IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 214 OF 2021

(Originating from Judgment and Decree of Land Application No. 71 of 2020 at District Land and Housing Tribunal of Ilala at Mwalimu House delivered by Hon M. Mgulambwa, Chairman delivered on 30th August, 2021)

ATHUMAN KABENGWA.....APPELLANT

VERSUS

MASIKA C. FARAJI.....RESPONDENT

Date of Last Order: 3/03/2022

Date of Judgment: 23/03/2022

JUDGMENT ON APPEAL

MKAPA, J:

This appeal is filed against the decision of the District Land and Housing Tribunal of Ilala at Mwalimu House ("the Tribunal) in **Land Application No. 71 of 2021.** The appellant Athuman Kabengwa, feeling aggrieved and dissatisfied with the said decision has preferred this appeal challenging both the judgment and decree of the tribunal.

Brief facts of the case are that the applicant, herein as respondent, filed **Land Application No. 71 of 2021**, claiming against the respondent therein to be declared the rightful owner of the suit land which she alleged to have been in adverse possession for about 40 years. That, she built rooms for business one of which was rented to the appellant from the year

2010 under a tenancy agreement. That she collected rent from the appellant and claimed shillings two million, four hundred thousand (say Tshs 2,400,000) being rental arrears for the period between July 2019 to February 2020. The said suit land is situated adjacent to respondent's premises with certificate of title registered as Title No. 77806, Plot No. 13, Block "I", Kariakoo Area in Dar Es Salaam. On the other hand the appellant claimed the suit land adjacent to the respondent's premises is an open space belonging to the Ilala municipal council thus no tenancy relationship existed between the appellant and the respondent as the applicant therein failed to prove ownership.

After hearing both parties the tribunal entered judgment in favour of the applicant, respondent herein. Dissatisfied, the appellant has filed the Memorandum of Appeal consisting of the following grounds of appeal;

i. *That the Hon. Chairperson erred in law and fact in holding that there existed tenancy relationship without establishing the ownership of the land to the respondent and which was null and void.*
ii. *That the Hon. Chairperson erred in law and fact in holding that the respondent was an inheritor of the suit*

land without observance to the procedures which governs process of inheritance.

iii. *That, the Hon. Chairperson erred in law and fact in basing on tenancy agreement which was concluded mistakenly between the applicant and respondent therein.*

iv. *That, the Hon Chairperson erred in law and fact in ignoring the testimony of officers from the Ilala Municipal Council instead of ordering the survey so as to establish the size of the land which is owned by the respondent in relation to the document she has but she only took for granted.*

v. *That, the Hon. Chairperson erred in law and fact in referring the opinion of the assessors without mentioning the names of the said assessors as well without recording details of such assessor's opinion nor reading out such opinions to the appellant.*

vi. *That the Hon Chairperson erred both in law and in fact in ordering payment of rent which had no legal basis.*

The appellant prayed for the decision and entire proceedings of the Tribunal be quashed and the appeal be allowed with costs.

The respondent contested the appeal and filed reply to the Memorandum of Appeal contesting all the grounds of appeal and prayed for the appeal to be dismissed.

On the date when the appeal came up for hearing both parties consented and with leave of the Court the appeal was argued by way of filing written submissions. The appellant was unrepresented, and his submissions were drawn and filed by Mr. Isaac Nassor Tasinga, learned advocate, while the respondent had the services of Mr. Osward L. Mpangala also learned advocate.

Arguing in support of the first ground that the tribunal chairman erred in holding that the tenancy agreement did exist without first determining respondent's ownership on the suit land, the appellant contended that, tribunal's record at page 4 paragraph 2 of the typed judgment speaks for itself that the suit land is an open space under the supervision of the Ilala Municipal Council. That, this was evident by testimony of DW4, an officer from Municipal Council who testified the fact that there existed surveyed plots and open spaces which accommodated "vibanda" (temporary structures) one of them was occupied by the appellant. It was appellant's argument that there was need for proof of ownership of the suit land by the respondent herein

prior to the tribunal's chairman holding that there existed tenancy agreement between the appellant and the respondent.

Submitting on the 2nd ground he challenged the respondent for failure to prove inheritance of the respondent to the suit land in order for the tribunal to ascertain respondent's *locus standi* to prosecute as administrator or owner of the suit land.

As to the 3rd ground, the appellant contended that the tribunal chairman erred in relying on the tenancy agreement in arriving at his decision as the agreement was concluded by mistake since the suit land did not form part of the respondent's land, hence renders the tenancy agreement void.

