

TANZANIA / JUDGMENT

adija lukonge khadija hamisi vs ridhiwan idd machombo and another 2023 tzhc 18575 30 june 2023

COURT
TZHCDECIDED
30 June 2023

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1 IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB - REGISTRY OF
MWANZA AT MWANZA LAND APPEAL NO. 27 OF 2023 (From Mwanza District Land & Housing
Tribunal Application No.73 of 2015) ADIJA LUKONGE @ KHADIJA
HAMISI.....APPELLANT Versus RIDHIWAN IDD
MACHOMBO.....1st RESPONDENT RAMADHAN
JUMA.....2nd RESPONDENT

JUDGEMENT

June 13th & 30th, 2023 Morris, J The appellant above stands dissatisfied with the judgement of the District Land and Housing Tribunal (elsewhere DLHT or Tribunal) in Land Application No. 73 of 2015. She has preferred this appeal marshalled with seven grounds. In this judgement the identical grounds have been merged in the interest of brevity and coherence. The Tribunal's decision is faulted on the following bases: that, the trial Tribunal Chairman erred in law and fact by disregarding cogent evidence of the appellant and her witness regarding ownership of suit land; that the 2nd respondent failed to prove his ownership of land capable of transferring to the 1st respondent; and that then variance in appellant's evidence was not fundamental. Predominantly, the appellant is faulting the way DLHT dealt with the evidence at trial and the weight accorded to each respective type of evidence before it. In brief, record reveals that, the parties herein are struggling over Plot No. 013/140 (formerly No. 013/021) located at Ihangiro, Mihina, Nyakato, Mwanza (the suit land). The appellant herein alleged that she purchased the same from the late Juma Ramadhani, the 2nd respondent's father, way back on 12/04/2001. She consideration of Tshs. 650,000/=. On his part, the 2nd respondent is also alleging that he was given the suit land by his late grandmother. He subsequently disposed it to the 1st respondent at a price of Tshs. 1,700,000/= on 28/04/2014. Upon becoming aware of the interference by the 1st respondent, the appellant unsuccessfully sued the 1st and 2nd respondent before the DLHT. Hence, this appeal challenges the trial Tribunal's decision. When the matter was for hearing the appellant was unrepresented. The respondents were represented by Advocate Adam Robert. I will consider the submissions of both parties while determining the grounds of appeal below. 3

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-analyse 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). Having said so, I now start with the first and second grounds of appeal. In determining the duo grounds, I undertake to re-evaluate the evidence on record. The objective of this approach, is to enable the Court to establish who between the appellant and the 2nd respondent managed to prove ownership of the suit land prior to transferring it to the 1st respondent. It was the submissions by the appellant that, she bought the disputed land in 2001. By then, there was a house thereon. The sale agreement (PE1) is evident to such effect. Each party to the said agreement had own witnesses. For the buyer, witnesses were Mzee Rajab and Ms. Salima. The seller's witnesses were Mr. Mustapher and Yona William Kahabi, the hamlet/local leader. The suit land was bought at Tshs 4 650,000/=. That she has been paying land rent ever since. According to her, however, this evidence was poorly considered by the trial Tribunal. She also argued that the 2nd respondent was absent on allegations that he resides at Dar es Salaam. The seller of land to her was Juma Ramadhan who was then (2001) physically and mentally fine health-wise. Hence, allegations that he was sick were fabricated. For then respondents, it was submitted that the appellant's case was weakened by her failure to summon people who had allegedly witnessed the disposition of the land between her and Juma Ramadhan. It was also argued by the respondent's counsel that the evidence of the appellant contradicted with exhibit PE1 (Sale Agreement). On the said exhibit, the witnesses were indicated as Rajabu Juma and Salima Abdallah. However, during her testimony (as PW1); the appellant did not mention them nor did she summon them to build her case. Citing page 14 of the Tribunal's proceedings, as an example; the respondents submitted that names of witnesses were not stated (though their names appeared in exhibit PE1). Further, the appellant had stated that in the house allegedly bought by her there were a tenant known as Mary and other neighbors (whose names were not disclosed). All these witnesses were not procured to testify in her favour at the Tribunal. 5 In addition, PW2 testified that the witness to the sale were Juma Ramadhan, Mustapher and Francis Ndomba. None of these too attended the trial to testify thereat. Regarding appellant's argument that the 2nd respondent did not produce documents to prove the suit land being given to him by his grandmother; the respondents' counsel was of the view that, to prove ownership is not necessarily done through written document(s). Even the oral testimonies of those who witnessed the transactions suffice. Such position is reflected in the case of Joachim Ndelembi v Maulid M. Mshindo and others, Court of Appeal of Tanzania, Appeal No. 106/2020. (unreported). Regarding the allegations that the 1st respondent (DW1) bought a shamba while the appellant alleges to had bought a house; the advocate herein conceded that such hut was demolished by weather factors. This fact (existing of a building on the plot which over time collapsed due to weather conditions) was not disputed. The appellant's allegations of paying rent/tax were also attacked by the respondents. It was argued that payment of land rent is also not sufficient to prove ownership of land. Moreover, the respondents argued that tendered receipts thereof (exhibit PE2) referred to house No. 013/140 while exhibit PE1 indicated that the sold was

