

TANZANIA / JUDGMENT

athumani nassoro jakwenga vs renatus e ngabani 2 others 2022 tzhclandd 123 21 february 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 100 OF 2021 (Originating from the decision of Kinondoni District Land and Housing Tribunal at Mwananyamai in Land Application No. 316 of 2017) ATHUMANI NASORO 3AKWENGA APPLICANT VERSUS RENATUS E. NGABANI 1^t RESPONDENT VERIMUNDA MARRO 2"^° RESPONDENT PRISCUS TARIMO 3"*° RESPONDENT Date of Last Order; 14.02.2021 Date of Judgment: 21.02.2021

JUDGMENT

V.L. MAKANI. J The appellant is ATHUMANI NASORO JAKWENGA. He is appealing against the decision of Kinondoni District Land Tribunal at Mwananyamala (the Tribunal) in Land Application No. 316 of 2017 (Hon. Wambiii, Chairman). At the Tribunal the respondents claimed to be the owners of piece of iand located at Mpigi Magohe, Dar es Salaam (the suit land). However, the Tribunal found in favour of the respondents. Being dissatisfied with the decision of the Tribunai the appeilant filed a petition of appeal with 13 grounds of appeal and 2 grounds on supplementary petition. The grounds in the main petition are as follows:

1. That, the tribunal erred in iaw and fact in deciding in favour of the respondents whiie totally disregarding the evidence adduced by the appellant and other witnesses on the ownership ofthe suit iand.
2. That, the tribunal erred in iaw and fact in deciding in favour of the respondents whiie the said respondents acquired the suit iand from an iiiegai person.
3. That, the tribunal erred in iaw 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 ofthem admitted the fact that the suit iand was the property of the deceased Nasoro Seieman 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 said agreements purported to be witnessed and signed by DW2 while the said SW2 denied the contention and signatures in the said 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 also 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 Nasoro Seiemani 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. The supplementary grounds of appeal are as follows:
 - a) The trial Tribunal erred in law and in fact by admitting exhibit P4 which was neither annexed the respondents application nor served to the appellant as additional document
 - b) That the trial Tribunal erred in law and in fact entertaining the respondents application while the same did not show the name of the drawer. The appeal was argued by way of written submissions and Mr. Kisyeri Cosmas, Advocate drew and filed submissions on behalf of the appellant; while Living Raphael, Advocate drew and filed submissions in reply on behalf of the respondents. In support of the appeal Mr. Kisyeri dropped the 9th ground in the petition of appeal and the 2nd ground in the supplementary petition of appeal. He said he would argue the 1st, 3rd and grounds of appeal together, and the 6th and 7th grounds

