

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 10 OF 2019

(C/F Application No. 120 of 2012 in the District Land and Housing Tribunal of Arusha at Arusha)

ELISARIA ERNEST NASSARY.....APPELLANT

VERSUS

SENYAEL SOLOMONI NANYARO.....RESPONDENT

JUDGMENT

09/06/2021 & 23/07/2021

MZUNA, J.:

ELISARIA, the present appellant has instituted this appeal against **SENYAEL**, the respondent herein, challenging the District Land and Housing Tribunal of Arusha in Application No. 120 of 2012 which adjudged in favour of the respondent. The said respondent alleged that the appellant had trespassed into his land/shamba measuring 2 ½ acres, located at Kolila Village in King'ori Ward, Meru District.

The background story shows the original owner of suit land was Mr. Ernest Mambori Nassary. The said Ernest Mambori Nassary, is the father of the appellant, he being the fifth born. Before the Trial Tribunal, the appellant was sued by the respondent. The latter in his sole evidence as (AW.1) alleged that he bought it

from the appellant's father. He tendered the sale/purchase agreement and the family meeting of Ernest Mambori Nassary which blessed the sale as exhibit A1 collectively. He further said even the appellant was present during the sale transaction which was witnessed by his mother who however could not read and write, instead the appellant signed for her. Apart from the family members, other witnesses who signed were neighbours.

On his part the appellant said that the suit land was given to him by his father. He categorically denied to know the alleged sale agreement. This story was given support by his mother Afrasion Ernest (DW2) and a member of clan committee one John Zakayo Nassari (DW3).

The District Land and Housing tribunal agreed with the respondent that he bought it from the appellant's father. It ruled out the appellant's allegation that the suit plot was given to him by his father and mother.

Aggrieved by the decision of the trial tribunal, the appellant has filed his petition of appeal with a total of four grounds which in their totality centers on the issue as to whether the trial tribunal evaluated the evidence properly; They challenge as well the finding that the suit land was legally transferred to the respondent by the appellant's father. Lastly, there is also issue of compensation which he says the respondent had already been compensated.

During hearing of this appeal, the appellant and the respondent were represented by Mr. Peter Njau and Mr. Salehe Baraka Salehe, the learned counsels, respectively. With leave of the court the appeal was disposed of by way of written submissions.

The main issue(s) are:- One, whether the evidence adduced before the trial tribunal is sufficient to prove ownership of the land by the respondent. Second, whether the respondent has been compensated his purchase price by the appellant or his father? Lastly, whether this appeal has merit.

On the issue of evaluation of the evidence, the appellant in his submission maintained that he is the lawful owner of the disputed land which he claimed to have been given by his father before the year 2010 when the respondent alleges to have bought it. That, merely saying he was given the shamba by his father and mother while the pleadings show he was given the shamba by father alone has no mistake. It was a mere oversight. Further that all this was in accordance to the African Tradition which places a father as superior as opposed to mother. That there was no transfer because it was redeemed for the reasons that the sale was never consented by the wife of the seller. The seller was also of an old age.

In opposing the grounds of appeal the respondent submitted that the grounds of appeal raised by the appellant are baseless as it is apparent that the trial tribunal which was in a better position to assess the credibility of witnesses properly evaluated the evidence before it which according to him was tainted with

inconsistence and contradictions. The respondent further stated to have proved on how he obtained the land from the appellant's father through exhibit A1 which is a sale agreement and the same was not objected by the appellant when it was tendered before the trial court. According to the learned counsel there is disposition and title passed under section 64 (1) (a) and (b) of the Land Act, Cap 113 RE 2019 (Cap 113) because there was a written agreement for sale. The appellant's allegations that the sale agreement is null and void is misconceived and unfounded.

Let me start with the first issue. The respondent throughout his evidence alleged that he bought the suit land from the appellant's father. His testimony was backed up by the family consent and a sell agreement which were tendered as exhibits during trial at the trial tribunal and were marked as exhibit A1. The appellant herein ~~did not contest the admissibility of these exhibits, and is as good~~ as to say that the appellant admitted to that fact. This piece of evidence is also supported by the evidence of the appellant's witness DW2 Afraision Ernest who testified that it was her husband who sold the suit land to the respondent. He challenged the sale agreement merely because the Village Government leader and or Mshiri wa Ukoo never signed. She agreed that the farm was sold but later said, it was refunded.

The available evidence never showed that the appellant was given the suit land. None of the appellant's witnesses said so. Of course, the sale was challenged merely because DW2 could not read and write. Further that it was not signed by the VEO or that there was no blessing of the Village council. In a situation like this where fraud is alleged, proof is heavier than in a normal civil case. It was held in the case of **Omary Yusufu vs Rahma Ahmed Abdulkadr** [1987] TLR 169, 175 that;

"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."

