

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

LAND APPEAL NO. 100 OF 2021

(Originating from Kinondoni District Land and Housing Tribunal in
Land Application No.316 of 2017(Hon.S.H Wambili))

ATHUMANI NASSORO JAKWENGA..... APPELLANT

VERSUS

RENATUS E. NGABANI.....1ST RESPONDENT

VERIMUNDA MARRO.....2ND RESPONDENT

PRISCUS TARIMO.....3RD RESPONDENT

Date of Last Order: 15.12.2021

Date of Ruling: 14.02.2022

JUDGMENT

V.L. MAKANI, J

The above-named appellants are appealing against the decision of the Kinondoni District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 316 of 2017 (Hon. S.H. Wambili, Chairman).

At the Tribunal the respondents herein were declared the lawful owner of the piece of land located at Mpigi Mgohe, Ubongo District, Dar Es Salaam Region (**The suit Land**). The appellant was dissatisfied with the decision of the Tribunal hence this appeal with eight grounds of appeal reproduced herein below:

- 1. That, the tribunal erred in law and fact in deciding in favour of the respondents while totally disregarding the evidence adduced by the appellant and other witnesses on the ownership of the suit land.*

2. *That, the tribunal erred in law and fact in deciding in favour of the respondents while the said respondents acquired the suit land from an illegal person.*
3. *That, the tribunal erred in law and fact in deciding in favour of the respondents without analysing and indicating in its judgment the evidence adduced by respondents and their witnesses during cross examination where some of them admitted the fact that the suit land was the property of the deceased Nassoro Seleman Jakwenga and appellant is one of deceased's children.*
4. *That, the tribunal erred in law and fact in deciding in favour of the respondents while respondent's application did not clearly state on who was the respondent in their application as there exists contradictions on the same.*
5. *That, the tribunal erred in law and fact in deciding in favour of the respondents by relying on the sale agreements purported to be witnessed and signed by DW2 while the said SW2 denied the contention and signatures in the sale agreement are different and contradictory and seems to be forged.*
6. *That, the tribunal erred in law and fact in deciding in favour of the respondents by merely stating that the appellant admitted during cross examination that DW2 witnessed and signed sale agreement while in fact appellant did not admit such fact as he was not present during the alleged sales and even his name is not reflected in any of the sale agreements brought in the tribunal*
7. *That, the tribunal erred in law and fact in deciding in favour of the respondents by mere reason that the respondents are bonafide purchasers while in fact they are not bonafide purchasers in the eyes of the law.*

8. *That, the tribunal erred in law and fact in deciding in favour of the respondents while in fact the said respondents failed with no reasons to bring the vendor in the tribunal so as to testify in their favour.*
9. *That, the tribunal erred in law and fact allowing the suit to proceed while there was misjoinder of the respondents as every respondent claimed to purchase his own piece of land from the alleged vendor at different time under different agreement.*
10. *That, the tribunal erred in law and fact in declaring the appellant as a trespasser on the land in dispute while in fact the appellant has direct interest on the said land by virtue of being one of the beneficiaries of the estate of his father Nassoro Selemani Jakwenga.*
11. *That, the tribunal erred in law and fact by being misled by Living R. Kimaro who drafted respondents' pleadings and appeared in the tribunal to prosecute the suit for all respondents as an advocate while the same is unqualified advocate.*

Simultaneous to the above grounds, appellant filed supplementary petition of appeal with two grounds that:

1. *The trial Tribunal erred in law and in fact by admitting exhibit P4 which was neither annexed the respondent's application nor served to the appellant as additional document.*
2. *That the trial Tribunal erred in law and in fact entertaining the respondent's application while the same did not show the name of the drawer.*

With leave of the court the appeal was argued by way of written submissions. Advocate Kisyeri Cosmas drew and filed submissions on

behalf of the appellant. Reply to the main submission were drawn and filed by advocate Living Raphael on behalf of respondents.

