

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

LAND APPEAL NO. 17 OF 2021

(Arising from the Judgment and Decree from District Land and Housing Tribunal for
Ilala at Mwalimu House in Land Application No. 299/2014 delivered on 24th
December 2020 by Hon. A. R Kirumbi)

RAMADHANI NASSORO MAYUGUMBI

(as administrator of the estate of the late

OMARY NASSORO MUYUGUMBI).....APPELLANT

VERSUS

NIKO SAMWELI ASAPH..... RESPONDENT

J U D G M E N T

Date of Last Order: 30/11/2021

Date of Judgment: 02/03/2022

T. N. MWENEGOHA, J.

The appellants have preferred this appeal to this Court after being aggrieved by the Judgment and Decree delivered by Hon. A. R Kirumbi at the District Land and Housing Tribunal for Ilala at Mwalimu House in Land Application No. 17 of 2021 delivered on 24th December 2020. Brief facts of the matter are that the appellants have filed their Memorandum of Appeal with the following grounds;

- 1. That the Honourable Chairperson erred in law and in fact by delivering the Judgment on the favour of the respondent without proving on the standard required by the law;**

- 2. That the honourable Chairperson erred in law and facts by holding that the appellants were jealously as the respondent was benefiting from the disputed property;**
- 3. That the Honourable Chairperson erred in law and facts by his failure to evaluate the evidence of the appellants together with relaying on evidence not tendered by respondent as to reach the fair and just decision;**
- 4. That the Honourable chairperson erred in law and fact by his act to grant the 9million to the respondent without any colour of right and justification of the said amount;**
- 5. That the Honourable Chairperson erred in law and facts by his act of omission to analyze the opinion of assessors to the Judgment as required by the law.**
- 6. That the trial Tribunal erred in law and fact by entering the Judgment against the dead person (2nd respondent in original application);**

This appeal was agreed to by both parties to be disposed of, by way of written submissions. The appellants had the services of Mr. Ubaid Hamidu (advocate) while respondent was represented by Mr. Nehemia Gabo (advocate).

Mr Hamidu submitted that, the Chairperson failed by declaring the respondent owner of disputed land without proving on the standard of proof on civil matters, proof on balance of probability. That the suit land was purchased by respondent's father from the appellant (Omary Nassoro Muyugumbi) on 4th September 1999 while the respondent was only 6 years. He submitted that, the respondent did not provide a sale agreement and the Tribunal relied on the exhibit P1 (lease agreement).

He further submitted that the evidence of PW1 and PW2 are contradictory as PW1 stated that after he was given land by his father, he built a single room on the suit land followed by six business frames, while PW2 testified that two rooms house was built after respondent was given the suit land in 2010 by his father. Also, he submitted that the power of attorney issued to PW2 was for lease agreement but in her testimony PW2 stated that she bought building materials for constructing, but in nowhere there is power of attorney for constructing.

He further submitted that, PW3 (who was not Chairman of *Serikali za Mitaa* in 1999) was the only witness who testified that Samwel Asaph bought the disputed land as in Annexure 1 though not tendered as exhibit but both of them state the buyer of suit land was Niko Asaph. Hence for the 1st ground of appeal, the standard of proof was not applied into reaching Judgment in favour of the respondent herein.

For the 2nd ground of appeal, he referred to page 10 paragraph 11 of the Tribunal's impugned Judgment which reads;

".....what is seen is jealousy of the respondent after seeing the applicant is benefiting from the suit land".

He submitted that the appellants could not be jealous since they did not institute the application before the trial Tribunal and that if appellant was jealous, he would have re-sold the suit land since the remaining balance was yet to be settled since 1999 to 2014 when dispute arose.

Submitting on the 3rd ground concerning evaluation of evidence that the buyer of suit land one Niko Samwel Asaph is not the one who appeared in the trial Tribunal, there appeared a new face from the one who purchased the suit land. That the Tribunal failed to evaluate evidence that

failure to pay the remaining purchase price (Tshs. 150,000/-) within a month after sale agreement was entered resulted to breach of sale agreement. He submitted that the Chairperson erred by relying on Exhibit P1 which is the lease agreement which not prove ownership of suit land.

On the 4th ground of appeal on grant of damages to the tune of 9 million, he submitted that the chairperson grant of damages was unjustified it was contrary to what the respondent prayed which was Tshs. 650,000/= per month from 31st October 2014 to the date of determination of suit. He submitted that the rent agreements were cooked and lacked corroboration for its genuineness making damages granted with no enough proof.