The one who could have said that sale was tainted with fraud is the seller, the appellant's father who was not summoned to challenge the sale. I find that the appellant did not discharge that proof. It is bound to fail. The evidence was properly evaluated. The allegation that he was given that shamba before sale did not feature in the defence evidence.

The sale agreement was legal as it was a disposition which was in writing. It confers title to land. Section 64 (1) (a) and (b) of Cap 113, reads:-

64. Writing required for enforcement of contracts relating to land

(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if–

(a) the contract is in writing or there is a written memorandum of its terms;

*(b) **the contract** or the written memorandum **is signed by the party against whom the contract is sought to be enforced.***

The above provision shows that the law recognizes the seller and purchaser. The appellant does not fall in any of the two categories let alone "Mshiri wa ukoo". The first issue is resolved in favour of the respondent.

On the second issue, the appellant further submitted that the respondent herein had already been compensated his purchase price of Tshs. 3,125,000/= by the appellant's father with assistance of the appellant which was done after the respondent herein had filed a Civil Case at Maji ya Chai Primary Court. Copy of the judgment was attached to his submission.

On the allegation that the respondent had already been compensated the purchase price by the appellant, the respondent is of the view that this allegation is devoid of merit since there was no proof at the trial tribunal that the appellant compensated the respondent. That, even the father of the appellant who is said to have compensated the respondent was not summoned at the trial tribunal to justify the alleged compensation. More so, the respondent urges this court to

disregard the annexures in the appellant's submission as it has been the position of the law that submission is a summary of arguments and it is not evidence, the respondent cited the case of **TUICO vs. Mbeya Cement Co. Ltd** [2005] TLR 41.

Looking at the appellant's submission he alleges that the respondent herein has already been compensated his purchase price by the appellant's father which in other words the appellant admits that the respondent herein bought the suit land from his father. With this piece of evidence, it is apparent that the respondent herein bought the suit land from the appellant's father which supports the evidence that he is a bonafide purchaser.

This being the position, the question which follows is, was the respondent compensated as alleged? The appellant in his submission claims that the respondent at the time when they were pursuing the land matter before the trial tribunal, he instituted another Civil Case at Maji ya Chai Primary Court and it was from the Civil Case that the respondent herein had been compensated his purchase price.

Looking at the proceedings of the trial tribunal at page 19 of the typed proceedings the appellant herein raised a concern which reads, I quote;

"Your Hon. The applicant does not say the truth. He filed another case in primary court of Maji ya Chai. There he has sued my father whom they sold the disputed land (sic). And they agreed to pay each other

the money of purchase price. This is the second time he says that he is sick. I leave it for the tribunal to issue necessary order."

The same concern about compensation of the purchase price was raised by the appellant's witness DW2. Part of her testimony is reproduced here under (page 23 of the typed proceedings);


"It is my husband who has sold the farm to Senyael. He sold the suit land. The respondent (Senyael) had already been refunded with his purchase money by my husband. I can not recall a date when such refund was made."

Surprisingly, the appellant herein when testifying at the trial tribunal denied the fact that the respondent bought the land from his father and alleged that the suit land is his farm. Even though he previously raised a concern that there was a civil case between his father and the respondent and that they agreed to refund the money back, it was the expectation of this court that the appellant could have raised such a defence and prove that the respondent herein had been compensated his purchase price by his father and that the suit land now belongs to him. That was not the case. I would agree with the respondent's counsel that an adverse inference should be drawn for the failure of the appellant to call his father who is within reach, as it was so held in the case of **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113 (HC), the position which I fully associate myself with. The court, Sisya, J (as he then 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."

For whatever reasons best known to the appellant, the alleged compensation as a defence, has been raised at the appeal stage and worse still, has attached the judgment in the Civil Case as proof of payment in his written submission. Such evidence I dare say, was so crucial and ought to have been tendered during hearing of the defence case, unless otherwise there was a hidden agenda. To say the District Tribunal never considered such evidence is with due respect unfounded. As correctly submitted by the respondent's counsel this court is also of the view that submission is only arguments, it cannot raise evidence as it was held in the case of **TUICO vs. Mbeya Cement Co. Ltd** (supra). It is a settled principle of the law that at an appellate level, the court only deals with matters that have been decided upon by the lower court, See: **Richard Majenga vs. Specioza Sylivester**, Civil Appeal No. 208 of 2018 (unreported). The alleged compensation is a new ground which cannot be entertained. It is an afterthought.

For the above stated reasons, this appeal is bound to fail. Appeal stands dismissed with costs.



**M. G. MZUNA,
JUDGE.
23/07/2021.**