

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO.255 OF 2022

(Appeal from the decision of the District Land and Housing Tribunal for Kinondoni, at Mwananyamala by Hon. Wambili S.H. Chairperson, in Application No.214 of 2015 dated 17th February, 2022).

ANDREW J.M KITENGE.....APPELLANT

VERSUS

MAUA HAMISI RAI.....1ST RESPONDENT

ALEX MSAMA.....2ND RESPONDENT

JUDGMENT

27th April 2023 & 23rd May 2023

L.HEMED, J.

The subject matter of the instantaneous matter is a landed property known as **Plot No.200 Block B Msasani Village, Kinondoni Municipality in Dar es Salaam**. On 17th April 2015 the appellant herein, was forcefully evicted from the suit landed property by the respondents by demolishing a house and the fence wall which were erected by the appellant.

The Appellant claimed to be the owner of the suit land since 23rd June 1984 when he was given the letter of offer. Following the aforesaid

eviction, the appellant instituted a suit in the District Land and Housing Tribunal for Kinondoni against the present respondents. In the said suit, the appellant claimed for the following reliefs.

- "1. For declaration that the appellant is the lawful owner of the suit landed property.*
- 2. For an order to evict the respondents from the suit premise.*
- 3. For permanent injunction restraining the respondents from interfering the appellant herein with peaceful enjoyment of the suit land.*
- 4. Compensation*
- 5. Costs of the suit."*

At the DLHT, the respondents herein challenged the suit/application *vide* their written statement of defence claiming that the suit property belong to the 1st respondent. The DLHT deliberated on the matter and found the 1st respondent herein the owner of the suit landed property, in consequence thereof, the trial Tribunal dismissed the appellant's claims. The appellant got aggrieved by the decision hence the instantaneous appeal on the following grounds:-

- "1. That the trial Chairman erred in law and fact by reaching the said decision without concrete evidence to support the same and by*

failing to evaluate the evidence adduced by the Appellant which was sufficient to justify ownership of the suit land.

2. that the trial Chairman erred in law and fact by holding that the suit premises belong to the 1st Respondent without proof and in absence of by (sic) Certificate of title and failure to consider the tenure of ownership by the Appellant.

3. That the trial Chairman erred in law and fact by considering that the applicant's failed to pay the requisite allocation fee while the applicant pleaded to have lost the letter of offer and tendered other proof like payment of land rend(sic) and water bills together with building permit."

It should be noted that, on 23rd March 2023, this Court ordered the matter to proceed *ex parte* against the 1st respondent following his non appearance despite being served by way of substituted service by publication in Mwananchi News Paper of 31st December 2022. The Appeal was heard by way of written submissions. **Mr. Paschal Kihamba**, learned advocate prepared and filed submissions on behalf of the appellant while the 2nd respondent enjoyed the service of **Mr. Rajab Mrindoko** learned counsel.

The appellant's advocate argued all the three (3) grounds of appeal simultaneously. He asserted that the Chairman of the DLHT declared the 1st Respondent as lawful owner of the suit land without justifiable and sufficient evidence or reasons to justify his findings. He cited section 119 of the Evidence Act, Cap 6 to cement his point that the 1st respondent had a burden to prove her claims.

It was submitted that the Appellant had testified to be in occupation of the suit land from 23rd June 1984 up to 2015 without any interference from any person. According to the counsel for the appellant these facts were not disputed and supported by the testimonies of PW2 and PW3. It was submitted further that apart from the requisite allocation fees, the appellants was paying land rent in his own name, water and electricity bills which were supplied to him in the disputed plot and lived in the disputed plot for 31 good years before he was unlawfully evicted by the respondents.

The counsel for the appellant insisted that the 1st respondent did not prove her ownership over the suit piece of land. He substantiated his argument by citing section 110(1) of the Evidence Act, Cap 6 which requires a person who desires a court to give judgment as to any right or liability to prove. The appellant stated that, the 1st respondent failed to prove her ownership since she did not tender the alleged certificate of title. He cited the decision of the Court in **Dinkerrai Ramkrishan Pandya v R** [1957]1EA 336.

