

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 109 OF 2020

(Arising from the District Land and Housing Tribunal for Temeke at
Temeke in Land Application No. 375 of 2016)

NAZIMIN MOHAMED RWAMBO (Administrator of the
Estate of the late **MOHAMED SHWEJI RWAMBO**) **APPELLANT**

VERSUS

MAULID TAGWA **1ST RESPONDENT**

WESTON MILANZI **2ND RESPONDENT**

ZUHURA HAMIS ABDALLAH **3RD RESPONDENT**

FESTO KITALI **4TH RESPONDENT**

ASAU LAMECK..... **5TH RESPONDENT**

JUDGMENT

Date of Last order: 15.12.2021

Date of Judgment: 21.12.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is land ownership. The decision from which this

appeal stems is the judgment of the District Land and Housing Tribunal for Temeke in Land Application No.375 of 2016.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: Nazimin Mohamed Rwambo, lodged a suit against the respondents. The dispute started after the death of the appellant's father. The appellant decided to file a suit at the District Land and Housing Tribunal for Temeke claiming that the respondents have trespassed his plot without any permission from the administrator of the estate because his late father did not inform the appellant that he sold the suit land to the respondents. According to the appellant, the boundaries of the suit land are known and there is no any document to prove that the appellant's father sold the suit land to the respondents.

On their side, the respondents denied the allegations. They claimed that they bought the suit land. The 1st respondent bought the suit land from Sabrina Khalef who bought it from Mzee Rwambo. To prove his testimony he tendered Sale Agreements prepared by Mzee Rwambo (Exh.D1). The

4th respondent claimed that he bought the suit land from Shaweji Mohamed Rwambo in 2010, the village Chairman and neighbours were involved in the said sale and constructed a house in 2011, and in 2016 he was alleged for trespass. To prove his case he tendered a Sale Agreement (Exh.D3).

The 2nd respondent testified to the effect that he bought the suit land from Sudi Rwambo in 2004, the ten cell leader one Hamis Kilola witnessed the Sale Agreement (Exh.D4). The 3rd respondent also claimed that she bought the suit land from Mzee Mohamed Rwambo. To support her testimony she tendered a Sale Agreement (Exh.D6). The 5th respondent testified to the effect that he bought the suit land from Gilency Solomon Meena in 2016 and the sale agreement was between Walid Abdul Mwamia and Gilency then Gilecy and the 5th respondent also entered into a Sale Agreement (Exh.D5).

The trial tribunal determined the matter and found that the appellant failed to prove that the respondents have trespassed into the land of Shaweji Mohamed Rwambo. Therefore, the tribunal decided in the favour of the respondents.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged this Petition of Appeal containing two grounds of appeal as follows:-

1. *That, the trial Tribunal, erred in law and fact by not considering the evidence adduced by the appellant showing that the respondents had trespassed the suit land.*
2. *That the trial Tribunal erred in law and fact by not considering the evidence adduced by the appellant's witnesses.*

When the matter was called for hearing before this court on 23rd November, 2021 the appellant was absent, the 1st, 2nd, 4th, and 5th respondents had the legal service of Ms. Benedetha, learned counsel. The matter proceeded *ex parte* against the 3rd respondent who was duly being served but did not show appearance. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant through the assistance of Tanzania Women Lawyers Association filed his submission in chief on 02nd December, 2021 and the 1st, 2nd, 4th, and 5th respondents Advocate filed

his reply on 10th December, 2021. The appellant waived his right to file a rejoinder.

The appellant in his written submission opted to combine the first and second grounds of appeal and argued them together. It was his submission that the Sheweji Rambo was the one who sold the suit land to the respondents but he was not the legal owner of the suit land because he sold the suit land after the death of the appellant's father. He strongly contended that the sale was null and void since the seller was not the owner of the suit land, the transaction was conducted soon after the death of the late appellant's father in August, 2010 and June, 2011.

