

**IN THE HIGH COURT OF TANZANIA
MOROGORO SUB-REGISTRY
AT IJC MOROGORO**

LAND APPEAL NO.124 OF 2023

(Arising out of Application No. 113/2021 in District Land and Housing Tribunal of Morogoro at Morogoro.)

ZAINABU NASSORO KIGUNIA APPELLANT

VERSUS

YAHAYA ALMASI HAJI..... 1ST RESPONDENT
SAID ISSA DEGE.....2ND RESPONDENT
HALIMA ALLY NGOZOMA.....3RD RESPONDENT
ZENA MOHAMED OMARY.....4TH RESPONDENT
ABDUL KIBWANA MLANGALA.....5TH RESPONDENT


JUDGEMENT

04th of April, 2024.

MANSOOR, J.

The appellant herein is seeking to challenge the judgement and decree of the District Land and Housing Tribunal for Morogoro at Morogoro herein referred as "the Tribunal" a case in which she was protesting a sale of the house in Plot No.78 Block P1 located at Mji mpya Mwembesongo within Morogoro Municipality between the 1st Respondent and the 2nd Respondent.

In order to appreciate what is involved in the instant appeal I find it proper to start by giving a detailed history of the matter. That sometimes in 1960



the Appellant and the 5th Respondent contracted Islamic marriage. The appellant moved away from their matrimonial house in 1987 after misunderstandings that had cropped up between them culminating the 5th Respondent to sell the unfinished house they jointly acquired at Mburahati Dar es Salaam and move to Morogoro leaving aside his children uninformed.

The records reveal further that, the children succeeded to find the 5th Respondent in Morogoro, who introduced to them the two houses he managed to purchase in Morogoro from the proceeds of sale of their house based at Mburahati, in Dar es Salaam. He identified the houses to include the disputed house and the house located at Mikese. It is also on records that the said children of the 5th Respondent remained the occupants of the disputed house peacefully until it was discovered that the house has been sold to the 2nd Respondent.

The discovery culminated the appellant to institute matrimonial proceedings against the 5th Respondent in the Urban Primary Court at Morogoro via Matrimonial Cause No.49/2021. At the conclusion of trial, the court entered exparte decision in favor of the appellant by dissolving the marriage and ordered distribution of matrimonial properties. The

appellant was awarded with the house in Block 78 Block P1 located at Mji Mpya Mwembesongo within Morogoro Municipality.

As a result of such a decision, troubles on the disputed house surpassed between the appellant and the 1st Respondent's family, struggling for ownership of the house. Owing to the struggles, the appellant was prompted again to knock the doors of the tribunal through Land Application No. 13 of 2021 against the respondents, seeking to be declared the lawful owner of disputed house claiming the same being the matrimonial property that was purchased by the 5th Respondent from the proceeds of sale of their matrimonial house based at Mburahati, in Dar es salaam.

On the other side the 5th Respondent vehemently disputed the appellant's arguments. He admitted to have sold their house at Mburahati Dar es Salaam but he diverged on the use of the proceeds of the said sale by alleging that he used the same for his treatment. He similarly resisted to be the owner of the disputed house by saying that he was hosted by the family of the 1st Respondent for him to easily access the medical treatment. The records depict further that the 5th Respondent chose to return the disputed house to the 1st Respondent to end the tension that

raised between him and the appellant in relation to the disputed house and thereafter the house was sold to the 2nd Respondent.

The Tribunal having adequately heard both parties, it proceeded inter alia to dismiss the application and the 2nd Respondent was declared as the rightfully owner of the suit house. Dissatisfied, the appellant preferred this appeal armed with two (2) grounds of appeal as hereunder:

1. That, the trial Tribunal erred in law and in facts when it failed to analyses, and evaluate exhibit A2 in its judgement and hence arrived into a wrong decision.
2. That, the trial tribunal erred in law and in facts when it failed totally to scrutinize the evidence and testimony of the appellant's witness as testified before tribunal during the composing of its judgement.