013/021. So, these documents did not tally. 6 In rejoinder it was submitted that the appellant did not summon the witnesses who were present during the purchase because they are both deceased. The only surviving witness (PW2) testified. She also denied to had known one Marry (then tenant in the suit land) as submitted by the respondents. I have dispassionately considered the submissions by both parties. Indeed, this being a civil case; all facts need to be analyzed on the basis of proving the it on a balance of probabilities. Such holding is found in the case of Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna), CoA Civil Appeal No. 118 /2014 (unreported). Further, it is a cardinal principle of law that, in civil case that who alleges must prove his/her allegations as stated in Obed Mtei v Rakia Omari [1989] TLR 111 and Paulina Samson Ndawavya vs Theresia Thomas Madaha, CoA Civil Appeal No. 45 /2017 (unreported). The appellant herein is alleging that she bought the suit land from the late Juma Ramadhan. Apparently, she testified that the latter was the father to the 2nd respondent. This fact was not controverted. On his part, however, the 2nd respondent alleged to had been given the suit land by his grandmother (Juma Ramadhan's mother). He further testified that in 2001, he was taking care of his sick father at Bugando hospital because 7 he had been sick from 1999 to 2002. The objective of such testimony was to establish that his father was incapacitated at the time sale of the suit land to the appellant is purported to had been concluded. The trial Chairman, in his reasoning, was of the view inter alia that failure by the appellant to call Rajab Juma and Salma Abdala who witnessed the sale; one Mary who was the tenant in the house; and neighbors thereat created adverse inference to the appellant. Upon careful examination of evidence on record, this Court is of the considered conclusion that the appellant managed to prove that she bought the suit land from Juma Ramadhan. She tendered the requisite sale agreement between the vendor (Juma Ramadhan) and her. Further, PW2, the ten-cell leader, also testified to had been present at the time of sale and execution of exhibit PE1. He gave evidence to prove that he too signed it. Without other witnesses to disprove his evidence, exhibit PE1 was substantiated. To me, calling other witnesses would be corroborative but would not necessarily be contradictory. I am aware that failure to call a material witness may attract adverse inference to the respective party [Sungura Athuman v R, CoA Crim. Appeal No. 291/2016 (unreported); Emmanuel Kabelele v R, CoA Crim. Appeal No. 536/ 2017; and 8 Francisco Daudi & Others v R, Crim. Appeal No. 430/2017 followed]. It is apparent that before drawing an adverse inference as argued by the respondents, circumstances should dictate towards such direction [Francisco Daudi's case (supra)]. The respondents in this matter have not pointed on what areas they thought calling the suggested witnesses would have built their case than that of the appellant and PW2. It is also a law that adverse inference is to be invoked where the persons who have not been procured to testify "are within reach, and not called without sufficient reason being shown by the prosecution" [Refer to Francisco Daudi's case (supra); and Aziz Abdallah v R [1991] T. L. R 71]. In the present matter, some of the witnesses were alleged having been deceased. On his part, the 2nd respondent failed to prove his ownership of land as he alleged to have had been given by his grandmother. However, no proof of such transaction was given. More so, it was not laid a foundation as to why his father was not involved in the affairs of the suit land. That remained unestablished, whether or not the alleged granny gave the subject land in the form of gift intervivos or through probate and administration of estate. 9 Further, the 2nd respondent was required to prove that his father

