IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO. 20 OF 2020

DEOGRATIAS MASANJA ....APPELLANT

VERSUS

MARIAM MOHAMED ABDI ....RESPONDENT

(Appeal from the Judgement of the District Land and Housing Tribunal of Dodoma -Mandari R.S.S-Chairman)
Dated the 24th day of September 2019
In
Land Appeal No. 151 of 2019

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JUDGMENT

25th February, 2022

MDEMU, J.:

This appeal was filed by the Appellant (Deogratias Masanja) after the first appellate tribunal reversed the trial tribunal's decision which declared him the lawful owner of the suit land. He filed five grounds of appeal faulting the decision of the first appellate tribunal, namely: -

1. *That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts by pronouncing judgement in favour of the Respondent basing on weak and contradictory evidence adduced by the Respondent thereto.*

2. *That, the District and Land Housing tribunal at Dodoma erred in law and facts by pronouncing irrational decision by misdirecting itself on views of court assessors who are nowhere to be found in the proceedings.*
3. *That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts by pronouncing judgement in favour of the Respondent by misdirecting itself that the trial tribunal nullified offer letter which is not true.*
4. *That, the District Land and Housing Tribunal for Dodoma erred in law and facts by pronouncing judgement in favour of the Respondent by arguing that, the disputed land has been given to Appellant by land allocating authority without considering the fate of indigenous owners (former owners).*
5. *That, the District Land and Housing Tribunal for Dodoma at Dodoma erred in law and facts by pronouncing judgement in favour of the Respondent without considering that there was no evidence adduced by the Respondent to prove that the land*

in dispute was given to her as compensation by land allocating authority.

With leave of the court, the appeal was disposed of by way of written submissions. The Appellant appeared in person whereas the Respondent was represented by Mr. Francis Mantago Kesanta, learned Advocate.

The Appellant abandoned the second, fourth and fifth grounds of appeal and therefore he submitted on first and third grounds jointly that, the evidence adduced by the Respondent and her witnesses was weak and contradictory in the sense that the Respondent claimed to have obtained the suit land from Capital Development Authority (CDA) as compensation but she produced the letter of offer dated 18th January, 1994 when the suit land was not surveyed. The Village Authority proved this and he thus argued that, the said letter of offer has no legal effect.

He argued further that, the law required approval of the Village Authority in respect of the private disposition of the derivatives rights as per the provisions of section 31(3) of the Village Land Act Cap. 114. He also cited the case of **Methusela Paul Nyagwaswa vs. Christopher Nyirabu [1985] TLR 103**. He proceeded to argue that, the Appellant at Ihumwa Ward Tribunal testified to be the lawful owner of the suit land measured one acre as he purchased the same from one Peter Fukunyi. In

his view, this evidence was corroborated by the said Peter Fukunyi who testified to have been given by his father in 1990's and sold to the Appellant in 2010.

He submitted further that, the evidence adduced by the Respondent before the District Land and Housing Tribunal for Dodoma was contradictory, weak and inconsistent for want of evidence to prove her ownership of the suit land. He supported his submissions by citing the provisions of Section 111 of the Evidence Act, Cap. 6 R.E 2019 and the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** and **Emanuel Abraham Nanyaro vs. Peniel Ole Saitabu [1987] TLR 47**.

In reply, the Respondent submitted among other things that, since it was the Appellant who sued the Respondent in the Ward Tribunal, he was duty bound to prove that he bought the suit land from a person with better title. He supported his assertion with the provisions of Section 110 of Evidence Act Cap. 6 R.E 2019 and the case of **Alex Mwarabu vs. Dickson Nhonya** and **Another, Misc. Land Appeal No. 43 of 2018**, (unreported), where it was held that, only a person with clothed title has power to pass it over to another person.

It was the Respondent's submissions further that, the Appellant evidence was weak and contradictory compared to that of hers, since the alleged seller one Peter Fukunyi failed to prove to have better title to pass

to the Appellant. He failed to tender evidence proving that, he was given such land by his father in 1998.

He proceeded to argue that, the fact that Peter Fukunyi owned land in 1990's and his father owned the same in 1970's is not reflected in the proceedings of Ward Tribunal, therefore he said that, the Appellant is barred from stating new facts in submission. He cited the case of **TUICO at Mbeya Cement Ltd vs. Mbeya Cement Co. Ltd** and **National Insurance Corporation [2005] TLR 41.**

He argued further that, the Respondent proved the case as was allocated the land by the defunct Capital Development Authority as compensation in which she was issued a letter of offer in 1994 as admitted by the Appellant and proved by one Timoth Hosea Ndumizi who was working for Respondent in the suit land.

On the appellant's argument that in 1994 the suit land was not yet surveyed, she said not to be true because the Appellant didn't prove in the Ward Tribunal and that, the defunct Capital Development Authority could have not allocated the land with specific plot and block to Respondent if the same was not surveyed. Furthermore, she said that apart from the Appellant's argument that the suit land was yet surveyed in 1994, still the Appellant failed to tell if still not surveyed and whether he still owns the land under customary right.

It was the Respondent's testimony that, search conducted in October 2017, shows that the suit land was under the ownership of the Respondent. She argued that, since the Appellant's claim to own the suit land under customary right of occupancy, it is obvious that customary right of occupancy and the granted right of occupancy cannot co-exist. In this, He cited the case of **Mwalimu Omary** and **Another vs. Omari A. Balali [1990] TLR 9.** Thus, the Appellant cannot claim ownership under customary right of occupancy to the surveyed area.

He also said that, the argument that there was a need for approval from the Village Council for the land to be allocated to the Respondent from the defunct Capital Development Authority is baseless for the reasons that, the Appellant has not proved that the land was registered in the Village Council for the same to require approval. He cited the provision of Section 2 of the Village Land Act Cap 114, R.E 2019 which defines disposition not to include land allocation.

