THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 1 OF 2022

(Originating from the District Land and Housing Tribunal for Mtwara at Mtwara in Land Application No.79 of 2019)

MAJID AHMED NASSOR ....APPELLANT

VERSUS

STANSLAUS JOHN KISAKA.....1ST RESPONDENT

SALOME PAUL NOBERT .....2ND RESPONDENT

JUDGEMENT

28/2/2023 & 06/6/2023

LALTAIKA, J

The appellant herein **MAJID AHMED NASSOR** is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara (the DLHT) in Land Application No.79 of 2019. The impugned Judgement was delivered on the 13th day of January 2022 by the Hon. Chairman **H.J. Lukeha**.

Consequently, the appellant has appealed to this Court on thirteen (13) grounds. Admittedly, the grounds contain not only quit a few grammatical and typographical errors but also some information not normally forming

part of grounds of appeal. However, I find it prudent to reproduce them in their raw state for reasons that will become obvious in due course.

1. *That, the trial chairman erred in law and fact by misdirecting himself on the principles regulating land ownership in Tanzania in particular sale, allocation and issuance of the letter of offer and certificate of occupancy for failure to critically analyze and weighing the Appellant's offer letter showing that he started owning the suit land in 1st January 1982 through allocation from Commissioner for Lands hence reaching to erroneous conclusion.*
2. *That, the trial Tribunal Chairman erred in law and fact for failure to evaluate and giving significance to the Appellant letter of offer signifying his ownership from the 1st January 1982 for the suit land long before subsequent grant to Kudra Rashid Mchata in 11/09/1982 and the 2nd Respondent Salome Paul Nobert in 1/03/1983 as per guidance in the of case of Frank Safari Mchuma vs Shaibu Ally Shemndolwa, High Court of Tanzania at Dar es Salaam Civil Case No.240 of 1988.*
3. *That, the trial Tribunal Chairman erred in law and fact by failing to critically analyze the appellant stamp duty receipt with serial number 487318 issued by the Commissioner for lands in 10/03/1982 for payment of fees in acceptance of letter of offer with description of plot 216 (New Nol436) as it was observed in the case of Colonel S.M.A Kashimiri v. Naghinder Singh Matharu (C.A) Civil Appeal No.4 of 1988.*
4. *That, the trial Tribunal erred in law and fact for admitting a defective joint written statement of defence tendered by the 1st respondent without the signature nor verification of the 2nd respondent contrary to Order VI Rule 6 of the Civil Procedure Code Cap.33 R.E 2002.*
5. *That, the Trial Tribunal Chairman erred in law and fact for failing to verify the validity and authenticity of the Sale Agreement between the 1st Respondent and 2nd Respondent as it does not bear The advocate seal, photographs of the parties and the stamp duty contrary to Section 5 and 47(1) of the Stamp Duty Act Cap.189 R.E 2019 as it was observed in the case of Zanzibar Telecom Ltd Vs. Petrofuel Tanzania Ltd (Civil Appeal No.69 of 2014) 2019 Tanzania Civil Appeal.*
6. *That, the Honourable Trial Chairman erred in law and facts for relying that the suit land was sold for 2,500,000 as per the sale agreement which is inconsistent, with the oral testimony of the 1st respondent and the sale value appearing on the transfer deed (1,500,000) and on Tax Clearance Certificate (1,200,000) hence reaching to erroneous conclusions.*
7. *That, the trial Chairperson erred in law and fact for misdirecting himself contrary to the maxim "nemo dat quod non habet" (he who does not have lawful title cannot pass good title over the same to another) in relation to the exparte order of 17/11/2020 issued to the 2nd respondent who did not appear nor file any written statement of defence to plead her ownership on the suit land, as in the guidance of the case of Farah Mohamed vs. Fatuma Abdallah (1992) Tanzania High Court 21 (18 Aug 1992) hence reaching to a problematic conclusion.*
8. *That, the Honourable Trial Chairman erred in law and fact for failing to evaluate and assign proper weigh on the Appellant Stamp Duty with serial number "487318" proving act of forgery on the title deed of the suit land tendered by 1st respondent without lawful justification.*
9. *That, the trial Tribunal erred in law and fact for holding that the disputed was first allocated to Kudra Rashidi Mchata in 11/09/1982 in absence of any documentary proof from the Land Office Records to verify and authenticate the testimony of Patrick Mpangala (land officer) to that effect hence reaching to erroneous conclusion.*

