

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

LAND APPEAL NO. 27 OF 2023

*(Appeal from the judgment and decree in Land Application No. 335 of 2017 before
District Land and Housing Tribunal for Dodoma at Dodoma)*

SELEMAN M. MAHADHI.....APPELLANT

VERSUS

JAMES KIMWAGA (as administrator of the estate of the late

MARY KIMWAGARESPONDENT

JUDGMENT

Date of last order: 4/10/2023

Date of Judgment: 27/11/2023

KHALFAN, J.

The above appellant sued the respondent before the District Land and Housing Tribunal for Dodoma at Dodoma (hereinafter referred to as the trial tribunal) for an assortment of reliefs such as he be declared as lawful owner of a piece of land measuring 25 to 7 meters situated at Chinyoyo within Dodoma Municipality (hereinafter referred as the suit land).

Briefly, as could be gathered from the record, the appellant claimed to have been using the suit land since 1993 up to 2017 when the respondent



stopped him from using it claiming that it belonged to his sister one Mary Kimwaga. The respondent claimed that the suit land was purchased by his late sister namely Mary Kimgwaga jointly with her husband. He contended that the suit land was purchased from one Ernest Senerin Mwihu (DW1). The respondent maintained that the appellant was his late sister's lover.

After hearing the parties, the trial tribunal dismissed the appellant's application and proceeded to declare the respondent as a lawful owner of the suit land.

Being aggrieved with the decision of the trial tribunal, the appellant preferred the instant appeal with 6 grounds of appeal as follows:

- 1. That, the trial chairman erred in law and fact by holding that the respondent's evidence was watertight than that of the appellant's evidence the fact which was erroneously arrived.*
- 2. That, the trial chairman failed in law and fact by failure to order the necessary party to wit Capital Development Authority currently Dodoma City Council to be joined as party of the suit.*
- 3. That, the trial chairman erred in law by granting the right of ownership over the landed property to the respondent without summoning a key witness Ally Mohamed who was mentioned by the purported original owner Ernest Severin*



Mwiru to have all documentation regarding the sale of the disputed land.

- 4. That, the trial tribunal erred in law and fact to hold in favour of the respondent by conceding to the fact that the deceased before her demise was the one who purchased the disputed land while DW1 testified to the effect that the disputed land was purchased by Ally Mohamed who resides in Singida.*
- 5. That, the tribunal chairman erred in law by holding in favour of the respondent without complying with the procedures governing assessors while giving opinion.*
- 6. That, the tribunal chairman erred in law by holding in favour of the respondent without taking into consideration exhibit P1 tendered by the appellant and disregarding the same while composing judgment.*

By the parties' consensus, the appeal was disposed of by way of written submissions. Mr. Fredy Kalonga learned advocate represented the appellant while Ms. Sarah Makondo learned advocate represented the respondent.

Mr. Kalonga abandoned the second and fifth grounds of appeal. In his submission in support of the first ground of appeal, Mr. Kalonga maintained that the appellant has been in occupation of the suit land since 1993 till 2016



when he was formally allocated by Capital Development Authority (CDA) which was an authority responsible for land allocation. He submitted that there was a sale contract and property tax receipts that were admitted as exhibit D1 which were endorsed by the village chairman.

The learned advocate submitted further that the contract recognized the appellant as a lawful owner of the suit land on which he has constructed commercial rooms for business. He submitted that PW2 was a village chairman and he conducted the survey program with CDA and later after survey, the suit land was conveyed to the appellant and there was no objection from anyone.

The learned advocate submitted that the late Mary Kimwaga was the ten-cell leader and she confirmed the appellant as the owner of the suit land. He maintained that had the trial tribunal considered the appellant's evidence, it would have arrived to a conclusion that the appellant had watertight evidence compared with the uncorroborated evidence by the respondent.

The learned advocate argued the third and fourth grounds of appeal jointly, faulting the trial tribunal for declaring the respondent as lawful owner of the suit land without summoning the key witness Ally Mohamed who was



mentioned by the purported original owner DW1 to have all documents regarding the sale of the suit land. He argued that DW1 testified that he sold the suit land to Ally Mohamed and Mary Kimwaga but DW1 never tendered any exhibit to substantiate either ownership or alleged sales.

The learned advocate contended that there was no proof as to whether the suit land falls under the deceased's estate. He submitted that section 64 (1)(a) and (b) of the Land Act [CAP 113 RE 2019] require the disposition of land to be in writing or written memorandum of its terms. He cited the case of **Nitin Coffee Estates Ltd & 4 others v United Engineering Works Ltd & another** [1988] TLR 203 in which the court observed that an oral agreement to sell land held under a right of occupancy is inoperative and of no effect.

He also referred the decision in the case of **Registered Trustees of the Hold Spirit Sisters v January Kamili Shayo & 136 others** Civil Appeal No. 193 of 2016 (unreported).

