THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

MOROGORO

LAND APPEAL NO. 05 OF 2021

(Originating from Land Application No. 26 of 2020)

EPIMAEL NKO..... APPELLANT

VERSUS

FRIDA MALYA..... RESPONDENT

JUDGMENT

Hearing date: 24/11/2021

Judgement on: 21/01/2022

NGWEMBE, J:

This is an appeal by Epimael Nko against the judgement and decree of the District Land and Housing Tribunal (Tribunal) for Morogoro in Land Application No. 26 of 2020.

In a nutshell the dispute traces its origin from the sale agreements. While the respondent claim to have purchased house No. 36 as per the certificate of title No. 46528 sold by Presidential Parastatal Sector Reform Commission (PSRC) in year 2005, for the sale price of shillings six million (TZS. 6,000,000). Upon full and satisfactory payment of the sale price, PSRC surrendered the title deed and right of occupancy to the purchaser. Thus, the respondent became the lawful owner of house No. 36. In the contrary, the appellant claimed to own grain milling machine, which he purchased lawfully, from Polytex Consumers

Cooperative Society Mgr 75 in year 1999. Since then, to date he has been running that machine undisturbed until the current dispute. Thus, denied to trespass to the respondent's landed property.

Both parties were well equipped by experienced legal practitioners, Professor Cyriacus Binamungu appeared for the respondent herein, and Mr. Godfrey Gabriel Mwansoho for the appellant. The same representation appeared at trial. At the end the tribunal decided in favour of the respondent that, the appellant had no right of occupancy over the suit land where his grain milling machine is located; that the appellant was ordered to remove the said grain milling machine from where it is, with a view to allow the respondent to proceed with surveying her land; and the appellant was condemned to pay costs of the suit.

Being dissatisfied with that decision, he preferred this appeal armed with four (4) grounds namely:-

1. That the Trial Chairman erred in law and in fact in declaring that the biding of house No. 36 by PSRC included area where the appellant grain mill was located;
2. That the Trial Chairman erred in law and fact for his rejection to disqualify the respondent counsel and rejecting to summon the coordinator from PSRC as tribunal witness;
3. That the Trial Chairman erred in law and fact for failure to properly evaluate the evidence on record that led to erroneous decision; and

4. That the Trial Chairman erred in law and fact by adding statements which were not pleaded during trial and in the proceedings.

In arguing these grounds of appeal, the learned advocate Mwansoho, successfully, prayed to consolidate grounds 1 & 3, and the 2nd ground he prayed to argue only on failure to disqualify the learned advocate from representing the respondent. Being allowed to amend his grounds of appeal, the learned advocate commenced his submission with ground four (4). Submitting on ground 4, he referred this court to page 4 paragraph 4 of the tribunal's judgement and in page 5 paragraph 2 last line, and page 5 paragraph 4 of the judgement, that all those paragraphs comprised statements which were not pleaded by any party to the suit.

Further argued that, since the witness from PSRC was not called upon by the respondent as key witness, the Tribunal ought to summon him as its witness, but refused. He cited the case of **Hemed Said Vs. Mohamed Mbilu [1984] T.L.R 113** where it was held, "*where for undisclosed reasons a party fail to call material witness the court is entitled to draw an inference if the witness is called, he could have given evidence contrary to the party interest*"

He contended that, there was no reason why a person from PSRC could not be summoned and suggested that this court should order trial de novo.

In response therein, the learned advocate for the respondent commenced his submission by an interesting phrase; "*cases never seize*

to amuse him" and proceeded to argue forcefully, that ground four is vague and it does not make any legal sense. Since any attempt by a lawyer to impinge a court judgement is a serious issue. He cited the case of **Mathias Luhana Vs. Mupizi Mpuzu in Misc. Land case Appeal No 20 of 2019.** The averments of the advocate for the appellant ought to swear an affidavit and affidavits from those witnesses who testified during trial, failure of which, this ground should be dismissed with costs, he rested.

