

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND CASE APPEAL NO. 37 OF 2021

*(Arising from Tabora District Land and Housing Tribunal in
Land Application No.42 of 2021)*

JALALA MUSSA HASSAN 1ST APPELLANT

SAID LENGWE 2ND APPELLANT

VERSUS

MAANGO KITWANA RAJABU1ST RESPONDENT

HAMIDA HASSAN THABIT *(As administratrix of estate*

of the late Jalala Hassan Mabruck) 2ND RESPONDENT

Date of Last Order: 19.04.2023

Date of Judgment: 05.05.2023

JUDGMENT

KADILU, J.

This is an appeal in respect of house No. 62, Market – Migazi Street, now Plot No. 266 Block “F” located at Gongoni within Tabora Municipality. The house was subject of litigation in Land Application No. 42 of 2021 before the District Land and Housing Tribunal for Tabora whereby the 1st respondent was declared the lawful owner. The appellants were aggrieved by the decision of the DLHT in that case, hence they preferred this appeal consisting of four (4) grounds which may be paraphrased into the following three (3) grounds of appeal:

- i. *That, the proceedings of the District Land and Housing Tribunal were tainted with irregularities for being based on defective power of attorney.*
- ii. *That, the trial tribunal erred in law and fact for failing to properly consider the appellants' evidence hence, reaching at a wrong decision.*
- iii. *That, the trial tribunal erred in law and fact by holding that the disputed house was lawfully sold to the 1st respondent by the 2nd respondent while there was no prior revocation of the grant of letters of administration as against the 1st appellant.*

Brief background of the dispute is that, the 1st and 2nd appellants are husband and wife respectively. The 2nd respondent is the aunt of the 1st appellant. The disputed house belonged to the late mother of the 2nd respondent, one Jalala Hassan Mabruk. Being an administratrix of estate of their deceased mother, the 2nd respondent sold the disputed house to the 1st respondent. In the course of transferring ownership of the disputed house to the 1st respondent, the 2nd respondent realised that in 2016 the 1st appellant purporting to be the administratrix of estate of her late grandmother, sold the house in dispute to the 2nd appellant who was then her husband.

The transfer was however successful, but the appellants refused to vacate the house claiming that they are the rightful owners. The 1st respondent filed a land dispute in the DLHT accusing the appellants of trespassing to the house which he had purchased. The dispute was decided in his favour. Consequently, the appellants preferred the present appeal resisting the 1st respondent's ownership of the house in dispute. They prayed

the court to allow their appeal and declare them the lawful owners of the disputed house. The respondents filed a joint reply to the memorandum of appeal praying for the appeal to be dismissed with costs.

The appeal was argued by way of written submissions. The Appellants were represented by the learned Advocate, Mr. Kashindye Lucas whereas the respondents were represented by Ms. Flavia Francis, also the learned Advocate. After having set out the background of this matter, I now turn to resolve the grounds of appeal. In the 1st ground of appeal, the appellants allege that the DLHT's proceedings offended the provisions of Section 96 (1) of the Land Registration Act [Cap. 334 R.E. 2019]. Advocate for the appellants submitted that the power of attorney in respect of registered land is required to be registered under the Land Registration Act, but in the present case, the same was registered under the Registration of Documents Act [Cap. 117 R.E. 2002].

Advocate for the respondents submitted that the learned Counsel for the appellants has not shown how registration of the power of attorney under the Registration of Documents Act instead of doing so under the Land Registration Act has occasioned injustice to the appellants or any other interested party. She argued that even if it was improper to register the said power of attorney under the Registration of Documents Act, the same is curable under Sections 3A and 3B of the Civil Procedure Code [Cap. 33 R.E. 2019].

It is not disputed that the power of attorney given by the 2nd respondent to Mr. Hamisi Mwami Rehani to represent her at the tribunal was registered under the Registration of Documents Act [Cap. 117 R.E. 2002]. The appellants' contention is that the said power of attorney was supposed to be registered under the Land Registration Act [Cap. 334 R.E. 2019] instead. This issue was not raised by the appellants during the trial at the tribunal where the said power of attorney was presented. Perusal of the tribunal's proceedings indicates that when the power of attorney was presented, there was no objection from the appellants. On 18/10/2021, Mr. Hamisi Mwami addressed the tribunal in the following words:

"... I have registered the power of attorney today. Therefore, I am representing the first respondent." (Translation from Kiswahili to English is mine).

Mr. Said Lengwe, now the 2nd appellant replied that he had nothing to say. Ms. Flavia Francis, (now Advocate for the respondents) replied as follows:

"Your Honour, I have no objection to the power of attorney presented by Mr. Hamisi Mwami to represent the first applicant since she is sick."

