

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

LAND APPEAL NO. 25 OF 2022

(Originating from Kibaha District Land & Housing Tribunal in Land Application No. 136 of 2016)

RAJABU SELEMANI CHUMA.....APPELLANT

VERSUS

AHSA MLANGI.....1ST RESPONDENT

EZEKEL EHUNYO.....2ND RESPONDENT

Date of Last Order: 18.07.2022
Date of Judgment: 12.08.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by RAJABU SELEMANI CHUMA. He lost at Kibaha District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 136 of 2016 (Hon.Lungw'echa, Chairman). Being dissatisfied by the decision, the appellant preferred this appeal with three grounds as reproduced hereinbelow:

- 1. That, the tribunal erred in law and fact in its failure to include the main issue of trespass into the appellants land as one of the issues to be determined by the tribunal.*
- 2. That the trial tribunal erred in law and fact in considering the land in dispute to be nine (9) acres instead of three (3) acres as claimed by the appellant in his pleadings.*

3. That the tribunal erred in law and fact in declaring the respondents as the lawful owners of the whole nine acres originally owned by appellant including three acres that remained in his ownership after selling the six (6) acres to the respondents.

Appellant prayed for the appeal to be allowed and the decision of the district tribunal be set aside.

This appeal was orally argued by Mr. I. Mbuga, Advocate who represented the appellant; while Mrs. C. William, Advocate represented the respondents.

Regarding the first ground, Mr. Mbuga submitted that the issues were wrongly framed by the Tribunal. That only two issues were framed regarding the lawful ownership of the suit land and the reliefs. He said that the pleadings reveal that the main issue was trespass to the applicant's land. He said this is observed in clause 6(i) of the Application that the complaint was trespass, but the issues were confined to ownership of land. He relied on the case of **Sylverous Zabel vs. TIDESO, Civil Appeal No.4/2018 (HC-Bukoba)** (unreported) where it was insisted that proper frame of the issues is the backbone of the suit.

Mr. Mbuga argued the second and third grounds of appeal together. He said that the suitland which is located at Kidimu, Pangani Kibaha, was only 3 acres but the Tribunal decided on 9 acres which was not proper. He said according to paragraph 6 (a) (3) of the Application the claim was for 3 acres which the respondents trespassed although the said 3 acres were not sold to them. He thus prayed for the reliefs sought in the Memorandum of Appeal to be granted.

In reply, Mrs. William said Mr. Gaspar Henry, Advocate of the appellant at the Tribunal was the best person to know why trespass was not among the issues that were framed. She said even in the evidence he did not show how the respondents trespassed in the suit land because the appellant had sold all his land to the respondents. That is, 6 acres to the 2nd respondent and 1½ acres to the 1st respondent. She said the appellant also grabbed ½ an acre from the 1st respondent and sold it to Getrude Alipo Mwasamane. She if he had 3 acres, he would have sold it to Getrude. Mrs. William went on saying that the evidence shows that there was no land owned by the appellant even in *Serikali ya Mtaa* (Local Street Authority) there was no *Hati ya Shamba* (Title document). She said since the advocate did

not challenge this issue at the Tribunal doing it now is an afterthought.

On the second and third grounds of appeal, Mrs. William said the appellant sold all the land to the respondents and so he has nothing to claim. She prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Mbuga reiterated his main submissions and added that the duty to frame issues rests on the trial court and not the parties. He said Counsel for respondents is misdirecting herself as she is talking about evidence while the concern is on the framing of issues. And for the second and third issues he said there is also a misdirection because the Tribunal deviated from the pleadings which is wrong and contrary to the principle that parties are bound by their pleadings. He reiterated the prayers for the appeal to be allowed with costs.

I have listened to Counsel for the parties, the main issue for consideration is whether this appeal has merit. And this being the first appellate court, then the court is entitled to re-evaluate the evidence and make its own findings where necessary (see: **Swalehe Mwsdi**

Salum vs. Republic, Criminal Appeal No. 206 of 2010 (CAT)

(unreported).

In the first ground, Mr. Mbuga is lamenting that the issues were wrongly framed, that the issue of trespass was not included among the framed issues. He is putting the blame on the Tribunal. On the other hand, Mrs. William was of the view that the appellant's advocate at the Tribunal had the chance to challenge the same however he did not do so.

