

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

MISCELLANEOUS LAND CASE APPEAL NO. 121 OF 2021

(Arising from Land Appeal No. 20 of 2020 of the District Land and Housing Tribunal for Kinondoni at Mwananyamala and Originating from Land Dispute No. 84 of 2017 of Kunduchi Ward Tribunal)

HAJI SALIM MAKAME (Administrator of
the Estate of the late **SALIM MAKAME**) **APPELLANT**

VERSUS

ABDUL MTUMWENE **1ST RESPONDENT**

ATHUMAN MAKAME **2ND RESPONDENT**

AME HAMIS MSELENI **3RD RESPONDENT**

Date of last Hearing: 10/06/2022

Date of Ex parte Judgment: 21/06/2022

JUDGMENT

I. ARUFANI, J

The appellant herein, filed in this court the instant appeal to challenge the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (hereinafter referred as the appellate tribunal) delivered in Land Appeal No. 20 of 2020 dated 10th August, 2021. The impugned decision of the appellate tribunal has its genesis from the decision of Kunduchi Ward Tribunal (hereinafter referred as the trial tribunal) made in Land Dispute No. 84 of 2017 dated 31st December, 2017.

The brief background of the matter as can be found in the record of the matter is to the effect that, the parties in this appeal are relatives. It was stated in the evidence adduced before the trial tribunal that, in 1977 the late Salim Makame and the respondents who were all fishermen from Unguja came to conduct fishing activities at Kunduchi beach area of Dar es Salaam. It was stated the late Salim Makame was their leader and custodian of their money.

The respondents stated that, when they were proceeding with their activities the late Salim Makame told them there was a house which was being sold at Kunduchi area and all of them agreed to purchase the said house so that they can to stay therein while at Dar es Salaam instead of renting a house to stay. It was stated the house was a mud house and the parties used to stay there while at Dar es Salaam. It was stated that, thereafter the house was reconstructed by using bricks and all the respondents knew the house was owned jointly by all of them.

The respondents stated that, later on they discovered the late Salim Makame wrote his name in the sale agreement as a sole purchaser of the house and when they asked him about the status of the house, he told them to sue him anywhere they want. Thereafter, the respondents instituted Land Dispute No. 84 of 2017 before the trial tribunal against the late Salim Makame. After hearing the evidence from both sides, the

respondents won the case. The appellant was aggrieved by the decision of the Ward Tribunal and unsuccessfully appealed to the appellate tribunal vide Land Appeal No. 20 of 2020. The appellant has filed the appeal at hand in this court to challenge the concurrent finding of the trial and appellate tribunal basing on the following grounds: -

- 1. That, the Ward Tribunal erred in law and facts for entertaining the matter over the suit property beyond its pecuniary jurisdiction.*
- 2. That, the Ward Tribunal erred in law and in facts to issue the decision without any proof of ownership tendered by the respondents herein.*
- 3. That, the Ward Tribunal erred in law and facts to issue the decision in favour of the dead party (2nd Respondent) who never appeared in person at the Ward Tribunal.*
- 4. That, the 1st Appellate Tribunal erred in law and in facts for non-consideration of the appeal grounds advanced thereby in the petition of appeal and nullify the proceedings of the Hon. Kunduchi Ward Tribunal in respect of Application No. 84 of 2017.*

Parties appeared in this court unrepresented and when the matter came for hearing of the appeal the appellant prayed to argue the appeal by way of written submission and he was allowed. On the other hand, the respondents prayed to argue the appeal orally and they were allowed.

The appellant stated in his written submission in relation to the first ground of appeal that, section 15 of the Land Disputes Courts Act, [Cap 216, R.E 2019] states the pecuniary jurisdiction of ward tribunals to entertain civil matters relating to land is limited to disputed land or property valued at three million shillings. He stated that, the appellant bought the house in dispute at a consideration of Tshs. 2,250/= in 1977 but currently the value of the house is estimated at Tshs. 25,000,000/= as it is located nearby Kunduchi Beach and is nearby WET'N'WORLD. He stated the suit premises contains a small and old house built by the appellant which was being used as shelter by the appellant together with his relatives who were invited as all were fishermen started fishing together from 1997.

He stated in relation to the second ground of appeal that, the trial tribunal decided the matter in favour of the respondent while there was no any proof of ownership tendered before the trial tribunal by the respondents. He argued that, although the first respondent stated the late Salim Makame was their treasurer but he failed to say how much money was used to purchase the land in dispute.

