

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LAND CASE APPEAL NO. 12 OF 2023

*(Originating from Judgment of District Land and Housing Tribunal of Moshi at Moshi in
Application No. 172 of 2018 dated 7th day of February, 2023)*

ASHA SELEMANI.....APPELLANT

Versus

ISSA ABDALLAH.....1st RESPONDENT

RAYMOND CHARLES MUSHI.....2nd RESPONDENT

JUDGMENT

5th July & 7th August, 2023

A.P.KILIMI, J.:

The appellant mentioned above filed an application at the above-mentioned District Land and Housing Tribunal against all respondents praying for the following; first, an order that she is the lawful owner of the suit land; second, eviction of the second respondent from the suit land and third, permanent injunction restricting the respondents and their agent from further trespassing and or interfering with applicant's quite possession of the suit land.

At the trial tribunal before hearing, parties agreed on the following issues; first, whether respondents are trespassers to the suit land; second, whether the suit land was included in Matrimonial cause no. 5 of 2013; third, who is the legal owner of the suit land and fourth, to what relief(s) are parties entitled for. After hearing parties and considered exhibits tendered the said tribunal decide the case in favor of the respondents and declared the second respondent to be the legal owner of the suit land.

The appellant aggrieved with the above decision and order thereto has preferred this appeal before this court on the five grounds as follows:

1. That the trial tribunal erred in law and in facts in holding that the suit property belongs to the 2nd respondent.
2. That the trial tribunal erred in law and in facts in holding that based on the dispute between the Appellant and the 1st Respondent, the first respondent was given the suit land while the Appellant was given the land with the house the fact which is not true.
3. That the trial tribunal erred in law and in fact in failure to ascertain that the decision of the Ward tribunal vide Land Case No. 22/2010 which ordered the appellant to be given the land with a house and the 1st respondent to be given the suit land was overturned/ nullified and set aside by the District land and housing tribunal vide Appeal No. 44/2011 hence rendering the distribution done by ward officers and the letter/ document justifying distribution to be null and void.

4. That the trial tribunal erred in law and in facts in failure to ascertain that judgment of Shauri la Ndoa No. 5/2013 ordered the appellant to remain with the suit land and not otherwise.
5. That the trial tribunal erred in failure to properly evaluate and analyze the evidence given by both parties hence reached to an erroneous decision by declaring the 2nd Respondent as the lawful owner of the suit land.

Before I dwell into the substance of the appeal, I find it necessary to provide a brief fact of the matter at hand which are gleaned from the record of this matter. The Appellant Asha Selemani was once married to the 1st Respondent Issa Abdallah. In the year 2002 they separated and after eleven years of living apart, the Appellant petitioned for divorce at Hai Kati Primary court in 2013. The matter was heard *ex-parte* following non-appearance of the 1st respondent. The primary court granted the divorce and also ordered for the appellant to remain with the suit property. In the course of executing the decree issued by the primary court, the Appellant discovered that the 1st Respondent had already sold the suit land to the 2nd Respondent. Consequently, the Appellant decided to sue the 1st and 2nd Respondents in the District Land and Housing Tribunal for Moshi through Application No. 172 of 2018, wherein she lost the case hence this appeal.

When this matter came for hearing, parties agreed that the matter be disposed of by way of written submissions. All parties' submissions were timely filed and their effort is commendable. I have carefully gone through submissions for and against the appeal. I will not reproduce everything that parties submitted in this judgment, but I assure that all submissions have been considered when preparing this judgment.

Submitting in support of the appeal, the appellant stated that the trial tribunal erred in holding that it based on the dispute between the Appellant and the 1st Respondent, the Appellant was given the land with the house while the 1st Respondent was given the suit land. She argued that the decision of the ward tribunal which divided the suit land was nullified by the District Land and Housing Tribunal on appeal and the 1st respondent never challenged it hence the decision still stands. She thus contended that the trial tribunal misdirected itself by relying on the decision of the ward tribunal which had been nullified.

Furthering in her submission, the Appellant faulted the trial tribunal for failure to consider the decision of Hai Kati Primary court in Matrimonial cause No. 5 of 2013 which ordered the Appellant to remain with the suit land a decision which was never challenged by the Respondents. Based on

those facts the Appellant was of the view that the trial tribunal failed to properly evaluate the evidence hence reached an erroneous decision.

