IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

LAND APPEAL NO 276 OF 2023

BABUMO MSASILA KINYOGOTO .....1st APPELLANT

FIDEL NICODEMUS NZAKAHA.....2nd APPELLANT

VERSUS

STRATON SYLEVESTER MUTAYABARWA ..... RESPONDENT

(Appeal from the decision and order of the District and Land Housing Tribunal at Temeke)
(P.I Chinyele, Chairperson.)
Dated the 31st day of May 2023
in Land Application No. 224 of 2023

J U D G M E N T

Date of last Order:07/09/2023
Date of Judgment:20/11/2023

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. 224 of 2021, whereby the respondent in the instant appeal, *inter alia*, claimed for an order to stop the respondents from continuing trespassing into his land, an order for eviction and demolition of the respondents' buildings therein and a declaration that the land in

dispute described as Plot No. 306, Block A Plan 'E' 305/1 located at Vijibweni, Kigamboni District in Dar es Salaam belonged to him.

The brief facts which led to the institution of Application No. 224 of 2021 at the DLHT are that the applicant alleged that in 2013, he purchased suit land from Hadija Saidi Seif for TZS 8,000,000. He paid a "down payment" of TZS. 2,000,000/= through mobile phone money transfer. Later, he paid the remaining TZS 6,000,000 to the seller, and they executed the sale agreement before the advocate, Mr. Aaron Alan Lesindamu.

Later, he discovered that the appellants had trespassed into his land and constructed structures therein.

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

On their side, the appellants alleged that in 2018, they purchased the suit land from the respondent for consideration of TZS 8,000,000/= vide sale agreements dated 10 September 2013 and 13 June 2018. Therefore, they maintained that the suit land belonged to them.

After a full trial, the DLHT decided the dispute in favour of the respondent by declaring him as the lawful owner and that the appellants were trespassers.

Undaunted, the appellants are now approaching this Court by way of appeal with the following six (6) grounds of appeal;

i. *That the trial chairperson erred in law and in fact, by declaring that the appellants invaded and trespassed the suit land*
ii. *That the trial chairperson erred in law and in fact, by not considering the evidence of SU3 Bahati Maganga*
iii. *That the trial chairperson erred in law and in fact, by failure to analyse the evidence and (think) aforethought (nafikiri)*
iv. *That the trial chairperson erred in law and in fact, by considering that the sale agreement by Khadija and the respondent were okay while the respondent was not present by the one between appellant and respondent while not present also are not okay*
v. *That the trial chairperson erred in law and in fact, by not considering the sale agreement by the advocate, which did not give an addendum to the former one 2 million only*
vi. *That the trial chairperson erred in law and in fact, by not considering that the respondent did not participate in acquiring the land and disposing of the same*

The appeal was argued by way of written submissions. The

appellants were represented by Mr. Geofrey Martin, a learned advocate, while the respondent was represented by Mr. Helmes Marcel Mutatina, also a learned Advocate.

In supporting appeal, the appellant abandoned the 5th ground and argued the first, second, third, fourth and sixth grounds.

The appellant faulted the decision of the trial DLHT based on the following;

In the first ground, Mr. Martin submitted that the appellants bought the said plots following the procedure through local government authority after satisfying themselves through the former sale agreement between Khadija and Respondent; not only that, also the witness who was present during the said transaction one Bahati Maganga Mjelwa (SU3). In that sense, there is no trespass or invasion of the suit plot.

Mr. Martin, on the second ground, submitted that Bahati Maganga Mjelwa (SU 3) was the centre of the evidence to the Tribunal because he was present at the time when one Khadija Sefu bought the suit land from Mzee Mashamaba thereafter, he was present while the respondent purchased the same from Khadija Seif. The respondent was absent in that sale but sent his representative to buy

the suit land. Even at the final stage of disposing of the same suit land to the appellants, the respondent was absent. He sent the same person, and SU3 was present. Therefore, SU3 was the key witness to that transaction.

As regards the third ground, Mr. Martin, submitted that it seems the decision did not come to the evidence adduced in Court but the Chairperson's afterthought, as can be seen at page 7 of the typed judgement where it was written that.

"Hata hivo nafikiri kwamba SMI kwa kutoa kielelezo S -I inaonyesha alikuwa na hati yake ya ununuzi"

Therefore, the trial chairperson failed to analyse the evidence adduced before her.

Arguing for the fourth ground, the learned counsel submitted that there was double jeopardy since the transaction between Khadija Saidi, the respondent, was absent. At the same time, he was also not present in the transaction between the appellants and the respondent. But the trial Chairperson blessed the former transaction while both transactions were done through the same representative.

