

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

MISC. LAND APPEAL NO. 105 OF 2021

*(Originating from the District Land and Housing Tribunal for Kibaha in
Land Application No. 27 of 2016)*

ESHA HAJI APPELLANT

VERSUS

ROMANUS HAULE 1ST RESPONDENT

PETER PETER JUNIOR 2ND RESPONDENT

JUDGMENT

Date of Last Order: 11.03.2022

Date of Judgment: 16.03.2022

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Nianjema Street at Bagamoyo District within Pwani Region. The decision from which this

appeal stems is the judgment of the District Land and Housing Tribunal in Land Application No. 27 of 2016.

The material background facts to the dispute are not difficult to comprehend. They go thus: the respondent alleged that he bought the suit land in 2013 from the second respondent and in 2014 the appellant invaded the suit land and she claimed that she is the lawful owner of the suit land. The respondent urged the trial tribunal to declare him the lawful owner of the suit land and restrain the appellant and second respondent to enter into the suit land. The trial tribunal decided the matter in favour of the first respondent. The appellant and second respondent were ordered to vacate the suit land and restricted to enter into the suit land.

Believing the decision of the District Land and Housing Tribunal for Kibaha was not correct, the appellant lodged this second appeal on four grounds of complaint seeking to assail the decision of this court. The grounds are as follows:-

- 1. That the Honourable Tribunal Chairperson erred both in law and facts for deciding in favour of the 1st Respondent without considering the appellant sufficient evidence on the trial.*

- 2. That Honourable Chairperson erred both in law and fact for condemning the appellant for failure to involve local leader who in law are not requisite.*
- 3. That the Trial Chairperson erred both in law and facts for failure to evaluate properly the evidence on record.*
- 4. That the Honourable Trial Chairperson erred in law and fact for not considering the evidence of the appellant that she acquired the land bonafide before the 1st Respondent.*

When the appeal was placed before me for hearing on 15th February, 2022, both parties appeared in person, unrepresented. The 1st respondent urged this court to argue the appeal by way of written submission. The submissions were by way of written submission. All parties complied with the court order whereas the appellant's Advocate filed her written submission in chief on 25th February, 2022 and the respondents filed a joint reply on 7th March, 2022.

Mr. Living Raphael, learned counsel for the applicant stated his onslaught by tracing the origin of the case which I am not going to reproduce in this appeal.

On the first ground, Mr. Raphael contended that the trial Chairperson ignored the appellant's evidence that he purchased the land from Volustan Tesha, and his neighbour DW2 supported her evidence. He argued that the appellant proved that she bought the suit land and obtained a letter of offer from the Bagamoyo District Council and the same was granted 15th August, 2003. He added that the suit land, Plot No. 1229 Block F at Bagamoyo was a surveyed area. He argued that since the Bagamoyo District Council surveyed the suit land then it was a necessary party to join the suit, failure to that it was his view that there was a serious misjoinder of parties. He urged this court to nullify the trial proceedings and order retrial since none joinder of the necessary parties caused a miscarriage of justice. He lamented that the second respondent sold a surveyed land.

Submitting on the second ground, the learned counsel for the appellant contended that the trial tribunal faulted the appellant's ownership for the reason that he did not involve local leaders. He wondered as to which law compels a party to involve local leaders in purchasing a piece of land. He lamented that the local leaders have been known to course serious chores as far as ownership of land is concerned. He contended that the

appellant produced in court an acquisition document (Exh.D1) and letter of offer (Exh.D2) and she was able to identify his land which she bought free from any incumbrancers since 2003. She claimed that her evidence was supported by DW2 and the vendor who sold the suit land to both of them was the same. She further claimed that the 1st respondent lodged the case at the tribunal in 2016, more than 12 years. She claimed that the 1st respondent and the local Government leader (DW2) were engaged in forgery but this court acquitted them for lack of sufficient evidence.

The learned counsel for the appellant went on to argue that the mere allegations of the second respondent that he was owning 10 acres but he did not call one Kasimu Mbwana to testify at the tribunal. She claimed that as per the circumstance of the case at hand the tribunal was required to visit locus in quo to establish the 10 acres of the second respondent. He invited this court to validate the second respondent's evidence.

On the 4th and fifth grounds, the learned counsel for the appellant complained that the evidence of DW1, DW2 and exhibits D1, D2 and D3 prove on the balance of probability that the appellant was a bonafide purchaser and she acquired the area legally. He added that the appellant

described her suit land with its size and the same was supported by documentary evidence to prove that she bought the same from the original owner. Fortifying his submission he cited the case of **Sizane S. Warioba v Shija Dalaa**, Civil Appeal No. 44 of 2017 Court of Appeal of Tanzania at Mwanza (unreported). Stressing on the point, Mr. Raphael contended that the appellant was in possession of the suit land since 2003 and she is still possessing the suit land while the second respondent emerged in 2016 after the lapse of 12 years.

On the strength of the above submission, the appellant's Advocate beckoned upon this court to quash the decision of the trial tribunal and allow the appeal.

