

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

LAND APPEAL NO. 197 OF 2020

(Originating from Kinondoni District Land and Housing Tribunal in
Land Application No.418 of 2018 (Hon.Wambili, Chairman))

MATILDA MATIGANA.....APPELLANT

VERSUS

PETER KIULA.....1ST RESPONDENT

BROWN MWAKALEBELA.....2ND RESPONDENT

PAULO KUBE MASANJA.....3RD RESPONDENT

GABRIEL BENARD.....4TH RESPONDENT

Date of Last Order: 23.09.2021

Date of Ruling: 18.10.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by MATILDA MATIGANA. He is appealing against the decision of the Kinondoni District Land and Housing Tribunal at Ilala (the **Tribunal**) in Land Application No. 418 of 2018 (Hon.Wambili, Chairman).

At the Tribunal the appellant herein was claiming against the respondents' part of surveyed one acre of land located at Goba within Ubungo Municipality Dar es Salaam (the **suit land**). The application was dismissed for want of merit. Being dissatisfied with the decision of the Tribunal, the appellant has preferred this appeal with eight grounds of appeal reproduced herein below as follows:

1. *That, the trial tribunal erred in law and fact by deciding the case in favour of the respondents without considering the adduced evidence of the appellant to prove the ownership of the appellant land.*
2. *That the trial tribunal grossly erred in law and fact by failing to properly scrutinize or evaluate the evidence adduced by the appellant herein and her witness.*
3. *That the trial tribunal erred in law and fact and grossly misdirected itself on deciding that the 2nd respondent is the lawful owner and seller of the disputed land in his absence and without having any justification to prove his allocation to the disputed land.*
4. *That the trial tribunal grossly erred in law and fact in not making a finding that the 3rd respondent had failed to prove that he who purportedly sold the land to him had proprietary interest and rights of ownership which the seller could lawfully pass to him.*
5. *That the trial tribunal grossly erred in law and fact on deciding the case in favour of the respondents by referring to the evidence of the quashed decision of Goba ward tribunal in a fresh suit or land application.*
6. *That the trial tribunal erred in law and fact on failure to consider the evidence of PW2 (Selemani Athumani Mkutano) by denying his evidence.*
7. *That the trial tribunal grossly erred in law and fact by departing from the findings of both trial tribunals and the assessor's opinion that the appellant is the lawful owner of the disputed land.*
8. *That the trial ward tribunal erred in law and fact by being biased to the respondent and the trial proceedings were tainted with fraud making them to reach into the decision.*

With leave of the court the appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Ms. Happy Mgallah, Advocate; while Advocate Kelvin Kidifu drew and filed submissions in reply on behalf of the 1st and 3rd respondents. The appeal proceeded ex-parte against the 2nd and 4th respondents.

In arguing the appeal, Ms. Happy gave a brief background of the appeal. As for the first ground of appeal Ms. Happy said that at the Tribunal the appellant mentioned a copy of ownership document to be one of the relevant documents that make part of the application. She said that it is not true that the appellant did not produce evidence of ownership of one acre as decided by the Chairman. She said that Counsel for the 1st and 3rd respondents objected the admissibility of the said document it being a copy. She insisted that the Chairman was wrong in not admitting the said copy, being secondary evidence. She said that the appellant was in possession of the secondary evidence simply because the 1st respondent had asked her to give him the original document and gave back a different document showing that the appellant owns half an acre. She said further that the Chairman could have accepted the secondary evidence under

section 95 of the Civil Procedure Code RE 2019 (the **CPC**) and section 65 (b) and (c) of the Evidence Act Cap 6 RE 2019 (the **Evidence Act**).

Ms. Happy consolidated the 2nd and 8th grounds of appeal and argued that the Tribunal failed to analyse the evidence adduced by the appellant's witnesses. That the Chairman failed to take in account the fact that the 1st respondent misled the appellant into giving her original documents which showed that she owned one acre of land. That the Chairman stated in the judgment that the facts were not pleaded. She said that the Chairman failed to evaluate and scrutinize the evidence of **PW2** and **PW3** which clearly shows how the appellant came into occupation of 1 acre of land. That **PW2** was the one who allocated the said piece of land to the appellant and **PW3** was present during the said sale and he is her neighbour as they were together allocated land in 2000. She relied on the case of **Leonard Mwanashoka vs. Republic, Criminal Appeal No. 226 Of 2014** (unreported) cited in the case of **Shaban Adam Mwajulu & Baraka Msafiri Mwakapala vs. Republic, Criminal Appeal No.131 of 2019** in which among other things it was held that, it is one thing to summarize the evidence from both sides separately and another thing

to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. She submitted that in the case at hand the Chairman failed to put the evidence to a proper evaluation process which is not right and it is biased. She submitted that the omission to evaluate the appellants evidence by the Chairman is fatal as it was so decided in the case of **Hussein Iddi & Another vs. Republic [1986] TLR 166.**

