

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

LAND APPEAL NO. 86 OF 2021

(Originating from Temeke District Land and Housing Tribunal in
Land Application No.343 of 2018 (Hon. P.I. Chinyela, Chairman))

JUMA YUSUFU MYELLA.....APPELLANT

VERSUS

LINDA ABDUL MANU (Guardian of Laila Rashidi)RESPONDENT

Date of Last Order: 11.10.2021
Date of Ruling: 29.10.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by JUMA YUSUFU MYELLA. He is appealing against the decision of Temeke District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 343 of 2018 (Hon. P.I. Chinyela, Chairman).

At the Tribunal the appellant herein was claiming against the respondent among other things, declaration that he is the lawful owner of Plot No.168, Block 17, Kibada Area, Kigamboni Dar es Salaam (the **suit land**). The respondent disputed the claim and filed a counterclaim that she is the lawful owner of the suit land. In paragraph (b) of the prayers in counterclaim, the respondent prayed

for the payment to the tune of TZS 20,000,000/= being the mental anguish and disturbances caused. The application was dismissed for want of merit. Prayers in paragraph (b) of the counterclaim were granted. Being dissatisfied with the decision of the Tribunal, the appellant has preferred this appeal with five grounds of appeal reproduced herein below:

- 1. That, the honourable chairperson grossly misdirected herself in law and in fact by finding that the appellant obtained certificate of title (Exhibit P7) over the suit land without approval of disposition contrary to the unchallenged evidence of PW2 Land Officer from Kigamboni Municipal Council.*
- 2. That, the honourable chairperson grossly misdirected herself in law and in fact by finding that there are two files maintained at the Ministry of Lands over the same disputed land. The original being respondents and temporary being appellants and further that the two files were tempered with, out of which the appellant was given the title deed (Exhibit P7) without any proof of existence of two files at the land registry as well as tempering of the files.*
- 3. That, the honourable chairperson grossly misdirected herself in law and in fact by finding that Juma Said Jongo sold the same piece of land to PW1 and DW1 at different times and further that Kigamboni Municipal and the Ministry of Land went ahead to allocate the plot to PW1 and DW1 contrary to the evidence on record.*
- 4. That, the honourable chairperson grossly misdirected herself in law and in fact by relying on hearsay evidence of DW1 which lead the tribunal to erroneous conclusion that there was two files, one temporary and the other*

one permanent over the same disputed piece of land maintained at the Ministry of Lands.

- 5. That, the honourable chairperson grossly misdirected herself in law and in fact by finding that the Ministry of Lands at Kigamboni Municipal are the ones who erred to accept the sale of Juma Said Jongo to PW1 and DW1 while there is no evidence that the Respondents exhibits are genuine and were presented to Kigamboni Municipal and Ministry for lands.*

With leave of the court the appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Mr. Wilson Edward Ogunde, Advocate; while Mr. Kulwa Shilemba, Advocate drew and filed submissions in reply on behalf of respondent.

In arguing the first ground of appeal Mr. Ogunde said that in proving ownership of the suit land the appellant brought the Land Officer from Kigamboni Municipal Council (**PW2**) to testify. According to **PW2** the suit land was first allocated to Juma Said Jongo. He said in February 2018 Kigamboni Municipal received an application for transfer of the said land to Juma Yusufu Myella, the appellant herein. The same was proved by **Exhibits P1-P6**. That on request from Kigamboni Municipal Council, the Ministry of Lands confirmed that the registered owner was Juma Said Jongo. That after completion of transfer formalities the Commissioner for Lands granted the Certificate of Title

(**Exhibit P7**) to the appellant who constructed a building on the said suit land. He said that the evidence of **PW2**, that the disposition was approved and hence transfer to the appellant was not challenged. That **PW2** denied there was any transfer from the first owner to the respondent and that the evidence of **PW2** was clear that there was an approval of disposition and therefore the transfer was affected and a Title Deed granted in the name of the appellant (**Exhibit P7**).

