

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 221 OF 2023

(Originated from the decision of Temeke District Land and Housing Tribunal in Land Application No. 62 of 2022 before Hon. J. Silas- Chairman)

THE BOARD OF REGISTERED TRUSTEES

OF CORNERSTONE ASSEMBLIES' MINISTRYAPPELLANT

VERSUS

ROSEMARY JULIUS CHALAMILA

(Administratrix of the estate

of the late SIMON BUNDALA MACHIBYA).....RESPONDENT

J U D G M E N T

Date of last Order:21/08/2023

Date of Judgment:05/10/2023

K. D. MHINA, J.

This is the first appeal. It stems from the District Land and Housing Tribunal ("the DLHT") for Temeke in Land Application No. 12 of 2021, whereby, the applicant at the DLHT, who is now the respondent, *inter alia*, claimed for a declaration that the respondent, who is now the appellant (The Board of Registered Trustees of Cornerstone Assemblies Ministry), has trespassed the suit premise, to order the respondent, who is now the appellant for specific performance on payment of debt and in alternative to vacate from the case premise in the event of failure to pay the debt.

The brief facts which led to the institution of Application No. 12 of 2021 at the DLHT are that the applicant alleged that, initially in 2011 her late husband sold a parcel of land to the appellant for a price of TZS. 9,000,000.

Later, on 8 May 2014 her late husband sold another parcel of land to the appellant for a consideration of TZS 22,000,000/=. She alleged the appellant paid a down payment of TZS. 3,585,000/= and TZS. 18,415,000/= remained as an outstanding debt balance.

Thereafter, the appellant constructed a church at the suit premise but did not pay the remain balance of debt.

After her late husband passed away on 30 March 2020, her efforts to recover the debt from the appellant proved futile

Therefore, this background prompted the applicant now the respondent to rush and seek redress at the DLHT for Temeke.

On the appellant side they alleged that on 19 June 2014, they purchased a parcel of land from the late Simon Bundala Machibya for TZS. 12,585,000/= and they paid the whole amount as agreed.

After the full trial, the DLHT decided the matter in favour of the applicant who is now the respondent and ordered the appellant to pay the outstanding debt of TZS. 18,415,000/= and in case of failure to vacate from the suit premise.

Undaunted, the appellant appealed to this court and preferred the following grounds to fault the decision of the DLHT.

1. That the Learned chairperson erred in law and in fact in holding that the Appellant has debt to pay to applicant in absence of proof.

2. That the learned chairperson erred in law and in fact in holding that the Appellant is an invader to the said suit premise contrary to as provided for by the law.

3. That the Learned chairperson erred in law and in fact in holding the way she did while the church has no sale agreement with the Respondent worth TZS. 22,000,000/=

4. That the Learned chairperson erred in law and in fact in holding in favour of Respondent who failed to tender sale agreement document of Tshs 22,000,000 between the church and the late Simon Bundala Machibya which has been paid TZS. 3,585,000/= as part payment and remains TSZ. 18,415,000/= as debt.

The appeal was argued by way of written submissions. The appellant was unrepresented, while the respondent was represented by Grace Daffa, a learned Advocate from Womens Legal Aid Centre.

In supporting appeal, the appellant combined the first, third and fourth grounds and argued them jointly. On this the appellant faulted the decision of the trial DLHT based on the following; **one**, during the trial the respondent did not produce any documentary evidence to show that there was such a sale of the suit property worth TZS. 22,000,000/= dated 8 May 2014.

Two, there was no sale agreement tendered at the trial to substantiate her allegations that the Church has been paid TZS. 3,585,000/= as part payment and TZS. 18,415,000/= remained and, **three**, the respondent did not produced evidence from any other person who could have witnessed such sale of the property worth TZS. 22,000,000/= dated 8 May 2014.

The appellant further submitted that the burden of proving that the Church has debt to pay fall upon the one who alleges, especially to prove that the sell agreement worth Tsh. 22,000,000/= between the Church and the late Simon Machibya existed and there was installments payment. But the respondent had failed to discharge that burden by failing to prove the above.

Regarding the second ground, the appellant submitted that the church is the bonafide purchaser of called suit premise, the vendor was one Simon Bundala Machibya the deceased now, and during the trial they

tendered sale agreements between the Church and Simon Bundala Machibya, the first one was dated 04 January 2011 worth TZS. 9,000,000/= which was paid in full and the second one was dated 19 June 2014 worth TZS.12,585,000/= which was also paid in full.

The appellant further submitted that in the respondent's Land Application form No. 1, she appended the sale agreement dated 4 January 2011 worth TZS. 9,000,000/= but did not append sale agreement worth TZS. 22,000,000/= dated 8 May 2014.

Further, the appellant submitted that the church did not have any record of having a debt to Simon Bundala Machibya rather than having two sale agreements which were full paid.

The appellant concluded by submitting that the respondent failed to prove her case on the balance of probabilities, hence the Judgment of the DLHT was purely founded on allegations, which were not correct in law.

In reply Ms. Daffa resisted the appeal. She argued that the respondent discharged her burden of proof when she tendered a letter/note evidencing that there was another agreement between the appellant and the deceased. That letter which was admitted in evidence during trial was never objected nor cross- examined by the appellant. Therefore, she argued that shows that the appellant agreed to its contents for failure to cross-examine. To bolster her argument, she cited the

decisions of the Court of Appeal in **Martin Misara vs. Republic**, Criminal Appeal No. 428 of 2016 and **Paul Yustus Nchia vs. the National Executive Secretary CCM and another**, Civil Appeal No 85 of 2005.

Having objectively gone through the grounds of appeal, submissions from both parties and the entire record of appeal, the main issue to determine is whether the appeal by the appellant is founded.

