

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 138 OF 2018

(Decision of the District Land and Housing Tribunal for Kibaha in Application No. 9 of 2011 dated 7th October, 2016)

AND

(Pursuant to the Ruling and Order of the Court in Misc. Land Application No. 1031 of 2016 (Hon. Kerefu, J dated 25th September, 2018))

JAMES MAJURA GAMBA

(As Lawful Attorney of LUKUBA AMBROSE CHANJI) APPELLANT

VERSUS

DR. HERMAN FREDERICK KISAMO1ST RESPONDENT
NJEMA SAID2ND RESPONDENT
MWENYEKITI WA KITONGOJI AMANI KEREGE3RD RESPONDENT
DR. EDWARD ELIAKIM MOSHI.....4TH RESPONDENT
SASABO ELIAS MPILI5TH RESPONDENT
EMMANUEL LUSHINGE6TH RESPONDENT

Date of last Order: 30/08/2021

Date of Judgment: 04/10/2021

J U D G M E N T

The Appellant alleges to have purchased a farm measuring 10 acres located at Amani area Kerege Bagamoyo in Pwani Region from Mr. and Mrs Sasabo Elias Mpili on 20th November 2010. The First Respondent alleged to have purchased the same farm from one Immanuel Lishinde. According to the first

Respondent, the farm measures approximately 15 acres and he purchased the same on 15th October 2001. On 20th June 2011 the Appellant instituted Land Application No. 09 of 2011 before the District Land and Housing Tribunal for Kibaha seeking for the following orders: -

- i. Declaration that the Applicant is the lawful owner of the Land in Dispute;**
- ii. Respondents be ordered to pay damages to the Applicant to the tune of Tshs 20 Million for denying the Applicant the use of land;**
- iii. In alternative to paragraph 7(a) the Respondents jointly and severally be ordered to refund the purchase price Tshs. 13, 750,000/-;**
- iv. Interest on the Principal amount at commercial rate, 30% from 20th November 2010 to the date of judgement;**
- v. Interest on the decretal amount at Court's rate of 12% from the date of judgement to the date of payment;**
- vi. Costs; and**
- vii. Any other and further orders as the tribunal will deem just and equitable to grant.**

The trial tribunal dismissed the Appellant's Application with costs. It also declared the 4th Respondent to be the lawful owner of the suit land. Aggrieved by the decision of the trial tribunal, the Appellant preferred this Appeal on the following grounds:

- i. That the Honourable Tribunal Chairman erred in law and fact for failure to rule out that the Appellant is the lawful owner of**

the land in dispute after had purchased the same from the then lawful owner;

- ii. That the Honourable Tribunal Chairman erred in law and in fact for failure to order the 5th Respondent to refund the money paid after he declared that the 5th Respondent had no title to pass to the Appellant.**

The Appeal was argued by way of written submissions. The Appellant was represented by Mr. Thomas Brash, learned advocate while the first and fourth Respondents were represented by Mr. Frederick D. Mwakajinga, learned advocate. The second, third, fifth and sixth Respondents did not enter appearance thus, the appeal proceeded ex-parte against them. In determining the Appeal ex parte, the Court considered the fact that this matter was also determined ex parte against the second, third, fifth and sixth Respondent before the trial tribunal.

Submitting in support of the first ground of Appeal, learned counsel for the Appellant argued that the Trial tribunal erred in determining the Application in favour of the fourth respondent because, the Appellants evidence regarding ownership of the suit land weighs more than that of the fourth Respondent. He submitted that, the Appellant tendered a sale agreement executed by him and the fifth Respondent who is his vendor, and minutes of the village assembly which establishes the fifth Respondent ownership over the suit land. He submitted further that, testimonies of the Appellant and his witness establishes that the Appellant is the lawful owner of the suit land.

Commenting on evidence tendered by the fourth Respondent, he argued the same to be weak and does not establish the fourth Respondent to be the owner of the suit land. He submitted that, there is no documentary evidence that was tendered before the tribunal to establish the alleged sale agreement between the fourth and the sixth Respondent. The alleged to be exhibit D1 is not reflected in the proceedings before the Tribunal. He is of the view that, even if Exhibit D1 will be considered to be part of record, it does not establish how the sixth Respondent acquired the land in dispute before disposing the same to the fourth Respondent.

On the second ground of Appeal the submitted that, the trial tribunal, erred in fact to refrain from ordering the 5th Respondent to refund monies paid to him as consideration for the purchase of the suit land. He is of the view that, the tribunal having held that the 5th Respondent had no title over the suit land, it ought to have ordered refund of the purchase price advanced to the 5th Respondent by the Appellant.

In his reply submission the Respondents Counsel argued that the trial tribunal was right in refraining to hold in favour of the Appellant. He first challenged the genuineness of the Exhibit P1. He also pointed out the Appellant's failure to summon witnesses who witnessed the sale transaction between him and Mrs. and Mrs. Sasabo Elias Mpilly. He also challenged the Appellants failure to summon even neighbors from the suit land to establish his alleged purchase and occupation over the suit land. He cited the case of **AZIZI ABDALLAH VERSUS REPUBLIC [1991] TLR** in which the Court insisted on the prima facie duty of the prosecutor to call witnesses who, from their connection with the transaction in question, are able to testify on material facts. He insisted that, in the matter at hand, the Appellant ought

to have summoned Mr. and Mrs. Sasabo Elias to assist him in verifying their ownership over the suit land and the alleged disposal of the land to the Appellant. The learned advocate is of the view that, failure of the Appellant to summon what he considers to be principle witnesses in this matter, made the Appellant's evidence weaker compared to that of the first and the fourth Respondents.

