

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

LAND APPEAL NO. 40 OF 2023

(Originating from the Judgment and Decree in Land Application No. 331 of 2017 at
Temeke District Land Housing Tribunal delivered on 23 January 2023, Hon. Silas,
Chairman)

HARITH OMAR SULEIMAN..... APPELLANT

VERSUS

LUCAS JOHN..... RESPONDENT

J U D G M E N T

Date of last Order: 26/05/2023
Date of Judgment: 20/06/2023

K. D. MHINA, J.

This is the first appeal. It stems from the decision of the District Land and Housing Tribunal (**the DLHT**) for Temeke, whereby Harith Omar Suleiman, the appellant, vide Land Application No. 331 of 2017, sued the respondent for recovery of a parcel of Land located at Tungi Msikitini within Kigamboni District in Dar es salaam (the suit land) which was allegedly encroached by the respondent.

The declaratory orders sought by the appellant were;

- i. The applicant be declared the lawful owner of the suit land.*
- ii. The respondent be ordered to enter vacant possession of the suit land.*
- iii. The respondent pays compensation to the tune of TZS. 10,000,000/= compensation for the demolished structure built by the applicant in the suit land.*
- iv. General damages and costs”.*

The brief facts which led to the institution of Application No. 331 of 2017 at the DLHT are that the appellant alleged that he was a lawful owner of the suit land titled plot no. TMK/KGN/TNG20/28 after he purchased from Shaibu Juma Mzee in 1998. In 2006 he obtained a residential permit from Temeke Municipality and started to pay Property Tax.

He further alleged that in 2016 the respondent unlawfully invaded the suit's land, demolished the erected structures/ houses built therein, and started to build the house using the same demolished materials. He tried to solve the dispute amicably with the Local Authorities, but his efforts went unrewarded. Therefore, this background prompted the appellant to rush and seek redress at the DLHT.

On his side, the respondent's story was that they both bought the suit land from the heirs of the late Juma Issa Mzee. The appellant purchased from Shaibu Juma Mzee while the respondent from Fatuma Juma Mzee.

Prior to that, the dispute between the two heirs was referred to the Kigamboni Primary Court vide Civil Case No. 57 of 2001 on 2 October 2001, which issued an injunctive order barring the sale and development of the plot. Later, the Primary Court informed the Local Leaders of Tungi Street that the land was divided into two parcels and ordered them to oversee the division. Therefore, he bought the parcel of land allocated to Fatuma Juma Mzee.

He alleged that the residential permit issued in 2006 resulted from a fraudulent transaction.

After the trial, the DLHT was satisfied that the respondent proved his claims of ownership and declared him as the lawful owner of the suit land. The reasons for that decision were;

One, the suit land was part of the land left by the late Juma Mzee. After the order of Kigamboni Primary Court to divide the land among the heirs,

i.e., Shaibu Juma Mzee and Fatuma Juma Mzee, it was found that Shaibu Juma Mzee had already sold a large chunk of land despite the Primary Court injunction to do so.

Two, after being allocated her land, Fatuma Juma Mzee lawfully sold the suit land to the respondent.

Aggrieved by that decision, the appellant raised seven grounds of appeal as follows: -

1)The Trial Chairperson erred in law and fact by failing to answer all issues raised for trial.

2) The Trial Chairperson erred in law and fact by failing to hold that the Residential license held by the Appellant herein was lawfully obtained.

3) The Trial Chairperson erred in law and fact for completely ignoring the evidence of the Applicant/Appellant herein and that of his witness

4) The Trial Chairperson erred in law and fact by holding that the locus in quo was part of the divided land in the absence of any evidence of the said division at the instance of the court order

5)The Trial Chairperson erred in law and fact by holding that the locus in quo belongs to the Respondent in the absence of any evidence that he actually bought the same

6) The Trial Chairperson erred in law and fact by holding that the locus in quo is the area sold by Fatuma Juma Mzee to the Respondent

7)The Trial Chairperson erred in law and fact by totally failing to analyse the evidence on Record and hence arriving at an erroneous factual conclusion.

The appeal proceeded by way of written submissions, and the appellant had the services of Mr. Yuda Dominic, learned counsel, while Mr. Nyaronyo Kicheere, also learned counsel, represented the respondent.

