

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

LAND APPEAL NO. 267 OF 2023

*(Originating from the decision and order of the District Land and Housing Tribunal
for Kinondoni at Mwananyamala, dated 31st May 2023 by Hon. Chenya, R.L)*

ADAMU WAZIRI1ST APPELLANT
MBWANA NJORA 2ND APPELLANT
JULIUS CHATANDA 3RD APPELLANT
YAHAYA SAIDI LYAMBO 4TH APPELLANT
MOHAMEDI HAMISI KIBALIKIO 5TH APPELLANT
HEMED ABDUL 6TH APPELLANT
ALLY WAZIRI 7TH APPELLANT
SAIDI MAPATANO MKUNGA 8TH APPELLANT
LENADI MAGOMBANO 9TH APPELLANT
SAIDI HEMEDI KIPALA10TH APPELLANT
HAMIS ABDULI MKUMBA 11TH APPELLANT

VERSUS

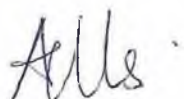
MUSSA RAFIKI MALUA RESPONDENT

JUDGMENT

Date of last Order: 14/9/2023

Date of Judgment: 29/09/2023

A. MSAFIRI, J.



This appeal originates from the Application No. 123 of 2019 which was instituted by the current appellants in the land Housing and Tribunal of Kinondoni at Mwananyamala (herein the trial Tribunal) against the respondent.

At the trial Tribunal, the appellants claimed that they are the lawful owners of the suit property which was described as unregistered land located at Mabwepande Banana Street, within Kinondoni District in Dar es Salaam. The respondent filed a written statement of defence and along with it, a counterclaim in which he claimed to be the lawful owner of piece of unsurveyed land, located at Mabwepande Street, Mabwepande Ward, Kinondoni District. He claimed that the appellants are trespassers to the said land.

After hearing of both parties, the trial Tribunal decided in favour of the respondent and dismissed the main application. The trial Tribunal made a declaration that the respondent is the lawful owner of the suit property. The appellants were aggrieved and have lodged this appeal on six (6) grounds of appeal. The grounds of appeal are;

- 1. That, the trial Tribunal erred in law and fact for disregarding the evidence testified by the appellants and the documentary evidence tendered by the appellants hence reached into erroneously. (sic)* *Alls.*

2. *That, the trial Tribunal erred in law and fact by basing on the weak evidence tendered by the respondent hence reached into an erroneous decision.*
3. *That, the trial District Land and Housing Tribunal erred in law and in fact in deciding the matter in favour of the respondent without properly scrutinizing and evaluating the validity of the purchasing agreement tendered by the respondent herein in relation to evidence adduced by his witnesses.*
4. *That, the trial Tribunal erred in law and fact by directing its mind on the agreements which were not proved by any witnesses during the hearing of the dispute and final deciding (sic) the matter in favour of the respondent based on such unproved documents.*
5. *That, the Honourable Chairperson erred in law and fact for deciding the dispute by firstly account the respondent as the first owner of the dispute property without according parties equal opportunities on ownership status during the determination of ownership of the dispute property. And without taking into consideration that the dispute property was "shamba pori" which was not owned by anyone before 1998, something which amounts to unfair trial.*
6. *That, the Honourable Chairperson erred in law and fact for holding that, the dispute property was given mistakenly to the appellants by the Village Council, while the respondent appeared on the dispute property for the first time on 2018, something reached (sic) to an erroneous decision.*

AMS

The appellants prayed for this Court to quash and set aside the decision of the trial Tribunal, allow the appeal and declare the appellants the lawful owners of the disputed property.

The hearing of the appeal was by way of written submissions whereby the submissions in chief and rejoinder by the appellants were drawn and filed by Mr. Revocatus Sedede, learned advocate. The reply submission by the respondent was drawn and filed by Mr. Mwami Mengo Kiozya, advocate of the respondent.

I commend the counsels of the parties for their useful, analytical submissions, along with the supporting authorities. I have considered the submissions of both parties in my determination of this appeal, and I will go through them as I determine the grounds of appeal.

