

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

LAND APPEAL NO. 12 OF 2021

(Originating from Ilala District Land & Housing Tribunal in Land Application No. 155 of 2019)

SAMWEL JUSTIN MAGAMBOAPPELLANT

VERSUS

JUMA MFAUME..... 1ST RESPONDENT
JACQUINE TESHA KIBIRITI.....2ND RESPONDENT

Date of Last Order: 13.07.2022
Date of Judgment: 09.08.2022

JUDGMENT

V.L. MAKANI, J.

This is an appeal by SAMWEL JUSTIN MAGAMBO. He is appealing against the judgment and decree of Ilala Land District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 155 of 2019 (Hon. Rugarabamu, Chairman).

The gist of the matter is that the appellant (the applicant in the Tribunal) alleged to have purchased a piece of land from Said Abdallah Dikwembe located at Kurutuni areas, Mbondole Street, Msongola Ward, Ilala District (the **suit land**) on 20/12/2014 for TZS 1,800,000/=. The appellant said in 2017 to 2018 he travelled out of

Dar es Salaam and when he came back, he found that the 2nd respondent has trespassed into his land and has constructed a house which was not yet finished. He said the 2nd respondent told him that she purchased the suit land from the 1st respondent in 2017. He said despite telling the 2nd respondent that the 1st respondent was not the owner of the suit land, the 2nd respondent did not vacate nor demolish the house built thereon.

At the hearing of the application, the Tribunal decided in favour of the 2nd respondent and declared her the owner of the suit land and the application by the appellant was dismissed with costs for lack of merit. The Tribunal said at the time the said Said Abdallh Dikwembe sold the suit land he had no title to pass to the appellant as by then the suit land belonged to his brother the 1st respondent herein.

Being dissatisfied with the decision of the Tribunal the appellant has filed this appeal with four grounds of appeal reproduced herein below as follows:

- 1. That the trial tribunal erred in law and fact by determining the dispute without being properly constituted.*

- 2. That the trial tribunal erred in law and facts by determining the matter without taking into consideration of non-joinder of the necessary party.*
- 3. That the trial tribunal erred in law and facts by awarding reliefs which was no (sic) prayed by the respondent.*
- 4. That the trial tribunal erred in law and fact by declaring the respondent to be the lawful owner of the suit land while there was no enough evidence to that effect.*

The appellant prayed for the appeal to be allowed and the judgment and decree be set aside. He further prayed for judgment to be entered in his favour with costs.

With leave of the court the appeal was argued by way of written submissions. The submissions by the appellant were drawn and filed by Mr. Lutufyo Mvumbagu, while the 1st respondent drew and filed his submissions personally. Mr. Kelvin Kidifu drew and filed submissions on behalf of the 2nd respondent.

In arguing the appeal Mr. Mvumbagu abandoned the fourth ground. As regards the first ground, he submitted that the Tribunal was not properly constituted as per section 23(2) of the Land Disputes Courts Act CAP 216 RE 2019. He said the section states that the Tribunal is properly constituted where there is a Chairman and two assessors.

And Regulation 19(2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, GN. No. 174 of 2003 requires every assessor to give his opinion before the conclusion of the hearing. He said the Chairman in his judgment admitted that there was only one assessor who gave opinion without disclosing any reason and also he decided to consider the said opinion to form part of the judgment. He said the Tribunal contravened the provisions stated above and he relied on the case of **Tubone Mwambeta vs. Mbeya City Council, Land Appeal No. 25 of 2015 (CAT-Mbeya)** (unreported) which was quoted in the case of **Dr. Clemence Kalugendo vs. Peter Andrew Athmani, Civil Appeal No. 92 Of 2018 (CAT-DSM)** (unreported).

As for the second ground, Mr. Mvumbagu said the Tribunal erred for not joining the necessary party. He said the dispute emanates from a sale of the suit land to two purchasers that is to say the Appellant and the 2nd respondent who claim to have purchased the same from the 1st respondent and one Said Abdalha Dikwembe. He said it was alleged that Said Abdallah Dikwembe purchased the suit land from Ally Mkala who co-owned the suit land with the 1st respondent and the said Ally Mkalla sold the suit land without consent of the 1st

respondent. Mr. Mvumbagu was of the view that since Ally Mkala was also involved then he ought to be joined as a necessary party. He said the joining of the necessary party is not only the duty of the litigants but also the court in certain circumstances. He relied on the case of **Abdulatif Mohamed Hamis vs. Mehboob Yusuf Osman & Another, Civil Revision No. 6 of 2017** (unreported).

