

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL No. 36 OF 2020

*(Arising from the decision of the District Land and Housing Tribunal of Mwanza District
at Mwanza in Land Application No. 230 of 2019)*

GRACE WANNAAPPELLANT

VERSUS

PETRO JOSEPH KITAMBO..... RESPONDENT

JUDGMENT

06th October & 08th December, 2020

TIGANGA, J

Before the District Land and Housing Tribunal for Mwanza sitting at Mwanza, in Land Application No. 230 of 2019, Petro Joseph Kitambo, the respondent herein, sued the appellant Grace Wanna for the following orders;

- a) That the respondent be declared to give vacant possession of the house in dispute,
- b) That the forcible eviction order against the respondent in case she refuses to give vacant possession peaceably,
- c) Costs of the application, and
- d) Any other orders and relief(s) as this honourable Court deems fit and just to grant.

After full trial before the District Land and Housing Tribunal,



- (i) The applicant Petro Joseph Kitambo was declared the legal and lawful owner of the two houses in dispute located on plot No. 1580 Block B Nyamalongo street in Mwanza City,
- (ii) The respondent Grace Wana was ordered to vacate from the disputed houses with immediate effect, failure of which the tribunal Broker will evict her.
- (iii) The application was allowed with costs.

Following that decision the appellant was aggrieved, he appealed against the decision by filing a four grounded petition of appeal as follows;

1. That, the trial tribunal erred in law and fact by entertaining a dispute which it had no jurisdiction.
2. That, the trial tribunal erred in law and fact in failure to ascertain the contradictory evidence on the ownership of the disputed house by the respondent hence reached at the erroneous decision.
3. That, the trial tribunal erred in law and facts by declaring the respondent the owner of the disputed land without enough evidence that prove that the respondent was allocated the said disputed suit premises as part of his property after distribution of the Matrimonial properties by Nyankumbu Primary Court.
4. That, the trial tribunal erred in law and facts for failure to analyse properly the weight of the evidence adduced by the appellant and his witnesses as a result, delivering judgment which is arbitrary, oppressive, and unfair to the appellant.

In consideration of the above grounds of appeal, he prayed for the following orders;

- a) An order to quash and set aside the decision of the trial tribunal for lack of jurisdiction,
- b) To allow the appeal and declare the appellant the lawful owner of the disputed house,
- c) An order for costs in this honourable Court,
- d) Any other necessary order as the court may deem fit and appropriate to grant.

Before going to the merits of the appeal, I find it pertinent to point out the background which gave rise to the dispute at hand. Briefly, the parties to this case were married as wife and husband respectively. In 2010 through Matrimonial Cause No. 99/2010 before Nyankumbu Primary Court of Geita District they divorced. The divorce decree was followed by the division of the matrimonial properties in which, a house which is located on Plot 1580 Block "B" Nyamalango in Mwanza city, hereinafter referred as the suit house, was given to the respondent.

That decision aggrieved the appellant, she attempted to appeal to the District Court against the decision but unsuccessfully, her last effort before the District Court being an application No.4 of 2016 in which she was asking for extension of time to appeal against the decision of Nyankumbu Primary Court, which application was refused on the ground that, the application was hopelessly time bared and without sufficient reasons for delay. The honourable Senior Resident Magistrate who presided over to the application held *inter alia* that; a delay of a period of four years is too long and that allowing such an application will be an abuse of court process. That decision was appealed against before the



High Court, Hon. Mdemu, J, in PC. Civil Appeal No. 35 of 2016, which was also dismissed for want of merits thereby leaving the position of the District Court undisturbed.

Thereafter, the appellant did not appeal to the Court of Appeal to challenge the decision of the High Court; instead, she invaded the suit premises and started to live thereon. It was when the respondent filed the application before the District Land and Housing Tribunal asking for the orders earlier on mentioned. The District Land and Housing Tribunal declared the respondent as the lawful owner of the suit properties having been allocated the premises by the Primary Court of Nyankumbu in the Matrimonial dispute between the parties.

With the leave of the Court, the application was argued by written submissions, in the submission in chief filed by the appellant in support of the appeal, the appellant decided to consolidate and argue together grounds of appeal number 1 and 3, and ground number 2 was consolidated and argued together with ground 4.

Arguing the consolidated ground No.1 and 3 of the appeal, the appellant submitted that, the trial chairperson of the District Land and Housing Tribunal erred in law and in fact by declaring the respondent as the lawful owner of the property on plot No.1580 Block 'B' basing on the decision of the Primary Court of Nyankumbu in Matrimonial Dispute between the parties. He submitted so because the said house was not expressly mentioned by the said judgment, as the judgment held that;

"Mme atapata mali zifuatazo

- I. Nyumba mbili, Moja iliyokamilika na isiyokamilika kwa kuwa yeye ndiye atakuwa na jukumu la kulea watoto wote na kuhakikisha wanapata elimu bora."

