IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT MOROGORO

LAND APPEAL NO. 25 OF 2022

(Arising from the decision of the District Land and Housing Tribunal of Morogoro at Morogoro in Land Application No. 200 of 2016)

BETWEEN

JULIANA JERRY ARMSTRONG ..... APPELLANT

VERSUS

GERALD MISINZO ..... RESPONDENT

JUDGMENT

31st August, 2023

CHABA, J.

On the 1st day of December, 2016, before the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT), the appellant, Juliana Jerry Armstrong, sued the respondent herein over trespassing on the disputed land measuring 10 acres, situated at Mkundi, Mawasiliano area, in Kihonda Ward, within the District and Region of Morogoro.

The appellant, who claimed to have been allocated the said parcel of land by the local government of Mawasiliano area on 6th December, 2006 lamented that, the respondent invaded the suit land in 2015 claiming to be a lawful owner of the same. Thus, the appellant approached the DLHT vide Land Application No. 200 of 2016 seeking for judgment and decree against the respondent as follows:

i. That, the appellant herein be declared as the owner of the premises,

ii. That, the respondent be declared as trespasser,

iii. That, the respondent be restrained permanently from trespassing the premises of the applicant,

iv. That, the respondent be ordered to pay compensation at tune of 30,000,000/= for disturbance caused to the applicant,

v. General damages as may be granted by the Honorable Tribunal,

vi. Cost of this suit,

vii. An interest rate of the decretal amount at 22 per annum.

After the full trial, the DLHT adjudicated the matter in favour of the respondent, declaring him as a lawful owner of the disputed land, whereas the appellant was declared a trespasser. Aggrieved by that decision, the appellant has preferred this appeal advancing four (4) grounds of appeals as reproduced hereunder: -

i. That, the trial District Land and Housing Tribunal erred in law and fact by making judgment in favour of the respondent, while the purported seller was neither joined nor called to testify.

ii. That, the trial District Land and Housing Tribunal erred in law and fact by making judgment in favour of the respondent, basing on the weak and contradictory evidence adduced by the respondent and his witness during the hearing of the same.

iii. That, the trial District Land and Housing Tribunal erred in law and fact by failure to evaluate and analyse the evidence tabled before it.

iv. That, the trial District Land and Housing Tribunal erred in law and fact by introducing the new issue not raised by either the appellant nor respondent herein and proceed to discuss it without even accord the parties with the right to submit on the same.

On 16th December, 2022, by consensus, parties agreed to argue and dispose of the appeal by way of written submissions. Whereas the appellant enjoyed legal services of Mr. Abdul Bwanga, learned counsel, the respondent had the services of Mr. Richard Giray, also the learned counsel.

Submitting on the first ground of appeal, the learned Counsel for the appellant, Mr. Bwanga contended that since the respondent claimed that the suit property was passed to him by way of sale, then the vendor/seller was supposed to be called to prove that he had a good title to pass as once expounded in the case **of Faraha Mohammed Vs. Fatuma Abdallah (1992), TLR 205**, where the Court held: -

> "He who does not have legal title to the land cannot pass a good title over the same land to another".

He added that, failure to join the vendor who was in a better position to state whether he has or had a good title or not is fatal, since the question of

ownership of the suit property between the appellant herein and William Paulo Kunambi before he sold the same to the respondent herein is in vacuum.

On the second ground which touched on the issue of weak and contradictory evidence claimed to have been adduced by the respondent, Mr. Bwanga contended that whereas the respondent claimed to have been bought ten acres of land from one William Paulo Kunambi, his key witness one Mussa Aloysi Kilewa (DW2) said that the respondent bought only seven acres (7) and not ten (10) acres. According to him, the contradiction goes deeper to the root of this case, and referred this Court to the decisions in the cases of **Wilfred Lukago Vs. R, [1994] TLR 189,** and that of **Michael Haishi Vs. R, [1992] TLR, 92** where the Court underlined that, contradictory evidence create doubts which should be decided in the favour of the accused (appellant).