Arguing the 3rd and 4th grounds of appeal Ms. Happy said that one of the issues at the Tribunal was the absence of Brown Mwakalebela at the Ward Tribunal. That it was important for both buyer and seller to be present and be heard by the Tribunal. She said that the Chairman decided that the matter should be returned to the Ward Tribunal since Mwakalebela was a necessary party to the case as a vendor. That when Mwakalebela failed to appear at the Ward Tribunal, it was directed that the matter should be filed at the District Tribunal having mandate to summon Brown Mwakalebela. That the Chairman preceded with the matter at the Tribunal without summoning the said Mwakalebela and decided that Mwakalebela was the rightful owner of the disputed land in his absence. She said therefore the Chairman was wrong in deciding that the 2nd and 3rd respondents are the rightful

owners of the suit land and that the 4th respondent had not trespassed the appellant's plot. That Mwakalebela was the most crucial and necessary part in the said decision. Counsel relied on the case of **Abdullatif Mihamed Hamis vs. Mahboob Yusuph Osman & Another, Civil Revision No.6 Of 2017** (unreported) where it was stated that if a suit is instituted by or against a particular identifiable group, all the members of such a group have to be impleaded whether in personal or in representative capacity. She insisted that it was important for Mwakalebela to appear at the Tribunal and testify on whether he was allocated the suit land in 2000 and whether he sold the same to the 3rd respondent in 2012. Counsel stressed that Brown Mwakalebela is just an imaginary person created to deprive the appellant's rights over the disputed land.

Arguing the 5th ground of appeal, Ms. Happy said that the Chairman of the Tribunal erred in making reference to the decision of the Ward Tribunal which was quashed by Hon. Lung'wecha. That the Chairman pointed out the evidence of **PW2** as adduced at the Ward Tribunal. She submitted that the matter was not by way of appeal to the Tribunal rather it was a fresh suit.

On the 6th ground of appeal, Counsel for the appellant said that the Tribunal failed to consider the evidence of **PW2** who was among the key witnesses to the appellant herein as he was the one who allocated the land to the appellant in 2000. That **PW2** clearly stated that he had never seen or heard Brown Mwakalebela before this dispute. That he has never allocated the suit land to him. That he even refused to have signed **Exhibit D2** and document which shows that the appellant owns half acre instead of 1 acre. That at the Tribunal **PW2** even doubted his signature in **Exhibit D1** and assessors reached a conclusion that the signature of **PW2** be tested. That as the Chairman was looking to decide in favour of the respondent, he therefore neglected to conduct test of signature. Counsel relied on the case of **Thabita Muhondwa Vs Mwango Ramadhani Maindo & Another, Civil Appeal No.28 Of 2012** (unreported) as cited in the case of **Iddi Ally Msumangilo (As an Administrator of the Estate of The Late Lydia Elisali@ Lydia Mushi) vs. TIB Development Bank Limited, Equity Bank (Tanzania) Limited & Norberty Donatus Kayugwa, Land Case No.161 Of 2016.**

Ms. Happy submitted on the 7th ground of appeal that the assessor's opinion was that the appellant is the lawful owner of the suit land

because **PW2** who allocated land to the appellant and others testified that he does not know Brown Mwakalebela and he never allocated land to him in 2000. The assessors further advised that the signature of **PW1** appearing in **Exhibit D1** be tested. That the Chairman ignored the opinion and ruled that the 2nd and 3rd respondents are the rightful owners of the disputed land and that the 4th respondent was not trespasser. She insisted that the decision of the Tribunal contain a lot of illegalities which this court should rely on in allowing the appeal with costs.

