

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

LAND APPEAL NO. 05 OF 2022

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No.519 of 2020)

JESSE FRANK KIWELU 1ST APPELLANT

BELINDA IMANI ULOMI 2ND APPELLANT

VERSUS

GRAYSON KAJUNA RESPONDENT

JUDGMENT

Date of last Order: 09.08.2022

Date of Judgment: 16.08.2022

A.Z.MGEYEKWA, J

At the centre of controversy between the parties to this appeal is a parcel of land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in

Land Application No. 519 of 2020. The essence of the respondent's claim (original applicant) as obtained from the record of appeal indicate that the centre of the dispute is the suit land which is alleged to belong to him. The respondent claimed that the appellants have restricted him to conduct a survey in regard to his land. The respondent in his testimony contended that his land measuring four acres is located at Kihonzile, Mabwepande Ward and it is an unsurveyed area. The respondent claimed that he obtained the suit land in December, 2004 from his father and his father bought it from Shabani Malingumu in 1994 to a tune of Tshs. 800,000/=. The respondent testified that he used the suit land peacefully until 2020 when the appellants restricted him to survey the suit land. The appellants on their side claimed that the suit land is a reserved rift valley area. The District Land and Housing Tribunal determined the matter and decided in favour of the respondent.

Undeterred, the appellants have come to this Court seeking to assail the decision of the District Land and Housing Tribunal on four grounds of grievance; namely:

1. *That, the Honourable Trial Chairman erred both in law and fact by the by failing to analyse and consider the evidence of SU 3, an Officer of the Ministry of Land and Human Settlement who gave the evidence that, the disputed land was the property of the Ministry under 20,000 Plots Project.*
2. *That, the Trial Chairman erred both in law and fact to decide in favour of the Applicant without considering that, the same land was fully compensated to another person that is Seif Mshindo by Ministry of Land and Human Settlement.*
3. *That, the Trial Chairman erred both in law and fact by accepting the evidence of SM2, Hussein Halfan Hussein who never obtained consent to re-survey the land from the Land Planning Director.*
4. *That, Trial Chairman erred both in law and fact by accepting the contradictory evidence of SM1 who said he inherited the disputed land from his late father contrary to his letter to Kinondoni Municipality where he submitted that, he purchased the land.*

When the matter was called for hearing before this court on 12th July, 2022, the Court ordered parties to dispose of the matter by way of written

submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

Mr. Mafwele, the appellant's advocate was the first one to kick the ball rolling. The appellant's counsel consolidated and argued the first and second grounds, and the third and fourth grounds were argued separately as they appear.

On the first and second grounds, the appellant's advocate contended that the Chairman failed to analyse and consider the evidence of SU3 who testified as an Officer from the Ministry of Land and Human Settlement. The counsel for the appellant faulted the Chairman in deciding the matter in favour of the respondent without taking into consideration the fact that the Ministry for Land and Human Settlement had fully compensated Seif Mashindo.

He added that SU testified to the effect that the suit land is among the area which was acquired by the Ministry for Land, the area was surveyed and divided among the citizens. They lamented that Chairman ought to find out that the Ministry of Land and Human Settlement was a necessary

party to the suit to facilitate an effectual and complete decision on the dispute. To buttress his contention he cited the cases of **Constatine B. Assenga v Elizabeth Peter, Civil Appeal No. 70 of 2019**. He added that the Ministry for Land and Human Settlement was deprived of its right to be heard. To support his submission, Mr. Mafwele disregarding the evidence of SU3 was fatal and the irregularity is fundamental and impacted the fair determination of the case.

Submitting on the third ground, Mr. Mafwele contended that the Chairman erred in law by considering the evidence of SM2 who never obtained consent to re-survey the land. The learned counsel for the appellant contended that SM1 in his letter requested for a surveyor from the Kinondoni Municipal Directory and SM2 surveyed and prepared a detailed survey, however, she did not tender any exhibit or letter from Kinondoni Municipal Council which authorized her to survey the 20,000 plots. It was his submission that SM2 was not authorized by the Director therefore his action was illegal. He added that the change of land use is the task of the Director of Urban Planning.

As to the fourth ground, the learned counsel for the appellant complained that the Chairman did not evaluate nor analyse evidence on the record as a result he conceded with the evidence of SM1 who testified that he inherited the suit land from his father contrary to the letter of the Municipality. It was his submission that had the Chairman evaluated and analysed the evidence properly then he would have come to a different conclusion.

In conclusion, the learned counsel for the appellants beckoned upon this court to quash and set aside the decision of the tribunal and allow the appeal with costs.

The respondent's counsel, confutation was strenuous Mr. Lyimo learned came out forcefully and defended the trial court's decision as sound and reasoned. He began to trace the genesis of the matter that on 7th September, 2021 during the hearing of the case, two issues were framed and recorded for deliberations to wit, who between the applicant (now Respondent) and the respondents (now Appellants) was the lawful owners of the disputed property and what reliefs were parties entitled in which the Respondent kept his hopes high that would behooves this court to

straightforwardly dispose of this appeal candidly.