He stated further that the first respondents failed to tender any documentary evidence to prove the purchase of the land in dispute. He submitted that, despite all those deficiencies but the trial tribunal issued

a decision in favour of the respondents. He stated the appellant adduced the sale agreement before the trial tribunal which shows the appellant purchased the land in dispute from Chama cha Mapinduzi on 9th October, 1977.

He submitted that, section 110 and 111 of the Evidence Act, [Cap 6 R.E 2019] states that, he who alleges must prove. He argued that, as the respondents filed Land Application No. 84 of 2017 before the Ward Tribunal against the appellant, they were required to prove their allegation against the appellant. The appellant who is the legal representative of the appellant stated he presented the sale agreement before the trial tribunal and summoned Juma Kitwana who was a CCM Secretary and drafter of the said sale agreement who admitted to have prepared the same.

He argued in relation to the third ground of appeal that, the trial tribunal issued the decision in favour of the second respondent who had never appeared in person before the trial tribunal. He said the first respondent had no power of attorney of representing his fellow respondents in the matter who among them was the second respondent. He said the said second respondent is a deceased and the first respondent never disclosed the same to the trial tribunal and instead of that the second respondent was represented by his young sister one Dawa Mtwana without stating the reason for doing so.

He argued in relation to the fourth ground of appeal that, although the appellate tribunal failed to uphold the ground of the trial tribunal to lack pecuniary jurisdiction to entertain the matter on ground that there was no valuation report but it never stated the value of the suit property is three million shillings so that the stated amount can be distributed to the parties. He stated that, the trial tribunal had power to order valuation be conducted in order to determine the issue before it but that was not done. Instead of that the appellate tribunal agreed with the trial tribunal that the land in dispute has a value which does not exceed three million shillings.

At the end he prayed the court to find the appeal has merit and quashed the decision of the trial tribunal delivered on 10th August, 2021 in Land Appeal No. 20 of 2020 and set the same aside. He also prayed the court to order the matter to be tried de novo and appeal be allowed with costs.

In their reply the first respondent told the court that, they purchased the house at Kunduchi area after entering into agreement with the father of the appellant to purchase the house by using the income they were getting from fishing activities they were conducting. He said the father of the appellant breached the agreement by saying he didn't purchase the house jointly with them. He said after the said breach they took the matter

to the trial tribunal. He said after the decision of the trial tribunal the appellant appealed to the appellate tribunal where it was decided the house is the property of four people who are appellant and the respondents in the current appeal.

He argued that although after the judgment of the appellate tribunal it was ordered the tenants who are in the house should be vacated but the tenants have never been vacated from the house in dispute and the appellant is continuing to collect rent from the said tenants. The representative for the second respondent had nothing to tell the court. On his part the third respondent told the court that, they have no documentary evidence to prove the purchase of the house. He said their money was being kept by the late Salim Makame who was their Captain in the fishing activities.

He stated that, they trusted him as he was their captain and believed he would have written a document to show the house was purchased jointly by all of them. He stated the appellant want to defraud them their right and prayed the court to give judgment which will cause each one of them to get his right. In his rejoinder the legal representative for the appellant told the court that, the suit property is the property of his late father and the respondents have no any documentary evidence to show the house was bought jointly by them and the appellant.

As alluded in the background of this matter given at the outset of this judgment it is crystal clear that the appeal before the court has its genesis from the Land Dispute No. 84 of 2017 filed by the first respondent at the trial tribunal and the first appeal which was Land Appeal No. 20 of 2020 was determined by the appellate tribunal. This being the second appeal the court has found proper to state at this juncture that, the court is not required to interfere with the concurrent finding of the tribunals in the absence of misdirection or misapprehension of evidence adduced before the trial tribunal.

The above stated position of the law can be found in the cases of **Amratlal Damodar & Another V. A. H. Jarawalla**, [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige**, [2002] TLR 335 where it was held in the latter case that, in the absence of misdirection or misapprehension of evidence an appellate court should not interfere with concurrent finding of facts of the two lower courts. While being guided by the above stated position of the law the court has found proper to determine this appeal by dealing with the grounds brought to this court by the appellant as listed earlier in this judgment.