From the foregoing, contending that the power of attorney was improper, is an afterthought which is bad in law. It is also a new point which as a rule, cannot be entertained at the appellate stage. It is only in exceptional circumstances that the appellate court may allow a new point to

be raised before it, regard being that the respondent shall not be prejudiced by the appellant raising the new ground at the hearing of the appeal. If the contention was about a serious point of law, it could be raised at any stage even at the appellate level. I am also of the view that in the interest of justice, the alleged improper registration of the power of attorney is curable under the pretexts of the overriding objective principle.

The Court of Appeal in the case of ***Hamis Bushiri Pazi & Others v Saul Henry Amon & Others***, Civil Appeal No. 166 of 2019 stated that, the court will only look into matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by the trial court. Since the appellants did not raise this point at the DLHT, it cannot be entertained now. More so because, I am satisfied that the same has not occasioned any miscarriage of justice. I thus dismiss the first ground of appeal for lack of merit.

In the second ground of appeal, the appellants complain that, the trial tribunal erred in law and fact for failing to properly consider the appellants' evidence hence, reaching at a wrong decision. In resolving this ground of appeal, I will let the proceedings of the trial tribunal to speak by itself. At page 37 of the typed proceedings, the 1st appellant told the tribunal that she is the grand-daughter of the late Jalala Hassan Mabruk and that she sold the disputed house to the 1st appellant for TZS. 4,000,000/= . She stated that she sold the said house as an administratrix of estate, but she has no letter of appointment as such.

On being cross-examined by Ms. Flavia, the 1st appellant said she has no record of the family meeting which appointed her to administer the estate of her deceased grandmother. She told the tribunal further that she handed the TZS. 4,000,000/= to the 2nd respondent in Dar es Salaam while the 2nd respondent and the 1st appellant were alone. This piece of evidence was contradicted by the 2nd appellant from page 48 to 49 of the proceedings where he told the tribunal that he was the one who handed the purchase price to the 2nd respondent at Dar es Salaam in the presence of the 2nd respondent's young sister and the 1st appellant.

Generally, evidence of the appellants as shown from pages 36 to 49 of the proceedings is full of contradictions. I am aware that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. Nevertheless, where evidence of the witnesses is surrounded by a lot of contradictions, the court cannot safely act on it. In the case of ***Awadhi Abrahamani Waziri v Republic***, Criminal Appeal No. 303 of 2014, the Court of Appeal stated that, it is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon.

Consideration of evidence is one thing and relying on it is yet a different aspect which depends on the credibility of witnesses giving such evidence. In this case, the trial tribunal found the respondents' evidence credible and trustworthy compared with the evidence of the appellants. As such, the

tribunal decided the case in favour of the respondents. Therefore, the second ground of appeal is also devoid of merit.

Lastly, the appellants complain that the trial tribunal erred in law and fact by holding that the disputed house was lawfully sold to the 1st respondent by the 2nd respondent while there was no prior revocation of the grant of letters of administration as against the 1st appellant. This ground of appeal should not take much of my time as the record is very clear that there were no letters of administration which were granted to the 1st appellant. It was the 1st appellant's testimony that she has no evidence that she was appointed to administer the estate of her late grandmother.

On the other hand, the 2nd respondent has established that she was duly appointed as the administratrix of estate of her late mother after being proposed by the family meeting. On page 37 of the proceedings, the 1st appellant stated as follows in the tribunal:

"Niliteuliwa kuwa msimamizi wa mirathi mwaka 2016. Sina barua ya usimamizi. ... Ilikuwa mwaka 2016 lakini hakuna muhtasari wa kikao kwa kuwa nilikuwa sijui kama kutakuwa na shida."

For this reason, I find the third ground of appeal lacking the legal base so I dismiss it accordingly.

In the final analysis, I find that the 2nd appellant has not proved his ownership of the house in dispute so as to warrant this court to quash and

set aside the decision of the DLHT for Tabora. Consequently, the appeal is hereby dismissed with costs. The 1st respondent is declared the rightful owner of the disputed house after having purchased it legally. The appellants are ordered to vacate the house in dispute forthwith. Right of appeal is fully explained.

Order accordingly.


KADILU, M.J.,

JUDGE

05/05/2023

Judgement delivered on the 5th Day of May, 2023 in the presence of Mr. Said Lengwe, the 2nd Appellant and Ms. Flavia Francis, Advocate for the respondents.




KADILU, M. J.

JUDGE

05/05/2023