

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

**LAND APPEAL NO.216 OF 2021**

*(Arising from the District Land and Housing Tribunal for Temeke at Temeke in  
Land Application No.306 of 2017)*

**MERCY MSANGI ..... APPELLANT**

**VERSUS**

**EVANCE BAHATI ..... 1<sup>ST</sup> RESPONDENT**

**MKUNDE MLAY ..... 2<sup>ND</sup> RESPONDENT**

**DEOGRATIAS BELLIAN ..... 3<sup>RD</sup> RESPONDENT**

**KARL WILFRED ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*Date of last Order: 03.08.2022*

*Date of Judgment: 11.08.2022*

**A.Z.MGEYEKWA, J**

The present appeal stems from the decision of the District Land and Housing Tribunal for Temeke concerning Land Application No. 306 of 2017. The material background facts of the dispute are not difficult to comprehend. They go thus; the respondents filed an application claiming

that they are the lawful owners of the suit land. They claimed that the appellant invaded the respondents' suit land located at Kichangani Pemba Mnazi, Kigamboni. They alleged that in 2015, they bought the suit land from Juma Iddy Sizya to a tune of Tshs. 25,000,000/=. The respondents urged the tribunal to declare them lawful owners of the suit land and order the appellant to vacate the suit land.

On his party, the appellant filed a written statement of defence and denied the allegation. She claimed that she bought 3.5 acres from Steven Kuya claiming that he was the lawful owner of the suit land. The District Land and Housing Tribunal determined the application and decided in the favour of the respondents and the appellant was ordered to vacate the suit land.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged an appeal containing four grounds of appeal which can be crystalized as follows:-

- 1. That the trial tribunal erred both in law and facts to decide in favour of the 2<sup>nd</sup> and 3<sup>d</sup> respondents despite the fact that they did not testify and it was not a representative suit.*

2. *That the trial tribunal erred both in law and facts for not considering that the appellant bought the disputed land before the respondents.*
3. *That the trial tribunal erred both in law and facts for not taking into consideration exhibits A1 and D1 that are not referring to one area while the former is in regard to 10 acres and the latter is in regard to 3 acres.*
4. *That the trial Chairman erred both in law and facts for not considering the appellant's testimony without stating any reason.*

When the matter was called for hearing before this court on 20<sup>th</sup> July, 2020, the appellant appeared in person and informed the court that the respondents appeared in court only once. I have perused the court records and noted that Mr. Leonard Kipengele, learned counsel for the respondent appeared in court on 17<sup>th</sup> November, 2021 thereafter he did not show appearance and the respondents never appeared in court. For those reasons this court ordered the matter to proceed ex parte against the respondents.

In his submission in support of the appeal, the learned counsel for the appellant began by tracing the genesis of the matter which I am not going to reproduce in this appeal.

Arguing for the first ground, Mr. Magau was brief and straight to the point. He submitted that it is clear from the trial court's record that the second and third respondents never appeared before the tribunal to prove if they were lawful owners or had an interest in the appellant's three and a half acres. To bolster his submission he cited section 110 (1) of the Evidence Act, Cap. 6 [R.E 2019]. He lamented that despite their absence the trial court decided in their favour. He added that it is trite law that whoever alleges a fact unless it is unequivocally admitted by the adversary party has to prove on the balance of probability. He stated that the record is silent on whether the appellant admitted any fact, but still, the tribunal decided in favour of the second and third respondents who never testified and proved their ownership over the suit land.

Submitting on the second ground, the appellant 's counsel contended that there is no dispute that the appellant acquired three and a half acres from Stephen Kuya also known as Msera Pori who had good title thus after disposing of the suit land to the appellant Msera Pori had no good title to pass to the respondents. Fortifying his submission he cited the case of **Faraha Mohamed v Fatuma Abdallah** (1992) TLR 205 the court held that:-

*" He who does not have a legal title to the land cannot pass a good title over the same land to another."*

The learned counsel for the appellant continued to submit that it is not in dispute that the original owner sold the piece of land in 2006 and 2008. He went on to submit that since the ownership shifted to the appellant in 2015 then the vendor had no good title over the three and a half acres to pass to the respondents. Thus, it was his view that as to the evidence on record, the Chairman erred both in law and fact to declare the respondents' rightful owners since the appellant bought the suit land before them.

As to the third ground, Mr. Magau complained that the tribunal misdirected itself on exactly the land in dispute as a result the Chairman ended up in a wrong conclusion. He went on to submit that the appellant claimed ownership of the three and a half acres and not the whole 10.9 acres. He added that exhibit 1 did not refer to 10 acres. He blamed the tribunal for failure to determine the matter at issue as a result he reached an unjust decision. The learned counsel cited the case of **Credo Siwale v The Republic**, Criminal Appeal No. 417 of 2013, the court cited with approval the case of **Mbogo & Another v Shah** (1963) EA 93. He urged this court to find that the tribunal did not determine the issues between the parties

and prayed for this court to step into the shoes of the tribunal, determine the issues and differ with the tribunal.