At the hearing of the Appeal which was by the leave of the court canvassed by way of written submission by the order of this Court dated 13th of February, 2024, Farida Abdul represented the appellant through the Power of Attorney, whereas all the respondents were represented by Mr. Ignas Punge the learned advocate who also drew their respective submission.

Mr Francis M. Mwita the learned advocate who drew the written submission on behalf of the appellant was the first one to start to kick the

ball rolling. Beginning with the first ground of appeal, the learned counsel referred this court exhibit A2 the judgement of Matrimonial Cause No. 49/2021 tendered on the tribunal and argued that on the judgement the disputed property was given to the appellant. He demonstrated further that the decision stands to date for it has never been challenged in court of law of the higher hierarchy.

The learned counsel explained further that, the trial chairperson mentioned nothing in her judgement in reference to exhibit A2 and he argued this court to re-evaluate the evidence on record specifically exhibit A2 in course of determining this appeal.

He lamented further that the trial chairman didn't determine the issues as framed but proceeded to grant order that was never accrued from the drawn issues. To put weight on his contention the learned advocate referred this court to item iii on page 16 and page 2 of the impugned judgement saying; page 2 indicates the issues framed by the tribunal to include as to whether the disputed property was matrimonial house and item iii at page 16 indicates declaration of the 2nd Respondent as the rightful owner of the disputed land. The learned counsel argues that, the trial chairperson did not determine the issues as framed but proceeded to grant the order never accrued on the issues. To support his contention,

he was fortified by the decision in the case of **Said Mohamed Said v. Muhusin Amiri and Another** in Civil Appeal No. 110 of 2020 where the Court of Appeal instructively required the trial judges to decide the cases basing on the issues on the record. He said that there was contravention of the provided principle which rendered the impugned judgement void.

On the second ground the learned counsel lamented on the tribunal for its failure to evaluate the evidence of the appellant's witness. He referred this court to pages 3 in the first paragraph, page 5 to 6 of the impugned judgement which reflects the evidences of the appellant's witnesses and submitted that the evidence was very crucial and ought to have been featured in the trial chairperson's analysis during composition of judgement instead of the tribunal to simply conclude that the appellant herein failed to provide strong evidence without any substantiation.

In addition, the learned counsel argued that the evidences leave no shadow of doubt that the house belonged to the 5th Respondent who purchased the same from the proceeds of sale of matrimonial house at Mburahati and he added that it was the reason that the whole family shifted to the house un-disturbed.

The learned counsel concluded his arguments and urged the Court to allow the appeal.

Responding to the Appellant's submission Mr. Punge started by adopting the reply to memorandum of appeal to form part of his submissions and he further referred this court to section 110(1) and (2) of the Tanzania Evidence Act [Cap.6 R.E. 2019] and the case of **Abdul-Karim Haji vs. Raymond Nchimbi Alois and Joseph Seta Joseph** (2006) TLR 420 to insist on the principle that who alleges is the one responsible to prove his allegation.

To him the trial Tribunal properly analyzed and evaluated exhibit A-2 tendered. He said the Appellant failed to establish and prove that the disputed premises belonged to her and he was of the view that the assertion that the Appellant and the fifth respondent owned the disputed premises were unsupported.

He maintained further that, the disputed premises is a registered land and the second Respondent is the registered owner of the same. He cited the provision of Section 2 of the Land Registration Act (CAP 334 R.E. 2019) and the case of **Salum Mateyo vs. Mohamed Mateyo** (1987) TLR 111 at pg 112 where the term owner of land was defined to mean;

"a person for the time being in whose name the estate or interest is registered."

