

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 25 OF 2022

(Arising from Land Appeal No. 02 of 2021, Kinondoni District Land and Housing Tribunal and Original Land Case No. 0019/2020, Mabwepande Ward Tribunal)

STEVEN AMANDUS NGONYANI..... APPELLANT

VERSUS

AMOS RUBEN..... RESPONDENT

JUDGMENT

Date of order: 23.09.2022

Date of Ruling: 04.10.2022

KADILU, J.

This is an appeal against decision of the District Land and Housing Tribunal for Kinondoni (Hon. Rugarabamu - Chairperson), Land Appeal No. 02 of 2021 delivered on 08.02.2022. The petition of appeal consists of 4 grounds as follows:

1. The Chairperson of the DLHT erred in law and fact in raising its own ground of appeal and using it to determine the appeal without affording parties right to argue on it.

2. The Chairperson of the DLHT erred in law and fact in wrongly faulting the Ward Tribunal's findings based on evidence presented before it and reversed the Ward Tribunal's decision without cogent, supportable and reasonable grounds.
3. The Chairperson of the DLHT erred in law and fact in failing to correctly analyze and evaluate evidence on record leading to a wrong conclusion.
4. The Chairperson of the DLHT erred in law and fact in that, according to evidence on record, the respondent stated to have purchased the disputed land from Ally Omari while his witness stated that the respondent bought land from Ally Shabani.

The appellant prays for the appeal to be allowed, judgment and decree of the DLHT to be reversed, Ward Tribunal's decision be restored and appellant be declared as lawful owner of the disputed land. Finally, costs of this appeal and proceedings below be awarded to the appellant.

Brief facts of the dispute are that, on 1/6/2015 the appellant purchased a piece of land in Mabwepande measuring 40*60-foot steps from Mohamed Haji Hassani for Tshs. 10,000,000/=. Mohamed Haji Hassani is said to have derived his ownership through purchase from Kitenge Simon on 27/12/2014.

On 7/1/2020, the respondent purchased a piece of land alleged to be bordering the appellant's land. The respondent purchased his land from Ally Shabani for Tshs. 1,200,000/= and its size was 20×20-foot steps.

In April 2020, the dispute arose as to who is the lawful owner of a piece of land measuring 20×20-foot steps. The appellant alleges that the said piece of land belongs to him, being part of his whole land measuring 40×60-foot steps and that the respondent had encroached into it. On the other hand, the respondent claims to be a lawful owner of the disputed piece of land as he had purchased it from Ally Shabani. The dispute was referred to Mabwepande Ward Tribunal (Land Case No. 0019/2020) whereby the appellant was declared a lawful owner of the disputed land.

Aggrieved by that decision, the respondent appealed to the DLHT for Kinondoni which declared him a lawful owner of the disputed land. Dissatisfied with the decision of Kinondoni DLHT, the appellant preferred the present appeal to this court. The respondent did not file a reply to the petition of appeal. During the hearing of appeal, he appeared in person while the appellant was represented by Mr. Amini Mshana, the learned Advocate. The Advocate for the appellant started by praying for the adoption of the petition of appeal by the court.

He then submitted that the DLHT's Chairperson erred in law and fact in raising her own ground of appeal and using it to determine the appeal without affording the parties right to argue on it. In determining the appeal, the chairperson of the DLHT observed that the appellant herein did not call a person who had sold the disputed land to him as a witness. This was not among the grounds of appeal. The learned Counsel for the appellant argued that the Tribunal Chairperson was supposed to give opportunity to parties to address her on this point.

The Advocate cited Order XXXIX, Rule 2 of the CPC [Cap. 33 R.E. 2019] which provides that appeal shall be heard on the basis of the grounds presented to the court and where the court has raised a point on its own motion, the parties should be afforded an opportunity to be heard on the raised point.

He also referred to the case of *Said Mohamed Said v Muhusin Amiri & Another*, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported), it was stated that:

"...a trial judge is obligated to decide the case on the basis of the issues on record. As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, the new question or issue should be placed on record and the parties must be given opportunity to address the court on it."