On the first ground of appeal, Mr. Dominic submitted that the trial Tribunal framed three issues upon which the case between the parties was supposed to be determined. The issues were:

- a. Who is the lawful owner of the locus in quo*
- b. Whether the Residential License given to the Applicant was properly procured or not, and*
- c. To what reliefs are the parties entitled to.*

He submitted that, but during the trial, the chairperson only considered issue number one and abandoned the remaining issues, especially the second issue on the legality of the residential license held by the appellant, and that was a procedural irregularity.

To bolster his argument, he cited the decisions of the Court of Appeal in one; *Ally Rashid and 534 others vs. Permanent Secretary, Ministry of Industry and Trade, Civil Appeal No. 71 of 2018 (Tanzlii)* Two, **Ahmed Said vs. The Registered Trustees of Manyema Masjid [2005] TLR 61**, and

Three, **Bhag Bhari v. Mehdi Khan [1965] EA 94**, and **National Insurance Corporation and Another v. Sekulu Construction Co. [1986] TLR 157**, where it was emphasized the duty of the Trial Court to determine all issues framed for trial and the consequence of the omission is serious.

Mr. Dominic faulted the second ground by submitting that the appellant's evidence led to the process through which he applied for and obtained the residential license. Further, the Land Officer from Kigamboni Municipal Council, the issuing authority of the license, **Janeth Wallace**

Mwantimo(PW3), testified on the process through which the appellant obtained the Residential license and DW2(Ramadhani Kayombo), who admitted to having signed and endorsed the exhibit A3. To substantiate his submission, he cited the decision of the Court of Appeal in the case of ***Athuman Amiri vs. Hamza Amiri & another, Civil Appeal no. 8 of 2020(unreported)*** at page 14,where it was held that:

"It is settled that the certificate of title is conclusive evidence to prove ownership over the land unless proved otherwise.

He added that the priority principle in land issues requires that once there are two competing claims over the same piece of land, the one who acquired title to the land much earlier is the lawful owner. He narrated that the applicant bought a suit land in 1998 and obtained a residential license in 2006, while the respondent purchased the same in 2017. On this, he cited **Ombeni Kimaro vs. Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal Number 33 of 2017(unreported)**

On the third ground, Mr. Dominic submitted that the Tribunal erred in law and fact byignoring the evidence of the appellant herein and that of his witness. While composing the judgment, the tribunal never

reflected the evidence and exhibits by the appellant and accorded the weight. The Tribunal judgment did not reflect the evidence of the appellant (PW1) and his witness Shaibu Juma Mzee (PW2). He argued that the omission was serious misdirection and had occasioned a miscarriage of justice.

On the fourth ground of appeal, he faulted the finding that the land in dispute was divided between PW2 and DW3 and was not supported by any evidence on record. Firstly, no single witness for the respondent proved that the said division of the land took place, including the leader from the Local Government Authority (DW2), who was ordered by the court in 2003, had proof that the division occurred.

Secondly, the division being ordered at the instance of a written court order, its implementation would be supposed to be by way of a written declaration. Without such proof, the findings were unsupported and erroneous. Thirdly, there were no details such as the size of the area divided and who got what from the division. Therefore, without evidence that the division took place and DW3 Fatuma Juma Mzee got her share, she could not be considered to have lawfully sold anything to the

respondent because she never had a title capable of being passed on by sale.

Submitting on the fifth ground, Mr. Dominic stated that there was no evidence to suggest that the area that the respondent alleges to have bought from DW3 Fatuma Juma Mzee in 2017 was the same suit property, i.e. plot number TMK/KGN/TNG/20/28. This was because the sale agreement admitted as exhibit D1 was silent and uncertain about the location, size, or borders of the area sold to the respondent. The only evidence used by the tribunal to reach its conclusion was the oral accounts offered by the respondent and his witnesses.

He argued that the oral account in law could not be allowed to supersede the documentary evidence as per the decision of the Court of Appeal in **Martin Fredrick Rajab vs. Ilemela Municipal Council & another, Civil Appeal No. 197 of 2019**(unreported)

On the sixth ground, he submitted that the appellant bought the suit land in 1998 and 2006 and obtained a residential license (Exhibit P1) through the Local Government Authority leaders, including DW2. He stated that, on the other hand, the evidence of the respondent, together with

exhibit D1 as well as the evidence of his two witnesses, did not prove that what was sold to him was the suit land but rather a piece of land of unspecified size, location, and boundaries.

