land which is one of the ways to acquire ownership relying on the case of **Silananga Kimenanga v Mevomngori Mosoni** (1962) L.C.C.A 42. On that basis he prayed the appeal to be allowed with costs.

On part of the respondent, Mr. Aman Mwakolo replied that the appellant has no any piece of land to claim as his land was taken by NAFCO since 1990 as per evidence of the appellant himself and PW2. The counsel further argued that it was upon the appellant to call material witness one Fadi Moja or officer from NAFCO to support the appellant's version that part of his land was surrendered by investor. He implored the court to draw adverse inference by citing the case of **Aziz Abdallah v R** [1991] TLR 71.

Submitting on 1st and 2nd grounds Mr. Aman Mwakolo replied that the appellant had not made a case against the respondent thus, the tribunal was supposed to rule on no case to answer. He distinguished the case of **Christina Mwamlima** and **Silanga Kamenanga** which were cited by the appellant and that the appellant had no duty to join any party to the suit. On 4th and 5th grounds Mr. Aman Mwakolo responded that the tribunal properly evaluated evidence and arrived to proper conclusion.

In a short rejoinder, the appellant restated what had been submitted earlier in his written submission in chief.

I have considered records of appeal and submission filed by both parties, the only issue calling for my determination are two;

- 1. Whether the seller was a necessary party in circumstances of this appeal.*
- 2. Whether the trial tribunal properly evaluated evidence.*

The first issue will be dealt with in two lots, **one**; the issue of joining seller as necessary party, **two**; tendering sale agreement to prove purchase. It is elementary knowledge of civil proceedings including land matters that, the plaintiff is the one who knows who should be sued and for which claim, if any.

In the contrary, the defendant has no choice and in fact the nature of claim is best known by the plaintiff. Notably such duty cannot be shifted to the defendant/respondent. Doing otherwise, will be contrary to sections 111 of the Evidence Act. In addition, our civil litigation is governed by rules of pleadings which entails informing each party the nature of the case or defense of the other party so as not to be taken by surprise.

Starting with the first lot, the term necessary party is not defined by the law rather case laws. Determination of necessary party depends from case to case. In the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No.6 of 2017, CAT at Dar Es Salaam(unreported) the court was faced with an akin situation, it stated that;

'The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.'

Also in the case of **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported) the court stated;

'His proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.'

The appellant argued that the seller one Mkapwa Mgale ought to be joined as necessary party while the counsel for the respondent did not respond on this pertinent issue. The question is, was a seller a necessary party in this case? definitely not. Looking from the reliefs claimed by the appellant the matter could be disposed off without his presence, the said seller had no any

proprietary interest in the suit land having sold it way back in 1990. The appellant was informed through written statement of defense filed by the respondent under paragraph 3 that he purchased the suit land from Mkapwa Msimba Mgale in 1990, so it was upon the appellant to pray for amendment of application to include the seller or the administrators. This claim has been raised as an afterthought.

This bring me to the second limb of first ground, the appellant contended that sale agreement ought to be tendered into evidence in reply Mr. Aman Mwakolo submitted that there was no need as even the appellant himself produced no exhibit and did not call material witness.

On my part this issue is purely of fact which will depend on weight of evidence. Cases are proved by oral and documentary evidence, even where documentary evidence is produced it must be preceded by oral evidence. There is no disputed that the respondent bought the suit land and the sale was reduced in writings in presence of witnesses. The respondent's evidence on sale was supported by Jeremia Kidasi (DW3) and Wile Kilindu (DW4) who testified that they witnessed sale agreement and signed it, their evidence proved existence of written contract which is as per section 62(1)(a) of the Evidence Act [Cap 6 R:E 2019].

Be it as it may, the question for determination before the tribunal was who was the lawful owner and not whether there was sale agreement. The appellant was the one who had duty to prove the case and the evidential burden lied on him. This is *in tandem* with the rule that he who alleges the existence of any fact has a burden of proof as outlined under section 110 of the Evidence Act [Cap 6 R: E 2019]. It is settled law that in civil matters, the standard of proof is on a balance of probabilities and the plaintiff is the one who bare evidential burden, meaning that the evidence with more credence on a particular fact to be proved will be sustained by courts. See the case of

Paulina Samson Ndawanya vs Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017, CAT at Mwanza (Unreported).

From evidence in record, I am satisfied that the appellant failed to prove his ownership of the suit land as it is clear that all his land was taken by NAFCO in 1990, this fact was supported by the appellant himself and his witness one Chikoti Sunga. There is no proof that the same was returned to him in 2017 by Fadi Moja as alleged by the appellant. On the contrary it was established in defence by Jeremia Kidasi (DW3), Wile Kilindu (DW4) and Jonas Samwel Matayo(DW2) who is the uncle of the appellant that NAFCO took all land of the appellant while the respondent remained with 1.9 acre and that the respondent is in occupation of that part since then to date.

Having so deliberated I hold that in circumstance of this case there was no need to tender sale agreement, the said contract was proved by accounts of oral evidence from Jeremia Kidasi and Wile Kilindu who witnessed the contract and signed it. The first issue is answered in negative.

Regarding the second issue, it won't take much of my time as it has already been discussed above. The Chairman weighed evidence of both parties and found that there was evidence that all land of the appellant was taken by NAFCO and that there was no evidence to prove that part of the appellant's land was returned in 2017 by Fida Moja who was not called as witness. He travelled through witnesses' evidence and was satisfied that it established that the respondent remained with 1.9 acres which was the crux of the dispute. On my analysis of evidence as elucidated when dealing with the first issue I am satisfied that this ground has no merits and the findings of the tribunal was reached after proper evaluation and analysis of evidence. To that end this ground is devoid of merits.

From what I have endeavoured to discuss above, this court finds no cogent reasons to fault the decision of the Tribunal. The trial Tribunal was justified to declare that the appellant failed to prove ownership of the disputed land. Consequently, this appeal is meritless and the same is dismissed with costs. It is so ordered.



D. P. Ngunyale
Judge
21/02/2022

Delivered this 21st day of February 2022 in presence of both parties in person.



D. P. Ngunyale
Judge
21/02/2022