

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

MISC. LAND APPEAL NO. 138 OF 2019

(Arising from District Land and Housing Tribunal for Kilombero at Kibaha in Land Appeal No. 431 of 2018;
Originating from Mlabani Ward Tribunal in Land Case No. 50 of 2018)

PELESTAS KIBIRITI.....APPELLANT

VERSUS

ASHA MMEGELWA.....RESPONDENT

Date of last Order: 20.07.2020
Date of Judgment: 07.09.2020

JUDGMENT

V.L. MAKANI, J.

This is a second appeal by PALESTAS KIBIRIT. She is appealing against the decision of the Kilombero District Land and Housing Tribunal (the **District Tribunal**) in Land Appeal No.431 of 2018 (Hon.Mwakibuja, R. Chairman) in which the decision was entered in favour of the respondent. The matter originated from Mlabani Ward Tribunal in Land Case No. 50 of 2018.

At the Ward Tribunal the respondent claimed that the appellant trespassed unto her land. The respondent stated that his husband Joseph Mlango sold a piece of land to the appellant for 50,000/= where she built a house and lived with his family. The appellant further requested Joseph Mlango to temporarily use the remaining empty space adjacent and in front of the piece of land she had bought

to create a garden and dig a pit latrine. However, after some time the appellant started building a permanent house. The respondent filed a case at the Ward Tribunal where the matter was decided in her favour and ordered the appellant to demolish her house and leave the empty area to respondent and his family. Dissatisfied, the appellant appealed to the District Tribunal, where the decision of the Ward Tribunal was confirmed.

Being dissatisfied with the decision of the District Tribunal the Appellant has come to this court with the following grounds of appeal:

- 1. That the learned Chairperson of the tribunal erred in law and fact by deciding in favour of the respondent without considering the fact that the appellant has been in the area uninterrupted using the land since 1994 to 2018 (24) years and that she was time barred.*
- 2. That the learned Chairperson of the tribunal erred in law and fact by deciding in favour of the respondent despite her failure to produce a documentary proof of alleged disputed land to both the appellant and to the chairperson.*
- 3. That the learned Chairperson of the tribunal erred in law and fact by deciding in favour of the respondent and failed to take into account that the appellant brought the land from the late JOSEPH MLANGO and had purchase agreement thus occupying it as the owner up to date.*
- 4. That the learned Chairperson of the tribunal erred in law and fact by deciding in favour of the respondent and depend upon the false witness who was arraigned at the tribunal.*
- 5. That the learned Chairperson made a mistake to analyse and evaluate and assess evidence adduced before him and his assessors*

6. That the learned Chairperson of the tribunal came up with unclean conclusion which victimized the appellant, tortured and embarrassment to the family of the appellant.

With leave of the court, the appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by the appellant herself. The respondent's submissions were drawn and filed by Stella Shindika, Advocate.

Submitting on the first ground of appeal, she said that, the Tribunal's decision did not consider the irregularities of the Ward Tribunal, such as the balance of the members of the Ward Tribunal, failure to stick to *Haki Ardhi Regulations* and that ASHA MMEGELWA (respondent) was not party to the disputed land as it was JOSEPH MLANGO who sold the land to the appellant in 1994. She submitted further that the respondent claimed to have acquired land from the deceased JOSEPH MLANGO without any proof or Letters of Administration.

She added that, the respondent did not testify that she was present when the appellant bought the suit land and thus she knows nothing about the sale of the land. She submitted further that, the appellant has documents of the suit land and even the hamlet leader testified that the appellant is the owner of the suit land. She added that even the respondent's son one Fred Mlango was convicted by Ifakara Primary Court on trespass in Case No.219/2011 and this is the proof of appellant's ownership of the suit land. She added that the appellant is in possession of the suit land for 24 years from 1994 to 26/11/2018

when respondent started to claim that the land belongs to her. He prayed for this appeal to be allowed with costs.

On the other hand, Ms. Shindika for the respondent before replying to the grounds of appeal raised a concern that the appellant filed her written submissions contrary to the order of the court and further that the submission did not address the grounds of appeal and the same were attached with evidence.

On the grounds of appeal, she said that submissions should not be attached with evidence but may be attached with copies of the laws. She supported her position with the case of **Tanzania Union Of Industrial & Commercial Workers (TUICO) vs. Mbeya Company Limited & National Insurance Corporation (T) Limited (2005) TLR 41** and added that the evidence should be expunged and ignored.

Submitting on the late filing of the submissions by the appellant Ms. Shindika said that the appellant was supposed to file her submissions on or before 11/06/2020 but she decided to file the submissions on 15/06/2020 without seeking extension of time.

She further said that the written submissions by the appellant did not direct themselves to the grounds of appeal. That the appellant has not submitted whatsoever as far as her grounds of appeal are concerned. She insisted that the appellant has decided not to prosecute her case. She referred the case of **Abdul Lyuu Vs.**

Zainabu Kasimu Lyuu, Misc Land Appeal No.56 of 2019 (HC-Land Division, DSM) (unreported). She further insisted that the court should decline to consider the appellant's submissions.

