IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO: 251 OF 2023

(Appeal from the Judgment and Decree of the District Land and Housing Tribunal for Kinondoni)
(R.L Chenya, Chairman.)
Dated the 23 May 2023
in Application No. 238 of 2018)

PROF. MOHAMMED SHAABAN SHEYA.....APPELLANT

VERSUS

MARIAM NKONG'WANZOKA (as an administratrix of the estate of the late MARTIN NKONG'WANZOKA) ...1st RESPONDENT

RASHID KONDO (MZEE MPATE) .....2nd RESPONDENT

JUDGMENT

Date of last Order:10/10/2023

Date of Judgment:11/12/2023

K. D. MHINA, J.

This is the first appeal. It stems from the decision of the District Land and Housing Tribunal ("the DLHT") for Kinondoni in Land Application No. 238 of 2018, whereby the appellant in the instant appeal, *inter alia*, claimed to be declared the lawful owner of the piece of land located at Goba, an order to evict the respondent from the encroached piece of land, including

removing all her belonging and the survey plan No. E367/606 dated 21 May 2010, which included Nos. Plots 2166 and 2167 should be revoked.

The brief facts which led to the institution of Application No. 238 of 2018 at the DLHT, where the applicant alleged that in 1989, he purchased suit land from the 2nd respondent, Rashidi Kondo @ Mzee Mpate, measuring 6.3 acres, located at Goba, Ubungo Municipal Dar es Salaam.

In January 2003, the Applicant carried out a block survey of his 6.3 acres of land and mapped it out on TP Drawing No. 1 / 818/ 896 dated 5 November 1999 and laid down procedures as per the survey plan E'367/97 dated 19 March 2003, but he left eight un surveyed plots of his land for further negotiation as they overlapped with his immediate neighbours, six plot to Mzee Mwanambilimbi on the west side and two plots to Dr. Kulwa on the south side.

In January 2015, the respondent surfaced in the area and erected 'red-painted' concrete poles, part of which encroached the applicant's strip of land about 90 metres long and 26 metres wide that shared a boundary with Binti Mbegu to the North and Mzee Mwanambilimbi to the West.

The appellant later learned that the respondent surveyed that piece of land in 2010 and had allocated plots No. 2166 and 2167 in Survey Plan No. E'367/606 of 21 May 2010 to herself

He contended that the whole exercise was done without the prior knowledge and consent of the Applicant and his immediate neighbours.

Further, nowhere on existing traditional boundaries, the 1st respondent (Mariamu Mkongwazoka) shared a border with the applicant.

The land, which the respondent claimed to have bought in 1982 from Rashidi Kondo (Mzee Mpate), was located far away from the disputed piece of land, as the seller attested. Therefore, there was no boundary between the applicant and the 1st respondent's lands.

After a full trial, the DLHT dismissed the suit for lack of merits. The reasons advanced by the DLHT were;

One, the appellant failed to call as a witness the seller of the disputed land to him and the respondent's late husband and the surveyor who he alleged he surveyed his suit land.

Two, the appellant's sale agreement did not describe the land in dispute in terms of the size of the land, neighbours and boundaries. Therefore, in such circumstances, the first buyer has priority over the land.

Third, the appellant did not involve his neighbours when fixing the boundaries.

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

> *1. The trial chairperson erred both in law and facts by deciding in favour of the 1st respondent where there is no any credible piece of evidence to support the same.*
>
> *2. The Trial Chairperson erred both in law and facts by failing to evaluate evidence and hence reached an unfair decision.*
>
> *3. That the trial chairperson erred both in law and facts by deciding the case in favour of the 1st respondent without visiting locus in quo to ascertain favour of the 1st respondent without visiting locus in quo to ascertain the existence of disputed land and its boundaries.*
>
> *4. That the trial chairperson erred both in law and facts by deciding in favour of the 1st respondent contrary to her testimony, which are to the effect that the said land was owned by her deceased husband.*
>
> *5. That the trial chairperson erred in law and facts by failing to balance the evidence adduced by both the appellant and 1st respondent, hence reaching an unfair decision.*
>
> *6. That the trial chairperson erred both in law and facts by failing to summon the 2nd respondent, whose evidence was crucial to this matter, and hence relied on unascertained and denied facts on the side of the 1st respondent.*

The appeal was argued by way of written submissions. The appellant was represented by Mr. Stephen Ndila Mboje, a learned advocate, while the 1st respondent was represented by Mr. Fred Calist, a learned advocate, and the 2nd respondent was presented by Ms. Jane Goodluck Mseja, also a learned Advocate.

