

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND APPEAL NO.51 OF 2021**

*(Arising from Judgment and decree of the Kinondoni District Land and Housing Tribunal for Kinondoni, in Land Application No.42 of 2014)*

**MAKOKO RASHID MAMBOLEO** (Administrator  
of the Estates of the Late  
TABU PAZI MWINYIMVUA) ..... **APPELLANT**

**VERSUS**

**ABDULLAH MOHAMED HOZA  
MAJIDI MUSUYA  
INNOCENT JUSTIN  
ROBERT D. MASUNGA  
CASSTAN C. MAHUNDI  
EMMANUEL S. RUTAMBUKA  
JAMIRA S. DEBWE  
REHEMA M. MTORO  
FRANK KIPILIPILI  
SEGUMBA ALLY  
ALLY HAMEDU KAMENYA  
GETRUDA BENEDICTO MLINGA &  
TUKAE RAJABU MZINDU** ..... **1<sup>ST</sup> RESPONDENTS**

..... **2<sup>ND</sup> RESPONDENTS**

**JUDGMENT**

Date of Last order: 21.10.2021

Date of Judgment: 25.10.2021

**A.Z.MGEYEKWA, J**

The present appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No. 42 of 2014. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and the respondent are disputing over a piece of an unsurveyed land measuring 15 acres located at King'azi Street Kwembe Ward at Kinondoni District within Dar es Salaam Region. The appellant by then Kassim Salum Mhanga (administrator of the estate of the late Tabu Pazi Mwinyimvua) filed a suit against the respondents. The appellant prayed for a declaration order that the 1<sup>st</sup> respondent is a trespasser, the sale agreements between the 1<sup>st</sup> and 3<sup>rd</sup> respondents be declared null and void and a demolition order of the building found in the disputed area.

The District Land and Housing Tribunal determine two issues; *who is the lawful owner of the suit land and to what reliefs to award the parties herein*. The evidence revealed that the first owner of the suit land was the late Tabu Pazi then the 2<sup>nd</sup> respondent sold the suit land to the 1<sup>st</sup> respondent. To substantiate his submission, the 1<sup>st</sup> respondent tendered a Sale Agreement dated 27<sup>th</sup> June, 2005. To prove that they purchased the suit landed property, DW2, DW3, DW4, DW5, DW7, and DW10 tendered their Sale Agreements. DW9 alleged that her late husband

bought the suit land from Halfani Masenge and DW12 testified to the effect that she was appointed as an administrator of the late Tabu Pazi. DW12 admitted that she sold the plots to the respondents. The tribunal decided the matter in favour of the respondents and dismissed the case.

Aggrieved, another administrator of the estate of the late Tabu Pazi one Makoko Rashid Mamboleo, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Kinondoni and raised seven grounds of grievance, namely:-

- 1. That the Hon. Chairman erred in law and facts for framing issue which was irrelevant to the dispute in issues claimed before the Honorable Tribunal.*
- 2. The Hon. Chairman erred in law and in facts for allowing the respondents to prove the land application contrary to the law that governs the principle of the burden of proof.*
- 3. The Hon. Chairman erred in law and facts for determining the matter in favor of DW10 (Frank Kipilipili) based on hearsay evidence.*
- 4. That the Hon Chairman erred in law and facts to determine the matter in favor of the 1<sup>st</sup> respondents based on the reason that the sale agreements were approved and witnessed by the local government leadership.*
- 5. That the Hon. Chairman erred in law and facts for failure to put into consideration that the 1<sup>st</sup> respondents failed to call the local*

*government Leaders who claimed to approve and witnessed the disposition of the disputed property.*

- 6. That the Hon. Chairman erred in law and facts for failing to put into consideration that the 2<sup>nd</sup> Respondent sold the disputed property while she was aware of the presence of Civil Appeal No. 160 of 2003 filed in the High Court of Tanzania at Dar es Salaam which challenged his appointment of the administrator of estates of deceased.*
- 7. That the Hon. Chairman erred in law and facts for failure to examine and evaluate properly the evidence of the Appellant which were sufficient to prove his case in his favor.*

When the matter came up for orders on 18<sup>th</sup> October, 2021 the Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his written submission, the appellant started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this application. The appellant opted to combine the 1<sup>st</sup>, second, third, fourth, and fifth grounds and argue them together. The sixth and seventh grounds were argued separately.

