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

LAND APPEAL NO. 209 OF 2020

(Arising from the Decision of District Land and Housing Tribunal of Ilala District at Mwalimu House)

VERONICA HASSAN KISHAI..... APPELLANT

Versus

SUSAN SALUM MALANGAI.....1st RESPONDENT

DORIKAS SALUM MALANGAI.....2nd RESPONDENT

HASSAN KISHAI.....3rd RESPONDENT

JUDGMENT

28/04/2021 & 30/06/2021

Masoud J.

This appeal arose from the decision of the District Land and Housing Tribunal of Ilala in Application No. 79 of 2019. The decision was on the ownership of a disputed land of about an acre situated at Msongola, Ilala, Dar es Salaam. Whereas the appellant claimed that she was the lawful owner of the disputed land having bought the same sometime in 2005, the first and second respondent claimed that the disputed land belongs to the first respondent.

Having heard the parties and their witnesses, the trial tribunal was of the decision that the evidence adduced by the first respondent who was also the first respondent in the trial tribunal was heavier than that of the appellant (the applicant in the trial tribunal). Accordingly, the trial tribunal decided in the favour of the applicant. In so doing, the trial tribunal had special regard to the documentary evidence adduced by the first respondent which in the view of the Hon. Chairman of the said trial tribunal supported her case very well. This was notwithstanding some shortfalls, which according to the learned Hon. Chairman of the trial tribunal, were apparent on the testimony of the first respondent.

The factual basis pleaded and upon which the evidence was adduced and the decision was made by the trial tribunal was, going by the pleadings on the record, not hard to comprehend. The same could be presented in a nutshell as follow.

From the application filed in the trial tribunal which is the genesis of the matter that gave way to the present appeal, it is apparent that the suit land claimed was described as one situated at Msongola, Ilala, Dar es Salaam, bought at a purchase price of Tshs 150,000/- by the appellant from one Mohamed Sefu Kibalu (DW.3) in 2005 and estimated at a value of Tshs 100,000,000/-.

It was part of the appellant's pleading in the trial tribunal that the said vendor expressed to the appellant his intention to sell the suit property. Having visited the suit property, identified its boundaries, and satisfied with the price, he promised to purchase the said property. A day after the visit, the appellant sent the first respondent (DW.1), and one Pendo Hassan Kishai (PW.2) to pay the purchase price of Tshs 150,000/- to the vendor (DW.3) on her behalf. However, the first respondent used her name as the purchaser in the concluded sale agreement whilst very well knowing that they were only acting on behalf of the appellant.

As the first respondent and the appellant were relatives living together in peace and without problems and since the said sale agreement was also given to the appellant after the sale transaction, there was no dispute that arose amongst the first respondent and the appellant as a result of the first respondent using her name in the sale agreement. Subsequently, the appellant built two houses on the purchased piece of land and brought her parents (second and third respondent) from Singida to reside therein before she later on took them to live at Vianzi-Mkuranga District, Pwani where the applicant also built a house for them in 2013. She in addition allocated part of the disputed land in 2010 to Free Pentecostal Church of Tanzania, which has since been using the same for worshipping.

It was further pleaded that sometime in 2017 when the government initiated a move of identifying owners of pieces of land situated at Msogola Ilala, the first respondent was required to appear before the street local government to confirm that the appellant was the owner of the suit land although her name appeared in the sale agreement as the purchaser. The said first respondent declined, and as a result, the vendor Mohamed Sefu Kibalu was called by and appeared before the street local government where, according to the appellant, he confirmed that he sold the suit land to the appellant. It was likewise part of the appellant's pleading that the first respondent was only sent and used by the appellant to pay agreed purchase price on behalf of the appellant. As a result of the intervention by the street local government, a sale agreement reflecting the one concluded in 2005 was entered portraying the appellant as the purchaser.

