

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 02 OF 2023

*(Originating from the District Land and Housing Tribunal for Songea at Songea in
Land Application No. 87 of 2018)*

MOHAMED ISSA APPELLANT

VERSUS

AJABAH ISSAH CHITETE RESPONDENT

JUDGMENT

Date of Last Order: 30/03/2023

Date of Judgment: 25/04/2023

U. E. Madeha, J.

To begin with, before the Trial Tribunal both parties in this appeal claimed to be the lawful owners of Plot Number 1243 Block FF which is located at Bombambili area within the Municipal of Songea in Ruvuma Region. The Respondent claimed that he was given the disputed land by Fransisca R. Kiwale on 28th September, 2009. The said Fransisca R. Kiwale bought that plot of land on 14th April, 2006 from Twaha Mohamed and at that time the land was surveyed. The letter showing how Fransica R. Kiwale handed over the land to the Respondent were tendered and admitted before the Trial Tribunal as exhibit P1. Until now

the Respondent is living in the disputed land and he has made some developments on it.

PW3 who is the land officer from Songea Municipal Council testified that Plot Number 1243 Block FF Bombambili was surveyed in the year 1990. It was surveyed and the ownership remained to the inhabitants of that area until 2018 when the Appellant requested to be registered as the lawful owner. The Appellant was given a form to send to his neighbors to signify if he is a rightfully owner of the disputed land. Also, at the same time they received a letter from the Respondent requesting to be registered as a lawful owner of the same piece of land. In fact, the Songea Municipal Director's Office stopped the exercise of preparing documents for not recognizing the legal owner of the disputed area.

As a matter of fact, the District Land and Housing Tribunal of Songea declared the Respondent to be the lawful owner of Plot No. 1243, Block FF located at Bombambili area within Songea Municipal in Ruvuma Region. The Appellant was declared to be the trespasser in the disputed land of the land Plot No. 1243, Block FF and he was ordered to pay to the Respondent an amount of five million Tanzanian shillings (5,000,000/=) as a compensation for the inconvenience he had caused.

Also, the Appellant and his agent were ordered to leave in the disputed land. Being dissatisfied with that decision he preferred this appeal. In his petition of appeal, he has two grounds of appeal which reads as follows:

- 1. That, the trial Tribunal erred in law and in facts when against the appellant without justification.*
- 2. That, the Trial Tribunal erred in law when it heard the matter contrary to the law and evidence.*

It is important to consider that, this appeal was canvassed by way of written submissions. Principally, the Appellant was represented by none other than the learned advocate Mr. Eliseus Ndunguru. On the other hand, the Respondent enjoyed the service of the learned advocate Mr. Lazaro Simba.

Arguing on the grounds of this appeal, Mr. Eliseus Ndunguru prayed to argue the grounds of appeal together. He submitted that the Trial Tribunal erred in law and facts when it decreed against the Appellant without justification since its decision was contrary to the evidence tabled before it. He further submitted that the Appellant testified that he purchased the suit land from one Aridi Tawila in the year 1992 and the sale agreement was admitted as MH1 to prove the same. In addition, he testified that he was the first person to purchase

the disputed land and his testimony was supported by Zuberi Mgosi Hala (DW2) and Rufina Alex Zamtanga (DW3).

Apart from that, he further stated that the Trial Tribunal did not give any reason as to why it disbelieved the Appellant's evidence. He contended that the Respondent testified that he was given the suit land in the year 2009 by one Fransica R. Kiwale who purchased the same from Twaha Mohamed on 14th April, 2006 as per exhibit P1 and that the suit premises was surveyed in the year 1990. Moreover, PW2 testified that he witnessed the suit land being sold to one Francisica R. Kiwale by one Twaha Mohamed.

Furthermore, PW3 testified that he is the land officer and the land in dispute was surveyed in the year 1990 and left to the inhabitants of that land. The Appellant and the Respondent applied to be registered as lawful owner and after being approved by the local government authorities the letter of approval was revoked accordingly.

He added that the testimony shows that it is not clear if the disputed land is on Plot No. 1243 FF or Plot No. 1243 Block DD as the witnesses' testimonies were different from what was claimed before the Trail Tribunal. Similarly, he further contended that while the application shows that the dispute is in respect of land on Plot No. 1243, Block DD

located at Bombambili area within Songea Municipal but the sale agreement between the Respondent and the said Twaha Mohamed does not show the Plot Number at all.

He further averred that on his part the Respondent applied to be allocated the same as a native or inhabitant of that land but it was expected that the Respondent would have stated that he obtained the same from Francisca R. Kiwale. In fact, the letter of handing over the land between the Respondent and the said Francisca R. Kiwale (exhibit P1) shows that it was in respect of land in Plot No. 1243 Block DD and not in Plot No. 1243 Block FF as the Trial Tribunal held. Furthermore, PW1 (the Respondent) while testifying before the Trial Tribunal stated that his land is in Plot No. 1243, Block QQ. He stated that those inconsistencies were serious and they go directly to the root of the case as the Respondent failed to prove his case to the required standard. Also, he added that the said Francisca R. Kiwale also was not called to testify.

