

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

LAND APPEAL NO. 26198 OF 2023

(Arising from Land Application No. 268 of 2020, of the District Land and Housing Tribunal for Temeke)

**PENCIL HOPE FOUNDATION.....1ST APPELLANT
ZUBERI MGENI HAMIS.....2ND APPELLANT**

VERSUS

MANG'ERA PHANUEL GISUNTE.....RESPONDENT

J U D G M E N T

Date of Last Order:26.02.2024

Date of Judgment:25.03.2024

T. N. MWENEGOHA, J.

The following are the grounds, forming the basis of this Appeal;-

- 1. That, the Hon Trial Chairperson erred in law and fact by failing to consider that the land has already been surveyed and Certificates of Title had been issued to the 1st appellant and other persons not party to the dispute;**
- 2. That, the Hon Trial Chairperson erred in law and fact to issue Judgment against a piece of land that is no longer in existence;**
- 3. That, the Hon Trial Chairperson erred in law and fact to issue a decision affecting persons who were not part to the case;**

4. That, the Honorable Chairperson's decision is not supported by evidence on record;
5. That, the Hon Trial Chairperson erred in law and fact to entertain an application against a wrong party; and
6. That, the Hon Trial Chairperson erred in law to entertain a matter which it had no Jurisdiction.

The Appeal was heard through written submissions. Advocate Walter Shayo appeared for the appellants while the respondent was represented by Advocate Kaizer Msosa.

Before submitting in favour of the Appeal, Mr. Shayo invited this Court to receive additional evidence under **Order XXXIX Rule 27 of the Civil Procedure Code, Cap 33 R. E. 2019**. He insisted that, there are crucial documents which were not tendered at the Trial Tribunal and the same are material in determination of the suit at hand. These are the four Certificates of Titles which were not in the possession of the appellants, that is why they are to be received at this stage. This prayer was strongly disputed by the respondent counsel on the reasons that, during their testimonies, the appellants did not mention of these documents.

To resolve this issue, I will refer to the provisions of **Order XXXIX Rule 27 of the Civil Procedure Code, Cap, 33 R. E. 2019** as follows; -

27.-(1) The parties to an Appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if-

(a) the Court from whose decree the Appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such evidence or document to be produced, or the witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the Court, the Court shall record the reason for its admission.

Based on the quoted provisions above, the Court should satisfy itself as to two issues before allowing evidence to be received at the appellate stage. Firstly, that the trial Court refused to admit evidence which was or ought to have been admitted at the trial, or if there is a justifiable cause the Court will admit such evidence as prayed by the counsel for the appellant needs. In this case, I am satisfied that, there are no circumstances, requiring the application of **Order XXXIX Rule 27** (supra). In avoidance of repetition further discussion on this is highlighted on my analysis of evidence below. Therefore, the prayer by the appellant's counsel is denied.

Submitting on first and third grounds, Mr. Shayo insisted that, the suit land had already been surveyed at the commencement of the trial. Therefore, the current status has changed. That, there are Certificates of Titles already issued, where the first appellant has 3 Titles and the remaining 4 Titles are in possession of other persons. That, the

Honourable Chairperson only relied on the Sale Agreement instead of the issued Title, contrary to **Section 12 of the Land Registration Act, Cap 334, R. E. 2019** and also the case of **Kellu Kamo Lucas versus Dr. Luis Shija, Civil Appeal No. 63 of 2023, Court of Appeal of Tanzania(unreported)**.

He went on to argue on the second ground that, the Certificates of Tittle were issued in 2021 and thus the 20 acres claimed by the respondent do not exist. Therefore, the Tribunal's decision is not executable as the land in dispute does not exist. As for the fourth ground, the counsel for the appellants maintained that, the respondent did not discharge his legal burden of proof. The case was not proved on balance of probabilities as stated in **Brelia Karangirangi versus Asteria Nyalwambwa, Civil Appeal No. 237 of 2017, Court of Appeal of Tanzania at Mwanza(unreported)**.

