

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 185 OF 2019

(Originating from Land appeal No. 59 of 2018 before the District Land and Housing Tribunal of Kinondoni. Also arising from Decision of the Kwembe Ward Tribunal in application 16 of 2018.)

ALLY MWILU APPELLANT

VERSUS

BAHATI ATHUMANI MTANGO RESPONDENT

JUDGMENT ON APPEAL

S.M MAGHIMBI, J:

The appellant was aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni (**the 1st appellate Tribunal**) in Land Appeal No. 59 of 2018, an appeal which originated from the decision of the Kwembe Ward Tribunal in Case No. 16/2018. He has lodged this appeal whereby in his memorandum of appeal, he has raised one ground of appeal that the first appellate Tribunal erred both in law and facts when it decided in favor of the respondent without considering that the respondent dishonored the sale agreement entered between the appellant and the respondent regarding the land in dispute. His prayer was that the appeal be allowed, the decision of the first appellate tribunal be quashed and any other reliefs this court may deem fit for the interest of justice.

On 3rd June 2020, the court ordered the matter to proceed by the way of written submissions. During the hearing of this appeal the appellant was represented by the Legal and Human right Center while the respondent was represented by Mr. Emmanuel Kusekwa, learned Advocate.

When submitting in support of the appeal, the Appellant submitted that on 24th of October 2007 he sold the land measuring one acre to the respondent for the consideration of Tshs. one million and five hundred thousand (1,500,000/=). The price was supposed to be paid in two installments. The agreements were reduced into writing and the appellant alleged that the respondent did not leave a copy for the appellant. He submitted further that on the same material date of the contract, the respondent paid advance of five hundred thousand only (500,000/=) to the appellant and promised to pay the remaining amount. The dispute arose after the respondent failed to pay the remaining amount.

The appellant continued to submit that after waiting for the respondent to come and pay the remaining amount in vain, he thought that the respondent lost interest in the suit land that is why the appellant decided to re-sale the suit land to other people in 2017. The appellant then cited Sections 10 and 25 of the Law of Contract Act, Cap 345 R.E Of 2019(**"The Contract Act"**) which provides as follows;

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:

25.-(1) An agreement made without consideration is void...

The appellant continued to submit much as there was a contract between the parties, the respondent failed to perform his duty of paying the remaining amount that is one million Tshs. which leads to the breach of the contract. He argued that the respondent's claim of ownership by the respondent is an act of wanting to benefit from her own wrongful act. That the first appellate Tribunal erred both in law and fact when it favored the respondent without evaluating and considering the sale agreement entered and tendered before it. he further submitted that the testimony of his Witness one Yassin Mlope, who witnessed the agreement was never taken. He then cited the case of **Dinkerrai Ramkrishan Pandya v R [1957]1 EA 336 CAD** in which the Court emphasized the importance of evaluation of the adduced evidence in order to reach to the just decision. He finalized his submission by praying that the decision of the 1st appellate Tribunal be quashed and set aside and he is declared the lawful owner of the disputed land.

In reply, Mr. Kusekwa admitted of the existence of the sale agreement between the parties arguing that in the year 2017 when the respondent traveled outside the country, the appellant breached the contract by re selling the suit property to 4 others without the respondent's consent. He then submitted that at the Kwembe Ward Tribunal, the appellant conceded to have breached their contract and in the tribunal found the appellant liable for unlawful act of re selling the suit property and the appellant agreed/promised to refund the respondent's land.

He continued to submit that the respondent being dissatisfied with the Kwembe Ward Tribunal's decision he appealed to the 1st appellate Tribunal

which reversed the Ward tribunal's decision and declared the respondent the right owner of the suit land, hence this appeal. Thereafter, Mr. Kusekwa clustered his arguments in two aspects, whether the 1st appellate tribunal was right to reach its decision by discussing the matters which were not at issue at the trial tribunal and whether the consequence of half payment and promise to pay in full the balance can make one to rescind the contract.

Discussing the first issue, he submitted that the issue of remaining balance of payment was a new fact that was never supposed to be entertained by the 1st appellate tribunal as it was never at issue in the trial tribunal. To support his argument he cited the case of **Eliasa Moses Msaki Vs. Yesaya Ngateu Matee [1990] TLR 90.**

On the 2nd issue of whether the appellant was right to re sale the suit property because the respondent delayed in paying the balance, Mr. Kusekwa submitted that the 1st appellate Tribunal made it clear that the 2nd sale agreement cannot override the 1st contract. That when the matter was before the ward Tribunal the appellant agreed that he sold the suit property to other people and promised to compensate the respondent and the issue of balance payment was never discussed at the trial tribunal because it was not an issue. That it is not true that the respondent did not pay the amount in full because it could have not been easy for the appellant to remain silent (for almost 11 years from 2007 when they entered into the sale contract) without taking any action to claim the balance.

Mr. Kusekwa finalized his submission by submitting that even if the appellant's allegations that the consideration is not paid in full was true, it was not proper for the appellant to re sale the suit land while he knows that the title to the suit land was already passed to the respondent. He therefore prayed that the appeal be dismissed as it has no merit.

Having gone through the records of this appeal and the parties' submissions, I find that in their testimonies, there was undisputed evidence that the land in dispute has already been sold to other people and they have developed the land. Therefore in order to cure the blunder, the appellant offered to pay the respondent another land as compensation. This made me, without prejudice, question the jurisdiction of the Ward Tribunal as the land was sold at Tshs. 1,500,000/- in 2007 and now sold to other 4 people cannot still have a value of less than 3,000,000/- Tshs.

Further to that, at all the time that the litigations were ongoing, none of the people who are in actual occupation of the suitland were involved. It is not known if they even have a clue that the land they are comfortably in occupation of is in the middle of ownership battle and the risk they are in on the verdict of the matter. My concern is that, looking at the decree of the District Tribunal, should the matter go to execution, it is those people that will be affected by the execution order. Therefore non-joiner of those necessary parties was fatal to the determination and execution of the matter thus affects the validity of the previous proceedings.

For the above reason I allow this appeal by setting aside the judgment and decree of the tribunal. I further set aside the proceedings and judgment of the Ward Tribunal in the original Case No. 59/2018. Should any party still be interested in pursuing their rights, they should do so in a tribunal with competent jurisdiction to try the matter and ensure that they involve all those who have interest in the land including those who are in physical occupation of the suitland and those who have purportedly purchased the suitland from the appellant herein. Given the nature of my findings, I make no order as to costs.

Dated at Dar es Salaam this 16th day of December, 2020.



A handwritten signature in black ink, appearing to be 'S. Maghimbi', written over a horizontal dotted line.

S.MAGHIMBI, J.

JUDGE