On the fourth ground, Mr. Magau contended that the tribunal erred in law and facts by denying the testimony of the appellant without giving any reasons. He stated that it is trite law that once a party to a case has tendered admissible evidence before the court of law, then the court has a duty to evaluate and consider the evidence, and failure to consider the evidence in the record, the judgment may lead to injustice. He insisted that the tribunal did not evaluate the evidence of DW1, DW2, and DW3. Mr. Magau stressed that the tribunal summarized the evidence but did not consider the testimony of the appellant in its judgment as a result the Chairman reached a wrong decision. It was his stand that the omission of ignoring the defence evidence is fatal. To buttress his contention he cited the case of **Hussein Iddi and Another v Republic** [1986] TLR 166.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to grant the appeal and costs to follow the event.

I have revisited the evidence and submission of the appellant's counsel, now I am in a position to determine the appeal. I have opted to combine

the second and third grounds because they are intertwined. The first and fourth grounds will be argued separately.

Concerning the second and third grounds, the appellant's advocate is complaining that the tribunal did not consider the fact that the appellant bought the suit land before the respondents. They also faulted the tribunal for failure to consider exhibits A1 and D1 in his judgment. The tribunal proceedings reveal that DW1 testified to the effect that in 2006, she bought the suit land located at Kichangani Pemba Mnazi measuring 3 acres, and in 2008, she bought a half acre from Stephen Kuya. To substantiate her testimony she tendered Sale Agreements which were admitted as exhibit D1 collectively.

The record further reveals that DW2 was the Street Chairman of Kichangani Pemba Mnazi, he testified in favour of the appellant. DW2 witnessed the sale agreement between Mercy Msangi, the appellant, and Stephen Kuya, the vendor. I have scrutinized the sale agreements and noted that the same bears the name of the vendor, it is signed, the seller and buyer, and their witnesses appended their signatures and it was dated. Additionally, the Street Chairman appended his signature and affixed an office stamp of Kichangani.

Additionally, the records show that the appellant acquired the suit land measuring 3.5 acres in 2006 and 2008 before the respondents acquired their suit lands in 2015. Thus, I fully subscribe to the submission of the counsel for the appellant that the vendor had no good title to pass the ownership of the suit land measuring 3.5 acres to the respondent because the same were already been sold to the appellant. Thus, the vendor was not in a position to sell the suit land measuring 3.5 acres to the respondent because he had nothing to sell to the respondents as his interest in the suit land measuring 3.5 acres had been relinquished and transferred to the appellant in 2006 and 2008. In other words, the vendor could not give what he did not have or possess (*Nemo dat quid non habet*). This court in the case of **Frank Mohamed v Fatuma Abdak** (1992) TLR 205, the court held that:-

*" He who does not have a good title to the land cannot pass the same to another."*

Similar in the case of **Mished Chunilla Kotak v OmaryShabani & 2 Others**, Misc. Land Application No. 617 of 2020 HC Land Division held that:-

*" At this juncture I am in agreement with Mr. Chitale that during the sale of the suit house to the applicant herein the third respondent had*



*no better title to pass to the applicant. The situation is a pure case of the principle of Nemo dat quod non habet or no one can give better title than he himself has. This common law rule means that the first person to acquire title to the property is entitled to that property notwithstanding any subsequent sell of the same."*

Equally, the Court of Appeal of Tanzania addressed the similar situation at hand in the case of **Melchiades John Mwenda v Giselle Mbag** **(Administratrix of the Estate of the Late John Japhet Mbag)** and **two others**, Civil appeal No. 57 of 2018 CAT (Unreported) had this to say:-

*"In view of the above, we think, the trial court, having found that John Japhet Mbag sold the disputed land to both the Appellant and the 2<sup>nd</sup> respondent, it should have found that the appellant was the first buyer and 13 that John Japhet Mbag (the seller) had no good title to pass to the 2<sup>nd</sup> respondent!". Being guided by the herein above cited authority."*

Applying the above authorities in the instant case, it is obvious that the respondents being the latter buyer after the appellant, could not acquire any interest over the suit land measuring 3. 5 acres. The Chairman in his findings stated that the appellant's Sale Agreement does not bear any pictures, in my view that is not an essential ingredient of a contract, what

matter is the Sale Agreement must contain the names of the vendor, seller and their witnesses, signatures, location, Stamp of the Street Chairman and the same must be dated.

For those reasons, I differ with the findings of the Chairman and I fully subscribe to the submission made by the learned counsel for the appellant that the appellant has proved his case based on her oral evidence and documentary evidence.

In the event, I find the second and third grounds meritorious. I will therefore detain myself in evaluating and analyzing the remaining grounds of appeal doing so will be an academic exercise. The appeal is allowed to the extent that the appellant is the lawful owner of the suit land measuring three and a half acres located at Kichangani Pemba Mnazi Ward. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 11<sup>th</sup> August, 2022.



A.Z.MGEYEKWA

**JUDGE**

11.08.2022

Judgment delivered on 11<sup>th</sup> August, 2022 through video conferencing whereas the appellant was remotely present.



  
A.Z.MGEYEKWA

**JUDGE**

11.08.2022