

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IRINGA SUB REGISTRY**

**AT IRINGA**

**LAND APPEAL NO. 58 OF 2022**

*(Originating from Application No. 115 of 2018 in the Iringa District Land and Housing Tribunal  
and Misc. Land Application No. 35 of 2020 in the High Court of Tanzania at Iringa)*

**AMIDU DAMIAN LIKILIWIKE (Administrator**

**Of Estate of Late BOIMANDA LIKILIWIKE).....APPELLANT**

**VERSUS**

**SAMAWATI RASHIDI CHALAMILA (Administrator**

**of the Estate of the Late STEVEN TEMBA).....RESPONDENT**

**JUDGMENT**

**Date of the Last Order: 15.03.2023**

**Date of Judgment: 31.03.2023**

**A.E. Mwipopo, J.**

Amidu Damian Likiliwike, who is the administrator of the estates of the late Damian Boimanda Likiliwike, sued the late Steven Temba in Application No. 115 of 2018 in the Iringa District Land and Housing Tribunal for trespassing into the suit land which is Plot No. 95, Block "N", Mjimwema within Iringa Municipality. The trial Tribunal dismissed the application for

want of merits and declared the late Steven Temba to be the lawful owner of the disputed land.

The appellant aggrieved with the decision of the trial Tribunal and preferred this appeal with a total of four (4) grounds of appeal. The said grounds of appeal are as follows;

- 1. That, the chairman erred in law and fact by disregarding evidence as delivered by the Applicant in the District Land and Housing Tribunal for Iringa at Iringa on 05 March 2019.*
- 2. That, the chairman erred in law and fact by failing to evaluate evidence required for establishing the first issue affirmatively.*
- 3. That, the Chairman erred in law and fact by holding the opinion of assessors who had no legal knowledge regarding the disposition of the land according to the laws.*
- 4. That, the Chairman erred in fact by recognizing Anna Kwiya as a seller of the suit property, which falls among the deceased's estate, without a legal justification to sell the suit property to the buyer.*

The Appellant prays for the judgment and decree of the District Land and Housing Tribunal be quashed, the Court to declare that the suit property falls among the deceased's estate under the administration of the administrator of the Estate, a declaration that the sale of the suit property null and void from abinitio, order for the Respondent to vacate the premise and any other order that the Court may deem fit, just and equitable to grant.

At the hearing of this suit both parties were represented. The appellant was represented by Mr. Joshua Chussi, learned Advocate, whereas the Respondent enjoyed the service of Ms. Neema Chacha, learned Advocate.

Mr. Chussi submitted jointly on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> grounds of appeal and he abandoned the 3<sup>rd</sup> ground of appeal. It was submitted on behalf of the appellant that the respondent tendered a record of Probate Cause No. 43 of 2010 in the Primary Court for Iringa District at Iringa Urban - Exhibit P3 and the appellant testified on oath before the Tribunal to prove the ownership of the land in dispute. The evidence proved that the said suit land had already been sold by the wife of the late Damian Likiliwike. PW1 testified before the District Land and Housing Tribunal that (see page 5 of proceedings) the House No. 95N at Mjimwema belongs to Damian Boimanda Kiliwike. The District Land and Housing Tribunal was supposed to take judicial notice of the record of the Primary Court and consider evidence of PW1. The District Land and Housing Tribunal did not address itself properly over the issue of ownership of the said land in dispute. The Tribunal is duty bound to make sure that its decision is coming from the issue before it which has been raised and/or addressed in order to do justice. In the case of **Said Mohamed Said vs. Muhsin Amiri and Another**, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania, at Dar es Salaam, (unreported), at page 7, it held that:-

*"..... a decision of the court should be based on the issue which are framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice".*

The issue of ownership of the house in dispute is found in the Exhibit P3. In the suit before the Tribunal there was caveat which in paragraph (i) shows that Anna Sekuyava has interest in the land registered in the name of Damian Likiliwike. PW4 namely Eliza Damiani Likiliwike testified that they were arrested and taken to police following the fracas which occurred over the ownership of the house in dispute. After they were discharged by the court in 2012 they went to the Registrar of land to inquire about the house. She was informed that there is a caveat in the title of the land in dispute which was filed by Anna Kuyava. The testimony by PW4 has never been contradicted by the respondent through cross examination or counter evidence.

The history of the land in dispute is found in the file and the said caveat were in the title deed since 2012. As the selling of the house was done later on after the buyer did official search as seen at page 30 of the District Land and Housing Tribunal proceedings and the search shows that the owner is Anna Kuyava and she decided to buy the house. Thus, the buyer was aware of the conflict going on over the ownership of the house and she did buy the

house on her own peril. In the case of **Mohamed Issa Makongoro vs. Gilbert Zebedayo Mrema**, Land Case No. 107 of 2015, High Court Land Division at Dar Es Salaam (unreported), the court reminded the principle of buyer be aware as provided by Section 10 of the Law of Contract Act. Failure to get free consent of the parties competent to contract render the contract to be void. As the search done by the buyer did show who the owner is, the buyer was supposed to buy the house from the holder of the title who is registered by the Authority.