Submitting on the first and second grounds, Mr. Lyimo contended that nothing viable legitimatizing faulting the District Land and Housing Tribunal decision since the Chairman analysed the evidence and testimonies and the same were taken into board inclusive SU3 evidence and undoubtedly the tribunal reached a fair conclusion that the respondent was the lawful owner of the disputed land and not the appellants or the third party; Kinondoni Municipal Council or whatsoever as alluded by the appellants.

The learned counsel further stated that the District Land and Housing Tribunal holding was backed up by the respondent's averments in suit application; documentary exhibits such as the Sale Agreement (Exh. G-1), Deed of Gift (Exh.G-2), Recognition letter (Exh.G-4) that were pegged, tendered and admitted at the tribunal. He added that the trailer of witnesses' testimonies such as SMI, Hussein Halfan Hussein the surveyor from Kinondoni Municipal Council (SM2), SM3, and Gerald Kahoho a Member of Local Government (SM4) proved that the respondent was the lawful owner of the suit land.

The learned counsel for the respondent did not end there, he contended that on the contrary, the appellants botched to disprove the respondent's ownership and also unsuccessful to substantiate rival ownerships and consequently, contradicted themselves as to who is the owners of the disputed land. He argued that the 1st appellant vigorously asserted that the suit land is owned by the Kinondoni Municipal Council while SU2 and SU3 alleged the suit land is a property of the Ministry of Land and Human Settlement with no scintilla of evidence.

He continued to argue that the tribunal's outcomes regarding the respondent's evidence as to ownership was critically synthesized and admitted by the 1st appellant and his ally witnesses during their testimonies on 24th September, 2021, and 30th September, 2021 respectively that there was nothing in contention with the ownership of the suit land and thereby a siren of victory was pressed in favour of the Respondent.

The learned counsel for the respondent went on to submit that being an alleged owner of that property, SU3 was imperatively supposed to prove his case but nothing suggestive was laid substantiating her narrations. Mr.

Lyimo went on to argue that the appellants' counsel's contention that Seif Mshindo was fully compensated was never backed up with viable and concrete evidence. The learned counsel disputed the appellants' counsel submission that the disputed land was within the domain of Block 23 and therefore surveyed one. He valiantly contended that the allegation is a sheer illusion with no traces of footage in that a proper Officer of the Ministry for Land was compelled to elucidate broadly in evidence by submitting inclusive plot number, map of the land in dispute, survey plan number, and other features amenable in a survey. He added that astonishingly when probed by the wise assessor she totally repulsed her previous testimony and admitted that the specific area was not surveyed. The learned counsel for the respondent invited this court to refer to the testimony of SU3 that was incorporated at page 10 of the said decision as quoted hereunder:-

"SU3 alisema pia kwenye ushahidi wake kwamba kwenye kitalu 23 siyo maeneo yaliachwa wazi mfano maeneo yaliyonekana kama mabonde kwa wakati huo hayakukidhi vigezo vya kupimwa viwanja yaliachwa..."

Mr. Lyimo insisted that the evidence were well analyzed and considered by the tribunal and hammered that the respondent managed to prove his ownership with exclusions of all others, his land was not surveyed, compensated, and did not fall under Block 23. To buttress his submission he cited section 110 of Evidence Act, Cap.6 [RE 2019] orchestrated by various judicial pronouncements naming the case of **Anthony M. Masanga v Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 CAT (Unreported), **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 and **Barelia Karangirangi v Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (unreported), and **Justine Paul Mukabi and 50 Others v Coast Auction Mart Co. LTD and Court Brokers**, Land Case No. 128 /2012 (unreported).

He further stated that regarding the issue of non-joinder of Ministry for Land as a necessary party, he submitted that this contention was misconceived and an afterthought. He reckoned to the principle that parties are bound by their own pleadings as enumerated in the case of **Mbowe v Eliufoo** [1967] EA 240. Mr. Lyimo went on to submit that the claims at the tribunal was all about ownership of disputed land which does not feature

the necessity to implead the Ministry for Land or KMC because the respondent was not in a tag of war with the alleged authorities. He invited this Court to the wisdom of the apex Court of the land in **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman & Fatina Mohamed**, Civil Revision No. 6 of 2017 (unreported).

Submitting on the third ground, Mr. Lyimo submitted that on 16th September, 2021 when SM2 was in the dock, he testified that “Eneo la mgogoro halijapimwa,” and when crossed examined by the appellants’ counsel, SM2 testified that “eneo ambalo halijapimwa halina block”. He argued that the disputed land was unsurveyed and there was no re-surveying hence no needful consent was ever supposed to be obtained. He went on to submit that SM2 whose profession was not contested at the trial, intensively enumerated how the application for a survey of land is inured at KMC and working modality towards responding to the same which in his entire testimony, nothing was suggestive demanding consent as alluded by the appellants.

