

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND APPEAL NO. 47 OF 2023

(Arising from the District Land and Housing Tribunal for Karagwe at Kayunga in Land Application No. 42 of 2021)

HAMISA SALUM APPELLANT

VERSUS

DEUS KABAKAKI RESPONDENT

JUGDMENT

11th & 13th October 2023

A.Y. Mwenda, J.

Ms. Hamisa Salum (the Appellant) is appealing to challenge the Judgment and Decree of the District Land and Housing Tribunal for Karagwe at Kayunga in Land Application No. 42 of 2021. Before the said tribunal, the respondent sued the appellant praying to evict her in the house located at Kihanga Hamlet, Kihanga Village in Karagwe District. At the end, the trial tribunal ruled in favor of the respondent by issuing eviction order against her. Aggrieved, the appellant preferred this appeal with three (3) grounds which read as follows;

- 1) That, the trial Tribunal erred in law and facts for only relying on the matrimonial issues while it is pure land case, hence lack of jurisdiction to entertain the matter.
(sic)

- 2) That, the trial Tribunal erred in law and facts by only evaluating the evidence of the respondent while the applicant is the one required to prove his case as the requirement of the law; (sic)
- 3) That, the trial tribunal erred in law by deciding that, the appellant was the mere invitee without any justifiable reasons;

During the hearing of this appeal, the appellant appeared in person without legal representation while the respondent hired the legal services from Mr. Dickson Laurent, learned counsel.

When she was invited to submit in support of the grounds of appeal the appellant prayed the said grounds to be adopted to form part of her oral submissions. On top of that she submitted that she is aggrieved with the decision of the District Land and Housing Tribunal which declared her a trespasser to a suit property while the respondent and herself lived together for over 12 years as a husband and wife. She said that during all that time they were blessed with one issue named Grace Deusdedit Kabakaki. Further to that she submitted that the allegation that she is a tenant is not true. She was of the assertion that this conflict arose when the respondent abandoned her for eight (8) years and came back with intention of selling the said house. She thus concluded her submissions praying this appeal to be allowed by granting the relief sought in her petition of appeal.

Responding to the submissions by the appellant, Mr. Dickson Laurent, the learned counsel for the respondent prayed a reply to the petition of appeal to be adopted to form part of his oral submissions. Regarding the first ground of appeal, he submitted that the District Land and Housing Tribunal had jurisdiction to entertain the matter before it. He said that the tribunal was justified to discuss matrimonial issues because it was one of the issues which were framed before it. He referred the said issue as to "*Whether the land in dispute is matrimonial property.*" Having said so, he impressed that this ground is baseless and that it should be dismissed.

On the 2nd ground, the learned counsel submitted that based on the above issue before the tribunal, the appellant was obliged to prove the existence of their marriage and that the said property as matrimonial. He was of the view that the appellant failed to do so but to the contrary, it is the respondent who proved that the said property is not a matrimonial property by tendering the judgment of Criminal Case No. 70 of 2020 delivered before Kayunga Primary Court (exhibit A2). He stressed that in that case before the Primary Court, it was held that the marriage between the appellant and the respondent never existed. On top of that he added in that the said judgment was never challenged. Further to that he submitted that before the trial tribunal, DW3 who is the appellant's father did not recognize the respondent as his son in law (as the appellant's husband). He then concluded that this ground is also unmerited.

Regarding the 3rd ground of appeal, the learned counsel submitted that since the appellant failed to prove that the said land in dispute is a matrimonial property it was proper for the District Land and Housing Tribunal to declare her as trespasser. He therefore concluded his submissions praying this appeal to be dismissed with costs.

Having gone through submissions from both parties the issue for determination is whether or not this appeal is meritorious.

It is trite law that a first appellate court is entitled to re-evaluate the evidence on record from both sides and come up with its own conclusion. This principle has been applied by the Court in its various decisions, some of which include MAKUBI DOGANI VS NDOGONGO MAGANGA, CIVIL APPEAL NO. 78 OF 2019, LEOPOLD MUTEMBEI VS PRINCIPAL ASSISTANT REGISTRAR OF TITLES MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT AND ANOTHER, CIVIL APPEAL NO. 7 OF 2017 and DOMINA KAGARUKI VS FARIDA F. MBARAK AND FIVE OTHERS, CIVIL APPEAL NO. 60 OF 2016 (Unreported).

On top of that this court is mindful on the principal that he who alleges must prove. This is provided under section 110 (1) of the Law of Evidence Act [CAP 6 R.E 2019]. It is also important to note that the standard of proof in civil case is on the balance of probabilities and this is by virtue of section 3(2) (b) of the Law of Evidence Act [CAP 6 R.E 2019].

In the present appeal the appellant is alleging that the land in dispute is owned by her and the respondent jointly as they are a couple (husband and wife). According to her the District Land and Housing Tribunal erred in law by declaring her a trespasser while the property is jointly owned. Based on her position this court is of the view the appellant was required to prove the allegation that the property at issue is jointly owned as matrimonial property.


In a bid to ascertain if the appellant discharged her duty, the court went through the records and observed the following. Firstly, the appellant testified that respondent is her husband and they lived together for over 12 years and are blessed with one issue. In her testimony to support the point, the appellant tendered a clinic card which shows the name of a child as being Grace Deusdedit Kabakaki. However, regarding the issue of marriage, she tendered no evidence. It is important to point out that co-parenting between them even if it was supported by the hospital clinic card (exhibit A2) by itself cannot be a substituted proof regarding existence of marriage between the duo. After all even the appellant's father who was called to testify as DW3 did not recognize the respondent as his son in law (appellant's husband). Since the existence of marriage was not proved, there is no justification to declare the property in dispute as matrimonial property. The Appellant's assertion that she stayed in the said land in dispute over 12 years by itself, without any cogent evidence to the contrary, entail she was either an invitee or a tenant. The law is clear that an invitee cannot own a land to which he was invited to the exclusion of his

host whatever the length of his stay. This position was stated by the Court in the case of YERIKO MGEGE VS JOSEPH AMOS MHICHE, CIVIL APPEAL NO. 137 OF 2017 (CAT) (Unreported) that;

“We are settled in our mind that the appellant, as an invitee to the disputed land, could not have owned the said land to the exclusion of the respondent. Also, he could not claim adverse possession simply because he stayed in the disputed land for seventeen undisturbed years. He was an invitee and his status remains so.”

From the foregoing observation this court is of the view that the appellant was just an invitee to the land in dispute and therefore the trial Tribunal was justified to declare the appellant a trespasser. On that basis, this appeal lacks merits and it is hereby dismissed and I thus pronounce that the decision in Land Application No. 42 of 2021 before the District Land and Housing Tribunal for Karagwe at Kayanga is hereby upheld. No orders as to the costs.

It is so ordered.


A.Y. MWENDA
JUDGE
13.10.2023

Judgment delivered in chamber under the seal of this court in the absence of the Appellant Ms. Hamisa Salum and in the presence of Mr. Dastan Mujaki holding brief for Mr. Dickson Laurent learned counsel of the respondent.




A.Y. MWENDA

JUDGE

13.10.2023