

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

LAND APPEAL NO. 118 OF 2018

(From the decision of the District Land and Housing Tribunal for Morogoro in Application
No. 92 of 2014)

BAKARI S. GONZA (As Administrator of
Estate of the late Omary Mbomo).....**APPELLANT**

VERSUS

SWALEHE R. KITULIKE.....**RESPONDENT**

J U D G M E N T

Date of Last Order: 5/3/2021
Date of Judgement: 16/04/2021

MANGO, J.

The appellant instituted Application No. 92 of 2014 before the District Land and Housing Tribunal for Morogoro claiming that the respondent has trespassed into the suit land located at Matombo, Morogoro. According to him the suit land forms part of the estate of the late Omary Mbomo. The District Land and Housing 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 honorable tribunal erred in law and fact for failure to analyse the appellant's evidence and awarding the disputed land to the respondent without concrete evidence;**

- 2. That the honourable tribunal erred in law and fact for failure to identify properly the legality of the sale agreement between the respondent and one Zahoro Salum and reached the wrong decision;**
- 3. That the honourable tribunal erred in law and fact for failure to record the testimony of other appellant's witnesses and failure to call the key witness who alleged by the respondent to witness the sale of the suit premise and reached the wrong decision; and**
- 4. The appeal was argued by way of written submissions.**

The Appellant had no legal representation while the respondent had his submission drawn by Mr. Mashaka Edgar Mfala, advocate.

In his submission in chief, the appellant submitted on the first and third grounds of appeal collectively. He argued that it was wrong for the trial tribunal to draw adverse inference on the actions of the appellant after the respondent started to extract minerals from the suit land. He argued that he did not take long to institute a case to recover the suit land as the respondent trespassed into the suit land in 2011.

On the second and third grounds of appeal the appellant disputed the validity of the sale agreement. He argued that the sale agreement produced by the respondent is not a reliable document on the reason that, it has not been signed by all leaders of the village council. The agreement was signed by only the chairperson Amani R. Kalua. The space for the village secretary was left blank. He also disputed the capacity of the vendor to dispose the suit land. In this, he argued that the vendor one ZAHORO SALUM is not the administrator

of the estate of the late Omary Mbomo therefore, he does not have capacity to dispose the suit land.

The appellant was also aggrieved by the manner exhibits were tendered, He argued that exhibit R4 and R9 did not form part of the pleadings, they were merely introduced in the proceedings during defence hearing. He argued that the manner the two documents were tendered contravenes the provisions of Order XIII Rule 4(1) and 7(1) and (2) of the Civil Procedure Code Cap. 33 R.E 2002.

In his reply submission, the respondent argued that, the appellant failed to prove his case within the required standards. He submitted that the cause of action in the case instituted by the appellant is trespass. In order to prove trespass, the appellant was supposed to prove ownership over the suit land. In his view the appellant failed to prove ownership over the suit land as he did not summon any witness who testified that the suit land belonged to the late Omary Mbomo. The appellant failed even to produce any documentary evidence that proves the late Omary Mbomo's ownership over the suit land. Referring to section 110(1) of the Evidence Act, [Cap. 6 R.E 2019], he submitted that, the appellant had the duty to prove his case. The respondent submitted further that he is the lawful owner of the suit land. He referred to the evidence of DW2, the Village chairman who testified in his favor and the sale agreement between him and Zahoro Salum.

Submitting on the second ground of appeal the respondent argued that, the District Land and Housing Tribunal does not have jurisdiction to determine a dispute on legality of contracts. According to him section 167 of the Land Act,[Cap. 113 R.E 2019], limits powers of the District Land and Housing Tribunals to adjudication of land matters only. The dispute in this case is on

the legality of the sale agreement between the respondent and Zahoro Salum. Such disputes cannot be determined by the District Land and Housing Tribunal.

On the third ground of Appeal the respondent reiterated his arguments that his evidence weighs more than the appellants evidence, thus the trial tribunal was correct to hold in his favour.