As regards to the third ground, Mr. Bwanga substantiated that the trial Tribunal failed to evaluate and analyze the evidence tabled before it by the respondent who failed to call upon the material witnesses to prove his case. He went on and mentioned the said witnesses to be one William Paulo Kunambi, who allegedly sold the land in dispute to the respondent and Maria Stephano, who was said to be the person who witnessed the purported sale agreement. It was his view that, the absence of the said witnesses who were not called to testify entitles the appellant to draw adverse inference as held in the case of **Aziz Abdallah Vs. Republic (1991) T.R.L 71,** where it was stated that; -

"……the general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

On the last ground, Mr. Bwanga averred that the DLHT erred in law and fact by introducing a new issue *suo motu* as to whether the street council had a good title to pass to the appellant or not, but without according the parties with the rights to submit on the same. To support his position, he cited the cases of **Mbeya-Rukwa Autoparts and Transport Limited Vs. Jestina George Mwakyoma [2003] T.L.R 251**, and that of **National Oil (T) Ltd Vs. Farida Jumbe and Three Others [2018] LCCD 10,** where in the latter, the Court held *inter-alia* that; -

"I am of a view that, the arbitrator violated the rules of natural justice as he denied parties their right to be held on the issues raised suo moto in the award. He denied each party the right to be informed of any point adverse to him that is going to relied upon by the arbitrator, and to be given the opportunity of stating what his answer to it is".

At the end, Mr. Bwanga rounded up and prayed this appeal be allowed, with the order of setting aside the Judgment of the District Land and Housing Tribunal for Morogoro and any other relief(s) that this Honorable Court may deem fit and just to grant.

On his part, Mr. Giray, counsel for the respondent resisted the appeal. On the first ground, he argued that there is no evidence on record to suggest that the said William Paul Kunambi had a defective title. He added that, the fact that the respondent purchased the land from Mr. Kunambi was made known to the appellant and his Counsel by way of written statement of defence but they didn't raise it as an objection, and that they had an avenue of applying to the Court for joinder of the seller under Order 1, Rule 10 (2) of the Civil Procedure Act, [CAP. 33, R. E. 2019]. He added further that, the appellant is the one who filed the application before the trial tribunal but opted to sue the respondent alone, leaving the seller who could not testify as information on his death was communicated to the trial tribunal during the hearing of the application.

Rebutting the 2nd ground of appeal, Mr. Giray reproduced an excerpt of the copy of the typed Judgment of the DLHT, at paragraph 2 and submitted that, on the day of executing the sale, the suit land was measured and found to be of seven (7) acres, and that the 10 acres was just an estimation. On this facet, Mr. Giray was of the view that, the notion of contradictory evidence is a misconception, and that the allegedly Wilfred Lukago's case cited by the

appellant's Counsel is misplaced and distinguishable. At last, he beckoned this Court to dismiss this ground of appeal for lack of merit.

As for the 3rd ground, Mr. Giray contended that William Paulo Kunambi could not be a witness as he is now a deceased person. He went on elaborating that, Musa Kilewa and Maria Stephano are the Street Chairpersons and are members (Wajumbe) respectively, who attested the sale agreement, and that Musa Kilewa testified before the trial Tribunal as DW2. In his opinion, the evidence of Musa Kilewa was strong and credible. What matters is not a long chain of evidence but the weight of evidence adduced by the witnesses.

On the 4th ground, Mr. Giray reproduced the last paragraph of page 8 of the typed Judgment of the DLHT and narrated that, the Honorable Chairperson did not raise any new issue but rather he expressed his views, hence according to him, the case of **National Oil (T) Limited** and **Mbeya-Rukwa Auto parts** (supra) have been misplaced.

Additionally, citing the case of **Erick Mwimbo & 90 Others Vs. Morogoro Municipal Council,** Land Case No. 459 of 2017, HCT - Dar Es Salaam (unreported), the Counsel informed this Court that, the respondent won the case against one Ramadhani Majuala at Kihonda Ward Tribunal in Land Dispute No. 20 of 2015 over the same disputed suit land, and that the decision was never appealed against.