Juma Ramadhan was not the owner of the land. However, he only stated that at the time of alleged disposition of the land to the appellant, his father was sick. Nonetheless, no medical credentials were produced in the Tribunal to such effect. Therefore, the suit land was proved to have been the property of the appellant. The 2nd respondent failed to prove his ownership and therefore he had no title to pass to the 1st respondent. Regarding the last ground, the appellant contends that the variance found in his testimony was not fundamental. Considering the time which had passed since the appellant bought the house; and the fact that she is of advanced age, discrepancies associated with recollection in her mental faculty are expectable. After all, the standard of proof in civil cases, as reasoned earlier, is not beyond doubt. In reply it was submitted that the evidence of PW1 and PW2 contradicted one another. While PW1 mentioned the purchase price of Tshs 650,000/=; PW2 testified that the price was Tsh 600,000/=. Further, that the year of purchase stated in appellant's testimony is 2001 not 2004 given by PW2. The trial chairman was of the view that, such variance was fundamental. With respect, I am less inclined towards that finding. The sale agreement (PE1) had particulars pertaining to the subject disposition. Indeed, PE1 conclusively contained details that sale was done in 2001 at Tshs. 650,000/=. Thus, the trial Tribunal should have not taken oral testimony in exclusion of the documentary evidence which was unequivocally tendered and admitted in the proceedings. In connection to the variance of plot numbers (between 013/140 and 013/021) I hold that the appellant specifically identified the suit land in her application using both reference numbers. Hence, there was no significant miscarriage of justice or misrepresentation by referring to it by either set of numbers during the trial. More so, parties are bound by their respective pleadings. It is cardinal principle that variance in evidence will be disregarded by court when it is not so fundamental to affect the remaining evidence on record. See the case of DPP v Daniel Mwasonga, Criminal Appeal No. 64 of 2018 (unreported). The appellant testified that she made negotiation with the late Juma Ramadhan to purchase the suit land for consideration of Tshs. 650,000/= Further, during cross examination at page 22 she maintained to have bought the same on 2001 as it was stated by PW2. 11 Considering the evidence on record, I found the variance of year and figure of purchase price was not fundamental because as I have stated herein above it was proved that the appellant bought the suit land from the 2nd respondent's father in accordance with exhibit PE1 which was also witnessed by PW2. In upshot, I find the appeal to be merited. It is allowed. Consequent to that, the decision of the District Land and Housing Tribunal of Mwanza in Land Application No. 73 of 2015 is quashed and decree therefrom set aside. Plot No. 013/140 (formerly 013/021) at Ihangiro-Mahina, Nyakato is declared to belong to the appellant, Adija Lukonge @ Khadija Hamis. Each party shall shoulder own costs. It is so ordered. Right of appeal is fully explained to the parties. C.K.K. Morris Judge June 30th, 2023 12 Judgement delivered this 30th day of June 2023 in the presence of Ms. Adija Lukonge @Khadija Hamis, appellant and Mr. Robert Adam, advocate for the respondents. C.K.K. Morris Judge June 30th, 2023

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