He submitted on the 5th ground of appeal on omission to consider assessors' opinion that, there is nowhere on the record where it shows opinion of assessors were given or read out to parties. He prayed for the Judgment of the Tribunal be quashed and set aside.

For the 6th ground he submitted that the Tribunal entered Judgment against two respondents one being the dead person one Omary Muyugumbi which is shown on the title of the Tribunal's Judgment.

On reply Mr Gabo submitted on the 1st ground of appeal that PW1 and PW2 testified that the suit land was purchased by the respondent's father one Asaph Samwel as the respondent was a minor. He further submitted that the purchase price was paid by two instalments and thereafter a two-room house was built in 2000. He submitted that the DW1 and DW2 admitted that the suit land was sold to the respondent's father and later handed to respondent when he attained age of majority. He submitted that despite that the sale agreement being rejected by the trial Tribunal

due to legal technicalities, the Tribunal fairly considered strong oral evidence of PW1 and PW2 together with Exhibit 1 and 2 to establish there was sale between Omary Muyugumbi and the respondent herein.

He submitted that the claims of the appellant were raised in 2014, about 14 years from the sale agreement entered on 1999 of which those claims are time barred Case of **Ismail Halidi Mmingwa vs. Mohamed Saleh Amour, Land Case No. 83 of 2014, HCT Land Division, (Unreported)**.

He submitted on the 2nd ground of appeal that it was correct for the trial Tribunal to associate the trespass of the appellant into suit land in 2014 with jealous since both parties agreed they entered into sale agreement since 1999 and the same was developed in 2000 and as soon as the respondent built the house and frames of business, the appellants were tempted and trespassed to suit land in 2014.

With regard to 3rd ground of appeal he submitted that the trial Tribunal delivered Judgment in favour of the respondent after considering evidence adduced by PW1, PW2 and PW3 despite the fact that respondent's father did not appear to testify before the trial Tribunal since he had already handed over the suit land to the respondent when he attained majority age. He submitted that there is no required number of witnesses to prove a case and with this he referred to **Section 143 of Law of Evidence Act, Cap 6 R. E. 2019** and the case of **Joshua Chipanha @ Kidyani vs. R, Criminal Appeal No. 336 of 2020, Court of Appeal of Tanzania at Dodoma (Unreported)**.

On the 4th ground of appeal, he submitted that it is in record that the appellants invaded and destroyed a fence on respondent's land and took

away all fence poles and stopped 30 petty traders who were renting at the business premises at the suit land and as a result caused loss to the respondent. That the trial Tribunal granted damages after considering those facts/ evidence and the injuries suffered in connection with the said destruction.

He submitted on the 5th ground of appeal that at page 9 paragraph 2 of the Tribunal's Judgment, assessors' opinion is that the application be granted and it is in Tribunal's records that the said assessors' opinion was read over to parties before delivery of Judgment hence this ground of appeal is baseless. He submitted for the 6th ground of appeal that the respondent's counsel had written a letter to the trial Tribunal on the error of names on the Tribunal Judgment and the trial Tribunal had made corrections to the error and the correct Judgment was also served to the applicant.

In his brief rejoinder Mr. Hamidu reiterated what he submitted in chief and further stated that, the standard of proof of civil matters that is on balance of probabilities, the weight of evidence and its substance determines the number of witnesses to be called to testify. He submitted that the witnesses that were called to testify to the Tribunal were irrelevant since nobody testified on purchasing the disputed land and no documentary evidence tendered to verify the purchase of suit land while PW1 was a minor, PW2 was absent during purchase and PW3 was unknown person at the time of purchase.

I will now go straight to determine whether the appeal has merits by addressing the grounds of appeal as they were submitted. On the 1st ground of appeal that the Judgment was delivered without proof on

balance of probability, appellant's counsel submitted that the respondent herein did not give enough evidence to prove ownership of suit land by tendering any document before the Tribunal to prove ownership or transfer of ownership from Samwel Asaph to the respondent. This is governed by the principle laid down in numerous cases as in the case of **Anthony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (unreported)** which held that:

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"...let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour."