Looking at the grounds of appeal, it is my view that they are mainly based on the appellants' dissatisfaction of the way the trial Tribunal analysed and determined the evidence adduced during the trial. As the Court of first appeal, this Court can reevaluate the evidence adduced during the trial and come with its own conclusion. At the trial, the issue in dispute was; who is the owner of the suit property?

Submitting on the 1st ground of appeal, Mr. Sedede, advocate for the appellants submitted that the records of the trial Tribunal are clear that the

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appellants have been living into the disputed area for about 15 years and they have occupied the dispute area on the diverse dates in 2003 and 2004. That, the presence of the appellants and their families in the disputed area since 2003 and 2004 was never disputed.

He averred that, the area in dispute was allocated by the Government via Village Council, and that during the trial, the appellants tendered their ownership documents on the suit property. He said further that, the appellants brought witnesses from the then Village Council to prove that the disputed land was allocated the suit property. That the appellants were the first one to live into the suit property as it was a virgin land and in absence of proof of ownership of the suit property from the respondent, automatically gives rise to a claim of adverse possession by gaining land through clearing the bush.

The counsel for respondent opted to reply by consolidating the two grounds of appeal, the 1st and 2nd grounds and argue them together. He submitted that, the appellants instituted their claims basing on Exhibits P1, P2, P3, P4, P5 and P6. That the said exhibits are short of substance because they were neither supported by Minutes of defunct Mabwepande Village Council that could have paved way for re allocation of suit property to the appellants. He said further that, there was no any leaders from Mabwepande local government who testified to buttress the appellant's claims.

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Mr. Kiozya contended that the appellant's submission that they acquired the land vide adverse possession cannot stand as there was evidence adduced at the trial Tribunal that showed that the respondent has all along been developing the suit property by cultivating various crops, and hence the appellants cannot rely on the principle of adverse possession. That in proving his ownership the respondent called DW2 and DW4 who adduced evidence in affirmative to the effect that they know only the respondent as the owner of the suit property.

In rejoinder, Mr. Sedede reiterated his submission and added that the claims of the respondent that the appellants did not call the local village leaders to prove the land allocation are not true as the records shows clearly that PW8 and PW9 were members of the Committee appointed by the Local Government Authorities to participate into the allocation of the suit property.

In their evidence during the trial, the now appellants Adamu Waziri Ramadhani (PW1), Mohamed Hamis Kibarikio (PW2), Mbwana Omary Mjora (PW3), Julius Simon Chatanda (PW4), Saidi Mapatano Mkunga (PW5), Hamis Abdul Mkumba (PW6) and Yahya Said Lyambo (PW7), all testified that they are the lawful owners of their allocated pieces of land situated on the suit property which they claim to be allocated to them by the Village Government of Mabwepande on diverse dates between 2003 and 2004. That, the said area

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was a forest which they cleared after allocation. That, the suit property is located at Mabwepande, Banana Street; and that they have lived in the area for more than ten (10) years. That, they have been living in their areas until 2018 when the respondent emerged and demolished their houses built on the suit premises.

I have read exhibits P1, P2, P3, P4, P5 and P6 which are the village joining forms. They are the forms issued by the office of Mabwepande Village Government to the appellants which shows that the applicants have been allowed to join the village and the Village Government has approved their requests and allocated them the said pieces of land.

I have read carefully the village joining forms as Exhibits P1-P6, and it is my view that although the forms shows that the person/villager has been allocated a particular piece of land with its size, the form does not reveal the exact location of the allocated land. The form just state at Item D as follows;

MAONI YA KIJIKI.

AMEKUBALIWA NA S/KIJIKI KUPEWA ENEO LA UKUBWA WA HATUA ...

It is true that the forms shows that the appellants were allocated the pieces of land, but where exactly are those pieces of land located? Are those pieces of land which were allocated to the appellants, located in the area claimed by the

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respondent in the counterclaim during the trial? What exactly is the location of the pieces of land granted to the appellant in Mabwepande Village? The village is a big area, and the appellants' lands might be located anywhere within the village. Does the piece of area claimed by the respondent, the same area as the pieces of land which the appellants claimed they were allocated to them? These were very important questions to be answered by evidence during the trial.