Mr. Eliseus Ndunguru further submitted that in any case parties are bound by their pleadings, in the sense that they are required to lead their evidence to prove what they have pleaded in their pleadings. Basically, he averred that in this case it is clear that the Respondent in

his pleading was claiming ownership in Plot No. 1243 Block DD, in his testimony testified that he is claiming ownership of the land in Plot No. 1243, Block QQ and the Trial Tribunal declared the Respondent to be the lawful owner of Plot No. 1243 Block FF. Conclusively he submitted that from those observations the Trial Tribunal erred to order the Respondent to be the lawful owner of the disputed land as there was no any legal and evidential justification. Lastly, he prayed for this appeal to be allowed with costs.

On the contrary Mr. Lazaro Simba submitted that the Appellant has stated that the Trial Tribunal faulted by deciding the matter against the Appellant without justification and contrary to the evidence which was before it on two issues which are; *one* and foremost, the Trial Tribunal did not give any reason for in disregarding the evidence of the Appellant and *two*, there are contradictions on the description of the suit land that is to say, on the exactly block of the suit land which was referred to as Plot No. 1243 Block "DD" and sometimes Plot No. 1243 Block "FF". More so, it is that the Respondent in his evidence sometimes he referred the suit land to be in Block "QQ", a contradiction which to the opinion of the Appellant's advocate goes to the root of the case.

In that regard, he further contended that the judgment of the Trial Tribunal is in line with the legal requirement in which each and every element required by the law to be contained in the judgment do exist. The judgment of the Trial Tribunal contains a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Basically, the reasons as to why the Trial Tribunal decided in favour of the Respondent are well elaborated in page seven, eight, nine and ten of the typed judgement of the Trial Tribunal. Besides, he added that from the above pages it is very clear that the Trial Tribunal had considered a number of reasons to decide in favour of the Respondent. *First*, was the kind of witnesses which the Respondent brought who were neighbors to the suit land and conversant with the suit land. On the same note, the witnesses testified that they witnessed the selling of the suit land from Twaha Mohamed.

Two, there was strong evidence that was heavier than that of adduced by the Appellant and his witnesses. In fact, that was the justification as to why the Trial Tribunal decided in favour of the Respondent. The Trial Tribunal did exactly as what was held in the celebrated case of **Hemedi Saidi v. Mohamed Mbilu (1984) TLR 113** in which it was held that:

"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".

Apart from that, he further contended that the suit land as per the amended application that was filed on 12th November, 2018; the suit land was described to be in Plot No. 1243 Block "DD" located at Bombambili area within Songea Municipal. Actually, the description of the suit land was not disputed by the Appellant and in his written statement of defence he categorically stated that the disputed land is in Plot No. 1243 Block "DD" located at Bombambili area within Songea Municipal. To add flavor to it, he contended that taking into consideration that each party to the suit claimed to be the lawful owner of the same Plot. Additionally, he averred that the issue as to who is the lawful owner of the disputed land was framed and thereby determined in favour of the Respondent herein. As matter of fact, he further submitted that it is very clear that the judgment of the Trial Tribunal referred the suit land to be in Plot No. 1243 Block "FF" Bombambili as that being the true and correct description of the suit land as was clearly explained by PW3.

Basically, he submitted further that it was clear from the pleadings of both parties to the suit that the suit land is in Plot No. 1243 Block

"DD" Bombambili following the documents which were supplied to them by Songea Municipal and in which the mistake was well explained by the said witness (PW3) during hearing of the Application and that testimony was not challenged by any party to the suit through cross-examination.

As a result, he stated that the Appellant has completely failed to show how he has been prejudiced by referring the suit land as Plot No. 1243 block "FF" Bombambili. Therefore, to prove that the Appellant was not prejudiced, the Appellant did not cross-examine PW1, PW3 and PW4 on the aspect of Block Number of the suit land. He contended that as much as the law is concerned, failure to cross-examine on an important matter ordinarily implies the acceptance of the truth of the witness's evidence. He made reference to the case of **Paul Yusuph Nchia v. National Executive Secretary, CCM & Another, Civil Appeal No. 85 of 2005** (unreported). Notably, he averred that the suit land referred by the disputants in Land Application No. 87 of 2018 can be seen from the pleadings, the evidence given by PW3 and the same is referred in the judgment of the Trial Tribunal.

Consequently, he emphasized it is apparent that the typing error appearing on the typed proceedings referring the suit land as Plot No. 1243 Block "QQ" Bombambili and reading at page ten of the typed

judgment of the Trial Tribunal in which the suit Plot is referred to as Plot No. 1234 Block "FF" are typing errors which did not prejudice the Appellant and no any injustice occurred. He added that those typing errors can only be rectified by the Trial Tribunal itself under section 96 of the *Civil Procedure Code* (Cap. 33, R. E. 2019) and which cannot affect the judgment on appeal. Basically, he contended that from the above explanation it cannot be said that the Respondent had failed to prove this case as has been submitted by the Appellant. Thus, there is no any ground or submission by the Appellant attacking the proceedings, judgment or findings of the Trial Tribunal enough to fault the findings of the Trial Tribunal. He prayed for this appeal to be dismissed in its entirety with costs for lack of merits.