The learned Advocate stated that, the Chairperson of the DLHT was duty bound to decide the appeal on the issues on record and when a question arose, she was required to give opportunity to the parties to address her on that question. In the case cited above, the Court went on to insist that a decision of the court should be based on the issues which are framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice.

In contesting the appeal, the respondent elaborated that it is not surprising that he purchased a disputed land for Tshs. 1,200,000/= only because in Mabwepande those are normal prices. He also told the court that Ally Shabani considered him as his young brother so, he sold the disputed land to him for a relatively low price. He therefore submitted that the court has to declare him a lawful owner of the disputed land because the sale agreement and payments were conducted in the street government's office. He prayed for the appeal to be dismissed.

After having passed through the grounds of appeal and submissions of the parties, I now determine each ground. Starting with the 1st ground of appeal, it is undisputed that the court may raise any point in its own motion, but the only condition is that before determining such point, the parties must be accorded the right to heard. This right is enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania [Cap. 2 R. E. 2002] and several precedents including, *Judge in Charge, High Court at Arusha & the A.G. v. Nin Munuo Ng'uni* [2004] TLR 44; *Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma*, Civil Appeal No. 45 of 2002; *Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority*, Civil Appeal No. 20 of 2018 and *Ponsian Kadangu v. Muganyizi Samwel*, Misc. Land Case Appeal No. 41 of 2018.

In the records of the Tribunal, it is not indicated in anywhere that after raising that point, the parties were called to respond. In this regard, I agree with the learned Counsel for the applicant that it was improper for the Chairperson of the DLHT to raise a point and proceed to determine it without engaging the parties. As such, the first ground of appeal succeeds.

I now turn to determine the 3rd and 4th grounds together before I consider the 2nd ground of appeal. The appellant alleges in the 3rd ground of appeal that, the Chairperson of the DLHT erred in law and fact in failing to correctly analyze and evaluate evidence on record leading to a wrong conclusion. The gist of this assertion as stated by the Counsel for the appellant is that, during the hearing of appeal, it was shown clearly how the appellant got the disputed land and a sale agreement was tendered. It was proved that the disputed land is just part of the whole land owned by the appellant so, he could not be expected to have separate evidence proving that the said portion of land belongs to him.

With due respect, after having read the judgment of the DLHT, it is clear that evidence from all witnesses and documents of both parties has been analyzed from page 3 to page 5 of the judgment. Basically, decision of the Chairperson of the Tribunal was based on the point which she raised that; the appellant did not call a person who sold land to him as a witness. Consequently, this ground of appeal has no merit and therefore, I dismiss it.

In the 4th ground of appeal, the appellant avers that the Chairperson of the DLHT erred in law and fact in that, according to evidence on record, the respondent stated to have purchased the disputed land from Ally Omari while his witness stated that the respondent bought his piece of land from Ally Shabani. The Advocate contended that the witness' evidence was contradictory and full of inconsistencies. He told the court that the respondent's witness failed to describe the exact person who sold the land to him before selling the same to the respondent. According to him, the witness was not reliable.

The record shows that the name 'Ally Omari' appeared only twice in the Tribunal's records and the respondent explained that it might be a typing error, but the name of a person who sold land to him is Ally Shabani. Since the said Ally Shabani testified in the Tribunal and no other person named Ally Omari did the same, I think I should not spend much time on this ground of appeal. I have examined the record of the Ward Tribunal as well as that of the DLHT, it is true that there was an interchange between the name 'Ally Omari' and 'Ally Shabani,' but they do not appear as two different persons. In addition, there are a number of typos in the Ward Tribunal's records so, it is no wonder that Ally Shabani was sometimes referred to as Ally Omari.

Much as it has not been shown that the typing error has caused miscarriage of justice to any of the parties, this ground of appeal is also devoid of merit.