together. He argued the remaining grounds separately. Arguing the 3rd and 10th grounds. 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. He said the Tribunal disregarded the evidence adduced by the appellant and other witnesses which proved that the suit land is owned by Nasoro 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 DW1 testified at the Tribunal that the suit land was left to them by their late father (page 47 of the Tribunal's proceedings). That they were four children; Jakwenga Nasoro, Siasa Nasoro, Athumani Nasoro and Kitama Nasoro Jakwenga. That the testimony was corroborated by the evidence of DW2, DW3, PW2, PW3, PW4 and PW5. He said PW5 stated that he knows the suit land was left to Jakwenga Nasoro by his father. Counsel further said PW2, PW3, PW4, and PW5 who participated in the alleged sales, knew earlier that the suit land belonged to the late Nasoro Athumani Jakwenga (appellants father) and that the Jakwenga Nasoro (the Seller) of the property had other relatives including the appellant. That there is no evidence from respondents herein to prove that the Seller inherited the suit land from his late father after proper administration of the deceased's estate. As for the 2nd ground, Counsel said that the Seller 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 about inheritance at page 20 of the Tribunal's proceedings he replied that he doesn't know about inheritance. That PW3 on cross examination at page 28 of the proceedings 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 Seller acquired the land. Counsel said that the law vests power to the administrator or executor of the deceased estate to dispose 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)(unreported) and Hassan Hamisi Nzomari vs. Edmund Thomas Lusese & 3 Others, Land Appeal No. 176 of 2016 (HC-Land Division) (unreported). Counsel insisted that from authorities cited, the Seller had no title to pass to the respondents since he was not the owner nor the administrator of the deceased's estate. Submitting on the 4th ground Mr. Kisyeri said that the application was filed at the Tribunal on 23/10/2017 and the name of respondent was Athumani Nasoro Jakwenga. He said when you read the second paragraph of the application the name of Pill Ismail features as the respondent. He pointed out that the application contained two different names Athumani Nasoro Jakwenga and Pill Ismail who were not sued as the 2nd respondent respectively. He said this led to miscarriage of justice on the part of the appellant as the application failed to specify who was the real respondent and no amendment of the pleadings was done though the respondents were represented by an advocate. 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 (Pill Ismail) is the mother of four children including the appellant and the alleged Seller of the suit land. She denied signing any Sale Agreements (PI, P2, P3 and P4) tendered by respondents during trial. She said 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 of the sale 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 respondent. Counsel asked if DW2 was not present during the sale, then how did the Tribunal decide that he signed the Sale Agreements. He maintained that seemingly there was forgery of documents as noted by DW1 at page 48 of the proceedings. That Exhibit P3 was even not signed by the Seller (Jakwenga Nasoro), the space for signature remained blank. This he said, is contrary to respondent's statement in their application at the Tribunal that the appellant 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 Nasoro Jakwenga). He said there is no witness who testified that the appellant was present during the sales and that he signed the Sale Agreements. He said there is variance between the application and the evidence adduced. Mr. Kisyeri submitted on the 7th and 8th grounds of appeal intend to disclose the defect in respondent's application which make the respondents not bonafide purchasers and the failure to call the Seller 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 (Suzan Waryoba's case) relied upon by the Tribunal. That the cited case could only fit the case at hand if the respondent had purchased the suit land with good faith. That good faith was lacking for among other reasons that respondents did not call the Seller to testify as he was material witness. That the Court should draw adverse inference against the respondents on the issue of their ownership of the suit land. Counsel submitted on the ground that Mr. Living R. Kimaro had no qualification to prosecute the respondent's application as an advocate though he prosecuted the preliminary objection raised by the appellant at the Tribunal. He 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 on the case of Ruth Mfanga vs. Ilelele Municipal Council, Labour Revision No.66 of 2019(HC-Mwanza). Counsel prayed for the court to nullify every proceedings prosecuted by the said Mr. Living Kimaro at the Tribunal as he is an unqualified advocate. As for the additional ground of appeal, Mr. Kisyeri said Exhibit P4 tendered by PW3 was admitted contrary to the law. That the said document was not attached to the respondent's application. He said it was even not served to the appellant as an additional document before the hearing of the application. That the appellant as a layman who appeared In person was not shown documents to be tendered so that he may object where necessary. Counsel cited the case of Reference Point Ltd vs. Overseas Infrastructure Alliance (I) P. Ltd Civil Case No.71 of 2018(HC-DSM)(unreported). Counsel argued the court to expunge the said exhibit from the records, and further prayed for this appeal to be allowed. In reply Mr. Living gave a brief history of the matter. He said that whether the appellant was the child of the deceased or not this was not an Issue before the Tribunal. That the Issue was whether the respondents acquired the land lawfully and If the

appellant was a trespasser. He said the chairman found that respondents were lawful owners as they acquired the land bona fide and the appellant was a trespasser. He said the Chairman's decision was based on the evidence adduced which was supported by witnesses and documentary evidence. He said the Tribunal was satisfied that the respondents acquired the land bona fide without knowledge of defect of title from the Seller. He observed that PW1 and other witnesses testified on how they acquired land after they had exercised due diligence including involvement of ten cell leader, Mtaa government, 10 neighbours and the Seller's mother. It was therefore proved that the suit land belonged to the Seller. That there were therefore no doubts that the Seller was the real owner of the suit land and had passed the land to defendants who became bona fide purchasers. That the finding of the Tribunal was well supported by the case of Suzan Waryoba (supra) which defined bona fide purchaser and who qualified to be bona fide purchaser. Counsel added that by the time the respondents were purchasing the suit land they had no notice of defective title to the Seller, no evidence of fraudulent conduct was done by respondents in acquisition of their piece of land as they believed in good faith that the suit land belonged to the Seller as assured by all available sources of information. Counsel further said that even if the appellant had interest in the suit land, still under the principle of bona fide purchaser, the claims must be directed to the Seller and not the respondents who in law are supposed to be declared the lawful owners. On the 2nd ground Mr. Living argued that the evidence that the suit land was the property of deceased was not presented when the respondent was purchasing the suit land and even from the 1st appellant's side such evidence was not adduced. He said apart from mere allegations from the appellant and his witnesses, no documentary evidence was tendered to prove that the land was the property of the deceased. He pointed out that there was no 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 Seller and his family were living in the disputed land before the death of his father in 2005 as stated by DW1. He said there was also no possibility for him to plead his father's property as security for loan taken from PW1 which he compensated by giving the respondent part of the land in dispute. Counsel therefore insisted that the respondents were bona fide purchasers. Responding to the 4th ground, Mr. Living said that the alleged contradiction on who was the respondent at the Tribunal did not in any way occasion injustice on the part of the appellant herein. That the application before the tribunal mentioned Athumani Nasoro Jakwenga as respondent and the summons was directed to him. That the defect if any existed may be ignored as it did not occasion any injustice since the court argues to do away with legal technicalities. 12 On the 5th and 6th grounds he said that the sale agreements tendered show clearly that DW2 witnessed all sale agreements and all witnesses for respondents confirmed to that effect. There is evidence in the proceedings showing that DW2 signed the sale agreement and she was cooperating with the Seller. That a mere denial that she did not sign the sale agreement without any evidence to rebut the available evidence is 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 the sale agreements in evidence were adhered to. He further said that the witness was quoted saying she participated in the sale