Submitting in support of the first ground of appeal, the appellant complained that the trial Chairman seriously faulted to raise and

determine the issue of who is the lawful owner of the suit land for the reason that there is variance between the cause of action or statement of facts constituting the claim and issue raised by the Chairman. To fortify his submission, the appellant referred thus court to the tribunal judgment when the Chairman referred to Form No.1. It was his view that the first issue for determination was supposed to be *whether the 1<sup>st</sup> respondent trespassed over the suit land.*

The appellant went on to submit that the Chairman departed from what was pleaded by the parties. It was his view that the issue framed did not reflect the actual dispute. Fortifying his stand he cited the case of **James Funge Ngwagilo v The Attorney General** (2004) TLR 161. Insisting he submitted that the decision of the tribunal did arise from what had been averted by the parties in their pleadings.

On the second ground, the appellant contended that the trial Chairman faulted himself for failure to properly put into consideration that the appellant had the right to prove his case instead the Chairman considered the respondents' evidence that they have proved their ownership. He valiantly argued that the Chairman considered the respondents' evidence as if they were the ones who lodged the land dispute. He lamented that the appellant's evidence was not considered. To support his submission

he referred this court to section 115 of the Evidence Act, Cap.6 [R.E 2019]. He lamented that the appellant claimed that the respondents trespassed the suit land but the same was not reflected in the tribunal's judgment.

Arguing for the third ground, the appellant complained that the Chairman was wrong to allow the evidence of DW10 that he bought the suit land from Yusufu Said Mgeleke who bought the same from Abdallah Salum under the power of Tukae Rajabu. He claimed that DW10 did not witness when the execution of the sale between Yusufu Said Mgeleke and Abdallah and the power of attorney was not tendered to prove his allegations.

With respect to the fourth ground, the appellant lamented that the Chairman fault himself to believe that the sale of agreements was proved and witnessed by the local government leader while no any leader was called to prove whether they witnessed the sale agreements. To bolster his submission he referred this court to section 112 of the Evidence Act, Cap.6 [R.E 2019] and the case of **Hemedi Saidi v Mohamed Mbilu** (1984) TLR 113.

Concerning the sixth ground, the appellant contended that the Chairman failed to put into consideration that the 2<sup>nd</sup> respondent did transfer the suit property while there was a case lodged in court challenging her

appointment of being appointed as an administrator. It was his considered view that the 2<sup>nd</sup> respondent was not supposed to sell the suit plot in 2005 because her appointment was challenged and as a result, her letter of appointment as an administrator of the estate was revoked in 2016. He added that the deceased family members challenged her appointment by lodging a Probate Cause No. 69 of 2002 and the 2<sup>nd</sup> respondent lost her case. He added that even when she filed an appeal before the appellate tribunal and lost the appeal. Stressing, he claimed that the 2<sup>nd</sup> respondent unlawfully disposed of the suit landed properties.

As to the last ground, the appellant argued that the Chairman failed to evaluate the evidence of the appellant and in his decision, he did not consider his evidence. The appellant further submitted that the Chairman only summarized the appellant's evidence. To support his position he referred this court to page 5 of the tribunal judgment. Fortifying his submission he cited the case of **Hussein Iddi & another v Republic** (1986) TLR 166.

On the strength of the above submission, the appellant beckoned upon this court to find that the tribunal faulted itself to declare the 2<sup>nd</sup> respondent owner of the suit property. He urged this court to allow the appeal and

quash the decision of the tribunal in its entirety with costs and declare the appellant a lawful owner of the suit land.

In his rebuttal submission, Mr. Kuboja took a swipe at the appellant's submission. On the first ground, he contended that the land case at the tribunal was based on ownership of the disputed land and both parties were in a tug of war to prove who had legal ownership and who is not.

