IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 50OF 2020

(From the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No. 482 of 2016 Hon. Mbilinyi, Chairperson)

CASSIM ABBAS MALLYA.....APPELLANT

VERSUS

NAIMI BARNABAS.....RESPONDENT

Last Order: 05/03/2021
Judgment date: 16/04/2021

J U D G M E N T

MANGO, J

The appellant filed Land Application No. 482 of 2016 before the District Land and Housing Tribunal for Kinondoni claiming ownership of unsurveyed piece of land located at Ubungo, Dar es Salaam. The trial tribunal held infavour of the respondent. Aggrieved by the decision of the tribunal the appellant preferred this appeal on the following grounds:

1. **That the District Land and Housing Tribunal erred both in law and fact by declaring the respondent to be the lawful owner of the suit premises**

2. **That the District Land and Housing Tribunal erred in law and in fact for declaring that the respondent did not trespass on the Appellants land while there was clear evidence of trespass**
3. **That the District Land and Housing Tribunal erred in law and in fact for failure to analyse the evidence on record arriving into erroneous conclusion**
4. **That the District Land and Housing Tribunal never complied with mandatory legal requirements pertaining to the delivery of assessor's opinion.**
5. **That the trial tribunal erred in law and fact for basing its decision on evidence that was one sided, weak contradictory and false.**

The appeal was argued by way of written submissions. The appellant was represented by Mr. Thobias Kavishe John learned advocate and the respondent was represented by Mr. Danniel Lisanga, learned advocate.

In his submission, Mr. Kavishe consolidated all grounds of appeal that concern evaluation of evidence which are the first, second, third and fifth grounds of appeal. He argued that the trial tribunal was wrong to declare the respondent to be the lawful owner of the suit premises in absence of evidence proving such ownership. The learned counsel submitted that the appellant proved ownership over the suit land on the required standard. He expressed his concern on genuineness of the deed of gift tendered by the respondent as Exhibit D1. In this, he argued that according to the respondent's testimony, the suit land belonged to her late mother. He wonders how the respondent acquired the suit land via a deed of gift drawn by her late father.

On the issue of sawage system being part of the suit land, the appellant argued that, testimony of DW4 Bryson Edward Martin, who constructed the sawage system is very relevant. According to DW4's testimony, he was engage by the respondent to build the sawage system in the year 2014 and he was stopped by the appellant. He added that, during site visit, the sewage pipes were clearly seen near the appellant's door. Thus, the appellant cannot be considered to have trespassed into the respondent's land.

He also submitted on the fourth ground of appeal as the second ground of appeal following consolidation of grounds of appeal. In this ground of Appeal, he argued that the trial tribunal did not comply with section 23(2) of the Land Disputes Court's Act, [Cap. 216 R. E. 2019]. According to him, the cited provision requires the chairman to collect opinion of two assessors. In this appeal, only one assessor gave his opinion following the death of one assessor. And that the chairman did not call upon the said assessor to give his opinion or direct him to give opinion on a future date. He argued that parties are entitled to know the opinion of the assessors. Thus, the chairman ought to have called upon the assessors to give their opinion in writing as required by the law and make sure that such opinion is read before the parties.

In his reply submission, Mr. Liganga argued that the respondent had strong evidence compared to the appellant. According to him, the appellant had only two witnesses while the respondent had five witnesses with strong evidence.

He argued that the appellant purchased a small piece of land from one Modesta S. Kilembe. He later developed the area and in the course of developing the area he encroached into the respondents land. Unfortunately,

the size of the land purchased by the appellant is not indicated in the sale agreement which was tendered and admitted as exhibit P1. On the other hand, the size of the land bequeathed to the respondent is clearly described by the bounderies of the land indicated in the deed of gift. Testimony of DW5 who was conversant with the land in dispute and other respondent's witnesses proves that the appellant has trespassed into the respondents land.

On the second ground of appeal he argued that it is not fatal for the trial chairman to proceed adjudicating the case with one assessor if one of the assessors couldn't make it to the end of proceedings. In this matter one of the assessors passed away thus, the trial tribunal was correct to proceed with the matter with the aid of the remaining assessor. As on the mode of collecting the opinion, he submitted that the trial tribunal collected the opinion of the assessor as required by the law.

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

I have considered submission of both parties and court record. On the issue of evaluation of evidence as contained in the first, second, third and fifth ground of appeal, the law, section 110(1) & (2) of the evidence Act, [Cap. 6 R. E. 2019], is very clear that whoever wishes to be declared to be the lawful owner of the property must prove. The appellant, who was the applicant before the trial tribunal had the burden to prove his ownership over the suit land as he alleged to be the owner of the same. Such position is cemented by the fact that the respondent did not raise a counter claim in his written statement of defence before the tribunal. Thus, he had no duty than to defend the appellant's claim

According to the evidence tendered by the appellant he is the owner of the land described in the sale agreement between him and Modesta. This is proved by the fact that nobody disputed that he owns the land he purchased from Modesta.

The respondent alleged in her written statement of defence filed before the tribunal that the area has been declared to be hazardous land. If that is correct then the land in dispute cannot be allocated to anybody. Despite such allegation the respondent did not tender any evidence that the area has been declared to be hazardous. Section 7(9) of the Land Act, [Cap. 113 R.E 2019] requires notice of declaration of hazarduous land to be published in the Gazzette. In absence of evidence of such declaration this court cannot presume that the area is indeed a hazardous land.

Evidence establishes that the Appellant holds a residential licence No. KND026907 in which the land owned by the appellant is estimated to be 297sqm. Residential licence is among the documents that can be used as a proof of ownership of land. There is no evidence that the appellant has extended his plot beyond what is indicated in the residential licence and the survey map attached to the licence. According to his testimony which has not been controverted, the residential licence was issued by Kinondoni Municipal Council. Thus, any person who wishes to challenge the contents of the residential permit need to join Kinondoni Municipal Council as a necessary party to the case.

For that reason, I find the appellant to have proved to be the owner of the land described in the residential licence. Any person who is aggrieved with the description of the appellant's land as contained in the residential licence should pursue his case against the appellant and the authority which issued the licence as a necessary party.

The appeal is hereby allowed. The decision of the trial tribunal is quashed and set aside. Given circumstances of this case, I award no costs.

Z. D. MANGO
JUDGE
16/04/2021