

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.45 OF 2020

*(Originating from the District Land and Housing Tribunal for Kinondoni in Land
Case No.254 of 2016)*

ERICK NYONI 1ST APPELLANT

JUBILITE SALIEL 2ND APPELLANT

VERSUS

JANETH KANYWENYWE (Administrator of the Estate of

STEVEN KANYWENYWE MPANDE) RESPONDENT

JUDGMENT

Date of Last Order: 24.08.2021

Date of Judgment: 27.08.2021

A.Z.MGEYEKWA, J

This is the first appeal. The matter originates from the District Land and Housing Tribunal for Kinondoni in Land Case No. 45 of 2020. At the centre of controversy between the parties to this appeal is a parcel of land. The material background facts to the dispute are as follows: The respondent was

the complainant at the District Land and Housing Tribunal, he successfully claimed ownership of a piece of land located at Saranga Ward within Kinondoni District. The respondent prayed for a declaration that he is the lawful owner of the suit premises and the respondent was a trespasser.

Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal for Kinondoni on four grounds of grievance; namely:-

- 1. That the trial tribunal grossly erred both in law and fact in upholding the respondent's claim of ownership of the disputed suit land basing on the existence of graves.*
- 2. That the trial tribunal erred in law and based on hearsay evidence given by respondent which is contradictory.*
- 3. That the trial tribunal erred in law and based on weak evidence tendered by the respondent's witness hence reached into an erroneous decision.*
- 4. That the trial tribunal erred in law and fact for disregarding the evidence testified by the appellants and the documentary evidence tendered by the appellants hence reached into erroneously.*

When the matter was called for hearing before this court on 30th March, 2021, the court ordered the parties to argue the appeal by way of written

submissions whereas, the appellants filed their submission in chief on 08th April, 2021 and the respondent filed his reply on 27th April, 2021. The appellants waived their rights to file a rejoinder.

The appellants were the first one to kick the ball rolling. On the first ground, the appellants claimed that the trial tribunal erred in law and fact in upholding the respondents' claim of ownership of the suit land basing on the existence of a grave. The appellants contended that the evidence adduced at the trial tribunal is scanty and contradictory the same does not meet the legal standard of proof on a balance of probabilities. To support their argumentation they referred this court to page 3, paragraph 2 of the tribunal judgment. The appellants lamented that Steven Kanyenywe the respondent's late father bought the suit land in 1984 and was buried in the suit land in 1992. They claimed that the respondents did not say from whom the late Kanyenywe bought the suit land.

The applicants continued to complain that the respondent's testimony was doubtful by stating that Mwasaburi gave the suit land to her mother if the same was bought by the respondent's late father in 1984. To support their argumentation, they referred this court to page 3 paragraph 3 of the Judgment where the respondent testified to the effect one Mwasaburi Sultan gave the suit land to the respondent's mother on 3rd May, 1994 and on 6th

May, 1994 the respondent's mother returned the same to Mwasaburi Sultan. The appellants claimed that the evidence defeats the allegations that the late Steven Kanyenywe bought the said land. They stressed that the suit land belonged to Mwasaburi and not the respondent's father.

The appellants went on to submit that PW2 and PW3 testified to the effect that Mwasaburi sold the suit land to the respondent's father without saying where they acquired the information and did not say whether they witnessed the sale. Stressing, the appellants argued that the respondent's evidence was contradictory and the trial tribunal was wrong to base on in its findings. Fortifying their submission, they referred this court to the case of **Nizar M. H Ladak v Gulany Fazal Jan Mohamed** (1980) TLR 29. The appellants further contended that it was not necessary for the trial tribunal to visit locus in quo instead of basing on the evidence on record.

Arguing for the second and third grounds which relates to hearsay evidence. The appellants claimed that the respondent and his witnesses adduced hearsay evidence. The appellants claimed that the respondent case heavily hinged on matters heard from other people since none of them witnessed the sale of the suit land to the respondent's father. To support their submission they referred this court to page 4 of the judgment. They claimed

that the respondent's evidence did not meet the standard set down under section 62 (1) and (2) of the Evidence Act Cap. 6 [R.E 2019].

As to the fourth ground which relates to documentary evidence tendered at the trial tribunal. The appellants claimed that the respondent testified that they bought two pieces, the first appellant bought a piece of land valued Tshs. 1,500,000/= measuring $\frac{1}{4}$ acre and he tendered a sale agreement (Exh.D1) and a Judgment from the Primary Court (Exh.D2) in regard to a criminal case. The appellants argued that the piece of evidence proves that the land suit belonged to Mwasaburi and the respondent's father borrowed the same from Mwasaburi and that is the reason why the respondent's father returned the suit land to the owner. The appellants valiantly contended that the fact that Kanywenywe was buried in the suit land cannot be proof of ownership of the suit land.

On the strength of the above submission, the appellants beckoned upon this court to allow the appeal based on the evidence on record.

The respondent's confutation was strenuous. She came out forcefully and defended the trial court's decision as sound and reasoned. On the fourth ground, she opposed the appellants' claims and simply argued that the appellants' claim is devoid of merit.

Submitting on the first ground, the respondent claimed that the respondent's claims of the suit land were upheld not only based on the existence of the graves but ample evidence adduced by the respondents and their witnesses. The respondent claimed that the record is clear that Steven Kanywenywe Mpande purchased the suit land from Mwasaburi Sultan in 1984 and since that year, he was the lawful owner of the suit land. The respondent claimed that no one can allow a person to be buried in his land without raising any objection and even Mwasaburi Sultan nor his relatives raised any objection. The respondent referred this court to the evidence on record, that on 27th December, 2011 Kanywenywe family and Mwasubiri's family had a formal handing over of the suit land in writing, and exhibit P1 was admitted in court.