The learned counsel for the appellant contended that the appellant claimed to have letters of administration of the estate of the late Tabu Pazi Mwinyimvua thus he has stepped in the shoes of the deceased claiming for legal ownership of the disputed land. He added that the respondents on their side claimed to have a legal right to the land after they purchased it from the 2<sup>nd</sup> respondent who was the first administratrix of the estate of the late Tabu Mwinyimvua.

The learned counsel for the respondents continued to argue that the appellant is misleading this court by stating that the controversy before the tribunal was on the issue of trespass. To support his submission he referred this court to paragraph 6 (a),(ii) of the appellant's application where the appellant claimed that the respondents in 2006 trespassed into the disputed property and erected several buildings therein, and claimed



ownership by saying that they have purchased the disputed property from the 2<sup>nd</sup> respondent. He spiritedly submitted that the respondents claimed ownership of the disputed property and they considered themselves as legal owners of the disputed land. He insisted that the trespassers cannot any way change the controversy from ownership to trespass.

Mr. Kuboja continued to argue that in the written statement of defence the respondents, they claimed that they are lawful owners of the suit landed property. Hence he negates the notion advanced by the appellants that they were trespassers. Stressing he stated that the controversy was on the point of ownership. The learned counsel went on to argue that one of the issues for discussion at the tribunal is the issue of who was the lawful owners of the suit land. It was his view that the said issue determines the question of ownership which was the centre of controversy.

The learned counsel for the respondents forcefully defended the trial court's decision as sound and reasoned. He submitted that the Chairman made a stick to the real question of controversy arising from the pleading of the parties. The learned counsel went on to state that it is trite law that the duty of every Judge, Magistrate, and Chairman is to control the proceedings and framing of the issue being one of the important parts of

controlling the proceedings and the issues framed are proper and to assist the tribunal to resolve the dispute. Stressing, he contended that the court cannot determine the issue of trespass of land without first determining the issue of rightful ownership.

Submitting on the second ground. The learned counsel for the respondents contended that he failed to grasp a relevant submission in connection to the principle of burden of proof. He stated that it is trite law that every case should be decided on its own. He argued that the disputed land originally was owned by Tabu Pazi Mwinyimvua and after her death one Tukae Rajabu Mzindu, the 2<sup>nd</sup> respondent was appointed as an administratrix of the estate of the late Tabu Pazi in 2003 (Exh.D11) and she sold the disputed land to the respondents in 2005.

He added that the 1<sup>st</sup> administratrix of the estate of the late Tabu Pazi had a legal burden to prove the fact of the respondents' ownership. To fortify his position he cited section 115 of the Law of Evidence Act, Cap.6 [R.E 2019]. He added that the respondents were the only ones with knowledge of their purchase of the disputed land from the 1<sup>st</sup> administratrix of the estate of the Tabu Pazi Mwinyimvua and the law required them to prove their ownership. He added that the tribunal did not dwell much on the evidence of the appellant since there was no dispute

that the late Tabu Pazi Mwinyimvua was the original owner and the appellant was the second administrator of the estate of the late Tabu Pazi Mwinyimvua.

With respect to the third ground, Mr. Kuboja contended that the appellant is trying to mislead this court by saying that the evidence of DW10 was hearsay evidence and heard the information of sale from an unknown source. It was his contentious that DW10 testified the issue to how he acquired the disputed land and the series of events were well known to him from the time he purchased the disputed land from Yusufu Saidi Mgeleka on 10<sup>th</sup> September, 2010 and DW10 tendered a sale agreement between Yusuf Said Mgeleka and Abdala Salum under the power of Tukae Rajabu who was the administratrix of the estate of the late Tabu Pazi Mwinyimvua. To bolster his submission he referred this court to section 62 (1) of the Law of Evidence Cap.6 [R.E 2019].

Mr. Kuboja continued to submit that, DW10 has all the qualifications of being direct evidence by the fact the witness was the one who bought the disputed land in 2010 from Yusufu Said Mgeleka. It was his submission that the tribunal considered the evidence of PW10 since it was a shred of direct evidence.

