

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 157 OF 2022

(Arising out of Land Application No. 61 of 2019 before the District Land & Housing Tribunal for Babati at Babati.)

RAZAKI ISMAIL _____ **APPELLANT**

VERSUS

MAGDALENA MAMENGWA _____ **RESPONDENT**

JUDGMENT

19/10/2023 & 23/02/2024

BADE, J.

The brief background which prompts this Appeal is that the Appellant was the 1st Respondent before the District Land & Housing Tribunal for Babati [Henceforth referred as "the Land Tribunal"]. The Appellant and one Kadede Kidamenyenya who is not part to this Appeal who was a second respondent before the Land Tribunal were sued by the Respondent in this Appeal for trespassing into her land. Before the Land Tribunal, the Respondent claimed that the Appellant and her son (Kadede Kidamenyenya) trespassed into her land measuring 7 ½ acres located at Wandela Village in Getanuwas Ward, in the District of Hanang. She claimed that she left her land with her son but he sold the

suit land to the Appellant without her knowledge. On the other hand, the Appellant testified before the Land Tribunal that he purchased the suit land on different phases. That in 2010 he purchased 2 acres from the Respondent's son, on 7/01/2011 he bought 1 acre from the Respondent's son, on 27/06/2011 he added another piece of land from the Respondent's son, on 22/05/2011 he once again bought another piece of land from the Respondent's son together with the Respondent herself, and on 01/02/2013 he bought 2 more acres from the Respondent's son. He further testified that he bought a total of 4 acres from the Respondent and 3 ½ from the Respondent's son. Meanwhile, the Chairperson of the Tribunal heard the evidence of both sides and ruled that the transfer of the suit land was illegal. His further orders were that the Respondent and her son were to refund the Appellant the purchase price of the suit land and the house he built on the suit land before the Respondent could take back her land. The Appellant was aggrieved by that decision and decided to appeal to this court based on the following grounds:

- i. That, the trial tribunal erred in law and in fact by deciding that the appellant be compensated for the house or structures he built on the suit land and be refunded his money he purchased (sic) the

suit land by only purchase price(sic) regardless of the varied price index as from the year 2010 to date.

- ii. That the trial Tribunal erred in law and fact by deciding that the suit land should be restored to the Respondent in this appeal upon the refund of the purchase price regardless of the fact that the sale transactions were legally executed between competent parties and who had a legal title and able to pass the title to the Appellant.
- iii. That the trial tribunal erred in law and in fact by deciding the case and according weight to the Respondent's evidence in the absence of an important and necessary party (sic) that the whole suit land was sold by that Kadede Kidamenyenya, as the only son of the Respondent without title and power to sale the 3 ½ acres.
- iv. That the trial tribunal erred in law by using its discretionary power (sic) ordering and awarding no costs to the Appellant.

The Appellant was represented by Mr. Raymond Joackim Kim, a learned advocate while the Respondent enjoyed the services of Alpha Ng'ondya, also a learned advocate.

Counsel for the appellant dropped grounds 2 and 3 of the grounds of appeal. In a very brief submission, he submitted that the price index as of now is well varied compared to 2014 when the Appellant bought the suit land so in his view, the compensation should be of actual value. Mr. Kim further contended that the sale was executed by competent persons, therefore, the tribunal erred in law and in fact by deciding that the land should be restored to the Respondent upon the refund of purchase price regardless of the fact that the sale transactions were legally executed between competent parties who had a legal title and able to pass the title to the Appellant.

In opposition to the appeal, counsel for the Respondent first took the liberty to bring to the attention of this court the fact that the Appellant introduced a new party at this stage, who was not a party at the Land Tribunal. Mr. Ng'ondya contended that the Respondent in this appeal is Magdalena Mamengwa while at the Land Tribunal it was Magdalena Mameng'na; contending that it is a position of the law that failure to bring a proper party to the court of law render the said matter liable to be struck out. To support his position, he cited the case of **Olam (T) Ltd vs Zakaria D. Marinya**, Revision No. 518 of

2019, urging the court to take the same stance and strike out this appeal.

Arguing in response to the 2nd ground of appeal, Mr. Ng'ondya submitted that the suit land has neither a structure nor any building, so ordering compensation on the building is not right, Adding further that the appellant is not entitled to any compensated because he purchased the suit land from the person who had no title at all. In his view, the ordered compensation was discretionary and done out mercy of the Tribunal. He insists that the most recompense he could enjoy is to have the Appellant be refunded the purchase price that he paid for the suit land. He referred to this court on page 4 of the Land Tribunal's Judgment. In his opinion, this court cannot interfere with the mercy of the Tribunal unless it could be established as a right of the Appellant to be refunded and compensated.

He maintains that it is on record that the one who sold the suit land to the Appellant was the son of the Respondent who was the 2nd Respondent before the Land Tribunal, and it stands unsubstantiated before the tribunal that the suit land was ever transferred to the said 2nd Respondent(at the Land Tribunal) from the Respondent in this appeal, who is the owner of the suit land. He further contended that

the seller had no transferable title or any title at all to transfer the said land in dispute to the Respondent.

