

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

LAND APPEAL NO. 165 OF 2021

(Originating from Kinondoni District Land and Housing Tribunal in
Land Application No.258 of 2017)

FIDELIS M. MWASELELA.....APPELLANT

SHAIBU HATIBU HAMAD (Legal Representative of the
Estate of the late Hatibu Hamad and Salum Mussa).....**RESPONDENT**

Date of Last Order: 29.09.2022
Date of Ruling: 07.11.2022

JUDGMENT

V.L. MAKANI, J

The appellant named above lost at Kinondoni District Land and Housing Tribunal (**The Tribunal**) in Land application No.258 of 2017 (S.H. Wambili, Chairman). He claimed to be lawful owner of the land described as Plot No.586, Block 45 C, held under certificate of title No.50685 (the **suit land**). He claimed that the respondent trespassed in the suit land. Being dissatisfied by this decision, the appellant has preferred this appeal basing on three grounds hereunder reproduced:

- 1. That, the Honourable Chairman erred in law and in fact when he failed to give weight to the opinion of assessors which is sound and in accord with the law and practice obtaining in Tanzania.*

- 2. That the Honourable Chairman erred in law and in fact when he decided that the appellant knew of the invasion to his land in 1999 and did not sue for 18 years. The evidence on records is that the appellant became aware of the invasion on 29/10/2013 when the report of planning officers was published to the parties.*
- 3. That the declaration that respondent is the lawful owner of the suit land is not supported by cogent evidence and is without any foundation because respondent did not counter claim for such declaration.*

The appellant prayed for the appeal to be allowed and the decision of the District Tribunal be set aside, and the appellant be declared the rightful owner of the suit land. The appellant also prayed for costs of this appeal be provided for. The matter proceeded orally where Mr. Sylvester Shayo, Advocate represented the appellant and the respondent appeared in person.

Mr Shayo argued the grounds of appeal together. He said the evidence before the Tribunal was clear that the appellant is the owner of the suit land. That even the certificate shows that appellant is the owner of the suit land. He said that section 2 (1) of The Land Registration Act Cap 334 RE 2019 defines the owner to be the one who is registered. That the section read together with section 40 of the Land Registration Act that certificate of title shall be admissible

for the contents therein. He said the Certificate states that he was not a bonafide purchaser, but in essence he was not a purchaser but the owner of Certificate of Title. He said that one plot cannot be allocated to two people so if he had Certificate of Title of the suit land then he should remain in that plot and no other plot. That the Chairman said that he had considered opinion of assessors but he did not do so. He said that the issue of customary law cannot apply to a registered land. He relied on the case of **Mwalimu Omari & Another vs Omari A. Bilal (1999) TLR 432** where it was stated that land in urban areas has to be registered and has to be on grant.

Mr. Shayo pointed out that the assessor's opinion was correct. He said that the report published on 29/10/2013 (**Exhibit P1**) shows how the respondent trespassed on the suit land. He said the appellant filed the case in 2017 after the report and the assessors observed that owners of Plot No.585 and 587 should respect their boundaries. He said even the deed plan shows that Plot No.586 belongs to the appellant. That the only evidence by respondent was a Letter of Offer in respect of Plot No.585 Block 45C, Kijitonyama Dar es Salaam. He said there is nothing that the applicant is claiming in respect of Plot No.585 and respondent has no right on Plots No.586 and 587. That

the dispute is that respondent trespassed in Plots No.586 and 587 as per report by surveyors which was also admitted as evidence. He prayed for the appeal to be allowed with costs.

In reply, the respondent said that the applicant is within Plot No.585. He said his father bought the land in 1975 and had a building permit in 1978. That the land was surveyed, and he was advised where to build the house. He said on the left and also on the right there were spaces. He said he complained about the Certificate of Title by the appellant as it did not show the initial owner of the suit land, and further that the Certificate of Title was obtained without involving local government and neighbours. He went on saying that that his father did not sell the suit land to the appellant and there were no witnesses at the time he bought the suit land. The appellant bought a house which was within the respondent's plot. He said he exhibited building permits, letters of offer and letters of administration. That the plots were surveyed in 1972 not in 2013, and surveying is done only once, and he said they were not notified of any new survey as such the report of the survey of 2013 is not true. That his late father gave the plot to Salim Mussa Mjaka to enable him stay, but he did not sell the land to him. That the said Salim Mussa Mjaka secretly sold

the land to the appellant. That the appellant could not provide Sale Agreement between him and Salim Mussa Mjaka. That they were paying land rent from 1975 to 2005. In 2006 when they went to pay, they did not find their names there but that of Selemani Mtengele with Plot No.585 who was the respondent's neighbour. That plot No.586 is between 584 and 586 so it seems that the appellant wants to snatch respondent's land. He prayed for the appeal to be dismissed with costs.