He also challenged evidential weight of Exhibit P2, the Minutes of the Village authority, and P3 Baraza la Matumizi Bora ya Ardhi. He insisted that, the Appellant as the Applicant before the tribunal had the duty to prove his case. He is of the view that the Appellant failed to prove his case.

In his brief rejoinder, the Appellant counsel argued that Mr. Sasabo Elias Mpilly who is the Appellant's vendor was sued before the tribunal. He defaulted appearance and he never filed any defence. It is obvious that such person could not be easily procured to testify as the Appellant's witness. He pointed out that even the Respondent's vendor, the 6th Respondent did not testify before the tribunal.

On the challenges raised against exhibit P1, P2 and P3 he submitted that the same were not challenged before the trial tribunal thus they cannot be raised at Appeal stage.

I have considered submissions by both parties and Court Record. The first ground of Appeal requires this court to re-evaluate evidence tendered before the Trial Tribunal and find out whether the same establishes the Appellant's title over the suit land. In order to prove the Appellant's title over the suit land, Appellant's evidence should prove two issues. First whether the Appellant purchased the suit land from the 5th Respondent and second,

whether the 5th Respondent had good title over the Suit Land to pass the same to the Appellant.

Evidence on record indicates that the Appellant purchased the Suit Land from Mr. and Mrs. Sasabo Eliasy Mpili at Tanzanian Shilling 12,500,000/=. The testimony of the Appellant, PW2 Joseph Philemon Mgaya and that of PW3 Habiba Kassimu Athumani, prove the existence of the sale agreement between the Appellant and the 5th Respondent. PW3 who introduced herself as the Secretary to Kerege Village Office testified that, the Sale Agreement between the Appellant and the 5th Respondent followed all procedures of sale of land at Kerege village. The agreement was tendered as Exhibit P1. With such evidence, the Appellant proved that he executed a sale agreement with the 5th Respondent in which the Appellant paid Tshs. 12, 500,000/- as consideration for purchase of land allegedly belonging to the 5th Respondent.

The Appellant was also supposed to prove ownership of his vendor over the suit land as it is well established that he who does not have legal title cannot pass legal title to another person. There are a number of cases that discussed the necessity of a person passing title to another to have legal title. The decisions are based on the principle that no one gives a better title to property than himself possesses. See the decision of the Court of Appeal of Tanzania in Paschal **MAGANGA VERSUS KITINGA MBARIKA**, Civil Appeal No. 240 of 2017, Court of Appeal of Tanzania at Mwanza.

In proving his title as well as his vendor's title over the suit land, the Appellant who testified as PW1 stated that his vendor had a document indicating that he was allocated the suit Land by the Village authority from 2007. Unfortunately, the Appellant did not tender the document establishing

his vendor's ownership over the Suitland nor did the vendor who was sued as the 5th Respondent appear and testify to establish his ownership over the suit Land.

PW2 Joseph Philemon Mgaya alleged to have seen the document, a letter indicating that the land in dispute is owned by Mr. Elias Sasabo since 2007 and that the said ownership was confirmed by the village Chairman. However, the alleged village chairman was not summoned to testify on the same. PW3 was not involved in the course of execution of the Sale Agreement and she does not know even the location of the Land in dispute.

Section 111 of the Evidence Act, [Cap 6 R. E. 2019] provides that, burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. As correctly submitted by Respondents Counsel, the Appellant is duty bound to prove his title over the suit land. The Appellant did not produce any evidence establishing his vendor's title over the suit land than mere words. Unfortunately, the Court cannot rely on mere words of the Appellant. In such circumstances, I am of a considered view that, the Appellant who is duty bound to prove existence and legality of Mr. Elias Sasabo's title over the suit land, failed to discharge his duty.

For that reason, I don't find any reason to interfere with the findings of the trial Tribunal dismissing the Applicants Application.

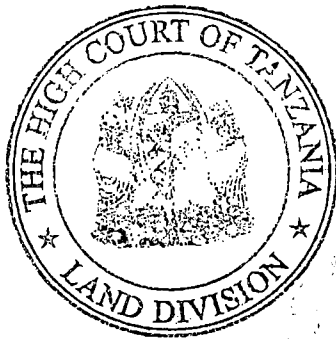
Despite such findings, Court record establishes that the Appellant prayed to be refunded his purchase price as an alternative prayer. The trial Tribunal did not address this prayer. As I found the Appellant to have purchased the suit land from the 5th Respondent who had no title to pass to the Appellant,

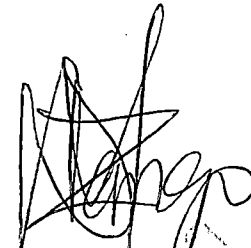
I hereby order refund of Tshs. 12,500,000/= to the Appellant by Mr. Sasabo Elias Mpili as prayed in the Appellant's Application before the Trial Tribunal.

Appeal is hereby partly allowed to the extent expressed in this Judgment.

Given circumstances in this Appeal, I award no costs.

Right of Appeal Explained.




Z. D. MANGO
JUDGE
04/10/2021