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

On the first ground, Mr Mboje submitted that the 1st respondent's claims of ownership were based on the evidence that they bought the disputed land from the same person who also sold it to the appellant and relied on a sale agreement, which was tendered and admitted as Exhibit D2.

He submitted that the said sale agreement of 22 August 1982, Exhibit D2, had the following discrepancies: the name of the seller was Mpate Kondo, while in their case, the land in dispute was originally owned by Rashid Kondo, the neighbour in the sale agreement were Binti Mbegu/Dalushi/Mamboya. It was not known which part of the land was bordered by each neighbour, and worse, the size of the land was not shown in that sale agreement.

The appellant's counsel further argued that the 1st respondent was supposed to demonstrate that she legally acquired the property and was the only person who owned that land other than the appellant. He cited section 119 of The Law of Evidence Act, Cap 6, R; E 2022, which provides;

> *"When the question is whether any person is the owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner."*

Faulting the DLHT decision in the second ground of appeal, Mr. Mboje submitted that the importance of the court to evaluate the evidence before making findings was overemphasized in the case of ***The National Microfinance Bank [NMB] vs Chama Cha Kutetea Haki na Maslahi ya Walimu Tanzania [CHAKAMWATA]*** Civil Appeal No 17 of 2019, at Mbeya [HC-Unreported]

He narrated that there was no doubt that the evidence in the record was that the testimony of PW2, PW3 and PW4 corroborated with the testimony of PW1 (The appellant). Also, the Sale Agreement between the appellant and the 2nd respondent had no discrepancy as it described the size and existence of boundaries in all corners.

Furthermore, he submitted that the testimony of DW2 had nothing special regarding the way the 1st respondent acquired the land and the sale

agreements tendered by the 1st respondent; exhibit D2 was inconsistent with the testimony of the 1st respondent.

Arguing for the third ground of appeal, Mr. Mbuje submitted that there are circumstances where a case cannot be decided without visiting the locus in quo.

But in this case, the evidence in records indicated that the appellant and 1st respondent were contested over the same land. According to the appellant's testimony, the said piece of land had definite size and boundaries, while the 1st respondent stated that both the size and boundaries were indefinite.

Therefore, there was a need for the DLHT to visit the locus in quo to determine the location of the disputed land, size and boundaries so it could discover the truth between the two. To bolster his argument, he cited the decision of the Court of Appeal of Tanzania in ***Avit Thadeus Masawe vs Isidory Assenga***, Civil Appeal No. 6 of 2017.

There were some controversial worth to be determined through visiting locus in quo as the 2nd respondent, in his written statement of defence, clearly stated that he sold such piece of land to the appellant and not the 1st respondent as quoted in 1st paragraph of page 3 of the judgment of the district land and housing tribunal that: -

> *"Kwa upande wa mjibu maombi wa pili amekiri na kutambua mwombaji kuwa alimuumiza ardhi mwaka 1989 ambayo baadaye ilithibitishwa na serikali ya mtaa. Vile vile anatambua, kuwa mwombaji alifuata taratibu sahihi za kupima eneo lake. Vivyo hivyo anakiri kuuza eneo lake la bondeni kwa Martin Nkong'wazoka ambaye ni mume wa mjibu Maombi wa kwanza mwaka 2002 na kwamba maeneo yao hayakupakana, Kwamba yeye hatambui eneo linadaiwa na mjibu maombi na kwa hiyo anakubaliana na nafuu anazoomba mwombaji katika eneo lake".*

Regarding the fourth ground, the appellant counsel submitted that the 1st respondent was sued in her own capacity while she was an administrator of her late husband, which rendered the whole proceedings fatal. To support his argument, he cited the decision of the Court of Appeal in ***Muleta Gabo vs. Adam Mtegu***, Civil Appeal No. 485 of 2022 (Tanzlii)

He further submitted that on the 2nd paragraph of page 3 of the judgment of the DLHT, the Chairman of the tribunal acknowledged that the 1st respondent confirmed that she was not the owner of the disputed property; instead, the same belonged to her deceased husband.

Furthermore, the appellant's counsel contended that the 1st respondent testified that the suit land belonged to her deceased husband. Thus, since she was the administrator of her deceased husband, she could not be sued under that capacity rather than being sued as the administratrix. Therefore, that was incompatible with the proceedings; hence, as good as

no defence was made by the 1st respondent, hence it completely dismantled the weight scale on her side.

