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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR- ES- SALAAM

LAND APPEAL NO.26 OF 2019

(Originating from Judgment and Decree of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Land Application number 411/2016 delivered on 29TH day of December 2017)

MOSES MOMBA.....APPEALLANT

VERSUS

HASFA HAMIS.....1st RESPONDENT

HANANGU MASHAURI.....2nd RESPONDENT

JUDGMENT

OPIYO J.

On 17th May 2005 the 1st Respondent above named purchased a piece of land from the 2nd Respondent at the tune of Tshs. 450,000/=, paid in cash. She then erected a structure reaching the linter stage and sometimes in 2006 she travelled to Mbeya and Bukoba respectively to settle her family matters while leaving her land under the care of the 2nd respondent, Hanangu Mashauri. It is further alleged that, the 1st respondent returned to Dar Es Salaam in 2015 and found her land has already been sold to the appellant, Moses Momba. The appellant insisted that it is the 2nd respondent who sold the said land to him. Efforts to settle the dispute between them amicably did not yield any fruits, hence the matter reached the District Land and Housing Tribunal for Kinondoni, here in after referred as the trial tribunal, vide Land Application number 411 of 2016. On 29TH December 2017 the trial tribunal delivered its judgment in favour of the

1st respondent. Against this background, the appellant has preferred the instant appeal basing on the following grounds;-

1. That the Honorable Trial Tribunal erred in both law and fact by putting reliance in the document tendered by the applicant which was not descriptive and specific as to the location of the land in particular.

2. That the Honorable Trial Tribunal erred in both law and fact to disregard the title deed by the Appellant.

3. That the Honorable Trial Tribunal erred in both law and fact by failing to consider the fact that the Appellant had stayed with the property for years having constructed a modern house without any interference from the Respondent or any member of her family while away if at all.

4. That the Honorable Trial Tribunal erred in both law and fact by failing to appreciate the evidence that the Appellant after purchasing the property from the 2ndRespondent there appeared the son of the 2nd Respondent claiming part of the land and was compensated accordingly by the Appellant.

5. That the Trial Tribunal misdirected itself in law and fact in holding that the suit property belongs to the Respondent where there was no adequate and credible documentary evidence adduced by the Respondent to prove her assertion.

6. That the Trial Tribunal erred in law and fact for disregarding the strong oral and documentary evidence adduced by the

Appellant to prove that he is a rightful owner of the suit property.

7. That the Honorable Trial Tribunal erred in law for delivering an unreasoned judgment.

8. That the Honorable Tribunal erred in both law and fact to declare the 1st Respondent the lawful owner of the disputed property without considering and evaluating the evidence on record from both sides.

The appeal was heard by written submissions; Pendo Charles, learned Counsel appeared for the appellant, Advocate Irene Nambuo represented the 1st respondent while the 2nd respondent did not appear to defend the appeal against him.

Pendo Charles learned Counsel for the appellant submitted in support of the appeal for ground 1 and 5 that, the main issue in the Trial Tribunal was who the rightful owner of the disputed property is. The 1st respondent testified before the District Tribunal that she purchased the disputed land from the 2nd respondent herein above and she tendered a Sale Agreement which was admitted as exhibit Pl. According to Advocate Pendo, the said agreement does not bear the name of the respondent but someone else known as KASIFA HAMISI KAYIMBWA. She contended further that, the document neither shows proper location of the land sold nor does it show its size. The same agreement further shows that the land is located at Makongo Juu Kinondoni District Makongo Juu and it is a very big area. These defects create doubts as to the authenticity of the document itself and the reliability of the

evidence in question as the sale Agreement is not descriptive and specific as to the location of the land in particular, therefore, the Honourable Chairperson was wrong to rely on it and the entire testimony of the 1st respondent about buying the suit land and later travelling to Mbeya and Bukoba without any proof of the said facts.

As for grounds 2, 6 and 8, it was submitted by Advocate Pendo that, the appellant purchased the disputed area from the 2ndRespondent. He surveyed it as Plot number 1015 Block B with a Certificate of Title Number 77880. The appellant developed the disputed land by building a modern house in which he and his family are living. He has stayed in the disputed land for a number of years without any interference from the respondents and or any member of their family and tendered proof to that effect which was admitted by the trial tribunal as exhibit ID1. He argued that, this evidence was not considered at all.