10. *That, the trial Tribunal erred in law and fact for admitting without analyzing and verify the authenticity of the photocopied documents tendered by the 1st respondent hence reaching to erroneous conclusions contrary to Section 65 of the Evidence Act Cap.6.*
11. *That, the Honourable Chairman erred in law and fact for holding that 1st respondent purchased the suit land from the 2nd Respondent without any proof of the existence of such a person even after it has issued an expar-te order on 17/11/2020 against the 2nd respondent hence reaching to erroneous decisions.*
12. *That, the trial Tribunal Chairman erred in law and fact for relying on the opinion of the assessors' contrary to section 24 of the Land Disputes Courts Act Cap.216 in favour of the 1st Respondent hence reaching to erroneous conclusions.*
13. *That, the trial Tribunal Chairman erred in law and fact for being bias to observe the judicial principle of the rule of impartiality by failing to analyze and giving a total disregard of the Appellant evidence without lawful justification.*

At this juncture, I find it imperative to provide a brief factual and contextual backdrop as can be gleaned from the court records. The appellant was a civil servant with the government of Tanzania. He was an Artisan Grade III employed by the Tanzania Harbours Authority (THA) based at Mtwara. In 1997 he was retrenched. Upon being retrenched he received, among other entitlements, *"Tuzo kwa utumishi wa muda mrefu wa miaka 22".* This simply means honorary recognition for long/outstanding service of 22 years.

It is on records that during the 22 years' service, the appellant acquired, among other properties, a piece of land which is the center of this controversy. It appears that the 8th day March 1982 can be regarded as the date that the property allegedly came to the possession of the appellant as per the letter of offer produced by a typewriter. Fifteen years later, that is in 1997 upon being retrenched, the appellant left Mtwara (and the property) for Zanzibar. On his return to Mtwara several years later, his land was not lying dormant waiting for him. It came to his knowledge that the first respondent, by then a civil servant in the designation of Civil Aviation

Manager with the Tanzania Civil Aviation Authority (TCAA) had allegedly bought the same piece of land from the second respondent.

As expected, the appellant demanded he is given his land back. He, allegedly, tried to take his grievances through several administrative channels. Having failed to receive a satisfactory answer from high-ranking executive and administrative forums the appellant knocked the doors of the District Land and Housing Tribunal (the DLHT) as alluded to above.

When the appeal was called on for hearing the appellant was represented by Holder of a Power of Attorney **Ahmed Majid.** The respondent, on the other hand, enjoyed services **of Mr. Stephen Lekey**, learned Advocate. It is instructive to note that the hearing was preceded by several legal wrangles ranging from appropriateness of the power of attorney to whether the learned counsel was indeed properly instructed. I take this opportunity to register my appreciation to both the learned counsel and the counsel in the making for finally choosing substantive justice over technicality if not outright ***de mi nimis*** that derailed the matter for several months.

Submitting in support of the appeal, Mr. Majid stated that he would submit on the 1st, 3rd, and 8th grounds of appeal collectively. He argued that the learned Chairman erred in not considering the procedure for granting right of ownership, particularly for not considering exhibit P1 collectively tendered by the appellant. He explained that exhibit P1 showed that he was granted the right of the suit land Plot No. 216 Safu B Shangani Low Density Area Mjini Mtwara (New Number 436) vide the letter Offer with

Ref. No **MT/7102/1/8B dated on 8th March 1982 for a term of 99 years commencing from the 1st of January 1982**. He argued that reading together with exhibit P1, there was an exchequer receipt No. 487318 which was for payment of stamp duty on the original certificate of Title Deed. The same receipt appeared on both the appellant's letter of offer (exhibit P1 collectively) and the title deed of the 2nd respondent (exhibit D13), which implied that the suit land Plot No. 216 and 436 were the same plot.

He pointed out that the procedure of issuing a letter of offer had been provided under section **27 and 29 of the Land Act Cap 113 RE 2009** and cited the case of **Sarjit versus Sebastian Christom [1998] TLR 24**, where the court held that "it is clear that land becomes legally owned, or the right of occupancy is established once an offer for it is made, and the offeree pays the fee. The question of certificate does not arise in order for a right of occupancy to be created." He also cited the case of **Frank Safari Mchuma v. Shaibu A. Shemndolwa [1988] Civ. Case 244** (TANZLII) to emphasize that an offer made after the acceptance of the previous offer is invalid and cannot give rise to a title. He concluded that all these cases and provisions showed that the appellant was lawfully granted the right over the suit plot by the commissioner of land, which was the proper authority, and he prayed that the ground of appeal be upheld.