He submitted that there was a danger of the beneficiaries losing their inheritance as the property would be owned by the 1st respondent.

Submitting to the fifth ground, Mr. Mbuje contended that he was aware of the principle of law under section 110 of the Evidence Act, Cap 6, RE 2022, that the burden of proof lies on a party who alleges anything in his favour and in civil case the standard is on balance of Probability as per the decision of the Court of Appeal in ***Euphracie Mathew Rimisho t/a Emari Provision Store and another vs. Tema Enterprises Limited and another***, Civil Appeal No 270 of 2018, (Unreported).

He narrated that the appellant's evidence was heavier than that of the 1st respondent. Exhibit D2, tendered by the 1st respondent, had indefinite size and boundaries, while the appellant's exhibit P1 had definite size and boundaries. Therefore, on the balance of probabilities, the appellant had a greater chance of winning.

As to the last ground, the applicant's counsel submitted that it is apparent in records that the 2nd respondent denied selling the disputed land to the 1st respondent. Therefore, it was on record that the 2nd respondent was sued by the appellant and attended to the Tribunal on various

adjournments, and it is not known why the Tribunal proceeded ex parte against the 2nd respondent without making efforts to summon him. The 2nd respondent being a password to the decision of the Tribunal, the Tribunal ought to have made efforts to call him, and if its efforts ended unto unfruitful, it could have recorded the reasons.

Failure to call the 2nd respondent rendered the hearing fatal as it denied the right to be heard as the Court of Appeal held in ***Tanelec Ltd vs. TRA***, Civil Appeal No. 0 of 2018 (unreported).

In response, regarding the first ground, Mr. Calist for 1st respondent, argued that the 1st proved her ownership by tendering exhibit D2, which was admitted at the trial tribunal. The document was the sale agreement of 1982, between her husband and the 2nd respondent, earlier and before the sale agreement of the appellant of 1989.

The sale agreement was admitted after the objection on non-payment of stamp duty, which the 1st respondent complied with later on.

He cited ***section 101 of the Evidence Act [CAP. 6 R.E. 2019]*** as well as the Court of Appeal decision of ***Lulu Victor Kayombo vs Oceanic Bay Limited & Mchinga Bay Limited***, Consolidated Civil Appeals No. 22 & 155 OF 2020, where the law states that when terms of contract, grant or disposition of property or any matter required by the law to be reduced to

the form of document have been admitted under section 100 of the same act, no oral statement or agreement should be admitted.

Mr. Calist further argued that the Appellant had introduced the new issue of questioning the exhibit, which was already tendered without any objection at the trial court, which is fatal. He cited the case of ***Malula Chemu @ Malula & 2 Others vs The Republic,*** Criminal Appeal No. 188 of 2019, where the Court of Appeal (Unreported) explained the effect of failure to object to the admission of exhibits and the meaning of admission of exhibits; when was held that: -

> *"With respect, it is too late in a day for him to do so because its admissibility or otherwise was never raised at the trial. As a matter of general principle, an appellate court cannot decide matters that were not raised and decided upon by the court below...".*

Therefore, the DLHT was proper to hold that the 1st respondent was the lawful owner of two plots, No. 2166 and 2167 Block "E" Goba, as she acquired through her late husband as the survey plan dated 21 May 2010 with registration No. E' 367/606 was still valid and was tendered by DW2, the in-charge and custodian of survey plan maps as provided by ***section 18 of the Land Survey Act, Cap 324.***

Arguing on the second ground, Mr. Calist submitted that the appellant's claims of encroachment by the 1st Respondent were not proved by himself or either of his summoned three witnesses the same.

He stated that the Appellant's neighbours mentioned in his application at the trial tribunal were material witnesses. Thus, failure to call them as witnesses at the trial may draw an adverse inference against him as it was held in the case of ***HEMED SAID vs MOHAMED MBILU [1984] TLR144,*** where the court stated: -

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests".*

He further argued that the DLHT evaluated the evidence and made a fair decision.

As for the third ground, the 1st respondent's counsel submitted that there is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo. The same is done at the discretion of the court or the tribunal, particularly when it is necessary to verify evidence adduced by the parties at the trial.