She maintained that, the Trial Tribunal ought to have considered this important document as far as the proof of ownership of the suit land is concerned. Advocate Pendo also invited this court to read the observation made by Dr. R.W. Tenga and Dr. S.J. Mramba in their book bearing the title Conveyance and Disposition of Land in Tanzania: Law and Procedure, Law Africa, Dar es Salaam, 2017, at page 330:16 for the value of the registration of right of occupancy that:-

> *"the registration under land titles system is more than a mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confers, affect or terminate that ownership or interest. Once the registration process is completed no search behind*

the register is needed to establish a chain of titles to the property for the register itself is conclusive proof of the title."

She further quoted **from Sarkar on Evidence 14th Edition Vol 11, 1993 at page 1455** that:-

> *"If there are two persons in a field each asserting that the field is his, and each doing some act in the assertion of the right of a possession, and if the question is which of the two is in actual possession, the answer is the person who has the title in actual possession and the other party is a trespasser."*

She argued that, in the instant appeal the Appellant is in possession of titles compared to the 1st respondent. The Appellant has a Sale Agreement which was admitted as exhibit DI and a Title Deed which was receive as IDI. The 1st respondent has nothing at hand even the sale agreement which was tendered as exhibit PI does not bear the name of the 1st respondent, therefore this appeal should be allowed.

As for the 3rd, 4th and 7th grounds of appeal it was stated by Advocate Pendo that, according to the judgment the appellant testified before the trial Court that, he purchased the disputed land from the 2nd Respondent herein in 2006 and started construction on the same year. Nobody interfered his ownership and possession save for the son of the seller who claimed part of the land to be his and was compensated. It is in the judgment that, the son of the 2ndRespondent came with a residential license which was verified before payment was done. Payment to the son of the 2nd respondent was done after the 2nd respondent had been paid. The trial chairperson did not consider all these; instead he declared

the 1st respondent to be the lawful owner of the disputed land based on the document that does not bear her name.

She went on to argue that the Trial tribunal delivered unreasoned judgment. The trial Tribunal did not evaluate properly the evidence before it. There was ample evidence that showed that, the owner of the disputed land is the appellant. She argued further that, the act of the 2nd respondent herein to admit that she sold the disputed property to the 1st respondent and not the appellant indicate conspiracy between the respondents.

In reply to the first and fifth merged grounds of appeal, Advocate Irene maintained that, the appellant is just trying to mislead this Court, by fabricating facts and diverting from what he stated in both tribunals in various occasions. What is seen on the said document is an error in spelling the names of the 1st respondent, whereby it was stated with the "K" as in Khasifa Hamisi Kayimbwa. Furthermore, the evidence of the 2nd respondent who happens to be the vendor to both appellant and the 1st Respondent had confirmed to have sold the said piece of land to the 1st respondent. She went on to argue that, the appellant is trying to invalidate the sale agreement between the 1st respondents, whilst his sale agreement is null and void because at the time the 2nd respondent was selling the suit land to him, he had no good title.

On the 2nd, 6th and 8th grounds of appeal, it was submitted by Advocate Irene that, the appellant is just taking advantage because he has registered the suit land; however, the same registration is unlawful owing to the whole processes of acquisition of the said land by the appellant.

The appellant surveyed the land without even involving the neighbors as per the testimony of DW1, the 2nd respondent. This proves that the appellant had an ill will from the beginning to deprive the 1st respondent of her land.

As for the 3rd, 4th and 5th grounds of appeal, it was submitted by the 1st respondent's counsel that, the appellant has indeed consented that he has invaded the 1st respondent's land as submitted in his submission page 7, the fourth paragraph. The appellant claims that he has occupied the disputed land for a long time, however, it has not superseded the time limit prescribed by the Law of Limitation. By the way, as evidenced from the records, the appellant insisted that, he was sold the disputed land by the 2nd Respondent, and it was right for the trial Tribunal to enter into decision in favour of the 1st Respondent, as the 2nd Respondent had no good title to transfer the ownership as it was observed in the case of **Farah Mohamed V Fatuma Abdallah 1992 TLR 205 (HC)** that, he who doesn't have legal title to land cannot pass good title over the same to another. She therefore, argued for the dismissal of the of the appeal with costs.