Furthermore, Mr.Kihamba asserted that, the chairman of the DLHT did not appreciate evidence adduced by PW1,PW2,and PW3 which in his opinion hold more water than that of the 1st respondent which showed clearly that the suit land belonged to the appellant. He cited the decision in **Hemed Said v. Mohamed Mbilu** [1984] TLR 113 where the it was held that the person whose evidence is heavier than that of the other is the one who must win. The appellant concluded by craving the Court to allow the appeal and declare him owner of the suit piece of land.

In reply thereof, Mr. Mrindoko learned advocate who represented the 2nd respondent contended that during trial at the DLHT, the appellant failed to prove on the balance of probability that the disputed land known as Plot No.200, Block "B" Msasani Village, Kinondoni Dar es Salaam was allocated to him by the relevant land Authority. It was stated that, the Appellant in his evidence alleged to have been given the land in dispute by elders of Msasani village in 1984. He alleged that Joseph Shengena being among the elders of Msasani Village was given three plots by the elders of Msasani village and Joseph Shengena gave him one plot out of the three plots given to him. To support his oral account in a bid to establish how he had acquired the disputed land, the appellant produced land rent assessment receipt and property tax receipt.

It was averred by Mr. Mrindoko that the allegations by the appellant were not supported by his pleadings. He stressed that in paragraph 7 of the application, the Appellant alleged to have been allocated or granted letter of offer of the disputed land by the relevant authority on 23rd June 1984. However, while giving testimony he told the court that the suit

property was given to him by way of gift. Under the principle that parties are bound by their pleadings, the trial court would not have declared the appellant lawful owner of the suit property based on fact not pleaded.

The learned advocate for the 2nd respondent also submitted that the appellant did not tender the Deed of Gift or letter of Offer to prove that he was allocated the disputed land by the relevant authorities. In the views of the advocate of the 2nd respondent, land rent receipts and water bills could not be evidence to prove ownership of the disputed land. He cited the decision of the Court of Appeal in **Maigu E.M. Magenda vs Abrogast Maugu Magenda**, Civil Appeal No.218 of 2017 at page 11 where it was stated that by building a permanent house on another person's land or paying land rent or property tax to the relevant authority does not prove ownership.

The counsel for the respondent asseverated that the appellant did not call Joseph Sengena and officer from Kinondoni Municipal Council or Ministry of Land were not called to testify. In his opinion it was justifiable to draw negative inference that if the alleged persons were called would give evidence contrary to the appellant's evidence.

He concluded by stating that the argument of the appellant that he had been in actual occupation for more than 12 years on ground of adverse possession was not supported by his pleadings which he filed in court. There is no way the trial court could have declared the appellant as lawful owner of the disputed plot on account of adverse possession which

was neither pleaded nor prayed for in the application. It was submitted that the appeal be dismissed with costs.

In his rejoinder submissions, the counsel for the appellant reiterated his submissions in chief. He stated that the adverse possession comes into effect when one is dispossessed of his ownership as per section 9(2) of the Law of Limitation Act, Cap 89 RE 2019. The appellant's tenure of ownership started in 1984, which is pleaded in the Application by the applicant in paragraph 7. He also distinguished all the cases cited by the 2nd respondent that they are not relevant to the matter at hand.

Having gone through the submissions made by both counsel, let me turn to determine whether the appeal at hand has merits. In determining this appeal, I have opted to combine all the grounds of appeal. The reasons for so doing are such that in arguing the same, both parties argued the grounds simultaneously. Another reason of combining the ground is that after having examined all the three grounds of appeal, I found all of them are concerned with the question of evaluation and analysis of evidence.

Before the trial Tribunal, that is, the District Land and Housing Tribunal for Kinondoni at Mwananyamala, the Appellant herein had sued the present respondents, *vide* Land Application No.214 of 2015 claiming ownership of the suit landed property known as Plot No.200 Block "B" Msasani Village. Record of the trial Tribunal shows that the issues for determination were that:-

"1. Whether the applicant is the lawful owner of Plot No.200 Block "B" Msasani Village, Kinondoni District.

2. To what reliefs are the parties entitled."

From the way pleadings were crafted and issues framed, it was the duty of the appellant who was the applicant at the DLHT to prove that he is the lawful owner of the suit landed property. The duty of the appellant to prove his claims is pursuant to section 110(1) of the Evidence Act, [Cap 6 R.E 2019] which provides thus:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The question that arises is whether the appellant managed to prove that he is the owner of the suit landed property.

