

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB - REGISTRY OF MWANZA
AT MWANZA**

LAND APPEAL NO. 55 OF 2023

[From District Land & Housing Tribunal for Mwanza, Application No.90 of 2016]

ADAM JOSEPH KAZUNGU-----APPELLANT

VERSUS

VENANCE JOSEPH KAZUNGU----- RESPONDENT

JUDGEMENT

Sept. 26th & Oct. 6th, 2023

Morris, J

Life sometimes places siblings at loggerheads. It is not uncommon for brethren to engage in a terrible skirmish over a property. The parties above are brothers. The dispute between them is ownership over land. The judgement of the District Land and Housing Tribunal for Mwanza (elsewhere, "DLHT" or "Tribunal") in Application No. 90 of 2016 between the two, aggrieved the appellant. He now appeals to this Court, marshalled with four grounds. In this judgement, however, identical grounds have been merged in the interest of brevity and coherence.

The Tribunal's decision is faulted on two major premises. **One**, that DLHT erred in law and fact to disregard cogent evidence of the appellant

and his witness regarding ownership of suit land. **Two**, that the respondent failed to prove his ownership over land while his witnesses' evidence was contradictory.

In brief, the respondent sued the appellant for declaration that he is the owner of a house at Plot No. 4 Block 'AA' -Mabatini, Mwanza (the suit house). On his part, the appellant alleged that the suit house belonged to the estates of their father, one Joseph Kazungu. He alleged further that Joseph Kazungu had acquired the subject house from Makoni Mwananyeye. It was also claimed that the said father had built another house at Kisesa for exchange with Makoni Mwananyeye. The Tribunal decided in favour of the respondent herein. This appeal challenges such victory.

Both parties appeared for hearing without legal representation. The appellant hastily adopted the grounds of appeal as part of his submissions. Further, he submitted that the title deed for the suit house that is in the name of the respondent is illegitimate for want of a valid transfer. He argued that the alleged transfer credentials are dated on 17/01/1997 from one Lugahamila Muhando while the latter died on 12/7/1973. He referred to testimonies from him (DW1), Mayela Bujingwa (DW3); Lushomi



Maganyane (DW4) and Nyanda Kazungu (DW2). He stated further that after the death of the original owner of the suit house (Lugahamila Muhando), his sister Makoni Mwananyeye took over the supervision of Mr. Joseph Kazungu's tenancy therein and collection of rent from the latter.

The appellant also argued that, in 1995 the said Makoni Mwananyeye requested their tenant-father to build a house for her at Kisesa in exchange of the suit house. He submitted further that the late Joseph Kazungu built the house at Kisesa and accordingly acquired ownership of the suit house. It was his additional contention that the respondent, who was then working outside Mwanza region, came back from employment in 1996 only to find Makoni Mwananyeye already dead. And that the respondent was instructed by their father to process transfer of the suit house into the latter's name. However, allegedly, the respondent kept the Letters of Offer by himself instead.

It was further argument by the appellant that on 17/01/1997, the respondent fraudulently transferred the suit house in his favour. Expounding on the allegations of fraud, the appellant stated that the testimonies by Juma Ngeleja (PW2), Roman Kulwa (PW4) and Magesa Paskal (PW3) were largely contradictory to one another. Moreover, he

stated that the administrator of the late Joseph Kazungu's estate has never been appointed. Finally, he prayed for the appeal to be allowed and the suit house should be declared part of the estate of the late Joseph Kazungu.

In reply, the respondent submitted that the testimony by the appellant that the original owner of the suit house died on 1973 is hearsay because he (the appellant) was born in 1963. That is, he was then only 10 years old. He also argued that the appellant once sued their late father claiming that the latter had given the house to the respondent alone. But their father never attended such proceedings and the outcome from that suit is unknown. It was the respondent's further submissions that their late father had told his family members to reimburse the respondent of the construction costs spent on the alternate house at Kisesa but they did not comply. He contended that after the death of their father, two family meetings confirmed the respondent's ownership over the suit house. And that, upon Makoni Mwananyeye's death, her family members accorded him necessary cooperation which culminated into transfer of the title deed in his name. He maintained that the suit house belongs to him. Hence, he prayed for dismissal of the appeal.



I have dispassionately considered the submissions of parties. This being the first appeal, it is justified to take it in a form of rehearing. I so hold because the appeal is primarily hinged on evidence at the trial Tribunal. In law, the first appellate court retains the mandate to re-appraise, re-assess and re-analyze the evidence on the record before it arrives at its own conclusion on the matter. Reference is made to the cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; and ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019 (both unreported).

That said, I now set to determine the duo grounds of appeal. The prime objective in re-evaluating the evidence on record is to see to it whether the evidence on record adequately prove ownership of the suit house in favor of the respondent or estate of the late Joseph Kazungu. The appellant testified that the suit house belongs to the estate of Joseph Kazungu. He argued that he had participated in building the alternative house at Kisesa for Lugahamila's Sister (Mwananyeye) in exchange with the suit house. That the respondent was absent at that time though he is now trying to evict him (appellant) from the suit house despite the

inconsistent evidence by his witnesses, on the one hand, and against the plausible evidence from the appellant's side, on the other.

Nevertheless, the respondent bases his claim of ownership on the title deed which he claims to have obtained after liaising with the late Mwananyeye's family members. The respondent also testified that the appellant had, in the past, sued their late father over the suit house but their father never attended. To him, even his family members and local leaders confirmed that suit house belonged to the respondent.