As for the third ground, Mr. Mvumbagu submitted that the Tribunal erred in law and facts by granting a relief which was not prayed and sought for by the respondents. He said the appellant was the one who filed the suit before the Tribunal seeking for declaratory orders that the respondents have trespassed into the suit land. But the Tribunal declared the 2nd respondent the lawful owner of the suit land a relief she had not prayed for while she had not filed any counterclaim. He relied on the case of **National Bank of Commerce vs. Stephen Kyando t/a Asky Intrertrade, Civil Appeal No. 162 of 2019 (CAT)** (unreported). Mr. Mvumbagu went on saying that the Chairman was supposed to dismiss the application and not declaring the 2nd respondent the lawful owner of the suit land because by doing so he contravened Order VII Rule 1 (g) of the Civil Procedure Code (the **CPC**). He concluded by praying for the appeal to be

allowed with costs and set aside the judgment and decree entered in favour of the respondents and the same be entered in the favour of the appellant.

In reply the applicant on the first ground said that the records show that the Chairman of the Tribunal did require every assessor to give his opinion but only one assessor gave his opinion. He said the cases cited of **Tubone Mwambeta** and **Dr. Clemence Kalugendo** (supra) are distinguishable in that in the cited cases the assessors were not given an opportunity to give their opinion. However, in the present case the Chairman gave an opportunity for the opinion to be given and it was only one assessor who gave his opinion. He said the failure by the Chairman to give reason as to why only one assessor gave his opinion did not cause any failure of justice to the appellant hence, he prayed for the court to consider section 45 of the Land Disputes Courts Act.

As for the second ground, the applicant said the alleged necessary party was called as a witness to support the appellant's case. He said the fact that Said Abdallah Dikwembe was not made a party to the application did not cause any miscarriage of justice since he was

allowed to give testimony. He said despite the said testimony, the appellant failed to prove his case on the standard required in civil cases of balance of probability as he could not even produce ownership documents. He said the case of **Abdullatif Mohamed Hamis** (supra) is no longer mandatory since it was the appellant who decided to sue, and any injustice caused by his failure to sue necessary party should be borne by the appellant.

The applicant was not very clear on the last ground he merely stated that the relief by the appellant at the Tribunal was for the respondents to be declared trespassers. He said the case of **National Bank of Commerce vs. Stephen Kyando** (supra) is distinguishable as the CPC is not applicable in the Tribunal as per section 51 of the Land Disputes Court Act. The applicant prayed for the appeal to be dismissed with costs.

In his submissions on behalf of the 2nd respondent Mr. Kidifu pointed out that the names in the application and the judgment and decree are different. While the 2nd respondent in the application is Jacqueline Tesha the 2nd respondent in the judgment and decree is Jacqueline Tesha Kibiriti. He said the anomaly in the judgment and decree is

crucial for it refers to a non-existing party to the suit and thus renders the appeal to be incompetent and hence deserves to be struck out with costs. He referred the court to Order XX Rule 6(1) of the CPC.

As for the first ground, Mr. Kidifu said according to the records one assessor gave his opinion. He said the cases of **Tubone Mwambeta** and **Dr. Clemence Kalugendo** (supra) are distinguishable because in the cited cases the Chairman did not direct the assessors to give their opinion and their written opinion was missing in the records before the Court of Appeal. He said, in the present case, the records show that it is only one assessor who gave his opinion, and no reason was assigned by the Chairman, however, the anomaly can be cured by section 45 of the Land Disputes Court Act which provides that no decision of the Tribunal would be reversed or altered on appeal on account of any error, omission or irregularity which has in fact not occasioned a failure of justice. He prayed for the said provision of section 45 of the Land Disputes Court Act to be brought into play and this ground be disallowed as it is a misconception as the Tribunal was properly constituted.

On the second ground Mr. Kidifu submitted that the Chairman did take consideration of non-joinder of the necessary party as it was

raised by the assessor in his opinion. He however pointed out that the Chairman observed that one of the issue that was framed before the Tribunal was who was the lawful owner of the suit land. He said the appellant, in so doing, according to section 110 and 111 of the Evidence Act CAP 6 RE 2019, brought the person who sold him the suit land one Said Abdalh Dikwembe as his witness (**PW2**) who testified that he did not seek the consent of his co-owner Ally Mkala when he sold the suit land. Referring to the case of **Abdullatif Mohamed** (supra), Mr. Kidifu pointed out that he cannot submit on as it was not annexed to the submissions. He said this ground was also a misconception and without merit and it ought to be disallowed.

As for the third ground Mr. Kidifu said the relief the appellant sought at the Tribunal was to be declared the legal owner of the suit land and the framed issues at the hearing were who is the lawful owner of the suit premises and what other reliefs are the parties are entitled to. Mr. Kidifu went on saying that since the appellant failed to prove his ownership to the suit land, it was correct for the Tribunal to declare who was the lawful owner and that was the 2nd respondent. He said he could not submit on the case of **National Bank of Commerce vs Stephen Kyando** because it was not annexed to the

the submissions so he could not submit on it. He said this ground too is a misconception and it has no merit. In conclusion he prayed for the appeal to be dismissed with costs.