Mr. Majid moved on to ground no. 2 and 11 and argued that the Honourable Chairman erred in law and fact for not evaluating and giving significance to the appellant's letter of offer, which showed that he was the first one to be granted the ownership on 1st January 1982, long before Salome Paul Nobert on 1st January 1983. He cited the Latin Maxim **"quod**

prius est verius et quod prius tempore potius est jure," which means what is first is truest and what comes first in time is best in law, to support his argument and prayed for this ground to be upheld and Salome Paul Nobert to be removed as the owner.

Mr. Majid then moved on to ground no. 4 and argued that the DLHT erred in law and fact for admitting a defective joint written statement of defence tendered by the 1st respondent without the proper signature nor verification of the 2nd respondent, which was contrary to **Order VI Rule 14 and 15 of the Civil Procedure Code Cap 20 RE 2022 (the CPC).** He cited relevant provisions of the CPC and the case of **Samwel Kimaro v. Hidaya Didas [2018] Civil Appeal No 271** (TANZLII) and argued that the court ought to order amendments or strike out the joint WSD, and since no amendment was granted, the defense ought not to have been accorded any weight.

Resisting the appeal, counsel for the respondent Mr. Lekey stated that concerning the first, third, and eighth points, they were questioning the legality of the DLHT without considering Exhibit P1 and its annexures.

Mr. Lekey informed the court that Mr. Majid's assertion was incorrect. The offer letter presented as Exhibit P1 simply states "Kiwanja Namba 216 Safu B Shangani Low Density Area Mjini Mtwara," but below those words, there are bracketed words stating, "New No. 436." Additionally, the exchequer receipt includes the plot number on top. Mr. Lekey argued that the words "New No." in the offer letter are not counter-signed or dated to verify the change of name. Similarly, the writings on the receipt lack dates

and countersignatures to verify the indicated information. He emphasized that the suit land was originally allocated to the second respondent, Salome Paul Nobert, in 1983 and was never issued to the appellant. During the hearing, **Mr. Mpangala (SU2)** from the Land Office of the District Council testified that the area was never allocated to the appellant and that it was issued to a person named Kudra Rashid Mchata on September 11, 1982. Since Kudra failed to pay the required fee, the land was subsequently allocated to Salome Paul Nobert, who eventually sold it to the first respondent.

Mr. Lekey further highlighted that the first respondent currently possesses a title deed for the land, which was submitted as Exhibit D13 at the DLHT. He referred to the case of Singh (supra) to argue that ownership at the time occurs when a person receives an offer letter and pays the required fee. Therefore, Salome became the rightful owner when she received the offer letter and paid the fee. He added that no subsequent offer was issued to the appellant, and since the respondent holds a title deed, the Court of Appeal of Tanzania, in the case of **Amina Maulid Ambali and 2 Others vs. Ramadhani Juma Civil Application No 143/08 of 2020 CAT, Mbeya (TANZLII) p.** 9, states that the certificate holder will be considered the lawful owner unless it can be proven that the certificate was unlawfully obtained.

Mr. Lekey explained that the issues raised at the DLHT were twofold: (a) whether the applicant is the rightful owner of the disputed land, and (b) what relief(s) the parties are entitled to. However, the issue of the respondent's title deed's legality was not addressed in the framed issues. It

was the appellant's responsibility to prove the legality of their ownership, which they failed to do so.

He pointed out that the appellant's grounds suggest fraud, but during the DLHT hearing, fraud was not proven. Allegations of fraud or forgery require a higher standard of proof beyond the balance of probability, as stated in the case of **Omar Yusuf versus Rahman Ahmed Abubakar [1987] TLR 167.** Furthermore, the issue of forgery was not raised in the applicant's pleadings, and it is a well-established principle of law that parties are bound by their pleadings, as seen in the case of **Makori Osaga vs. Joshua Mwikambo and Another [1987] TLR 88.**

Mr. Lekey concluded by emphasizing that since Mr. Mpangala (SU2) was from the office responsible for land allocation and management, his testimony on the clear records in their office, he found similarity between the 2nd and 11th grounds with the above grounds that he had just argued. Moving on to ground 4 on the WSD, Mr. Lekey acknowledged that the WSD available showed that it was a joint WSD and was not signed by Salome (second respondent). Nevertheless, he pointed out that the DLHT had already resolved the matter by *ex parte* proceeding against the second respondent, as stated on page 3, paragraph 1 of the judgement.