Mr. Dominic did not submit anything to support his seventh ground of appeal. Instead, he stated that the duty of the appellate court in hearing appeals that it has a duty to re-evaluate evidence on record and, where necessary, come up with a factual conclusion on the issues raised by the trial court. Therefore, because of the serious misdirection by the DLHT, he urged this court to step into the shoes of the trial DLHT, re-assess the evidence, and come up with its own findings.

In reply regarding the first ground, Mr. Kicheere submitted that during the trial, three issues were raised, the first was to determine the lawful owner of the disputed land, and the second was to determine the legality of the residential license. The third was what reliefs are parties entitled to. The first and second issues were resolved and answered conjunctively because both issues were connected and cannot be separated because they answered the question of land ownership in dispute.

In the matter at hand, the Trial Chairman was aware of the procedural and legal obligation to answer all the issues raised. He answered the first and second issues conjunctively as they were connected and inseparable.

To answer the question of "who is the lawful owner of the locus quo", one must consider all evidence that proves ownership of land, sale agreements, deed of gift, certificate of title, court order, and lawfulness of the Residential License.

Therefore, he argued that it was on record that the Appellant failed to prove that he acquired the land in dispute legally by either producing a sale agreement if he bought it, a deed of gift if it was given to him, a certificate of title together with documents evidencing how he got it, court order if he got it through the operation of law or a residential license together with documents showing how he got the land.

The Appellant's witness PW 3, Land Officer, admitted that the Residential License held by the Appellant was obtained in 2006 on land whose area is square meters 281. But also, according to PW3, there was evidence(exhibit A2)showing the Residential license was not renewed. Therefore, the residential License was obtained fraudulently.

Moreover,DW3 Fatuma Juma Mzee testified how the land in dispute was involved in a probate case at Kigamboni Primary Court, where it ruled for the land to be divided after that, she sold her piece of land to the Respondent as per exhibit D1.

He further submitted that the trial tribunal decided to labour itself in determining all issues concurrently. The exact position was adopted in several decided cases, one of them being the case of **Hamis Bushiri Pazi and 4 Others vs Saul Henry Amon and 3 Others**,Civil Appeal No.166 of 2019,CAT (Tanzlii), where it was stated;-

"for convenience, we shall address the first and second issues as to the legality of the sale of the suit property and the bar under O. XXI. 90(3) of the code concurrently. We have found it prudent so to do since the legality of procurement of the certificate of sale on whose basis the bar O. XXI. 90(3) is premised, and from which the second respondent traces title on which sit the property, was the basis of contention at the trial

court, in such a situation. Therefore, the said two issues are so interwoven that they cannot be separated."

In arguing the second ground of appeal, he submitted that the DLHT was correct in fact and law by not considering the residential license that the appellant unlawfully obtained. He was a trespasser at the time of issuance of that license. It was due to the testimonial evidence adduced by the Respondent witness Ramadhani Kayombo (DW2) that there was an error in issuing this contested Residential License since the application for issuance was not accompanied by any document showing the Appellant as the owner of the suit land.

To narrate further, he stated that Residential License is recognised under Section 23 of the **Land Act Cap 113 RE 2019** as a derivative right. However, in the matter, the Appellant possessed a residential license but still lacked other evidence to prove his ownership over the locus quo. The Appellant said he bought the land in dispute but could neither tender the sale agreement nor did not say where and how the sale agreement disappeared, if at all there was one. He bolsters his argument by the decision of this Court in **Halima Juma Mwisaka vs Athumani Maulid**

Kombo and 4 Others, Land Appeal No. 170 Of 2021, High Court at Dar es Salaam (Unreported) at page 8, where it was held that;

"The residential license might be a proof of ownership, but there are circumstances where the possession of it alone cannot stand alone as a sole proof of ownership..."

He concluded that the appellant possessed the residential license but lacked other evidence to prove that he lawfully owned the land in dispute before obtaining a residential license. Hence the DLHT was correct in fact and in law to declare Respondent as the valid owner.

