IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 27066 OF 2023

(Originating from Application No 68 of 2016 of District Land and Housing Tribunal at Babati)

MOHAMED RAJABU..... APPELLANT

VERSUS

1. **JOHN NADA .....**
2. **SWALEHE BAKARI.....**
3. **JOHN QAMBAY.....**
4. **KIBAIGWA AUCTION MART LTD.....**

RESPONDENTS

JUDGMENT

4th March and 25th April, 2024

MIRINDO, J.:

Two houses, namely House No 561 renamed as No 43 Block EE and House No 562 renamed as No 44 Block EE, both situated at Maisaka "B" within Babati Town have been the subject of litigation before Babati District Land Housing Tribunal between 2012 and 2016.

In Application No 49 of 2012 before Babati District Land and Housing Tribunal, Mohamed Rajabu Kisaka, who in this appeal features simply as Mohamed Rajabu, brought an action against John Qambay, the third respondent in this appeal, for vacant possession of House No 561 and other incidental reliefs. In his defence, the third respondent, claimed that the disputed house belonged to

John Nada, the first respondent in this appeal. The third respondent testified witnessing the first respondent purchasing the disputed house from the second respondent in this appeal, one Swalehe Bakari. The first respondent testified for the third respondent and conceded as much. At the conclusion of the trial, the Tribunal held in favour of the appellant and made the following orders:

> In short I allow this application by allowing the applicant enter and enjoy the use of his plot No. 43 block EE, Maisaka "B" in Babati town. The respondent/RW2 are to leave the disputed house immediately. They are at liberty to claim for their money, costs incurred in developing that suit plot and damages to the one sold to them the house which is not his. I agree with assessors to what I have endeavoured.
>
> Due to the nature of this case that the applicant lost income for non use of the suit house and for the reason that the respondent/RW2 has renovated the suit house and that the seller Swalehe Bakari is part in this case I order each party to bear his own costs.

The expression "the respondent/RW2" in the last paragraph of the quotation had reference to John Qambay and John Nada, respectively. The execution of the decree against Mohamed Rajabu in respect of House No 561 extended to House No 562 which had by then came to be known as BBT/MSB/JEN/444. When John Nada heard about the execution of the decree against House No 562, he brought an action, Application No 68 of 2016 before Babati District Land and Housing Tribunal for two main prayers: (1) to be declared as the lawful owner of the House No No BBT/MSB/JEN/444; and (2) for vacant possession. He pleaded

that in Application No 49 of 2012 before the trial tribunal, House No 561 was decreed to the appellant but the execution of that decree extended to House No 562.

Out of the four respondents sued by John Nada, only Mohamed Rajabu, the appellant, filed his defence. In his written statement of defence, he stated that he was the decree-holder in connection with House No 561 and was given vacant possession in respect of that house. Besides, he stated that John Nada was directed to claim their money from Swalehe Bakari who had defrauded him. In his testimony he added that he purchased both Houses No 561 and 562 on 2nd November 2009 from Stella Mariki Samade (the appellant's second witness). He concluded that he had a certificate of occupancy for House No 561 which was tendered in court. But the certificate of occupancy for House No 562 had been used to secure a loan at NMB Kondoa Branch

In a well-reasoned judgment, the Tribunal held that Mohamed Rajabu, the appellant, was wrongly given possession of House No 562 in execution of decree arising from Application No 49 of 2012. It declared the first respondent, John Nada as the lawful owner of House No 562. The Tribunal issued a permanent injunction preventing the respondents from disturbing the first respondent during his occupation of House No 562.

Mohamed Rajabu has appealed to this Court against the findings of the trial tribunal. In his four grounds of appeal, the appellant complains that the decision of the trial tribunal is against the weight of evidence. In particular the

appellant complains that the trial tribunal misdirected itself on the issue of ownership of House No 562.

At the hearing of the appeal, the appellant, Mohamed Rajabu, was represented by Mr Abdallah Kilobwa, learned advocate. The first and third respondents appeared in person while the second and fourth respondents did not appear. The appeal was argued by way of written submission.

This appeal raises three issues for consideration. The first issue is whether ownership of House No 562 was determined in Application No 49 of 2012. This is relevant because the appellant's defence at the trial and complaint rest on the judgment in Application No 49 of 2012. In his written submission to this appeal, the appellant's counsel, Mr Abdallah Kilobwa, complains that despite John Nada's admission of ownership of House No 561 in the first case, it is perplexing that he now claims ownership of House No 562. Owing to this contradictory evidence, the trial tribunal erred in not disregarding John Nada's evidence as false.

