

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO. 12 OF 2022**

(Arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No.98 of 2020, originating from Ward Tribunal for Mabwepande in Land Case No.98 of 2020)

**FESTO OBED SANGA ..... APPELLANT**

**VERSUS**

**ZUHURA JUMA KERIA ..... RESPONDENT**

**JUDGMENT**

*Date of Last order: 16.05.2022*

*Date of Judgment: 23.05.2022*

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Mabwepande in Land Dispute No.0080 of 2020 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No.98 of 2020. The material background facts to the dispute are briefly as follows; Zuhura Juma Karia, the respondent instituted a case

at Mabwepande Ward Tribunal against Festo Obed Sanga. The respondent claimed that the appellant trespassed on her piece of land. The respondent submitted that the land allocation committee allocated her a one-acre piece of land. On his side, the appellant claimed that he bought the suit land from Mzee Mkwya. The trial tribunal decided the matter and ended up deciding in the favour of the appellant.

Aggrieved, Zuhura Juma Karia appealed to the District Land and Housing Tribunal for Kinondoni at Mwananyamala vide Land Appeal No. 98 of 2020 complaining that the trial tribunal faulted itself to decide in favour of Festo Obed Sanga while he did not state any justifiable reasons and his evidence was weak. She also complained that the trial tribunal decision was tainted with pre-arranged scenes. The District Land and Housing Tribunal quashed the judgment of the trial Tribunal and allowed the appeal

The District Land and Housing Tribunal decision did not amuse Festo Obed Sanga, hence. He decided to challenge it by way of appeal before this court on six grounds of appeal and he also filed two supplementary grounds in total I will list eight grounds of appeal as follows:-

- 1. That the Ward Tribunal proceedings and judgment was illegal for non-joinder to of Mabwepande Village Government and Mwanaidi Abdallah*

*as necessary parties because they respondent alleged that one hand she was allocated the suit property by the said government and on the other hand bought it from Mwanaidi Abdallah.*

- 2. That, the impugned proceedings and judgement is illegal and irregular for being one man show as the appellant was not granted opportunity to present his defence /replied to submission in chief on the grounds of appeal thereby denied him right to be heard on this appeal*
- 3. That, the trial tribunal Chairman grossly erred in law and fact by suo motto raising and determining new grounds without giving the appellant an opportunity to heard on the same*
- 4. That the reason given by tribunal chairperson when uploading the grounds of appeal no. 1 are full of contradictions and inconsistency as to the respondent evidence in chief at the Ward Tribunal.*
- 5. That the tribunal chairperson erred in law and fact by upholding grounds of appeal number 1, 2, 3 and 5. Yet there is undisputed fact that Ibrahim Ally Tundwa, the vendor was allocated the suit property in 2004 before selling it to the appellant in 2016 but there are contradictions as to how the Village Government allocated the suit land to the respondent.*

6. *That, the appellate tribunal grossly erred in law and, in fact, for not holding that, the appellant was a bonafide purchaser for value without adverse notice when discussing and upholding ground one of appeal.*
7. *That, the appellant tribunal grossly erred in law and, in fact, in ruling in favour of the respondent yet the vendors had no legal title to pass to the respondent.*

When the matter came up for hearing on 16<sup>th</sup> May, 2022, the appellant had the legal service of Mr. Daniel Oduor, learned counsel, and the respondent enlisted the legal service of Mr. Godwin Fiso, learned counsel.

In his submission in support of the appeal, Mr. Odour opted to abandon the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. Submitting on the 1<sup>st</sup> ground, he contended that the proceedings of the trial tribunal were illegal for non-joinder of Mabwepande Village Government and Mwanaidi Abdallah. He insisted that the two were necessary parties because at the Ward Tribunal the respondent in her testimony said that the Village Government of Mwapande allocated her the said land and she also claimed that Mwanaidi Abdallah and Mkwaya Ibrahim sold her the said property. To support his argumentation, the learned counsel referred this court to the proceedings of the trial tribunal dated 14<sup>th</sup> May, 2010 in examination of chief and exhibit

P1. It was his view that the trial tribunal ought to have called the alleged vendor to join and appear to testify. Fortifying his stance he cited the case of **Juma B. Kalala v Laurent Mkande**, (1983) TLR 103. He also urged this court to refer to the second witness of the respondent's witness and the reasons stated by the trial tribunal. He urged this court to draw inference the respondent at the trial tribunal refused to call the Village Government and the vendors for undisclosed reasons, she knew that they will testify against her. To buttress his contention, Mr. Odour cited the famous case of **Hemedi Said v Mohamed Mbilu** (1984) TRL 113 the court emphasises that if parties for undisclosed reasons failed to call material witnesses then adverse inference should be drawn by the court.

