

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

LAND APPEAL NO. 168 OF 2022

(C/F Land Application No. 240 of 2019 District Land and Housing Tribunal of Arusha at Arusha)

LIGHTNESS WILFRED KIWELU APPELLANT

VERSUS

PETER JOHN LEVI (As the Administrator of the

Estate of the late **SAMSON JOHN LEVI**) **RESPONDENT**

JUDGMENT

25th July & 20th September, 2023

TIGANGA, J.

This appeal emanates from the decision of Land Application No. 240 of 2019 from District Land and Housing Tribunal of Arusha at Arusha (the trial tribunal) in which the respondent herein successfully sued the appellant for trespassing into the piece of land in Plot No. 376, Block N measuring 450 sqm with 50 meters long and 12 meters width located at Benety area in Engutoto Ward within Monduli District, Arusha Region (the suit land). The respondent among other prayed that, the suit land be declared part of the estate of the late Samson John Levy (the deceased).

According to SM2, the deceased's wife, she told the trial tribunal that, the deceased was allocated the suit land by Monduli District Council and they had paid Tshs. 675,000/= vide receipt No. 64459 back in the

year 2012. That, together with the deceased, they developed the suit land by starting to built a house but the deceased was struck with untimely death in 2017 hence, the house remained unfinished to date. That, they were in the process of obtaining a title deed but following his demise, the respondent had trespassed into the suit land and claim ownership of the same. According to the appellant, the suit land is hers on the ground that, although the deceased was allocated the same by Monduli District Council, she was the one who paid for it as the deceased, at the time, did not have money.

That, following the payment, the deceased transferred ownership to her which was preceded by a letter, exhibit D2 to Monduli District Council praying for a change of the name of ownership from his to that of the appellant herein. According to the appellant, due to their own understanding, the deceased allowed her to develop the suit land, in which she built a house and made other developments therein. At the end of the trial, the tribunal held that the suit land forms part of the estate of the deceased, since the receipt shows his name. The trial chairman also refuted the letter praying to transfer ownership on the ground that, the same was never replied or worked upon, so it remained as such, just a request. Aggrieved, she preferred this appeal with the following three (3) grounds;

1. That, the trial trial Chairman erred in law and in fact in wrongly shifting the burden of proof to the appellant herein in proving the ownership of the suit land.
2. That, the trial tribunal erred in law and in fact in failing to properly evaluate the evidence tendered before it as there was clear proof that, the suit land currently belongs to the appellant as per the land offer.
3. That, the trial tribunal erred in law and in fact in holding that the evidence of the appellant differed with what was in her statement of defence without taking into consideration that there was no proof that she paid for the suit land and the same was registered to her name.

During the hearing which was by way of written submissions, the appellant was represented by Ms. Beatrice F. Mboya while the respondent was represented by Mr. Richard Evance Manyota, both learned advocates.

Supporting the appeal, Ms. Mboya submitted on the 1st ground of appeal that, it is the basic principle of law as per section 110 (1), (2) and 111 of the **Evidence Act**, [Cap 6, R.E. 2019] that, he who alleges must prove. Thus, it was the respondent's duty to prove the case against the appellant herein and not vice versa as seen in the trial tribunal's judgment. She referred the Court to the case of **Barelia Karangirangi vs. Asteria Nyalambwa**, Civil Appeal No. 237 of 2017 CAT at Mwanza (unreported)

and maintained that it was the duty of the respondent herein to prove ownership of the suit land.

On the 2nd ground, Ms. Mboya submitted that, the trial tribunal failed to properly evaluate the evidence that was tendered before it. She argued that, SU4's evidence clearly shows that, the ownership of the suit land belongs to the appellant because, there was a proof of receipt showing that, she paid for the suit land, deceased letter requesting change of name from him to her and her application to the District Council requesting right of occupancy.

On the last ground, learned counsel asserted that, the tribunal chairman erred in holding that, her evidence differed to what was in her Written Statement of Defence (WSD) without elaborating further on the said differences. More so, the trial tribunal only analysed the appellant's evidence without properly weighing it to that of the respondent herein. Also, the trial tribunal erred in directing itself to discuss the sale agreement which was never tendered in Court instead of focusing on the agreement between the deceased and the appellant herein. Learned counsel prayed that, this appeal be allowed with cost.