It is indisputable that the question of ownership of House No 562 was not the subject-matter of the cause of action in Application No 49 of 2012. It is clear from parties' pleadings and proceedings of the trial tribunal that the House in dispute in Application No 49 of 2012 was House No 561. That fact remains unquestionable in Application No 68 of 2016 before the trial tribunal and the present appeal emanating from Application No 68 of 2016. The only point of

disagreement is the effect of the evidence of the first respondent, John Nada, in Application No 49 of 2012.

In answering this question, it should be recalled, that in his written statement and in his testimony, John Qambay mentioned John Nada as the owner of House No 561. John Qambay testified witnessing John Nada purchasing the House from the second respondent, in this appeal, one Swalehe Bakari. John Nada as the second witness for John Qambay testified in chief only that:

> I bought a house from Swalehe Bakari. The respondent was my witness on such sale.
>
> .... I was present during the sale and I signed the sale deed. I bought the suit plot from Swalehe Bakari. Swalehe bought a plot from Julius Daudi in 2005 then Swalehe built a house there and he sold it to me.

On examination by the Chairman, he responded:

> It is Swalehe who told the respondent that he is selling his house. Respondent phoned me about the sale and I was residing in Karatu and I was in the process of shifting to Tanga. [sic]
>
> Swalehe in the sale gave the sale agreement between him and Julius Daudi. Such plot was not surveyed. It had no titles. [sic] Later we saw bills/posts that my house is going to be sold. We found Swalehe and Stellah. Stella said she will go to pay such debt so I kept on occupying the use of my house. I do not know the house of Stellah. Since the Bank stopped its plan to sell it I knew Stella settled her debt. [sic]

The immediate question is the relevancy of this evidence given in a dispute involving House No 561 to the dispute involving House No 562.

Clearly, John Nada was not a party to Application No 49 of 2012 and in that application he testified about House No 561 and not House No 562. The judgment in Application No 49 of 2012 was not *in rem* or on a matter of public nature as contemplated by sections 43 and 44 of the Evidence Act, Cap 6. The evidence in Application No 49 of 2012 is governed by the provisions of section 45 of the Evidence Act, Cap 6 which states in part that:

> Judgements, orders or decrees...are irrelevant unless the existence of such judgement, order or decree is a fact in issue, or is relevant under some other provision of this Act.

The scope of this provision has been expounded in Rao K (2009), *Sir John Woodroffe and Syed Amir's Law of Evidence,* 18th edn, Vol 2, Nagpure: Lexis Nexis Butterworths Wadwa, at page 2453:

> Judgments in a previous suit, not between the same parties, are not relevant to prove title or possession in a subsequent suit between different parties...The section lays down that judgments, orders or decrees...are relevant if (i) their existence is a fact in issue; or (ii) they are relevant under some other provisions of this Act. Thus, they may be admissible to prove that a right was asserted or denied under section 13 [section 15 of the Tanzania Evidence Act], or to explain or introduce facts in issue, or to explain the history of the case....

The general rule under section 45 is that the evidence of John Nada in Application No 49 of 2012 was inadmissible in Application No 68 of 2016.

Even if the evidence of John Nada was admissible, it could not amount to admission under the provisions of the Evidence Act. The admission had no connection with the fact in issue or relevant fact. His admission in the first case led to presenting before the tribunal Exhibit R 1, the sale agreement relating to House No 562, which had no connection with House No 561, the then subject of litigation. Another reason for disqualifying his evidence is that the statement he made had no relation to an existing fact. He admitted to be the owner of House No 561 while in fact his agreement was in relation to House No 562.

Nor do I agree that John Nada is an unreliable witness who gave conflicting testimony. In both cases, he consistently testified to be the owner of House No 562. In both cases, the same sale agreement was tendered in both cases. He offered plausible explanation of the confusion at the trial giving rise to this appeal. He testified that John Qambay confused between House No 561 and 562, and called him to testify about House No 562 instead of House No 561.

The second issue is the legality of attachment of House No 562 as a result of the decree in Application No 49 of 2012. Although the appellant testified at the second trial that the execution was in respect of House No 561 only there is ample evidence that House No 562 was included. This fact emerges from the evidence of John Qambay who isthe judgment-debtor in Application No 49 of 2012. This was clearly illegal.

The third and last issue is who is the lawful owner of House No 562. On the second, third and fourth grounds of appeal, the appellant complains that it was

Stella Mariki Samade, and not Swalehe Bakari who had the authority to sell the disputed house and the sale of the disputed house by Swalehe Bakari to John Nada, was ineffective. In answering this question, it is important to revisit the evidence adduced before the trial tribunal on this point.

The evidence of John Nada is that he purchased House No 562 from Swalehe Bakari on 22nd July 2009 for 7,200,000/= TZS. His sale agreement was witnessed before Maisaka "B" Street Executive Officer. He obtained possession of the house, repaired it, paid property tax until 2015, and allowed his younger brother, Simon Nada to stay in that house.