To maintain his stance, he also referred this court to the case of **Nairobi Permanent Markets Society and Others vs. Salima Enterprises and Others** (1995-1998) 1 EA 232 where it was confirmed that

"a certificate of title is conclusive evidence that the person named therein is the proprietor of the land and his title is indefeasible"

Reverting back to the trial court records Mr. Punge averred that, the original registered owner of the disputed premises is the late Mwantumu Waziri Biki. Upon her demise, the first Respondent was appointed to be an Administrator of the estate. He even said that, the second Respondent lawfully acquired ownership of the disputed property after purchasing the same from the Administrator of the estate.

In relation to the point that the trial Chairperson did not determine the framed issues the learned counsel considered it as a new ground. In attacking the same the learned counsel, referred this court to the case of **Makorl Wassaga vs Joshua Mwaikambo and Another** 1987 TLR 88, where the Court of Appeal instructively aired that the 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.

He however submitted that, all framed issues were determined and he referred this court to page 11 to 15 of the Judgment of the trial Tribunal.

In relation to the second ground Mr. Punge submitted that the tribunal properly scrutinized the evidence tendered by both parties and that the Tribunal's decision is based on the evidence adduced by both parties and their respective witnesses.

He concluded that the trial Tribunal carefully weighed and evaluated the evidence received before arriving at the firm decision that the 2nd Respondent is the lawful owner of the disputed land. He maintained that the evidence adduced by the Respondents was heavier compared to the Appellant. To support his contention, he put his reliance in the case of **Hemedi Saidi vs. Mohamed Mbilu** (1984) TLR 133 and finally he urged this court find the appeal unmerited and to dismiss it with costs.

Having considered the submissions from both parties, and after a keen scrutiny of the records from the Tribunal, the pertinent issue for consideration and determination is whether the instant appeal has merit or not.

For a smooth determination of this appeal, I propose to deal with the grounds of appeal as submitted by the appellant.

In answering the issue as to whether the tribunal erred by not analyzing and evaluating exhibit A2 the decision on Matrimonial Cause No 49/2021, I was compelled to peruse the records of the DLHT specifically the impugned judgement. This is due to the reason that, usually Court records are presumed to be serious and genuine transcripts on what had been transpired either in Courts or Tribunals, and cannot be easily impeached, unless there is evidence to the contrary. [See: **Halfani Sudi Vs. Abieza Chichili**, [1998] TLR, 527].

From the onset, I am not in agreement with the appellant that the tribunal did not analyze and evaluate Exhibit A2 (the judgment of the Urban Primary Court at Morogoro via Matrimonial Cause No.49/2021). To the contrary it is my finding that the tribunal dealt with the same in general save for the fact that it didn't specifically mentioned the same and accord it the weight the appellant thought it deserved. For ease of reference, I propose to reproduce the as hereunder:

*"Baraza hili limepitia kwa makini ushahidi kwa kina,kwanza kabisa,upande wa mdai hauna uthibitisho wala kielelezo chochote kinachothibitisha kuwa mdaiwa wa 5 (DW2) alinunua nyumba yenye mgogoro mwaka 2006 na **kupelekea nyumba hiyo kuwa ya wana ndoa.**"emphasis added*

As observed above the Tribunal impliedly analyzed and thereafter discredited the contents of Exhibit A2 which declared the house in dispute a matrimonial House. Be it as it may, it is not a mandatory legal requirement that once an exhibit is admitted, the same must be accorded weight by the court. This was the position in the case of **Nyerere Nyague vs Republic**, Criminal Appeal Case 67 of 2010 at page 14, where the court of appeal observed thus;

"But, of course, admissibility is one thing. That is the domain of the trial court. The weight to be attached to an admitted exhibit is another"

Flowing from above, I am of a firm view that the trial tribunal made a regard to the impugned exhibit as indicated earlier above. All the same the said exhibit was of less relevancy under the circumstance of the case at the trial tribunal where the parties locked horns on the ownership of the land in dispute which was among the reliefs sought by the appellant that she be declared as the lawful owner of the house in dispute.

Now as the Exhibit had an effect of establishing disputed house was a matrimonial house but couldn't in any event determine as to who was a truthfully owner of the house in dispute, I find and hold that the same deserved less weight as rightly accorded by the trial tribunal.