On the first ground of appeal she said that the use of land cannot guarantee ownership of land, as the appellant asked permission from respondent only to cultivate vegetables and not otherwise. Learned Counsel relied on the case of the **Registered Trustees of Holy Spirti Sisters Tanzania vs. January Kamili Shayo & 136 Others Civil Appeal No. 193 of 2016 (CAT-Arusha)** (unreported) and **Maigu E.M. Magenda vs. Arbogast Mauho Magenda, Civil Appeal No. 218 of 2017 (CAT-Mwanza)**(unreported)

On the second ground she said that the evidence in land matters must be on balance of probabilities and that the respondent during the trial proved her case on the balance of probabilities as per section 110 (1) (2) of the Evidence Act CAP 6 RE 2019

On the third ground of appeal she said that, the land was not sold to the appellant as it is a family property, the allegation that the land was purchased from the deceased Joseph Mlango does not entitle the appellant to be the owner. That when it was purchased there was no consent of the seller's wife who is the respondent and no evidence of spousal consent shown during trial. She added that even the sale agreement had neither signature of the respondent nor the signature of the parties contrary to section 63 of the Land Act CAP 113 RE 2019

On the fourth, fifth and sixth grounds she said that the Tribunal rightly evaluated the evidence adduced by the witnesses as well as assessor's opinion and that justice was dispensed regardless of whether it victimized the appellant. She prayed for the appeal to be dismissed with costs.

Having gone through submissions from the rival parties, I would wish to first tackle the procedural issues that were raised by Ms. Shindika Counsel for the respondent.

As for the claim that the appellant's submissions were contrary to the order of this court of 15/05/2020. Indeed, the court ordered that this appeal proceed by the way of written submissions and that the appellant should file her main submissions on or before **11/06/2020**. The Exchequer Receipt **No.24928506** attached to the appellant's submission indicates that, the submissions were paid for and thus filed in this court on **15/06/2020**, which is four days out of the time ordered by the Court. However, considering that the order for the submissions was given during the COVID-19 pandemic and further that they were drawn and filed by the appellant herself who is a layperson, and that she was late by only four days; the court shall give a benefit of doubt to the appellant and allow the submissions to be on record as the respondent would not be prejudice in any way. So the concern by learned Council is disregarded.

As regards Ms. Shindika's second concern, it is true that the appellant in addressing the grounds of appeal has also appended annexures

and assumingly referring and relying on them as exhibits. It is common knowledge that no new evidence is admitted at the appeal level and parties cannot address new matters on appeal. In that respect the annexures to written submission are hereby expunged from the record.

Now, I will determine the grounds of appeal generally as they are based on the analysis of the evidence by the lower Tribunals.

It is without dispute that the late Joseph Mlango sold a piece of land to the appellant for TZS 50,000/=. According to the evidence on record, the appellant asked for a further piece of land to dig a pit latrine and another piece for gardening and the late Joseph Mlango gave her what she wanted but for temporary usage. This was the evidence by the respondent which was corroborated by Mpondoka the person who introduced the appellant to the late Joseph Mlango and was also present when the boundaries of the piece of land bought by the appellant were shown to her. This evidence which was at the Ward Tribunal was not controverted and when the appellant was asked to bring witnesses, she said they were all dead. So in essence, though the appellant is claiming that she is the owner of the piece of land on the basis of adverse possession, but she was an invitee and and it is the law that an invitee cannot assume ownership by claiming continuous occupation of the land (see the cited cases of **Registered Trustees of Holy Spirit Sisters Tanzania vs. January Kamili Shayo & Others** and **Maigu E.M. Magenda vs Arbogasti Maugo Magenda** (supra). This ground of appeal therefore has no merit.

It is trite law that he who alleges must prove as provided for under section 110 of the Evidence Act CAP 6 RE 2019. In the case of **Hemed Said vs. Hemed Mbilu [1984] TLR 113** it was held:

"in law both parties to a suit cannot lie, but the person whose evidence is heavier than that of the other is the one who must win."

The above cited case implies that courts should be moved to decide this or that way by the weight of evidence adduced by the parties and after a thorough evaluation of such evidence in its totality. At the Ward Tribunal the matter was decided upon balance of probabilities and decided that the evidence by the respondent was far stronger than that of the appellant.

Indeed, the agreement for sale that was referred in the Ward Tribunal's judgment was not available in the file. But the Ward Tribunal did not rely on that agreement alone but also the evidence which was given by the respondent and supported by her witness. As stated hereinabove, the witness was: one, the relative of the witness herself, two, present during the sale and three, present when the appellant was shown the boundaries. This very crucial witness declared that the suit land which the appellant is claiming was not part of the land that was sold to her by the late Joseph Mlango. In that respect and as was established by the Ward Tribunal the evidence of the respondent was heavier as opposed to that of the appellant who gave bare assertions that she bought the suit land from the late Joseph Mlango without any further supportive evidence. In view of the principle in **Hemed Said vs. Hemed Mbilu** (supra) the

evidence by the respondent was heavy and strong and so she had to win.

The complaints by the appellant concerning the balance of the opinion of the members in the Ward Tribunal, the Haki Ardhi Regulations, the question that the appellant was not an administrator of the estate of the late Joseph Mlango were not raised at the Ward and District Tribunals and so cannot be entertained at this stage of second appeal. The ground that the Chairman of the Tribunal came out with an unclear conclusion which victimized the appellant, tortured and embarrassment to the family of the appellant has no merit, and in any case, was not addressed by the appellant in her submissions and thus this ground is also disregarded.

For the reasons advanced above, I find no reason to fault the decisions of the lower Tribunals. In the result, the appeal is dismissed with costs for want of merit.

It is so ordered.

V.L. Makani
V.L. MAKANI
JUDGE
07/09/2020

