

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 04 OF 2023

*(Originating from the District Land and Housing Tribunal for Songea at Songea in
Land Application No. 88 of 2018)*

ZABIUNA AHAMAD NYONI APPELLANT

VERSUS

VICTOR EUSEBIUS KILOWOKO 1ST RESPONDENT

ABDUL MAJID KILOSA 2ND RESPONDENT

JUDGMENT

Date of Last Order: 17/04/2023

Date of Judgment: 09/05/2023

U. E. Madeha, J.

To begin with, this appeal emanates from the decision of the District Land and Housing Tribunal for Songea at Songea in Land Application No. 88 of 2018. As a matter of fact, the center of dispute between the parties is on a house built in Plot No. 64, Block D located at Rwinga Street, Namtumbo District in Ruvuma Region (hereinafter "the suit property"). Before the Trial Tribunal the Appellant claimed for the Respondents to be declared trespassers in the above-named house.

Principally, the brief facts leading to this appeal are as follows: In the year 2017 the Appellant bought the suit property from the first Respondent who claimed to be the legal representative of the late Eusebius Filimoni Kilowoko. The purchase price was to be paid on installments and the last installment was to be paid on or before 30th October, 2017. It seems to be true that, the Appellant paid some of the purchase price but she failed to pay the remaining balance. The first Respondent thought the Appellant had failed to adhere to the terms of their contract and on 22nd February, 2018 the first Respondent sold the disputed land to the second Respondent who started making some developments on the suit property.

After the discovery of what was going on in the disputed land, the Appellant instituted an application before the Trial Tribunal. After a full trial the Trial Tribunal found the title of the disputed piece of land did not pass from the first Respondent to both the Appellant and the second Respondent and it was still the property of the late Eusebius Filimoni Kilowoko. Being aggrieved by that decision made by the Trial Tribunal the appellant has come before this court for appeal. Moreover, the grounds of appeal raised by the Appellant in her petition of appeal are as follows:

- i. That, the Trial Tribunal seriously misconceived the premises of holdings the judgment cited as authority in making his decision.*
- ii. That, the Trial Tribunal seriously erred in fact and law by invalidating the terms of the contract in relation to the authority cited in reaching his decision.*
- iii. That, the Trial Tribunal seriously erred in fact and law by violation section 32 of the Land Disputes Courts Act (Cap. 2016, R.E 2019).*

As a matter of fact, this appeal was argued by way of written submissions. Similarly, the Appellant was represented by none other than; the learned advocate Mr. Augustino Mahenge whereas the Respondents enjoyed the services of none other than; Mr. Raphael Matola, the learned counsel. It is worth considering that, both parties adhered to the orders of this court whereby they filed their submissions on time which enabled this court to compose this judgment accordingly.

Particularly, arguing in support of the first ground that is, on whether the presiding learned chairperson of the Trial Tribunal properly comprehended the decision he used as precedent in reaching his conclusion.

With respect to that, the Appellant's learned counsel stated that the case of **Abbas Ally Athumani Bantulaki and KCB Bank**

Tanzania Limited V. Kelvin Victor Mahity (Administrator of the Estate of the late Peter Walcher, Civil Appeal No. 385 of 2019 Court of Appeal at Dar es Salaam (unreported) was not properly comprehended. For instance, he added that if the chairperson would have clearly looked on pages 9 up to page 12 of the judgment he would have reached into a different decision. Among others, he stated that the first Respondent was the administrator of the estate of his late father and he was granted with the letters of administration by the Court. Thus, he had full power and mandate to deal with the estate of his late father. To cement his arguments, he referred this Court to sections 66, 99, 100 and 101 of the *Probate and Administration of Estates Act (Cap. 352, R.E 2002)* and the case of **Jose Shumbusho V. Mary Grace Tigerwa and Two Others**, Civil Appeal No. 183 of 2016 (unreported) in which it was held that: -

"A legal representative of the deceased's estate, all the deceased's estate are vested to him and has all the powers over the deceased assets as the deceased would have, save that he is acting in a representative capacity."

Notably, basing on the above legal stance the Appellant's learned counsel argued that; since the Appellant bought the disputed plot of

land from the first Respondent who was the legal representative of his father, the sale agreement was valid and the decision of the Trial Tribunal to invalidate the sale agreement was contrary to the law, unfair, unjust and biased on the administration of justice.