Exhibit P8 collectively is a piece of newspaper which contain news that the Village Government of Mabwepande intends (at that time) to allocate the wild farms which were either abandoned or the virgin land which were not yet occupied. That the Village Government will allocate the said farms to the interested residents of Dar es Salaam. Also there is a letter dated 31/12/1998 from the Office of the District Commissioner to the Ward Executive Officers of all Wards in Kinondoni District. The letter directs the Ward Executive Officers to inspect all abandoned areas and the wild forests in their areas and allocate them to the interested people.

However, I agree with the findings of the trial Chairperson that these documents (Exhibit P8) does not show that the appellants were among the citizens/interested people who were allocated the disputed land farms.

PW8, Akili Athumani Majesi stated that he was a member of the Village Government of Mabwepande, and a member of Allocating Committee. He *Atle*.

testified that, the area which the respondent claims, was allocated by the village to the appellants. That he was directed by the Village Chairman to supervise the exercise of wild farms allocation to the appellants and other interested people. He was the one who tendered Exhibit P8 as a proof of his evidence. He insisted that the respondent has his own area but it is different from the disputed land.

In his defence, the respondent stated that, he bought pieces of land located at Mabwepande Street, Mabwepande area in diverse dates in 1988 and 1989. The sale agreements were admitted collectively as Exhibit D1. The agreements shows that the respondent bought pieces of land farms at Mabwepande on 23/5/1989, 01/10/1989 and 31/01/1988. He also tendered Exhibit D5 which is a Notice of formalizing Mabwepande area from village into streets by Kinondoni Municipal Council.

After the Villages were ceased in Dar es Salaam Region, all unplanned/unsurveyed areas were identified and placed under the Councils and the said areas had to be formalized. Exhibit D5 shows the names of the owners of pieces of land which were formalized by Kinondoni Municipal Council. The respondent name is also listed among the owners of unsurveyed area at Mabwepande. *Alle*

Having gone through the evidence which was adduced during the trial, I will go back on determining the 1st and 2nd grounds of appeal. The appellants are aggrieved that the trial Tribunal erred in law and fact for disregarding the evidence they adduced both oral and documentary, and that the trial Tribunal based on weak evidence tendered by the respondent.

I have already analysed the evidence, oral and documentary which were adduced by the appellants, the evidence shows that they were certainly allocated the pieces of land but does not give the description of the land allocated or the place which the said pieces of land are located.

Hence, it is difficult to find whether the areas which the appellants claims to own is exactly the area which is also being claimed by the respondent. The only documents of ownership which the appellants have tendered is Exhibits P1-P6 which I have already found that does not describe the location of the pieces of land allocated to the appellants by Mabwepande Village. In addition, I have observed that the appellants did not produce the Minutes of the Village Committee which approved the allocation of the claimed land. It is only the verbal words of the witness PW8 who said that he was a member of the Allocating Committee and confirmed that the appellants were allocated the disputed land.

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More confusing, the appellants claims that their pieces of land are located at Mabwepande, Banana Street, while the respondent said his land is located at Mabwepande Street, Mabwepande Ward.

Hence, I subscribe to the findings of the trial Chairperson that the evidence adduced by the appellants failed to show whether the appellants were allocated the wild farms and in addition, the documents does not describe the exact location of the allocated farms/pieces of land.

It is the cardinal principle that he who allege must prove. The law places a burden of proof upon a person who desires a Court to give judgment in his/her favour, and such a person who states the existence of facts have to prove existence of those facts. (See the decision of the case of **Ernest Sebastian Mbele vs. Sebastian Mbele**, Civil Appeal No. 66 of 2019, CAT at Iringa (unreported)).

I find that the trial Chairperson regarded both the evidence by the appellants and the respondent and on balance of probabilities, rightly found that the evidence of the respondent was heavier. Therefore, the 1st and 2nd grounds of appeal have no merit.