It was his further submissions also that, the Respondent's evidence is not contradictory as submitted by the Appellant that, it is the appellant's evidence which was contradictory as he stated to purchase two acres of land from Peter Fukunyi whereas the said Peter Fukunyi testified to have disposed two and a half acres while at the same time the Appellant's witness one Dionis Maige was not sure about the size.

Having these submissions from the parties and also having taken into account the entire evidence on record, the issue to be determined is whether this appeal has merits. This being a civil proceeding, as submitted by both parties, it goes on balance of probabilities, of course, each party is charged with the duty to prove what he or she asserted. This invariably is a matter of evidence and should be depicted at the trial tribunal. Since it was the Appellant who claimed to be the owner of the suit land and in fact, is the one who lodged the claim at the trial tribunal, is legally bound to prove his ownership.

Starting with the first ground of appeal that, the Respondent's evidence was weak and contradictory, I agree with the Respondent's Advocate that it was the Appellant's evidence which was weak and contradictory in the sense that **one**, the size of the suit land differed materially among witnesses. Whereas the Appellant testified to own two acres; his witness one Dionis Maige who witnessed the sale agreement didn't know the size as here under when examined by members to the tribunal:

Je shamba lina ekari ngapi?

Jibu: sijui ukubwa

Yet another witness Peter Fukunyu stated to have sold one acres and a half as hereunder:

Je Masanja ulimuuzia ekari ngapi?

Jibu: ekari 1½

Two, whereas Peter Fukunyi who sold the suit land to the Appellant, orally testified to be 1 ½ acres and the Appellant testified orally to be two acres, the sale agreement tendered in evidence contradicts the two version as it indicates that the sold land measured one acre only. The agreement partly reads in the title:

YAH: HATI YA KUNUNUA MALI YA SHAMBA EKARI MOJA (1)

Three, again, Peter Fukunyi testified that the suit land was registered under customary right of occupancy and has a certificate to that effect. However, to the conclusion of trial at the trial tribunal, no such document got tendered. Part of such evidence to this regard reads:

Je ulikuwa na Hati ya Kimila?

Jibu: Ndiyo.

Je Hati hiyo ipo?

Jibu:Ndiyo.

Je hati hiyo ulimwambatanishia Masanja?

Jibu:Hapana.

Four, furthermore, Peter Fukunyi stated to have been given the suit land sold to the Appellant by his father who is alive. However, the said

further was not called to testify at trial. The reason for not calling this material witness in evidence is not apparent on record. It is trite law that failure to call material witnesses by a party invites the court to draw adverse inference that a witness would testify against party's interest.

On the Respondent's side, her evidence was strong as she submitted on how, when and where she got the suit land by tendering letter of offer which traces her ownership since 1994. Even further correspondences with the defunct Capital Development Authority and City Council respectively dated 31/12/1993, 8/2/1994, 10/01/2005 and 3/9/2018 all proved that she is the owner of the suit land.

The law is very clear that, when two persons are competing of ownership, the one with good title should be regarded the rightful owner unless there is fraud on the manner the said tittle got acquired. The provisions of section 40 of the Land Registration Act, Cap. 334 regarding this legal position reads as hereunder:

> *A certificate of title shall be admissible as evidence of the several matters therein contained.*

It was also stated in the case of **Salum Mateo vs. Mohamed Mateo [1987] TLR 111** that:

> *(i) Section 2 of the Land Registration Act, Cap. 334 defines owner in relation to any estate or interest as the person*

for the time being in whose name the estate or interest is registered.

Furthermore, what the defunct Capital Development Authority did was to allocate the suit land to the Respondent as compensation following acquisition of her land by the Government. As said above, there is also no proof that the suit land was owned customarily by the said Peter Fukunyi who sold it to the Appellant.

The first appellate Tribunal also considered the evidence adduced by the Respondent, that is, a letter of offer on Plot 5, Block "G" Ihumwa issued on 8th February 1994 by the defunct Capital Development Authority. As said, the Appellant on his part produced a sale agreement dated 28th March 2010 stating that, he purchased the suit land from one Peter Fukunyi. When comparing dates on Letter of Offer to those in the sale agreement, it shows clearly that, the Respondent was the first to be allocated the suit land. Peter Fukunyi therefore had no better title to pass to the Appellant.

In the final analysis, what is noted generally is that, the basis of the decision in the District Land and Housing Tribunal on appeal was not on weaknesses but rather the strength of the Respondent's case. It was neither owe the basis to the weakness of the Appellant's case. Mostly the assessment of evidence by the first appellate tribunal, which was legally

mandated to do so, was on weight of the evidence on record which each party had a burden to discharge. This was also the position in **Charles Christopher Humphrey Richard –Kombe t/a Humphrey Building Building Materials vs. Kinondoni Municipal Council, Civil Appeal No.125 of 2016** (unreported) where the Court of Appeal in its judgment dated 2nd August 2021 at pages 15 & 16 observed that:

> *For the sake of completeness, as the learned advocate for the appellant may be aware,* ***it is not the law that the litigant's burden of proof in a suit is made lighter by reason of the weakness, if any, in the opponent's case****. At the risk of making this judgment unduly long, we feel constrained to refer yet again to commentaries from decided cases in India referred in the works of Sarkar (supra) at page 1896 as follows: 15*
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> > *"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. ...The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he*

cannot proceed on the basis of weakness of the other party...."

That said and done, this appeal fails for want of merits and is accordingly dismissed with costs.

It is so ordered.

Gerson J. Mdemu
JUDGE
25/2/2022

DATED at **DODOMA** this 25th day of February, 2022

Gerson J. Mdemu
JUDGE
25/2/2022