

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.181 OF 2021

*(Arising from the decision of the District Land and Housing Tribunal for Temeke
at Temeke in Land Application No.27 of 2020)*

UWESU IDD MBWANA APPELLANT

VERSUS

ZENA YUSUPH RESPONDENT

JUDGMENT

Date of Last Order: 06.12.2021

Date of Judgment: 14.12.2021

A.Z.MGEYEKWA, J

This is the first appeal. The matter originates from the District Land and Housing Tribunal for Temeke at Temeke in Land Application No. 27 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 appellant was the complainant at the District Land and Housing Tribunal for

Temeke in Land Application No.27 of 2020. His claims on ownership of a piece of land. At the District Land and Housing Tribunal for Mkuranga the appellant was so certain that the suit land belonged to him.

The appellant prayed for a declaration that he is the lawful owner of the disputed land, the respondent is a trespasser in the appellant's property. He prayed for the court to issue a demolition order and order the respondent to vacate the suit land and pay general damages of Tshs. 12,000,000/= for trespass. During the hearing of the case the appellant claimed that his uncle one Pongwe Juma Sinde was his guardian, he passed away in 2016 and left behind two children and two widows one is residing in Mwanza, and one in Dar es Salaam where the dispute premises is located. The appellant claimed that the respondent invaded the suit land and constructed four bedrooms when his husband was in Mwanza and after a discussion, the respondent agreed to pay the appellant but she did not honour her promise. Hence the appellant decided to institute a case at the District Land and Housing Tribunal.

In the defense case, the respondent disputed the claims against her. She claimed that the suit premises was owned jointly by the respondent and her

late husband Mwishehe Mohamed Mkokola and the same was a matrimonial house. The respondent claimed that there was no any written or oral agreement to hand over the suit premises to the appellant. She prayed for a declaration that the disputed premises belongs to her and the tribunal to issue a permanent injunction to the appellant and dismiss the suit. The District Land and Housing Tribunal for Temeke determined the matter and declared the respondent' lawful owners of the suit landed properties.

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

- 1. That the Hon. trial Chairperson erred both in law and facts in declaring that the Respondent is the lawful owner of the suit land in total disregard of the adduced evidence showing that the suit land is the property of the late Pongwa Juma Sinde.*
- 2. That the Trial Chairperson erred both in law and facts in holding as she did that before his death late Pondwa Juma Sinde gave the suit land to the Respondent's husband without any proof and in total disregard of the documentary evidence tendered by the Appellant, which shows that the suit land is not part of the Respondent's land.*

When the matter was called for hearing before this court on 29th November, 2021, the appellant was represented by Mr. Mashiku Saba Saba, learned counsel whereas the appellant enjoyed the legal service of Mr. Lufuyo Lumbavu, learned counsel for the respondent.

Getting off the ground was Mr. Mashiku, learned counsel for the appellant. On the first ground, Mr. Mashiku contended that the matter is related to land ownership whereas it was his view that the trial tribunal did not consider the evidence of both parties and the appellant's witness's evidence. He submitted that the disputed plot is at the backside of the appellant and that she does not border with the suit land and there was a Mango tree. He added that the respondent asked the appellant to cut the Mango tree and to build a toilet and when she was cutting off the said tree the appellant's toilet was destroyed thus he repaired the appellant's toilet.

Mr. Mashiku continued to submit that in 2009, the appellant obtained a Certificate of Title and the suit land was measuring 566 sqm. When the owner passed away the respondent constructed a wall, invaded the appellant's land, and constructed three rooms. The learned counsel valiantly argued that the

respondent did not buy the suit land and there is no any evidence to prove her allegations.

Arguing on the second ground, the appellant's Advocate submitted that there was a title Deed registered in 2008 while the owner was alive therefore claiming that the appellant sold the suit land in 2006 is untrue since the same was included as part of the Title Deed. He insisted that the Title shows clear that the respondent entered into the appellant's land Mr. Mashiku strongly argued that had the tribunal directed itself well, it could not reach such a decision.

On the strength of the above submission, the appellant's Advocate beckoned upon this court to go through the District Land and Housing Tribunal proceedings and find out what transpired at the tribunal.

The respondent's Advocate confutation was strenuous. He came out forcefully and defended the District Land and Housing Tribunal's decision as sound and reasoned. From the outset, he urged this court to dismiss the appeal. He submitted that the District Land and Housing Tribunal for Temeke considered and evaluated the evidence on record and found that the owner gave the appellant the said suit land was given to the appellant. The learned

counsel for the respondent went on to argue that in 2006, the respondent was in possession of the suit land and Kongwe Sinde was aware but he did not claim the suit land until November, 2016.

The learned counsel for the respondent went on to argue that the District Land and Housing Tribunal declared the respondent as a lawful owner since it found that the appellant did not raise his claims knowing that he gave it to the respondent's husband. He added that the residential license is not related to the suit land.

Concerning the second ground, the learned counsel for the respondent simply argued that the disputed land was given to the respondent. It was his view that this ground is demerit.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief. He claimed that the appellant was residing outside Dar es Salaam therefore claiming that he saw the respondent developing the suit land is not correct. Insisting, he claimed that the appellant did not bless the trespass. Stressing, the learned counsel for the appellant submitted that the disputed land is part of the appellant's land and related to the residential licenced.