I will also combine the 3rd and 4th grounds of appeal as they are similar. The appellants contended that, the trial Tribunal erred in deciding the matter in favour of the respondent without properly scrutinizing and evaluating the

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validity of purchasing agreement tendered by the respondent. That, the agreements were not proved by any witnesses during the hearing of the dispute.

In submission, Mr. Sedede, counsel for the appellants stated that, the respondent failed to call material witnesses to prove his ownership of the disputed property. That, the respondent claimed that he bought the suit property from Antony Kalokola, Said Lihinje and Jampani Omari Mbawe, but only one Saidi Lihinje came to testify in Court. That, the burden of proof has shifted to the respondent to prove that he indeed bought the purported land from the two men as claimed. Counsel for the appellants also submitted that the respondent failed to prove the size of the area he owns and failed to call witnesses of the agreements he entered with the sellers.

In reply, Mr. Kiozya argued that, the claims of the appellants are uncalled for as the said sellers Antony Kalokola and Jampani Omari Mbawe are now dead. That, Said Lihinje was a material witness who adduced evidence as DW5 and his evidence corroborated that of the defendant. He stated further that, it is the appellants who have onus to prove ownership of suit land.

In rejoinder, Mr. Sedede vehemently submitted that, the claim that Mr. Kalokola and Mr. Mbawe are already dead is a new fact which has been

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introduced at the appeal level. That the issue of death never arises during the trial and this Court has no jurisdiction to entertain new facts at appeal level.

In determination of these two grounds of appeal, I have to read carefully the contended sale agreements of the respondents which were tendered collectively as Exhibit D1. The agreements shows that the respondent purchased pieces of land from Said Lihinje on 23/5/1998, Jampani Omari Mbewe on 01/10/1989 and Antoni Kalokola on 31/1/1988.

The facts according to the evidence adduced by both parties does not show whether the area purchased by the respondent as per exhibit D1, is the area which belongs to the appellants. Hence, even if the respondent could have brought the other witnesses to prove his ownership on the land he had purportedly purchased, the fact remains that the appellants failed to establish that the area they claim the right of ownership, actually belongs to them. Since the appellants failed to prove ownership of the claimed land, even their claims on the 3rd and 4th grounds of appeal cannot hold water and I find that they have no merit.

On the 5th ground of appeal, the appellants argued that the trial Tribunal erred by deciding the dispute by accounting the respondent as the first owner of the disputed property without according parties equal opportunities on ownership status during the determination of ownership of the dispute property.

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Without wasting time on reproducing the evidence which I have already analysed herein above, I also find this ground of appeal to have no merit as I have already found that appellants failed to establish the ownership of the land they claim to belong to them.

The 6th ground of appeal, the appellants states that the trial Chairperson erred for holding that the dispute property were given mistakenly to the appellants by the Village Council while the respondent appeared on the disputed property for the first time in 2018.

In this, the counsel for the appellant submitted that, the respondent failed to prove the case on balance of probabilities. That, the record reveals that the appellants have been living in the disputed area since 2003 and 20024, and that the dispute arose in 2018 when the respondent allegedly found the people in his farm marking the boundaries.

In reply, counsel for the respondent reiterated that the trial Chairperson pronounced judgment in favour of respondent as the same proved his case in balance of probabilities unlike the appellants.

Looking at the 6th ground of appeal, it also revolve around the issue of ownership of suit property which this Court has already established that according to the evidence, the appellants failed to convince the trial Tribunal that they were the lawful owners of suit property as they claim. *Alls*

For the foregoing reasons, I am of the view that the trial Chairperson analysed the evidence, oral and documentary which was adduced and tendered by both parties to the dispute and came with the just and fair decision which I find no reason to depart from. I therefore uphold the findings, decision, Judgment and Decree of the trial Tribunal and proceed to dismiss the appeal with costs.

It so ordered.

Right of Appeal explained.

A. Msafiri

A. MSAFIRI

JUDGE

29/9/2023