It was finally pleaded in the said pleading that since the suit land was purchased in 2005, there had never been a claim of ownership of the suit land by the first respondent. The claim only emerged in 2017 when the appellant was registering in her own name her ownership of the suit land at the street local government office at Msogola. Consistent with the claim, the second and third respondents moved from Mkuranga to the suit

property claiming that the same belongs to them as the first respondent built the property for them.

On the basis of the above pleadings, the appellant asked for the trial tribunal for a declaration that she was the lawful owner of the suit property, a declaration that the first respondent was a trespasser, eviction of the respondents from the suit property, a permanent order restraining the respondents, costs and any other reliefs.

With the exception of the third respondent, the first and second respondents opposed the appellant's pleadings in their joint written statement of defence. It was their defence that the suit property belongs to the first respondent having purchased it in 2005 from Mohamed Sefu Kibalu (DW.3). It was thus not true that they were sent by the appellant (PW.1) to pay the agreed purchase price to the above named vendor (DW.3) and conclude the sale agreement on the appellant.

On the contrary, the sale agreement was, they stated in their joint statement of defence, concluded between the first respondent (DW.1) as the lawful purchaser, and the said Mohamed Kibalu (DW.3) as the vendor. As such, the first respondent's name was correctly entered in the sale agreement as she was the lawful purchaser of the suit land and therefore the owner of the suit land. The original sale agreement was not given to

the appellant by the first respondent as alleged. Rather, it was wrongly given to the appellant without the first respondent's consent by the officers of MBAGACO SACCOS LTD once the first respondent repaid in full the loan she borrowed from the SACCOS.

The allegation of the appellant building houses on the suit land was equally disputed by the first and second respondent in their joint statement of defence. They contended that it was the first respondent who started to build a house on the disputed land in 2006 and later on brought the second respondent to live with her. The first respondent later on built two more houses on the disputed land. The allegation as to redrafting of the sale agreement allegedly caused by the street local government was equally disputed.

As indicated earlier, none of the reliefs that the appellant sought was granted, as the trial tribunal in the end found against the appellant. Aggrieved by the decision of the trial tribunal, the appellant challenged it on the following grounds:

> 1. *The Honourable trial Chairman erred both in facts and law in declaring that the first respondent is the lawful owner of the suit land in total disregard of ample and tangible evidence adduced by the respondent and strongly corroborated by the third respondent*

among others that the suit land was purchased and developed by the appellant.

2. *The trial chairman erred both in law and facts in relying on a sale agreement which bears the names of the first respondent as the purchaser of the suit land without any due consideration of the appellant's evidence that the first respondent purchased the suit land for and on behalf of the appellant.*

3. *After having found that the first respondent's evidence is tainted with lies the trial chairman erred both in law and facts in relying on the same evidence to justify that the first respondent is the lawful owner of the suit land.*

As the grounds of appeal rested on the complaint that there was a total disregard of the evidence adduced in the favour of the appellant's case and reliance on the evidence of the first respondent which was tainted with lies, I had to scan through the evidence on the record of the trial tribunal's proceedings against the backdrop of the pleadings. In this endeavour, I took note of the witnesses that testified for the appellant and for the respondents, and the exhibits admitted in evidence. Apparently, the appellant and the respondents were among the witnesses.

Amongst the exhibits admitted in evidence were the sale agreement which identified the first respondent as the purchaser (Exhibit P.2 and D.1) and the sale agreement dated 30/12/2019 alleged to have been recorded by

the street local government portraying the appellant as the purchaser (Exhibit P.1). Of significance to note at the outset is that Exhibit P.1 was not signed by the vendor (DW.3).

With the leave of this court, the appeal was argued by filing written submissions. The order of the court as to the filing of the submissions was duly complied with by the parties. I have taken time to go through the rival submissions expounding on the grounds of appeal and the evidence on the record.

