

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

LAND APPEAL NO. 45 OF 2023

*(Originating from the Land Application No. 183 of 2018 at the District Land
and Housing Tribunal for Ilala)*

HIDAYA SHUKURU.....APPELLANT

VERSUS

JOYCE JOSEPH 1ST RESPONDENT
ALLY MOHAMED MKALA 2ND RESPONDENT
ZAINABU ABDALLAH MSEKELA 3RD RESPONDENT
ROBERT EDWARD MASWANYA 4TH RESPONDENT
MICHAEL MAZIKU 5TH RESPONDENT
NASSORO KHAMIS AHMED 6TH RESPONDENT

JUDGMENT

Date of the last Order: 27.03.2023

Date of Judgment: 28.03.2023

A.Z. MGEYEKWA, J

The appellant has lodged this appeal against the Judgment of the District Land and Housing for Ilala in Land Application No. 183 of 2018, 28th June, 2022. The material backgrounds facts of the dispute are not difficult to

comprehend. They go thus: the appellant filed an application against the respondents claiming that she is the lawful owner of the suit land measuring one acre located at Kurutini, Msongola Ward within Ilala Municipal Council. The appellant claimed that the respondents have trespassed into the suit land. The appellant alleged that she bought the suit land on 8th October 2022 from Nassoro Abasi Bori and she developed the suit land until December 2015 when she realized that the respondents have invaded the suit land. The appellant prayed for a declaration that the respondents are trespassers and be ordered to vacate from the suit land.

On their side, the respondents disputed the claims and testified to the effect that they bought the suit lands from Hassan Abdallah Jambia who bought the same land from Hiza Mbuguni. The District Land and Housing Tribunal for Ilala determined the application and declared the appellant a lawful owner, the respondents were ordered to vacate the suit land that the appellant was ordered to compensate the 1st respondent Tshs. 3,000,000/=, the 2nd respondent Tshs. 5,000,000/= the 3rd respondent Tshs. 5,000,000/=. The 4th, 5th, and 6th respondents were restricted to enter into the suit land.

The appellant was partly not happy with the decision of the District Land and Housing Tribunal. Hence, she preferred this appeal on one ground of grievance; namely:-

1. That, *the trial Tribunal erred in law and fact by ordering the appellant to pay the 1st, 2nd, and 3rd Respondents exhaustive improvements without considering the fact that the 1st respondent did not build a house and the 2nd and 3rd respondents ignored the stop order and continued to construct houses.*

When the matter was called for hearing on 7th March 2023, the appellant, 2nd and 3rd respondents appeared in persona, unrepresented. By the Court's consent, the appeal was argued by the way of written submission whereas both parties complied with the Court order.

Getting off the ground, Ms. Hidaya, learned counsel for the appellate started to narrate the genesis of the matter which I am not going to produce in this appeal. Submitting on the sole ground of appeal, Ms. Hidaya was brief and focused. She submitted that the 1st respondent did not build a house or made any improvements rather he bought a dwelling house. Therefore it was her view that it is unjustifiable for the appellant to pay for exhaustive improvements made on a property that she did not construct. Ms. Glory continued to submit that the fact that the 2nd and 3rd respondents ignored a stop order and continued to construct their houses could have been considered by the tribunal when issuing its Judgment since their actions were unlawful.

In conclusion, the learned counsel for the appellant beckoned upon this Court to allow the appeal.

In reply, the respondents began to narrate the genesis of the matter which I am not going to reproduce in this appeal. They contended that the appellant was ordered to pay the 1st, 2nd, and 3rd respondents after finding out that the appellant gave the suit land to someone else with full authority and the other person disposed of the suit land to the respondents. They added that thus, the respondents without hesitation developed the suit land. In their view, they find that the tribunal's decision was sound and reasoned. They refused that the Ward Tribunal issued an injunctive order. They went on to submit that the 1st respondent after buying the suit land developed and improved the building. The respondents insisted that the suit land is only one acre and 8 acres are not involved in the suit at hand. They claimed that the appellant is misleading the court.