In rejoinder, the counsel for the appellant strongly disputed the fact that the 2nd respondent sold the disputed land to the 1st respondent in 2005. She was of the view that, the disputed land has never been sold to the 1st respondent as alleged. The evidence on record shows that, the same was sold to the Appellant by the 2nd respondent and thereafter came the son of the 2nd respondent with a residential License who was also accordingly compensated. This fact has never been disputed neither by the 1st nor the 2nd respondents. The said residential license

was verified before the said compensation which indicated that the said land was registered even before it was sold to the Appellant.

She reiterated that, the sale agreement between the 1st respondent and the 2nd respondent is not descriptive in nature as it does not state exactly which particular area was sold to the 1st respondent by the 2nd respondent.

She went on to argue that, the appellant is the one who is currently in possession of the disputed land. He has built a modern house and occupied the same for about ten years without interruption. It is the duty of the first respondent to prove that the appellant is not the owner.

I have considered the submissions of both parties as given by their respective counsels and the records from the trial tribunal. Discussion on the grounds above will follow the same manner as done by the parties when submitting in respect of this appeal by margining the grounds of appeal.

Starting with the 1st and 5th grounds, the main issue of contention was the sale agreement presented by the 1st respondent at the trial tribunal. According to the appellant's counsel the same is not reliable as it does not bear the name of the appellant and does not describe the size of the suit land. In the said agreement, the buyer appears to be KASIFA HAMISI KAYIMBWA and not the 1st respondent. The counsel for the 1st respondent has replied that the error is just a minor one resulting from spelling mistakes. I have perused the records of the trial tribunal and my findings on this issue goes in line with that of the 1st respondent's counsel. The 1st respondent's name has been appearing differently in different documents

as per the records at hand. Some documents, the name has been written Khashfa (power of Attorney), in others, the name is Hasifa (see payment receipts), also Hafsa as written in the trial tribunals' case file. Therefore, the spelling errors arising in the said document cannot be taken to mean the whole agreement is void or the land was not sold to the 1st respondent. Looking at the records further, I have noted that, there are many spelling mistakes in names of the other parties as well. In the sale agreement between the appellant and the 2nd respondent (exhbit. D1), the vendor's name is written as ***"Anangu"*** and not ***"Hanangu"*** as appearing in the case files. Therefore, if we are not questioning exhibit D1, equally we should not question the sale agreement between the 1st respondent and the 2nd respondent based on the names. For the reasons the 1st and 5th grounds are hereby dismissed.

As for grounds 2, 6 and 8 grounds that touches on trial courts failure to consider appellant's evidence, it was contended that, the appellant has surveyed the suit land and registered as Plot number 1015 Block B with a Certificate of Title Number 77880. He developed the same and built a modern house in which he and his family are living for years with no any interference from any person. In other words, the appellant wants to be left undisturbed on the suit land as it has always been for over a decade. I have perused the records again and found document in ID1, which is a certificate of Occupancy. The name appearing on that document is not (Moses Momba), but Flavianus Mahiti Momba. In such variation, it is easier to hold that the ownership was not of the appellant herein appearing as Moses Momba. I would have been swayed in the same way if not for paragraph 2 of the written statement of defence he filed at trial that, corrected his name to Flavianus Mahiti Momba. Although the trial tribunal

did not effect that necessary change, but such declaration, as it was not disputed proves that he is also known as Flavianus Mahiti Momba. Thus, he stands to be the one who bought, surveyed and developed the suit property and stayed therein to date.

The question that arise is whether, the appellant bought the whole piece of land he surveyed. There is a piece of evidence from the evidence of DW1 who is the 2nd respondent in this appeal, when testifying at the trial tribunal that, the survey done by the appellant covered the 1st respondent's land, and it was done without involving the neighbors. The sale agreement tendered by the appellant shows that, he had bought ¾ acre (exhibit D2) while the one tendered by the 2nd respondent as the correct one shows the size was ¼ of a hector. Second respondent disputed the contract submitted by the appellant as being fake, by allegedly varying the boundaries of the property he had bought, engulfing 1st respondent's land. She also stated that, the appellant conned her in signing the same to conceal his ill will. In my considered view, such allegation is unfounded as the size remained the same save for measurement units used. ¼ of a hector is approximately ¾ of an acre. So, the two documents maintained the same size of property sold to the appellant contrary to what was stated by the 2nd respondent. The above finding takes us to the remaining grounds of appeal which also challenge trial tribunals evaluation of evidence before reaching conclusion.