Groundthree, four, five, six, and seven were argued together as Mr. Kicheere submitted that they were all based on the weight of evidence and consideration of witness testimonies.

Regarding the third and fourth grounds, he stated that the DLHT was correct in fact and law as the evidence of the Appellant and that of his witnesses was not ignored by the trial Chairman. Instead, it was weak compared with the strong evidence of the Respondent. Furthermore, it was correct to hold that the land was formally divided, as the Respondent proved this through his witness, Fatuma Juma Mzee, who sold the disputed

land to him. Analysis of evidence adduced by the parties was conducted. The DLHT went far by evaluating the decision made by the Primary Court of Kigamboni, which gave the root of the disputed suit. It was on record that Fatuma Juma Mzee being a lawful owner, sold land to the respondent while on the other hand, Shaibu Juma Mzee sold the same land owned by his sister to the appellant.

On the fifth and sixth grounds, Mr. Kicheere submitted that it was correct to hold that the suit land belongs to the respondent due to the adduced sale agreement and the testimony of the seller. He stated that to prove ownership over the land, one must prove how he acquired the land as per **Millan Richard vs. Bakari Hoza** (1992) TLR 385. He argued that the respondent managed to prove that there was a sale agreement between him and Fatuma Juma Mzee, while on the appellant's side, there was no sale agreement but mere words that he bought the land from Shaibu Juma Mzee, who was not a lawful owner.

He concluded by inviting this Court to re-evaluate the evidence to see that the decision of the DLHT was correct.

Mr. Dominic filed the rejoinder, which countered what was submitted in the reply and also reiterated his submission in chief. Therefore, I do not

see the reason to produce it here but as usual I will consider it in the deliberation and determination of the appeal.

Having examined the rival submissions of the parties in the light of the grounds of appeal, I shall initially dispose of the first and second grounds in the Memorandum of Appeal together on the allegation that the DLHT failed to answer all issues raised for trial by revisiting the DLHT decision and that whether the Residential License given to the Applicant was properly procured or not.

At page 2 of the typed decision, the DLHT put it clear that the main issues for consideration were who is the lawful owner of the locus in quo and whether the Residential License given to the Applicant was properly procured or not.

In determining the first issue, the DLHT evaluated the evidence presented before it. After analysis, it satisfied itself that the evidence proved that the land was owned by Fatuma Juma Mzee, who sold it lawfully to the respondent. I quote what was held at page 3 of the Judgment;

"Katikakujibu hoja Ushahidi umeonyesha ardhi yenye mgogoro ilikuwa mali ya marehemu Juma Mzee aliyeacha warithi wawili ambao ni Fatuma Juma Mzee na Shaibu Juma Mzee ambao Mahakama ya Mwanzo Kigamboni iliamuru eneo lenye mgogoro ligawanywe pande mbili sawa, na baada ya kugawa Fatuma Juma Mzee aliuza ardhi yake kwa mdaiwa.

Hivyo kwa kujibu hoja ya kwanza mdaiwa ndiye mmiliki halali wa ardhi yenye mgogoro. Hivyo basi maombi haya yamekataliwa kwa gharama.

Briefly, that means the respondent was declared the rightful owner of the suit land and the appellant's case was dismissed with cost.

From above, issues one and three were determined by the DLHT declaring the respondent as the lawful owner and the reliefs granted were the dismissal of the appellant's case with costs. The second issue was left undetermined.

It is trite that a court of law has a legal obligation to resolve all issues arising out of pleadings. Failure to do so constitutes an abdication of duty to procedurally adjudicate disputes presented to the court see **Ally Rashid (Supra)**

Despite the position of law above, which I fully acknowledge but the question is whether it was significant to determine the second issue after the DLHT declared the respondent as a lawful owner of the suit land. This Court had faced a similar scenario in **Agatha Mshote vs. Edson Emmanuel and ten others**, Land Case No. 286 of 2015 (unreported), whereby at the trial, three issues were framed to wit; **one**; whether the plaintiff is the lawful owner of the suit premises; **two**; whether the defendants trespassed into the suit premises and **three**, to what reliefs are the parties entitled to.