Starting with the first ground of appeal which states the trial tribunal erred in entertaining the matter which the value of the suit property was beyond its pecuniary jurisdiction the court has found that, as stated in the

submission of the appellant the suit property was bought at a consideration of Tshs. 2,250/=. The appellant submitted further that, currently the suit property is estimated to be valued at Tshs. 25,000,000/= because it is located nearby Kunduchi Beach and is nearby WET'N'WORLD and it contains a small house and old house built by the appellant.

The court has found that, when the Chairman of the appellate tribunal was determining that ground of appeal which was raised at the appellate tribunal, he relied on the case of **Zaidi Baraka V. Engine Petroleum TZ Limited**, Case No. 135 of 2004 where it was stated that, the value of the suit premises cannot be ascertained without support of a valuation report done by the registered valuer. A mere allegation and/or estimation of the value of a property cannot oust the jurisdiction of the court.

The court has found that, the appellant allegation that the suit property had a value which is beyond pecuniary jurisdiction of the trial tribunal is based on mere estimation done by the appellant which is not supported by any tangible evidence like a valuation report to show what was the actual value of the suit property at the time of instituting the dispute before the trial tribunal. To the view of this court and as rightly found by the appellate tribunal's Chairman and as stated in the case of

Zaidi Baraka (supra) it cannot be said there is sufficient evidence to prove the value of the suit property was beyond the pecuniary jurisdiction of the trial tribunal.

The assertion by the appellant that the value of the suit property is estimated to be Tshs. 25,000,000/= because the suit property is nearby Kunduchi Beach and nearby WET'N'WORLD cannot be sufficient evidence to prove the value of the suit property which was purchased at the price of Tshs. 2,250/= is now Tshs. 25,000,000/=. Therefore, despite the fact that the pecuniary jurisdiction of trial tribunal is limited to three million shillings but the court has failed to see any error committed by the appellate tribunal in finding there was no material evidence to establish the value of the suit property at the time of instituting the matter before the trial tribunal was beyond the stated amount of three million shillings.

Coming to the second ground of appeal where the appellant stated the trial tribunal erred in issuing a decision in favour of the respondents without any proof of ownership the court has found it is true that the respondents did not adduce any documentary evidence before the trial tribunal to prove their ownership to the suit land. However, as provided under section 61 of the Evidence Act Cap 6, R. E 2019 all facts except the contents of a documents are supposed to be proved by oral evidence. Therefore although the respondents did not adduce any documentary

evidence before the trial tribunal to prove their ownership to the suit land but that is not sufficient enough to establish the respondents failed to prove their ownership to the suit land.

To the contrary the court has found the respondents adduced oral evidence before the trial tribunal which established that, the suit property was purchased by the late Salim Makame on their behalf and despite the fact that the sale agreement was prepared in the name of the late Salim Makame but the suit property was their joint property. Therefore, a mere lack of documentary evidence to prove ownership of the suit property while there is oral evidence to prove their ownership cannot be a ground of finding the respondents failed to prove their ownership to the suit property.

The court has come to the above stated view after seeing the record of the matter shows the evidence adduced before the trial tribunal by the respondents to prove their ownership to the suit property was oral evidence and they had no documentary evidence. As appearing in the judgment of both tribunals the said oral evidence of the respondents was accepted by both tribunals and both tribunals agreed with them that the suit property was owned jointly by the appellant and the respondents.

The issue is whether both tribunals were right in accepting and believing the evidence of the respondents and disbelieved the evidence

of the appellant that the suit property was purchased as a joint property and not as a personal property of the appellant as argued by the appellant's legal representative. The court has found the issue of believing a witness or not was considered by the Court of Appeal of Tanzania in the case of **Goodluck Kyando V. R**, [2006] TLR 363 and stated at page 367 that: -

"It is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

The court has failed to see any good or cogent reason which would have made the evidence of the respondents to be found is not credible. The court has arrived to the above finding after seeing the evidence of the respondents that the suit property is not the property of the appellant alone but the property owned jointly by the appellant and the respondents after seeing the evidence of the respondents was also supported by the evidence of Machao Hamisi Mselem, Dawa Mtwana and Ally Abdallah who all of them testified before the trial tribunal and said the suit property was the property purchased and owned jointly by the appellant and the respondents.