Regarding the 4th ground, he challenged the tribunal chairman for ignoring testimonies of the witnesses from the Ilala Municipal Council with a view to establishing the size of land owned by the respondent vis a vis the size of the suit land.

As for his 5th ground of appeal, that the tribunal chairman erred in not reading out assessors' opinion as well as not recording assessors' names it was the appellants' submission that the role of the assessors during the proceedings were unclear thus contrary to the law. Supporting his argument he relied on the provisions of section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216 [R.E 2019] and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal)

Regulation, 2003 and the decision in the case of **Sikuzani Saidi Magambo and Kirioni Richard Vs. Mohamed Roble, Civil Appeal No. 197 of 2018, (CAT).**

Submitting on the 6th ground of appeal, the appellant contended that the trial tribunal's order for the appellant to pay the respondent shillings 5,290,000/= being rental arrears is unfair with no legal justification as the respondent is not the owner of the suit land. He finally prayed for the appeal to be allowed with costs.

Responding to the above submission Mr. Mpangala counsel for the respondent made the following submission beginning with the first ground of appeal that; at the trial proceedings one of the issues framed by the tribunal chairman was to establish as to who is the rightful owner of the suit land. That; vide pages 1, 6 to 7 of the tribunal typed judgment the tribunal chairman explained how the respondent laid down the basis of her case that she was the owner of the suit land which in the final analysis the tribunal decided in her favour. More so, PW2 also testified to the effect that, the appellant first entered into tenancy agreement with PW2 from 2010 through September 2019 by renting a small room for business. It was Mr. Mpangala's further argument that the testimonies of the appellant's witnesses from Ilala Municipal council were recorded

by the tribunal chairman but failed to prove the fact that the suit land was an open space or even belonged to the Ilala Municipal council. He added that, witnesses from the Ilala Municipal Council were unaware of the developments made on the suit land and those involved in developments even the existed tenancy dispute. In that regard he submitted that the first ground of appeal is a misconception thus lacks merit.

Countering the submission on non-observance of procedures governing the issue on inheritance it was Mr. Mpangala's submission that, such an issue was not for determination by the tribunal as evidenced at page 6 of the typed judgment. That, in the event of the issue of inheritance being raised, the tribunal would have lacked jurisdiction to entertain it. He added that through **Exhibit P2** the respondent herein managed to prove that she was the rightful owner of the land adjacent to the suit land as shown at the bottom of page 1 and in the middle of page 7 which reads; ***....."Mdai aliendelea kutoa Hati miliki ya eneo lake analomiliki kuwa kielelezo P2"***

That; reference to the respondent's late mother was meant to provide background information to the suit land.

He submitted on the 3rd ground of appeal that, at the trial tribunal's hearing the appellant did not submit nor raise incidences of the alleged mistakes found in the tenancy

agreement which was executed between the appellant and the respondent. That, though the appellant had admitted on the existence of the tenancy agreement yet he refused to pay rental fees which the trial tribunal found amounted to violation of tenancy agreement.

On the 4th ground of appeal he submitted that, the testimonies of DW3 and DW4 were recorded and considered as seen at page 8 of the tribunal's judgment. He submitted that the appellant's contention that the tribunal ought to have ordered survey in order to establish size of the suit land is total misconception because there was no prayer by the appellant for the said order. He further submitted that it would be inappropriate for the trial tribunal to deal with issue of survey which was not subject matter of the case.

Addressing on the 5th ground of appeal, that of non-consideration and recording of the opinion of assessors by the trial tribunal, it was Mr. Mpangala's submission that the trial tribunal did record and consider the opinion of the assessors named Ramadhani Matimbwa and Tumaini Mwakalasya respectively, and their opinion were issued in writing on 26th August 2021. He contended further that, the law requires assessors to give their opinion in writing, but does not provide on where the opinion are to be recorded, though it is a common

practice for assessors' opinion to form part of the tribunal's proceedings as they are recorded in the trial proceedings.

Finally, Mr. Mpangala submitted on the 6th ground of appeal on the fact that, the trial tribunal ordered the appellant to pay shillings five million two hundred and ninety thousand (Say Tshs 5,290,000) being rental arrears due to the appellant arising from the tenancy agreement. He prayed for the decision of the Tribunal to be upheld and the appeal be quashed with costs.

In his brief rejoinder, the appellant reiterated what he had earlier on submitted in his submission in chief and maintained that; **first**, though he did enter into a tenancy agreement with the respondent, he later discovered that the respondent was not the owner of the suit land subject to the tenancy agreement as the law requires for right of ownership prior to establishing tenancy relationship. **Second,** the suit land subject to the tenancy agreement is an open space belonging to the Ilala Municipal Council.