It is important to note that, in the rejoinder submission Mr. Eliseus Ndunguru submitted that the advocate for the Respondent on the issue of inconsistency which goes to the root of the suit has submitted that it is a typing error to write Plot. No. 1243 block "DD" and Plot No. 1234 Block FF. In fact, he contended that he still maintains that the Respondent while filing his application was claiming ownership over a land on Plot No. 1243 Block DD located at Bombambili area within Songea Municipal. He submitted further that, the application was

annexed with annexure P1 a handing over letter which also showed that the Respondent was given by one Francisca R. Kiwale in Plot No. 1243 and that the said letter was admitted as exhibit P1 and the Trial Tribunal was to base on the said exhibit P1 and nothing more. In that regard, he further contended that the issue of typing error is baseless due to the fact the said Francisca R. Kiwale was not called as one of the witnesses to state whether it was a typing error and the Trial Tribunal was to draw adverse inference and not to presume that it was a typing error. For more clarification, he made reference to the decision of the Court of Appeal of Tanzania in the case of **Mujuni Joseph Katarai v. Samwel Ntambala Luangisa and Another (1986) TLR 53** in which it held that when a party fails to call a material witness to testify in his case the court must draw adverse inference against him.

In fact, he reiterated what he has submitted early by stating that it is the law that parties are bound by their own pleadings and he cited with approval the case of **Maria Amandus Kavishe v. Norah Waziri Mzeru (Administrator of Estates of the Late Sivanus Mzeru) and Another**, Civil Appeal No. 365 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Makori Wassaga v. Jushua**

Mwaikambo and Another (1987) TLR 88, in which the Court held that:

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up new case".

To crown it all, he submitted that the testimony on Plot No. 1243 Block FF was a new case and not a typing error as it has been alleged by the Respondent's learned advocate. Lastly, he prayed for this Court to allow this appeal with cost.

As much as I am concerned, having gone through the petition of appeal which encompasses two grounds of appeal, the records of the Trial Tribunal and the submissions made by both parties, I find they boil down into one issue namely; whether this case was proved on the balance of probabilities.

Actually, the respondent claimed that the one who brought the land is Fransisca R. Kiwale who bought the disputed plot of land on 14th April, 2006 from one Twaha Mohamed. In fact, the Respondent was given the right over the land on 28th September, 2009 after being handed to him by the buyer. Principally, I find that the second buyer (the Respondent) lacked the legal title to claim the land. First, he did not

have sufficient evidence to prove how he got the land. So, the copy of a letter from the Village Chairman in which both parties has contending that they bought that particular piece of land from one buyer who is none other than; Twaha Mohamed is not tenable. On the other hand, the seller also signed as a witness for the Appellant in the year 1992.

As much as the second buyer who is the Respondent is concerned, the evidence shows that it was Fransisca R. Kiwale who bought the farm in the year 2006 and gave it to the Respondent in the year 2009 who confirmed the purchase of the farm by the Village Chairman.

To the best of my knowledge, I find the Appellant was the first owner of the disputed land from 1992. In fact, he bought it before the second owner who is the Respondent. Principally, the right to sue for the trespassed land lies upon the person having lawful possession of that land or to the person with legal possession. For more clarification, this stance was stated in the case of **Sentongo Godfrey v. Mukono Industries (U) LTD** (Civil Suit 55 of 2012) UGCommC 138 (09 November 2012).

As a matter of fact, I am of the view that the disputed land belongs to the Appellant and not to the Respondent as shown in the evidence given by DW1 and DW2. DW2's evidence which shows that the

Appellant has been using that land for all those years. In fact, he is the one who lives on that place and has even mentioned the people with whom he borders.

Therefore, I agree with the Appellant's learned advocate submission that the disputed land belongs to the Appellant. The Appellant testified that he purchased the suit land from one Aridi Tawila in the year 1992 and exhibit MH1 was tendered to prove the same. Also, his testimony was supported by DW2 (Zuberi Mgesi Hala) and DW3 (Rufina Alex Zamtanga).

From the foregoing this appeal is allowed and I hereby set aside the decision, decree and orders of the Trial Tribunal. The Appellant is declared to be the lawful owner of the disputed land. I give no order to costs. It is so ordered.

DATED and DELIVERED at Songea this 25th day of April, 2023.




U.E MADEHA

JUDGE

25/04/2023

COURT: Judgment delivered on this 25th day of April, 2023 in the presence of the Appellant and the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "U. E. MADEHA", with a long horizontal line extending to the right.

U. E. MADEHA

JUDGE

25/04/2023