The court has found that, although the appellant stated he tendered a sale agreement showing the late Salim Makame purchased the suit

property from Chama cha Mapinduzi but the copy of sale agreement available in the record of the matter shows the suit property was purchased from Hamis Omari and not from Chama cha Mapinduzi. Therefore, although the copy of the sale agreement shows the sale agreement was prepared by the Secretary for Chama cha Mapinduzi for Kunduchi Beach but the seller of the suit property was not Chama cha Mapinduzi but one Hamis Omari.

The court has also considered the further argument by the appellant that Juma Kitwana who was Secretary for Chama cha Mapinduzi and drawer of the sale agreement of the suit property was summoned to testify before the trial tribunal about the said sale agreement but the court has not seen anywhere in the proceedings of the trial tribunal or appellate tribunal indicated Juma Kitwana was the drawer of the sale agreement and he testified before the trial tribunal to support the argument by the appellant that he admitted the suit property was sold by Chama cha Mapinduzi to the late Salim Makame as his personal property.

To the contrary the court has found as appearing in the copy of the sale agreement contained in the record of the matter the seller of the suit property was Hamis Omari and not Chama cha Mapinduzi. Since the two tribunals which considered the evidence in the matter believed the evidence of the respondents and concurrently decided the matter in

favour of the respondents the court has failed to see any good or cogent reason which can make it differ with two tribunals.

As for the third ground of appeal the court has found it is stating that, the trial tribunal erred in issuing the decision in favour of the second respondent who is a dead person. The appellant stated neither the first respondent was given power of attorney to represent him nor the sister of the second respondent namely Dawa Mtwana who has been appearing in the court was appointed to represent the second respondent in the matter. The court has found that, although it is not disputed that the second respondent is a deceased but there is nowhere indicated in the record of the trial tribunal that the said issue was raised before the matter being determined by the trial tribunal so that the due process of finding a legal representative for the second respondent would have been ordered to be followed before determination of the matter. To the contrary the court has found the record of the trial tribunal show the matter continued without that issue being raised before the trial tribunal.

Since as rightly found by the appellate tribunal the matter was not involving the appellant and the second respondent alone but it was also involving the first and third respondents who are alive the court has found it cannot be said it is proper at this stage of the case to base on the stated ground alone to fault the finding of the two tribunals, quash and set aside

the proceedings of the tribunals and its decision and ordered the matter to be tried de novo as prayed by the appellant. To the contrary the court has found that, as the right of a person in a civil litigation does not die when a party to a suit die where the right to sue survive the court has found it is not appropriate at this stage of a matter to quash the concurrent decisions of the tribunals and order the matter to be tried de novo as prayed by the appellant.

Coming to the fourth ground of appeal where it is stated the appellate tribunal failed to consider the grounds of appeal filed therein, the court has found the appellant argued in his submission that, the appellate tribunal refused to uphold the ground of the trial tribunal to lack pecuniary jurisdiction basing on ground of lack of valuation report. The court has found this ground has already been covered in the finding made by the court in the first ground of appeal. Therefore, there is no justifiable reason for the court deal with the issue of pecuniary jurisdiction of the trial tribunal again while it has not been shown there is anything else which was not considered by the appellate tribunal in relation to the said ground.

The further argument by the appellant that the appellate tribunal had power to order valuation of the suit property to be carried out so as to know the value of the suit property the court has found the appellant has not told the court which law empowers the tribunal to do when it has not

been moved by the parties to the case to do so. In totality of all what I have stated hereinabove the court has found it has not seen any ground of appeal raised at the first appellate tribunal which was not considered in the judgment of the appellate tribunal.

In the premises the court has found there is no any ground of appeal brought to this court by the appellant which has been able to make the court to find there is any good or cogent reason to move the court to interfere with the concurrent finding of the trial tribunal and the appellate tribunal. Therefore, the appeal filed in this court by the appellant is hereby dismissed in its entirety for being devoid of merit. As the matter at hand involve relatives, the court has found proper to order each party to bear his own costs. It is so ordered.

Dated at Dar es Salaam this 21st day of June, 2022



I. Arufani

JUDGE

21/06/2022

Court:

Judgment delivered today 21st day of June, 2022 in the presence of all parties in person save for the second respondent who is represented by his young sister namely Dawa Mtwana. Right of appeal to the Court of Appeal is fully explained to the parties.



I. Arufani

I. Arufani

JUDGE

21/06/2022