It is her submissions that, as it can be gathered from the decision, no description was made regarding the house in question. Therefore it was not proper for the chairperson to assume that the house was among the two houses mentioned in the judgment of the Primary Court. Further to that, he reminded the court the duty of the plaintiff under section 110 and 111 of the Evidence Act [Cap. 6 R.E 2019], that he who alleges must prove. He submitted that there is no proof actually presented with regard to the ownership of that said land.

Alternatively, he argued that even if we find that, the house was actually allocated to the respondent, still the tribunal had no jurisdiction because the proper procedure was for the respondent to file an application for execution of the order of the Primary Court instead of filing the fresh suit. He prayed for the first and third grounds of appeal to be allowed with costs.

Regarding the 2nd and 4th grounds of appeal as consolidated, which to the effect read that, the trial tribunal failed to locate the contradiction in the evidence regarding ownership which led to erroneous decision. He referred this court to the contradictions as reflected at page 6 and 8 of the typed proceedings of the trial tribunal where he once said at page 6 that he built the house while at page 8 he said he was given such a house by the court.

The other contradiction according to the appellant was caused by the said house as to what house was between the two houses which were mentioned in the judgment of the Primary Court of Nyankumbu. He submitted that the evidence of the appellant was very clear that, the disputed house belongs to her as she bought a plot from one NYETU, in the year 2010 and built the house thereon in 2011 with a shop on the front side and that from the year 2012 she has been living in the same house up to now.

She submitted further that the allegations that, she invaded the plot on 05/07/2019 is not true as she has been living therein since 2012 when the respondent instituted criminal trespass case against the appellant and from that time the appellant has been living in the house to date. She prayed for the appeal to be allowed with costs.

In the reply to the submission in chief, the counsel for the respondent decided to consolidate the ground number 1 and 3 together as argued by the appellant, he submitted that the matter before the trial tribunal was on the ownership of land as indicated and exhibited in the title deed with C.T No. 65497 LR –Mwanza, admitted as exhibit P4 at page 9 of the typed proceedings. He submitted that issue of the distribution of the matrimonial properties done by Nyankungu Primary Court, has no bearing in the appeal at hand, as the decision of Nyankumbu Primary Court was appealed against before the District Court of Geita, and later to the High Court but unsuccessfully. However, the decision of the High Court was not appealed against to the Court of Appeal.

Basing on that state of affair, he believe that what was before the tribunal was the ownership of the said property which the respondent managed to prove beyond reasonable by tendering the title deed exhibit P4 bearing his name.

He further reminded the appellant the fact that section 110 and 111 read together with section 3(2) all of Evidence Act [Cap 6 R.E 2019] which require that he who alleges must prove on the preponderance of probability in civil cases.

He submitted that, the allegations by the appellant that she bought the land from one NYETU was not supported by any evidence either of that said NYETU himself or of the documents, in a photocopy or original form, of the sale agreement to back up the story.

Regarding the 2nd and 4th grounds of appeal, he submitted that, there was no contradiction in the evidence of the respondent. He submitted further that the properties which were distributed to the parties in matrimonial case marked the ownership of the properties. However despite that distribution, the appellant continued disturbing the respondent that is why she was charged with criminal trespass. Although she was acquitted in that criminal case, but the acquittal did not declare her the lawful owner. The respondent rejoined by asking the court to dismiss the appeal with costs.

That being a summary, of the record and the submissions by the parties, it is instructive to find that, as earlier on pointed out, the tribunal after full hearing of the parties, found the appellant who was the applicant

before it, to have failed to prove her claim at the required standard, as the respondent had stronger evidence than hers. It is following that base, she came up with this appeal.

Now, as argued by the parties through their respective representative, I would like to start with the consolidated grounds number 1 and 3 which raise the complaint that, the trial tribunal erred in law and fact by entertaining a dispute which it had no jurisdiction and that, the trial tribunal erred in law and facts by declaring the respondent the owner of the disputed land without enough evidence to prove that the respondent was allocated the said suit premises as part of his property after distribution of the Matrimonial properties by Nyankumbu Primary Court.

