IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO 111 OF 2017

(From the decision of the District Land and Housing Tribunal of Kinondoni in Land case No. 48 of 2013)

KASSIM LEMA.....1ST APPELLANT
VALERIAN FERNANDOS.....2ND APPELLANT
VERSUS
KELVIN ATULWA MUNISI.....RESPONDENT

Date of last order: 19/07/2018
Date of Judgment: 26/07/2018

JUDGMENT

Makuru, J.:

The Appellants, Kassim Lema and Valerian Fernandos, unsuccessfully sued the Respondent, Kelvin Atulwa Munisi, in the District Land and Housing Tribunal of Kinondoni in Land Application No. 48 of 2013. The subject matter is a piece of land located at Kinzudi-Goba Area in Kinondoni Municipality. The cause of action arose in February 2013 when the Respondent allegedly invaded the Appellants' land by erecting concrete poles with barbed wire surrounding the whole land. The Appellants were therefore praying for judgment and decree against the Respondent, among other things, for a declaration that they are the lawful owners of the disputed land. However, the trial Tribunal dismissed the application on grounds that the Appellants, the then Applicants, failed to prove ownership over the suit land. Aggrieved by the said decision the Appellants have appealed to this court on the following grounds:

1. *That the trial Tribunal erred in law and in fact by failing to scrutiny (sic), analyze and evaluate evidence on record and thereby reached to an erroneous decision.*
2. *That the trial chairperson erred in both law and in fact by concur (sic) with the assessor's opinion that the Respondent is the lawful owner of the suit land without any tangible supporting evidence."*

When the appeal was called on for hearing Mr. Mrindoko Learned Counsel appeared for the Appellants while Mr. Jovin Ndungi Advocate represented the Respondent.

Submitting in support of the grounds of appeal Mr. Mrindoko contended that the finding that the suit land belonged to the late Adam Msekwa and was lawfully sold to the Respondent was not supported by evidence on record. According to him, Selemani Adam Msekwa (DW1) did not prove the death of Adam Msekwa and his relation with the deceased by producing a death certificate, letters of administration or his birth certificate showing that he was the deceased's son and lawful heir. The learned counsel further stated that the Respondent did not tender any evidence to show the heirs of the late Adam Msekwa.

Citing the provisions of section 101 of the Probate and Administration of Estates Act, Cap 352 R.E. 2002 Mr. Mrindoko argued that, Elias Mwamlima (DW2) had no mandate to dispose of the disputed land as he was neither appointed as an administrator of estate of the deceased nor was he authorized by the administrator of estate. It is also submitted that the document which is purported to be the authorization document was issued

on 30.12.2012 while the sale was concluded on 15.12.2012. This means the authorization was issued after the sale was concluded.

In his further submission Mr. Mrindoko contended that, the Appellants' evidence is clear because they have managed to show how the vendor acquired title of the disputed land. Hence, they managed to prove their ownership of the disputed land.

In reply thereto Mr. Ndungi submitted that, the trial Tribunal properly analyzed and evaluated evidence and made a proper decision. He argued that the issue as to whether Selemani Adam Msekwa (DW1) was the son and legal heir of the late Adam Msekwa was not raised during trial and it wasn't part of the issues which were framed during trial. According to him, it was the Appellants who failed to prove ownership of the disputed land during trial. He cited the provisions of section 110 and 111 of the Evidence Act, Cap 6 RE 2002 in support of his argument.

It is further submitted that, the issues of probate and administration, competence of documents tendered in court and competence of the persons who sold the suit property to the Respondent were not raised during trial. Thus, they do not form part of the grounds of appeal raised herein. He added that the Appellants failed to procure the attendance of the vendor one Agustin Bushiri and they did not prove whether the vendor had a good title to pass to them.

In rejoinder, Mr. Mrindoko reiterated his submission in chief and insisted that, the vendor could not be sued because he is not the trespasser in this matter. According to him, the vendor could only be sued if it is found that the Respondent also claims to have purchased land from the same vendor.