As much as the second ground of appeal is concerned, that the Trial Tribunal erred in fact and in law by invalidating the terms of the contract in relation to the authority cited in reaching its decision, Mr. Augustino Mahenge argued that if the Trial Tribunal would have read properly page 16 of the judgment used as an authority the decision reached would have been different. On the same way, he contended that if the principle of equity would have been applied the decision would have been properly reached since, the Appellant believes that she had a valid contract with the first Respondent.

On the third ground of appeal, the Appellant's learned counsel started by quoting section 32 of the *Land Disputes Act (Cap. 216 R. E. 2019)*, which reads:

"The language of the District Land and Housing Tribunal shall be either English or Kiswahili as the Chairman holding such tribunal may direct except that the record and judgment of the tribunal shall be in English".

On the view of the above provision, he argued that the judgment of the Trial Tribunal was written in Swahili language which is contrary to the above cited provision of the law. On the base of that arguments, he averred that there was no judgment written by the Trial Tribunal since the purported judgment was written contrary to the law governing the Tribunal in writing its judgment. Finally, he prayed for this appeal to be allowed due to the defects given above.

On the contrary, Mr. Raphael Matola the Respondent's learned advocate submitted that he wonders and doubt if this appeal is proper before this Court. He argued that the proceedings of Trial Tribunal show that on 29th, June 2022, the appellant's counsel prayed for a leave to amend the pleadings especially on the names of the Appellant who was then the Applicant after seeing that the names in pleading which were Zabiuna Ahamad Nyoni is different from that on the sale agreement. Basically, the application was amended on 06th July, 2022 the Appellant filed an amended pleading which has the name of Zabiuna Ahamad Kuhowa Nyoni. To add to it, he argued that following the amendment of the pleadings before the Trial Tribunal the name of the Appellant changed to be Zabiuna Ahamad Kuhowa Nyoni instead of Zabiuna Ahamad Nyoni.

At the same note, he added that it appears after amendment the Appellant did not bother to make an application to correct the names in the records of the Trial Tribunal, as a result, the amendment does not reflect even in the judgment given by the Trial Tribunal. Similarly, in the memorandum of appeal before this court bears the wrong name of Zabiuna Ahamad Nyoni the name which does not exist anymore in the Tribunal records following the amendments done in the pleadings.

He further submitted that according to the law and practice, once a pleading is amended the former pleading is no longer material before the court and it does not exist. To buttress his argument, he made reference to the case of **Salim Amour Diwani v. The Vice Chancellor Nelson Mandela African Institute of Science and Technology and Attorney General**, Civil Application No. 116 of 2021 (unreported), **Warner v. Sampson & Another (1958) 1 QB 297**, quoted with approval by the Court of Appeal of Tanzania in **Tanga Hardware & Auto Parts Ltd & 6 Others v. CRDB Bank PLC**, Civil Application No. 144 of 2005, in which the Court stated that:

"Once pleadings are amended, that which stood before amendment is no longer material before the Court."

Principally, on that argument he stated that this appeal is incompetent and what this Court is ought to do is to struck it out accordingly.

Arguing on the grounds of appeal the Respondents' learned advocate stated that the holding in the case of **Abbas Ally Athumani Bantulaki and KBC Bank Tanzania Limited v. Kelvin Victor Mahity (Administrator of Estate of the Late Peter Walcher)**, Civil Appeal No. 385 of 2019, Court of Appeal at Dar es salaam (unreported) was correctly applied by the Trial Chairperson in making his findings. He quoted page 9 of the said judgment which reads:

"On the clear terms of section 68 of the Land Registration Act, he lacked mandate to sell the property of the deceased (the disputed land). That section categorically states;

'68 (1) No assent to the vesting of any devises of bequest of any registered estate or interest, or disposition by a legal personal representative, shall be registered unless such estate or interest is registered in the name of such legal representative."

The Court went a mile further by stating that:

"Based on the above exposition of the law... there was no valid disposition of the disputed land ... and the

registration of the later as owner of it is thereby rendered invalid and ineffectual."