The appellant went on to complain that Shaweji Rwambo claimed that he was the lawful owner but he did not tender any document to prove his allegations. He added that the respondents were not required to believe the seller based on oral evidence instead of documentary evidence of ownership. He lamented that the local government and neighbours supported Shaweji Rwambo for their own interests. He argued that the seller was required to prove his ownership of the suit land before proceeding with any transfer of the land. The appellant valiantly argued

that Shaweji Rwambo is also a trespasser to that land, therefore the sale agreement was illegal and the tribunal was not required to decide on their favour.

The appellant continued to submit that DW2 said that the seller did not show him his ownership document but the local government confirmed that he was the seller was the owner and DW3 during examination in chief stated that the suit land belongs to him, he purchased it from Sudi Rwambo in 2004 but there was no any document to prove his ownership. He added that the appellant in his testimony testified to the effect that Sudi Rwambo was neither the owner no the beneficiary of the estate of the deceased since he was not the son of the deceased.

It was his view that for those reasons the Sale Agreement was illegal. The appellant went on to claim that the tribunal Chairman in his judgment did not state that the seller was the legal owner of the suit land and it is not true that they purchased the suit land when the deceased was alive.

The appellant did not end there, in his written submission, he contended that the Chairman did not visit *locus in quo* even when he requested him to do so. He testified that he wanted the tribunal to identify the boundaries

in dispute as a result it ended up delivering an unfair decision. He added that the issue of boundaries was featured in the pleadings, proceedings, judgment, and decree, therefore, in his view, it was mandatory for the Chairman to visit *locus in quo*. Reliance was placed on the case of **Said Mnyangule v Maimuna S. Mkwata**, Appeal No. 90 of 2016 (unreported).

The appellant lamented that he has not failed to prove the size of the plot which was owned by the deceased or superficially identify the boundaries of the suit land because no record shows that the tribunal visited locus in quo to identify the boundaries and size of the suit plot. He further said that in 2004, when the respondent trespassed the suit land, the late Mohamed Shwaje Rwambo had a stroke thus Sheweji Mohamed Rwambo mislead the purchaser because of his name is similar to his father.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to allow the appeal, quash the decision of the District Land and Housing Tribunal for Temeke and declare the appellant a legal owner and the respondent to demolish their houses in the appellant's land.

Opposing the appeal, the learned counsel for the respondents started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal.

Ms. Benedeta Shayo, the learned counsel for the respondents submitted that the appellant failed to prosecute his case since he filed his written submission on 3rd December, 2021 instead of 2nd December, 2021. She urged this court to expunge the appellant's written submission. To support her submission she cited the case of **Said Salum Kimbilio (Administrator of the estate of the late Salum Kimbilio) & another v Bakari Amiri Kimbilio & others**, Misc. Land Application No. 76 of 2016 [2018] TZHC 135

Submitting on merit of the appeal, Ms. Benedeta from the outset stated that the appeal has no merit. She complained that the appellant had a burden to prove that the respondent have trespassed into the land owned by the late Mohamed Shaweji Rwambo. She submitted that the appellant had to bring sufficient evidence to satisfy the tribunal on a balance of probability that the respondents trespassed the suit land. She referred this court to section 110 of the Evidence Act, Cap.6 [R.E 2019].

It was her further submission that the appellant has failed to discharge the burden of proof; first, she did not plead that the suit land was owned by the late Mohamed Shaweji Rwambo. Secondly, she and failed to state the date of the alleged trespass and third, the appellant did not state the size of the suit land or the boundaries of the suit land. It was her view that failure to state the size of the suit land and boundaries are serious irregularities.

She insisted that the appellant was required to state the date when the dispute arose. Fortifying her submission she cited the cases of **Ngulo Mtiga (as Legal Personal Representative of the estate of the late Abubakar Omar Said Mtiga) v Tulibako Kyoma**, Land Case No. 40 of 2012, HC Hon. Mwandambo, J (as he then was) and **Gozbert Francis Kashanga v Halmashauri ya Kijiji Katangalala**, Land Case Appeal No. 19 of 2021.