The District Land and Housing Tribunal failed to address the issue properly which has led to miscarriage of justice. The Tribunal failed consider the facts before it. As a result, the whole of the decision of the District Land and Housing Tribunal in Application No. 115 of 2018 to be null and void.

On her reply Ms. Chacha submitted jointly on ground No. 1, 2 and 4 as it was submitted by the counsel for the applicant. It was her submission that the respondent case before the District Land and Housing Tribunal was more weight than that of the applicant. The respondent tendered certificate of occupancy of the land in dispute which is Plot No. 95, block "N", Mjimwema within Iringa Municipality. The proceedings show at page 30 that the respondent satisfied herself that the seller was the rightful owner of the land and the document were genuine. The respondent paid 65 million as a

purchase price. The Respondent did not know the applicant or the late Damian Likiliwike. The respondent could not have known about the conflict within the family since he did not meet with the applicant. The appellant did not produce any evidence to prove that the land in dispute belong to the late Damian Likiliwike. When answering questions during cross examination, PW1 admitted that he has no exhibit to prove that the land in dispute belongs to his late father.

On the testimony of PW2, it was submitted that it was hearsay evidence as she was telling about what she was informed. It was PW3 testimony in page 17 of typed proceedings that the land in dispute has an offer, but the witness failed to tender it. It was just a mere word. The only exhibit they tendered was pay-in slips, but the said pay-in slip did not contain the name of the owner of land and stamp of the authority receiving the payment. The said paying slip was not sufficient to prove the ownership of land. Section 69 of the Evidence Act provides how to prove the ownership of the document. In the case of **Nitak Limited vs. Onesmo Claud Nyika**, Civil Appeal No. 239 OF 2018, High Court of Tanzania at Dar Es Salaam, (unreported), at page 5 and 6, it was stated the principle governing admission of exhibits which includes relevancy, materiality and competence. This is the reasons their

exhibits were not admitted. The respondent tendered original documents to prove her ownership of the land in dispute.

In a short rejoinder, the counsel for the appellant submitted on the issue of evidence that the respondent did make search and he was aware that the land was registered in Damian Likiliwike name. Also, there is probate cause proceeding which is part of the evidence before the District Land and Housing Tribunal. All of these proved that the late Damian Likiliwike was the owner of the land in dispute. The buyer bought the land while knowing that it does not belong to the seller. He insisted for this appeal be allowed with cost.

Having heard the rival submissions by the learned counsels and having carefully perused the court records, the crucial issue to be determined here is whether this appeal has merit before this court.

The counsel for the appellant submitted jointly on grounds No.1, 2, and 4 and he abandoned ground no. 3. Likewise, in her reply the counsel for the respondent did the same. The main appellant's complaint on those grounds is that the District Land and Housing Tribunal failed to evaluate evidence and exhibits tendered by the appellant in order to satisfy itself on who is a lawfully owner of the suit premise. The trial Tribunal failed to consider the evidence of PW1 that the House No.95, Block "N" at Mji mwema belongs to the late

Damian Boimanda Likiliwike and the Tribunal did not take judicial notice of the judgment of the Primary Court for Iringa District at Iringa Urban in probate Cause No.43/2010 - exhibit P3 where the suit property was recorded in probate cause as among the properties left by the late Damian Likiliwike. The respondent's reply was that he has a right of occupancy which prove his ownership of the suit land. Thus, this dispute is on who is the lawfully owner of the disputed land.

The appellant evidence was on the claim that the suit land belongs to his late father Damian Likiliwike. The appellant's evidence is based on oral testimony of the appellant – PW1, Crisensia Mswata – PW2, Emilio Damian Likiliwike – PW3, Eliza Damian Likiliwike – PW4 and Riziki Damian Likiliwike – PW5 that the land in dispute belongs to their late father who bought the plot from Augustino Boso Mwanyigu in 1960 and he constructed a house in 1964. The appellant also tendered receipt of the Iringa Municipal Council dated 24.10.2016 and demand notice dated 21.10.2016 – Exhibit P1 collectively, letter of appointment as administration of the deceased estate – exhibit P2, and proceedings and ruling of Probate Cause No. 43 of 2010 in the Iringa Urban Primary Court – exhibit P3.

Exhibit P1 is Iringa Municipal receipt which show that the late Damian Likiliwike paid to the Municipal Tshs. 42,000/= as property tax. But, the



receipt does not state the tax paid was for which property. The demand notice issued on 21.10.2016 by the Iringa Municipal Council shows that Municipal Council was demanding Damian Likiliwike to pay land rent for the year 2016/2017 for the plot No. 95 "N" at Mjimwema Street. However, the demand notice is not the proof of ownership of the land.