He narrated that at the trial, there was no such a need because, one, the disputed land was already surveyed and mapped out and allocated the two Plots 2166 and 2167, Block 'E' Goba Area, to the 1st Respondent and second, there was no any credible or material witness on Appellant's case convinced the trial court to visit the locus in quo (vendor, surveyor, neighbours, witnesses in sale agreement or closet assignee). To support his argument, he cited ***Sikuzani Saidi Magambo1 & Kirioni Richard vs Mohamed Roble,*** Civil Appeal No. 197 Of 2018 and ***Nizar M.H. vs Gulamali Fazal Janmohamed [1980] TLR 29.***

As to the fourth ground, Mr. Calist submitted that where the deceased property is in dispute, the interested person may sue the Administrator of the Estate as the Appellant did at the trial court and in this appeal. The testimony of the 1st Respondent included tendering of a Letter of Administration of the estate of her late husband. He cited Saida ***M. Mnyone vs Salum Nassoro Mgonza [2010]*** T.L.R. 366, where it was held that;

> *" (ii) There may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in the determination of the dispute or establishing ownership may institute proceedings against the administrator, or the administrator may sue to establish claim of the deceased's properly."*

The appellant's arguments in his written submission on this ground hold no water. First, he was the one to raise that objection of locus stand, if any, at the trial tribunal; second, if any amendment would be needed before the trial tribunal, he was the one to plead the amendment; and third, this issue should not be raised at this stage because it is overtaken by events.

Regarding the fifth ground, Mr. Calist submitted that, the trial DLHT balanced the evidence fairly adduced by both the appellant and the 1st respondent thus why and reached a fair trial. The appellant's case did not convince the trial tribunal Chairman and its assessors to dispense justice in his Favor.

He argued that it is a cardinal principle and general rule in Civil and Criminal matters that he who alleges must prove, as emphasized under ***Section 110 (1)*** *and* ***(2)*** *of the* ***Evidence Act [CAP. 6 R.E. 2019]***

He further submitted that the credible witnesses who were material to the case, the ones who witnessed the sale agreements to prove the applicant's allegations, did not testify. Not only that, even the neighbours (Bint Mbegu, Mwanambilimbi, Dr Kulwa and Mzee Mpate (Rashidi Kondo) mentioned by the appellant in his amended application and Annexure '1' did not testify about the traditional or original boundaries before the survey was effected.

Submitting on the sixth ground, Mr. Calist contended that the DLHT disposed of the suit fairly to both parties and issued summons to the 2nd respondent by which the appellant brought proof of service of the 2nd respondent.

The 2nd respondent, in response, filed his written statement of defence before the tribunal but, unfortunately, did not appear to defend his case or testify as a witness for the appellant; hence, the matter proceeded ex parte against him.

On his side, the 2nd respondent in his submission, conceded the appeal. His reasons were the same as what was submitted by the appellant. In fact, his reasons were a replica of what was submitted by the appellant.

In rejoinder, the applicant's counsel mostly reiterated what he had submitted in his submission in chief and further submitted that the Survey plan argued by the 1st respondent is immaterial as it cannot be taken as proof of land ownership.

Having keenly considered the above submissions by the parties, it is quite clear that most of the grounds of appeal revolve around the issue of evaluation of evidence at the DLHT. The grounds revolving around the evaluation of evidence are No. 1, 2, 4, 5 and 6. Therefore, since the grounds are related, I will determine together.

On this, I will sail and be guided by the principle enunciated under section 110 (1) of the Evidence Act as a standard in proving a case.

The section reads;

> *"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."*

Similarly, I will be guided by the case of ***Hemedi Said vs. Mohamedi Mbilu*** (1984) TLR 113, where it was held that;

> *"He who alleged must prove the allegations."*

Therefore, the burden of proof at the trial lay on the appellant to prove that he was the lawful owner of the suit land.

But before determination, I wish to discuss the issue regarding the 2nd respondent.

At the trial, the 2nd respondent was served and filed his written statement of defence. When the matter was set for hearing, despite duly being served with the summons dated 23 December 2019, which he signed, he did not enter an appearance. On 1 September 2020, the DLHT ordered the matter to proceed ex parte against him.

When the DLHT set a date for the judgment, the 2nd respondent was duly served with the notice of judgment, which he signed on 13 May 2023. On the date of judgment, he did not enter appearance. In the notice the process server deponed that he was old and sick. Therefore, the DLTH proceeded to deliver its judgment. Therefore, the matter proceeded ex parte against him.

In this appeal, he was made a party as the 2nd respondent and filed his submission.

Having narrated as above, it is clear that since the matter proceeded ex parte against him, the law bar him from participating in this appeal by filing the submissions. His available remedy was to challenge the exparte order and judgment against him. Therefore, I will disregard his submission.