Arguments made by the counsel for the appellant on the first ground of appeal were to the effect that the evidence of the appellant that she instructed the first respondent to pay the purchase price of the suit land after negotiating and agreeing with the vendor (DW.3) was corroborated by the evidence of PW.2 and the third respondent. It was argued that the said witnesses affirmed the fact that the suit property was indeed purchased by the appellant and is therefore owned by the appellant who had since built houses thereon as was also corroborated by PW.3. The latter testified that he was employed by the appellant to build houses on the suit premise.

On the strength of the above argument and the construction of the first ground of appeal, it was seemingly submitted that there was ample and

tangible evidence adduced by the appellant and strongly corroborated by other witnesses which ought not to be disregarded in the favour of the first respondent.

In reply to the arguments and submissions on the first ground, it was argued by the counsel for the first respondent that the trial tribunal considered and evaluated the evidence adduced by both parties. Based on the evaluated evidence, it was argued that the sale transaction for the disputed land was contractual whose nature does not invite family relationship consideration between the patties. As documentary evidence was tendered and admitted in relation to the sale transaction concluded, there was no room for oral evidence for the said transaction to be used as it can be easily tempered with.

It was further submitted that the evidence on the record from the first respondent and the sale agreement admitted in evidence is abundantly clear that the suit property was purchased by the first respondent upon being, in the submission of the first respondent's counsel, advised to purchase the same by the appellant. This evidence was, according to the first respondent, well captured, evaluated and considered by the trial tribunal' s judgment at page 13 of the same.

I have considered the evidence which was referred to me in relation to the first ground. In particular, I have had regard to the evidence of the appellant (PW.1), PW.2, and the third respondent. Against the backdrop of such evidence and the exhibits admitted, I used the pleadings before the tribunal as a yardstick of determining whether the appellant established her pleadings by her evidence.

I was clear that the appellant pleaded to have sent the first respondent to pay the purchase price on her behalf upon giving her the sum constituting the purchase price. Apart from the sale agreement showing that the first respondent was the purchaser and DW3 was the vendor, there was nothing in terms of documents showing that the appellant did indeed give the purchase price money to the first respondent, and sent her along with PW2 to pay the said purchase price on her behalf. The evidence of giving the first respondent the purchase price money and how such money was so given was equally not adduced despite such allegation in the pleading. The Exhibit P.1 adduced by the appellant was not signed by the vendor and was also renounced by the vendor's evidence so to speak. It could therefore not support the allegation in anyway.

The evidence of PW.2 supporting the appellant's pleading that PW.2 was with first respondent sent by the appellant to pay the purchase price to

the vendor (DW.3) on behalf of the appellant is to me not sufficient to water down the evidence of the first respondent (DW.1), exhibit D.1, and the evidence of the vendor, namely, Mohamed Seif Kibalu (DW.3) who testified as DW.3 and the evidence of one, Safina Mpelera (DW.3) who not only testified that she witnessed the signing of the sale agreement (Exhibit D.1), but also testified in the favour of the first respondent saying that the first respondent was not accompanied by anyone. Indeed, Exhibit D.1 does not bear the name of PW.1 who was allegedly sent with the first respondent by the appellant to pay the purchase price on her behalf.

To be clear also DW.3 denied to have transacted the sale of the suit property with the appellant. DW.3 further told the trial tribunal that the appellant was unknown to him. It is worthwhile to note that DW.3 was not cross-examined by the appellant on such evidence. In his evidence among other things, DW.3 agreed to have sold the suit land to the first respondent and he also tendered Exhibit D.1 which is the sale agreement he concluded with the first respondent.

PW.2 whose evidence is relied on by the appellant stated that she was 30yrs old when she was testifying on 08/03/2020. This means that when the transaction was concluded on 29/09/2005, she was a minor of about

15 years old. Indeed, when she was questioned by one of the assessors, she admitted that she was then still a minor.

As if the former is not enough, one would also want to consider whether at the age of 15 years, the said witness could contract to act on behalf of the appellant in a transaction for the sale of a piece of land as was alleged by the appellant. The answer is in my considered opinion in the negative. With the foregoing in mind, I could not but to find against the appellant on the first ground. For those reasons, the first ground of appeal fails for want of merit.