On the second ground, Mr. Odour submitted that the reason given by the District Land and Housing Tribunal Chairman when upholding the first ground of appeal is full of contradictions since the respondent testified to the effect the Village Government allocate to her one-acre while the respondent's first witness testified to the effect that there is a dispute over the said acre of land because the same belongs to one Bwana Jengo and he threatened to sue the Village Government thus the Village Government decided to allocate the respondent another piece of land, the suit property. He added that the trial tribunal in its findings held that the respondent bought

the suit land from Mkwaya who is also the appellant's vendor while there is no evidence revealing that she bought the suit land. He lamented that it was not correct to declare the respondent while the contradictions go to the root of the case. He added that the respondent's and her witnesses' testimonies are full of contradictions. He urged this court not to close his eyes to the said contradictions.

As to the 5<sup>th</sup> ground, Mr. Odour argued that the appellate tribunal erred in law in upholding the first, second, and third grounds of appeal because there is a disputed fact on evidence on record. He added that Ibrahim Ally Tundwa who was the appellant's vendor was allocated the suit land in 2004 before he sold it to the appellant in 2016, the same was not disputed at the trial tribunal. He stressed that it is not possible for the respondent to acquire the suit land twice; the two vendors and allocation did by the Village Government without mentioning when the Village Government allocated her the suit land. He stressed that there is procedural and legal compliance in allocating the suit property to the respondent.

Submitting on the 2<sup>nd</sup> and 3<sup>rd</sup> grounds. He stated that given the circumstances of the case it was imperative for the tribunals to hold that the respondent was a bonafide purchaser for value without adverse notice. He strongly submitted that the Village Government was the cause of the dispute since the said land was wrongly allocated to the respondent since there was

no any due diligence on the part of the Village Government. Mr. Odoure stated that the appellant approached the Village Government before he bought the suit land the sale was witnessed by the Village Government. He insisted that the appellant was a bonafide purchaser he bought the same in good faith trusting the Village Government. Therefore, it was his view that anything that transpired after the sale cannot be blamed on the appellant. He insisted that there is no proof of legal title. To support his submission he cited the case of **Faraha Mohamed v Fatuma Abdallah** (1992) TLR 205

On the strength of the above submissions, the appellant beckoned upon this court to quash the judgment of the appellate tribunal and allows the appeal with costs.

Opposing the appeal, the respondent contended that the appeal has no iota of merit. On the first ground, Mr. Fissoo disputed the issue of joining a necessary part. He claimed that a necessary party is a person who ought to be joined as a party in a suit, in his absence, no effective decree can pass by the court and if not pleaded then the suit is unattainable. He claimed that the cause of action is trespass and each party claimed that he is the owner of the suit land and acquired the suit land from different persons. Thus, in his submission, he claimed that neither the Village Government nor Mwanaidi were necessary parties rather they were material witnesses of the respondent. He contended that Mzee Mkwya sold the suit land to both

parties but the respondent did not join him as a necessary party to prove his allegations rather he was called to testify. He valiantly argued that the appellant is challenging the trial tribunal decision which was in his favour. He stressed that the first ground must fail because it has no legal justification for the Village Government or Mwanaidi to join the case.

He distinguished the cited case of **Juma** (supra) since the court held that if land in dispute involves a 3<sup>rd</sup> party then he must be joined, but in the case, at hand, neither the Village Government nor Mwanaidi was 3<sup>rd</sup> parties. He also stated that the respondent's witness; Makili Maliesi was a member of the Local Government and testified to the effect that the Village Government allocated the suit land to the respondent. Mr. Fissoo went on to submit that the adverse inference cannot be drawn since the respondent called two material witnesses and the appellate tribunal Chairman concluded that the said witnesses were material witnesses while the respondent's witnesses did not confirm that Mzee Mkwaya was the owner of the suit land.

On the fourth ground, Mr. Fissoo claimed that there are no any contradictions since there is no any evidence from the respondent to prove that he bought the suit land from Mkwaya. He referred this court to page 4 of the trial tribunal decision. Mr. Fissoo was certain that the respondent bought



the suit land from a person who had a title and she was in possession of the suit land since 2010. He urged this court to dismiss this ground of appeal.

As to the 5<sup>th</sup> and 6<sup>th</sup> and supplementary grounds, Mr. Fissoo disputed the fact that the appellant's vendor testified to have acquired the suit land in 2004 and sold it in 2016, the vendors were the first ones to occupy the said land since the respondent acquired the same in 2010. He argued that there is no any evidence supporting the said allegation. He insisted that the appellate tribunal in its findings found that the appellant's testimonies were mere allegations that were not supported by any evidence.

He further contended that while the respondent's witnesses confirmed without a doubt that the respondent was the lawful owner. He insisted that the appellate tribunal found that Mzee Mkwya had no good title to pass to the appellant, thus the legal principle state that no one can give a title which he does not have ' *Nemo dat quod non habet*'. He added that the issue of bona fide purchaser cannot stand. To fortify his submission he cited the case of **Hamis Bushiri Pazi & 4 others v Saulu Henry Amon & 3 Others**, Civil Appeal No. 16 of 2019. He added that the appellant as a bonafide purchaser was required to verify the information from neighbours.