The rationale being that, the vendor will assist the court to establish who the real purchaser of the land in dispute is. He added that, the Appellants' vendor in this matter is not the same as the Respondent's vendor. Hence, there was no need of joining or calling Agustino Bushiri.

Having considered the rival submissions of the learned counsel for both parties and also after going through the entire record of this case, It is obvious that this appeal is based on the weight and evaluation of evidence. My task, therefore, is to study the evidence on record adduced during trial and determine whether the Chairman of the trial Tribunal properly evaluated the evidence before him/her.

The Appellants' case during trial was based on the evidence that they purchased the suit property from one Agustino Bushiri on 28/6/2013 for Tshs. 13 Million. It is also on record that the said Agustino Bushiri purchased the said land from Daudi Mugasa on 05/3/2003. The Appellants' evidence was corroborated by the testimonies of PW2 and PW3 who witnessed the sale transaction. The two sale agreements were tendered and collectively admitted as Exhibit P1.

The Respondent's case on the other hand was based on the evidence that, the original owner of the disputed land was the late Adam Selemani Msekwa. DW1 testified during trial that he is the son and heir of the late Adam Selemani Msekwa who purchased the said land from Marcus Anderea in 1987 vide a sale agreement dated 2/10/1987. It is further on record that, the alleged heirs of the late Adam Msekwa authorised Elias J. Mwamlima to sell the disputed land to the Respondent. However the document authorizing him to sale the disputed land was made on

31/12/2012 and the sale agreement was executed on 15/12/2012. Therefore, the authorization was given after the sale transaction had already been concluded.

Further to that, under section **101 of the Probate and Administration of Estates Act, Cap 352 RE 2002** the only person who is empowered to dispose of the property of the deceased person is the administrator of the estate. In the instant case, there is no evidence as to whether there was any administrator of estate duly appointed to administer the estate of the late Adam Msekwa. There is also no proof that the said Adam Msekwa died intestate and that DW1 and his relatives were the legal heirs of the deceased's estate. There is neither death certificate nor will or birth certificates of the alleged heirs tendered in the trial Tribunal.

From the foregoing, the issue is whether the said Elias J. Mwamlima had a good title to pass to the Respondent. The answer is definitely in the negative. I say so because, as I stated hereinabove, the authorization was made after the sale transaction was concluded. Even if the authorization was made before the sale transaction, the sale would still be a nullity because he was authorized by the people who had no powers to do so as per the provisions of section 101 of the Probate and Administration of Estates Act (supra). It is trite law that, no one can pass a better title than he himself who possesses "**Nemo dat quod non habet**". So in this case since the vendor was not the administrator of the deceased's estate, it follows that no good title has passed between Elias Mwamlima and the Respondent.

Now, weighing between the evidence of the Appellants and that of the Respondent, I am of the view that the Appellant's evidence is more probable. I say so because, the Appellants' evidence is straight forward as they managed to show how the vendor acquired ownership of the suit property vide a sale agreement dated 5/3/2003 between Daudi Mugasa and Agustino Bushiri. Hence, the Appellants vendor had a good title to pass to the Appellants.

It is trite law that he who alleges must prove. This principle is founded on the rule '***ei incumbit probation qui dicit, non qui negat***' which means that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof.

In civil cases, **Section 111 of Evidence Act, Cap 6 RE 2002** provides for whom the burden of proof lies. In order to win his case he has to establish the truth of what he asserts on the balance of probabilities. Thus, as a general rule the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all is given on the other side. In the instant case, as stated earlier, it is undoubted that the Appellants have managed to prove their case on the standard required by the law.

In the circumstances, it goes without saying that, the appeal is meritorious. The appeal is allowed with costs.

C.W. Makuru
JUDGE
26/07/2018

Court: Judgment delivered in court this 26th day of July, 2018 in the presence of Mr. Mrindoko, learned counsel for the Appellants and Mr. Jovin Ndungi learned counsel for the Respondent.

C.W. Makuru
JUDGE
26/07/2018