The afore going analysis of the evidence in relation to the first ground of appeal also takes care of the second ground of appeal in respect of which it was argued by the appellant that the trial tribunal erroneously relied on the sale agreement bearing the first respondent's name and ignored the family relationship of the parties. With the above analysis, I agree with the arguments for the first respondent that the family relationship has no place in the present matter where the sale agreement concluded between the first respondent and the vendor was evidenced by a documentary evidence and supported by the oral evidence of the vendor (DW.3). The said documentary evidence does not whatsoever envision anything that reflects the alleged family relation or the allegation that the respondent

was in the sale agreement acting on the behalf of the appellant. The allegation that the first respondent wrongly used her name instead of the appellant's name as the purchaser was equally not supported by any cogent evidence.

As already pointed out, the absence of proof that the first respondent was given the money by the appellant as the purchase price to pay the vendor on behalf of the appellant was pertinent on the record as was the absence of the evidence that the appellant negotiated the price and the agreement and had the first respondent acting on his behalf in paying the agreed purchase price.

If I may add, the identified boundaries alleged in the appellant's pleading without being particularised were never supported by any evidence. To make it worse, the street local government official that allegedly summoned the vendor (DW.3) to verify that he sold the suit property to the appellant and caused the sale agreement reflecting the appellant as the purchaser to be reduced in writing was not called to testified in support of the appellant's allegation. Since there were no reasons given why such officer was not called to testify in respect of such allegation, I am contented that the adverse inference principle should in the circumstances apply against the appellant's case. It is my finding at this

juncture that the second ground of appeal would equally fail. It is accordingly dismissed for lack of merit.

While it was true that the trial tribunal found that the first respondent's evidence was characterised by lies, it was nonetheless contented that the evidence of the first respondent looked at as a whole was more appealing and heavier than that of the appellant, regard being had to, the documentary evidence which established that the first respondent was the purchaser, the evidence of the vendor (DW.3) which renounced the appellant as the purchaser and the purported sale agreement tendered by the appellant which had no signature of the alleged vendor (DW.3) and the evidence of DW.2 who witnessed the sale transaction and whose name clearly appears in the sale agreement (Exhibit D.1). I need not to go back to the details of the evidence as it was considered herein above in great detail. I wish only to add that the sale agreement bearing the name of the first respondent is in itself not disputed by the appellant. The only dispute was in relation to the allegations the appellant advanced which as was pointed out earlier were not established.

Consequently, the arguments by the appellant in relation to the last ground of appeal complaining about the use of the evidence of the first respondent which consisted of lies are without merit. They were to the

effect that the trial tribunal should not have relied on the evidence. It should have entered judgment in the favour of the appellant. The trial tribunal ought not to have relied on the sale agreement which was part and parcel of the unreliable oral evidence of the first respondent.

Against the above arguments in relation to the last ground of appeal, the first respondent submitted in a nutshell that the evidence in the favour of the first respondent was heavier than that of the appellant for reasons already stated herein above. The first respondent went further to reproduce in support the reasoning of the learned Chairman of the trial tribunal at page 20 of his typed judgment to the effect that and I hereby quote:

> *"....However, by documentary evidence the first respondent is looked to have been the purchaser of the suit land. I have opted to go by documentary evidence, because the applicant also was not smart on how she acquired exhibit P.1 which lacks even the signature of the seller...."*

In view of the above findings, all grounds of appeal are without merit. They ail fail as already pointed out herein above.

In the upshot, for reasons already stated herein above, the appeal is without merit. It is accordingly dismissed. Considering that this matter involved parties who are related and the first respondent was under legal aid, I will not make any order as to costs.

Ordered accordingly.

Dated and Delivered at Dar es Salaam this 30th day of June 2021

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B. S. Masoud

Judge