The learned counsel for the respondents combined the fourth and fifth grounds and argued them together. He contended that these grounds are misconceived by the fact that the mode of proving the tendered sale agreements was through the contents itself. He went on to submit that the 2<sup>nd</sup> respondent and 1<sup>st</sup> respondent testified to the contents of the documents that indeed the sale agreements were made. Mr. Kuboja further contended that it is trite law that agreements are between parties who have executed the agreement thus the best evidence was from the documents and the people who executed them. Fortifying his submission he referred this court to the tribunal judgment specifically paragraph 2 of page 6 that there was proof that the 2<sup>nd</sup> respondent has sold the suit land to the 1<sup>st</sup> respondent at various times. He also cited section 100 (1) of the Evidence Act, Cap. 6 [R.E 2019]. He added that the local government leaders' evidence is shown in the documents, thus it was not necessary to call them as witnesses since the dispute was among the parties who executed the sale agreements.

Submitting on the sixth ground, the learned counsel for the respondents was brief and straight to the point. He contended that there was no any court order that was tendered as an exhibit which restrained the 2<sup>nd</sup> respondent from discharging her duties as an administratrix of the estate

of the late Tabu Pazi Mwinyimvua. Supporting his submission he referred this court to section 101 of the Probate and Administration of Estate Act, Cap. 352 [R.E 2019].

On the last ground, the learned counsel for the respondents submitted that the Chairman evaluated the evidence on record properly. Supporting his submission, he cited the case of **Amiri Mohamed v Republic** (1994) TLR 138 that every Magistrate has his or her own style of composing a judgment and what matters is the essential ingredients and these include critical analysis of both the prosecution and the defence. Mr. Kuboja contended that analysis and evaluation of evidence depends on the nature of the dispute that us before the trial court.

He did not end there, he stated that parties did not dispute that the original owner was the late Tabu Pazi Mwinyimvua and the issue of ownership was determined by the Chairman, who analysed the evidence presented by the appellant. Mr. Kuboja insisted that the evidence of both parties were evaluated and analysed in a manner of separating the chaff from grain to come with the final and conclusively decision after evaluation. To buttress his submission he cited the case of **Leonard Mwanashoka v Republic**, Criminal Appeal No.226 of 2014 (unreported).

On the strength of the above submission, the learned counsel for the respondents beckoned upon this court to dismiss the appeal with costs and uphold the tribunal's judgment.

I have revisited the evidence and submissions of both sides during the trial and before this court during the hearing of this appeal. In my determination, I will consolidate the second, fourth and fifth grounds because they are intertwined. The first, third, sixth, and seventh grounds will be determined separately. In order, they appear.

Addressing the first ground, the appellant contended that the Chairman erred in law and fact from framing issue which was irrelevant to the dispute. Before I address the appellant contentions, let me first trace back the untyped proceedings of the District Land and Housing Tribunal. This takes me to the first hearing date on 17<sup>th</sup> January, 2017, whereby the tribunal in the presence of the parties; Mr. Makoko Rashid and Mr. Kiozya, learned counsel for the respondents framed two issues for determination as follows:-

1. *Who is the lawful owner of the suit land?*
2. *To what reliefs are the parties entitled.*

The drawn issues were framed to lead the hearing of the case and assist the tribunal or court to conclude whether the appellant's claims held any semblance of weight. The appellant's on the first ground, is blaming the Chairman for failure to determine the issue of trespass which was not framed by the parties. His claims is related to the quality of the tribunal decision whether the same conforms to the cause of action which in his view is trespass.

Reading the judgment of the tribunal, I have noted that the Chairman considered the two issue framed by the parties. The appellant did not raise this concern at the tribunal, all parties were comfortable with the issues framed and the tribunal determined both issues and arrived at a conclusion. Therefore, first of all, I do find that it is not proper for the appellant to come before this court and blame the tribunal for not including the issue of trespass. Secondly, as rightly pointed out by the learned counsel for the respondents the issue of trespass was first required to be determined after the determination of who is the lawful owner (s). After the determination of the first issue then the tribunal could be in a better place to determine whether the respondents are trespassers or not. In the instant case, the issue of ownership was determined and the tribunal was satisfied that the respondents are lawful owners of the suit landed

properties. Therefore, the appellant's claim is unfounded. This ground is devoid of merit.

