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

LAND APPEAL NO. 217 OF 2017

(Originating from Kibaha District Land and Housing Tribunal at Kibaha in Land Application No.94 of 2011 (Hon. Jerome Njiwa, Chairman)

MONY TERI PETTIT.....APPELLANT

VERSUS

JEROME I. SHIRIMA.....1ST RESPONDENT
ELIABI MGOLO.....2ND RESPONDENT
STEPHEN ANTHONY.....3RD RESPONDENT
FESTO NASHON.....4TH RESPONDENT
EDMUND XOSA.....5TH RESPONDENT
YAKOBO OMARI.....6TH RESPONDENT

Date of Last Order: 14.02.2020
Date of Ruling: 20.04.2020

JUDGMENT

V.L. MAKANI, J

This is an appeal by MONYI TERI PETTIT. She is appealing against the decision of the Kibaha District Land and Housing Tribunal at Kibaha (the **Tribunal**) in Land Application No. 94 of 2011 (Hon. J. Njiwa, Chairman).

At the Tribunal the 1st respondent was declared the rightful owner of ten acres of farm located at Amani Kerege in Bagamoyo (the **suit land**). The appellant was dissatisfied with the decision of the Tribunal hence this appeal with five grounds of appeal reproduced herein below:

1. *The trial Tribunal Chairperson erred in law and fact by disregarding exhibit P1 for being not stamped.*

2. *The trial Tribunal Chairperson erred in law and in fact for failure to consider the evidence of TW1 and TW2 as a result reached at a wrong conclusion.*

3. *That the Trial Tribunal Chairperson erred in law and in fact by playing double standards when evaluating the evidence of the Applicant and other Respondents.*

4. *The Trial Tribunal Chairperson erred in law and in fact for failure to evaluate properly the evidence in records as a result reached in a wrong conclusion.*

5. *That the Trial Tribunal Chairperson erred in law and in fact in its failure to reach a conclusion that, some of the Respondents failed to appear and defend the suit against them.*

With leave of the court the appeal was argued by way of written submissions. The appellant's submission was drawn and filed by Gregory L. Ndanu, Advocate from G & S Associates and the submissions by the respondents were drawn and filed by Emmanuel Safari, Advocate from Prime Attorneys.

In arguing the appeal Mr. Gregory adopted the memorandum of appeal. He further stated that failure to stamp the contract of sale was not an irregularity to affect jurisdiction of the court, but the omission could be cured by Section 73 of the Civil Procedural Code, CAP 34 RE 2006. He said the respondent could have been ordered to pay the duty with which the instrument is chargeable. He added that by disregarding **Exhibit P1** the Tribunal erred in law because having admitted the same as evidence during the trial, the Tribunal ought to

have ordered the appellant to go and pay the requisite stamp duty and not to disregard it. He cited the case of **Elibariki Mboya vs. Amina Abeid TLR [2000] 122.** He further said that admission of **Exhibit P1** was the mistake made by the Chairperson therefore it is unfair to punish the appellant for the mistake made by the court, and it should give substantive justice in priority to legal technicalities. He insisted that the remedy was to order the appellant to go and pay the necessary stamp duty. He referred the court to the case of **China Henan International Cooperation Group Co. Limited vs. Salvand K.A. Rwegasira, Civil Application No. 43 of 2006** in which he insisted that procedural rules are there to guide for an orderly and systematic presentation of cause so as to help the substantive law and not to enslave the same. He concluded by saying that the Tribunal Chairman erred in law and fact by disregarding Exhibit P1 for being not stamped contrary to the position of the law.

On the second ground of appeal he submitted that when the court visited locus in quo, two other witnesses were heard by the consent of both parties, that is **TW1** and **TW2**. The witness **TW2** testified to the effect that the suit land that belonged to ADAM MAKONGORO was the same land which now belongs to appellant. He said the Tribunal completely disregarded this evidence and concluded that the 1st respondent is the lawful owner of the suit land which measures 6.5 acres.