In arguing the appeal Advocate Kisyeri dropped 9th ground of appeal and the 2nd ground in the supplementary petition of appeal. Counsel argued the 1st ,3rd and 10th grounds together as one ground (the first set), 5th and 6th ground together (second set) and 7th argued together with 8th ground (third set). He argued the rest of the grounds separately.

Arguing the first set, counsel said that the intention of the grounds is to explore the true owner of the suit land and the interest of the appellant on the land. that the tribunal disregarded the evidence adduced by the appellant and other witnesses which proved that the suit land is owned by Nassoro Selemani Jakwenga (the appellants father) who passed away in 2005. That appellant is one of the children of deceased and therefore has a direct interest on the suit land. He said that DW1 testified at the tribunal that the suit land was left to them by their late father (page 47 of the tribunals proceedings). That they were four children; Jakwenga Nassoro, Siasa Nassoro, Athumani Nassoro and Kitama Nassoro Jakwenga. That the testimony was corroborated by the evidence of DW2, DW3, PW2, PW3, PW4 and PW5. Counsel quoted part of the said witnesses' testimonies' which I see no need to reproduce them here. That PW5 stated that he knows the suit land was left to Jakwenga by his father. Counsel said that PW2, PW3, PW4, and PW5 who participated in the alleged sales, knew earlier that the suit land belonged to the late Nassoro Athumani Jakwenga (appellants father) and that the alleged

seller had other relatives including the appellant. That there is no any evidence from respondents herein to prove that the vendor inherits the suit land from his late father after proper administration of the deceased's estate.

On the second ground, counsel said that the vendor had no power to sell the suit land as he was neither the owner nor the administrator+ of the deceased estate. That when PW2 was cross examined at page 20 of the tribunals proceedings about inheritance he replied that he doesn't know about inheritance. That PW3 on cross examination at page 28 he replied that he was not shown any document as a proof of ownership by the seller. That even PW4 testified that he doesn't know how the vendor acquired the land. Counsel said that the law vests power to administrator or executor of the deceased estate to disposed the property of the deceased by way of sale. Counsel relied on section 101 of the Probate and Administration of Estates Act Cap 352 RE 2019 and the case of **Menard Theobard Bijuka & 2 others vs Didas J. Tumaini, Civil Appeal No.49 of 2019(CAT-Bukoba)**. Counsel insisted that from authorities cited, the vendor had no title to pass to the respondents since he was not the owner nor the administrator of the deceased's estate.

Submitting for the 4th ground counsel said that the application was filed at the tribunal on 23/10/2017 and the name of respondent was Athumani Nassoro Jakwenga. The 2nd respondent is seen at the second paragraph of the application as Pili Ismail. That the application contained two different names while the same person. (Athumani Nassoro Jakwenga and Pili Ismail) were not sued as the 1st

and 2nd respondent respectively. That it led to miscarriage of justice on the part of the appellant as the application failed to specify who was the real respondent.

Arguing the 5th and 6th grounds, counsel for appellant said that the grounds intend to disclose the defects found in the sale agreements tendered by the respondents during trial. That DW2 (Pili Ismail) is the mother of four children including the appellant and the alleged seller of the suit land. She denied to sell any sale agreements (P1, P2, P3 and P4) tendered by respondents during trial. That she denied to participate in the sale as she was not present. That DW2 even denied the signature when she was cross examined. That DW1 also verified in the testimony that their mother was unaware of the sale and that she was notified by Mjumbe. Counsel insisted that PW5 during cross examination at page 42 of the tribunal's proceedings stated that DW2 was not present during the sale of the suit land to the 1st respondent. Counsel asked if DW2 was not present during the sale, then how did the tribunal decided that he signed sale agreements. He maintained that seemingly there was forgery of documents as noted by DW1 in page 48 of the proceedings. That exhibit P3 was even not signed by the seller (Jakwenga Nassoro), the space for signature remained blank. This he said, is contrary to respondents' statements in his application at the tribunal that he witnessed all sale agreements (paragraph 6 (a) (v) of the application). He said that exhibits P1, P2, P3 and P4 contain no name of the appellant (Athumani Nassoro Jakwenga). That no any witness who testified that appellant was present during sales and that he signed sale agreements. That the

same creates contradiction between the application and the evidence adduced.