Based on the above submission, Mr. Giray prayed for the Court to dismiss the appeal with costs and the decision of the trial Tribunal be upheld.

By way of rejoinder, starting with the first ground, Mr. Mbwanga highlighted that the seller's ownership over the suit property was in question since in 2006 which is the time the seller claimed to have owned the suit property as the appellant was already in possession and use of the land without any interference thereto. Moreover, the Counsel for the appellant averred that, there was no evidence to prove as to how Mr. Kunambi (the seller), obtained the parcel of land in dispute before passing it to the respondent. He went on contending that, the Court in the case of **Juma B. Kadal Vs. Laurent Mkande (1983) TLR 103,** observed that buyers are supposed to be sued along with their vendors in order to resolve the question as to whether the latter had a good title or not. He added that, there was even no piece of evidence which was tendered to prove that the seller whose title over the suit property is in question is dead, as neither the Administrator of the deceased's estates nor his family members appeared before the trial Tribunal to testify to that effect.

On the 2nd ground, Mr. Bwanga rejoined that the Counsel for the respondent relied on the decision in the case of **Wilfred Lukago Vs. R.,** (supra) and the case of **Michael Haishi Vs. R, [1992] TLR, 92** and insisted that, the respondent's claim was over ten (10) acres over the said suit property and not seven (7) acres, and that such contradiction goes deeper to the root of this case hence the doubts created by such contradictions should be decided in favour of the appellant.

As to the 3rd ground, Mr. Bwanga underlined that the there were no proof evidencing that one Bakari Iddi was not a Street Chairperson in the year 2006 as even his own documents did not identify him as such.

Regarding the new issue introduced by the Hon. Chairperson, Mr. Bwanga emphasized that no matter the tongue twisting, the gist of the Chairperson's views was as to whether the Street Council has a good title to pass to the appellant or not, and that the same sounds to be a new issue for determination hence the parties were to be invited to address on the same since its effect goes to the root of the matter as well as to the final decision.

As regards to the claim that the respondent won cases over the suit property, Mr. Bwanga underscored that the same was a new ground as it was not raised in the grounds of appeal, and that it was even not proved as to whether the respondent won cases over the suit premises measuring seven (7) acres or ten (10) acres.

Finally, as a matter of remedy, Mr. Bwanga reiterated his prayers indicated in his submission in chief.

I have keenly perused and examined the trial Tribunal proceedings and Judgment. I have also thoroughly read the submissions made by both parties for and against this appeal. The main issue for consideration and determination is whether this appeal has merits.

To determine this appeal, I will start with the 1st ground of appeal where the appellant is faulting the decision of the trial DLHT on the ground that the

person who sold the disputed parcel of land to the respondent was neither joined nor called to testify before the trial Tribunal. In ascertaining as to whether this ground is meritorious or otherwise, I find it apposite to borrow wisdom from the decision of the Court of Appeal of Tanzania (the CAT) in the Case of **Fang Gas Distributors Limited Vs. Mohamed Salim Said and 2 Others,** Civil Revision No. 68 of 2011 (unreported), which was cited with approval in **Abdi M. Kipoto Vs. Chief Arthur Mtoi (Civil Appeal No. 75 of 2017) [2020] TZCA 26; (28 February 2020 TANZLII).** In this case, the CAT underlined that:

> "... an intervener, otherwise commonly referred to as a NECESSARY PARTY, would be added in a suit under this rule [Order 1, rule 10 (2) of the Civil Procedure Code, Cap. 33 R.E. 2002] even though there is no distinct cause of action against him, where: -
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> (a) in a representative suit, he wants to challenge the asserted authority of a plaintiff to represent him; or
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> **b) his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit; or**
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> (c) in actions for specific performance of contracts, third parties have an interest in the question of the

manner in which the contracts should be performed; and/or,

(d) on the application of the defendant, it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is called as a co-defendant". [Emphasis added].