On failure to determine the issues framed the appellant complained that the trial chairperson did not determine the issues as framed nevertheless it proceeded to grant the order that never accrued on the issues. The learned counsel for the respondents rejected the complaint contending it to be new ground.

Recourse to the record of Tribunal is indispensable for a thorough and exhaustive determination of the complaint under discussion. It is manifestly clear that the petition of appeal filed before this court contains two grounds of appeal as it was reproduced herein.

In the instant case, it is vivid, at page 02 of the appellant written submission, that the appellant complained on the Tribunal's failure to determine the issues as framed nevertheless it proceeded to grant the order never accrued which was not in the petition of appeal. To be specific, he un-procedurally submitted on the issue which was not included on his pleadings without any leave of the Court to supplement or add his grounds of appeal.

The law has tritely held that parties are to be bound by their pleadings (See Order 6 Rule 1 of the Civil Procedure Code Cap 33 R.E 2019). This position was re-affirmed in the cases of **Jani Properties Ltd v. Dar es Salaam City Council** (1966) EA 281 wherein Court rightly observed that;

"parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings"

Now, the grounds of appeal being an extension of the matters argued during trial, they too have to be pleaded, and cannot be introduced in the court records anyhow. This view was fortified in the case of **Philips Anania Masasi v. Returning Officer Njombe North Constituency and Others**, Misc. Civil Cause No. 7 of 1995, Songea (Unreported) where Samatta, J as he then was stated:-

"Litigation is not a game of surprise"

Likewise, the appellant in this appeal was required to stick to his grounds of appeal submitted with the Petition of appeal, and not raising new grounds and issues at the time of submission. The appellant was required to obtain leave of the Court to add a new ground of appeal instead of submitting on the same. In that case I find that the submission on new issues were un-procedural and thus I reject all the submission so added. The court will not be detained to make considerations on them. As such, the first ground of Appeal fails.

Going to the second ground of appeal the appellant complained on the Tribunal's for failure to scrutinize the evidence and testimony of the appellant's witness as testified before the tribunal. He said the chairman of the Tribunal generally concluded that the appellant herein failed to provide strong evidence without any substantiations. He referred this court to pages 3 in the first paragraph, page 5 to 6 of the impugned judgement which reflects the evidences of the appellant's witnesses. For of easy reference I find pertinent to reproduce it here under;

"...baada ya mdai kuondoka mdaiwa wa 5 aliuza nyumba ya Mburahati na kuhamia Morogoro bila kumshirikisha mtalaka wake na watoto wao na alipofika Morogoro alinunua nyumba yenye mgogoro hivyo mdaiwa wa tano alikuwa haonekani lakini watoto wake walimfata na kumkuta Morogoro na ndipo aliwaonyesha wanawe nyumba aliyojinunua Morogoro na mdaiwa wa tano aliwaruhusu wanae kuishi katika nyumba hiyo endapo wanakwama kimaisha na mtoto mkubwa aitwaye Mwanahamisi alipewa chumba kimoja na akawa ndio mkusanyaji wa kodi..."

Further on that AW2 testified at bottom of page 5 to page 6 of the tribunal's judgment that;

"...na AW2 alianza kuishi hapo na kwamba ameanza kuishi katika nyumba hiyo tangu mwaka 2012 bila mgogoro wowote lakini mgogoro huu umetokea miaka ya karibuni".

Further still AW3 testified at page 6 in the 3rd paragraph that;

"... AW3 alieleza zaidi kwamba nyumba yenye mgogoro Block 78 PI wamekuwa wakiishi hapo pamoja na wapangaji tangu mwaka 2006 na AW3 ndio alikuwa akiisaini kwa ridhaa ya mdaiwa wa 5 na kwamba nyumba yenye mgogoro inasoma jina la Mwantumu Waziri kwa kuwa hata baada ya kununuliwa na mdaiwa wa 5 jina halikubadilishwa."