As properly submitted by Mr. Kelvin Mutatina, the matter at hand is a land dispute, in which the main issue for determination was "who was the lawful owner of the disputed premise"? In resolving this issue, the trial District Land and Housing Tribunal, based on the evidence before it, from the evidence on record, there is no dispute that the suit premise that is a house situated on plot No. 1580 Block B Nyamalongo street in Mwanza City, was once a matrimonial property which was subjected to the division between the parties, as the result of the order of the Primary Court of Nyankungu in Matrimonial cause No. 99/2010. It seems from the records that the respondent in that case was given two houses while the appellant was given other properties.

It was evident that one of the two houses given to the respondent was the suit house before the trial tribunal, which is also the subject matter

in this appeal. This means, after the order for distribution which stands unreversed following being unsuccessfully challenged before the District Court and the High Court, which has not been appealed against to the Court of Appeal of Tanzania, then the order distributing and granting such house to the respondent is final and conclusive and actually conferred the ownership of the said house to the respondent. It was therefore proper for the person who thinks his interest in that house was prejudiced to file the land dispute before the tribunal to seek for the related orders. Therefore the tribunal had jurisdiction to entertain the matter as a land dispute case.

Regarding the issue as to whether there was enough evidence to prove that the respondent was allocated the said disputed suit premises as part of his property after distribution of the matrimonial properties by Nyankumbu Primary Court in Matrimonial cause No. 99/2010. The appellant contends that there was no such evidence, as the decision did not categorically mention the house by the descriptions of plot and block numbers. While so contending, the appellant has never shown as a proof that the house belonged to her. This is notwithstanding, the allegations by her that, she bought the land from one NYETU, but he never called that person who sold her the plot to prove that he really sold her the plot. She has not even proved by tendering the sale agreement to prove that she bought that plot.

To the contrary however, the respondent produced a title deed, which bears his name that he was the lawful owner of the said house. Weighing the evidence presented by both parties in proving the ownership, it goes without saying that the respondent proved the ownership of the

said house compared to the evidence by the appellant. This finding is based on the provision of section 2(1) of the Land Registration Act [Cap 334 R.E 2019] which defines the owner to mean the followings;

'Owner' "Means in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered."

In this case, the evidence given by the respondent via the title deed with C.T No. 65497 LR –Mwanza, admitted as exhibit P4 proves that the house in dispute was and is still registered in the name of the respondent which means in terms of section 2(1) of the Land Registration Act [Cap 334 R.E 2019], it means that, the person in whose name the house is registered who is the respondent is the owner of the suit house. The third ground of appeal also fails for the reasons given.

Regarding the consolidated 2nd and 4th grounds of appeal that, the trial tribunal failed to ascertain the contradictory evidence presented by the respondent on the ownership of the disputed house thereby reaching at erroneous decision and, that it failed to analyse properly the weight of the evidence adduced by the appellant and his witnesses as a result, it delivered judgment which is arbitrary, oppressive, and unfair to the appellant. I will also deal with them in the manner adopted by the parties in their arguments. While dealing with these two grounds of appeal, I have

traversed the record, especially the evidence as given and recorded before the trial tribunal, and found the followings facts; first, I noted neither any material contradiction nor any discrepancy in the evidence given by the respondent before the trial tribunal. As earlier on pointed out, the dispute between parties was over land ownership, the contradiction which has been cited by the appellant, although they are minor, but they relate to the evidence relating to the matrimonial dispute, not the ownership of land, therefore, these contradiction are not touching the root of the matter in dispute in this case.

The issue of evaluation of evidence dealing with contradiction and discrepancies is not novel, it has already been dealt with by the Court of Appeal of this country in a number of cases, one of them being the case of **Dikson Elia Nsamba Shapwata & Another vs The Republic**, Criminal Appeal No. 92 of 2007 CAT (Unreported), the Court held *inter alia* that:-

"In evaluating discrepancies, contradiction and omissions, it is undesirable for the court to pick sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."

In the case of **Marano Slaa Hofu & and 3 Others vs The Republic**, Criminal Appeal No 246/2011 (CAT) Arusha, it was held *inter alia* that, it is only the major contradictions touching the root of the matter which affect the evidence, those which are minor and not touching the root can be ignored.

In this case, having assessed the pinpointed contradictions, I am satisfied that they are minor and therefore can be safely ignored. I find the trial tribunal to have correctly analysed the evidence on record and reached to the correct conclusion that the case was proved at the required standard in civil cases that is the balance of probabilities. I find the evidence by the respondent to be stronger than that of the appellant, therefore the District Land and Housing Tribunal was justified to hold as it did. I thus find the Appeal to have no merits; it is hereby dismissed with costs.

The decision of the District Land and Housing Tribunal is hereby upheld for the reasons given.

It is so ordered.

DATED at **MWANZA**, this 08th day of December, 2020



J. C. Tiganga

Judge

08/12/2020