On the third ground Mr. Ndanu submitted that the Chairperson applied double standards in evaluating the evidence by the applicant and respondents as follows, that:

i. The Tribunal ruled in favour of the respondents while the 6th respondent who purportedly sold 2 ½ acres of the suit land never testified in the trial.

ii. There were defects in the WSD by the respondents as they were never signed nor verified by the respondents, contrary to Order VI Rule 6 of the Civil Procedure Code CAP 33 RE 2002.

iii. The **Exhibit D3** was admitted contrary to Regulation 10(3) of GN No.174/2003 which requires service of the document to the other party before hearing.

iv. That the size of suit land is 6.5 acres but the 2nd respondent only proved his case to the extent of 4 acres acquired from the 2nd, 3rd, 4th and 5th respondents. He wondered how the Tribunal reached conclusion that the suit land belonged to the 1st respondent without hearing the evidence of the 6th respondent.

v. The Tribunal disregarded the evidential value of Exhibit P1 for want of the requisite stamp duty and to be fair the appellant ought to have been ordered to

pay the requisite stamp duty as was the case with the 2nd respondent.

vi. The Tribunal played double standard by blaming the appellant for not calling Adam Makongoro and Emmanuel Lushinge while no blame was directed to the 1st respondent for failure to call the 6th respondent to testify in his favour

vii. The Tribunal maintained that the suit premises was bought by the applicant for TZS 10,00,000/= while the Exhibit P12 showed clearly that the price was TZS 1,000,000/=

On the fourth ground he submitted that the 2nd to 5th respondents had no title to pass to the 1st respondent and the sale of 2 ½ acres by the 6th respondent to the 1st respondent was a sham according to the evidence on records.

On the fifth ground the appellant said that the trial Tribunal did not call the 1st, 3rd, 4th, 5th and 6th respondents to defend their case. He added that it is clear on records that the 1st respondent is not one and the same person as HIEROMINI SHIRIMA or HIEROMINI IRENEUS who is the purchaser of 3.75 acres as per **DW2.** That the name of the 1st respondent and the name of the purchaser as per **Exhibit D2** and **D3** are totally different and perfect strangers. He said that it is appalling why the trial Tribunal failed to appreciate the fact of the

variance in the names of the purported purchaser, 1st respondent and **DW3**. He further averred that as the 1st, 3rd, 4th, 5th and 6th respondents failed to appear and defend their case the Tribunal ought to have proceeded ex-parte. He prayed for the appeal to be allowed with costs.

In reply, Mr. Emmanuel Safari said that at page 18 of the Tribunal's judgment, **Exhibit P1** was disregarded after being found to have been mistakenly admitted for lack of stamp duty and the appellant's side never bothered to pray for leave to go and pay for the required stamp duty. He cited the case of **Malmo Montage Consult Ab Tanzania Branch vs. Gama (2011) 2 EA 263** where he said that the Court of Appeal clearly provided that an agreement which is not stamped cannot be considered as an exhibit in deciding the rights of the parties regarding disputed property. He added that even if the said **Exhibit P1** was to be considered it did not support appellant's purchase price of TZS 10,000,000/- raised in the application form in the Tribunal. He added that according to **Exhibit P1** the purchase price is Tshs. 1,000,000/- which is inconsistence with the purchase price raised in the application form and therefore cannot be allowed for being in respect of the sum not claimed in the pleadings. He cited the case of **Makori Wassaga vs. Joshua Mwaikambo And Another [1987] TLR 88** in which it was held that what is not pleaded cannot be granted by the court. He said that since the purchase price claimed by the appellant in the application is different from TZS 1,000,000/- proved by **Exhibit P1** it is clear therefore that

the appellant's claim is short of proof and ought to be dismissed in its entirety.

Regarding the second ground, Mr. Safari submitted that it is clear that TW1 and TW2 were not the parties' witnesses and therefore the appellant was not prejudiced by the Tribunal's decision of not considering the testimonies of the two witnesses. He added that the Tribunal Chairman by not acting on those witnesses corrected himself because he had realized that the Tribunal had no role to call witnesses. He supported his assertion with the case of **Nizar M.H Ladak vs. Gulamali Fazal Janmohamed [1980] TLR 29.** Further he cited section 45 of the Land Disputes Courts Act which he said it has prohibited the decisions of Tribunal to be reversed or altered on appeal on account of any error, omission or irregularity in such decision or order on account of improper rejection of any evidence unless such error or rejection of evidence has in fact occasioned a failure of justice, which is not the case in the present situation and he thus submitted that the second ground had no merit.