Submitting on the sixth ground of appeal, the learned advocate faulted the trial tribunal for not taking into consideration exhibit P1 tendered by the appellant in its judgment.



In reply, the respondent argued that in civil cases, the standard of proof is on balance of probability as emphasized in the case of **Mollel Electrical Contractors Limited v Mantrac Tanzania Ltd** Civil Appeal No. 394 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported).

It was submitted that the respondent proved his case by bringing before the trial tribunal 4 witnesses. He argued that all 4 witnesses testified that the suit land was the lawful property of the late Mary Kimwaga. On further submission, the respondent contended that DW1 was the original owner of the suit land and sold the same to Ally Mohamed together with the deceased. The respondent argued that DW4 being a neighbour, testified that the suit land was owned by Mary Kimwaga.

Submitting on the third ground of appeal, the respondent argued that calling witnesses is a procedural requirement and the respondent therefore managed to call four witnesses who were certain with the ownership of the suit land.

As to the fourth ground of appeal, the respondent averred that it was the late Mary Kimwaga who purchased the suit land jointly with her husband one Ally Mohamed from DW1. Hence there was no any contradiction on the



evidence on the respondent's side. He submitted that it was firmly established that the late Mary Kimwaga is the one who constructed the commercial buildings on the disputed land.

Submitting on the sixth ground of appeal, the respondent argued that exhibit P1 had nothing to do with ownership of the suit land and that is why the trial tribunal never relied on it. The respondent therefore urged the court to dismiss the appeal with costs.

In rejoinder, the appellant essentially reiterated his submission in chief.

Having gone through the parties' rival submissions, the issue for my determination is whether the appeal has merits.

I have carefully gone through the trial tribunal's record. It is without doubt that each party herein claims to be the lawful owner of the suit land. The trial tribunal is being reproached by the appellant for declaring the suit land as forming part of the deceased's estate instead of declaring the appellant as the lawful owner of the same.

This court therefore sitting on the first appeal is tasked to reappraise the evidence on record and where possible, to make fresh findings.



The trial tribunal was satisfied with the evidence adduced by the respondent and the witnesses he called that the suit land was previously owned by the late Mary Kimwaga. On page 5 of the typed judgment, the learned trial chairperson is quoted to have said:

"On the other hand, the evidence of DW2 clearly states that one Mary Kimwaga purchased the suit land from DW1 that kind of evidence is given hand by the evidence of DW4."

It is further stated that:

"...however, the evidence of DW3 and DW1 has not been given any evidential weight as the same does not point clearly to the fact in issue."

The trial tribunal then was satisfied that only the evidence of DW2 and DW4 proved that the suit land was owned by the late Mary Kimwaga. I must admit that this holding by the learned trial chairman leaves a lot to be desired. One would ask having accorded lesser weight on the evidence of DW1, the one who the respondent has repeatedly referred to have sold the suit land to his deceased's sister, what evidence can be relied upon to prove the claim?

I have however noted some material contradiction in the evidence adduced by DW1 and DW2. DW1 claimed to be the former owner of the suit



land. In his evidence he categorically stated that he disposed it to one Ally Mohamed who is the respondent's brother-in-law. On the other hand, DW2 told the trial tribunal that his late sister and her husband purchased the suit land from DW1.

Looking at the testimony of DW1, he never said that he disposed the suit land to the late Mary Kimwaga jointly with her husband one Ally Mohamed. Similarly, no evidence was tendered by DW1 to show that he either owned the suit land or to have disposed the same as alleged. More importantly, DW1 testified that the said Ally Mohamed is alive and lives at Singida but was never called to testify. I am of the settled view that Ally Mohamed was a material witness alongside with proof that the suit land was truly disposed as alleged by the respondent. Failure to tender the documents and call the material witness, the respondent's evidence was not sufficient for the trial tribunal to declare the suit land a property of the late Mary Kimwaga. After all, the respondent never raised any counter claim. Consequently, I find merits on the first and third grounds of appeal.

I have also considered the appellant's evidence adduced at the trial. Indeed, the appellant tendered contract as well as several property tax receipts as his evidence to show that he is a lawful owner of the suit land.



The learned trial chairman never said anything regarding those documents. This was a serious error. It is settled law that since the appellant tendered contract and several property tax receipts as evidence of his ownership of the suit land, he is regarded as a lawful owner of the same in absence of fraud. Hence, I find merits on the fourth and sixth grounds of appeal.

Consequently, I find the appeal with merits and the same is accordingly allowed. The decision of the trial tribunal is quashed and set aside. The appellant is declared as lawful owner of the suit land. In the circumstances of this case, I make no order as to costs as each party shall bear its own costs.

It is so ordered.

Dated at Dodoma this 27th day of November 2023.




F. R. KHALFAN,

JUDGE