On the second ground of appeal Mr. Ogunde said that **DW1** testified at the Tribunal that after discovering that appellant had built on the plot and after receiving the Tribunal's summons, she followed the matter to the Ministry Of Lands. At the Ministry there were two files over the same property. That according to **DW2** the Commissioner for Lands said that there was the tampering of files by Kigamboni Municipal Council and the Ministry of Lands. Mr. Ogunde said the respondent did not produce any evidence proving that there was any tampering of the files. She didn't even tender any evidence to prove existence of two files at the Ministry of Lands. He said the respondent should have called an Officer from the Commissioner for Lands to prove the allegations of tampering with the files. He said where there is failure to call such a witness then an adverse inference is drawn

against the respondent that those witnesses, if summoned, would have given evidence contrary to the respondent's interest. Counsel relied on case of **Amina Maulid Ambali & 2 Others vs. Ramadhani Juma, Civil Application No. 35 Of 2019 (CAT-Mwanza)** and section 110 ,111 and 112 of the Evidence Act, Cap 6 RE 2019 (the **Evidence Act**).

As regards the third ground of appeal, Mr. Ogunde said that according to the Land Officer from Kigamboni Municipal Council (**PW2**) the sale transaction conducted in February 2018 was between Juma Said Jongo and the appellant. **PW2** clearly stated that they never received any application from respondent. The respondent also admitted that she never went to Kigamboni Municipal Council. He said the respondent contradicted herself that it was her husband who bought the suit land and that it was a gift to their daughter. However, the respondent's husband was not called to testify. That even one Malik Ramadhan said to the respondent that he was the one with the duty to lodge disposition documents for responsible authorities was not called to testify. He insisted from the foregoing that respondent did not have any evidence to prove that she bought the suit land from

Juma Said Jongo. It was therefore wrong for the Tribunal to hold that Juma Said Jongo sold the suit land twice.

As regards the fourth ground of appeal, Mr. Ogunde submitted that the Tribunal relied on hearsay evidence that there were two files at the Ministry of Lands. That **DW1** said the Commissioner for Lands said there are two files maintained at the Ministry of Lands. That the original had the respondent's documents and the other had the appellant's documents. That the Commissioner did not testify at the Tribunal and therefore the court cannot rely on hearsay evidence. He relied on the case of **Zacharia Kabengwe vs. The Editor Msanii Africa News Paper, Civil Reference No. 03 Of 2010, (CAT-DSM)** (unreported) where the Court among other things stated that the Court is generally precluded from acting on facts which are hearsay.

On the fifth ground Mr. Ogunde reiterated the evidence of **PW2** that, the only evidence of transfer received and acted upon was that of February 2018 between Juma Said Jongo and the appellant, was not shaken. He said it was wrong for the Tribunal to conclude that Kigamboni Municipal Council erred to accept the Sale Agreement of

Juma Said Jongo to **PW1** and **DW1**. That there is no evidence that Kigamboni Municipal Council accepted the sale between Juma Said Jongo and the respondent (**DW1**). He thus prayed for the appeal to be allowed with costs.

In reply Mr. Shilemba said the appellant tendered **Exhibit P4** which is a letter dated 26th March 2018 where Kigamboni Municipal Council enquired from the Ministry of Lands about the history of the suit land. The letter was responded through **Exhibit P5**, that the suit land was originally owned by Juma Said Jongo who applied for approval for disposition to the respondent on 23/09/2010 and Certificate of Approval was given to **PW1** on 31/05/2012. He said on 24/02/2018 Juma Said Jongo applied for approval of disposition but no Certificate was given. That **Exhibit 5** noted that Juma Said Jongo was the owner and no letter was given to **PW1** to show that the file was traced. Further, on 24/08/2018 the Land Registry gave the Title Deed to **PW1** (**Exhibit P7**). Counsel insisted that the appellant failed to prove that the Certificate of Approval was issued by the Commissioner to approve the disposition from Said Juma Jongo to the appellant. He said that the Certificate of Title issued was contrary to the provisions of the law which requires disposition to be approved by the

Commissioner for Lands. He relied on sections 36, 39, and 62 of the Land Act Cap 113 RE 2019 and Regulation 3 of the Land Regulations, 1960 (GN No.101 of 1960), section 41 (1) of the Land Registration Act Cap 334 RE 2019 and the case of **Abualy Alibhai Aziz Vs Bhatia Brothers Ltd [2000] TLR 288**. He insisted that it was proper for the Tribunal to rule that the appellant obtained the Certificate of Title (**Exhibit P7**) without approval of disposition and therefore the said disposition is inoperative.