Advocate Kisyeri submitted on the 7th and 8th grounds of appeal that are intending to disclose the defect in respondent's application which make the respondents not bonafide purchasers and the failure to call the vendor as material witness to testify on whether he had better title to pass. That the Chairman declared respondents' lawful owners merely by stating that they are bonafide purchasers as they involved local government authorities during sale. He distinguished the case which the tribunal relied upon (**Suzan Waryoba's case**). That the cited case could only fit the case at hand if the respondent purchased the suit land with good faith. That good faith was lacking for among other reasons that respondents did not call the vendor to testify as he was material witness. That the Court should draw adverse inference against respondents on their issue of ownership of the suit land.

Counsel submitted on the eleventh ground that Living R. Kimaro had no qualification to prosecute respondent's application as an advocate. That he prosecuted preliminary objection raised by the appellant herein at the tribunal. That the said Living Kimaro is not recognised by Tams Judiciary website as an advocate hence unqualified. That unqualified practice is prohibited under section 41 (1) and (2) of the Advocates Act Cap 341 RE 2019. Counsel relied also on the case of **Ruth Mfanga vs Ilemele Municipal Council, Labour Revision No.66 of 2019 (HC-Mwanza)**. Counsel prayed for the court to nullify every proceeding prosecuted by the said Living Kimaro at the tribunal as he is unqualified advocate.

Advocate Kisyeri argued the first additional ground of appeal as he dropped the second. He said that exhibit P4 tendered by PW3 was admitted contrary to the law. That the said document was not attached to the respondent's application. That it was even not served to the appellant as an additional document before hearing of the application. That the appellant as a layman who appeared in person was not shown documents so as to object it to be tendered. Counsel cited the case of **Reference Point Ltd vs Overseas Infrastructure Alliance (I) P. Ltd Civil Case No.71 of 2018 (HC-DSM)**. Counsel argued the court to **discard** the said exhibit from the records. He prayed for this appeal to be allowed.

In reply advocate Living gave a brief history of the matter. He said that whether appellant was the child of the deceased it was not an issue before the tribunal. That the issue was whether respondents acquire the land lawful and if appellant was trespasser. That the chairman found that respondents were lawful owners as they acquired the land bonafide and appellant was trespasser. That the Chairman decision based on the evidence adduced which was supported by witnesses and documentary evidence. That the tribunal was satisfied that respondents acquired the land bonafide without knowledge of defect of title from the vendor. That PW1 and other witnesses testified on how they acquired land from after they had exercised due diligence including involvement of ten cell leader, mtaa government, neighbours and vendors mother. That they proved that the suit land belonged to the vendor. That there were therefore no doubts that the vendor was the real owner of the suit land and had

passed the land to defendants who became bonafide purchasers. That the finding of the tribunal was well supported by the case of **Suzan Waryoba** (supra) which defined bonafide purchase and who qualified to be bonafide purchaser. Counsel added that by the time respondents were purchasing the suit land they had no notice of defective title to the vendor, no any evidence of fraudulent conduct done by respondents in acquisition of their piece of land. That they believed in good faith that the suit land belonged to the vendor as assured by all available sources of information. Counsel said further that even if appellant had interest on the suit land, still under the principle of bonafide purchaser, the claims must be directed to the vendor and not the respondents who in law are supposed to be declared lawful owner.

On the second ground the evidence that the suit land was the property of deceased was not presented when respondent was purchasing the suit land and even from appellants side such evidence has not been adduced apart from allegation of appellant and his witnesses, no documentary evidence was tendered to prove that the land was the property of the deceased. That there were no even letters of administration of the estate to show that the suit land formed part of the deceased's estate. That the evidence as stated by PW2 shows that the vendor and his family was living in the disputed land before the death of his father in 2005 as stated by DW1. That there was also no possibility for him to plead his father's property as security for loan taken from PW1 which he compensates by giving the 1st respondent part of the land in dispute. Counsel therefore insisted that respondents were bonafide purchasers.