It should be noted that the suit landed property is a surveyed and has been registered. In surveyed land like the one at hand, the person granted the right of occupancy is given by the Commissioner for Lands a "certificate of occupancy" to signify that, such person, is the rightful occupier of the piece of land described in the certificate. This is pursuant to section 29 (1) of the Land Act, [Cap 113 R.E.2019] which provides thus: -

"...where the Commissioner determines to grant a right of occupancy to a person ...he

shall issue a certificate referred to as a
"certificate of occupancy." (emphasis added).

Upon grant, such certificate has to be registered in the Land Registry by the Registrar of Titles pursuant to section 27 of the Land Registration Act, [Cap 334 RE 2019]. Once registered, the person whose name is in the land register becomes the owner of the particular registered piece of land. I am holding so because the word '**owner**' of the registered land has been defined under section 2 of the Land Registration Act, (supra) as follows:

"owner" means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered;"

I have gone through the entire proceedings of the trial Tribunal to ascertain evidence adduced by the appellant in respect of the suit landed property and found that he never produced either Certificate of Occupancy or any evidence showing that he is the registered owner of the suit property. The appellant claimed to have had the letters of offer in respect of the suit landed property, but he never tendered it before the trial Tribunal. Besides, evidence adduced by DW2, one **Hellen Philip**, the Land Officer from the office of the Commissioner for Lands, and exhibit D2, the appellant never accepted the letter of offer. She informed the trial Tribunal that currently the suit landed property has been allocated to **Maua Hamis Rai**. Section 35 of the Land Registration Act, (supra) provides thus:

"The owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto ..." (emphasis added).

In the matter at hand the appellant was expected to establish that he is the registered owner of the suit landed property by tendering the certificate of occupancy/certificate of title. He had no such evidence. I do subscribe to scholarly work of **Dr. R. W Tenga** and **Dr. S.J. Mramba** in their book, '**Conveyancing and Disposition of Land in Tanzania, Law and Procedure**', at page 330 where they said:

"The registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of or a legal interest in a parcel of land. The act of registration confirms transactions that confer, affect or terminate ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property."

Since the appellant failed to prove that he is the registered owner of the suit landed property, in no way the trial Tribunal could find him owner of the suit landed property.

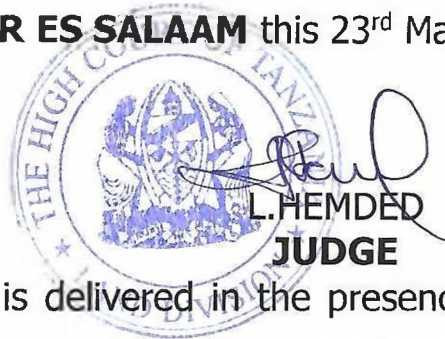
I have also evaluated the appellant's evidence before the trial Tribunal and found that, since the property is a surveyed and registered land, the Commissioner for Lands and the Register of Titles were crucial witnesses to support the appellant's case. He never called one. Failure to call such witness in my firm opinion was fatal. In **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 the Court had this to say:

"Like Mmasa Tumbatu, Almasi Sebarua was another material witness whom, for undisclosed reasons, the respondent failed to call as witness on his side. In such cases the Courts are entitled in law to draw an inference that if these witnesses were called, they would have given evidence contrary to the respondent's interests. The duty to call witnesses is not the courts but it is for the party who wants to be believed in his story and win the case."

In this matter I find proper to hold that the appellant's failure to call the material witnesses from the office of the Commissioner for Lands and/or Registrar of Titles to establish that he is the registered owner of the suit landed property was fatal. We here draw in inference that if they would have been called by the appellant, they would have testified contrary to his interests. Of course, it was so as the respondent paraded DW2, the Land Officer who testified that the 1st Respondent is the owner of the suit landed property.

In the upshot, I find no merits in the appeal. I have no option but to dismiss the entire appeal with costs. It is so ordered.

DATED at DAR ES SALAAM this 23rd May 2023



L. HEMDED
JUDGE

COURT: Judgment is delivered in the presence of **Mr. Pascal Kihamba**, advocate for the Appellant and **Mr. Rajab Mrindoko**, advocate for the 2nd Respondent this 23rd May 2023. Right of appeal explained.



L. HEMDED
JUDGE
23/05/2023