

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

MISC. LAND APPEAL NO. 110 OF 2021

(Originating from Mwarusembe Ward Tribunal in Application No. 19 of 2020; Arising from
Mkuranga District Land & Housing Tribunal in Land Appeal No. 41 of 2020)

GASPER ALBERT KOMORO..... APPELLANT

VERSUS

MUSHI SAID MKUMBA.....RESPONDENT

Date of Last Order: 18.07.2022
Date of Judgment: 25.07.2022

JUDGMENT

V.L. MAKANI, J.

This is a second appeal. The appellant **GASPER ALBERT KOMORO** lost at Mwarusemela Ward Tribunal (the **Ward Tribunal**) in Land Application No. 19 of 2020. He appealed and lost again at the District Land and Housing Tribunal at Mkuranga (the **District Tribunal**) in Land Appeal No. 41 Of 2020 (Hon. Mwakibuja, Chairperson). Being dissatisfied with the decision of the District Tribunal the appellant has filed this appeal with four grounds of appeal as follows:

- 1. That the honourable Chairman erred in law and fact by failure to find that the vendor was a necessary party in determining the ownership of the suit plot.*
- 2. That the Tribunal erred in law and fact by its failure to consider and evaluate evidence provided by the appellant as the ward tribunal did.*

3. *That the honourable Tribunal erred in law and fact by its failure to ascertain that the witness to the appellant one Hamad Hassan Ndambwe is the one who again witnessed the second sale of the suit land to the respondent.*
4. *That the honourable Tribunal erred in both law and fact by delivering judgment in favour of the respondent as the ward tribunal did without paying attention to that the appellant purchased such plot in 2015 four years prior the respondent who purchased it in 2019.*

The appellant has prayed for the appeal to be allowed with costs and the decision of the District Tribunal be quashed and set aside.

This appeal was orally argued by Mr. Victor Mhana, Advocate for the appellant, while the respondent appeared in person.

Mr. Mhana started by praying that the Reply to the Petition of Appeal by respondent be rejected on the ground that it contains case law and contravenes Order VI Rule 3 of the Civil Procedure Code Cap 33 RE 2019 (the **CPC**). As for the first ground of appeal he said according to section 63 (1) (a) and (b) of the Evidence Act, Cap 6 RE 2019 (the **Evidence Act**) where a person sees or hears, then that said person is a necessary party as opposed to hearsay. That the witness of the appellant one Hamad H. Ndambwe told the Ward Tribunal that he

was directed by Ramadhani Ndambwe to sell the suit land after the family consented to the said sale. Hamad Ndambwe was directed to proceed with the sale because the said Ramadhani Ndambwe was in hospital. He said the Ward Tribunal ought to have called the actual seller Ramadhan Ndambwe to give evidence and state whether what has been said by Hamad Ndambwe was true. That the Ward Tribunal did not do so therefore there was no evidence to the effect that Hamad Ndambwe was really directed to sell the suit land. Mr. Mhana said, for the reasons explained the Ward and the Distrit Tribunals erred in their decisions.

As for the second ground he submitted that, there was clear evidence by the appellant at the Ward Tribunal that he bought the suit land in 2015 and all the witnesses signed the Sale Agreement. That the said Hamad Ndambwe appeared as a witness at the Ward Tribunal and he also said he witnessed the sale. That the Sale Agreement was also witnessed by the VEO of Mwarusembe Village. Another witness Abdallah Mpila also witnessed the sale and gave evidence at the Ward Tribunal. Mr. Mhana said in view of the above, the respondent did not prove his case on balance of probabilities so as to win the case. That the key witness of the respondent Mohamed Athuman Mkumbilwa

who alleged to have witnessed the sale of the suit land between Bakari Ndambwe and the respondent said that he was given TZS 30,000/= to be witness (page 40 of the proceedings). Nowhere does he state that the suit land belongs to the respondent. He said Hamad Athumani Ndambwe witnessed the sale between Bakari Ndambwe and the respondent (page 20 of the Ward Tribunal proceedings) and he was a witness in the second sale and he signed while in the office so he did not know the location of the suit land and so his evidence cannot be relied upon.

Mr. Mhana went on saying that in the Sale Agreement between Bakari Ndambwe and the respondent, two witnesses did not sign but their names were only written that is why they could not explain anything at the Ward Tribunal. He said in the said Sale Agreement there is no name but a stamp of the village and there is only a signature only and no name as opposed that of the appellant which stamp had "*Afisa Mtendaji Kijiji cha Mwalumbe*". He reiterated that there was no proof that the family permitted the sale of the suit land for the second time. He concluded that the respondent failed to prove the case on the balance of probabilities as in the case of **Ziad Mohamed Rasool**

Generl Trading Co. LLC vs Aneth Joachim Mushi, Civil Case No. 21 of 2020 (HC-DSM Registry) (unreported).

On the third ground, he said that the witness Hamad Hassan Ndambwe was also the one who witnessed the second sale between Bakari and the respondent. So, the second sale had a problem as there was no consent between the seller and the buyer.