On the strength of the above submission, the respondent's counsel beckoned upon this court to dismiss the appeal for being meritless and upheld the decision of the appellate tribunal.

Rejoining, the learned counsel for the appellant reiterated his submission in chief and insisted that it was fatal for the tribunal to call Abdallah to testify because there were contradictions. He insisted that the appellant did not state when the Village Government allocated her the suit land and there is no any proof of minutes prepared by the Village Council. The learned counsel stressed that there was not any good title passed to the respondent since the vendor of the suit land was the same person who sold the same land to the appellant.

In conclusion, he urged this court to quash the Judgment and Decree of the tribunals and allow the appeal.

I have subjected the rival arguments by the learned counsels for the parties to the serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question *whether the appellant had good reasons to warrant this court to allow his appeal*. In my determination, I will address all three grounds of appeal separately as they appear.

I should make it clear from the beginning that this is a second appellate court. I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, Therefore this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the case of *Edwin Mhando v R* [1993] TLR 174. It is a settled principle that the second appellate court has to deal with the question of law. However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

*“ An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice.”*

With respect to the fifth and seventh grounds, tracing who had a good title? The respondent in her testimony testified to the effect that the allocation committee allocated her a piece of land without stating when exactly he acquired the suit land. In cross-examination, the appellant

testified to the effect that she bought the suit land. As rightly pointed out by the learned counsel for the appellant, the respondent's testimony was not clear, she contradict herself. It is not clear how the respondent obtained the suit land, when exactly the transfer was effected. During cross examination, the respondent testified to the effect that she has lost her sale agreement but there is no proof of the same. I expected the respondent could have tendered a police loss report to prove her allegations. On his part, the appellant claimed that he bought the suit land from Mzee Mkwaya and his witness Ibrahimu Ally Tundwa testified to the effect that the appellant acquired the suit land in 2004 when the land was allocated to villagers.

The appellate tribunal in its findings stated that the respondent acquired the suit land in 2010, however, there is no any evidence on record thus, it was not correct for the appellate tribunal to state that the sale agreement between the appellant and Mkwaya was a nullity. Had it been that the appellate tribunal analysed well the evidence on record it could find that there was a need to include the Village Government as a necessary party.

As to the first ground that the Village Government was a necessary party to join in the case. The evidence on records is not clear as to how

the village Government allocated the suit lands to the appellant and respondent. The respondent in his testimony claimed that the village Government allocated her the suit land and later she claimed that she bought the suit land. The same Village Government was alleged to have allocated the same piece of land to the respondent and the appellant's vendor.

Based on the aforesaid findings, I respectively agree with the learned counsel for the appellant that the Village Government was a necessary party in the matter at hand. It is settled law that all necessary parties must be brought in a suit to enable the court conclusively determine 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 like the situation at hand.

In the matter at hand, the whole epic needs to be addressed by the Village Government. Thus, it is my considered view that in such a dilemma, the Village Government ought to have been included in the suit since it is in a better position to explain the due processes of allocation of the suit land.

I find it difficult to effectually and completely adjudicate upon the issue raised in regard to the actual and real owner of the suit land since the parties have no clear answer or their evidence needs to be supported by the institution which allocated the said suit land. Thus, the Village

Government of Mabwepande could not be left out of the dispute because the court would not have been able to adjudicate upon the rival claims of the parties more effectively and completely. See the case of **Shahibu Salimu Hoza v Helena Mhacha** (Legal representative of Amerina Mhacha), Civil Appeal No. 7 of 2012 (unreported) and in the case of **Mohamed Masoud Abdallah & 42 others v Tanzania Road Haulage** (1980), Consolidated Civil Appeal No. 150 & 158 of 2019 (unreported) it held that:-

*“ ... in the instant appeal, the respondent sued the appellant over a house which she claimed that it was sold to her by the Tanzania Housing Agency, a Government Agency. The Court noticed that the agency that purported sold the disputed house to the respondent was not made a party. **It held that the agency could not have been left out of the dispute because the court would not have been able to adjudicate upon the rival of claims of the parties more effectively and completely.**” [Emphasis added].*

Guided by the above authorities, it is my view that it was therefore not correct for the District Land and Housing Tribunal to base its decision only on mere evidence of the respondent which does not prove that the vendor had a good title to pass to the respondent, while the institution which

allocated the suit land to the parties is available and in a better position to assist the tribunal to reach a fair decision.

In consequence, I find that there is merit in this 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 the 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, and parties are at liberty to lodge a new suit and include the Village Government of Mabwepande as a necessary party. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 23<sup>rd</sup> May, 2022.



  
A.Z.MGEYEKWA

**JUDGE**

23.05.2022



Judgment delivered on 23<sup>rd</sup> May, 2022 in the presence of the appellant.



  
A.Z.MGEYEKWA

**JUDGE**

23.05.2022

Right of Appeal fully explained.