In its decision, this court held that;

"It is for that reason that the plaintiff failed to prove that she is the lawful owner of the disputed land, and I accordingly [answer] the first issue in the negative. Since the plaintiff failed to prove her ownership, the second issue has no bearing at this stage."

The plaintiff was aggrieved and appealed to the Court of Appeal vide Civil Appeal No. 121 of 2019, **Agatha Mshote vs. Edson Emmanuel and ten others** (Tanzlii). One of the grounds in the appeal was;

"That the honourable High Court Judge grossly erred both in law and fact for failure to determine all issues framed

and agreed upon by the parties at the commencement of the trial.”

In its decision, the Court of Appeal held that;

“In a nutshell, from what is evident on the record, it would appear, the appellant was not aware as to who was the seller, and it is very probable that she was conned. Again, the appellant fell short of proving that she owned the three acres of land in question.

*.....In our considered view, we agree with the manner in which the trial Judge addressed the second issue as to whether the respondents' had trespassed into the land in disputed. We are fortified in that account because since the burden of proof was on the appellant and not the respondents, and in the event she did not discharge the onus, the credibility of the respondents' account was irrelevant. **Thus the appellant's counsel criticism on the learned trial judge's failure to consider the second issue framed is with respect, uncalled for....”***

[Emphasis provided]

Flowing from the above discussion, it was uncalled for the DLHT to determine thesecond issue while it was already decided who was the lawful owner of the suit land. Therefore, it was rendered insignificant for the DLHT to embark on determining the issues while the first issue had already dismissed the appellant case and declared the respondent as the lawful owner. Therefore, the cited cases of **Ally Rashid, Bhag Bhari and Ahmed Said (Supra)** are distinguishable and not applicable in the circumstances of this matter.

Therefore, the first and second ground of appeal lacks merit. By the way, the Residential license is not a land title per se. Under Section 23 of the **Land Act**, Cap 113 R: E 2019, a residential license is a derivative right, and under the same Act, a derivative right is defined as;

"a right to occupy and use land created out of a right of occupancy and includes a lease, a sublease, a licence, a usufructuary right and any interest analogous to those interests."

In further deliberation and determination, I will discuss the third, fourth, fifth, sixth and seventh grounds together because the appellant

faulted the DLHT for failing to analyse evidence. Eventually, ground seven carried all other grounds.

Having gone through the DLHT judgment at pages 2 and 3, I found that the appellant's evidence and his witnesses, Shaibu Juma Mzee and Janeth Wallance, were evaluated and considered by the DLHT, but the same was found to be weak compared to the respondent's evidence. Therefore, the fault that the evidence was ignored lacks merit.

Regarding the complaint that there was no evidence that the land was divided between Shaibu Juma Mzee and Fatuma Juma Mzee, after perusing the DLHT proceedings (untyped), I found that when cross-examined Shaibu Juma Mzee admitted that the land was divided between them. He said;

"Sikumbuki ukubwa halisia wa eneo maana tulipiniana kwa macho"

Therefore, Shaibu Juma Mzee, who allegedly sold the land to the appellant, knew that the land was divided, and he was present when the division occurred.

Further, on the proof that the respondent purchased the land from Fatuma Juma Mzee, this should not detain me long because the records

indicated that the sale between Fatuma Juma Mzee and the respondent was executed by the sale agreement dated 2 March 2017 (Exhibit D1). On the other hand, neither the appellant nor Shaibu Juma Mzee tendered a sale agreement. Both did not have any sale agreement.

Therefore, since the written agreement prevails over the oral evidence in terms of 101 of the **Tanzania Evidence Act**, Cap 6 RE 2019 and the respondent successfully tendered the sale agreement while the appellant failed to tender the same to indicate how he acquired the land, then Fatuma Juma Mzee sold the land to the respondent who lawfully proved how he acquired the land.

Finally, having scrutinised and re-evaluated the oral and documentary evidence adduced at the trial, I agree with the trial DLHT decision. It properly analysed the evidence and arrived at the correct decision. Therefore, the appeal is not merited, and consequently, I hereby dismiss the appeal in its entirety with costs.

I order accordingly.




K. D. MHINA
JUDGE
20/06/2023