IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND APPEAL NO.32 OF 2020

(From the decision of the District Land and Housing Tribunal for Kinondoni in Application No.450 of 2015)

HIDAYA JUMA (Administratix of the estate of the late Juma Saidi Mtembwe).....**APPELLANT**

VERSUS

MOSHI JUMA AND 18 OTHERS.....**RESPONDENTS**

J U D G E M E N T

MANGO, J.

The appellant instituted Land Application No 450 of 2015 against the respondents for recovery of land located at Mbezi Marambamawili area, Ubungo, Dar es Salaam herein referred to as the suit land. She alleged that the suit land is part of the estate of the late JUMA SAID MTEBWE and she has been appointed to be the administratix of the said estate. The first and the second respondents trespassed into the suit land and sold the same to the 3rd to 19th respondents without consent of the appellant. The appellant prayed for the following orders:-

i. **Declaration that the suit land forms part of the estate of the late JUMA SAID MTEMBWE;**
ii. **Sale agreements between first and second respondent and the third to nineteenth respondents null and void;**
iii. **Respondents trespassed over the Applicant's Plot**

iv. **The demolition order for the hut built on the Plot with title No. 97052;**

v. **Vacant possession of the suit land and costs.**

The trial tribunal held in favour of the respondents. Dissatisfied by the decision of the District Land and Housing Tribunal, the appellant preferred this appeal on the following grounds;

i. That the trial tribunal erred in law and fact by declaring the 3rd to 19th respondents as bona fide purchaser without taking into consideration that the first and second Respondents had not obtained consent to sale from the appellant herein;

ii. That the trial Tribunal erred in law and in fact by entering judgement in favour of the respondents without a proper analysis of evidence adduced by the appellant and her witnesses;

iii. That the Tribunal was not properly constituted as the assessor who concluded the case did not visit locus in quo

iv. That the Hon. Chairperson made error of law and fact when he differed with the opinion of assessor without apparent reason

v. That since the first and the second respondents were not appointed administrator of the estate of the late JUMA SAID MTEBWE, they had no power to sell any portion of land which is part of the deceased estate, They were administrators of their own wrong

The appellant had legal aid services from Legal and Human Rights Centre while the respondents were represented by Mr. Amini Mshana learned advocate. With leave of the court, the appeal was argued by way of written submissions

Submitting on the first ground of appeal, the appellant argued that the suit land was trespassed by the first and the second respondents by selling the same to the 3rd to 19th respondents. The 3rd, 4th, 5th, 6th, 7th,8th,9th,10th,11th,12th,13th,14th,15th,16th,17th,18th, and 19th respondents were duty bound to verify the second and first respondents ownership over the suit land before purchasing plots in the suit land. According to the appellant, the respondents did not perform their duty thus, they cannot be considered to be bonafide purchasers.

On the second ground of appeal she argued that, the disputed land belongs to the late Juma Said Mtembwe. She submitted that, it was wrong for the 1st and 2nd respondents to dispose the same because they had no capacity to dispose the land. The only person who has capacity to dispose properties forming part of the estate of the deceased person is the administrator of the deceased estate. The appellant being the sole administratix of the estate of the late Juma Said Mtembwe, she is the only person who can legally dispose properties forming part of the estate of the late Juma Said Mtembwe.

On the third ground of appeal, the appellant submitted that the assessors declined to visit locus in quo. Therefore the quorum of the tribunal when the visit to the suit land was conducted was not proper. The appellant is of the view that it was necessary for the assessors to visit the suit land so as to clear doubts. In cementing this ground of appeal, the appellant cited the case of **Avit Thadeus Massawe versus Isdory Asega** (Civil Appeal No. 6 of 2017)[2018]TZCA 357(13 December 2018) in which the Court of appeal quoted with approval the decision in the case of **Akosile versus Adeve**(2011) 17 NWLR(Pt.1276) p.263

The appellant contends also that the trial chairman did not advance reasons for differing with the opinion of assessors and that the 1st and 2nd respondents had no capacity to dispose the suit land, as they are not administrators of the deceased estate.

The learned counsel for the respondents argued that the trial tribunal correctly held in favour of the respondent as the appellant contributed to the mischief as they disposed the estate of their late father without following proper procedure. Highlighting the conduct of the appellant the learned counsel mentioned the following;

1. During the time of sale till the filing of Criminal Case No. 209 of 2010 based on obtaining money by false pretence the Appellant was not yet administratrix of the estate of Juma Said Mtembwe from whom consent could be obtained yet she acted from the estate;

2. Further to (1) above, at the time of instituting proceedings in the Ward Tribunal where the Appellant admitted to have received money from Sale of Land by the 1st Respondent to the 18th Respondent **FRANK JOSEPH**, the Appellant was not an Administratrix of the estate of Juma Said Mtembwe from whom consent could be obtained,. Yet she acted for the estate;

3. The Land had been sold by the 1st Respondent on 30/11/2010. At the time, that is, on 30/11/2010 when the 1st Respondent sold land to Juma Omary, the Appellant nor any other person was administrator from whom consent could be obtained , yet she acted or the estate;

4. On 16/07/2011 at the time appellant (as per her own evidence at page 7 of the Judgment) and family purportedly went again to sell land to the same Juma Omary only to find it already sold to him, (page 9) neither the Appellant nor anybody else was act for the estate. And mark you, this sale is not disputed as Juma Omary who

has constructed buildings and is living there is not part of the dispute;

5. The 13th Respondent Hamisi Ramadhani purchased land from Zaidina Hamisi who had purchased it from deceased Juma Said Mtembwe. Zaidina had handed over her land to her brother Issa who authorized the 1st Respondent (Moshi Juma) to sell the Land. At this time the Appellant was not an administrator and in fact the Land had nothing to do with her, yet Hamisi Ramadhani has been sued;