Arguing in favour of the fifth ground, Mr. Shayo maintained that, the first appellant is a registered organisation according to the Trustees Incorporation Act, Cap 318, R. E. 2002. It was therefore wrong for the respondent to sue the first appellant in the name of Pencil Hope Foundation instead of the **Registered Trustees of the foundation as given in Sibonike Anyingisye Mwaselemba versus Teofilo Kisanji University (TEKU), Misc. Civil Application No. 02 of 2020, High Court of Tanzania at Mbeya**. Lastly, on the sixth ground, it was argued that, the trial Tribunal entertained a dispute which it has no Jurisdiction over it. That, the land was surveyed in 2021, and the Titles issued. If the respondent was aggrieved, he could have challenged the decision of the

Registrar as provided for under **Section 102(1)(b) of the Land Registration Act, Cap 334, R. E. 2019.**

In reply, Mr. Msosa for the respondent maintained on the first and third ground that, the appellants are bound by their pleadings. They did not mention on the survey or existence of the Title over the suit land; hence they cannot rely on them at this stage. Above all, the said Title were fraudulently obtained. Further, the appellants and their witnesses failed to prove how the second appellant acquired the suit land. To cement his arguments, he cited the case of **Salim Said Mtomekela versus Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019, Court of Appeal of Tanzania (unreported).**

On the second ground, it was argued by the respondent's counsel that, the case was filed the 29th December 2020 and hearing started in August 2021. At that material time there were no issue of Certificate of Titles, therefore, the parties should be bound by their own pleadings. Furthermore, the appellants never filed any list of additional documents to prove the existence of these Titles. That, the defense case at the trial Tribunal started in 2022 but these documents were not presented. Therefore, these documents are forged or otherwise obtained by fraud.

On the fourth ground, the counsel for the respondent insisted that, the decision of the trial Tribunal was proper as the respondent managed to prove his case on balance of probabilities. That, the second appellant who is said to be the owner, failed to tender any documents showing that he owned the said land before disposing the same to the first appellant. And on the fifth ground, the submissions of the respondent's counsel were that, it is the first appellant himself who filed an Application for Objection

Proceedings and introduced herself as Pencil Hope Foundation. It is through this Application; the respondent became aware of her existence in the land. Further, the first appellant filed a Written Statement of Defence, filed a Power of Attorney, Sale Agreement all bearing the same name. This ground therefore is an afterthought and should not be entertained.

As for the sixth ground, it was contended by the counsel for the respondent that, the cause of auction was trespass and there was no issue of Certificates of Title raised at the trial Tribunal. Therefore, this ground is baseless and should be denied.

Having gone through the submissions of the parties through their respective counsels, the time has come for the Court to determine the merits or otherwise of this Appeal. In my discussion, I will consolidate grounds number 1, 2,3,4 and 5 and analyse them together as they communicate the same thing, that it was wrong for the trial Tribunal to entertain the case, while the land in dispute has already been surveyed and the Certificate of Titles issued, 3 to the first appellant and other 4 Certificates given to others persons.

All these grounds are well answered by looking at the available records from the trial Tribunal. Upon going through the records, here are my findings:-

- 1. There was a case decided by Pemba Mnazi Ward Tribunal, vide Application No. 36 of 2016, between the respondent and the second appellant herein above, Zuberi Mgeni Hamisi. The said case was decided in favour of the**

respondent; hence he initiated Execution proceedings at the trial Tribunal, vide Misc. Application no. 64 of 2018.

2. Following the Execution proceedings filed by the respondent, the first appellant successfully moved the trial Tribunal to stay the same, vide Land Application No. 434 of 2018 and further prayed for the investigation of the attached property as she claimed the same is not liable for attachment (Objection proceedings), vide Misc Application No. 59 of 2019.
3. The first appellant did not end there, she filed an Application for Temporary Injunction in 2020, vide Misc. Land Application No. 604 of 2020, which was dismissed on 8/04/2021
4. Thereafter, a case forming the basis of this Appeal was filed, on 29/11/2021. It was heard and finalised in favour of the respondent again on 16/03/2023. The records further show that, neither the first nor the second appellant, raised any issue regarding the survey or issuance of Certificate of Title over the suit land during the trial. Further, the said records show that, on 6/09/2021, the first appellant filed a list of additional documents which only mentioned a Ruling and Drawn Order dated 26/11/2020, but did not mention any Certificates of Titles that are being mentioned at this stage.