Since the respondent herein was the one who instituted the application/suit before the trial Tribunal claiming ownership of suit land against the appellant herein, he was duty bound to prove his ownership on suit land. The respondent submitted that the suit land was given to him by his father in 2010 after attaining age of majority, the land which was purchased by his father for him in 1999. He submitted further that the sale agreement was tendered before the trial Tribunal but was not admitted due to technical issue. However, there is the evidence of PW2 who is the mother of the respondent, she testified that the suit land is the property of the respondent after it was purchased for him in 1999 when he was a minor. The testimony of PW2 supported the allegation of the respondent herein that he is the owner of suit land. In addition to that it is not disputed that the suit land was sold to the father of the respondent one Samwel Asaph. I therefore find the trial Tribunal was correct to hold that the respondent is the owner of suit land considering the weight of

evidence tendered before it to prove ownership which is the testimony of PW1, PW2. The 1st ground of appeal has no merit.

Moving to the 2nd ground of appeal that the appellant was jealous after seeing the respondent benefiting in the suit land, I will directly go to the course of action which led to this matter. The respondent filed the application after the appellant has allegedly trespassed to the suit land and destroyed fence in 2014. It is also on record that the suit land was developed from 2000. The appellant did not contest this fact. It has thus taken approximately 14 years as rightly put by the respondent's counsel, for the appellant to enter and claim ownership on the suit land. It is puzzling as to why he did not take action earlier if he was aggrieved. Where was he the whole time when the construction was on going and the business frames were rented? Whereas I do not see the basis of associating the appellants' actions with jealous sentiments, I concur with the trial Tribunal finding that, it is unusual for the appellant to keep quiet seeing the suit land being developed and after 14 years come to claim ownership of suit land. As such claim will not succeed. I find this 2nd ground of appeal has no merit.

For the 3rd ground of appeal, the trial Tribunal at page 9 paragraph 2 and 3 when read together, clearly stipulates that the Tribunal evaluated the evidence tendered by the applicant and respondent therein. It is evident the trial Tribunal considered evidence tendered before it into reaching its decision. From the foregoing the 3rd ground holds no water.

On the 4th ground of appeal, the applicant submitted in Court for a prayer of specific damages to the tune of Tshs. 650,000/= that is the monthly income from 31st October 2014 to date of determination of the suit. He

outlined the breakdown to the amount that; Monthly rent of six shops 240,000/=, Monthly rent from 30 petty traders 300,000/=, monthly rent for two room house 60,000/= and monthly rent for public toilet and birth rooms 50,000/= total 650,000/=. In his testimony the respondent before the trial Tribunal testified that, *"I was very affected in business because the tenants vacated for fear and remained only with two tenants. I request the Court to determine and declare that I am the true legal owner of the suit land, be paid costs, damages for destruction"*.

It is trite law that specific damages are to be specifically pleaded and strictly proved. (See the case of **Anicet Mugabe vs. Zuberi Augustino, 1992 TLR 137**). In the testimony of the respondent at the trial Tribunal there is no proof given of specific damages claimed. The Tribunal gave order for payment of "general damages to the tune of Tshs. 9,000,000/=". From the prayer of the applicant therein, he did not pray for general damages but rather specific damages which in turn were not strictly proved. I therefore find the 4th ground of appeal has merit.

Moving to the 5th ground which will not dwell me much, the impugned Judgment at page 9 paragraph 1 clearly stated the opinion of assessors that the application should be granted and they gave their reason for holding so. Their separate opinions are in Tribunal's file records. Ms. Jokha Lemli signed on 13/10/2020 while Mr. T. Mwakalasya signed on 15/7/2020. The respondent's counsel submitted that the opinion of assessors was read over to the parties. In his rejoinder appellant's counsel did not answer to this issue that the assessors' opinion was read over to parties and it therefore implies he conceded to that fact that assessor's opinion was indeed read over to parties. Hence the 5th ground has no merit.

For the 6th ground that the Tribunal entered Judgment against a dead person, this as submitted by the respondent was cleared after the respondent's counsel had notified the Tribunal. A copy of the correct Judgment was served to the appellant herein and he has not contested to that. I therefore find the 6th ground without merit.

From the foregoing I concur with the decision of the trial Tribunal save for the issue of damages which the Tribunal granted an order for the appellant herein to pay Tshs. 9,000,000/= with no specific proof. Appeal is partly allowed with no order to costs. Each party bear own costs.

Rights of Appeal Explained.

Dated at Dar es salaam this **22nd** day of **March, 2022.**



T. N. MWENEGOHA
JUDGE

