

IN THE HIGHCOURT OF UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND APPEAL NO. 70 OF 2020

(From the decision of the District Land and Housing Tribunal for Temeke in Application No. 31 of 2019)

HASHIM ISSA MROPE.....APPELLANT

VERSUS

MWANAHAMISI BAKARI.....1st RESPONDENT

ABDALLAH MAGOMA.....2ND RESPONDENT

CHARLES VENENCE BUSANDA.....3RD RESPONDENT

Last Order: 19/04/2021

Judgement date:28/06/2021

J U D G M E N T

MANGO, J

The Appellant instituted Application No. 31 of 2019 before the District Land and Housing Tribunal for Temeke contesting ownership of a house located at Kilungule Mbagala, Temeke Dar es salaam. Brief facts of the case as contained in the Appellant's Application before the tribunal provides that, the Appellant purchased the suit house from MWANAHAMISI BAKARI, first respondent through ABDALLAH MAGOMA, second respondent on 30th September 2018 at Tshs. 10,000,000/-. He paid 9,000,000 as part of the consideration and agreed to pay the remainder sum in January 2019. Sometimes October 2018 before paying the final instalment he heard that the

said house has already been sold to another person. The Appellant reported the matter to Local Government Authorities and the chairman confirmed that the suit premise was sold to the third respondent since the first respondent had consulted him about the sale but he refused to be involved in the sale. The chairman confirmed that the sale was executed before a Primary Court Magistrate. The appellant prayed for the following reliefs;

- i. To be declared as the lawful owner of the suit house
- ii. Alternatively; be refunded the amount he paid for purchasing the house with an interest of 30%
- iii. General damages and costs of the suit

The respondent also alleges to have purchased the said house from the first respondent and he annexed to his written statement of defence, a sale agreement dated 8th October 2018 between him and the first respondent. He also annexed other documents that establishes the first respondent ownership over the suit land before she sold the same to the third respondent.

The District Land and Housing Tribunal for Temeke ruled in favour of the 3rd respondent. Aggrieved by the decision of the Trial Tribunal, the Appellant preferred this Appeal on the following grounds: -

- 1. That the Trial Tribunal erred in law and fact for failing to evaluate that there is a double sale and that the Appellant was the first one to purchase from the first respondent**
- 2. That the trial tribunal erred in law and fact for failing to consider that the Local Authorities accepted the sale between the appellant and the first respondent and waive the said sale**

just because it did not bear any stamp from the Commissioner for Oaths.

The appellant and the respondent had no legal representation. During hearing the appellant dropped the second ground of appeal and submitted only on the first ground of Appeal. Submitting on the first ground of Appeal, the Appellant argued that, he is not satisfied with the allegations that the 3rd respondent has all documents concerning ownership over the suit land. He submitted that, the third Respondent has never tendered any document before the trial tribunal. According to the Appellant, the Respondent has a sale agreement which does not bear the signature of the vendor and it has never been endorsed by any court. The said agreement dates 8th October 2018. He argued that, if the respondent's agreement will be considered to be valid then the suit property has been sold twice because the appellant purchased the property sometimes September 2018 and the respondent on 8th October 2018. He concluded that he purchased the house before the respondent, thus, he has a better title than the respondent.

In his reply submission the respondent argued that he purchased the suit land from the first respondent and he tendered documents regarding the sale transaction before the tribunal. He submitted that, his sale agreement contains all particulars regarding the sold house while that of the Appellant does not describe the plot purchased by the appellant.

I have considered submissions by both parties and Court record. Court record indicates that Hon. Trial chairman considered weaknesses in the appellant's case especially the sale agreement, payment of consideration and the conduct of the first respondent. In this, he mentioned on page 10 of his judgement

that the appellant's agreement does not contain description of the property he purchased from the first respondent, location of the property is not disclosed and it was not witnessed by a Commissioner for Oaths. In holding in favour of the respondent, the Trial Tribunal considered documents which were annexed to the respondent's written statement of defence. The relevant paragraph reads;

"According to the said agreement which was annexed to the written statement of defence as annexure "A" filed by the 3rd respondent stated clearly that the said Charles V. Busanda purchased a house with No. TMK/CHB/NZSA18/76 situated on the plot measures 177 SQM located at Mbagala Kilungule within Temeke Municipality."

Annexures do not form part of evidence unless they are tendered and admitted as evidence. Thus, it was improper for the trial tribunal to base its decision on documents which were merely annexed to the written statement of defence. In the case of **M/S SDV TRANSAMI(TANZANIA) LIMITED Versus M/S STE DATCO** Civil Appeal No. 16 of 2011 Court of Appeal of Tanzania at Dar es salaam, the Court of Appeal considered the Provisions of Order XIII Rule 4(1) and Rule 7(1) & (2) of the Civil Procedure Code, [Cap. 33R.E 2019] which sets a precondition for a document to be part of record that it should be admitted in evidence. It held that, *it is mandatory that for a document to form part of record of the suit it must first be cleared for admission before it is used in evidence*

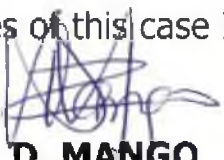
Section 45 of the Land Disputes Courts Act, [Cap.216 R.E 2019] limits the Courts from reversing the decisions of the tribunals on procedural irregularities unless such irregularity has occasioned failure of justice to parties. I am of the view that relying on annexures in this case has occasioned failure of justice on the part of the Appellant who was not afforded an opportunity to see and examine the documents before the same were used as a proof of the respondent's ownership over the suit land.

In addition to the irregularity in the respondent's case, I noted that the Appellant's agreement which was admitted as Exhibit P1 did not comply with the mandatory requirement of paying stamp duty as required by section 47 Of the stamp duty Act, [Cap. 189 R.E 2019]. Thus, the Appellant sale agreement which is the basis of his claim before the tribunal, was admitted illegally in contravention of the provisions of section 47 of the Stamp Duty Act.

In such circumstances, I find it to be in the interest of justice to order trial *de novo* of this matter during which the appellants and respondents documents regarding their alleged title over the suit land can be properly tendered and considered by the Tribunal.

The matter is hereby ordered to be tried afresh by the District Land and Housing Tribunal before a different chairman and a different set of assessors. Given the circumstances of this case I award no costs.




Z. D. MANGO
JUDGE
28/06/2021