In reply, Advocate Kidifu submitted to the 1st ground of appeal that pleadings are intended to solely put parties and assist the court on the issues of law which are in contention and need redress, that pleadings in themselves do not substitute evidence tendered in court. That the appellant during trial did not tender any document to prove her ownership of the suit land. He said that list of relevant documents annexed to the application are not evidence to prove appellants case unless admitted in evidence during the hearing or else the allegations are admitted by other party. He relied on the case of **Mbaraka Abdallah Al Said & Another vs. National Insurance Corporation of (T) Limited & Another, Commercial Case**

No.72 Of 2003 (HC-Commercial Division DSM)(unreported). He insisted that the appellant did not tender document to prove ownership of the suit land. He added that even if the appellant tendered secondary evidence, the Tribunal is bound to reject admission of the same until when proper procedures are followed as provided under section 68 of the Evidence Act which requires proper notice to be given to the person who has the original. That the process was not done hence the Tribunal could not admit secondary evidence. He said that in the appellants application, there is nowhere the appellant made averments that the 1st respondent asked her to give him the original documents so that changes can be made as per new rules. Mr. Kidifu said in the absence of those allegations, the Chairman was right to disregard the assertion. He said **PW2** testified that she did not collect ownership documents when the land was allocated to her on 2000. He said that a prudent man would ask where did the appellant get the secondary evidence when she did not have any when required to tender at District Commissioners office. He insisted that the appellant did not have ownership document showing grant of 1 acre of land.

Submitting on the 2nd and 8th group of appeal, Mr. Kidifu said that the Tribunal scrutinized and evaluated the evidence presented before it. That there was no fraud or illegality as claimed by the appellant. He submitted that the Tribunal could not have allowed making up of new case which were not pleaded as parties are bound by their pleadings. He said **PW2** who was the appellant's witness testified that appellant had no allocation documents. That it was **PW2** who introduced the appellant to the 1st respondent where they proceeded to issue another document to prove ownership of the land. That it was **DW2** who was measuring the land by counting his footsteps. Therefore, some got ¼, ½ and 1 acre and even above. That the assertion was corroborated by **PW3** on cross examination. He said that the evidence of the appellant was full of inconsistencies. Most of their testimonies was uncorroborated and this court has an avenue as the first appellate Court to come out with its finding.

Submitting for the 3rd and 4th grounds, Mr. Kidifu said that the law of joinder and misjoinder of parties to the suit is very clear. That it is the applicant's duty to sue those parties against whom relief can be claimed. However non-joinder of necessary party is crucial especially where there is dispute involving seller and buyer transaction. That it

was the duty of the applicant to affect the summons to the 2nd respondent which she failed because the whereabouts of the 2nd respondents was unknown. That the 2nd respondent was served by appellant herein via a substitute service under Regulation 9 (c) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 GN 174/2003. He further submitted that the 2nd respondent's failure to enter appearance would have been crucial if he was the sole respondent. However, the records show that **DW1, DW2, DW3, DW4, and DW5** knew Brown Mwakalebela and that by **Exhibit D2** was allocated land since 2000 where he owned the same without interference until 2012 when he sold the same to Paul Kube Masanja (3rd respondent) through **Exhibit D3**. That witnesses to the sale agreement testified that the 3rd Respondent did prove acquisition of the disputed land. He said that the testimony of **PW2** denying to know Brown Mwakalebela cannot be believed by this court as it was not believed by the trial Tribunal because he changed his testimony from that which he testified at the Ward Tribunal. He said that the remedy for non-appearance is well known and that it was the applicant's duty to prove her claim without relying on the weakness of the defence.

Submitting for the 5th ground of appeal Mr. Kidifu said that it is true that the testimony of **PW2** at the Tribunal was inconsistent to what he testified at the trial Tribunal and that the decision of the Ward Tribunal was quashed when the matter was appealed. However, he said that **PW2** gave his testimony before judicial body (Ward Tribunal) which he later changed his version of testimony. That any prudent person would question such a move and that did not amount to any illegality.

On the 6th ground Mr. Kidifu said that **PW2** has never denied to have signed **Exhibit D1**. It was **PW2's** testimony that appellant had no document proving allocation of land to her and when the appellant was given a proof of land which she was allocated by the then local authority **PW2** testified to have signed **Exhibit D1**. Counsel further reiterated his previous submission on **PW2's** denial to have known Brown Mwakalebela. He added that **PW2** never denied having signed **Exhibit D1** and that the appellant's Counsel had never perused the trial Tribunal's proceedings. He said that there is no need of undergoing signature tests as **PW2** testified that he signed **Exhibit D1** and that under section 95 of the CPC the trial Tribunal has no power to deny **PW2** signature.