Responding, the respondents forcefully opposed the appeal. Regarding the first ground, they contended that the appellant's submission based on the letter of offer on Plot No. 1229 Block 'F' Bagamoyo and the evidence that she purchased the land from one Volustan Tesha. However, the appellant failed to demonstrate well her evidence as to how her evidence was sufficient to warrant the court to declare her as the lawful owner of the suit land.

The respondents further submitted that the trial chair evaluated and analysed the evidence of both parties and gave reason for disregarding the

appellant's evidence. It was their further submission that the appellant's letters of offer until when it was tendered and admitted by the tribunal was not registered to form title as conclusive evidence so as to be received as evidence in court. To support their submission, they referred this court to section 30 (1) of the Land Act of 1999, Cap. 113 [RE 2002] and section 9 of the Registration of Documents Act, Cap. 117 [R.E 2019]. The respondents claimed that the letter of offer had nothing to do before the tribunal because it was not registered.

Regarding, the Sale Agreement (Exh. D1), the respondents submitted that exhibit D1 did not carry weight because was not collaborated with the said vendor to testify in a court of how he acquired the land before selling the same to the appellant. Thus, it was their view that the appellant was required to call the vendor purported to have sold her a piece of land to prove the case. To buttress their contention they cited the case of **Issa Ahmed v Mussa Abdul Mahamoud**, Land Appeal No. 72 of 2010. HC – LAND Division at Dar es Salaam. The respondents went on to submit that the appellant did not assign any reason why the material witnesses such as Volustan Tesha and the Land Officer were not called to testify in court.

Supporting their stand they cited the case of **Hemed Said v Mohamed Mbilo** (1984) TLR 113.

Arguing for the second ground, the respondents contended that the appellant submission it does not support the ground of appeal. They argued that the trial Chairperson in paragraph 5, reasoned that the appellant did not took effort to conduct search to know who was a previous owner of the suit land prior to purchase the suit land from the Volustan Tesha. Thus it was their view that the trial tribunal decision was reasoned. The added that the appellant had to blame herself for not demonstrating the case on the balance of probability.

Concerning the issue of *locus in quo*. The respondent were bried and focused. They argued that this is a new issue that was not raised at the trial tribunal. They contended that it was the appellant's duty to request the trial to visit the *locus in quo* to ascertain whether the disputed land was a part of ten acres.

Submitting on the fourth ground, the respondents argued that this ground is baseless. They submitted that it is the 2nd respondent was the first one to own the land since 2001. They went on to submit that the 2nd respondent did not saw the appellant in all material time using or developing

the suit land until when she trespassed it in 2014. They added that despite the fact that the 1st respondent purchased the suit land in 2013, he purchased it from the real owner who owned it since 2001. They argued that during cross-examination the appellant testified to the effect that the letter of offer was not issued by the District Council of Bagamoyo but it was manufactured by Volustan Tesha.

As to the fifth ground, the 1st respondent argued that this ground does not exist in the Memorandum of Appeal.

On the strength of the above submission, the respondents urged this court to dismiss the appeal with costs.

After a careful perusal of the record of the case and the final submissions submitted by both parties, I should state at the outset that, in the course of determining this case I will be guided by the principle outlined in the case of **Hemedi Said v Mohamedi Mbilu (1984) TLR 113**, which requires, "*the person whose evidence is heavier than that of the other is the one who must win*". In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant

this court to overrule the findings of the District Land and Housing Tribunal for Kibaha.

In my determination, I will consolidate the first, and third grounds because they are intertwined. The second and fourth grounds will be determined separately. The appellant is complaining that the Chairman did not consider the evidence on the record as a result he decided in favour of the respondent without considering the appellant's sufficient evidence.

The circumstance of the case, facts, and evidence will lead this court to determine the matter before it. It is in the record that the appellant testified to the effect that in 2003, she bought the suit land from Volstan Tesha, to substantiate her submission, she tendered a Sale Agreement (Exh.D1), a letter of offer (Exh.D2) and exchequer payment receipt (Exh.D3). It is worth noting that possession of a letter of offer and receipts of payment alone is not absolute proof of ownership of land. Instead, it verifies that a piece of land was offered to the person. As rightly pointed out by the 1st respondent in his submission, to ascertain, if the person accepted such an offer a Certificate of Title has to be produced. In

absence of the Certificate of Title, it is regarded that the process to allocate land to the person's possession letter of offer was incomplete.

The appellant's witness, Ramadhani Ally testified to the effect that the suit land belongs to the appellant since she bought the same in 2003 from Volstan Tesha. The second respondent testified to the effect that he bought the suit land in 2001 from Kasimu Mbwana Bora who owned the suit land since 1950 and he sold one of the plots to the 1st respondent.

On his side, the 1st respondent who was the applicant at the trial tribunal testified to the effect that he is the lawful owner of the suit land. He had one witness and tendered a Sale Agreement (Exh.P1), a 30 days' Notice to sue the Bagamoyo District Council dated 27th May, 2016 (Exh.P2) and a reply letter from the Bagamoyo District Council dated 28th June, 2016 (Exh.P3). The 2nd respondent testified to the effect that he sold the suit land to the 1st respondent in 2013. The former Street Chairman of Nia Njema testified to the effect that in 2001, one Kassim Mbwana sold the suit land to the 2nd respondent the size of the suit land was 1 acre.