With respect to the second, fourth, and fifth grounds, these grounds are related to the burden of proof and sale agreements. The record reveals that the appellant claims that the respondents trespassed the deceased suit land and build therein and claimed ownership of the suit landed property. In determination and analyses of the evidence on record and issues framed the appellant's claims were required to be proved. Therefore, the respondents had to prove whether they were lawful owners of the suit lands. As rightly submitted by Mr. Kuboja there was no dispute that the original owner of the suit land was Tabu Pazi Mwinyimvua, therefore, the respondents who knew how they owned the suit lands were required to prove their case. Section 115 of the Law of Evidence Act, Cap.6 [R.E 2019] provides that:-

*"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that facts is upon him."*

Applying the above provision of the law, the respondents had the legal burden of proving their ownership. Since the suit landed property passed



from the 2<sup>nd</sup> respondent who was the administratrix of the estate of the late Tabu Pazi Mwinyimvua to the respondents when the sale agreement was executed. The appellant disputed that the sale agreements were not witnessed by the local government leaders, Reading the records, I fully subscribe to Mr. Kuboja submission that the local government leaders were not called to testify but their evidence was shown the documents of sale. Therefore, it was not necessary to call them as a witness since the dispute was among the parties who executed the sale agreements. Had it been that the respondents failed to establish their ownership then respondents could be declared trespassers.

With respect to the third ground, the appellant claimed that the tribunal based its decision on DW10 whose evidence was hearsay evidence. The source of information of sale was based on the sale agreement (Exh. D9). In the tribunal judgment, the Chairman stated that DW10 testified that he purchased the piece of land from Yusufu Saidi Mgeleko who bought it from Abdala Salum under the power of Tukae Rajabu. He narrated how he bought the suit land and proved his ownership and the 2<sup>nd</sup> respondent did not deny the DW10 testimony therefore I find that the appellant's claims are unfounded.

Concerning the sixth ground, that the 2<sup>nd</sup> respondent sold the disputed property while there was a pending Civil Appeal No. 160 of 2003 lodged at the High Court. As rightly submitted by the learned counsel for the respondents that the Chairman determined this matter and found that it was mere words, there was no any evidence or no any order or document tendered in court to support their claims. Therefore at the time when the 2<sup>nd</sup> respondent sold the said suit lands to the respondents, she was discharging her duties as an administratrix of the estate of the late Tabu Pazi Mwinyimvua legally. Therefore this ground is devoid of merit.

As to the seventh ground, the appellant's ground is related to the quality of the tribunal judgment whether the same conforms to the requirements of the law. The battleground area as drawn through the issues were canvassed. I have reached this decision after noting that the Chairman in his findings he was guided by the framed issues and all issues framed were imperative and he considered the said issues. This is a requirement of the law as per Order XX Rule 5 of the Civil Procedure Code Cap.33 [R.E 2019] which provides as follows:-

*“In suits in which issues have been framed, the court shall state its findings or decision, with the reason therefor, upon each separate*

*issue unless the findings upon any one or more of the issue are sufficient for the decision of the suit."*

The imperative requirement imposed on the trial courts under the cited provision was given an impetus in the case of **Sheikh Ahmed Said v The Registered Trustees of Manyema Masjid** [2005] TLR 61, wherein it was held that:-

*"It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. A trial court must make **a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect.**"*

[Emphasis added].

The incisive reasoning in the just cited decision was observed by the tribunal Chairman in his judgment. The Chairman also determined the evidence adduced by the parties revealed that they are the lawful owners of the suit landed properties who was the administrator of the estate of the late Tabu Pazi Mwinyimvua. Therefore this ground is devoid of merit.

I am composed in my opinion that the impugned decision is a proper judgment. Consequently, in view of the foregoing, I find no merit in the appeal. Therefore, I proceed to dismiss the appeal in its entirety with costs.

Order accordingly.

Dated at Dar es Salaam this date 22<sup>nd</sup> November, 2021.



  
A.Z.MGEYEKWA

**JUDGE**

22.11.2021

Judgment delivered on 22<sup>nd</sup> November, 2021 in the presence of the appellant and Mr. Kuboja, learned counsel for the respondents.



  
A.Z.MGEYEKWA

**JUDGE**

22.11.2021

Right to appeal fully explained.