On the third ground Mr. Safari submitted that the evidence on record demonstrate that the testimony of the 6th respondent was to the effect that, he had sold his 2 ½ acres to the 1st respondent which was stated in the testimony of **DW3** who said that he bought the same from the 6th respondent and his testimony was supported by **Exhibit D3** which was the Sale Agreement attesting the same. He added that the Joint WSD was duly served to the applicant and no objection was raised against the same during the trial at the Tribunal. He further said that,

according to sub rule 4 of rule 7 of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003 the respondent shall not be required to follow any formal format in preparing his WSD. He said **Exhibit D3** was a Sale Agreement attesting to the purchase of the property by the 1st respondent from the 6th respondent pleaded under paragraph 6 of the WSD and annexed as Annexure A-2 and therefore it was not an ambush to the appellant. He said that the trial Tribunal was bound to uphold the most recent decision of the Court of Appeal with regards to the effects of non-payment of the stamp duty and hence there was no double standard. He said that the Tribunal did not formulate that the appellant bought the suit land for 10,000,000/- but it was rather stated in the Application filed by the appellant (then applicant), so every party is bound by his pleadings and is required to prove the facts as pleaded and not otherwise. The fact that on hearing she said that the suit land was bought for TZS 1,000,000/- gives one good reason to doubt the honesty of the appellant.

On the fourth ground Mr Safari, contended that the Chairperson evaluated the evidence on records properly and as a result he reached a proper decision. He said that the Tribunal noted the appellant's failure to prove the flow of title by failure to call AMANI MAKONGORO and EMMANUEL LUSHINGA who she claimed were the persons who sold the disputed land to her. He added that these were material witnesses because there was suspicion that **Exhibit P1** was a forgery for containing one signature of a seller which is contrary to the

appellants evidence that she bought from both of them under one agreement.

On the fifth ground he said the claim that some of the respondents failed to appear and defend the suit against them is highly misconceived and without merit as it is clear from the respondents joint WSD that it is only 1st respondent who claimed ownership of the disputed land. He said that the law is clear that he who desires the court to give judgment is the one who must prove in terms of section 110 of the evidence Act, Cap 6 RE 2002. He contended further that it is not the requirement of the law for the respondents who did not claim to prove and therefore it does not matter whether they appear and give evidence or not. That the evidence of the 1st respondent was heavier than that of the appellant and the Chairman of the Tribunal made a proper assessment and analysis as reflected in pages 20, 21, 22, and 23. He argued this court to dismiss this appeal with costs.

In rejoinder, Mr. Ndanu reiterated his main submission and added that save for the 2nd respondent, none of the respondents entered appearance. That JEROME I. SHIRIMA who is the 1st respondent is not one and the same in law as **DW3** who is HEROMIN SHIRIMA or one and the same person as HEROMINI ERENEUS who appears as the purchaser in **Exhibit D2** and **Exhibit D3** respectively. That Jerome I. Shirima has never appeared to defend his case in the Tribunal and the total acreage is not 6.5 acres rather it is 6.75 acres, and he questioned how could the Tribunal conclude that it was 6.5 acres and

that it belonged to 1st respondent? He prayed for the appeal to be allowed with costs.

Having gone through the submissions by Counsel for the parties, the main issue for consideration is whether this appeal has merit. I will consider the grounds of appeal as they were raised seriatim.

As for the first ground, the appellant is of the view that the Chairman of the Tribunal erred in law and facts by disregarding the Sale Agreement (**Exhibit P1**). It is not in dispute that the Sale Agreement was disregarded by the Chairperson for non-payment/stamping of stamp duty. The defect of non-stamping of the Sale Agreement could be rectified by the party who intends to tender the said document in evidence by praying to affix stamp duty so that the court can act upon it. This has been the common practise in this fraternity. However, this was not done by the appellant or her advocate as was explained by the Chairman at page 18 of the copy of the typewritten judgment, that he was waiting to be moved by the appellant to pay the required stamp duty, but the appellant and her advocate never bothered to request for leave. That apart, section 47 of the Stamp Duty Act makes it mandatory for any instrument chargeable with duty to be admitted in evidence only if it is duly stamped. This was also confirmed by the Court of Appeal in the case of **Malmo Montage Consult Ab Tanzania Branch** (supra). In that respect, the Tribunal could not have acted on the Sale Agreement (**Exhibit P1**) without stamp duty. The first ground therefore has no merit and it is disregarded.

