

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 69 OF 2022

(Appeal from the decision of District Land and Housing Tribunal Application of Moshi at Moshi dated 2nd November, 2022 in Application No. 138 of 2019)

ROBERT EDWARD LEMA APPELLANT

VERSUS

JONATHAN TIRAEIOFOO SWAI RESPONDENT

JUDGMENT

20th Sept. & 23rd October 2023

A.P.KILIMI, J.:

This is an appeal emanates from the decision of the District Land and Housing Tribunal of Moshi whereby the appellant was applicant suing as administrator of estate of late Edward Sirito Lema, sought for declaration order that the suit land belongs to the deceased and the respondent is the trespasser thereon. It was alleged that the suit land was initially owned by the deceased whom the appellant administers his estate and the respondent bought the said land through auction which according to the appellant was wrongly conducted hence makes the respondent a trespasser. At the conclusion of hearing of the suit the tribunal chairman decided in favour of the respondent and declare the same as the owner of the suit land.

Aggrieved with the decision, appellant knocked the door of this court to appeal on the following grounds,

1. That the trial tribunal erred in law and fact for considering the hearsay evidence of the respondent witnesses.
2. That the trail tribunal erred in law and fact by not considering that the respondent alleged ownership emanates from Auction marred with irregularities hence making him a trespasser.
3. That the tribunal erred in law and in fact for failing to properly evaluating the evidence on the record hence arrived at erroneous decision.

Subsequently after above, the appellant prays for the judgment and decision of the tribunal be quashed and set aside with costs and the appellant be declared as legal owner.

On appeal both parties were represented. Stewart Chuma learned advocate appeared for the appellant and Chiduo Zayumba learned advocate for the respondent and it was agreed to dispose this matter by way of written submission. They all complied with the scheduling order.

Submitting in support of first ground of appeal, the counsel for the appellant argued that the Appellant produced all necessary documents and evidence which would have convinced chairman of the tribunal into reaching the right decision which would be in his favour. The counsel then referred

the case which imposes this court duty of re-evaluating evidence as appellate court, the case of **Ndizu Ngasa vs Masisa Magasha** (1999) TLR 202.

On the second ground of appeal, the counsel submitted that the appellant filed the case as an administrator of estate and not the owner of the suit property so the chairman was wrongly by saying the land is not owned by the appellant. Either the auction was full of irregularities and invalidates the whole process.

In reply to the above, the counsel for the respondent submitted that the appellant counsel failed in his submission in a required standard that he neither state the reasons nor make legal proposition in it, therefore it is as good as no submission at all. To buttress his pointed he referred the case of **Gervas Masome Kulwa vs The Returning Officer and others** [1996] TLR 320.

Further the counsel for the respondent contended that if at all there was irregularities on the auction conducted the same was supposed to be raised at the trial tribunal so as to be determined in merit. The position is the same cannot be entertained at the appeal stage. To amplify this position, he referred the cases of **Hamisi Bushiri Pazi & 4 Others vs Saul Henry**

& 4 Others Civil Appeal No.166/2019 and **Yusuf Khamis Hamza vs Juma Ali Abdalla**, Civil Appeal No. 25 of 2020 (Both unreported).

In conclusion the counsel for the respondent added that the respondent is protected by being the bonafide purchaser as he bought a suit land on auction pursuant to the orders of the tribunal done legally, thus he is protected for being innocent for any flaw if existed. To buttress his assertions, he referred the cases of **Godebertha Lukanga vs Crdb Bank And Others**, Civil Appeal No. 25 117 of 2017 and **John Bosco Mahongoli vs Imelda Zakaria Mkwira and 2 others**, High Court of Tanzania at DSM, Land Appeal No 101 of 2016 (Both unreported). Thus, prayed for this court to dismiss the appeal and affirm the decision of the tribunal.

Having gone through the submission of both parties, judgment and the records of the tribunal, I am aware that this court being the first appellate court has a duty to reevaluate the evidence of the tribunal and determine the matter to the extent of affirming or order otherwise on the decision of the tribunal.

In respect to the first ground, as rightly submitted by the counsel for the respondent, the appellant did submit nothing in regard to this ground

raised by himself to be determined by this court, instead he raised a new ground in his submission that the learned Chairman of Tribunal erred in law and fact by not properly analyze and evaluate evidence adduced before him, and considering hearsay upon reaching his decision. This was contrary to earlier ground which stated that, the Trial Tribunal erred in law and in fact for considering the hearsay evidence of the Respondent witnesses. Nonetheless notwithstanding above, the issue on whether the trial tribunal relied on hearsay will be dealt on third ground of appeal wherein the appellant is alleging that trial tribunal did not evaluate evidence on record.

