

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

LAND APPEAL NO. 26713 OF 2023

(Arising from Land Application No. 299 of 2020, of the District Land and Housing Tribunal for Ilala)

JOHN JOSEPH MKUNJA.....APPELLANT

VERSUS

ISSA BAKARI MALINDI.....1ST RESPONDENT

FOSTERS AUCTIONEERS AND

GENERAL TRADERS.....2ND RESPONDENT

J U D G M E N T

Date of Last Order: 12. 02.2024

Date of Judgment: 13.03.2024

T. N. MWENEGOHA, J.

This appeal is based on the following grounds; -

- 1. That, the Tribunal seriously erred in law and facts in framing wrong, issues contrary to what the appellant's claims thus leading to wrong Decision of the case;**
- 2. That, the Tribunal seriously erred in law and facts holding that, the appellant failed to prove his case for failure to show whether the person who sold the land to him had a little top pass to the appellant thus reaching a wrong Judgment of the case;**

3. That, the Tribunal seriously erred in law and facts for its failure to consider that, the appellant was not a party to the appellant Application No. 42 of 2014 which declared the 1st respondent the lawful owner of 25 acres, thus condemning the appellant without being heard;
4. That, the Tribunal seriously erred in law and facts in declaring the 1st respondent the lawful owner of the land comprised of 2.5 acres on erroneous decision of Application No. 42 of 2020;
5. That, the Tribunal seriously erred in law in its Judgment by not dealing with and give decision on claims of trespass raised by the appellant in his application.

The appeal was heard through written submissions, Advocate Paskazia Benedict Mauki appeared for the 1st and 2nd respondents, while the appellant was represented by Advocate Litete Haji Ndugo who chose to abandon the 4th ground of Appeal in his submissions.

Submitting in favour of the appeal, Mr. Ndugo, consolidated the 1st and 2nd grounds of Appeal and argued that, the trial Tribunal misdirected itself in framing the issues. That, the claims by the appellant were for compensation for trespass and demolition of the appellant's house. Ownership of the land trespassed upon is not among the ingredients in proving trespass as stated in **Avit Thadeus Masawe versus Isidory Assenga, Civil Appeal No. 6 of 2017, Court of Appeal of Tanzania at Arusha (unreported)**. He went on to argue on the 3rd ground of Appeal that, the appellant was condemned unheard when the respondents executed the Decree leading to the demolition of the appellant's house. That, there was no Order of Execution tendered in at the trial Tribunal to prove the allegations of the 1st respondent to be

executing any Decree during demolition. Above all the appellant was not given any notice prior to Execution of the Decree in question, contrary to **Order XXI Rule 34 of the Civil Procedure Code, Cap 33 R. E. 2019** and the case on **Balozi Abubakar Ibrahim & Another versus M/s Benandys Ltd & Another, Civil Revision No. 6 of 2015, (unreported)**. Lastly on the 5th ground, it was argued that the learned chairperson did not deal with the claims of the appellant presented before him. He decided the matter based on misconception that, the appellant was required to provide a valuation report and this was wrong on his part.

In reply, Advocate Mauki for the respondents, maintained on the 1st, and 2nd grounds that, the first issue framed by the trial Tribunal was on who is the rightful owner of the suit land. This was very vital, as there is no trespass to land in absence of ownership of the same by another person. Therefore, the Chairperson was correct to draw that particular issue, as it was inevitable to decide the case before him without establishing who among the parties is a rightful owner of the disputed land as stated in **Geita Gold Mining Limited versus Twalin Ismain Haasan Ikoza & Others, Civil Appeal No. 103 of 2019, Court of Appeal of Tanzania.**

As for the 3rd and 5th grounds, the respondents counsel argued them together that, the suit land was rightly owned by the 1st respondent. The rest of the persons found there were trespasser. That even though the respondent was not a party in Land Application No. 42 of 2014, this does not make the appellant's right of ownership not to existing as stated in **Equador Limited versus National Development Corporation, Civil Application No. 388/01 of 2019, Court of Appeal of Tanzania at Dar es Salaam.**

Having gone through the submissions of parties as presented by their respective counsel, and the records at hand, the issue for determination is whether the Appeal has merits or not.

I will start by discussing the 1st and 2nd issues, where the appellant faulted the trial Tribunal for failure to frame issues properly and for erroneously holding that the appellant failed to prove his claims before it. In his submissions, the appellants counsel was of the view that, it was wrong to raise the issue of ownership in a claim of compensation by the appellant for demolition of his house by the respondents. On the other hand, the respondents' counsel maintained that the issues were correctly drawn and the decision was justifiable.

I went through the records of the trial Tribunal and I found the pleadings (Application from the appellant). At the first bullet of paragraph 6(a) of the same the applicant's claims against the respondents jointly and severally was for a declaration that, the applicant, now appellant is a lawful owner of the suit land and a compensation of 180,000,000/= to be paid to the applicant for unlawful demolition of his house. So, basically, the claims by the applicant who is now the appellant was on the ownership of the suit land and it was the applicant himself who wanted to be declared the owner of the disputed land. It is surprising at this point when his learned counsel is trying to avoid his client's claims. The rules are settled that parties are bound by their pleadings; hence the appellant cannot come with a new issue at this stage, see **Yara Tanzania Limited versus Ikuwo General Enterprises Ltd, Civil Appeal No. 309 of 2019(unreported)**.

Indeed, based on the pleadings by the appellant/applicant himself, the issue of ownership was a must to be entertained as it formed the

backbone of the applicant/appellant claims. The compensation claimed was based on establishing if he owned the land in question. He failed to prove his claims; hence the issue was answered negatively against him and in favour of the 1st respondent. The trial Tribunal at page 4, 5 and 6 explained this fact very well. That, the one who sold the suit land to the appellant (SM2), did not prove that he had a good Title to pass the same to the appellant as stated in **Farah Mohamed versus Fatuma Abdallah TLR (1995) 205.**

On my part, I rightly agree with the findings of the trial Tribunal. Throughout his testimony, Mr. Anatory Phidoline Mbangati (SM2), did not show how he acquired the land in question. Above all, the said land was in dispute for years between the 1st respondent and other 9 persons. Therefore, it was important for Mr. Mbangati to clear the dust surrounding his acquisition of the said land, before passing it to the appellant. That is to say, the evidence of the respondent was heavier than that of the appellant at the Tribunal, He deserved to win as stated in Hemed **Said versus Mohamed Mbilu (1986) TLR, 113.** The 1st and 2nd grounds are denied for lacking merits

On the 3rd and 5th grounds, I will also consolidate them as done by the respondents' counsel in her submissions. The appellant's counsel on these two grounds also claimed to be condemned unheard prior to Execution of the Decree leading to the demolition of his house. I find these arguments to be misplaced. If the appellant is against the Execution proceedings and its Orders that followed, he should choose the appropriate remedy available at his disposal to challenge the same and not by way of Appeal in another case, as he did. Above all, as I stated herein earlier, the findings of the trial Tribunal were correct, there is nothing material from the

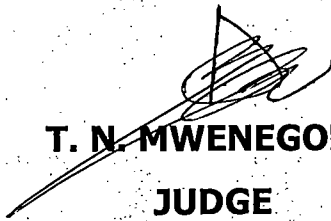
appellant requiring the said findings to be overturned. Therefore, the 3rd and 5th grounds are also rejected for want of merits.

Eventually, I uphold the Decision of the trial Tribunal, so are the Orders followed it.

The Appeal is accordingly dismissed with costs.

it is so ordered.




T. N. MWENEGOHA
JUDGE

13/03/ 2024