Responding to Appellant's submission, the 1st Respondent submitted that the trial tribunal was correct to hold that the suit property belong to 2nd Respondent and that the 1st Respondent was vide Matrimonial Cause No. 5/2013 given bare land without a house while the Appellant remained with another where there is a house. He contended further that based on the testimony of SM2 the trial tribunal correctly relied on Matrimonial Cause No.5/2013 and that it was the Appellant who is misleading, when submitted that the trial chairman relied on Civil Case No.22/2010. It was then his submissions that the trial tribunal properly evaluated the judgment of Matrimonial cause No.5/2013 which decreed that the Appellant not to remain in the suit land.

In his submission. the 2nd Respondent reiterated much of what was submitted by the 1st Respondent. He argued that the trial tribunal properly evaluated the evidence given by both parties and also visited the locus in quo to satisfy itself, thus the verdict reached was a conglomeration of both

site visit and evidence already given. He argued that the tribunal properly evaluated the evidence.

After going through the record of the trial tribunal, grounds of appeal and submissions from all parties, in determining whether the appeal has merit or otherwise, I will respond to the grounds of appeal as brought by the appellant, and in my view, in the conclusion the point which cut across them, is whether the Tribunal erred by declaring the 2nd Respondent as the lawful owner of the suit property.

I am aware, this being the first appellate court, it is a trite law, I have a duty to re-evaluate the evidence on record and in doing so; I may concur with the finding of fact made by the trial tribunal or come up with different finding. (See **Gaudence Sangu vs. Republic Criminal** Appeal no. 88 of 2020 and **Hosea Katampa vs. Ministry of Energy & Minerals & Others** Civil Appeal No. 221 of 2017 (Both unreported).

Starting with the first ground of appeal, the Appellant faulted the trial tribunal for holding that the suit property belonged to the 2nd Respondent, I had to go through the entire evidence presented by the parties in proving their case. I will begin with appellant's evidence at the trial tribunal which

was to the effect that the suit property belongs to her. The Appellant substantiated that fact by relying on the decision of court which granted her the rights during the matrimonial case where it was ordered that she retain the property after the divorce petition was granted. She attached the court's decision as evidence to support her argument. I have gone through the court's decision titled Shauri La Talaka Namba 5/2013 of Hai Kati Primary Court, on page 2 the second paragraph it is stated that,

*"Mali iliyochumwa katika ndoa ni **kiwanja kimoja** kilichopo Bomang'ombe **ambacho kinabaki chini ya mdai ambaye alikuwa anakimiliki toka awal'**".*

[Emphasis supplied]

Although to my view the size, scope and extent of contribution to the said land was not demonstrated by the Primary court, but still remained unchallenged decision of the proper court. But the above holding of Primary court was differently stated by the learned Chairman of the Tribunal, this was at page 5 of typed judgment of the District Tribunal and for easy reference I reproduce hereunder;

"Kwa mujibu wa ushahidi wa SM2 Muhidini, kwenye Shauri la Ndoa Na. 5/2013 Mahakama iliamua kwamba Mwombaji abaki ni sehemu yenye nyumba lakini asidai sehemu iiiiyouzwa (eneo la mgogoro). Kwa mujibu wa ushahidi wa SU1, baadae Ofisi ya Kata ilimkabidhi eneo hilo la mgogoro na Mwombaji akakabidhiwa eneo lenye nyumba. Lakini inavyoonekana Mwombaji anapata tamaa ya kutaka kumiliki maeneo vote mawili, yaani eneo lenye nyumba (ambalo ni mali yake) na eneo lililouzwa (eneo la mgogoro)".

[Emphasis supplied]

I have entirely scanned the said decision titled Shauri La Talaka Namba 5/2013, nowhere the said court said that the appellant should remain with the part of land where the house is situated, and she should not claim the land in dispute. In my view the tribunal misdirected to consider the evidence of SM2 Muhidini Rashid who told the story when the matrimonial dispute went to BAKWATA. Indeed, this witness testified at the said Primary court where the case was heard *ex-parte*, in fact the said court recognized him as conciliator of the marriage between the appellant and first respondent. Is SM2 revealed on how their marriage was irreparable,

and nothing than that said by him is reflected on the said Primary Court Judgment.