On the sixth ground, he submitted that the evidence on record indicates that the respondent was not present at the time of acquiring

the land the same at disposing of it to the appellants, in that sense, the one who represented him from buying from Khadija Seifu, was the one who represented him to dispose to the appellants.

Opposing the appeal, the respondent advocate Mr. Mutatina, submitted that the trial Chairperson was right to declare that the appellants invaded and trespassed onto the suit land as they bought the suit land from the person who was not a legal owner. Therefore, that person had no good title to pass to the appellants. He referred this Court to the case of **Farah Mohamed vs. Fatuma Abdallah** [1992] TLR 205, CAT.

On the second ground of appeal, the respondent counsel submitted that the trial chairperson considered the evidence of SU3 one Bahati Mganga Mjelwa in composing the judgment save that the said evidence was not watertight to support the appellants' case as it had no evidential weight in the eyes of the law.

Therefore, after considering the evidence of SU3 vis-a-vis that of the respondent's side, the trial chairperson found the respondent to be the winner. In so doing, the trial chairperson was guided by the principle as provided for in the case of **Hemed Said v. Mohamed Mbilu [1984] TLR 114,** where it was that

"According to the law, both parties to the suit cannot tie, but the person whose evidence is heavier than that of the other must win".

Regarding the third ground of appeal, he submitted that the phrase "*I think*", "nafikiri" as used by the trial chairperson does not mean that she did not analyse the evidence adduced before the DLHT. At any rate, this phrase cannot be used as a yardstick to invalidate the decision of the trial tribunal for the reason that even the Justices of the Court of Appeal, which is the apex Court in our jurisdiction, do use the phrase "we think" in composing their judgments. Still, their judgments remain to be valid. On this, he referred this Court to the decision of the Court of Appeal in **Avit Thadeus Massawe vs. Isidory Assenga,** Civil Appeal No. 6 of 2017, CAT at Arusha, (Unreported) page 23.

On the fourth ground, Mr. Mutatina submitted that the trial chairperson was right by considering that the sale agreement of the suit land between Khadija and the respondent was valid because the respondent's evidence during the trial was to the effect that he authorized Alole Ramadhani Athumani to buy a piece of land on his behalf at Kibene, Vijibweni from Khadija.

The presence or non-presence of the respondent during the signing of the sale agreement was not among the framed issues to be determined by the trial tribunal, or facts pleaded in pleadings. Therefore, Mr. Mutatina stated that it is an established principle of the law that a matter or an issue of fact not formally raised before the trial court cannot be raised before the appellate court as a ground for appeal. He referred this Court to the decision in **Dar es Salaam Water & Sewerage Authority v. Didas Kameka & 17 Others,** Civil Appeal No. 233 of 2019, (Unreported) at page.

Regarding the last ground of appeal, he submitted the record of the trial tribunal, which was very clear on how the respondent participated in the entire process of acquiring the suit land. This can be seen via the evidence that SMI, SM2, SM3 and SU3 elaborated on that issue. Therefore, the allegations by the appellants that the respondent did not participate in acquiring the suit land have no legal legs upon which to stand, hence meritless.

In rejoinder, Mr. Martin urged this Court to consider what he had submitted earlier in his submission in chief.

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I find

that both grounds of appeal revolve around the issues of evaluation of evidence; therefore, the grounds are intertwined.

The key issue is whether the respondent himself or, in his directives, sold the land to the appellants.

It should be noted that the first appellate court is entitled to re-evaluate the evidence on record and, if warranted, can arrive at its own conclusion. See **Makubi Dogani vs. Mgodongo Maganga,** Civil Appeal No. 28 of 2019 (Tanzlii).

At the trial, the respondent (SM1) testified that he purchased the suit land from Hadija Said Seif. He informed the DLTH on 10 September 2013 while at Kigoma working at the Tanzania Revenue Authority; he sent Alola Ramadhani Athuman to purchase the suit land from Hadija Saidi Seif. The price for the suit land was TZS. 8,000,000/=. After the agreement, he paid TZS 2,000,000/= via mobile phone money transfer, and later, he paid the remaining TZS. 6,000,000/= in the presence of the advocate (SM2), who also prepared the sale agreement, which both the seller and the buyer signed.

According to SU2, Aaron Allan Lesindamu stated he was the one who prepared the sale agreement (exhibit S6). After that, he started

the process of getting the title deed, but he stopped after he was transferred to Iramba Singida. In 2019, when he was transferred to Njombe, he was informed that his land was invaded. He decided to travel and visited the suit land. At the suit land, he found the trespassers, and there was a breach of peace.