Opposing the appeal, Mr. Manyota submitted on the 1st ground that, the trial tribunal never shifted its burden of proof to the appellant herein

rather, it weighed the evidence tendered on a probable cause and came up with a just decision. He averred that, according to section 3 (2)(b) of the Evidence Act, the appellant had tendered her evidence to prove ownership of the suit land and the trial tribunal used such evidence to scrutinize the alleged ownership. He contended that, the cases cited by the respondent are distinguishable from the appeal at hand, thus, they should be disregarded.

As to the 2nd ground, learned counsel submitted that, the trial tribunal reached to a fair decision because, DW3, application of the Right of Occupancy does not confirm the appellant as the rightful owner of the suit land. More so, the appellant lied to the trial tribunal that, she was given the suit land by the Monduli District Counsel while in her WSD she pleaded to have bought the same from the deceased. He referred the Court to the case of **James Funke Gwagilo vs. Attorney General** [2004] TLR 161 where it was emphasized that, parties are bound by their pleadings.

Apart from that, he argued that, the alleged sale agreement was dated on 2nd March, 2016 and the letter requesting change of names was dated on 15th November, 2016 but the year was corrected to 2014 which paints a picture of untruthfulness on the appellant's side. Mr. Manyota

submitted further that, none of the appellant's who are alleged to have witnessed the handing over of the suit land from the deceased to the appellant were summoned to testify.

Submitting on the 3rd ground, learned counsel reiterated part of his submission that, parties are bound by their own pleadings and the appellant's evidence regarding the suit land changed to what she pleaded in her WSD. He added that, the appellant was the concubine to the deceased whereas PW2, Neema Samson was the lawful wife of the deceased and she has no clue of any agreement between her late husband and the appellant. He prayed that the appeal be dismissed with costs.

In her brief rejoinder appellant's learned counsel reiterated her earlier submission and maintained that, there was enough proof that the suit land belongs to the appellant and not the respondent.

Having gone through the trial court's records as well as both parties submission, I now proceed to determine grounds of appeal which are to prove only one issue; Whether the trial tribunal was justified to hold that the suit land belongs to the respondent.

Starting with the 1st grounds of appeal, the appellant challenges the trial tribunal for shifting the burden of proof to her in proving that, the

suit land belongs to the respondent. In land disputes, just like in normal civil cases, the onus of proving the case is at the balance of probability which lies on the one who alleges anything on his/her favour. This principle is enshrined under section 110 of the Evidence Act and in a number of Court of Appeal Cases such as in the case of **Maria Amandus Kavishe vs. Norah Waziri Mzeru (Administratrix of the Estate of the late Silvanus Mzeru) & Another**, Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) where the Court of Appeal had this to say;

*It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his or her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. See: **Anthony Masanga v. Penina Mama Ngesi & Another**, Civil Appeal No. 118 of 2014 and **Hamza Byarushengo vs Fulgencia Manyamba & 4 Others**, Civil Appeal No. 33 of 2017 (both unreported). **It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. (emphasis added)***

Having the above principle in mind and applying it in the appeal at hand, the law puts it clear that, the burden to prove any fact lies on the one who alleges the same. When analysing the evidence tendered at the trial tribunal, the chairman started with the following remarks;

"Kwa kuangalia namna madai hayo ya pande zote yalivyo ni Dhahiri kwamba hakuna ubishi kuwa mmiliki wa awali wa ardhi ya daawa ni marehemu Samson John Levi. Ubishi mkubwa uliopo ni kuhusina na uhalali wa mkataba wa mauziano ya ardhi hiyo baina ya marehemu huyo na mjibu maombi"

From thereon, the trial chairman went on analysing the appellant's evidence as to how she managed to acquire ownership of the suit land from the deceased. At the end the trial tribunal arrived to the conclusion that, she failed to prove such ownership on how the ownership transferred from the deceased. Considering the undisputed fact that, the suit land initially belonged to the deceased and the appellant claimed that, the ownership had shifted to her, the trial chairperson did not shift the burden of proof to the appellant rather, he considered appellant's evidence regarding how she acquired the suit land and reached to his desired decision. This is as per the cited case above as well as section 3 (2)(b), 110 and 111 of the Evidence Act as cited by both parties in their submissions. This ground fails.

