

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LAND DIVISION
AT DAR ES SALAAM

LAND APPEAL NO. 42 OF 2019

(From the Decision of the District Land and Housing Tribunal for Temeke in Land
Application No. 130 of 2010)

JUMA ALONE MPENDA.....APPELLANT

VERSUS

ZAINABU KASSIM MAQSOUD.....RESPONDENT

Date of Last Order: 21/06/2021

Date of Judgement: 20/08/2021

J U D G M E N T

MANGO, J.

The Respondent instituted Land Application No. 130 of 2010 before the District Land and Housing Tribunal for Temeke against the Appellant and other five persons claiming ownership over the suit land described as Plot No. TMK/KGN/TNG/24/10424 located at Tungi, Kigamboni, Dar es salaam. The Trial Tribunal held in favour of the Respondent. Aggrieved by the decision of the Trial Tribunal, the Appellant preferred this appeal on the following grounds:

- 1. That the Trial Chairman erred in law and in fact by holding that the Respondent is the lawful owner of the suit premises without considering as to how the Appellant acquired ownership over the land.**

- 2. That the learned Trial Chairman erred both in law and fact by ignoring evidence on record and making a finding that the piece of land in dispute was bought by the Appellant from one Martin Mwita Chacha.**
- 3. That the Trial Chairman erred in law and in fact in arriving at a judgement based on pleadings alone, his own beliefs and conjectures not supported by evidence on record.**
- 4. That the learned Trial Chairman erred in law and in fact in not taking into consideration the evidence produced by the Appellant during trial.**
- 5. That the Trial Chairman erred in law and fact for failure to consider that there was no encroachment to the Respondent land as per her Residential Licence.**

The Appellant prosecuted the Appeal in person while the Respondent had legal services of Mr. Francis Raphael Nkoka, learned counsel. The Appeal was argued by way of written submissions.

In his submission, the Appellant consolidated the first, fourth and fifth grounds of Appeal. Submitting on the consolidated grounds of appeal, he argued that the Trial Tribunal erroneously declared the Respondent to be the owner of a piece of land described in Residential licence No. TMK002946 Comprising of a piece of land that measures 253 square meters. He argued further that, in their testimony, the Respondent and his witness did not testify that the land described in the Appellants Residential Licence has encroached the Respondents Land described in Residential Licence No. TMK. 032600. He submitted that, during trial, nobody challenged the Residential Licence issued to him by Temeke Municipal Council which was admitted as Exhibit D3. He

added that, the Respondent tendered Residential Licence No. TMK.032600 comprising of a piece of land that measures 7014 square meters. The Respondent's Residential licence was admitted as Exhibit P3. He submitted further that, the Respondent did not adduce any evidence proving that the Appellants land comprised in Residential License No. TMK002946 forms part of the Respondents Land described in her Residential Licence No. TMK.032600.

He submitted on the status of a Residential Licence as far as ownership of land is concerned. In this, he argued that, a Residential Licence is equivalent to title issued over land. He challenged the decision of the Honourable Chairman which he considers to have based on the expiry of his Residential Licence. In this he argued that, expiry of the Residential Licence was not at issue, the relevant issue was whether the Appellant was allocated the land described in the piece of land described in the said Residential Licence or not. According to the Appellant the land described in the Residential Licence was allocated to him and he has never encroached the Respondents land comprised in Residential Licence No. TMK.032600

The Appellant argued the second and third grounds of appeal collectively. He argued that, the Trial Tribunal did not consider evidence adduced by the Appellant and his witnesses and other pieces of evidence tendered during Trial. He is of the opinion that, the Tribunal Chairman concentrated only on the time the Respondent purportedly have occupied the suit land and evidence adduced by the Land Officer. He argued that, evidence adduced by the Land Officer concerns mostly a piece of land allocated to TIPPER and not the disputed land. In that regard, he is of the view that it was necessary for the Trial Tribunal to visit the locus in quo in order to ascertain whether the

Appellant's land encroached the Respondent's land. He cited the decision of the Court of Appeal of Tanzania in the case of **Avit Thadeus Massawe Versus Isdory Assenga**, Civil Appeal No. 6 of 2017, Court of Appeal of Tanzania at Arusha as an authority on the necessity of visiting locus in quo for proper determination of the case. He concluded his submission that, by failure to visit locus in quo the Trial Tribunal reached into a decision which is contrary to even the pleadings of the case.

In his reply submission, the Respondents counsel submitted that, the Trial Tribunal did not err by declaring the Respondent to be the lawful owner of the suit land. He argued that, the Appellant did not adduce any reliable evidence to prove his ownership over the suit land and that, the Trial Tribunal had no duty to search how did the Appellant acquire ownership over the suit land.

The learned counsel submitted also on the evidential value of the expired Residential licence which was tendered by the Appellant as a proof of his ownership over the suit land. In this he argued that, the expired Residential Licence has no evidential value and it cannot be relied upon as evidence to ownership of the land described therein. He submitted further that, even if the Residential Licence was valid, it does not make the Appellant free from trespass because, as correctly held by the Trial Tribunal, the Appellant acquired the disputed land unlawfully.