I have gone through the submissions by counsel for both parties, and also perused records of the tribunal and this being the first appellate court, has a duty to reconsider the evidence on record and come to its conclusion.

[**See**; the decisions in **Audiface Kibala Vs. Adili Elipenda & others, Civil Appeal; No. 107 of 2012, (CAT-Tabora) and**

Maramo Slaa Hofu & Others Vs Republic, Criminal Appeal No. 246 of 2011 (CAT-Arusha) both unreported.

Considering the manner in which I intend to deal with the appeal, I shall first consolidate and determine the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal which they all evolve in challenging the tribunal for failure to properly evaluating evidence before it, and lastly I shall dwell on the 6th and last ground of appeal.

The law is well settled that whoever alleges must prove. Section 110 of the Law of Evidence Cap 6 [R.E 2019] reads;

(i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove those facts exists.

(ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The Court of Appeal of Tanzania in **Anthony M. Masanga Vs. Penina Mama Mgesi & Lucia (Mama Anna) Civil Appeal No. 118 of 2014** (unreported) propounded this principle when the Court emphatically observed;

".....Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases ***the burden of proof*** *lies on the party who alleges in his favour."*

In commentaries by **Sarkar's Law of Evidence 18th Edn., MC. Sarkar, S.C. Sarkar** and **P.C. Sarkar**, published by Lexis Nexis, it was observed at page 1896 as follows;

".....the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue ***and not upon the party who denies it; for negative is usually incapable of proof.*** **[Emphasis added]**

It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .....until such burden is discharged, the ***other party is not required to be called upon to prove his case,*** *The Court has to examine as to whether the person whom the burden lies has been able to discharge his burden.* ***Until he arrives at such conclusion, he cannot proceed on the basis of the weakness of the other party.....***"

It is on record of the tribunal, even the respondent during his examination as PW1 had specifically testified the fact that she is the lawful owner of Plot 13, Block "I", Kariakoo area with the registered certificate of title No. 77806. However, adjacent to it is where the suit land is situate.

Section 2 of the Land Registration Act Cap 334 R.E 2019 the term owner has been defined to mean;

"in relation to any estate or interests the person for the time being in whose name that estate or interest is registered "

A plain reading of the above provision of the law, there can be no doubt that through **Exhibit P1** (Title Deed No. 77806) the respondent managed to establish that she is the lawful owner of the land adjacent to the suit land as title deed is a conclusive proof that the said land belonged to the respondent.

The above legal position was illustrated in **Salum Mateyo Vs Mohamed Mateyo (1987) TLR 111** where the court held;

"This means, any presentation of a registered interest in land is prima facie evidence that the person so registered is the lawful owner of the said land."

Also, the Court of Appeal in **Amina Maulid Ambali & 2 Others Vs Ramadhani Juma Civil Appeal No 35 of 2019 (CAT Mwanza)** had observed**;**

" In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a ***lawful owner*** *unless it is proved that the certificate was not lawful obtained" (Emphasis added)*

The respondent alleged the suit land which is adjacent to her premise also belongs to her by way of adverse possession.

Paragraph 6 (a) (ii) of the Application in **Land Application No. 71 of 2020** at the Tribunal states;

"6 (a) (ii) – For about 40 (forty) years the applicant has been an adverse owner of a piece of land measuring approximately twelve (12) to three (3) metre which is situate adjacent to the applicant's right of occupancy held under title number 77806, plot 13, block "I", Kariakoo area in Dar es Salaam City."

Paragraph 6 (a) (iii) – (vii) thereof provides further that;

"since the applicant was an adverse owner, she built a small house which she used for poultry keeping and charcoal business for 40 years. Later she developed the small house and partitioned it into 5 small rooms which she rented for business and one of the rooms was rented by the appellant herein."

At this juncture it would be necessary to refer to the provisions of section 37 of the Law of Limitation Act, Cap 89 [R.E 2019] which crystallised the doctrine of adverse possession that;

"Where a person claims to have become entitled by adverse possession to any land held under a right of occupancy or

***for any other estate or interest**, he may apply to the High Court for an order that he be registered under the relevant law as the holder of the right of occupancy or such other estate or interest, as the case may be, in place of the person then registered as such holder, and the High Court may, upon being satisfied that the applicant has become so entitled to such land, make an order that he be registered accordingly, or may make such other order as the High Court may deem fit."*

A reading from the foregoing provision it is sufficiently clear that, in order for a person to claim adverse possession he has to comply with the laid down legal procedures as the same is not automatic as was held in **Registered Trustees of Holy Spirit Sisters Tanzania Vs. January Kamili**, **Civil Appeal No. 193 of 2016,** where the **CAT** observed the following;

*"In our well-considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession, Possession and occupation of land for a considerable period **do not**, in themselves, **automatically give rise to a claim of adverse possession".* **[Emphasis added]**.