From record, a couple of facts are undisputed. **First**, the respondent herein was handed over the Letters of Offer in the name of Lugahamila Muhando. **Second**, the suit house is now owned by the respondent who has his name in the certificate of title. **Third**, that the ownership documents were given to him after the death of both Lugahamila Muhando and Makoni Mwananyeye. **Fourth**, Joseph Kazungu (parties' father) died on 2014 and no administrator of estate was appointed to administer his estates. **Fifth**, the suit house is being claimed on the basis that the owner/overseer exchanged it with the alternative house built for her at Kisesa.



The above set of facts notwithstanding, two basic matters remain to be resolved by the court. That is, the person who built the house at Kisesa for the late Mwananyeye between the respondent and the late Joseph Kazungu; and who the rightful owner of the said house is. This being civil case, facts need be proved on a balance of probabilities. This position is well stated in the case of ***Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)***, CoA Civil Appeal No. 118 of 2014 (unreported). Further, it is a cardinal principle of law that, in civil litigation, whoever alleges must prove his/her allegations. See, for instance, ***Obed Mtei v Rakia Omari*** [1989] TLR 111; and ***Paulina Samson Ndawavya vs Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported).

According to the appellant, he contributed in building the house at Kisesa (pages 61 and 64 of the proceedings). DW2 also supported him by testifying as having made mud blocks; and collected building stones along with another brother (page 70 of the proceedings). Evidence, further reveals that the iron sheets allegedly were supplied by the respondent (pages 21, 61 and 70 of proceedings). Therefore, it was proved that the

house at Kisesa was constructed with the parties herein with assistance of other family members.

Such efforts notwithstanding, the respondent has a Certificate of Title over the suit property. The appellant faults the medium through which the respondent transferred the said property to his name. To be precise, the respondent submitted that the whole process was fraudulent. However, at page 65 of the proceedings, the appellant testified to have reported the alleged fraud to police but abandoned the charges. It is law that fraud in civil case need be specifically pleaded and proved on higher degree of probability than is required in ordinary civil cases. See the cases of ***Gabriel Mathias Michael and another v Halima Feruzi and 2 others***, Civil Appeal No. 28 of 2020; ***City Coffee Ltd v The Registered Trustee of Ilolo Coffee Group***, Civil Appeal No. 94 of 2018; ***Dominicus Zimanimoto Makukula (administrator of the estates of the late Dommy Dominicus Makukula) v Dominica Dominicus Makukula and 3 others***, Civil Appeal No. 359 of 2020 (all unreported).

Moreover, the late Joseph Kazungu (parties' father) died in 2014. The alleged transfer herein was made on 17/01/1997. Thus, such effectuation of transfer was done while their father was still alive. On

record, there is nothing to suggest that the subject father challenged the respondent's title over the suit house (in particular, the way the transfer was realized).

Further, it was testified by the respondent herein (page 20 of the proceedings) that the appellant once sued their late father to the local street leadership alleging that the latter had preference in the respondent such that the suit house was given to him exclusively. This fact was never contradicted through cross-examination by the appellant herein. It is the settled principle of law that when the matter is left uncontroverted through cross examination, it is presumed as being admitted. Followed hereof are cases of ***Patrick William Magubo v Lilian Peter Kitali***, Civil Appeal No. 41 of 2019; ***Nelson s/o Onyango v Republic***, Criminal Appeal No. 49/2017; and ***Paul Yustus Nchia v National Executive Secretary Chama cha Mapinduzi and Another***, Civil Appeal No. 85 of 2005 (all unreported).

Therefore, it is undeniable that the dispute over the suit house preceded the death of Joseph Kazungu. Further, if that is the assertion to go with; the estate of the late Joseph Kazungu is yet to be administered for no one has not been appointed administrator hereof. The transfer is

alleged to have been made on 1997, that is, 17 years before the death of Joseph Kazungu. Such transfer has never been challenged anyhow. The law holds it a position that the owner of Certificate of Title owns the land. See, for example, ***Bilali Ally Kinguti v Ahadi Lulela Said and 4 others***, Civil Appeal No. 500 of 2021; ***Nacky Esther Nyange v Mihayo Marijani Wilmore and Another***, Civil Appeal No. 207 of 2019 (both unreported).

In addition to the foregoing view, after the death of Joseph Kazungu the suit house has never been recognized or described as forming part of his estates. It was the evidence of Juma Ngeleja (PW2) and Roman Kulwa (PW4) that the family meeting conducted for the purpose of recognizing properties of the Joseph Kazungu after his death identified the suit house as belonging to the respondent (see, pages 26, 27 & 40 of the proceedings). Whereas the evidence of PW2 was that the applicant got the suit house from Lugahamila Muhando, PW3 testified the respondent to be given the same by Mwananyeye. I have read the whole evidence of PW2 (especially, pages 26 to 31). I find no testimony as from whom the respondent derived his title. Therefore, the alleged inconsistency of testimonies of PW2, PW3 and PW4 is not apparent on the record.



In upshot, I find the appeal to be barren of merit. Thus, I find no legal justification to vary the judgement of the trial DLHT. The appeal stands dismissed accordingly. Each party shall shoulder own costs. It is so ordered. Right of appeal is fully explained to the parties.



C.K.K. Morris

Judge

October 6th, 2023

Judgment delivered this 6th day of October 2023 in the presence of the Messrs. Adam J. Kazungu and Venance J. Kazungu; the appellant and respondent respectively.

C.K.K. Morris

Judge

October 6th, 2023