Submitting on the fourth ground, Mr. Lyimo submitted that this ground crumbles as nothing viable warranting faulting the decision. He referred

this court to the historical background of how SMI acquired the land in dispute. Mr. Lyimo in support Of his submission cited the cases of **Hemed Said v Mohamed Mbilu** (supra) and **Halfani Sudi v Abieza Chichili** [1998] TLR 527 to condone the tribunal decision that the respondent's evidence was heavier than that of appellants. To support his submission he cited the case of **Halfani Sudi** (supra) the court underscored the importance of the court not lightly to impeach its records as quoted hereunder for better appreciation:-

"A Court record is a serious document; it should not be lightly Impeached."

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, Mr. Mafwele, reiterated his submission in chief. He stressed that the appellants are not legal owners of the suit instead the piece of land is owned by the Ministry and Human Settlement. He insisted that SM1 testimony was contradictory, at one point he testified that he inherited the disputed land while in his pleadings he says that he purchased the suit land. In his pleadings, he stated that he was still

underway to obtain the list of those who were compensated by the Kinondoni Municipal Council and the Ministry of Land and Human Settlement. Ending, he urged this court to grant the appeal.

Having heard the submissions of both learned counsels simultaneously with carrying a thorough review of the original record, in my determination, I will consolidate the first and second grounds together because they are interrelated. Equally related are the third and fourth grounds which I shall also determine together.

On the first and second grounds, the appellant's advocate is claiming that the Chairman did not analyse and consider the evidence of SU3. I have gone through the trial tribunal proceedings and found that SU3 testified to the effect that Block 23, Bunju is among the surveyed areas, while SM2 testified to the effect that the suit land was unsurveyed land. In my view as long as the respondent and SM2 testified were certain that the suit land was unsurveyed then the burden to proof was upon the appellants, they were required to tender supporting documents to encounter the evidence of SM1 and SM2, unfortunately, that was not done. SU3 testified that Seif Mtindo was compensated, but he failed to prove his allegations.

The appellant complained that the Ministry for Land was a necessary party to join the case. As rightly stated by Mr. Lyimo, the claims at the tribunal was about ownership of the suit land. The respondent in his application claimed that he is the lawful owner of the farmland measuring 4 acres at Kihonzile Street, Mabwepande Ward formerly Bunju Ward. The respondent urged the tribunal to declare him a lawful owner of the suit land and urged the tribunal to declare that the appellants' trespassers to the suit land. It is worth noting that the choice of whom to sue, lies on the applicant of the plaintiff who has the duty to show the cause of action against the person who she/he sues. In the matter at hand, the respondent chose the appellants as the proper persons to sue and the Ministry for Land. In the case of **Amon v Raphael Tuck and Sons** (1956) 1 ALL ER. 273. The Supreme Court observed that:-

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party...it is not enough that the intervener

should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally- that is by curtailing his legal rights." [Emphasis added].

Applying the above authority in the matter at hand, it is clear that the ownership of disputed land according to the respondent did not featured the necessity of include the Ministry for Land. Consequently, since the appellants were not lawful owners of the suit land they had no right to challenge the issue of ownership. Therefore, the issue of the necessary party does not concern them. I have also considered the fact that the appellants did not raise their concerns before hearing the case at the tribunal. Therefore raising the same at this juncture is an afterthought.

The third and fourth grounds are related to the evaluation of evidence on record, the appellant's counsel faulted the Chairman in considering the evidence of SM2 and hence reached a wrong decision. The records show that the Chairman analysed the evidence of the appellants as well as the respondent. In the record, SU2 testified to the effect that he is not the

owner of the suit landed property. There is nowhere in the judgment showing that the Chairman when analysing the first issue did analysed the evidence of SM2, instead, the Chairman relied on SM1's oral and documentary evidence, SU1 who testified that the suit land belongs to the Municipality of Kinondoni and testified to the effect that he is not the owner of the suit land. SU2 also testified to the effect that he is not the owner of the suit land. Thus, the tribunal in its findings found that SM1 proved his case.

On the issue of contradiction, the records reveals that SM1 in his testimony testified to the effect that, he is the lawful owner of the suit land, his father bought it in 1994. For ease of reference, I reproduce the testimony of SM1 as hereunder:-

"Eneo hilo ni mali yangu alinunua marehemu Baba yangu mwaka 1994 eneo liko Bunju Kata ya Mabwepande, Baba yangu alikuwa anaitwa Vicent Abel Kajuna."

SM1 testified further that:-

"Mnamo mwaka 2004 Baba yangu aliamua kunikabidhi eneo hilo mbele ya Uongozi wa Serikali ya Mtaa kwamba eneo hilo litakuwa ni mali yangu binafsi na si mali ya familia"

In the above excerpts, it shows that SM1 evidence was clear and thus there was no any contradiction. Therefore these grounds are devoid of merit.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of both tribunals. Therefore, I proceed to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 16th August, 2022.




A.Z.MGEYEKWA

JUDGE

16.08.2022

Judgment delivered on 16th August, 2022 via video conferencing whereas both learned counsels were remotely present.




A.Z.MGEYEKWA

JUDGE

16.08.2022

Right of Appeal fully explained.