It should be noted that the trial tribunal refused to admit certain receipts of property tax simply because they were not attached to the applicant's pleading. I think this was a misapplication of the principles of the Civil Procedure Code in disregard of the clear provisions of Regulation 10 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. Under these provisions the tribunal may admit "any material documents which were not annexed or produced earlier at the first hearing" if the conditions stated under Regulation 10 (3) are complied with. The conditions are that: (1) the copy of the document should be served on the opposite party; (2) the trial should be satisfied that the document is authentic. It was wrong not to admit the receipts.

On the other hand, Mohamed Rajabu, testified that he purchased two Houses, House No 561 and House No 562 on 2nd November 2009 from Stella Mariki Samade, and obtained certificates of occupancy in respect of them. He

produced a certificate of occupancy in respect of House No 561 and none for House No 562 which he claimed was in possession of the NMB Kondoa Branch as a security for the loan he presumably took. His sale agreements were admitted and marked Exhibit D 2. Neither certified copy of the loan nor certified copy of the certificate of occupancy was tendered in court. Not even the photocopy of the certificate of occupancy for House No 562 or its title number was forthcoming at the trial. There was simply no proof of title by the appellant.

His second witness, Stella Mariki Samade, testified that she built the two Houses after purchasing the plots between 2007 and 2009. In 2007, he purchased a plot from Ali Maulidi and built House No 562. In 2009 he purchased another plot from Swalehe Bakari and built House No 561.

There is no proof of original ownership of House No 562 by Stella Mariki Samade; there is only evidence of sale between Mohamed Rajabu and Stella Mariki Samade on 2nd November 2009. It was the appellant's argument that the question of original ownership of House No 562 by Stela Mariki Samade was not the subject of litigation in the present case and so, the original owner had full authority to sell the House No 562 to Mohamed Rajabu. The appellant contended that Swalehe Bakari was not the owner of House No 562 and had no authority to transfer it to the first respondent, John Nada.

Assuming for a moment that Stella Mariki Samade on the basis of November agreement had original ownership of the house, does the *nemo dat quod non habet* rule applies? This general common law-rule, embodied in section

23 of the Sale of Goods Act [Cap 214 RE 2002], states that the buyer acquires no better title than the seller had, and therefore, cannot pass ownership to the buyer unless they acquired one.

John Nada, as stated earlier, purchased House No 562 from Swalehe Bakari, the second respondent in this appeal. Swalehe Bakari is an enigmatic person who sold House No 562 to John Nada on 22/7/2009 and witnessed on 2/11/2009, the sale by Stella Mariki Samade of House No 561 and 562 to Mohamed Rajabu. Despite being sued before the trial tribunal, Swalehe Bakari, neither appeared at the trial nor at the hearing of this appeal but purported to present his written submission. There is no doubt, however, that Swalehe Bakari and Stella Mariki Samade were known to each other. One, in 2009 Swalehe Bakari sold the plot to Stela Mariki Samade in which House No 561 was later built. Two, Swalehe Bakari, was the third witness for Stella Mariki, being among the three witnesses who witnessed her sale to Mohamed Rajabu on 2/11/2009. Three, both Swalehe Bakari and Stella Mariki Samade were once business associates. In her testimony in-chief, Stella Mariki Samade, stated in Kiswahili:

> Swalehe Bakari alikuwa mfanyabiashara mwenzangu na aliniuzia kiwanja chenye nyumba na. 561....

In cross-examination, she stated:

> Mimi na Swalehe Bakari nilikuwa nafanya naye biashara ya mafuta ya Alizeti. Aliniuzia kiwanja; hakikuwa na nyumba na namba.

These findings are of particular interest and give some reason to believe that Stella Mariki Samade and Swalehe Bakari connived to deceive John Nada regarding the ownership of House No 562.

Yet, there are some stronger reasons to reject the appellant's version. Implicit in the appellant's case is the assertion that at all material times they have been in possession of House No 562. In dealing with this assertion, I will review the evidence of the appellant's possession. Stela Mariki Samade testified purchasing the plot in 2007 and building House No 562. In cross-examination she stated that she lived in that house. The inference is that at the time of the sale of House No 562 to John Nada on 22/7/20009, she was in physical possession of that House. However, this conclusion is implausible because immediately after the sale John Nada got possession of the House, started paying property tax and receipts carried his name. He continued to pay the tax up to 2015.

Should the evidence of payment of property tax be discarded, as the appellant's advocate contended, there are still other reasons to doubt the appellant's possession of House 562.

Assuming that Stellaa Mariki Samade was still in occupation of the house, there is no evidence how she lost possession of the House which shifted from her to John Nada between July to November 2009.