As the law in civil cases requires whoever alleges must proof it is evident that the respondent failed to proof ownership (title) by

virtue of adverse possession. More so, at page 4 last paragraph of the tribunal typed proceedings, the applicant (respondent herein) acknowledged to have been informed by the municipal council that the suit land belonged to the Municipal council when she narrated.....

".....That the land is adjacent to our house.....That, I remember Municipal came and stated the land is theirs, but we may use it."

My careful perusal of the tribunal's documents has further revealed that the second paragraph of the second page of **Exhibit P5** entitled; **"Taarifa ya Maamuzi ya Shauri la Madai ya Kodi ya Pango kati ya Ramadhani Faraji Masika, Mdai Kodi na Athumani Kabengwa, Mdaiwa Kodi tarehe 27/09/2019 Ofisi ya S/Mtaa Kariakoo Kaskazini,** principally stated that, the suit land which was rented by the appellant is an open space and the respondent herein was notified by a letter the relevant part of which reads;

> ***"Hivyo ingawa eneo kweli ni la wazi au la Serikali wakati Serikali ya Mtaa inadai eneo hilo lirudishwe kwa Serikali barua zote alipelekewa Ndugu Masika Faraji kama mvamizi barua hazikupelekwa kwa ndugu Athumani Kabengwa. Ndugu Athumani***

Kabengwa alipewa barua kama mpangaji wa mvamizi wa eneo kama walivyopewa wapangaji wengine waliopanga kwa S.H Amoni aliyejenga eneo la Serikali."

DW 3 while cross examined at page 37 of the tribunal's typed proceedings testified the following;

"Tulishawasilisha malalamiko yake mbele ya Mkurugenzi ambapo tulishagundua kuwa hili eneo ni ***open space*** *nami nilikuwa ni miongoni mwa Tume kwani Afisa Mipango Miji, Afisa Biashara, Afisa Ardhi (mimi) na Mwenyekiti wa Mtaa tulikuwapo."*

Now turning to the issue as to whether the evidence adduced by the applicant (respondent herein] is sufficient to prove ownership of the suit land on balance of probability, a decision in the case of **Paulina Samsoni Ndawanya Vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2107** (Unreported) is relevant in which the Court of Appeal of Tanzania had this to say;

"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved"

Guided by the above legal authority, by weighing the weightier evidence, I am satisfied that, the respondent (appellant herein) managed on balance of probability to prove that the suit land is an open space (public land) belonging to Ilala Municipal Council thus the respondent cannot claim ownership of the same.

Turning to the 6th ground of appeal, the cause of action allegedly arose from the tenancy agreement between the respondent and appellant involving a room situated in an open space. It is undisputed the fact that the appellant paid rent to the respondent from 2010 to 2019. In order to establish the existence of the said tenancy agreement one of the framed issues by the tribunal chairman was to establish as to who is the rightful owner of the suit land. It is on record **Exhibit P8** That the alleged tenancy agreement was executed between the respondent herein as the landlord ("owner") and the appellant.

Section 2 of the Land Registration Act Cap 334 [R.E 2019] defines the term "owner" as;

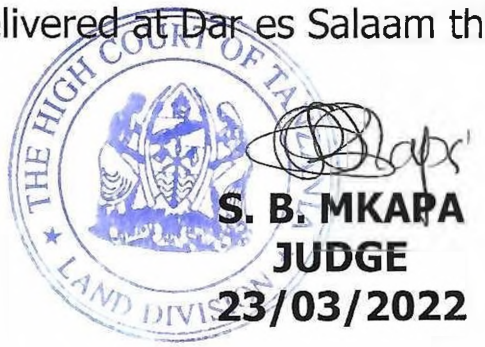
"in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered"

There can be no doubt from the above definition that, the respondent is not the owner of the suit land as alleged in the tenancy agreement which means the said tenancy agreement

which was entered between the respondent (as the owner) and the appellant is void.

Resultantly, with the aforementioned observations made, this appeal is allowed. Accordingly, the judgment and decree of the District Land and Housing Tribunal of Ilala at Mwalimu House in **Land Application No. 71 of 2020** is quashed and set aside. There shall be no order as to costs.

Dated and delivered at Dar es Salaam this 23rd March 2022.



S. B. MKAPA
JUDGE
23/03/2022