The respondent sis not end there, she strongly argued that the allegation, Violet Kanywenywe transferred the suit land to Mwasaburi is untenable. She went on to argue that Violet has never been appointed as an administratrix of the estate of the late Steven Kanywenywe Mpande. In her view, Violet had no legal power to transfer the property. She also lamented that the trial tribunal was not influenced by the visit of the suit land and the appellants did not raise any objection concerning the visit locus in quo. They urged this court to find that this ground is demerit.

Submitting on the second ground. The respondent claimed that the evidence on record was not hearsay. She argued that the appellants stated that they were staying with their mother when she saw a person preparing the suit land and when the appellant asked the said person, she was informed that Erick Nyoni has bought the suit land from Mwasaburi Sultan. She added that PW2 and PW3 evidence were cogent and consistent, they knew Kanywenywe well and the deceased's daughters' names one Edna and Betty. The respondent urged this court to disregard this ground.

On the third ground, the respondent claimed that the evidence on record was not weak and the trial did not rely on weak evidence. They claimed that there was ample evidence to prove the respondent's case and they convince the trial tribunal on the balance of probabilities that they are the lawful owners/custodian of the suit land. They urged this court to disregard this ground.

As to the fourth ground, the respondent argued that the trial tribunal was right to disregard the appellants' evidence since Mwasaburi Sultan sold the suit land to Steven Kanywenywe Mpande in 1984 and they had no title in the said land to pass to the appellants in 2008. To support her position she cited the case of **Farah Mohamed v Fatuma Abdallah** (1992) TLR 205. They

went on to claim that the appellant's sale agreement was not stamped as per section 46 (1) of the Stamp Duty Act No. 20 of 1972.

On the strength of the above submission, she urged this court to find that the grounds of appeal are demerit and proceed to dismiss the appeal with costs.

After a careful perusal of the record of the case, the testimonies adduced by the parties, and the final submissions submitted by parties. I should state at the outset that, in the course of determining this case, I will be guided by the canon of the civil principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 which require that "*the person whose evidence is heavier than that of the other is the one who must win*" -. And that propounded in the case of **Jeremiah Shemweta v Republic** (1985) TLR 228 that "*where doubts are created in evidence, the same should be resolved in favour of the opposite party.*"

In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons or grounds to warrant this court overrule the findings of the District Land and Housing Tribunal of Kinondoni. I have opted to combine the first, second, and third grounds because they are intertwined. These three grounds relate to the evidence adduced at the trial tribunal

whereas the appellant complained that the evidence was weak, contradictory and the Chairman reached its decision based on hearsay evidence.

Records reveal that the first respondent testified to the effect that he bought the suit land from Mwasaburi Sultani and paid Tshs. 1,500,000/= a land of $\frac{1}{4}$ acre. To substantiate his testimony he tendered a sale agreement (Exh.D1). The second respondent (DW2) testified that she bought the suit land of $\frac{1}{4}$ acre from Juma Abdallah for Tshs. 850,000/=. To substantiate her testimony she tendered a sale agreement (Exh. D2). DW3 and DW4 testified to the contrary they claimed that Mwasaburi Sultani was their relative, whereas the applicant's mother asked Mwasaburi for a piece of land and later she returned it to Mwasaburi Sultani. On the other side, the respondent testified that her father bought the suit land from one Mwasaburi and tendered a sale agreement (Exh.P1). The late Steven Kanywenywe was buried in the suit land and PW1, PW2, and PW3 proved that Steven Kanywenywe bought the suit land from Mwasaburi.

The respondent instituted the suit as an administrator of the Estate of the late Steven Kanywenywe therefore she stands a better chance to prove his ownership than the defendants who alleged to have bought the suit land in 2008 while the late Steven Kanywenywe was already occupying the suit land

since 1984 when he bought the said land from Mwasaburi. The appellants complained that the Chairman relied on hearsay evidence

Thus, he reached an unfair decision. The respondent's witnesses like the appellants' witnesses (DW3) testified as to what they knew. There is no dispute that their evidence was hearsay evidence because none of them witnessed the sale agreement.

On the fourth ground of appeal, the appellants are complaining that the Chairman ignored the documentary evidence tendered by the respondents. The records reveal that the 1st appellant and 2nd appellant tendered sale agreements; exhibit D1 and exhibit. D2 respectively. There is no dispute that the appellants tendered documentary evidence to prove their claims. The documents reveal that the 1st appellant alleged to have bought the suit land from Masaburi Sultani in 2008 and 2nd appellant alleged to have bought the alleged suit land from Juma Abdallah in 2008. While the respondent's father testified to the effect that in court without tendering any document the effect that the suit land belonged to his late father.

Subsequently, I am satisfied that in the present case there are no extraordinary circumstances that require me to interfere with the District Land and Housing for Kinondoni findings since the appellants have failed to prove their ownership of the suit land. Therefore, the respondents' evidence

overweighed the appellant's evidence as it was held in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113.

Based on the foregoing analysis and circumstance of this case, I uphold the decision of the District Land and Housing Tribunal for Kinondoni and proceed to dismiss the appeal on its entirety without costs.

Order accordingly.

Dated at Dar es Salaam this date 27th August, 2021.




A.Z.MGEYEKWA
JUDGE
27.08.2021

Judgment delivered on 27th August, 2021 in the presence of both parties.




A.Z.MGEYEKWA
JUDGE
27.08.2021

Right of Appeal fully explained.