On the contrary there is unchallenged evidence that during the suit in relation to House No 561 between Mohamed Rajabu and John Qambay in 2012,

House No 562 was in physical possession of John Nada and his younger brother, Simon Nada was staying there. John Nada was away in Tanga.

Finally, in his detailed explanation at the trial of how he purchased both Houses, Mohamed Rajabu, the appellant, never explained that he was at any time in physical possession of House No 562 or had at any time problem in obtaining possession of that house. The inference is that Mohamed Rajabu has never been in physical possession of the House and this fact is corroborated by his response in cross-examination that he did not remember names of his neighbours at the House.

Section 119 of the Evidence Act enacts the common law presumption of ownership from ownership as evolved at common law. This presumption is stated in the following terms by Rao K (2009), *Sir John Woodroffe and Syed Amir's Law of Evidence,* 18th edn, Vol 3, Nagpure: Lexis Nexis Butterworths Wadwa, at pages 4555-4556, in his analysis of section 110 of the Indian Evidence Act-a provision similar to section 119 of the Evidence Act:

> The principle of English law to the effect that possession is a good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him...Possession is evidence of title, and gives a good tilte as against a wrong-doer, but a person who has not had possession, cannot, without proof of title, turn another out of possession, even though that other may have no title-for possession is a good title against everyone who cannot prove a better title...

There is no evidence of a better title from the appellant to defeat the first respondent's possession of House No 562.

There is an alternative way of rejecting the appellant's reliance on *nemo dat quod non habet* rule. Assuming that Stella Mariki Samade, was at all times in possession of House No 562, there may be some reason to believe that either Swalehe Bakari sold his own house or was in acting with full knowledge of its owner, Stela Mariki Samade. There is no doubt that John Nada has been in peaceful possession of the House from 2007 to 2015 and neither Stela Mariki Samade nor Mohamed Rajabu attempted to eject him. This unexplained silence suggests that the sale of House No 562 to the first respondent was valid.

It is important to note that the first respondent, John Nada, was asked in cross-examination why he did not take the advice given by the trial tribunal in Application No 49 of 2012 to claim his money from Swalehe Bakari. He responded that:

> ...Hukumu iliandika kwamba mimi nikamdai Swalehe Bakari hela zangu kwakuwa amenitapeli mpaka leo sijaenda kumdai Swalehe Bakari fedha zangu kama baraza lilivyoagiza...Toka 2009 niliponunua nyumba mpaka mwaka 2016 sikumfungulia Mohamed Rajabu kwasababu nyumba ilikuwa kwenye umiliki wangu, mdogo wangu aitwae Simon ndiye alikuwa akiishi kwenye nyumba hiyo

The unexplained silence and first respondent peaceful physical possession are additional reasons to doubt the authenticity of the sale of House No 562 to the appellant.

These facts bring me to the exceptions to the *nemo dat quod non habet* rule under section 23 of the Sale of Goods Act [Cap 216 RE 2002]. Apart from the general rule, section 23 states that where goods are sold by a person who is not the owner, the owner's conduct may prevent him or her from denying the seller's authority to sell. The scope of this preclusion, modelled along English sale of goods legislation, restates the common law-rule of estoppel as set forth by Atiyah PS et al (2005), *The Sale of Goods*, 11th edn, Essex: Pearson Education Ltd, at page 375:

> This provision merely throws us back to the common law doctrine of estoppel, for it gives no indication when the owner is by his conduct precluded from denying the seller's authority to sell.....It seems that there are two distinct cases where the owner is so precluded. The first is where he has by his words or conduct represented to the buyer that the seller is the true owner, or has the owner's authority to sell, and the second is where the owner, by his negligent failure to act, allows the seller to appear as the owner or as having the owner's authority to sell. These are generally called estoppel by representation and estoppel by negligence respectively.

Given that John Nada had undisturbed physical possession of the House until when the appellant purported to extend the execution of the decree to House No 562, the appellant's claim is simply an occasion of *esprit d'escalier*- exploiting the confusion emanating from the suit involving House No 561. By virtue of the provisions of section 23 Stella Mariki Samade is estopped by conduct from denying the sale of the House to John Nada.

On these various accounts, I am satisfied that the first respondent, John Nada, lawfully purchased House No 562.

For the reasons given above, the decision of Babati District Land and Housing Tribunal is hereby affirmed and the appeal is dismissed with costs. The first respondent shall have his costs in this appeal and the trial tribunal.

DATED at BABATI this 22nd day of April, 2024

F.M. MIRINDO

JUDGE

Court: Judgment delivered in the presence of the appellant in person and in the presence of the first and third respondents in persons, and in the absence of the second and fourth respondents. B/C: William Makori (RMA) present.

F.M. MIRINDO

JUDGE

25/4/2024