The law governing frame of issues is found under Order XIV Rule 5(1) of the Civil Procedure Code CAP 33 RE 2019 which states:

"At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

It is apparent from the above provision that indeed the court frames the issues, but it does so after ascertainment by the parties as to which material facts or law are at variance. In other words, the framing of issues is conducted by the full participation of the parties. And practice has it that the court records the issues when all the parties are agreeable to issues that would guide the court in making

the right decision. In the present instant, it is on record that Counsel for the appellant at the Tribunal, one Gasper Henry, was present when the issues were framed on 22/05/2017 and he signed to agree to the said issues as framed. He did not raise this concern at the time of framing the issues or during the continuance of the hearing of the matter. As correctly said by Mrs. William raising the issue at the appeal stage is an afterthought and this court cannot entertain this issue now. This ground of appeal therefore has no merit, and it is dismissed.

On the second and third grounds, Mr. Mbuga said that the complaint by the appellant is trespass on 3 acres, but the Tribunal deliberated on 9 acres and declared the respondents' lawful owners.

I have gone through the record, and I agree with the Chairman that the evidence by the appellant at the Tribunal was not consistent. While it is on record that the application at the Tribunal by the appellant was allegedly a claim of trespass by the respondents of his 3 acres of land. The appellant said at paragraph 6(a)(iii) of his application said he was the lawful owner of 9 acres whereas 6 acres only were sold to the respondents and the applicant remained with 3

acres which acres were forcefully taken by the respondents. But in his testimony the appellant said he is owner of 6 acres of land which was bought from Sultan Saleh Fundi. And he sold only two acres to the 1st respondent herein. **PW2** the seller asserted that the land he sold to the appellant was only 6 acres. **PW3** who was Kitongoji Chairman of Kidimu Pangani Kibaha, said he knows that the appellant was allocated only 3 acres by the local government he does not know if the allocated land is the one in dispute. The 9 acres alleged is not reflected in his testimony or the testimony of his witnesses.

On the other hand, the respondents have presented Sale Agreements **Exhibit D1** and **Exhibit D6** between the appellant and the 1st and 2nd respondents respectively. **Exhibit D1** reflects 1½ acres sold to the 1st respondent and **Exhibit D6** reflects 6 acres sold to the 2nd respondent. The exhibits were not controverted in any way.

Now from the explanations above, it is apparent as observed by the Chairman that the evidence of the appellant is mixed up in that the appellant cannot be the owner of 9 acres he is claiming because in his testimony he said he only had 6 acres; he cannot also say he he owned 6 acres because **PW3** said the appellant had only 3 acres. And

he cannot say to be owner of 6 acres because he sold 1½ acres to the 1st respondent and 6 acres to the 2nd respondent which totals to 7½ acres which do not make the 9 acres neither does it make the 3 acres complained to have been allegedly trespassed. Further, with these discrepancies the copy of the Sale Agreement (the original not on record) between the appellant and **PW2 (Exhibit P1)** does not state the acreage. So, the 6 acres bought from the **PW2** is also questionable. The argument that there were 3 acres belonging to the appellant and trespassed by the respondents therefore cannot stand.

I would also wish to further state that one cannot determine the issue of trespass if ownership is not established. It was therefore necessary for the Tribunal to establish ownership, and as it can be observed the evidence of the respondents proved to be heavier than that of the appellant on the issue of ownership because the Sale Agreements, the recognition of the respondents by the *Serikali ya Mtaa* by virtue of **Exhibits D2** and **D7**; and the evidence by the local leaders that is, **DW5 (Balozi wa Mtaa)** who said the appellant sold his land to the respondents; and **DW4 (Mwenyekiti wa Mtaa)** who said he did not know the appellant. The evidence and the exhibits presented were not controverted. In the case of **Hemed Saidi vs. Mohamed Mbilu**

[1984] TLR 113 the court said "*...the person whose evidence is heavier than that of the other is the one who must win*". There is overwhelming evidence by the respondents and consequently the claim for trespass cannot stand because one cannot trespass on his own land. Subsequently, the overwhelming evidence on ownership renders the balance to lean in favour of the respondents. The argument by Mr. Mbuga that the Chairman went beyond the pleadings cannot therefore hold water.

For the reasons I have endeavoured to explain herein above, I find no fault in the decision of the Tribunal. Consequently, the appeal has no merit, and it is dismissed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
12/08/2022