6. That Mussa Masharubu purchased land from Appellant's brother, one Said Juma Mtwmbwe. Mussa Masharubu then instructed the 1st Respondent to sell the Land as it appeared inhabitable. The 1st Respondent then sold the 15th and 18th Respondents. At this time the Appellant was not an administrator from whom consent could be sought and obtained.
7. That even when there was no administrator, the Appellant and family sold land to their sister in law one Zaria Rajabu (Page 5 – 6) and the 1st Respondent was witness.
8. The Appellant herself sold land to one Hamisi when she was not Administrator of the estate of the deceased.
9. The 1st Respondent and Appellant's brother Dotto Juma Mtembwe sold Land to Athuman Juma, Hamisi Mohamed, Hamisi Ramadhani Maulid etc. (4th, 6th 7th, 8th 9th, 10th, 12th and 19th Respondent). Dotto Juma Mtembwe was not an Administrator is not part of the proceedings as he has been deliberately left out. He was not even called as witness to deny sale as well had alleged in the WSD;

10. Dotto Juma and the 1st Respondent sold land to the 14th Respondent Machibya Mayala (DW3) and the Appellant was present when discussion was being made but absent on the day of Sale and payment, yet she came against and sold it to another person thus creating conflict when she has was not administrator of any estate. How on earth can she base her objection on want of being Administrator;

He argued that he who goes for equity must go there with clean hands and that the cited transactions establish that the appellant's hands are not clean

I acknowledge that I have not reproduced everything that was submitted by the parties but I have considered submissions by both parties and court record. According to the grounds appeal, the main dispute in this appeal is the capacity of the first and second respondent in disposing the suit land. It is not disputed that the suit land belonged to the late Juma Saidi Mtambwe. The said Juma Saidi Tambwe passed away on 27th March 2004 leaving behind four heirs;Hidaya Juma, Asha Juma, Dotto Juma, Kassim Juma and Mariam Said Juma. The appellant was appointed to be the administrator of his estate on 10th May 201 2 via mirathi No. 231 of 2012.

The appellant and the 1st and 2nd Respondents are relatives. The first respondent, Moshi Juma is the uncle of the late Said Juma who passed away on 7th July 2009, Saidi Juma and the appellant are siblings, they are all children of the late Juma Saidi Tabwe but from different woumbs, mothers. The second respondents is their grandmother

According to the testimony of the appellant before the trial tribunal, they authorized the 1st respondent to sell the suit land but he was supposed to communicate to them via phone call whenever potential buyers approaches him. Court record establishes that transactions were conducted prior to the appointment of the administrator of their late father's estate as they were executed between the year 2007 and 2011. The disputed sale agreements bear the following dates:-

i. Athumani Juma Mjela and Familia ya Mzee Juma Saidi dates 27/07/2007
ii. Khamis Mohamed Ally and Moshi Juma dates 13 March 2011

iii. Khamisi Ramadhani and Moshi Juma dates 28th November 2009

iv. Frenky Josephat Mbakilek and Moshi Juma dates 22 October 2009

v. MACHIBYA MAYALA and Moshi Juma KN YA Familia dates 6th November 2009

vi. Julius Ally Selemani and Moshi Juma dates 3rd November 2009

vii. Shukuru Mrisho Omari and Doto Juma Said dates 2nd January 2011

viii. Shukuru Mrisho Omari and Doto Juma 18 November 2010

ix. Aisha Juma and Doto Juma 21st November 2009

x. Dived Lazaro and Zena Abdallah 5th August 2011

xi. Mohammed Nassoro and Moshi Juma 9th October 2010

In such circumstances it is true that the first and second respondents had no capacity to dispose the land belonging to the late Tambwe. However each case need to be determined on its own circumstances. Circumstances of the case at hand is a bit different.

The first respondent stated to have obtained oral consent of the heirs of the late Juma Said Mtembwe before selling the land. His testimony is collaborated with that of DW2 Fatuma Hemed Mtumbuka, who was a ten cell leader of the area the suit land is located. According to her both the appellant, first respondent, the late Said Juma and Dotto Juma sold some plots from the suit land. She testified further that, the first respondent used to communicate with the applicant via phone before disposing plots from the suit land and that the purchasers built their houses and nobody questioned their presence in the suit land.

A similar testimony was given by DW3 Machibya Mayala, DW7 Ester Mbakileki, DW8 Julius Ally Selemani and DW9 Shukuru Mrisho. Such evidence establish that the heirs of the late Tabwe including the appellant took part in disposing

the estate of their deceased father before appointment of the administrator. For that reason they cannot seek to nullify their own wrong at the expense of the 3rd to 19th respondents. It is trite law that nobody should benefit from his own wrong.

On the ground that the Trial Chairperson did not give reason that caused him to differ with the opinion of assessor and that the assessor who gave opinion was not the one who took part in the visit to locus in quo. The nature of this case does not require a visit to locus in quo as there is no dispute on the boundaries of the land or the small pieces of land sold to the respondents. The only dispute is on the validity of the sale agreements as it is alleged that the First and second respondent had no capacity to dispose the land. Such dispute can be determined by analysis of evidence adduced by the parties and not a visit to the suit land. Thus, the assessor was competent to give opinion on the dispute because he took part in its adjudication.

The trial chairman gave reasons of differing with the opinion of assessor through analysis of evidence and responding to issues raised at commencement of the trial. In doing so the trial chairman indicated expressly at page 5 of his judgement. I find the same to have satisfied the requirements of section 23 of the Land Disputes Courts Act, [Cap.216 R.E 2019]

For those reasons I hereby uphold the decision of the trial tribunal and dismiss the appeal with costs.

Z. D. MANGO
JUDGE
30/04/2021