In rejoinder, on the issue of variance of names, Mr. Kim responded that it is the Respondent herself who caused confusion to the matter by using a different name in her prior documents whereby in the first instance the Respondent in her Application, (Application no. 61 of 2019) she used the name of Magdalena Mameng'na while in Miscellaneous Application no. 171 of 2019 she preferred the name of Magdalena Mamengwa, as she sought injunction order. Mr. Kim further contended that the Respondent used the same name of Magdalena Mamengwa in her Misc. Application no. 245 of 2022 when she applied for an execution order. He insists that the Respondent had used the name Magdalena Mamengwa, as evidenced in the said Application. On the remedy side, Mr. Kim offered that this error is inconsequential and can be corrected simply by using ink as it was held in the case of **China Henan International Corporation Group Co. Ltd (CHICO) vs Morning Glory Construction Co. Ltd, Misc. Civil Application No. 2 of 2021** where the court ordered that ink/pen can correct the names of both parties. That he

distinguishes the principle in **Olam [T] Ltd** (supra) and relies on the current position in **China Henan** (supra).

On the argument that the Appellant has purchased the land from a person who has no title, he reiterates his view that the Appellant has purchased the land from a person who has a proper title on the suit land which is why the Respondent did not appeal on that ground, failing of which makes the Respondent to be taken to have acquiesced that the one who transferred the land has a legal title over the land.

Dismissing the contention that there was no building or house worth compensation, Mr. Kim submitted that the issue ought to have been raised as a cross-appeal, rather than being brought as a reply to the appeal, maintaining that it is an afterthought to raise it as such.

Having heard the rival submission by parties gone and going through the court records, the issues for determination before me are twofold; firstly, whether the trial Tribunal erred by holding that the transfer of the suit land from the Respondent's son to the Appellant was illegal, and secondly, whether the trial Tribunal erred by holding that the Respondent will get her land back after herself and her son

refunded the purchase price of the suit land as well as the value of the house built on the suit land.

As a starting point, the determination of the issue will hinge on the concern raised by the counsel for the Respondent that this appeal deserves to be struck out due to the reason that the Appellant introduced a new party in this appeal which was not a party before the Land Tribunal. Going through the court's record it is true that before the Land Tribunal, the name of the Respondent appeared to be Magdalena Mameng'na contrary to the name appearing in this appeal which is Magdalena Mamengwa. On this discrepancy counsel for the appellant argued that it is the Respondent who confused them as he used the name Magdalena Mamengwa in the other Application concerning the same subject matter. I agree with the counsel for the Appellant that it seems that the Respondent is using these names interchangeably. As it can be seen in Miscellaneous Application no 245 of 2022 and Miscellaneous Application no 171 of 2019, so she cannot deny that name at this stage, and she is estopped to so do as evidence by facts previously established.

Addressing the first issue, as I have gone through the evidence adduced before the Land Tribunal it is clear that it is the

Respondent's son who sold the suit land to the Appellant, without a passable title. It is trite law in land ownership that you cannot pass a title that you do not have. The evidence adduced before the Land Tribunal proved that the suit land belongs to the Respondent. The evidence that the Respondent's son sold the land to the Appellant without a title was supported by the evidence of RW3 who was a witness on the defense side and VEO of Wandela Village; who on cross examination stated that when the Respondent's son came before him for so that he could create the sale agreement, it is then that he told him that it is the Respondent who is selling the suit land, but requested that the sale agreement should bear his name since he is the person he saw before him. He also stated that the Respondent's son sold the land which does not belong to him. RW3 testified further that the one who had the right to sell the suit land is the Respondent, and certainly not his son. And that is the legal stand as well as better explained by the Latin maxim "*Nemo dat quod non habet*", literally meaning no one can give what they do not have. That was also the holding in the case of **Frank Mohamed vs Fatuma Abdak** [1992] TLR 205 where it was held that he who does not have a good title to the land cannot pass the same to another. Also see the

Court of Appeal in **Melchiades John Mwenda vs Giselle Mbag**
(Administratrix of the Estate of the Late John Japhet Mbag
and two others, Civil Appeal No. 57 of 2018 (unreported).

Concerning the second issue, it is apparent on the Judgment of the Land Tribunal that after the Chairperson of the Tribunal found that the disposition of the suit land was illegal, he ordered the Respondent and her son to compensate the Appellant the purchase price of the land and the house therein before the Respondent could take her land back.

I am of the considered opinion that the Chairperson misdirected himself on this order. He was duty-bound to ascertain who was the legal owner of the suit land and settle the rights of the legally recognized owner. If the Appellant wanted to recover his money, he could have sued the Respondent's son to recover his money. Besides, it is the position of the law that a buyer must beware (*Caveat Emptor*). The duty to ascertain and ensure the title that one wants to acquire in land is clean and passable lies with the buyer. See this court as per his lordship Kente, J. as he then was in **Ramadhani Msangi vs Sunna G. Mandara and 2 others**, Land Appeal No. 39 of 2017 which quoted with approval the case **Bishopsgate Motor**

Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB

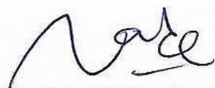
322 where he held:

".....the appellant as a buyer ought to have taken necessary steps by making a full investigation of the title or ownership of the suit house before completing the purchase. This would help him to ensure that he had purchased the suit property in good faith and without notice of any encumbrances or third-party interests. In the light of the evidence on record, it is my settled view that the plaintiff did not fully exercise the principle in sale contracts thus caveat emptor (let buyer beware). In the circumstances, therefore, the appellant's subsequent interests cannot be protected under the law."

Having said so, this appeal is partially allowed to the extent that the order of the Chairperson of the Land Tribunal that the Respondent should first refund the Appellant the purchase price of the suit land and the value of the house therein before she can get her land back is quashed and vacated. The rest of the Appeal is dismissed with cost for want of merits.

It is so ordered.

DATED at ARUSHA this 23rd day of February 2024



**A. Z. Bade
Judge
23/02/2024**

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **23rd day of February 2024**



**A. Z. BADE
JUDGE
23/02/2024**