I find this ground should be determined forthwith. I may begin by referring to some basic legal principles; that whoever aggrieved by a court judgement, is a constitutional and natural rights to appeal against it to a superior court. Second, the court's judgement should always be based on material facts, evidences adduced during trial and legal arguments advanced during trial by both parties. Third, allegations of importing new facts in the judgement, which same were not testified during trial, any party, may raise it, by way of an affidavit of an advocate or whoever alleges it. Also, he should obtain affidavits from the witnesses who testified in court during trial.

In this appeal I agree with the learned advocate for the respondent that an attempt to impinge the court's judgement is a serious issue and should not be taken lightly. To impinge the court's judgement has long lasting impact not only to the integrity of the judiciary in dispensation of justice, but more so, to the society in general. Therefore, court's must always stand firm to protect its integrity and decisions jealously.

Having laid down, those legal foundations on this ground, I find compelled to revisit more closely on the issues raised by the learned

advocate for the appellant. He referred this court to page 5 para 2, page 4 paragraph 4, and page 5 paragraph 4 of the judgement. However, perusing inquisitively on the referred pages and paragraphs of the tribunal's judgement the same is a recap of facts pleaded by parties as testified during trial. Usually, parties are bound by their pleadings. One cannot challenge on appeal his own pleadings. In this ground the learned advocate invites this court to revisit his own pleadings, which I think is unusual.

Without laboring much on this point, I agree with Prof. Binamungu that this ground is unfortunate same should be dismissed forthwith as I hereby do.

The 1st and 3rd ground were jointly argued by learned advocate for the appellant by challenging the tribunal's judgement for failure to decide the real issue in controversy. Argued that the judgement in pages 4 and 5 paragraphs 2-9 the trial tribunal discussed purchase of grain mill Machine instead of discussing the true issue raised during trial. During cross examination PW1 disclosed that, she had no title deed neither knew the boundaries and that the only documents she relied on was a contract for sale and biding document of house No 36.

That the Tribunal forgot to evaluate clause 6 (a) of the application and the evidence of PW1. Also, the purchase price of the house was TZS. Six Million (6,000,000/=), but the binding document provide the price of TZS. Four Million and five hundred thousand shillings (Tzs. 4,500,000/=) therefore the sale agreement can not be used to prove ownership, while there are discrepancies. Further, the Tribunal did not declare that the biding of house No. 36 included the area in dispute (the grain Mill), that

even the sale agreement was not legal. He cited the case of **Abel Masikiti Vs. R Criminal Appeal No 24 of 2015 at page 6,** which discussed the issue of analysis of evidence of both sides.

He further stated that the testimony of DW2 was not discussed by the tribunal, DW2 was a member of the subdivision committee, and he knows the boundaries.

In turn the learned advocate for the respondent argued that, what is crafted by the advocate for appellant is very clear, but what he has submitted in this court is wrong. He defines biding to mean the act of offering prices especially at an auction. However, the Tribunal did not declare that the biding included the piece of land in dispute.

Regarding differences of price on the biding document and sale agreement, argued that the seller was PSRC and not the disputants. Further stated that the appellant only owned grain milling machine not landed property, because even the seller of those grain mills had no title over the land. Added that the appellant bought moveable properties only, which is a grain milling Machine. He concluded by submitting that the review of the evidence of both parties were quite in order and the evaluation of the whole evidence were correct. In any event the appellant is a trespasser, he concluded.

On the last ground (2nd) the appellant argued that, on 06th April 2021 the sale agreement (Exhibit P3) of the house No. 36 was signed by advocate for the respondent and that he intended to call him as a witness, but the Tribunal failed to heed to his prayer. He cited **Regulation 96 (2) of the Advocate Professional Conduct G.N**

118 of 2018, that advocates should not undertake a matter when it is probable to be called as witnesses. The issue is simple that the advocate for the respondent witnessed a contract of TZS. Six Million (6,000,000/=) while the offer was only Four Million and Five Hundred Thousand shillings (4,500,000/=). He also cited the case of **Kathebet Robert Kajuna Vs. Equity Bank (T), Civil Case No 10 of 2018 at page 5.**

He concluded his submission by starting that the whole decision of the Trial Tribunal should be set aside and this court be pleased to order retrial.