As for the fourth ground he said that the suit land was bought by the appellant in 2015 as opposed to respondent who purchased the land in 2019. He said there is no evidence to show that the previous sale to the appellant was nullified. That the suit land was sold to the appellant on 16/05/2015 for TZS 1,400,000/= and after four years on 07/06/2019 it was sold to the respondent at TZS 600,000/=. Mr. Mhama said the latter sale was shrouded with fraud. He said there were illegalities and corruption and where there are such circumstances the appellate court has to intervene. He cited the case of **Edwin Isidory Elias vs. Serikali ya Mapinduzi Zanzibar [2004] TLR 297**. He prayed for the appeal to be allowed with costs.

In reply, the respondent said that Hamad Ndambwe is his Chairman and that is why he signed as a Chairman of the Ward. That the same Hamad Ndambwe is said to have sold the suit land to the appellant. So he said in 2015 the said Hamad Ndambwe was the seller but in the appellant's case he was Chairman of Kitongoji. That in the Ward Tribunal the seller was called and in his case it was Bakari Ndambwe and Hamad Ndambwe. That the father of the seller (Bakari) came, and his name was Mohamed Mkumbilwa and he said he had consented to the sale. The respondent said he did not know that the suit land was already sold to the appellant in 2015. He said Hamad Ndambwe was tricky as he signed as a Chairman while he knew that he had already sold the suit land to the appellant. He said he did not know anything about the TZS 30,000/= that was paid out to the witnesses, and the issue of family does not concern him as he was only the buyer and he involved local authorities. He prayed for the appeal to be dismissed.

In rejoinder, Mr. Mhana reiterated his main submission and added that the witness mentioned by the respondent as the elder was the one who stated that he had nothing to offer as he was given TZS 30,000/=. He said Hamad Ndambwe was not the seller in the Sale

Agreement of 2015 but a witness. That the law is clear for buyer to be aware when purchasing anything. He added that respondent has said nothing about the unsigned witnesses. That the witness Hamad Said signed while in the office therefore the issue of him being tricky has no merit.

I have listened to learned Counsel and the respondent herein. The main issue for determination is whether this appeal has merit. Foremost, I wish to join hands with Mr. Mhana that the reply to the petition of appeal contains case laws and therefore will not be considered. In any case, a reply to the petition of appeal is optional.

The whole appeal is on the weight of evidence presented by parties at the Ward Tribunal. It is clear from the records that the disposition of the suit land was through Sale Agreements, and in my considered view, the validity of each of the Sale Agreement can be established by ascertaining the records. The first Sale Agreement as said, was between Ramadhan Ndambwe and the appellant. It was concluded in 16/03/2015. It was signed by the parties and their witnesses together with the Village Executive Officer one Omary A. Mfilisi. On the other hand, on 07/06/2019, Bakari A. Ndambwe sold the same piece of land

to the respondent. Both the buyer and seller signed by use of a thumb print. However, there are no signatures of their witnesses but a thumb print which has been endorsed between the names of the witnesses of the seller and that of the buyer. It is therefore not certain whether the thumb print belongs to the witness of the buyer or the seller. With this uncertainty it is obvious that the evidential value of this Sale Agreement is questionable and the balance leans in favour of the appellant.

Even if the agreements were properly executed, still the Sale Agreement by the appellant beats that of the respondent on the basis of the principle of priority. The principle carries the maxim "*he who is earlier in time is stronger in law*". This means the first in time prevails over the others. In other words, if rights are created in favour of two persons at different times, the one who has advantage in time should have advantage in law. (See: **The Law Articles of India: Civil Laws, Doctrine of Priority in Property Law by Pallavi Ghorpade**). In the case of **Ombeni Kimaro vs. Joseph Mishili T/A Catholic Charismatic Renewal, Civil Appeal No.33 Of 2017 (CAT- DSM)** (unreported) the Court of Appeal stated:

"The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have title over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other"

See also **Sara Ngonyani vs. Joyce Philbert Hyera, Land Appeal No. 167 of 2016 (HC-Land Division)** (unreported). In **Helena Elias Choma vs Magambo Makongoro, Land Appeal No.165 of 2019 (HC-Land Division)** (unreported) it was stated:

"And thus, in case of application of the priority principle is put in to play in solving the dispute between the parties, the respondent being the first person to be allocated the suit land, and first developer, he is the rightful owner of the suit land the contextual meaning of the principle is that whenever there are two competing interest the earlier in time is stronger in law. Therefore, the first occupier in time prevails over the other"

As stated above, the appellant was the first in time to purchase the suit land in 2015 and the respondent came later In 2019. In terms of cited cases above, the appellant having purchased the suit land earlier than the respondent, he is covered by the priority principle of purchase over the suit land and thus is entitled to better title than the respondent.

In the evidence and submissions there was a claim that the Hamad Ndambwe who sold the suit land in 2015 received consent from his family. On the other hand, Bakari who sold the land in 2019 was administrator of the estate of their late father. However, there was no proof whatsoever on the claims by these people hence the argument remains a mystery cannot be taken on board by the court.

For the reasons I have endeavoured to explain above, I find the appeal meritorious, and it is hereby allowed. The decision of the District Tribunal is quashed and set aside. The appellant will have the costs of this appeal.

It is so ordered.



V.L. MAKANI
JUDGE
25/07/2022