However, my scrutiny of the record of the DLHT shows that the Tribunal summarized the appellant's evidence from page 2 to 6 and dealt with the same on page 12 of the impugned judgement and it stated the reason as to why it departed from it. I propose to reproduce the words of the tribunal in the impugned judgement after the analysis and evaluation of the said evidence as hereunder:

"Baraza hili limepitia kwa makini ushahidi kwa kina, kwanza kabisa, upande wa mdai hauna uthibitisho wala kielelezo chochote kinachothibitisha kuwa mdaiwa wa 5 (DW2) alinunua nyumba yenye mgogoro mwaka 2006 na kupelekea nyumba hiyo kuwa ya wana ndoa."

The trial chairperson went ahead and observed;

Mbali na hapo, upande wa madai wameeleza kuwa baada ya nyumba hiyo kununuliwa, mdaiwa wa tano (DW2) Aliwaita Watoto wake ili wakae/waishi katika nyumba hiyo na walianza kuipangisha maelezo hayo pia hayakuthibitishwa kwa kuwa

hakuna hata nyaraka yoyote ya upangaji iliyotolewa lakini pia hakuna hati ya mauziano wala nyaraka yoyote ya umiliki iliyoletwa barazani kuthibitisha madai ya mdai"

As noticed above, it is true as rightly submitted by the appellant that the Tribunal generally rejected the evidence of the appellant's witnesses but owing to the fact that there was no proof to substantiate their testimonies that the disputed house was purchased by the 5th Respondent from the proceeds of sale of their matrimonial house based at Mburahati, in Dar es Salaam for it to be considered as matrimonial property.

Notably, the decision of the trial tribunal was reached after the same analysed the evidence of both parties and thereafter found the evidence of the respondent herein to be weighty than that of the appellant. At page 13 of the judgment it reads;

"DW1 amethibitisha mbele ya baraza kuwa nyumba yenye mgogoro ilikuwa mali ya marehemu mama yake Mwamtumu Waziri na kwamba DW2 alipewa nyumba hiyo ili aishi tu kwa msaada ili awe karibu na hospitali na kwamba wao hawajawahi kuuza nyumba hiyo kwa mdaiwa wa 5 (DW5) zaidi ya kumruhusu tu aishi lakini miaka ya hivi karibuni ndio yeye na ndugu zake waliamua kuuza nyumba hiyo na mteja aliyepatikana na kuuziwa ni mdaiwa wa 2 (DW5) katika shauri

hili Sadick Issa Dege.....DW4 pia amethibitisha ya kuwa DW2 (mdaiwa No 5) ambaye ni mjomba wake alipewa nyumba ili aishi tu kwa ajili ya kuwa karibu na huduma za kiafya na pia kwamba hata DW2 alipotaka kuirejesha nyumba hiyo kwa wenyewe alimuwakilisha katika zoezi hilo kwa niaba yake kwa kuwa kwa sasa DW2 haoni n ahata mauziano yaliyofanywa kati ya DW1 na mdaiwa No 2 (DW5) alishiriki kwa niaba ya DW2. Kwa kuegemea katika Ushahidi huu, Baraza hili linaona ni wazi madai ya mdai hayajathibitika."

From the above illustration, It is plain clear that, the judgment of the trial tribunal contains the analysis of evidence of both parties, the reasoning and conclusion thereon. With respect, therefore, I am constrained to disagree with the appellant's counsel that the analysis and evaluation of the appellant's evidence was not done.

As a result, I find no need of exercising my duty as the first appellate court of re-evaluating the evidence adduced and thereafter interfere with a well-reasoned judgment of the District Land and Housing for Morogoro and its resultant orders as the evidence on record was properly evaluated and analysed by the trial Tribunal.

In the event, I find no merit in this Appeal, hence the same is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 04th DAY OF

APRIL, 2024



Latifa Mansoor
(LATIFA MANSOOR, J.)

JUDGE

04.04.2024