Similarly, Order I, Rule 3 of the Civil Procedure Code [CAP. 33 R. E. 2019] (the CPC), on who may be joined as a party to a case, clearly provides: -

"All persons may be joined as defendants **against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally** or in die alternative where, if separate suits were brought against such persons, any common question of law or fact would arise." [Emphasis is Mine].

Being guided by the above authority and the provisions of the law, I hasten to deliberate that, under the circumstance of this case, non-joinder of the seller (Mr. Kunambi, the deceased) was not fatal as he neither had interest in the disputed suit land nor claimed anything therefrom,thus, it is crystal clear that any order made by the trial tribunal would have not affected Mr. Kunambi as the title in the suit land in dispute had already passed from him to the

respondent. It therefore goes without saying that, failure to join him could not hinder the determination of suit at the DLHT to its finality.

Furthermore, it is now a settled position of the law that, a mere non-joinder of the seller of the disputed parcel of land cannot defeat the suit as stipulated under Order I, Rule 9 of the CPC which articulates that; -

> "A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it".

That being the current position of the law, I need not to go further with all arguments put forward by learned Counsel for the appellant. I find the first ground of appeal without merit and therefore dismissed.

On the 2nd ground, the appellant's complaint is premised on the claim that, the trial Tribunal erred in law and fact by delivering a Judgment based on weak and contradictory evidence adduced by the respondent and his witnesses. I have critically gone through the records of the trial Tribunal, and in a bid to determine the merit of this ground, I was compelled to travel through the application filed at the trial DLHT on 1st December, 2016 and noticed an irregularity concerning the proper descriptions of the disputed suit land which in my opinion, resulted into a contradiction of the same during the hearing of the application. In the said application, the location and address of the suit land was stated to be situated at Mkundi, Mawasiliano area. However, no specific

boundaries or neighbours were stated therein save for the size of the disputed suit land which was mentioned at paragraph 6 (a) to be of 10 acres. In my settled opinion, the descriptions were too general and vague contrary to the provision of Order VII, rule 3 of the CPC which provides that:

> "Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number."

The above position of the law has been amplified in numerous precedents in our jurisprudence including **Mondorosi Village Counsel & 2 Others Vs. Tanzania Breweries Limited & 4 Others,** Civil Appeal No. 66 of 2017, (CAT); **Daniel Kanuda Vs. Masaka Ibeho and 4 Others,** Land Appeal No. 26 of 2015 and **Mbwana M. Mchuma and Others Vs. Dar Es Salaam Park Land Housing Ltd,** Land Appeal No. 34 of 2022 (all unreported), where in all these cases, the suits were struck out after being found incompetent for want of proper descriptions and sufficient identification of the suit property.

It is without a flicker of doubt that, such insufficient descriptions of the disputed suit land led to confusion in the trial Tribunal which finally resulted into contradictions in respect of proper description thereof. As the records speaks, when the matter was called on for hearing on 17th August, 2020, in her testimony, the appellant described the disputed suit land to be bordered with a

Road in the Northern part, Mr. Togolani in the Southern part, Mr. Ngomanyoi in the East, and Ms. Matilda in the West. However, her witness, one Shaban Ramadhan Shabani who featured at trial as AW2, described the land in dispute to have a size or measured at ten (10) acres, being bordered with him in the North, Mr. Togolani in the south, Mr. Ngomanyoi in the East and Mr. Mgweno in the West.

The trend on the contradiction as to the identification of the land in dispute is further observed in the testimony adduced by the defense side where DW1 (Gerald Misinzo), respondent herein, in his testimony told the trial Tribunal that, the disputed land had the size of ten (10) acres. Upon being cross-examined by the Counsel for the appellant on the specific location of the same, DW1 informed the trial DLHT that, the land in dispute is bordered by a road which leads to a meat processing industry on the East, Mr. Samson and Mbweno on the Southern part, one Mchaga on the western part, and Mzee Chaula on the Northern part. On the other hand, his witness DW2 testified to the effect that, the land is measured seven (7) acres, bordering with a street road on the South, one Mbweno on the West, mzee Chaula on the East, and one "Mama wa Kichaga" on the Northern part.