Lastly, I resolve the 2nd ground of appeal. The appellant claims that the DLHT's Chairperson erred in law and fact in wrongly faulting the Ward Tribunal's findings based on evidence presented before it and reversed the Ward Tribunal's decision without cogent, supportable and reasonable grounds. Counsel for the appellant explains that in the DLHT, the matter proceeded by way of written submissions. But the Ward Tribunal had an opportunity to visit the disputed land, to see and hear evidence direct from the witnesses. Moreover, in the DLHT, the two assessors who participated in hearing of the appeal opined that the appellant herein was the lawful owner of the disputed land.

Despite all these, the Chairperson of the DLHT departed from the assessors' views and the Ward Tribunal's findings without assigning a strong reason for doing so. According to the learned Counsel for the appellant, the Chairperson did not cite any law or authority on which she relied on, in deciding the appeal. He averred that the Chairperson relied on logic and her own common sense.

On this ground of appeal, the records of the Ward Tribunal indicate that the appellant called Athuman Njama Juma as a witness of the sale agreement between the appellant and Mohamed Haji Hassani. Mohamed Haji Hassani also testified that he got ownership of his land by purchase from Kitenge Simon on 27/12/2014. On the other hand, the respondent called Ally Shabani who sold the disputed land to him. He also presented a sale agreement between himself and Ally Shabani.

However, in the Ward Tribunal and the DLHT, Ally Shabani did not disclose the date and mode that he had used to acquire his piece of land. Both the assessors observed that the appellant acquired the disputed land before the respondent and that the respondent's land is within the appellant's land. In the absence of evidence that the appellant had sold part of his land to the respondent or the sale was authorized by him, it raises suspicion on the lawfulness of the respondent's ownership. It is clear from the decision of the Ward Tribunal and opinion of the assessors in the DLHT that the appellant is the lawful owner of the disputed land.

The respondent, though purchased a piece of land, he did so from a person who had no ownership over the land that he purported to sell. It is a settled legal principle that, a person who has no title cannot pass title to another,

and where one has a defective title, it is the defective title that passes to the purchaser. As already shown, Ally Shabani was unable to demonstrate the lawfulness of his title over the disputed land. Having no title over the land which he purported to sell to the respondent, the purported sale of land between Ally Shabani and the respondent did not exist in law.

In view of this, I have no reason to interfere with the findings of the Ward Tribunal and the assessors in the DLHT. It is settled law that a second appellate court should not lightly interfere with the concurrent findings of fact by the two courts below except where it is evident that such concurrent findings of fact, were a result of misapprehension, misdirection or non-direction of the evidence or omission to consider available evidence. This has been stated in numerous cases including *Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores v. Jariwaiia t/a Zanzibar Hotel* [1980] TLR 31; *Samwel Kimaro v. Hidaya Didas*, CAT-Civil Appeal No. 271 of 2018 (unreported) and *Fatuma Ally v. Ally Shabani*, CAT-Civil Appeal No. 103 of 2009 (unreported).

There being no suggestion that the concurrent findings of fact by the Ward Tribunal and the assessors in the DLHT were a result of misapprehension, misdirection or non-direction of the evidence occasioning miscarriage of

justice, this court cannot interfere with the findings that the appellant is the lawful owner of the disputed land. Consequently, the appeal succeeds. The appellant is hereby declared a lawful owner of the disputed land. The respondent is ordered to demolish any structures he had developed on the appellant's land within 45 days. Each party to bear his own costs of this appeal and proceedings below.

Order accordingly.



A handwritten signature in blue ink, appearing to read "Kadilu", is written over a dotted line.

KADILU, M. J.

JUDGE

4.10.2022

Judgment delivered on 4th October, 2022 in the presence of Mr. Rochus Assenga and Anitha Fabian, Advocates for the appellant and Mr. Amos Ruben, Respondent appearing in person.



A handwritten signature in blue ink, appearing to read "Kadilu", is written over a dotted line.

KADILU, M. J.

JUDGE

4.10.2022.