He submitted that this Court must follow the position of the Court of Appeal's principle in the above-named case in which it requires an administrator of the estate to pass a good title on a registered estate to his/her name so as to have a lawful power to dispose the same. To add to it, he submitted that the registration on the name of the legal representative must be done before disposition.

On the second (2nd) ground of appeal, the Respondent's learned counsel argued that the Appellant's learned counsel started by quoting the second (2nd) paragraph on page 16 of the case of **Abbas Ally Athumani Bantulaki and KCB Bank Tanzania Limited v. Kelvin Victor Mahity (Administrator of estate of the late Peter Walcher)**, Civil Appeal No. 385 of 2019 (supra) which states that: -

'In the final analysis and forgoing reasons, we are of the decided view that the purported sale of the disputed plot by Erick Peter Watcher did not pass title to the 1st appellant and the High Court's order declaring the respondent the lawful owner of the disputed plot was invalid and ineffectual."

The Respondent's counsel argued that; *firstly*, if the counsel for the Appellant would have interpreted well the quoted paragraph, he

would not have use it since it is against his client as it simply cemented on the position that before an administrator of estate disposes off a registered estate, he/she must be registered in his/her name first and contrary to that the disposition becomes invalid and ineffectual.

Secondly, the Appellant's learned counsel is trying to mislead this Court that the contract between the Appellant and the first Respondent to be valid while knowing that in the cited purchaser it was invalid and ineffectual because the administrator did not register the disputed property in his name before disposing it.

Thirdly, he further submitted that when submitting on the second ground of appeal the Appellant's learned counsel argued on the principle of equity that if the Trial Tribunal would consider it, it would have decided otherwise. He pounded his argument by stating that the arguments on the principle of equity as given by the Appellant's learned counsel is non meritious and is just a misconception of the principle of equity as it is a cardinal norm that "*whoever comes to equity must come with clean hands.*"

In that regard, the Appellant in this matter went to the Trial Tribunal with dirty hands, due to the fact that the purported sale agreement sets a time limit of making payment of last installment which

was supposed to October, 2017, however, she did not make full payment as agreed something which she conceded in her testimony before the Trial Tribunal.

On the same note, he contended that the appellant cannot invoke equity and require to be declared lawful owner while she failed to honour the terms of the sale agreement.

It is important to consider the fact that on the third ground of appeal, the Respondent's learned counsel argued that the claim made by the Appellant's learned counsel that the Trial Tribunal erred in law by violating section 32 of the *Land Disputes Courts Act (Cap. 216 R. E. 2019)* which directs the record and judgment of the Trial Tribunal to be in English, was not correct. He argued that, that ground of appeal has no merit and it should not detain and waste the precious time and resources of this honorable Court as it seems that neither the Appellant nor her counsel knows the presence of *The Written Laws (Miscellaneous Amendment) Act, No. 1 of 2021 GN No. 18 Vol. 102, Dated 30th April, 2021*, which among other things in its section 4 amended section 84 of the *Interpretation of the Laws Act (Cap. 1)* and the language of the laws of the United Republic of Tanzania in courts, Tribunals and other bodies charged with the duties of dispensing justice is Kiswahili.

Besides, he added that under section 7 of the *Written Laws (Miscellaneous Amendment) act, No. 1 of 2021* (supra) repealed section 32 of the *Land Disputes Courts Act* (Cap. 216, R. E. 2019) to allow the use of Kiswahili language in the District Land and Housing Tribunal. On that ground he concluded that the Trial Tribunal correctly made its records and issue decision in Swahili language and that is the correct current position of the law and the Appellant's learned advocate must update himself on the current laws. Finally, he prayed for this appeal to be dismissed with cost since it is nothing rather than an abuse of Court process.

In his rejoinder submission the Appellant's learned counsel conceded that it is correct that the names of the Appellant do not tally with those found in the amended application. However, that defect cannot vitiate the judgment and this appeal. Principally, he argued that the defects are curable under section 96 of the *Civil Procedure Code* (Cap. 33, R. E. 2019) and there is no any prejudice to the Respondents on the name differences as it appears in the judgment.

It is worth considering that, in his rejoinder concerning the second and third grounds of appeal the Appellant's learned counsel has nothing

new to add rather than reiterating what he has submitted in his submission in chief.