Flowing from the above observation, it follows therefore that, the location of the land in dispute differs significantly between the descriptions given by the applicant and her witness and the descriptions of the same given by the respondent and his witnesses during the hearing of the application. Surprisingly,

the Honourable Chairperson didn't bother to address this serious contradiction which goes to the root of the matter, instead he proceeded to declare the respondent a lawful owner of the seven (7) acres of land whose location is not the one described by the applicant. I deem it appropriate to reproduce a part of the last paragraph of taken and recorded by the trial DLHT as reflected in the Judgment, for ease of reference; -

> "...kwanza natamka kuwa **eneo bishaniwa lililopo mtaa wa Mawasiliano, Kihonda Morogoro, la Ukubwa wa Ekari 7, linalopakana na Mashariki - Barabara, Kusini - Mbweno na Samson, Kaskazini – Mzee Chaula, na Magharibi – Mchaga** ni mali halali ya mjibu maombi, na hivyo basi maombi haya yamefutwa kwa gharama "dismissed with cost" kwa kushindwa kuthibitishwa. Imeamriwa hivyo." (Emphasis Added).

With due respect to the Honourable Chairperson, I find that he erred both in law and fact by making deliberation on the portion of land which was not the same as the one which formed the basis of the applicant / appellant complaints i.e., a suit land measuring ten (10) acres located at Mkundi, Mawasiliano area, Kihonda Ward within the District of Morogoro bordered with the Road in the Northern part, Mr. Togolani in the Southern part, Mr. Ngomanyoi in the East, and Ms. Matilda in the West.

With the above finding, I am of the strong view that, this was a fit case for the trial Tribunal to exercise its discretion and make a visit to the *locus in quo* in order to ascertain the boundaries in dispute and the size of the land it was enunciated in the case of **Avit Thadeus Massawe Vs. Isdory Assega,** Civil Appeal No. 6 of 2017 (unreported), where the CAT observed thus: -

> "Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of, on which plot the suit property is located."

Placed reliance on the above holding of the Apex Court, I believe that had the trial Chairperson paid the visit to disputed suit land, it could have made a clear finding on the issue in controversy and reached to a fair and just decision.

Having so deliberated, I find merit on the 2nd ground of appeal. In my considered view, the decision of the trial DLHT cannot stand as it is tainted with lots of irregularities on the proper description of the disputed suit land. Suffices

to say, the appellant's suit was improperly filed before the District Land and Housing Tribunal for Morogoro, at Morogoro for failure to exhaust the proper descriptions of the disputed suit land. In this regard, I am inclined to invoke my supervisory and revisionary powers bestowed upon this Court under section 43 (1) (a) (b) and (2) of the Land Disputes Courts Act, [CAP. 216 R. E, 2019], which articulates that; -

> "(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court:
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> (a) shall exercise general powers of supervision over all District Land and Housing Tribunals and may, at any time, call for and inspect the records of such tribunal and give directions as it considers necessary in the interests of justice, and all such tribunals shall comply with such direction without undue delay;
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> (b) **may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.**

(2) In the exercise of its revisional jurisdiction, the High Court shall have all the powers in the exercise of its appellate jurisdiction." [Emphasis Added].

Being fortified by the above position of the law, I proceed to quash the proceedings of the District Land and Housing Tribunal for Morogoro, at Morogoro in Land Application No. 200 of 2016 and set aside the Judgment, Decree and any other Orders emanated therefrom that declared the respondent a lawful owner of the parcel of land with the size of seven (7) acres.

In view of the foregoing finding, I allow the appeal with no order as to costs. Since the finding on the 2nd ground of appeal suffices to dispose of the appeal, I find no pressing need to canvas the other remaining grounds of appeal. Parties are at liberty to file a fresh application before an appropriate and competent tribunal, if they deem fit to protect their interests. It is so ordered.

DATED at **MOROGORO** this 31st day of August, 2023.

M. J. Chaba

JUDGE

31/08/2023