In response to the 7th ground of appeal, Mr. Kidifu said that the Tribunal is not bound by the opinion of assessors as per section 24 of the Land Disputes Courts Act, CAP 216 RE 2019. That the chairman is only required to give reasons as to why he is differing with their opinion. That the Chairman of the Tribunal gave reasons at page 10 of the typed judgment as to why he departed from the opinion of assessors. Mr. Kidifu concluded that appellant had failed to prove her claim on balance of probabilities and therefore this appeal lacks merit.

In rejoinder Ms. Happy for the appellant reiterated her main submissions and added that during the trial the appellant tendered a copy of Sale Agreement which was not taken in to consideration by the Chairman. That appellant stated that she was directed by the 1st respondent as local government leader to surrender the original sale agreement so that changes can be made as per the new rules and the appellant remained only with the copy of the Sale Agreement. That the evidence of the vendor (**PW2**) was also disregarded. She said that the 1st and 3rd respondents alleged that the 2nd respondent one Brown Mwakalebela was allocated the suit land in 2000 and sold the same to the 3rd respondent in 2012. However, the 2nd respondent

never appeared to testify and it was wrong for the Tribunal to rely on the statements which were not proved by the 2nd respondent. She insisted that no one can give what he does not possess and since the 2nd respondent did not prove to lawfully own the suit land therefore, he could not pass the same to the 3rd respondent.

The main issue for consideration is whether this appeal has merit.

I have taken time to go through the grounds of appeal as raised by the appellant together with submissions from both parties herein and noted that the entire appeal rests on the weight of evidence by the parties at the Tribunal. At the Tribunal both parties relied on the Sale Agreements together with testimonies of their witnesses. It is the contention of the appellant's advocate that the Sale Agreement by the appellant was disregarded by the Chairman at the Tribunal. On the other hand, Counsel for 1st and 3rd respondents stated that the appellant did not have any ownership document during the hearing. The records of the Tribunal show that among the documents listed by the appellant was a copy of ownership document (**Exhibit D1**). The 1st and 3rd respondents relied on **Exhibit D2** which is the allocation document to the 2nd respondent (Brown Mwakalebela), who

later disposed the said land to the 3rd respondent vide **Exhibit D3** which is the Sale Agreement. The rationale of narrating all this is to show that the decision of the District Tribunal was entirely based on the ownership documents. Now, were the ownership documents by the 1st and 3rd respondents more credible than those of the applicant/appellant. It is on record that the ownership document (**Exhibit D1**) by the appellant was not considered by the Chairman simply because it was a secondary evidence. Ms. Happy for the appellant was of the view that the Chairman was wrong for failure to consider secondary evidence by the appellant. She stated that the appellant failed to produce the original copy of the Sale Agreement because the 1st respondent had taken the original copy which witnessed that the appellant owns one acre of land and gave back a different document showing that the appellant owns only half an acre. However, there is no proof that the appellant actually gave the said original copy to the 1st respondent. It is doubtful as to why the appellant accepted the document witnessing the ownership of half an acre while knowing that it is not the same document, he gave to the 1st respondent. I expected that the appellant would have initiated a complaint against the 1st respondent once he noticed that the 1st respondent had tampered with her document. Further, I am also in

agreement with Counsel for the respondent that the applicant did not follow procedures laid in the section 68 of the Evidence Act for her to prove the contents of the secondary evidence. There was no notice given to the 1st respondent, the Tribunals record do not show that notice was given, only that the appellant in the Tribunal mentioned that she would rely on the copy of the ownership document (**Exhibit D1**). Since the appellant failed to fulfil this condition, I am of the settled mind that the Chairman did not err when he rejected a copy of ownership document by the appellant. **Exhibit D2** witnesses that the 2nd respondent was in 2000 allocated half an acre and he disposed the same to the 3rd respondent in 2012 vide **Exhibit D3**. The two documents were not disputed at the Tribunal and therefore they outweighed the appellants evidence since her ownership document was not admitted. Documents admitted in evidence are the only documents that can be treated as forming part of the record and if a document is not on record, it cannot be relied upon (**Japan International Corporation Agency (JICA) vs. KHAKI Complex Limited [2006] TLR 343**).

On the issue of assessors' opinion, as correctly submitted by Mr. Kidifu, the same is not binding on the Chairman. He is at liberty to

depart from the opinion of the assessors only that he should furnish reasons as to why he has decided to depart from opinion of his wise assessors. The duty was fulfilled by the Chairman in the 9th ,10th and 11th pages of the Tribunal's typed judgment where he clearly stated the position of the wise assessors and why he decided to depart from their opinion.

On the above basis, I am of the settled view that this appeal lacks merit and is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
18/10/2021