On the appellants' side, the 2nd respondent testified that he was informed by phone by Deogratius Hwayi Kihumo (SU4) that the suit plot was for sale for TZS.8,000,000/=. He went to the suit plot and handed the money to SU4, who also handed the same to Edward Emmanuel, a witness to the sale (Exhibit D1). Part of the money, i.e., TZS. 4,000,000/= was given to him by the 1st respondent. He further stated that the plot was owned by Straton Sylvester Mutayaba. At the sale, the seller's witnesses were Dennis Jonathan and Bahati Maganga, who was the caretaker of the plot.

His evidence was corroborated by the 1st appellant. In addition, the 1st appellant stated that after a few months, one local leader (Mjumbe) by the name of Christina told them that they sold the suit land because of urgency, and they wanted the same back and gave

the appellants TZS. 15,000,000/=, but they refused. The 1st appellant was recorded to say;

> *"Baada ya miezi kadhaa mjumbe Christina alitupigia simu na kusema waliouza waliuza kwa dharura tu hivyo wapokee 15,000,000 sisi tulikataa kuliuza tulitaka tuishi pale"*

On his side, SU3 testified that while he was at Kibiti, he received a phone call from Hatibu Ngulata (former street chairman) informing him that Tony (the respondent) went to him and wanted to sell his plot, but he lost the sale agreement. Because he had a copy, he gave it to the Chairman. Later, the suit plot was sold to the respondents. When he was cross-examined regarding the photos of the respondent in the sale agreement between Hadija Seifu and the respondent and the one between the respondent and the appellants, he stated that they were different persons.

Furthermore, the trial record indicates that SU4 Deogratias Hwayi Kihumo testified that he was called by the local leader (mjumbe) Christina Joseph, who informed him that there was a plot for sale, but the owner had no document, but Bahati Maganga had a copy. After that, the appellants purchased that plot.

From the above evidence, it should be noted that there was no dispute over the sale of the suit land between Hadija Saidi Seif and the respondent. Therefore, as I alluded to earlier, the issue was whether there was a sale between the respondents and the appellants.

From the above evidence, it is quite clear that the appellants and their witnesses did not indicate how the respondent participated in the sale of the suit land to them.

In their testimonies, they were throwing the ball to each other and other persons they did not call to testify on their side.

The 2nd respondent stated that he was informed (SU4) that the suit plot was for sale. SU4 stated that he was told by the local leader, Christina Joseph, that the suit plot was for sale. SU3 testified he was informed by Hatibu Ngulata (former street chairman) that Tony (the respondent) went to him and wanted to sell his plot, but he lost the sale agreement because he had a copy he gave to the Chairman.

Further, the purchase money was handed to SU4, who also handed the same to Edward Emmanuel, a witness to the sale.

From the above analysis, there is no evidence to suggest that the respondent sold the suit land to the appellants.

Flowing from above, in connection to the first ground of appeal, the DLHT was proper to declare the appellants invaded and trespassed into the suit land because, as shown above, no evidence suggests that the respondent sold the suit plot to the appellants. Further, the evidence revealed that the persons who sold the suit land to the appellants were not the owners of the suit plot; thus, they had no good title to pass. The evidence suggests that the appellants were conned. Therefore, since the owner of the land did not pass the title to the appellants, that means the appellants were trespassers and invaded into the suit land. Therefore, the first ground of appeal lacks merit.

Regarding the second ground of appeal, this should not detain me long. The evidence of SU3 was evaluated at page 7 of the DLHT Judgment but failed to shake the respondent's case.

By the way, in his evidence, SU3 stated that he was informed by Hatibu Ngulata (former street chairman) that the suit plot was for sale. Without confirming with the owner of the plot, he gave a copy of the sale agreement to that Chairman. Therefore, his evidence could

not serve the appellants' case; thus, the DLHT was proper and the 2nd ground of appeal lack merits.

On the third ground, regarding using the word "I think" (nafikiri) in the judgment. On this, with respect to the appellants' counsel, in no way can the use of that word in the judgment be a ground for appeal, or it can invalidate the decision.

As rightly submitted by Mr. Mutatina, the word is commonly used in composing court decisions. Using that word does not mean that the evidence was not evaluated.

Therefore, the third ground of appeal also fails.

The fourth and sixth grounds of appeal should not detain me long. The evidence at the DLHT was clear, and the Chairperson properly evaluated the same and reached the proper decision. The evidence does not indicate whether the respondent participated personally or authorised any other person to sell the suit land. Therefore, the 4th and 6th grounds of appeal also lack merits.

From the above discussion, in totality, the appeal lacks merits; both grounds of appeal fail to persuade this Court to interfere with the

decision of the DLHT.

Consequently, I dismiss the appeal with costs.

It is so ordered.

K. D. MHINA

JUDGE

20/11/2023