Mr. Lekey argued that the DLHT's decision appealed to the law and common sense, and that the absence of the second respondent's signature did not invalidate the WSD since the first respondent properly signed it. He further mentioned that there was no proper format for the response/reply

provided by law, **and the DLHT had been accepting even letters as response** to applications.

Regarding the 5th, 7th, 9th, and 10th grounds, Mr. Lekey stated that contracts were governed by law and referred to **section 10 of the Law of Contract Act Cap 345 RE 2019**, which provides for ingredients of a contract. He argued that nowhere in this section were photos and endorsement by counsel taken to be a legal requirement. He then drew attention to Section 64(1)(a) and (b) and Section 63 of the **Land Act Cap (Supra)** read together with section 92 of the Land Registration Act Cap 334 RE 2019. He acknowledged that section 5 and 47 of the Stamp Duty Act requires that the Stamp Duty be paid for, but pointed out that no transfer can be done without paying for the stamp duty. He argued that even if the receipt of the stamp duty was not in the court file, the remedy was to instruct the concerned to pay for the same, as per the Court of Appeal of Tanzania's case of **Elibariki Mboya versus Amina Abeid [2000] TLR 122.**

On the 12th and 13th grounds, Mr. Lekey argued that the reasons provided in the grounds of appeal spoke nothing about what he had submitted. He further explained that the 12th ground challenged the opinion of the assessors, and the reliance on their evidence was in line with Section 23 and 24 if the LDCA, as Hon. Lukeha, Chairman, took cognizance. On ground 13, Mr. Lekey argued that the Hon. Chairman was impartial and did not disregard his evidence. He concluded by praying for the appeal to be dismissed with cost.

In a brief rejoinder, Mr. Majid started off with the 1st, 3rd, and 8th grounds. He stated that Mr. Lekey had not mentioned any law that requires countersigning and referred to the sections he had cited and the case of Singh, which only required that the concerned authority issued the letter of offer and the requisite fee paid. Mr. Majid further argued that Mr. Lekey had not explained how receipt No 487318 was found in exhibit D13 Title Deed of Salome Paul Nobert, and that there was no written exhibit tendered in the DLHT in the form of a letter of offer to Salome and exchequer receipt.

Mr. Majid then referred to the case of **Melchiades John Mwenda versus Gizelle Mbaga and 2 Others [2018]** CAT and pointed out that the court stated that "The fact that the respondent is in possession of the original certificate of title is not ***ipso facto proof*** that he is a lawful owner of the suit land."

Having dispassionately considered the rival submissions, grounds of appeal and records of the trial Tribunal, I am inclined to determine on whether the appeal is meritorious. It is noteworthy that this being the first appellate court, I have taken the liberty of critically evaluating the entire evidence adduced at the trial Tribunal. Only upon such reevaluation can this court, should conditions so dictate, depart from the path taken by the Tribunal.

It is trite law in our jurisdiction that he "whoever desires the court to give judgement as to any legal right or liability dependent on the existence of facts must prove that those facts exist." See Section 110 (1) of the **Evidence Act [Cap 6 RE 2022].**

The appellant in the instant matter who was the plaintiff at the trial tribunal was duty bound to prove existence of the facts that he wanted the Tribunal to adjudge in his favour. As correctly stated by counsel for the respondent Mr. Lekey, the issued that were laid before the Tribunal for **determination were twofold:** (a) whether the applicant is the rightful owner of the disputed land, and (b) what relief(s) the parties are entitled to.

It is my reasoned opinion that the appellant gave his best shot on the first issue. I am baffled by the way the learned Chairman **belittled the arguments** and evidence of the appellant to justify an utterly misguided decision. To avoid generating unnecessary technicalities to the detriment of justice, it should be noted that the appellant is being represented by a holder of a power of attorney who, although he has studied law at undergraduate level displayed some difficulties in confronting head on legal issues raised by senior counsel Mr. Lekey representing the first respondent. Such a difficulty notwithstanding, I will show how the young and upcoming lawyer has managed, on a balance of probability to direct this court to depart from the Tribunal's decision which, as alluded to above, leaves a lot to be desired when it comes to evaluation and analysis of evidence.