In rejoinder submission, Mr. Shayo reiterated his main submission and added that the principal claim is that the Certificate of Title of the appellant was obtained by fraud. That particulars of fraud were not pleaded and proved at the tribunal. That the report was on the return of the boundaries but not new survey.

I have listened to Counsel and the respondent herein. The main issue for consideration is whether this appeal has merit. I shall dispose the appeal generally.

In this appeal the appellant's Counsel insists that since the appellant has Certificate of Title then it is prima facie evidence that the

appellant is the owner of the suit land. However, Counsel has forgotten that the respondent's father also had a Letter of Offer and there is no official revocation of the said Letter of Offer to date.

The evidence at the Tribunal was clearly narrated by the Chairman in his judgment and what is apparent is that the respondent's father had been on the suit plot for years and so he was the original owner within the area. The appellant did not dispute this fact and he also did not dispute that he found the house of the respondent's father on the suit plot when he bought his plot in 1999.

Indeed, the appellant may have a Certificate of Title, but how was the said Certificate obtained? I am saying so because it is the basic principle of law that who alleges must prove. In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

"..... it is an elementary principle that he who alleges is the one responsible to prove his allegations."

See also the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014**

(CAT) (unreported) where it was further held that the party with legal burden also bears the evidential burden on the balance of probabilities.

At the Tribunal it was the duty of the appellant to prove how he obtained the Certificate of Title especially when there is a claim of existence of Letter of Offer by the respondent. The appellant at the Tribunal did not tender as exhibit the alleged Sale Agreement between himself and the alleged seller one Salum Mussa Mjaka. He just presented the Certificate of Title. There was no person from the Municipal Council or the Commissioner for Lands or the Registrar of Titles who gave evidence to prove the existence and validity of the Certificate of Title vis a viz bthe Letter of Offer of the respondent's father. These witnesses would have, in my view, given an account of how the Certificate of Title was obtained while there is an existing Letter of Offer. They would have also said how the house of the respondent's father trespassed on the appellant's land. They would have also clarified on the surveys which were conducted to give raise to the said plots subject of the Certificate of Title and the claimed trespass herein. It is also questionable why the seller was not called as a witness and further why the appellant did not question the

trespass when the respondent's father was alive until the lapse of 18 years. Without such proof the allegations of trespass raised by the appellant are considerably watered down. In the course of giving evidence the appellant clarified to the Tribunal that:

- "- I bought my plot in 1999.*
- I met [found] a house of respondent's father was present in 1999.*
- The respondent's father was original owner there. It is him who allocated plots to other people."*

It is apparent from the above that the appellant knew that the original owner of the suit land was the respondent's father, and he found his house in the suit land, but he did not do anything at the time when he was alive or tell him anything until 18 years down the line when he started claims against the respondent. The silence by the appellant meant that there was acquiesce on his part and the claim after the death of the respondent's father creates a lot of questions. Looking at the Certificate of Title it shows that it was issued in 2000 and the respondent's father died in 2007 which means the appellant decided to keep quiet until the owner was out of the way. The appellant's claim after the death of the respondent's father and several years after the alleged purchase of the suit land is questionable.

Further, is on evidence by the appellant that the respondent's father was the one who allocated plots to other people. This being the case, the claim of trespass is strange because the respondent's father could not have allocated land to any other person knowing that he has built a house on the said land. In view thereof, I agree with the Chairman that the appellant (then applicant at the Tribunal) failed to prove his case at the Tribunal at the required standards of the law as they are a lot of unanswered questions which create a lot of doubts as to the claims raised by the appellant.

For the reasons above, I don't find any reason to fault the Tribunal's decision. Subsequently, the appeal is dismissed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
07/11/2022