On the second and third grounds of appeal, he argued that the Trial Tribunal considered evidence adduced by all parties to the Application. However, the Tribunal found the Appellant's evidence to be incapable of establishing his ownership over the suit land. He highlighted the fact that the Appellant though alleged to have purchased the suit land from one Martin Mwita Chacha, he did not tender any sale agreement to substantiate such

allegations. There is also no evidence proving that the said Martin Mwita Chacha had any title over the disputed land at the time he allegedly sold the same to the Appellant.

The learned counsel argued further that, evidence adduced by the Appellant was contradictory to the testimony of his witness DW3. While the Appellant alleged to have purchased a bare land containing only one coconut tree, his witness, who alleged to have witnessed the sale transaction, testified that the land had coconut and banana trees. He is of the view that such contradictions make the Appellants evidence unreliable.

On failure of the Tribunal to visit locus in quo, he argued that it is not mandatory. He cited the decision of the Court of Appeal of Tanzania in **Sikuzani Saidi Magambo and Karion Richard Versus Mohamed Robie** in which the Court of Appeal held that;

"We are mindful of the fact that there is no law which forcefully and mandatorily requires the Court or Tribunal to conduct a visit to locus in quo, as the same is done at the discretion of the Court or Tribunal particularly when it is necessary to verify evidence adduced by parties during the Trial."

He submitted further that, in this case, it was not necessary for the Tribunal to visit locus in quo and neither party has requested for such visit and the Tribunal found evidence on record to be sufficient for it to determine the dispute.

In his rejoinder, the Appellant reiterated his submission in chief.

I have considered submissions made by both parties and Court Record. The first ground of Appeal is on whether the Trial Tribunal erred by declaring the Respondent the lawful owner of the piece of land which is described as TMK/KGN/TNG24/86 comprised in a Residential License No. TMK002946. Court Record indicates that the Respondent's claim based on Plot No. TMK/KGN/TNG 24/104 with 7014 square meters located at Tungi Kigamboni, Dar es salaam. In her particulars of cause of action against the Appellant, the Respondent alleged that the Appellant has trespassed into her land by building a structure (big hole) on the piece of land purported to be TMK/KGN/TNG/24/86. The respondent described her land to be bordered by TIPER on the west, Road on the Eastern Part, a coconut tree on the North and a church on the Western side.

It is well established principle that he who allege must prove. In proving her case, the Respondent tendered a sale agreement between Joseph K.M Muyogoro and Frances J. Homvyne dated 15th September 1996 and the Residential Licence No.032600. The sale agreement does not describe the suit land nor does it provide for its size. The Residential licence indicates that the land belonging to the Respondent is approximately 7014 square metres.

The map attached to the residential licence indicates that Plot No. TMK/KGN/ TNG 24/104 and Plot No. TMK/KGN/TNG/24/86 are two different Plots. Unfortunately, As I have pointed out before, the sale agreement tendered by the Respondent before the Tribunal does not indicate boundaries of the Land which was sold to the said Frances J. Homvyne. It only describes the property sold to be a farm containing coconut and Mango trees. Such evidence does not prove the Respondent to be the lawful owner of a piece of land described as TMK/KGN/TNG/24/86 which its residential licence was

issued to the Appellant on 4th January 2006. She only proved her ownership over Plot No. TMK/KGN/ TNG 24/104 through her Residential licence No. TMK 032600.

As correctly argued by the Appellant, the Respondent has never tendered any evidence proving that the land described as plot TMK/KGN/TNG/24/86 forms Part of Plot No. TMK/KGN/ TNG 24/104 or it has encroached part of Plot TMK/KGN/TNG/24/104. With due respect to the honorable Tribunal Chairman I find the first ground of Appeal to be meritorious as the Trial Tribunal did not evaluate properly evidence tendered before it.

In holding so I am alert that the Residential Licence issued to the Appellant has expired. I agree with the counsel for the Respondent that expired documents has no evidential value. However, the expiration of the Residential document did not remove Plot number TMK/KGN/TNG/24/86 from the sketch plan drawn by Temeke Municipal Council. It should be noted also that, the expiration of the Residential Licence did not confer ownership of the disputed plot to the Respondent. Such expiration of the Residential Licence invalidates the Appellants ownership over the suit land. For that reason, the Trial Tribunal was correct to refrain from declaring the Appellant as the lawful owner of the disputed land as he did not have any evidence that proves his ownership over the suit land.

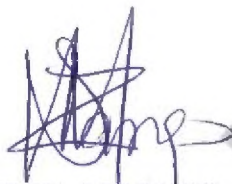
In such circumstances, the Appeal is partially allowed to the extent that the Respondents claim against the Appellant that, he trespassed into his land known as plot No. TMK/KGN/ TNG 24/104 is dismissed. This Court Cannot declare the Appellant to be the lawful owner of the disputed land as the Residential Licence that was issued to him has already expired way back the year 2010. And it is not clear why the Respondent has not renewed his

residential licence. The Respondent may be considered to be the lawful owner of the disputed land after renewal of the Residential licence issued to him in respect of the disputed land.

Land Appeal No. 42 of 2019 is hereby partially allowed to the extent expressed in this judgement. Given the circumstances in this Appeal, I award no costs.

Right of Appeal Explained.




Z.D. MANGO
JUDGE
20/08/2021