In respect to the second ground, the appellant alleges that, the respondent ownership emanates from auction marred with irregularities and make the respondent a trespasser. In my scanning to the record of the tribunal, I have found no any evidence adduced in respect to how the auction was conducted. Thus, this court cannot exercise its duty for unfounded evidence at the trial. I therefore subscribe with the respondent counsel that this is a new issue never pleaded or evidenced before the tribunal so as to be determined in merit hence cannot be entertained at this appeal stage. I join hand with the counsel for the respondent that this is a new issue. In the

case of **Hamisi Bushiri Pazi & 4 Others vs Saul Henry & 4 Others**

(supra) the court had this to say at page 18;

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal"

I am mindful, there are exceptions to the above, when for instance there is evidence and issues left to the court to decide, but in view as said above there is none in this matter. In the case of **Odds Jobs v. Mubia** [1970] E A 476 in which the erstwhile Court of Appeal of East Africa had this to say:

"A court may base its decision on un-pleaded issues if it appears from the course followed at the trial that, the issue had been left to the court for decision. And this could only arise, if on the facts the issue had been left for decision by the Court as there was led evidence on issues and address made to the court:"

Moreover, even the reliefs sought by the appellant before the tribunal none of the above dictates the issue of irregularity of the auction. Since the pleadings were silent on the issue of auction, therefore it was never discussed at all in the trial nor in the judgment by the chairman. Here comes the cardinal principle of law that parties are bound by their own pleadings. This was discussed in different cases as, **Hamisi Bushiri Pazi & 4 Others vs Saul Henry & 4 Others** (Supra), **Yusuf Khamis Hamza vs Juma Ali Abdalla** (Supra), **James Funke Gwagilo vs Attorney General** [2004] TLR 161 just to mention but few. In **Makori Wassaga vs Joshua Mwaikambo & Another** [1987] TLR 88 the court held;

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up new case"

Since the issue of irregularity of the auction is a new fact cannot be entertained at this appellate stage. If the appellant wished to challenge on that issue, could have raised it before the trial tribunal for the same to entertain it through the evidence of both parties. Therefore, this ground of appeal also fails forthwith.

At last, in respect to the third ground the appellant is alleging that tribunal failed to properly evaluating the evidence on the record hence arrived at erroneous decision. To start with the point for determination at the trial, 3 issues were agreed to such effect which are; whether the appellant was the administrator of the estate of Edward Silito, second who is the owner of the suit land and to what reliefs are parties entitled to.

In respect to the first issue at the trial tribunal it was answered in affirmative thereat upon appellant proved by documents appointed him. Next was the contentious for who is the owner of the suit land, according to the respondent and his witnesses it was proved the respondent bought the said land on a public auction after all procedure were followed, whereas as said above the appellant and his witnesses said nothing in respect to the said auction in regard whether they were irregularity or not.

Be as it may, since the appellant was the judgment debtor, this was the status which cause his property to be sold in public auction. Then the point to be considered is whether the land sold belong to the appellant or to the deceased whom the appellant proved to be the administrator of it. At the trial the appellant said that the land belongs to his deceased father died many years ago, his sister Paulina Robert (PW1) said that since their father

died the land remained in possession of the appellant for farming, PW2 and PW3 said they knew the said land belonged to the deceased which now is used by appellant for farming.

From the above evidence I can reflect deductively that, it was not proved whether the appellant has exercised his duty of distribution or not but was proved the suit land is in his possession, thus whether distributed to himself or not, and taking that no lifetime administrator of estate, I think that is the duty of probate court. However, be it as it may, since the respondent proved at the trial tribunal to be the bonafide purchaser as rightly pointed by the respondent counsel, the respondent hereinabove is protected for being innocent for any flaws if at all existed during the said auction. (See the cases of **Godebertha Lukanga vs Crdb Bank and Others** (supra) and **John Bosco Mahongoli vs Imelda Zakaria Mkwira and 2 others**, (supra). In **Godebertha Lukanga vs Crdb Bank and Others** above, the court had this say;

" In the circumstances, being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the 4th Respondents right over the suit property is legally protected"

Therefore, in my settled view, if the appellant had any claim about the alleged auction and the suitland was open to be sold or not, could have sued his Decree Holder and Auctioneer who knew the land and are the ones attached the said land and sold to the respondent. Thus, are responsible to whether they complied to the auction procedure or not. Therefore, I am of considered opinion this ground of appeal has no merit also fails forthwith.

In view of what I have endeavoured to discuss above, I settled that this appeal devoid of merit and I proceed to dismissed it in its entirety. In the circumstances I make no order as to costs.

It is so ordered.

DATED at MOSHI this day of 23rd October, 2023.



X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 23rd day of October, 2023 in the presence of Appellant and Respondent, but in the absence of Mr. Chiduo Zayumba and Mr. Stewart Shuma both learned advocate.

**Sgd: A. P. KILIMI
JUDGE
23/10/2023**

Court: - Right of Appeal Explained.

**Sgd: A. P. KILIMI
JUDGE
23/10/2023**