Replying to the fourth ground, Advocate Living said that the alleged contradiction on who was respondent at the tribunal did not in any way occasioned injustice on the part of the appellant herein. That the application before the tribunal mentioned Athumani Nassoro Jakwenga as respondent and the summons was directed to him. That the defect if any existed may be ignored as it does not occasion any injustice as the Court is argued to do away with legal technicalities.

On the 5th and 6th grounds he said that the sale agreement tendered shows clearly that DW2 witnesses all sale agreements and all witnesses for respondents confirmed to that effect. There are evidences in the proceedings showing that DW2 signed the sale agreement and he was cooperating with the vendor. That a mere denial that he did not sign sale agreement without any evidence to rebut the available evidence was a way of running away from the consequences of her act. That the said sale agreement was legally tendered and received without any objection and all procedures in admitting evidence were adhered to. That the witness was quoted saying that he participated to the sale after Jakwenga Nasoro told him that he was selling suit land which was left by his father. That his mother and mtaa government chairman witnessed the sale agreement (pg 44) of the proceeding. That vendors mother approved that it was deceased who gave the land to the vendor (Jakwenga Nassoro)

On the 7th ground he said that, allegations of fraud in civil cases must be established beyond a normal balance of probability as it has a

nature of criminality. That the tribunal allegations of fraud were not established therefore it is a new issue raised in this appeal. He added that even though P2 does not show the size of the land but it is adequately described by its neighbours. Father said that the 4th respondent throughout the proceedings did not change his name from what appeared in the application. That the appellants allegation at this stage is wanting as he was required to cross examine PW4 about his names during the proceedings at the tribunal so as to establish whether PW4 was different person from the 4th applicant. He insisted that the name was misplaced but there was no fraud committed. He insisted therefore the issue that Verimund Maro did not testify is well covered. Counsel further continued to reiterate submissions that there was no fraud on the sale of the suit land as alleged by the appellant for among other reasons that, the vendor being part of appellant family could as well come to disapprove the sale of the land if was available. He insisted that appellant has not proved the issue of fraud as alleged.

On the 11th ground as to whether Living R. Kimaro and Living Kimaro, Advocate Living and Advocate Living Raphael are the same person, he said that the four names refer to one person and have been used interchangeably. That I the Tams only two names appear. That no evidence adduced to show that the names describe two different persons. He argued that defendants should not be punished basing on different names used by their advocate.

Counsel finalised his reply submission on the 1st supplementary ground of appeal. He said that on 27/02/2019respondnet filed list of

additional documents to the tribunal. That the said exhibit P4 complained by the applicant was among the list of additional documents. That the documents were duly filed and served to the appellant. That exhibit P4 was admitted without any objection. Therefore, counsel insisted that the Chairman was correct in his findings. He thus prayed for the appeal to be dismissed with costs.

In rejoinder Advocate Kisyeri reiterated his main submissions.

Having gone through submissions from both parties, the main issue for consideration is whether this appeal has merit.

I have re visited the tribunals records amongst being proceedings taken during the trial. It is not disputed by both parties to the suit that the suit land was originally owned by the father of the appellant one Nassoro Selemani Jakwenga (now deceased). It is also not in dispute that respondent herein purchased their respective pieces of land from the elder son of the deceased one Jakwenga Nassoro (the vendor), who according the testimonies of respondents, his whereabouts is unknown. It is according to the respondents' testimonies that the suit land belonged to Jakwenga Nassoro, therefore respondents claimed that he had valid title to legally pass to the respondents. Appellant herein (Athumani Nassoro Jakwenga) is the young brother to the vendor. He claims that the suit land belonged to their deceased father and that his brother (the vendor) had no mandate to dispose of the suit land as he was not administrator of the estate of their late father. It is at this juncture legally click in to my mind that the issue to resolve this appeal lies on

the question on whether the vendor legally disposed of the suit land to the respondents.

