

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT MWANZA**

LAND APPEAL NO. 57 OF 2010

*(From the Decision of the District Land and Housing Tribunal of Mwanza District at
Mwanza in Land Case No. 180 of 2009)*

MASABUDA BOGOHE.....APPELLANT

VERSUS

ELIAS EZEKIEL1ST RESPONDENT

JOSEPH MASANJA.....2ND RESPONDENT

JUDGMENT

B.R. MUTUNGI, J.

The Appellant Masabuda Bogohe dully represented by Mr. Abdul Aziz legal counsel has raised Seven grounds of appeal in the amended petition of appeal as here under:-

- 1) That, the trial Tribunal erred in law for failure to consider evidence adduced by the Appellant as the result decided the matter relaying on forged documentary evidence tendered by 1st Respondent

- 2) That, the Trial Tribunal erred in law while it proceeded to hear the matter of which it was re-judicata as the matter was conclusively determined by the Nyakato Ward Tribunal in land Case No. 192/2008
- 3) That, the Trial Tribunal erred in law and fact by deciding that the first Respondent is the legal owner of the disputed land while the document relied upon were forged
- 4) That, the trial tribunal erred in law and fact in considering the evidence of the first Respondent and the Tribunal failed to call upon all witnesses who signed the loan agreement and the sale agreement to testify in order to come into a reasonable Judgment
- 5) That, the Trial Tribunal erred in law and in fact without considering the serious fact that the said Joseph Masanja was a dubious one.
- 6) That, the Trial Tribunal erred in law and in fact by ignoring the fact and evidence adduced by the

Appellant witnesses who was the one who witnessed the sale agreement on 15/8/1994 between the Appellant and one Joseph Masanja

7) That, the Trial Tribunal erred in law and fact in deciding the matter in favour of the first Respondent basing on the evidence which was adduced by the first Respondent, while the said right of offer came into existence out of a void transfer.

It is the Appellant's prayer that the court upon adjudicating over the matter should order:-

- i. That, the decision of the District Land and Housing Tribunal be quashed
- ii. That, the Appellant be declared the lawful owner of the Disputed land Plot No..330 Block "HH" NYAKATO – MWANZA CITY
- iii. Appeal be allowed with costs

iv. That any other relief this honourable court deems fit to grant

The Appellant's counsel in support of the six grounds of appeal having abandoned the second ground submitted that, the Appellant had informed the trial tribunal that she had given the sale agreement to Bugohe Mkwaya who is purported to be Joseph Masanja in order to proceed to pay the property tax at Mwanza Municipal Offices. Bugohe Mkwaya did not return the documents. Dispute the Appellant providing this piece of information the trial chairman did not consider it.

The counsel further submitted that the Appellant had informed the trial tribunal that the purported Joseph Masanja was not the one before the tribunal but the trial chairman did not even put on record this piece of information. This is why the Appellant upon appearing before Mruma , J. had complained to the identity of the said Joseph Masanja whereby the Judge ordering for the "real" Joseph Masanja to be summoned. The Appellant through a lot of efforts has been able to produce the "real"

Joseph Masanja at the appeal level, contrary to what had been alledged that he had died.

The Appellant's counsel further complained that the Appellant had informed the trial tribunal that after the sale agreement went missing she had reported the matter to the police who in turn issued her with a police report with reference number MW/RB/IR/9550/08.

This too was never considered by the trial chairman. The Appellant accordingly to her counsel was also bitter in that the witnesses to the loan agreement between Bugoye Mhonya (alledged Joseph Masanja) and Elias Ezekiel first Respondent were never summoned by the trial tribunal. Had they been summoned the tribunal would have realized that the Appellant only signed as a witness to the loan and was in no way giving away her house as security.

The Appellant's counsel further urged that the Appellant had trusted Bugoye Mkwaya as her son as they were living in the same house. In furtherance to this the Appellant does not know how to read and write.

The learned counsel further explained that the Appellant was aggrieved as some of the evidence on record had been distorted. To be specific is the evidence of DW2 (Hidaya Balozi) which has been completely changed. The Appellant had also informed the chairman that, Joseph Masanja was living in Mwanza yet not making appearance but this was not put down on record.