Therefore, with these findings, as above shown, I am fully satisfied that, the call or claim by the first appellant that the land in dispute did not exist during the trial of the case is unsubstantiated. Evidence has

revealed that this dispute over the land in question dates as far back as 2016; and it involved mainly the second appellant and the respondent. The records of the Ward Tribunal of Pemba Mnazi show clearly that, the case before it vide Application No. 36 of 2016, started to be heard on 19/12/2016. On other words, the land in dispute was there and unsurveyed and remained the same even when the case before the trial Tribunal started afresh with the joinder of the appellant on 29/11/2021, up to its end, on **16/03/2023**.

Secondly, there was no evidence of the existence of the survey over the land brought to the attention of the trial Tribunal throughout the trial of the case before it, between the parties herein. Bringing this issue at this stage is nothing other than an afterthought. Moreover, if the said survey existed, it was initiated during the pendency of this case. If the first appellant knew of the existing or ongoing survey on the suit land, she could have notified the Trial Tribunal either at the pleading stage or during the hearing. She did not do so, therefore she is bound by her pleadings as she is precluded from bringing new evidence or issues at this stage of the case, see **Yara Tanzania Limited versus Ikuwo General Enterprises Limited, Civil Appeal No. 309 of 2019, Court of Appeal of Tanzania at Dar es Salaam**.

Thirdly, it is the first appellant herself who introduced herself to the respondent as PENCIL HOPE FOUNDATION. She did so through filing countless cases at the trial Tribunal, with that name and against the respondent and the second appellant. In cases filed by her, the first appellant did not use the name Registered Trustees of her foundation, rather the same name, PENCIL HOPE FOUNDATION. Therefore, she is

estopped from denying the use of that name at this stage. She is the one who made the respondent file the case at the trial Tribunal using the name PENCIL HOPE FOUNDATION, see **East African Development Bank v Blueline Enterprises Ltd, Civil Appeal No. 110 OF 2009, Court of Appeal of Tanzania, (unreported)**.

Fourthly, on balance of probability, the case before the trial Tribunal was proved in favour of the respondent. Apart from the weaknesses pointed out by the learned trial Chairperson in the appellants evidence. I will highlight one issue, concerning their Sale Agreement. It seems that, the second appellant sold the land to the first appellant with an undefined size. Their Sale Agreement which was executed on 5/4/2016 reads as follows;

"Naapa/natamka kuwa mimi Zuberi Mgeni Hamis, nikiwa na akili zangu timamu bila kushurutishwa na mtu yoyote, namuuzia shamba langu ndg PENCIL HOPE FOUNDATION lenye ukubwa wa hekari YOTE kwa thamani ya Tshs 30,000,00/="

Reading plainly at the Sale Agreement, it is obvious that the seller did not know the exact size of the land he was selling, that is why he opted to use the word YOTE meaning thereby the whole land. Regardless, for whatever reason the size was not given and the consequence of the same is that, there was no sale as the buyer by using that Sale Agreement, can take any land of whatever size which she was to be shown by the seller. For the foregoing reasons, find grounds number 1,2,3,4 and 5 of the Appeal to be devoid of merits and reject them accordingly.

Turning to the sixth ground, I will directly declare that the same also lacks merits. There was nothing suggesting the application of **Section**

110(1)(b) of the Land Registration Act, Cap 334, R. E. 2019. The Certificates so named in this Appeal came after the case has been already filed if not finalised. As I have noted herein above, coming with such ideas at this stage is an afterthought on part of the first appellant.

Having so observed above, I proceed to dismiss the Appeal with costs. The Decision of the Trial Tribunal is upheld and so are the Orders that followed.

Ordered accordingly.




T. N. MWENEGOHA

JUDGE

25/03/2024