In grounds ground 3,4 and 7, it was argued that, the trial Tribunal did not evaluate properly the evidence before it. That, there was ample evidence that showed that, the owner of the disputed land is the appellant. The appellant's Advocate argued further that, the act of the

2nd respondent to admit that she sold the disputed property to the 1st respondent and not the appellant indicate conspiracy between the respondents. It has been argued in 1st respondent's favour that, the trial tribunal was correct to decide in her favour basing on the testimony of DW1 who is the 2nd respondent in this appeal (the vendor to both). In my view, for being a person of different words over the same thing depending on the circumstances makes DW1 unreliable witness. Indeed, such character in serious matters like this is doubtful and could insinuate conspiracy or lies as contended by the appellant. Although there is no direct evidence suggesting that there was conspiracy to deny the appellant of his rights over the suit land, but circumstantially, the insinuation of such is justifiable.

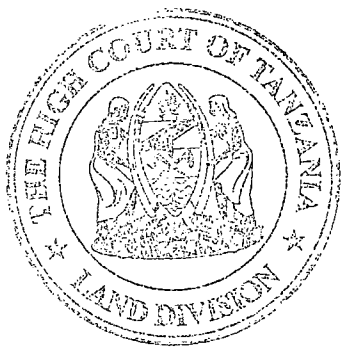
It is on record as testified by the 1st respondent that, at first when she asked the 2nd defendant about the whereabout of her land she left in her custody, the second respondent said she knew nothing. When taken to ward tribunal she admitted selling the land to the 1st respondent and denied knowing the appellant at all. When appellant was also called and produced sale agreement, the story changed that it was a forged agreement as she had not sold to the appellant. Again, during cross examination, first respondent stated that, at the tribunal the second respondent said that she had allowed her to sale the property on her behalf. All these scenarios are different from what the second respondent stated in her testimony. She stated that she had sold a different piece of land to the appellant near the land she sold to the 1st respondent, but she was surprised that the appellant extended his boundary to the 1st respondents land during survey, cunning fraud on part of the appellant. These discrepancies are substantial and could highly shake credibility of

the witness in question (see Joseph Syprian v R, Criminal Appeal No 158 2011 CA).

More insinuation of conspiracy comes from the fact that the 1st respondent alleged that she left the care taking of the property with a two-room structure on it to the 2nd respondent who had sold the property for more than 10 years without communication whatsoever and no any formal handover that was made to that effect. I am alive to the fact that, it is the buyer himself (the appellant) who is to be alert for the choice he had to make and not to buy the land blindly without being aware as to who occupied it at the time of doing such transaction. However, in the circumstances of this matter, it was wrong for the trial tribunal to hold against the appellant for having bought the land blindly. This is because, in the circumstances of this case, no amount of diligence would have kept the appellant on alert as the disputed land was allegedly left for care on the hands of the original owner for over a decade. The land being unsurveyed by then, it was not easy for the appellant to realize that, the land was already sold to another person by the same person years back, if at all. In the circumstances, the appellant stands to be a *bonafide* purchaser for value, if at all the land was resold to him. It is alleged that, the appellant engulfed the appellants land during survey. However, the sale agreement shows almost the same size with what was surveyed or even less in survey, which is only 910 square meters (just ¼ acre not ¾ originally estimated.

The above finding, coupled with the fact that in exhibit P1 no description of the size of property that was sold to the 1st respondent by second respondent was ever given, for possible knowledge of the piece engulfed

by the appellant, if at all, this court is left with no option than finding merits in these grounds too. Consequently, the judgement and decree of the trial court are quashed and set aside. The appeal is allowed to the extent that the appellant is the lawful owner of the disputed property.



M.P. OPIYO,
JUDGE
24/2/2021