It should be recalled that the disputed land is located **Shangani Low Density Area within Mtwara Municipality.** Land law experts in Tanzania know that this an important starting point in resolving a land dispute, A distinction is often made between "surveyed" and "unsurveyed" land such as land in the rural areas. In surveyed land like the subject matter at hand lawful occupancy (or ownership loosely defined) is subject to issuance of a"

Certificate of Occupancy" by the Commissioner for Lands **(See Section 29(1) of the Land Act Cap 113 RE 2019).**

Land law practitioners know very well that the story does not end with receipt of the Certificate of Occupancy. Such a Certificate must be registered by the Registrar of Titles (See Section 27 of the **Land Registration Act Cap 334 RE 2004).** It does not take much thought to realize that in resolving the first issue, the learned Chairman allowed himself to slip into error. The word "owner" is defined under section 2 of the **Land Registration Act (supra) as** follows:

> *"owner" means, in relation to any estate or interest, the person in whose name for the time being in whose name that interest is registered."*

If as it appears, the learned Chairman's finding was that both parties were "persons in whose name the interest is registered" he was supposed to evaluate such documents and boldly state whose interests outweighed the other. In this regard, I subscribe to Mr. Majid's reasoning on applicability of the Latin Maxim **"quod prius est verius et quod prius tempore potius est jure,"** (what is first is truest and what comes first in time is best in law.) The appellant was the first one (on 1st January 1982), compared to the second respondent Salome Paul Nobert (1st January 1983) if the learned Chairman had allowed himself to go an extra mile in evaluating and analyzing the evidence before him.

The first respondent's part of the story, as recounted by the learned counsel Mr. Steven Lekey may appear convincing at initially but only until

one goes into some details. The English idiom "the devil is in the details" summarizes the whole story. First, the 1st respondent claims that he bought the suit land from the 1st respondent. Since the 2nd respondent never appeared in the Tribunal technically there is no proof to such a transaction. Moreover, as will be alluded to in winding up this judgement, albeit in the form of an *obiter*, the 2nd respondent distanced herself from such a transaction!

The second respondent also claimed that he had stayed in the suit land for many years undisturbed and that he had built a house therein. Several documents, permits and other receipts were produced to support this claim. The Court of Appeal of Tanzania in **Maingu E.M. Magenda vs. Abrogast Maugu Magenda** Civil Appeal No. 218 of 2017 at page 11 stated that by building a permanent house on another person's land or paying land rent or property tax to the relevant authority does not prove ownership. To this end I find that the 1st, 3rd, and 8th grounds of appeal have merit. In my opinion, they can determine the entire appeal. However, before winding up, I will spend a few minutes on the 4th ground.

The appellant argued that the DLHT erred in law and fact for admitting a defective joint written statement of defence tendered by the 1st respondent. Mr. Lekey, on his part, argued that the DLHT's decision appealed to the law and common sense, and that the absence of the second respondent's signature did not invalidate the WSD since the first respondent properly signed it. As a court of record, I am inclined to state that the 2nd respondent distanced herself from any involvement in selling her land to the 1st respondent. However, it was the view of both parties that since the 2nd

respondent had not been in the trial tribunal, whatever she (eloquently I would say) told this court could not be considered in deciding the merits of the appeal. I agree. I will not go further than this for the sake of "procedural sacredness" if not pathways to legal technicalities.

Premised on the above, I allow the appeal. I set aside the judgement of the trial Tribunal and all orders emanating therefrom. I declare that the appellant is the rightful owner of the disputed land. I make no orders as to costs. Each party to bear their own costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA

JUDGE
6/6/2023

Court:

This judgement is delivered this 6th day of June 2023 in the presence of Mr. Stephen Lekey, learned Advocate for the 1st respondent and Mr. Saidi Majidi Ahmed representing the appellant.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA

JUDGE
6/6/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE
6/6/2023

Mr. Lekey: My lord having heard the Judgement just delivered, it is my prayer that it goes into the records that in line with Section 47(2) of the Land Disputes Act read together with section 5 of the Judicature and Application of Laws Act (JALA) I have orally applied for leave to appeal to the Court of Appeal of Tanzania.

E.I. LALTAIKA

JUDGE
6/6/2023