The second ground of appeal is that the Tribunal's Chairperson erred in law and in fact for failure to consider the evidence of **TW1** and **TW2** as a result reached at a wrong conclusion. **TW1** and **TW2** were Tribunal witnesses who were examined during the visit to the locus in quo. In the case of **Sikuzani Saidi Magambo & Kirionl Richard vs. Mohamed Roble, Civil Appeal No. 197 Of 2018 (CAT-Dodoma)** (unreported), the Court of Appeal stated:

> *"It is a known fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial. Some of the said guidelines and procedures were clearly articulated by this Court in the case of* ***Nizar M.H. v. Gulamali Fazal Janmohamed*** *[1980] TLR 29, where the Court, inter alia stated that:-*
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> > ***When a visit to a locus in quo is necessary*** *or appropriate, and as we have said, this should only be necessary in exceptional cases,* ***the court should attend with the parties and their advocates,*** *if any, and with much each witnesses as my have to testify in that particular matter...* ***when the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give the evidence of all those facts,*** *if they are relevant, and the curt only refers to the*

notes in order to understand or relate the evidenec in court given by witnesses. We trust that this procedure will be adopted by the court in future [Emphasis added]."

It is apparent from the above case that a visit to the locus in quo is only when it is necessary and intended to verify evidence adduced by the parties. In that respect, the visit is the discretion of the court or tribunal and no new witnesses or new evidence is required. Rather, the court or tribunal, as the case may be, verifies and get clarification from what has arisen in the course of the hearing. When the court resumes, the notes taken from the site are read out and witnesses who have been called by the parties, may make clarifications if any, in respect of the notes taken from the site by the court. Considering this position, it is my view that, the Chairman was correct not to consider the evidence of **TW1** and **TW2** because these were new witnesses; and as said above, the purpose of visit was only for verification and/or clarifications that may have arose in the course of the trial and not otherwise. In that respect this ground too has no merit and it is also disregarded.

As regards the third, fourth and fifth grounds, they are all centred on the evaluation of evidence. We have already addressed the issue of **Exhibit P1** which was disregarded, and this court has confirmed of the correctness for it not to be considered. In any case, apart that the **Exhibit P1** was not duty stamped but even if admitted the evidential value of the said **Exhibit P1** would still be questionable as it had weaknesses on the face of it. One, it had two sellers but only one

seller EMMANUEL LUSHINGE signed. Two, **Exhibit P1** shows that the suit land was bought for TZS 1,000,000/- whereas the appellant in her application/pleadings at paragraphs 6(a)(i)n and 6(a)(ii) stated that she bought it for TZS 10,000,000/- and has paid the same amount. The fact that the Sale Agreement was not signed by one of the buyers and he never appeared in court to explain why he did not sign or even confirm that he was present on the date of the sale; and the difference in amount as reflected in Sale Agreement and the pleadings creates doubt as to what was the actual purchase price. Such doubts lower the evidential value of **Exhibit P1** and thus even if admitted it would not have been safe for the said exhibit to be relied upon.

The appellant also complained that there was bias on the part of the Chairman in that he allowed **DW3** Hieromini Shirima to go and pay stamp duty while he did not do the same to the appellant. I have gone through the proceedings and it is reflected that the advocate for the respondents Mr. Safari requested the Tribunal for a short adjournment for purposes of payment of stamp duty. The learned advocate for the appellant Ms. Mhagama was present and she never objected to the prayer. In the case of the appellant neither the appellant nor his advocate moved the court by a prayer to make payment of the stamp duty. So, in my view there was no bias.

Another complaint by the appellant is that **Exhibit D3** was admitted contrary to Regulation 10(3) of GN No.174/2003 which requires service of the document to the other party before hearing. Having gone through the record, as correctly stated by Mr. Safari this

document was annexed to the joint WSD of the respondents. Unfortunately, the back page was not photocopied. Nevertheless, the reasons for admission of the document by the Chairman were very clearly narrated that there was an omission in the pohotocopying of the document and it did not prejudice the appellant in any way, and said Sale Agreement was admitted for the interest of substantive justice. The complaint thus has no merit.