The learned counsel for the respondent further submitted that the appellant in his written submission stated that the respondent had trespassed to the appellant's land without permission from the administrator of the estate because her late father did not say if he sold the disputed land to the respondents. She valiantly contended that the said statement is nowhere featured in the tribunal's record. She insisted that in the absence of a plea in the application that the disputed land was owned by the appellant's late

father and without any cogent evidence to prove the alleged ownership, the submission that the purchase by the respondents was illegal. It was her view that the seller involved the local government and the seller testified at the tribunal and the appellant cross examined them thus the tribunal found that the witnesses were truthful. It was her submission that there was nothing on record to fault their testimonies.

Regarding the issue of visiting *locus in quo*, the learned counsel for the respondents argued that to visit locus in quo is not necessary unless the tribunal thinks it is important to clarify specific issues such as boundaries. She argued that they do not recollect the appellant's request to visit *locus in quo*. Ms. Benedeta also refuted that Shaweji Rwambo mislead the purchaser because his name is similar to the deceased name. She stated that Shaweji Mohamed Rwambo testified as DW6 and he told the tribunal that the land previously belonged to his mother not his father and there was no evidence of misleading the purchasers as alleged.

On the strength of the above submissions, Ms. Benedeta beckoned upon this court to dismiss the appeal with costs.

Before I tackle the grounds of appeal, I would like to address the issue raised by the learned counsel for the respondents that the appellant has filed his written submission in chief on 3rd December, 2021 instead of filing the same on 2nd December, 2021. I am in accord with the learned counsel for the respondents that the appellant did not obey the court order, however, for the interest of justice, I proceed to consider his written submission taking to account that the respondents Advocate managed to file her reply within time, therefore, the respondents are not be prejudiced.

Having summarized the submissions and arguments by both learned counsels, I am now in the position to determine the grounds of appeal before me. In my determination, I will consolidate the grounds of appeal because they are intertwined. The appellant is complaining that the tribunal did not consider the appellant's evidence showing that the respondents had trespassed the suit land. 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 to decide on his favour. The appellant is the one who filed the case at the District Land and Housing Tribunal therefore he has the burden to prove that the respondents have trespassed his late father's land. In proving her case the appellant simply testified that the suit land belonged to his late father Mohamed Shaweji Rwambo who was living at Yombo without stating the date when the cause of action started to accrue.

It is trite law that any proceeding before the tribunal shall commence by an application filled by an applicant. In accordance to Regulation 3 of the Land Disputes Courts (The District Land and Housing Tribunal) GN. No. 173 of 2003. The application is required to contain among others; nature of the dispute and cause of the action, estimated value of the subject matter of the dispute.

I have examined the application amended application dated 26th January, 2016 and noted that Nazimin Mohamed Rwambo (Administrator of the late Mohamed Shaweji Lwambo) did not exactly mentioned the date when the cause of action arose. She simply stated that while she was in the process of collecting and administering the estate of the deceased, herein the respondents herein at different times trespassed the spaces of land which were surrounding the main house and started to divide among themselves and developed permanent structure therein without permission from the administrator of the estate. It is noteworthy that pleading should not mean to put the facts alleged and documents annexed thereto into scrutiny and challenge, but to put the same into a thorough check up so as to satisfy if they establish a *prima facie* case without affecting the jurisdiction of the Court, limitation of actions, cause of action, *locus standi* and any other procedural requirement.

The appellant was required to give sufficient description of the disputed land for instance the size of the suit land to know whether or not the suit land was subject to litigation and to identify the properties in dispute so that if a Decree is passed concerning it, it shall be unworkable.

Additionally, it was important for the appellant to give sufficient description of the size of the plot to determine whether the respondent trespassed into the late Mohamed Shaweji Rwambo's plot or not.