Reading the decision of the Iringa Urban Primary Court on the probate cause – exhibit P3, it shows that the appellant was appointed the administrator of the late Damian Likiliwike estates hence he has locus to institute the suit. Exhibit P3 shows in second page last paragraph that deceased estates includes farms at Njombe and Isimani, three houses at Isimani and two houses in Iringa Municipal. Unfortunately, the said decision of the Iringa Urban Primary Court does not say that one of the house at Iringa Municipal is the land in dispute. Thus, the claims by the appellant that the probate cause recognized the land in dispute to be the property of the deceased is not correct.

Apart from documentary exhibits discussed above, the appellant did not tender any title deed to prove the ownership of the suit land or the sale agreement between Agustino Mwanyigu and Damian Likiliwike to prove that the plot was sold by Augustion Boso Mwanyigu to his late father. Even though the demand notice issued by the Iringa Municipal contains the name of the

late Damian Likiliwike as the owner of the land, this is not the legal proof of the ownership of the land. The ownership of the surveyed land is proved by title deed, unless it is proved otherwise. Further, there is no witness of the sale who was brought to testify to the trial Tribunal. The failure of the appellant to call Augustino Mwanyigu or any other witness of the sale may draw adverse inference against them. In the case of **Hemed Said vs. Mohamed Mbilu [1986] TLR 113**, it was held that:-

*"(iii) Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests".*

The failure of the appellant call these material witnesses of the sale of the house from Augustino Mwanyigu to their late father without disclosing the reason leads to inference to be drawn against him.

On the other side, the respondent managed to tender the Certificate of Occupancy - exhibit D1 which is in his name to prove his ownership of the disputed land. The file shows that the late Steven Temba bought the land from Anna Kuyava. It is trite law that, where two persons have competing interests in a landed property, the person with the certificate thereof will always be taken to be the lawfully owner, unless it is proved that the

certificate was not lawfully obtained. See the case of **Amina Maulid Ambali and 2 Others vs. Ramadhani Juma**, Civil Application No. 173/08 of 2020 Court of Appeal of Tanzania, at Mwanza, (unreported). In the case of **Athuman Amiri vs. Hamza Amiri and Another**, Civil Appeal No. 8 of 2020 Court of Appeal of Tanzania at Arusha, (unreported), it was held at page 14 that:-

*"It is settled that the certificate of title is conclusive evidence to prove ownership over the land unless proved otherwise"*

In this case, there was no issue raised by the appellant as to whether the certificate of occupancy was unlawfully obtained to validate sale when the same was tendered. The evidence in record shows that the right of occupancy in the disputed land was in the name Augustino Boso Mwanyigu. The land was transferred by Augustino Boso Mwanyigu to Anna Kuyava and was registered in her name on 15.02.2016. The land was further transferred to the late Steven Peter Temba on 12.04.2016 by Anna Kwiya.

Regarding the claims by the counsel for the appellant that why Anna Kwiya filed caveat to the suit land in 2010 if she was the owner of the suit land, normally the Caveat is filed to protect interest of the party filing it. By filing the caveat, it shows that Anna Kwiya has interest to the land in

dispute. The Court is aware that on the same year 2010 when Anna Kwiyaava filed caveat the appellant was appointed to be administrator of the deceased estate and there was conflict in relation to the ownership of the suit land as it was testified by PW1 and PW4, the conflict led to institution of criminal case.

Concerning the applicant's claims that the District Land and Housing Tribunal was supposed to take judicial notice of the record of the Primary Court and consider evidence of PW1, I'm satisfied that the trial Tribunal did take judicial notice of the probate cause which was before Iringa Urban Primary Court, but the respondent's evidence was heavier than that of the appellant. The trial District Land and Housing Tribunal properly addressed itself to the issue of ownership of the said land in dispute. The decision of the Tribunal came from the issue before it which has been raised and addressed by the parties through evidence.

For that reason, I'm of the same position with the trial Tribunal that the respondent evidence has more weight than that of the appellant. The certificate of occupancy itself is showing the respondent is the owner of the suit land since April, 2016 after he bought it from Anna Kwiyaava. The property

was transferred to Anna Kwiyaava on February, 2016 from Augustino Boso Mwanyigu.

Therefore, I'm satisfied that the evidence by the respondent was heavier than that of the appellant and the trial District Land and Housing Tribunal properly dismissed the application filed by the appellant for want of merits. The declaration by the trial Tribunal that the respondent is the rightful owner of the suit land is lawful and I proceed to uphold it. Consequently, the appeal is dismissed with costs. It is so ordered. Right of Appeal explained.



A handwritten signature in blue ink, appearing to read "A.E. MWIPOPO", is written over the printed name.

**A.E. MWIPOPO**

**JUDGE**

**31/03/2023**