Furthermore, the trial tribunal proceeded to misdirect itself when it relied on the distribution of the suit land made by the ward tribunal which had no authority to do so. For purpose of clarity, I wish to reiterated excerpt found on page 6 of typed judgment of the District Tribunal;

*"Kwa kuzingatia ushahidi uliopo kwenye kumbukumbu pamoja na maelezo yaliyopo hapo juu, eneo la mgogoro ni mali ya Mjibu maombi wa pili alilonunua kutoka kwa Mjibu maombi wa kwanza **baada ya mgawanyo uliotokana na mgogoro ullokuwepo kati ya Mwombaji na Mjibu maombi wa kwanza ambapo Mjibu maombi wa kwanza alipewa eneo lenye mgogoro wakati Mwombaji akipewa eneo lenye nyumba"***

[Emphasis supplied]

I have considered the above holding; I am persuaded to know, which tribunal distributed the said land between the appellant and first respondent and under what authority. This has led me to available records, which shows 12 years back, this dispute went at the Ward Tribunal of Hai Mjini in Madai no. 22 of 2010, the judgment was issued on 29th November,

2010 which decided that the suit land be divided into two equal parts between the appellant and first respondent. The appellant who was the complainant therein aggrieved and appealed to District Land and Housing Tribunal of Moshi at Moshi in appeal no. 44 of 2011. On 20th September, 2011 the said District Tribunal nullified the decision and orders thereto of Hai Mjini Ward Tribunal and reasoned that, the appellant was supposed to file her case at normal Magistrate courts for a determination of marriage and distribution of matrimonial property, thus held that the said Ward Tribunal lacked jurisdiction.

In view of the above decisions, this means there two existing decision, one nullifying ward tribunal decision and the other is Hai Kati Primary court decision in Talaka Namba 5/2013 which ordered the appellant to remain with suit land. These decisions remained unchallenged to date; therefore, they hold the realm. If this is the position which I also subscribe, I am of considered opinion the decision remaining standing is that of the primary court, being so, any party who was not satisfied by the said decision ought to have appealed against the decision to the appellate court. Therefore, all acts of distributing the said suit land by other

authorities was unsubstantiated, thus, I am settled that, the trial tribunal misapprehended those decisions.

In the circumstances stated above, the next point to be considered in this ground is whether the title passed to the second respondent after purchasing the said land. In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR. 419, it was held-

"It is an elementary principle that he who alleges is the one responsible to prove his allegations".

Therefore, it was upon the first respondent to prove that the title of the suit land did legally pass to him before he could pass the same to the second respondent. In view of the above, I am settled the seller who is the first respondent had no legal title to pass to the second respondent. Thus, the first ground is answered in affirmative that, indeed the trial tribunal erred in law and in facts in holding that the suit property belongs to the 2nd respondent.

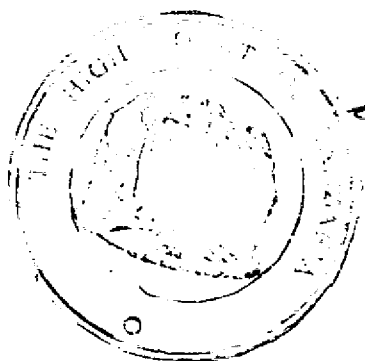
Before I pen off, I have considered the evidence on record, the first appellate duty said above flop, this is because in my opinion extra evidence

is needed, for instance, I see there is a need of other comprehensive evidence on real actual land the primary court said should remain with the appellant, this is because when the trial tribunal visited the suit land, found the said land is divided into three parts and there is no evidence to ascertain whether one of those part was disposed before even when the matrimonial cause was presented at the Primary Court by the appellant.

Basing on what I have discussed above, and since I have found merit in the first ground of appeal, I see no need of discussing the rest of the grounds since this ground suffice to dispose the entire appeal. Henceforth the appeal is allowed and the decision and orders thereto of the District Land and Housing Tribunal is hereby quashed and set aside with costs forthwith.

It is so ordered.

DATED at **MOSHI** this 7th day of August, 2023.



A.P.K.

A.P.KILIMI
JUDGE
7/8/2023