In view of the foregoing submission the Appellant's counsel prayed that the appeal be upheld as it has merits with costs.

Mr. Mhingo representing the first Respondent Elias Ezekiel commenced by submitting that the court should only address itself as to what is to be found on record and not otherwise.

The counsel proceeded to submit that the first Respondent had secured the disputed Plot after Joseph Masanja second Respondent had failed to repay a loan as per exhibit "PI" .

Reacting as to the issue of documents having been forged the learned counsel urged that, had this been the case then the matter should have been reported to the police and action taken, short of this the documents are proper.

The counsel proceeded to submit that the evidence of PW2 (Ndwele Maizala) the Land Officer who testified that they had revoked the first title and allocated it to a new owner (Elias Ezekiel) and that of the first Respondent was the best evidence to be relied upon by the trial tribunal.

The counsel proceeded to lament that the issue of who is to summon a witness is the duty of the one in need of such witnesses and not the burden to be shifted upon the trial tribunal.

The learned counsel proceed to state that the loan document bears the signature of the Appellant and if there was any cheating the same should have been reported by the Appellant to the police. Considering the above

submission the first Respondent's counsel made a prayer that the appeal should be dismissed with costs.

What then was the dispute before the trial tribunal?

It is on record that on 3/5/2007 the second Respondent was given a loan by first Respondent in this appeal after having entered into a loan agreement. The first Respondent advanced a loan to the second Respondent of Tshs. 500,000 which was to be repayable by 3/10/2007. The security for the loan was that, the second Respondent had pledged his Plot No. 530 Block "HH" Nyakato Mwanza City as security. What followed was that the second Respondent failed to repay the loan on the specified date and in order to discharge the loan contract, the first and second Respondents entered into another agreement, which now was to be a sale agreement. The sale agreement dated 7/1/2008 was for an agreement for the second Respondent to sale the suit Plot to the first Respondent for a price of Tshs. 3,500,000/= on 8/1/2008 a transfer deed was executed and the suit premises passed to the first Respondent.

The Appellant had her own version regarding the dispute. She claimed that she knew first and second Respondent as people who were friends. The second Respondent was her sister's son and by then were living together. There was a time the second Respondent informed her that he had been given a loan by the first Respondent of Tshs. 500,000 and the Appellant agreed to have signed the loan agreement as a witness whereby the second Appellant was to repay 1,000,000/= after six months. She was surprised to be told that the house she was living in belonged to the first Respondent. She claimed to have bought the said house from the second Respondent but had not changed the title of the plot. The Appellant latter realized that she had lost the original offer given to her by the second Respondent after she had given him to go and pay the land fees.

Having gone through the above analysis I have also gone through the documents that were tendered that included the offer of right of occupancy, the sale agreement and the loan agreement between the first and second Respondent. I find that they are proper and dully signed as required by law. The trial tribunal had no reason to doubt them. The

report by the land officer tendered collaborates the first Respondent's case together with the evidence of the Land Officer himself. The land office had to revoke the Appellant's title after the truth had come out and ownership allocated to the first Respondent on the basis of the loan.

The loan agreement dated 3/5/2007 which the Appellant herself signed befits her own case. It is obvious that she signed the same, a fact she does not dispute but proceeds to defend herself that she did not know the contents of the sale agreement as she can neither read or write. This piece of evidence negates her own sale agreement she had tendered dated 16/4/2004. Knowing that she was already the legal buyer of the disputed house why did she then go ahead to witness a loan agreement which was giving away the disputed property as security.

I find that the evidence by the first Respondent was sufficient for the trial tribunal to find in his favour. The Appellant's witness Hidaya Bakari cannot change the findings as the sale she witnessed of the disputed plot came much earlier and circumstances had now changed. The

circumstances were that the Appellant had already committed the said property to the first Respondent by signing the loan agreement.

In conclusion I find no merits in the grounds of appeal filed and proceed to uphold the judgment of the trial tribunal. It follows the appeal is dismissed for lack of merits with costs.

Right of Appeal is Explained.

B.R. MUTUNGI

JUDGE

4/7/2013

Read this day of 4/7/2013 in presence of Appellant in person and first Respondent in person.

B.R. MUTUNGI

JUDGE

4/7/2013