At the very outset, it is essential to quote the reason for the DLHT;

"Mikataba ya shilingi 22,000,000/= wa 3,585,000/= na 18,415,000/= haikuletwa barazani. Kwamba Machibya alishapokea 3,585,000/= ilipofika tarehe 08/5/2014, barua hiyo ni nakala tu, nakala halisi haikuletwa ndani ya nyaraka hiyo kuna sahihi za Mzee Machibya na SU2. SU2 hakueleza kuhusu malipo haya ya 3,585,000/= kanisa lililoyafanya ni ya nini na yalifanyika japo alisaini barua hiyo.

Kwa SU2 kusaini, ninakubaliana kwamba Sh. 3,585,000/= ililipwa na kwa Sh. 3,585,000/= kulipwa, shilingi 18,415,000/= ilibaki iweje sasa SU1 na SU2 waeleze walishailipa?

Nyaraka ya kumaliza deni hili la Sh. 18,415,000 haikutolewa na SU1 alieleza kwamba ipo katika benki ya Efata. Hakuna Mtumishi yeyote wa benki ya Efata aliyeletwa kutoa Ushahidi kuhusu hati hii.

Katika hati ya majibu ya Mjibu Maombi imeambatanishwa hati ya mauziano ya tarehe 19/6/2014 na kati ya waliosaini na SM1, aliyekataa fedha hiyo kulipwa na SU2 aliyeleza kanisa kuitoa

fedha hii. Nyaraka hii inataja eneo kuuzwa kw ash. 12,585,000/= na mkataba huu ndiyo ule SU1 alioeleza upo benki ya efata. Mkataba huu haurejei shilingi 22,000,000/= na hautaji shilingi 3,585,000/= kinyume na Ushahidi wa SU1 na SU2 waliodai kanisa kulipa kiasi na kumalizia sh. 18,415,000/=.

Kwa hiyo mkataba huo siyo ule ambao unatokana na sh. 22,000,000/= na hivyo hauongelei eneo lenye mgogoro, mkataba huu pia hauna picha za muuzaji na mnunuzi kama ule wa tarehe 04/01/2011 na ulifanyika tarehe 19/6/2014 wakati Simon Machibya akiwa hai, sioni sababu kwa nini wasiweke picha.

Kukosekana kwa Mkataba huo kunanifanya nikubaliane na hoja (kiini hiki) kwamba Simon Machibya hakulipwa kiasi kilichobaki cha Sh. 18,415,000/=”.

From above and principally it is quite clear that the DLHT based its decision on the letter mentioned at pages 7 and 8 of the Judgement and the sale agreement entered in 2014 between the appellant and the late Simon Bundala Machibya

I said so because that letter was the basis of granting the respondent TZS. 18,415,000/= and the sale agreement which was doubted by the DLHT was the basis of dismissing the appellant’s claim that the purchasing price was TZS.12,585,000/= and was paid to the late Simon Bundala Machibya in full. The documents were heavily relied on by the trial DLHT in its judgment.

Further, I did not find any sale agreement with the amount of TZS. 22,000,000/=

However, after perusing the trial DLHT proceedings (untyped), from the proceedings dated 25 November 2021 when hearing commenced up to 22 November 2022 when the defence case was closed, the record does not indicate if the letter and the sale agreement of 2014, referred in the judgment were tendered and admitted at the trial.

Upon my further perusal I find that copy letter dated 8 May 2014 attached to the respondent's application as an annexure and the copy of the sale agreement dated 19 June 2014 attached to the appellant's written statement of defence also as an annexure.

Flowing from above the position has already settled by the Court of Appeal on the weight of the annexures attached to the pleadings but never tendered and admitted by the Court as exhibits during the trial. In **Crescent Impex (T) Ltd vs. Mtibwa Sugar Estates Ltd**, Civil Appeal No. 455 of 2020 (Tanzlil), it was held that;

"The law is very clear on the weight of annexures which were not tendered or received as exhibits during the trial; that they should not be treated as evidence."

The above cited case also quoted the decision of **Sabry Hafidh Khalfan vs. Zanzibar Telecom Ltd (ZANTEL) Zanzibar**, Civil Appeal No. 47 of 2009 (unreported), where it was held that;

"We wish to point out that annexures attached along with either the plaint nor the written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents either to the plaint or to the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."

Therefore, as I alluded to earlier, the DLHT relied heavily as the basis of its decision, the annexures which were never tendered and admitted at the trial as exhibits. In my view, that is fatal and procedural irregularity in sense that the trial was not properly handled thus occasioned the miscarriage of justice.

The deliberations above determine the first, third and fourth ground of the appeal regarding the analysis of the evidence. That the trial DLHT mishandled the evidence.

Further, Since the first, third and fourth grounds of appeal suffices to dispose of this appeal. I do not see any point in considering the second ground of appeal, its determination is overtaken by the determination of

the first, third and fourth grounds; thus, it will not change the outcome of this appeal.

On the way forward, since the evidence at the trial was mishandled and affected the judgment, the trial was flawed, and in essence, there was no trial. See **Ismail Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015 (CAT), Tanzlii, I invoke revisional powers under Section 43(1) (b) of the Land Disputes Court Act, Cap. 216, and proceeds to revise the proceedings of the District Land and Housing Tribunal in the following manner: -

- i. The entire proceedings of the District and Housing Land Tribunal for Temeke in Land Application No. 12 of 2021 are nullified, and the resultant Judgment and decree are quashed and set aside.
- ii. The case file be remitted to the District Land and Housing Tribunal for Temeke to be heard de-novo before another Chairman and a new set of assessors.
- iii. I make no order as to costs.

It is so ordered.




K. D. MHINA
JUDGE
05/10/2023