Further, Mr. Shilemba argued that the Tribunal held at page 10 of judgment that the respondent was the first to purchase the suit land from Juma Said Jongo. That the same decision was reached after the Tribunal's analysis of the facts, documentary evidence and testimonial evidence of both parties. He insisted that even if the issue for determination was who is the rightful owner as argued by the appellant, still the answer was in favour of the respondent as the respondent was the first buyer therefore, the seller could not pass the title to the appellant by virtue of priority principle. Counsel relied on the case of **Ombeni Kimaro vs. Joseph Mishili T/A Catholic Charismatic Renewal, Civil Appeal No.33 Of 2017 (CAT- DSM)** (unreported) in which among other things the Court held that the

seller having first sold the suit land to the appellant, then he had no good title to pass to the second respondent. He said that the fact that appellant had Certificate of Approval did not prove that the appellant is the lawful owner of the suit land. That the Certificate of Title is not ipso facto proof that appellant is the lawful owner of the disputed land. He relied in the case of **Melchiades John Mwenda vs. Gizzele Mbaga And Two Others, Civil Appeal No.57 Of 2018 (Cat-Dsm)** (unreported)

Mr. Shilemba consolidated the second and fourth grounds of appeal. He reiterated that the respondent was the first to purchase the suit land from Juma Said Jongo and appellant purchased the second in 2018 and the Tribunal held the same at page 10 and page 11 of its judgment. He insisted that the Tribunal's decision did not rely on hearsay evidence as alleged by the appellant. That the decision was based on **Exhibit P1 to P7** and that of the respondents **Exhibit L1 to L6**, and after weighing the evidence, the Tribunal concluded that the respondent is the lawful owner of the suit land. He said that, even if the Municipal Council and the Ministry of Lands were not joined in the suit, the same could not have changed the position that respondent was the first to acquire the suit land.

Mr. Shilemba further submitted on the third and fifth grounds jointly. He said that both Sale Agreements by appellant and respondent referred Juma Said Jongo as the seller. That the property referred is Plot No.168 Block 17 Kibada area in Kigamboni. He therefore said the argument by the appellant that Juma Said Jongo did not sell the suit land to both parties has no merit since the same is stated in the Tribunal's judgment. Counsel added that appellant's argument that **Exhibits L1-L6** are doubtful is untenable as the same documents were received at the Tribunal without any objection. That **Exhibit P1** collectively show that the appellant bought the suit land from Juma Said Jongo on 24/02/2018 when the said seller no longer had title to the suit land. He added that the evidence of **PW2** that there were no transfer documents from the respondent were disapproved by **Exhibits L1-L6** by the respondent which is the Sale Agreement. He said **Exhibit L1-L2** are the receipts of the Sale Agreement, transfer form, notification for disposition, application for approval for disposition and fees paid. That if all these documents were never presented to the authorities for processing as argued by the appellant, then one must ask how the respondent got **Exhibit L6** which are receipts of the fees paid for the transfer process. He said

the answer is that there was an application for transfer of the disputed property which necessitated issuance of control number and receipts thereafter. Counsel prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Ogunde reiterated his main submissions.

Having gone through submissions by the parties, the main issue for determination is whether this appeal has merit. The parties are not at issue with description of the suit land, that is, Plot No.168, Block 17, Kibada in Kigamboni. It is further, not in dispute that the original owner of the suit land is Juma Said Jongo who on diverse dates disposed the suit land to the appellant and respondent. **Exhibit L-1** is the Sale Agreement between Juma Said Jongo and the respondent herein. The said agreement was executed on 23/09/2010. Again on 24/02/2018 the same Juma Said Jongo sold the same piece of land to the appellant herein vide **Exhibit P-2**. The important point for consideration here is who had better title over the suit land at that stage. It is without doubt that respondent had a better title over the suit land than appellant. The respondent bought the suit land earlier than the appellant, that was on 23/10/2010, whereas the appellant bought the same on 24/02/2018. It is obvious that Juma Said Jongo

had earlier transferred his rights over the suit land to the respondent. He later purported to transfer the same rights to the appellant. However, that is contrary to the famous Latin maxim *Nemo dat quod non habet* meaning that no one can give better title than he himself has. Juma Said Jongo having sold the suit land to the respondent on 23/10/2010 he remained with nothing. He did not have any further interest in the suit land. Therefore on 24/02/2018 he sold nothing to the appellant herein as his interest on the suit land had been relinquished and transferred to the respondent herein. In the case of **Mished Chunilal Kotak Vs Omary Shabani & 2 Others, Misc. Land Application No.617 of 2020 (HC-Land Division)** my Sister Hon. S.M. Maghimbi, J had this to say at page 10:

"At this juncture I am in agreement with Mr. Chitale that during the sale of the suit house to the applicant herein the third respondent had no better title to pass to the applicant. The situation is a pure case of the principle of Nemo dat quod non habet or no one can give better title than he himself has. This common law rule means that the first person to acquire title to the property is entitled to that property not withstanding any subsequent sell of the same."

It is without doubt therefore that appellant being the latter buyer after the respondent, he did not acquire any interest over the suit land.

On the other hand, and without prejudice to the foregoing, both parties attempted to acquire a Title Deed over the suit land. **Exhibit L-2** shows that Juma Said Jongo earlier commenced the process for Title Deed. On 23/09/2010 he made an application for the transfer of Right of Occupancy in favour of respondent. On the very same date he notified the Commissioner for Lands of the said disposition. On the same date Juma Said Jongo applied for Approval for Disposition in favour of respondent and on 31/05/2012 Commissioner for Lands approved the said disposition in favour of the respondent. However, no Title Deed was issued to the respondent.

Further, the process for acquiring the Title Deed to the appellant commenced on 24/02/2018 when the same Juma Said Jongo applied for transfer of the Right of Occupancy in favour of the appellant. Notification for disposition was made on 29/06/2018. Juma Said Jongo made an Application for Approval in favour of the appellant on 24/02/2018. Certificate of Title was issued in favour of the appellant on 20.08.2018. Honestly speaking, it leaves a lot of questions as to why the respective authorities continued to process application for the Title Deed in favour of the appellant in 2018 while knowing exactly that the respondent had way back in 2012 started processing

the Title Deed and the process had reached an advanced stage and this notwithstanding the same authorities issued the Title Deed to the appellant in 2018. Obviously and as correctly stated by the learned Chairman, the Title Deed to the appellant was issued contrary to the law as at the time of sale of the suit land to the appellant the seller one Juma Said Jongo did not have good title to pass on to another person. In the case **Farah Mohamed Said vs. Fatuma Abdallah [1992] TLR 205** it was stated:

"Who does not have legal title to land cannot pass good title over the same to another..."

Simply stated, where a person does not have a good title over the land, the said person cannot pass such title to a third person. In the present case Juma Said Jongo did not have good title to pass on to the appellant having sold the suit land to the respondent. It is also questionable on how the Title Deed was issued considering that the respondent had earlier on processed the Title Deed and the said process was pending, facts which were in the knowledge of the authorities.

Without prejudice to the above there is also the principle of priority to be considered. In situations where there are competing interests


on the same subject matter, the Principle of Priority comes into play. The principle carries the maxim "*he who is earlier in time is stronger in law*". This means the first in time prevails over the others. In other words, if rights are created in favour of two persons at different times, the one who has the advantage in time should have advantage in law. (See: **The Law Articles of India: Civil Laws, Doctrine of Priority in Property Law by Pallavi Ghorpade**).

In the present situation as correctly pointed out by Mr. Shilemba, the seller Juma Said Jongo sold the suit land to the respondent on **23/10/2010** and again on **24/02/2018** he sold the same suit land to the appellant. It is apparent that the sale transaction between Juma Said Jongo and the respondent was prior to that of the appellant. In other words, title passed to the respondent prior to that sale transaction and Sale Agreement between the Juma Said Jongo and the appellant was signed and came to a completion. In that regard, the interest by Juma Said Jongo had already been transferred to the respondent herein and he thus did not have interest to pass on to the appellant.

Suffice to say, it was the respondent who firstly acquired better title than the appellant and she was the first in whose favour the process of acquiring Title Deed was initiated. Thus, it is the respondent who is the lawful owner of the suit land. The appellant having acquired no interest from the original owner (Juma Said Jongo) then the issuance of the Title Deed was void and as it was processed on non-existing rights over the suit land.

That having been said, the entire appeal is devoid of any merit and I proceed to dismiss it with costs.

It is so ordered.


V.L. MAKANI
JUDGE
29/10/2021