On the strength of the above submission, the respondents beckoned upon this court to dismiss the appeal with costs.

Having read the written submission of both parties and after examining the record, I do not think this ground will detain this Court. The Court's duty is determined as to *whether the appeal is meritorious*.

In the premises, considering the nature of the instant appeal, it cannot be disputed that the issue of land ownership was not at stake. The DLHT Chairman in his Judgment stated that the respondents did not dispute the issue of ownership. Instead, they are *bonafide purchasers* since the appellant considered the sale of her pieces of land. However, the middle man Hiza Mbughuni was not called to testify in court. The respondents were in the position to call him to testify in their favour otherwise; it is presumed that the witness would testify against them.

The findings of the Chairman stated to the effect that the respondents have failed to call the vendors; Hiza Mbughuni and Hassan Abdallah Jambia to prove their allegations. Section 112 of the Evidence Act, Cap.6 provides that:-

“ The burden of proof as to any particular fact lies on that person who wishes the cost to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person.”

Applying the above provision of law the Hon. Chairman concluded its findings by stating that the respondents have failed to prove their allegations that the appellant directed Hiza Mbughuni to sell his plot to Hassan Abdallah Jambia who sold the suit lands to the respondents.

Failure to prove their allegation, clearly proved that the respondents are trespassers save for the fourth respondent who did not show appearance. The record proves that the appellant's evidence was heavier compared to the respondents' evidence. Thus, the District Land and Housing Tribunal for Ilala declared the appellant the lawful owner which means she proved her case to the required standard in civil litigation that she is the lawful owner of the piece of land measuring one acre not otherwise.

It is my considered view that since the respondents were not lawful owners of the one acre as stated by the appellant in paragraph 5 (ii) of her Application means they were trespassers. Therefore, I find the District Land and Housing Tribunal's findings were correct save for the granted relief. The fact that the respondents developed the suit land does not mean that they are entitled to compensation. As long as they are trespassers into the said one acre, they cannot be compensated and the blames cannot be upon the appellant since she managed to file the case of ownership before the expiration of the statutory period of 12 years. Had it been that the respondents have stayed in the suit land for more than 12 years then the defence of adverse possession could have applied in the case at hand. But that is not the case at hand, therefore, ordering the appellant to compensate the three

respondents was not correct in the eyes of law. It is noteworthy that, compensation cannot be awarded to an illegal occupier. See the case of **Princess Nadia (1998) LTD v Remency Shikusiry Tarimo & two Others**, Civil Appeal No. 242 of 2018 [TANZLII TZCA 249, 09 June 2021].

In the bases on which the claim was made did not form part of the evidence on record; it had no evidential value and for that reason, the trial court should not have relied upon it to award compensation.

In addition, the basis on which the compensation was awarded did not form part of the evidence on record; it had no evidential value and for that reason, the trial Tribunal should not have relied upon it to award compensation. The claim of compensation was not pleaded by the respondents. They did not file any counter claim. Thus, in my considered view, the trial Chairman was not required to award what was not pleaded for by the respondents.

In the basis of which the claim was made did not form part of the evidence on record; it had no evidential value and for that reason, the trial court should not have relied upon it to award compensation. In the case of **Princess Nadia (1998) LTD** (supra), the Court of Appeal of Tanzania held that:-

“Lastly, we once again agree with the learned advocate for the 11 respondents that since it was proved that the appellant was a

trespasser, she had no right to benefit from her wrongful act. At worst, the appellant assumed the risk arising from her unlawful occupation in the premises. Just as she was not entitled to any notice before eviction, she had no right to claim any compensation from the forceful eviction.”

In the final result and for the reasons aforesaid, I allow the appeal to the extent explained above. Therefore, I quash and set aside the Judgment, Decree, and proceedings of the DLHT for Ilala. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 28th March 2023.




A.Z MGEYEKWA
JUDGE
28.03.2023

Judgment delivered on 28th March 2023 via audio teleconference whereas the appellant and the 1st, 2nd, and 5th respondents were remotely present.




A.Z MGEYEKWA
JUDGE
28.03.2023