As previously stated, it is not disputed by the parties that the suit land originally belonged to the deceased (Nassoro Selemani Jakwenga). The vendor (Jakwenga Nassoro) who is deceased's elder son claim that he was given the suit land by his late father. However, the said vendor did not testify at the tribunal. The reasons by respondents being that his whereabouts is unknown. Apart from his absence, there is no any evidence, be it oral or documentary which proves that he was indeed granted the suit area by his late father. Therefore, any allegation that he was given the suit land by the deceased is wanting for absence of any proof. Vendor's mother, one Pili Ismail testified for appellant at the tribunal. Among others she is noted at page 52 of the Tribunals proceedings that:

"The dispute is over a farm of my late husband whom I beared 4 children of 2 males and 2 females" then she continued "I divorced my husband who later on died and left the suit land I lived with my children. Then I left my elder son who built his house of one room living at the suit land, I went back at my parents area with my other young children"

From the above quoted testimony of the vendors mother, it is obvious that the vendor was left at the suit land alone as his mother moved to her parents with her young children, among them is the appellant. At that time no doubt that the vendor (Jakwenga Nassoro) was only a care taker as he was not appointed administrator of the

estate of the deceased. It also undoubted that appellant was still young and that is why his mother moved along with him to the place of her parents. Jakwenga Nassoro therefore was left alone at his father's land and in such a situation every neighbour and local leader would, after a considerable period of time consider him as successor and owner of the suit land. No doubt therefore local Tencel leaders and steet Chairman confirmed to the respondents that Jakwenga Nassoro was the owner of the suit land. Legally he was not. The reasons as aforesaid is that he was only a care taker. How? Pili Ismail (DW2) and his young sisters and young Brother (appellant herein) was only away from the suit land. There is no any evidence to the contrary that they had surrendered their succession rights to their brother (Jakwenga Nassoro), further, DW2 (their mother) when cross examined at page 53 of the Tribunals proceeding, she stated that she got letters of administration of estate on 08/01/2018, meaning that she was the sole person to administer the estate of the deceased, including disposition of the same. The fact of deceased's wife administration over the estate was not disputed by the parties. The sale agreements by respondents shows that they were executed between 2010 to 2012 whereas Pili Ismail alleged to have been appointed as administratix in 2018, it is so obvious that the vendor (Jakwenga Nassoro) had no mandate to dispose of any part of deceased's estate. Further, he therefore had no better title to pass to respondents as he also had no better title over the suit land. It was stated in the case of **Farah Mohamed vs. Fatuma Abdalla [1992] TLR 205** that:

"he who has no legal title to the land cannot pass good title over the same to another"

Jakwenga Nassoro being only among beneficiary of the late Nassoro Seleman Jakwenga, had no better title than that of the alleged administratrix Pili Ismail to pass to the respondents. As stated in the proceedings that his sisters and young Brother were still young at the time he was caretaking the suit land, he therefore used his elderly position to deprive his fellow beneficiaries their right to inherit from the estate of their late Father Nassoro Suleiman Jakwenga. This habit should highly be discouraged. If at all respondents could take due diligence, they would have discovered that the estate was due for proper administration. If at all they had asked for original owner, they would have discovered that it was the estate of the deceased, from such discovery they could have asked for the letters of administration from the vendor. However, no such diligence was exercised by respondents. From that analysis, aim of the settled mind respondents acquired defective title from Jakwenga Nassoro who was neither the administrator nor had any legal ownership of the suit land. Consequently, no title passed to the respondents. This issue having disposed of the whole appeal warrants me no reasons to dwell on the other issues raised by the appellant as any purported disposition by Jakwenga Nassoro to the respondents are null and void ab initio, and any conduct, or agreement ancillary to such sale are also void. Consequently, I proceed to allow this appeal with costs. The decision of the tribunal is hereby quashed and set aside. The suit land is hereby reverted back to the estate of the late Nassoro Seleman Jakwenga for proper administration.

It is so ordered.

V.L. MAKANI

JUDGE

14/02/2022