I have considered submissions by both parties and court record. Court record establishes that the respondent purchased the suit land from one Zahoro Salum. The sale agreement tendered by the respondent indicates that the said Zaholo Salum sold the suit land on behalf of Tausi Omari and his brothers who are not mentioned. The transaction was executed on 13th January 1993 and it was witnessed by the village chairman of Uponda Village, Matombo Morogoro.

In their submission the appellant and the respondent have not disputed existence of the said sale agreement. The appellant challenged genuineness of the agreement and the respondent challenged the trial tribunal's jurisdiction to determine a dispute based on the alleged illegality of the sale agreement. The agreement in dispute is for disposition of a farm and resulted into a dispute over ownership of the same. In such circumstances, the District land and Housing tribunal have jurisdiction to determine the dispute on ownership of the suit land which was affected by the sale agreement. The law vests powers to the Ward and District Land and Housing Tribunals to determine land disputes. Validity of agreements that affects ownership of land can also be considered in the course of adjudication of land disputes.

As to the validity of the sale agreement, I am of the view that the agreement might be valid unless proved otherwise. The land sold by Zaholo Salum was

not village land which requires the processes of land allocation to be complied with. The role of the village chairman was only to witness execution of the sale agreement. Non- signing of the agreement by the village secretary and other members of the village council cannot by itself vitiate validity of the agreement. Thus, the third ground of appeal is hereby dismissed.

The first and the second grounds of appeal are based on the capacity of Zaholo Salum to dispose the suit land. According to the testimony of the appellant, Zaholo Salum is a grandson of the late Omary Mbomo. He represented himself as being a representative of his mother one Tausi Omary Mbomo and his brothers. According to the respondent and the village chairman, Zaholo was accompanied by his mother and she was the one who instructed him to sign the sale agreement on behalf of the beneficiaries of the suit land. The record establishes that by the time of sale, the estate of the late Omary Mbomo had no administrator. The appellant admitted that he knows Zaholo as one among the grandsons of the late Omary Mbomo. He however does not recognize the sale of the suit land by Zaholo as he was not the administrator of the deceased estate. PW2 Shabani Omari Mbomo testified to the effect that the respondent is a mere trespasser he did not purchase the suit land from anybody.

The actions of the appellant as noted by the trial raises doubts as to whether the family of Omary Mbomo, to be specific his children, did not consent to the sale of the suit land as reflected in the agreement. Court record establishes that the late Omary Mbomo passed away in the year 1982, the administrator of his estate was appointed in the year 2011 which is more than 25 years after the death of Omary Mbomo. The sale was executed in the year 1993 and it was supervised by the daughter of the late Omary Mbomo, Tausi Omary Mbomo. The dispute arose in the year 2014, more than five years from

when sale was concluded and after the death of Tausi Mbomo who supervised the sale. The appellant is of the view that the sale agreement produced by the respondent is a not a genuine document. However, Zaholo Salum who posed as the vendor of the suit land was not sued in this case, nor was he summoned as a witness.

I am of the view that the said Zaholo Salum is a necessary party in this case. His presence will enable the tribunal to have evidence regarding the disputed sale of the suit land and his capacity to sale the land which will assist in determining the dispute to its finality. Failure to join sellers was considered to be fatal in the case of **Juma B. Kadala versus Laurent Mkandee** (1983) TLR. I also find the appeal before me to be incompetent for failure to join the seller who is known and actually a member of the appellant's family. If the appellant has any dispute over the sale of the suit land, he should include Zaholo Salum as the first defendant in the case for recovery of the land.

For that reason the decision of the District Land and Housing Tribunal is hereby set aside. The matter be tried afresh at the option of the parties after inclusion of the vendor, Zaholo Salum as the defendant to this case. Given circumstances of this case, I award no costs. Each party should bear his own costs.




Z. D. MANGO
JUDGE
16/04/2021