Replying therein, the learned advocate for the respondent submitted that, the price in the plaint was TZS. Six Million (6,000,000/=) and the amount was never disputed. Usually, parties are bound by their own pleadings as in the case of **James Funke Gwagilo Vs. AG [2004] TLR 161.**

That on 06th April 2021, the appellant raised similar objection and the hearing was scheduled on 20th April 2021, but the appellant's advocate never appeared in court, thus the objection was dismissed. He cited the case of **Caltext (T) Ltd Vs. Wolfgang Spengler & The Registrar of Titles, Misc. Land App. No 24 of 2006.** Rested by inviting this court to dismiss this ground for lack of merits and is intended to mislead the court.

Having calmly gone through the evidence on record as well as the oral submissions advanced by the learned advocates, I find it imperative to point out the crux of the matter which, to the best, is the ownership of

the landed property. While the respondent claims to have failed to survey her plot of land through an agreed committee to survey it, the appellant dispute to remove his grain Milling Machine.

Undisputedly, those houses sold by PSPC, including her house, was built in one plot No. 46528, formally, owned by the defunct Morogoro Polyster Textiles Limited. Those houses were built by the company to accommodate her workers. In the process, the Presidential Parastatal Sector Reform Commission (PSRC), came in and sold them to different persons, including house No. 36 which was sold to the respondent.

Following that sale of houses, likewise, the appellant had an advantage of purchasing grain milling machine from Polytex Consumers Cooperative Society. It was a society of workers of the Company.

From a stand point of facts and law, the disputants are purchasers of properties, one purchased house No. 36, while another purchased grain milling machine. The respondent purchased the said house from PSRC, while the appellant purchased that grain milling machine from the society.

Under normal circumstances, the appellant has no right to question anything related to purchase of house No. 36, at the same time, the respondent has nothing to query on the purchase of grain milling machine of the appellant. With surprise, the learned advocate for the appellant has used a lot of energy and time to query on purchasing of House No. 36 as if, the two are disputing on the ownership of that house. I think advocates should always remember that, they are officers

of the court. Apart from their noble duties of defending their clients, yet as officers of the court, are prohibited to mislead the court.

In respect to this appeal, the record of trial tribunal speaks louder that, the respondent purchased such house on 16th day of February 2005. To prove it she tendered sale agreement marked Exhibit P3, and biding documents therein. Hence, it is undisputed fact that the respondent is the rightful owner of house No. 36 situated at plot No: 441 Block D Kihonda area, Morogoro. Other exhibits tendered during trial were offer to purchase Ex-polyster House (Exhibit P1) and acknowledge of payment to PSRC receipt numbers 6629, 6628, 6738 (Exhibit P2).

On the other hand, the appellant produced documentary evidences to prove ownership of the grain milling machine and that he acquired it from Polytex Consumers Co-operative Society for purchase price of shillings Five Hundred Thousand (TZS.500,000/=). Receipt of payment was tendered and admitted during trial marked exhibit D1.

With serious note, PSRC sold house No. 36 together with surrounding land attached therein as per the maxim of *"quicquid plantatur solo, solo cedit"* meaning whatever is affixed to the soil belongs to it. In simple words, what is attached to land is part of that land. The house is built on a land, thus, belong to it. In the contrary, a movable object put on a land do not belong to it because it can be removed at any time from one place to another. Therefore, the appellant purchased a grain milling machine, which is a movable object, thus do not belong to the land where it is placed to. The appellant cannot therefore, claim ownership of the suit land where the machine was placed.

Moreover, perusing deeply on the ability of the seller of those machines, who were the original owners of that milling machine (Polyter Consumers Cooperative Society), did not own any piece of land over plot No. 441 Block D Kihonda, Morogoro, bearing Certificate of Title No. 46528. Therefore, legally, the society had no title over the landed property to transfer to the appellant.

If the society had no title over the suit land, it goes like a day followed by night, that such society had no title to transfer to the purchaser of that machines (appellant). Consequently, the purchaser of the grain milling machine has no right whatsoever to claim ownership of any piece of land over the disputed plot of land, rather has every right over such grain milling machine.