Concerning the third ground of appeal the Appellant's learned counsel conceded that section 32 of the *Land Disputes Courts Act* (Cap. 216, R. E. 2019) to have been amended to allow Courts and all adjudicating bodies to use Swahili language. He concluded his submission by stating that this appeal has merits and he highly prayed for it to be allowed with cost, the proceedings and judgment of the Trial Tribunal to be quashed and orders be set aside.

As much as I am concerned and having gone through the submissions made by both parties, the grounds of appeal and the original records of the Trial Tribunal. I find the third ground of appeal is not in dispute anymore since the Appellant's learned counsel in his rejoinder submission has conceded that there was an amendment to allow the Courts or any other adjudicating body to use Swahili language in keeping its records.

As a matter of fact, the nagging issues in this appeal which need to be addressed are mainly two; *one* whether there was a valid sale agreement between the Appellant and the first Respondent on the disputed land and; *two* whether the Trial Tribunal erred in fact and in

law by invalidating the terms of the contract between the Appellant and the first Respondent on the sale of the disputed land.

On the first issue, the Appellant contended that the Trial Tribunal in reaching into its decision misconceived the application of the principle laid in the case of **Abbas Ally Athumani Bantulaki and KCB Bank Tanzania Limited v. Kelvin Victor Mahity (Administrator of the Estate of the Late PETER WALCHER** (supra). In fact, the Appellant's learned counsel was on the view that since the first Appellant was the administrator of the estate of his late father, he has power and mandate to transfer the disputed property and the holding of the Trial Tribunal that there was no valid transfer which was erroneously made and was contrary to the precedent or principle made in the case which was referred in making its decision. The respondents' views were that the Trial Tribunal correctly reached into its decision and the arguments made by the Appellant learned counsel aimed to mislead the Court.

In fact, as earlier stated above the dispute is on Plot No. 64, Block D which the Appellant claimed to have bought from the first Respondent who alleged to be the administrator of the estate of his late father that is none other than; Eusebius Filimoni Kilowoko. It is worth considering that, the Trial Tribunal found the transfer of the said property was not

valid since the first Respondent sold it without registering first in his names as the administrator of the estates of the late Eusebius Filimoni Kilowoko.

Basically, in reaching into its decision the Trial Tribunal stated that for the first Respondent to have good title to pass the land to the Appellant he has to register the property into his names first. The Trial Tribunal made reference to sections 67 and 68 of the *Land Registration Act* (Cap. 334, R. E. 2019). Section 68 of the *Land Registration Act* (supra) reads:

'68- (1) No assent to the vesting of any devises of bequest of any registered estate or interest, or disposition by a legal personal representative, shall be registered unless such estate or interest is registered in the name of such legal representative.'

From the above provisions the Trial Tribunal found there was no transfer of the disputed land since the first Respondent has no power to dispose it without first registering it in his name as the legal representative of the late Eusebius Filimoni Kilowoko, who was registered as the lawful owner.

From the above position of the law, it is my firm position that the Trial Tribunal reached into a correct decision. To cement on it, it is a

clear position of the law that the legal representative is duty bound to register the property into his name first before he makes disposition on it. Finally, I find there is no need to disturb the findings made by the Trial Tribunal.

On the issue of whether the Trial Tribunal erred in fact and in law by invalidating the terms of the contract between the Appellant and the first Respondent in relation to what has been discussed above, I am on the view that the Trial Tribunal being guided by section 67 and 68 of *the Land Registration Act* (supra) and the stance in the case of **Abbas Ally Athumani Bantulaki and KCB Bank Tanzania Limited v. Kelvin Victor Mahity (Administrator of the Estate of the late Peter Walcher)** (supra), it correct invalidated the terms of the sale contract of the dispute land since the purported sale was *void abinitio*.

Conclusively, I find that this appeal has no merit and I proceed to dismiss it with cost. The Appellant is to file a civil suit before a Court with competent jurisdiction to claim her money from the first Respondent. Order accordingly.

DATED and **DELIVERED** at Songea this 9th day of May, 2023.




U.E MADEHA

JUDGE

09/05/2023

COURT: Judgment delivered on this 9th day of May, 2023 in the presence of the Appellant and the first Respondent. Right of appeal explained.




U. E. MADEHA

JUDGE

09/05/2023