Another issue I want to clarify, which will not detain me long, is the issue raised by the counsel for the appellant is regarding the name of the seller of the disputed land.

He submitted that while in exhibit D2 tendered by the 1st respondent, the name of the seller was Mpate Kondo, but in their case, the land in dispute was originally owned by Rashid Kondo.

On this, I have to revisit the evidence on record. In his own words, the plaintiff in his evidence testified that the name of the seller was Rashid Kondo @Mzee Mpate.

From the above evidence, it is quite clear that the seller was one person, Rashid Kondo @ Mpate, and there is no dispute that he was the one who sold the land to both the appellant and the late husband of the 1st respondent.

Reverting the determination of grounds No. 1, 2, 4 and 5, first of all, it should be noted that the first appellate court is entitled to re-evaluate the evidence on record and, if warranted, arrive at its own conclusion. See ***Makubi Dogani vs. Mgodongo Maganga***, Civil Appeal No. 28 of 2019 (Tanzlii).

At the trial, the applicant (SM1) testified that he purchased the suit land from the 2nd respondent in 1989, while the 1st respondent testified that her deceased husband, Martin Mac Nkong'wanzoka, bought the suit land from the 2nd respondent in 1982. Exhibit D2, the sale agreement indicated that the seller was Mpate Kondo.

Both parties presented their sale agreement to wit; exhibit P1 and exhibit D2, respectively.

As I alluded to earlier, the seller was sued by the appellant as the 2nd respondent but failed to appear to testify at the trial.

Further, the appellant failed to call him as a witness to prove that the disputed land was sold to him by Rashid Kondo.

In the above scenario, the law is clear that the seller should be made a party or witness to the suit because his evidence is key in the determination of the suit. He is the one who knows the boundaries of the land he sold to the purchasers and at the time of sale to both parties the land was yet to be surveyed.

The facts of this case are clear that without the evidence of the seller, the plaintiff's case remains weak. In ***Clement John Mushi V. CRDB Bank, Hass Petroleum Co. Ltd and Viovena Company, Commercial Case No 7 of 2007,*** HC-Commercial (unreported), it was held that;

> *"Be that as it may, however, I think it is now settled law that in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant, non-joinder will be fatal to the proceedings".*

In the circumstances of this case, where the plaintiff alleged the ownership of the land, after seeing that Rashid Kondo failed to appear as a party, it was his duty to call him as his witness.

Further, the plaintiff testified that there were neighbours to the disputed land to prove his allegations, but he failed to call those neighbours who bordered the suit land. In the cited case of **George Ngando (Supra),** it was held that: -

> *"It is my opinion that those neighbours were material witnesses whom, for undisclosed reasons, the appellant failed to call as witnesses on his side".*

From the above-cited case, the neighbours were material witnesses to the instant case and failure to call those witnesses without any reason weakens a case. In **Hemed Said (Supra),** it was held that;

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests".*

Flowing from above, it is clear that the DLHT rightly evaluated the evidence and reached a decision based on the evidence on record.

Therefore, the 1st, 2nd, 4th, 5th and 6th grounds of appeal, both dealing with the evaluation of evidence, lack merit. In fact, in the 1st ground of appeal, the appellant was trying to shift the burden of proof to the 1st respondent while the law is clear that he who alleges must prove.

In the 6th ground of appeal, shown earlier, the DLHT summoned Rashid Kondo, two times, but he failed to appear despite being duly served. Therefore, the blame should not be on the DLHT.

Further, the appellant, in proving his case, also had a duty to call his seller as a witness, but he did not do so. Therefore, he has no one to blame.

Regarding the 3rd ground on visiting locus in quo, as rightly submitted by Mr, Calist, it is clear that that is not mandatory, and it is done under special circumstances at the discretion of the court. In **Sikuzani Saidi Magambo (Supra),** it was held that;

> *"As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial".*

Therefore, in this matter at hand, the trial chairperson had no duty bound him to visit locus in quo as a mandatory requirement.

Further, visiting the locus in quo without the presence of evidence of the vendor who knew the boundaries of the land he sold to both parties

would not assist anything in the determination of the matter. Therefore, the third ground also fails.

In view of the reasons, I have endeavoured to assign in this judgment, I find no iota of merit in this appeal as there are no extraordinary circumstances that require me to interfere with the findings of the DLHT. The appeal stands dismissed with costs.

It is so ordered.

K.D Mhina

JUDGE

11/12/2023