Having so said, I find compelled to consider with due care, the arguments advanced by the learned advocates on grounds 1st and 3rd jointly. The advocate for the appellant argued quite forcefully, that the tribunal failed to properly evaluate the evidence adduced during trial. This ground has taxed my mind to find the truth on it. Perusing the evidences adduced during trial, I find the testimony of DW2 was corroborating the evidences of PW1. For instance, DW2 testified that:-

> *"Wakati tunanunua utaratibu wa mipaka hatukuonyeshwa, mpaka baada ya kununua tuliamua katika kamati kati ya nyumba na nyumba kati kati ndio mpaka.*
>
> *Mdai aliuziwa nyumba na hakuonyeshwa mipaka na mashine ilikuwepo, mashine ni ya mdaiwa"*

Added that:- *"mashine ilikuwa ndani ya saccoss...saccoss ilipewa eneo na kampuni kiwanda kilipofungwa ilibidi mali za saccoss ziuzwe na mdaiwa alinunua mashine"*

The testimony of DW2 supported not only the evidence of the respondent, but also proved that the appellant owns grain milling machine. More so, the appellant failed to prove ownership of a piece of land where the machine was placed, contrary to sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E, 2002].

As rightly pointed out in the case of **Farah Mohamed Vs Fatuma Abdalah (1992) T.L.R 205,** where the Court held, a person who has no ownership over landed property, he cannot transfer good title to another. Polytex Consumers Co-operative Society never owned land, hence cannot transfer same to the purchaser (appellant).

There is a cherished principle of law, that in land law, the protection of the court can only be extended to a person who has valid, subsisting right over land. In this appeal the appellant has no claim of right over any piece of land. Therefore, these two grounds lack merits same must be dismissed forthwith.

The last issue is related to failure of the tribunal's chairman to disqualify the learned advocate for the respondent from representation. The reason is obvious that Prof. Binamungu witnessed the sale agreement of those houses. The record is clear that this point is being raised by the appellant for the second time. The first time was raised as an objection during trial, but same was not determined conclusively for failure of the appellant to appear and prosecute it. Thus, was dismissed for want of

prosecution. Above all, it is quite interesting, though is not a new issue in our jurisdiction to call an advocate to disqualify from representing a client. For instance, in the case of **Amiri Abdallah Kilindo Vs. Global Securities & Insurance Ltd, Civil Case No. 220 of 2002** HC at Dar es Salaam (unreported) before Mihayo J. was confronted with similar objection. The learned advocate for the plaintiff raised similar issue and prayed the court to disqualify him from representing the plaintiff. The court deeply considered that, objection in line with basic rights of an advocate to defend a client. It is both a professional right and a constitutional right for an advocate to represent his client in a court of law. To remove that right, there must be real danger or embarrassment and the counsel in question should be the first to see it or feel it, if he is worth that decision.

In this point the advocate for the respondent attested the sale agreement. Black's Law Dictionary (7th Edition) defines an attesting witness to mean: -

> *"One who vouches for the authenticity of another's signature by signing an instrument that the other has signed"*

When you attest, you vouch that the whole document is true and according to law. But when you witness, you are saying that the signature appearing herein is of so and so. In this appeal, Prof. Binamungu in the Asset sale agreement as appears in exhibit P3, indicates that he witnessed the signatures of one Dr. H. E. Kavishe, M. Mahanyu and Frida N. Mallya. Prof. Binamungu as an advocate did not draw the said document, rather witnessed the signatures of the parties. I am, settled in my mind, that what was done by the respondent's

advocate did not prejudice any one of the disputants. Accordingly, this ground must be dismissed as I hereby do.

The final findings of this appeal is that, the whole grounds of appeal fall short to convince my conscience to depart from the decision of the trial tribunal. Accordingly, this appeal lacks merits same is dismissed with costs.

Order Accordingly.

P.J. NGWEMBE

JUDGE

21/1/2022

Court: Judgement delivered at Morogoro in Chambers on this 21st day of January, 2022 in the presence of Ester Shoo for Mwansoho advocate for Appellant and Ms. Ester Shoo Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

21/1/2022