There was also a complaint by the appellant that there were defects in the WSD by the respondents as they were never signed nor verified by the respondents, contrary to Order VI Rule 6 of the Civil Procedure Code CAP 33 RE 2002. I have noted that indeed the joint WSD was not verified, but this ought to have been raised by the appellant or her advocate at the earliest possible time. I am of the view that raising it at this stage is an afterthought on the part of the appellant.

As for the weight of the evidence between the appellant and the respondents, it is settled law under sections 101, 102 and 103 of the Evidence Act, Cap 6 R.E 2019, that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. And in civil cases, the standard of proof is on balance of probabilities. In the case at hand, the appellant contends that his evidence weighs more than that of the respondents specifically the 1st respondent. It should be noted that the burden of proof was on the appellant to prove that, on balance of probabilities she is the real owner of the suit land.

The record shows that the appellant bought the suit land from two buyers namely ADAM MAKONGORO and EMMANUEL LUSHINGE in 2002. The appellant presented five witnesses who are residents of Kerege among them being ATHUMANI ALLY KARUMA who was a member of the Village Council, who said he knew the applicant when she went to complain about the suit land. The rest of the witnesses were neighbours to the suit land. As stated hereinabove, **Exhibit P1** was disregarded, and even if it were admitted, its evidential value is questionable. Following the doubts in **Exhibit P1** the oral evidence of the sellers might have answered the many questions which were left hanging, but unfortunately, the sellers were not called as witnesses, and nothing was said by the appellant of the whereabouts of Emmanuel Lushinge. As for Adam Makongoro it was said, in passing, that he was sick, but Counsel for the appellant did not tender any medical certificate or pray for the Tribunal to move to where the witness was or pray to the court to admit an affidavit in substitute of his oral testimony. Matters related to sale of landed properties are matters that require proof, and since **Exhibit P1** was disregarded the remaining evidence was not strong enough to support the appellant's case.

On the other side, the 1st respondent tendered a Sale Agreement (**Exhibit D2**) that he bought the suit land in 2006 from the 2nd, 3rd, 4th 5th respondents who said they were allocated the same by the Village Council. He said he also bought land from the 6th defendant which was adjacent to the land he bought and there was also a Sale Agreement admitted as **Exhibit D3.** The 1st respondent managed to

bring an undisputed Sale Agreement that was supported by the sellers who were allocated the suit land by the Village Council which had an authority to allocate the village land to interested parties. Indeed, the 6th respondent did not enter appearance to support the sale, but the said Sale Agreement **Exhibit D3** was tendered and admitted as part of the record. Having said so, I am in agreement with the decision of the Tribunal that, the evidence adduced by the 1st respondent was heavier than that of the appellant (See **Hemed Said vs. Mohamed Mbilu (1984) TLR 113**).

As for the complaint that the 1st respondent has not appeared to defend his case because he is a different person from **DW3**, firstly it is the appellant who sued the 1st respondent so she ought to have known the correct name of her alleged trespasser and questioned the presence of DW3 in court alleging to be the 1st defendant accordingly. But the appellant and her advocate did not question **DW3** on this because presumably they knew that he was also going by the names in the Sale Agreements. Secondly, this issue was neither raised nor discussed at the Tribunal and the appellant (then applicant) by her silence impliedly conceded that the 1st respondent is one and the same person as **DW3**. In the case of **Hotel Travertine Limited vs. NBC and 2 Others [2006] TLR 133** it was stated that matters not taken at trial court could not be raised on appeal. Similarly, the case of **Ismail Selemani Nole vs. Republic, Criminal Appeal No. 117 of 2003 (CAT- Mtwara),** the Court stated:

> *"...that as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and*

decided in the court(s) below to be raised on appeal.
(See, ***Kennedy Owino Onyongo And Others vs. Republic; Criminal Appeai No. 48 of 2006*** *(unreported)".*

Also see **Kipara Hamis Misagaa @ Bigi vs. Republic, Criminal Appeal No. 441 of 2007 [2018] TZCA 88**. Though all the cited cases are of criminal nature but the principle that has been set out caters also for civil cases.

For reasons I have endeavoured to advance hereinabove, I find no reason to interfere with the decision of the Tribunal. The appeal is thus dismissed for lack of merit with costs.

It is so ordered.

V.L. MAKANI
JUDGE
20/04/2020