On the 2nd ground, regarding analysis of evidence, this being the 1st appellate court I am duty bound to re-assess, re-evaluate the evidence and reach into my own decision. From the outset I do not find any fault with the trial tribunal's analysis of evidence as well as the decision reached thereof. The following are my reasons; **First**, in the application at the trial tribunal, the respondent claimed that the appellant herein trespassed into the suit land which the deceased was living with his wife, SM2, and claimed ownership thereof. The appellant on the other hand claimed that, she bought the suit land from the deceased, a fact which she pleaded in her WSD. However, during trial, the appellant testified that, after the deceased was allocated the suit land by the District Council, he failed to pay the requires fees needed thus, she chipped in in made the payments. However, the nature of the agreement as to why se paid was not disclosed. It is therefore not certain if she borrowed the deceased the said money, she helped the deceased to pay out of good will, friendship or love and affection. She tendered a receipt of payment which was exhibited as P1, however the same reflects the deceased names and not hers. In that regard, in absence of any other proof on the nature of their agreement, her claims remains unfounded.

Second; the appellant claimed that, she went further to the District Council with the intention of changing the suit name to her name, but she

was instructed that the deceased should be the one to make such request, and he did. She tendered exhibit P2 which shows that, the deceased wrote a letter to the Monduli District Council requesting to change ownership. However, as rightly held by the trial tribunal and submitted by the respondent's counsel, such request was never replied to or worked on from 2016 to 2018 when this dispute was filed at the trial tribunal. Be as it may, such letter alone does not give her ownership over the suit land. The same goes to her application of the Right of Occupancy, exhibit P3, this alone also does not justify her as the legal owner of the suit land.

It is a settled principle that where the land is registered, unless the contrary is shown, the person to whom the name appears in the title deed is the owner of the same. This was well elaborated in the case of **Leopold Mutembei vs. Principle Assistant Registrar of Titles, Minister of Lands Housing and Urban Development & Another**, Civil Appeal No 57 of 2017(unreported) the Court of Appeal quoted with approval the book titled "**Conveyancing and Disposition of Land in Tanzania**" by Dr. R. W Tenga and Dr. S. J Mramba, Law Africa, Dar es Salaam, 2017 at page 330 where it was stated that;

*"... the registration under a land titles system is more than the mere entry in a public register, it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confer, affect or terminate that ownership or interest. **Once the registration process is***

completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title. (emphasis added)"

Applying this authority to the appeal at hand, I join hands with the trial tribunal's decision that, the suit land forms part and parcel of the deceased estate. I hold so because, had the appellant been in any agreement with the deceased on the same, she would have tendered or gave evidence in supporting such agreement. The mere fact that, she has a receipt, or applied for the right of occupancy does not validate her as the lawful owner of the suit land. This ground also fails.

As to the last ground as briefly gleaned earlier, the appellant claimed that, she bought the suit land from the deceased, a fact which she pleaded in her WSD. However, during trial, the appellant testified that, after the deceased was allocated, the suit land by the District Council, he failed to pay the requires fees needed thus, she was the one who made the payments. This varied from what she pleaded in her WSD that she bought the suit land from the deceased. In **Makori Wassaga vs. Joshua Mwaikambo and Another** [1987] TLR 88 the Court of Appeal had this to say regarding pleadings;

In general, and this is I think elementary, party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; he is not permitted to set up a new case. And in reference to appeals, it is also trite

to observe that this Court cannot entertain a new ground of appeal if no supplementary record of appeal has been lodged or no application for leave to amend the memorandum has been made and granted”.

This has been echoed in a number of Court of Appeal cases such as in the cases of **National Bank of Commerce Limited vs. Mapele Enterprises Company Limited & 2 Others**, Civil Appeal No. 381 of 2019 CAT at Dsm and **Idrissa Ramadhani Mbondera** (Administrator of the Estate of the late **Ramadhani Ally Mbondera**) **vs. Allan Mbaruku & Another**, Civil Appeal No. 176 of 2020 CAT at Dsm. In the latter case for instance the Court of Appeal had this to say;

“It behoves us to state at this juncture that, it is a cardinal rule that, parties to any civil proceeding are bound by their pleadings and for that matter it is not open to the court to base its decision on an unpleaded matter.”

In the circumstance, the trial tribunal did not err in holding that, the appellant’s testimony differed from what she pleaded in her WSD considering the fact that, she did not tender the alleged sale agreement between her and the deceased. This ground also crumbles.

In light of the above, this appeal lacks merit and the same is dismissed with costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 20th day of September,
2023.



A handwritten signature in black ink, appearing to read "J.C. Tiganga", is written over a horizontal line.

J.C. TIGANGA
JUDGE