Additionally, the applicant was required to state the value of suit land. In the case of **Hertz International Ltd and another v Leisure Tours & Holidays Limited and 3 others**, Commercial Case No. 74 of 2008, High Court of Tanzania, and Commercial Division at Dar es Salaam (unreported) Makaramba J, stated that:-

***“...failure to make a statement in the Complaint of the value of the subject matter of the suit has an effect on the jurisdiction of this court...In the upshot and for the foregoing reasons the Complaint is hereby rejected by this court due to the omission by the Plaintiff to state the value of the subject matter of the suit for purposes of jurisdiction of this Court as mandatorily required under Order VII Rule 1 (1) (sic) of the Civil Procedure Code, 1966, Cap.33 [R.E. 2002]”.
[Emphasis added].***

Therefore, failure for the appellant to indicate in the application a statement on the monetary value of the subject matter of the suit has an effect on Jurisdiction of the court or tribunal.

The totality of all this demonstrates the appellant's failure to argue her case, and it constitutes an act which goes against the provisions of Regulation 3 of the Land Disputes Courts (The District Land and Housing Tribunal) GN. No. 173 of 2003. In that regard, I fully subscribe to the decision of the tribunal that the appellant was required to state the date when the dispute arose, size and value of the suit land, to enable the tribunal to find out whether it was clothed with jurisdiction to determine the said application and to find out when exactly the respondents trespassed the suit land.

Regarding the issue of *locus in quo*, I accede with the learned counsel for the respondents that it is not mandatory to conduct locus in quo. In the case at hand the appellant submitted that she requested the tribunal to visit locus in quo. However, after I have revisited the tribunal records and guided by the evidence adduced by appellant, it is nowhere shown that she requested the tribunal to visit locus in quo.

All in all, in the situation at hand, the issue of *locus in quo* was not important. I am saying so because the tribunal in its findings noted that the appellant failed to establish her case. Had it been that there was any doubts or ambiguity, then the tribunal had to assess the situation on the ground and to verify the evidence adduced by the parties during the trial. In the cited case of **Avit Thadeus Massawe v Isidory Assenga**, Civil Appeal No.6 of 2017, the Court of Appeal of Tanzania held that:-

“ Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it.”

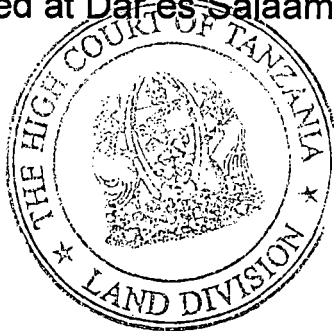
I am in accord with the learned counsel for the respondents that with the evidence on record, nature and circumstance of the case it was not important for the trial court to visit the *locus in quo*.

That said and done, I find that appellant's suit was improperly filed before the District Land and Housing Tribunal for failure to exhaust the description of the suit landed properties. Therefore, in the instant appeal there are no extraordinary circumstances that require me to interfere the

findings of the District Land and Housing Tribunal for Temeke. This appeal is dismissed without costs.

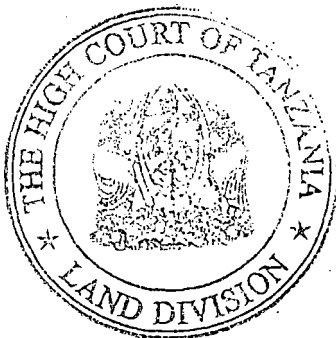
Order accordingly.

Dated at Dar es Salaam this date 21st December, 2021.




A.Z.MGEYEKWA
JUDGE
21.12.2021

Judgment was delivered on 21st December, 2021 in the presence of the appellant and Stephen Lucco, learned counsel holding brief for Ms. Benedeta, learned counsel for the respondents.




A.Z.MGEYEKWA
JUDGE
21.12.2021

Right of Appeal fully explained.