I have gone through the submissions by the parties herein and the records of the Tribunal. The main issue for determination is whether this appeal before this court has merit.

Before I embark on the substantial issue, I would wish to address the issue of names raised by Mr. Kidifu. He said the name of the 2nd respondent in the Application No. 155 of 2019 reads as Jacqueline Tesha and not Jacqueline Tesha Kibiriti as appearing in the Judgment and Decree of the Tribunal, and this is contrary to Order XX Rule 6(1) of the CPC. It is on record that Mr. Kidifu was the advocate of the 2nd respondent at the Tribunal. I am sure he received the copies of the judgment and decree. Since Mr. Kidifu did not request for correction of the judgment and decree at the Tribunal it means he did not see anything wrong with it. His silence means acquiescence. Further, if this was prejudicial to the 2nd respondent, Mr. Kidifu would have raised it at the earliest possible time during the appeal, raising it in

the submissions is in my considered view an afterthought. In that respect this argument is disregarded as it lacks merit.

As for the substantive appeal, I will consider the grounds as they were raised seriatim.

Regarding the first ground, it is clear from the record there were two assessors but only one assessor gave his written opinion. No reasons were assigned by the Chairman for failure by the other assessor to give his opinion. However, the Chairman considered the written opinion of the single assessor and gave reasons for departing from his opinion. In my view, this omission has not caused any injustice to the appellant because despite that the opinion was by one assessor, it was read out to the parties and the Chairman gave it consideration though he departed from it. It would have been different if there was no written opinion at all, or if it was there but not read out or if the assessors were not involved at all. As correctly said by Mr. Kidifu and the applicant the case of **Dr. Clemence Kalugendo** (supra) is distinguishable because in the cited case the record did not indicate if the Chairman directed the assessors to give their opinion and in fact the written opinion was missing. But in the present case the Chairman

directed the assessors to give their opinion, and one assessor did so and the same was read out to the parties and moreso, the Chairman considered it in the judgment. In the circumstances, and by invoking section 45 the Land Dispute Courts Act, I hold that the omission by the Chairman has not occasioned any injustice to the appellant as such I find the ground to be wanting in merit and it is dismissed.

The second ground is in respect of non-joinder of necessary party. Mr. Mavumbagu claims that the seller of the suit land one Juma Mkala ought to have been joined in the application as a necessary party. It was the allegation of the appellant that he bought the suit land from Said Abdallah Dikwembe (**PW2**). It was also the allegation of the 2nd respondent that she bought the suit land from Juma Mfaume (**DW1**) who bought it from Ally Mkala (**DW2**). All of them, that is **PW2, DW1** and **DW2** gave evidence and the said evidence leaned in support of the case of the respondents. It was established from the evidence that the suit land was sold by Said Abdallah Dikwembe without the consent of his co-owner Ally Mkala who acknowledged to have sold the suit land to the 1st respondent who later sold it to the 2nd respondent. In my considered view the joinder of Ally Mkala as the necessary party is immaterial as he gave his evidence as a witness.

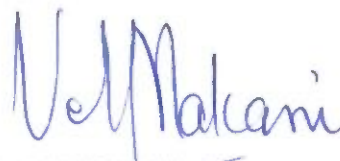
And further it is the appellant (then applicant) who knows his culprits, that is, who to sue and who not to sue. As noted in the records, this matter had passed through the Ward Tribunal and so the appellant ought to have known the existence of Ally Mkala and made him the necessary party. Mr. Mavumbagu relied on the case of **Abdulatif Mohamed Hamis** but he decided not to avail it to the court knowing it to be an unreported case, so in essence the court did not have an opportunity to go through to analyse the facts in comparison with the present case, therefore the court shall desist from relying on it as submitted by Counsel. In view thereof this ground too has no merit and it is dismissed.

Regarding the third ground, the record clearly shows that one of the reliefs prayed for by the appellant is who is the lawful owner of the suit land. The issues that were framed were who is the lawful owner of the suit land and what are the parties entitled to? The appellant therefore was supposed to prove on balance of probability that he was the owner of the suit land and equally the 2nd respondent was defending that she was the owner of the suit land. The issue of counterclaim raised by Mr. Mavumbagu is misconceived as the respondents do not have any claim against the plaintiff. According to

Order VIII Rule 9 a counterclaim arises if there is a claim as against the plaintiff but in this case neither the 1st respondent nor the 2nd respondent have a claim against the appellant. In that respect this allegation is misconceived and is dismissed. The cases cited by Mr. Mavumbagu to support this issue were also not annexed and since they are not reported they cannot therefore be considered. Similarly, Order VII Rule 1 (g) of the CPC relied by Mr. Mavumbagu is not relevant to the circumstances of this case.

In the result and for the reasons stated hereinabove, I find no fault in the decision of the Tribunal. The appeal is therefore dismissed with costs.

It is so ordered.



V.L. MAKANI
JUDGE
09/08/2022