The tribunal determined the first issue as to who is the lawful owner of the suit land. The tribunal decided the matter based on the findings as to who was the first person to occupy the suit land. I am in accord with the tribunal's findings that in the circumstances of the case at hand, it was correct to find out who was the first person to occupy the suit land. However, the 2nd respondent did not support his evidence with any documentary evidence. It is alleged that the Street Chairman of Nia Njema witnessed the sale of the suit land between Kassimu Mbwana and the 2nd respondent. However, the Sale Agreement between Kassimu Mbwana and Peter Peter Junior was not tendered at the tribunal. Therefore, it is difficult to determine whether the 2nd respondent was the first person to occupy the suit land in 2001. Therefore, the question to ask is whether the 2nd respondent obtained the suit land lawfully.

In my view, it was not correct to rely on the 1st respondent sale of the agreement (Exh.P1) in exclusion of other factors such as the ingredient of the sale of agreements in relation to the case and the previous sale agreements of the first person who occupied the suit land. Expounding on the evidence, the 1st respondent's Sale of Agreement (Exh.P1) does not show all the description of the suit land, it shows that the plot is

allocated at Nianjema 'A' Magomeni at Bagamoyo. No description of the size of the plot. While the appellant's Sale of Agreement dated 3rd August, 2003 is located at Nianjema at Bagamoyo and the same is measuring 800 meters. The 2nd respondent in his testimony at the District Land and Housing Tribunal testified to the effect that he is the lawful owner of the suit land measuring 800 meters while the Sale Agreement (Exh.P1) does not show the size of the plot.

Also, the Sale Agreement between the 2nd respondent and Kasimu Mbwana was not tendered in court to support the 2nd respondent's assertion. Therefore, the evidence on record does not favour the 2nd respondent. The 1st respondent on his side relied on the Sale Agreement which was issued in 2013 and the same did not state the measurement of the suit land.

Concerning the issue of a necessary party, it is settled law that all necessary parties must be brought in a suit to enable the court conclusively determines the matter. It is also worth noting that non-joinder of any party is fatal and the effect is to nullify the proceedings. This position has been underscored in copious court decisions. These include; **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman**, Civil

Revision no. 6 of 2017. The law on effects of non-joinder of a necessary party is fortunately now settled. In the case of **Abdullatif Mohamed** (supra), the Court of Appeal defined a necessary party as one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. The Court of Appeal of Tanzania was of the view that:-

" The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination, according to the decision in the above-cited case, include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

I understand that Order 1 Rule 9 and 13 of the Civil Procedure Code Cap.33 [R.E 2019] provides for a general rule that non-joinder of parties is not fatal. However, it is fatal when the non-joinder party is a necessary party to the case.

In the matter at hand, the appellant was paying land rents since 2003, the suit land was surveyed and the Bagamoyo District Council issued the

letter of offer to the appellant in respect to Plot No. 1229 Block F at Nia Njema dated 18.08.2003 (Exh.P2). I have perused the tribunal records and noted that there are no other documents related to Plot No. 1229 Block F located at Nia Njema. The 1st respondent nor the 2nd respondent tendered documents related to surveyed land and none of them tendered a Certificate of Occupancy. The 1st respondent at the trial tribunal intended to join the Bagamoyo District Council the same is supported by the documents which he tendered at the District Land and Housing Tribunal. (Exh.P2) A 30 days' Notice to sue the same was addressed to the District Executive Director of Bagamoyo District Council.

It is my considered view that in such a dilemma, the 1st respondent ought to have included the Bagamoyo District Council in the suit. The District Council was in a better position to explain the due processes of the survey and allocation of the suit land.

Additionally, the Bagamoyo District Council was a necessary party to the suit as the suit could not proceed effectively to enable the court to effectually and completely adjudicate upon the issue raised in regard to the actual and real owner of the suit land. See the case of **Shahibu Salimu Hoza v Helena Mhacha** (Legal representative of Amerina

Mhacha), Civil Appeal No. 7 of 2012. It was therefore not correct for the District Land and Housing Tribunal to base in its decision only on the Sale Agreement (Exh. P1) which does not describe the size of the plot.

In consequence, I find that there is merit in these grounds of grievance. In the instant case, the issue of who is the lawful owner could not be solved without involving the necessary party.

Having so found, I refrain from deciding on remaining grounds of appeal as, I think, any result out of it will have no useful effect on this appeal. It will be but an academic endeavour.

That said and done, I proceed to allow the appeal. Parties are at liberty to lodge a fresh suit and include the Bagamoyo District Council as a necessary party. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 16th March, 2022.



A.Z.MGEYEKWA

JUDGE

16.03.2022

Judgment delivered on 16th March, 2022 in the presence of the 1st respondent.



A.Z.MGEYEKWA

JUDGE

16.03.2022

Right of Appeal fully explained.