After a careful perusal of the record of the case, the final submissions 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 for Temeke. I have opted to combine the first and second grounds because they are intertwined.

Both grounds relate to the issue of evidence on record. I will determine whether the respondent bought the suit land or was given the suit land by Pongwe Juma Sinda, the owner before his death or whether the respondent invaded the said suit land. The records reveal that the appellant testified to the effect that he has instituted the suit land as an administrator of the estate of the late Pongwe Juma Sinda.

He claimed that in 2012, the respondent trespassed the suit land which was owned by the deceased and build a house with four rooms. PW1 tender a residential licence which was admitted as an exhibit UIM2 to prove that Pongwe Juma Sinde was the owner of the suit land. It was stated that the suit land is not bordering the respondent's piece of land. Mariam Musa (PW2) was married to Pongwe Juma. She testified to the effect that the respondent lives in the backyard of their house. She claimed that in 2014, the respondent invaded their land and build 3 rooms. Zena Yusuph (DW1), the respondent testified to the effect that she moved in the suit land in 2006. She claimed that her husband requested a piece of land and Pongwe Juma gave him a piece of land and a toilet was within the said piece of land. She claimed that they build him another toilet within the appellant's fence.

After perusing the tribunal's records I realized that the disputed area was recognized as the appellant's land and the respondent was claiming the ownership shifted from the appellant to the respondent. However, the respondent's claims that Pongwe Juma gave him a piece of land is not supported by any documentary evidence. The respondent's testimony was mere words.

On the other side, the appellant tendered a document to prove their claims. The record reveal that the in 2016, Mariam Musa Mambo and Zena Yusuf respondent entered into an agreement 'Makubaliano ya Kukabidhi Eneo' the two agreed that Mama Salama accepted to hand over the area to Mama Nadim on 30th May, 2017. However, the one who signed the said agreement was the respondent's daughter and she was asked to write her mother's name. In my respectful opinion the said signature was as good as nothing. Therefore they cannot rely on the said agreement.

In a situation where there is no any documentary evidence on record to prove both parties assertions, it was correct for the District Land and Housing Tribunal for Temeke to draw an adverse inference from such non-production of evidence. Mr. Pongwe Juma passed away on 9th June, 2016 and from that date the appellant was appointed to administer the estate of the late Pongwe Juma on 19th September, 2016. PW1 claimed that in 2012, the respondent invaded the suit land when the late Pongwe Juma was alive. PW2, the wife of the late Pongwe Juma claimed that in 2014, the respondent build three rooms in their plot and she confirmed that Pongwe Juma was alive. PW2 claimed that she informed her husband who was living in Mwanza but until his death, he did not solve the matter. The question to ask is why PW2 and

his late husband had to wait the respondent to build three rooms. At the time when the respondent was building the first room, they did not say anything. Again, the respondent erected another two rooms PW2 did not take any legal action to restrain her. Until the year 2020 when the administrator of the estate of the late Pongwe Juma decided to lodge a case at the District Land and Housing Tribunal for Temeke. The circumstance of this case creates doubt as to why PW2 started to raise his claims after the death of her husband while they saw the respondent building the latrine and the three bedrooms.

It is a principle of law that he who alleges must prove, this is built on the philosophy enshrined in the provision of section 110 and 111 read together with section 3 (2),(b) of the Evidence Act Cap.6 [R.E 2019], requires the person who alleges to prove and the standard of proof in land cases, just like any other civil case, is on the balance of probabilities. This was held in the case of **Magambo J. Masato & 3 others v Ester Amos Bulaya & 3 others**, Civil Appeal No. 199 of 2016, CAT at Dar Es Salaam.

Likewise, the Court of Appeal of Tanzania in the case of **Anthony M. Masanga v Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of

2014 (unreported), cited 8 with approval the case of in Re B [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities states that:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof" foils to discharge it a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened".

In the case before the District Land and Housing Tribunal, the appellant had evidential burden to prove that the respondent was a trespasser but they failed to prove their case.

With the above analyses, and authorities, I find that the District Land and Housing Tribunal analyzed well the evidence on record and noted that the respondent's evidence was heavier compared to the appellant's evidence. In such circumstances, I find that the appellant's claim was an afterthoughts

the same cannot stand. There is no dispute that the suit land was owned by Pongwe Juma Sinde, However, the appellant was required to prove their case instead of shifting the burden of proof to the respondent. Failure to that, it is regarded that the respondent legally occupied the suit landed premises.

Following the above findings and analysis, I hold that in the instant appeal, there are no extraordinary circumstances that require me to interfere with the findings of the District Land and Housing Tribunal for Temeke. The doubts created by the appellant rendered the tribunal to decide in favour of the respondent. See the case of **Jeremiah Shemweta** (supra).

In the upshot, I find this appeal devoid of merits. I proceed to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 14th December, 2021.




A.Z.MGEYEKWA

JUDGE

14.12.2021

Judgment delivered on 14th December, 2021 in the presence of the appellant and the respondent.



AK
A.Z.MGEYEKWA

JUDGE

14.12.2021

Right to appeal fully explained.