after the Seller told him that he was selling the suit land which was left by his father, and that she and the Chairman of Mtaa witnessed the sale agreement (page 44 of the proceedings). He said DW2, the Seller's mother, confirmed that It was the deceased who gave the land to the Seller. On the ground Mr. Living said allegations of fraud In civil cases must be proved beyond the normal balance of probability as It has a nature of criminality. He said the allegations of fraud were not established at the Tribunal therefore It Is a new Issue raised In this 13 appeal. He added that even though Exhibit P2 does not show the size of the land, but it is adequately described by its neighbours. He said the appellant's 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 a different person from the 4th applicant. He insisted that the name was misplaced but there was no fraud committed. He insisted therefore that 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 Seller being part of the appellant family could as well come to disapprove the sale of the land if available. He insisted that the appellant has not proved the issue of fraud as alleged. On the ground as to whether Living R. Kimaro, Living Kimaro, Advocate Living Kimaro and Living Raphael are the same person, he said the four names refer to one person and have been used interchangeably. He said in TAMS system of Judiciary only two names appear. He said there is no evidence that has been adduced to show that the names describe two different persons. He observed that the 14 respondents should not be punished because of the different names used by their advocate. As regards the additional ground of appeal. He said on 27/02/2019 the respondents filed a list of additional documents at the Tribunal. That the said Exhibit P4, complained of by the applicant was among the items in the list of additional documents. He said the documents were dully filed and served upon the appellant and was admitted without any objection. Counsel emphasized that the Chairman was correct in his findings. He thus prayed for the appeal to be dismissed with costs. In rejoinder, Mr. Kisyeri reiterated his main submissions. I have gone through the record of the Tribunal. It is not disputed by the parties that the suit land was originally owned by the appellant's father one Nasoro Selemani Jakwenga (now deceased). It is also not in dispute that the respondents herein purchased their respective pieces of land from the elder son of the deceased one Jakwenga Nasoro, who has all along been referred as the Seller herein. According to the testimonies of the respondents, his whereabouts is 15 unknown and they alleged that the suit land belonged to the said Seller. They therefore claim that he had valid title to legally pass to them. It is also not in dispute that the appellant herein (Athumani Nasoro Jakwenga) is the Seller's younger brother, and he is claiming that suit land belonged to their late father. The appellant further claims that his brother had no mandate to dispose of the suit land as he was not an administrator of the estate of their late father. The issue to resolve in this appeal is whether the disposition of the suit land by the Seller to the respondents was lawful. I will start with the and 10th grounds which revolve around the analysis of evidence by the Tribunal in respect of sale and ownership of the suit land. As previously stated, it is not disputed by the parties that the suit land originally belonged to the late Nasoro Selemani Jakwenga. Though

it is claimed by the Seller that he was given the suit land by his late father as the eldest son, but this was not testified at the Tribunal, the reasons being that the respondent's whereabouts are unknown. Apart from his absence, there was no evidence, be it oral or documentary 16 which proved that he was indeed granted the suit area by his late father. Therefore, the allegation that he was given the suit land by the deceased is wanting for absence of any proof. The Seller's mother, one Pili Ismail testified in Tribunal in support of the appellant as DW2. From her testimony she noted among other things at page 52 of the Tribunal's typewritten proceedings that: "The dispute Is over a farm of my fate husband whom I beared 4 children of2 males and 2females...! divorced my husband who later on died and left the suit land I lived with my children. Then Ileft my elderson who buHt his house ofone room living at the suitland,I went back at mv parents area with mv other vouna children" From the above quoted testimony, it is obvious that the Seller was left at the suit land alone as his mother moved to her parents with her younger children, among them was the appellant. During that time it is without a doubt that the Seller was left as a caretaker of the suit land as he was not an appointed administrator of the estate of his late father. It also clear that since the Seller was left alone at the suit land and then every neighbour and local leader would, after a considerable period of time, assume that he is the successor and owner of the suit land. It is on this basis that the Local Ten Cell leaders and Street Chairman confirmed to the respondents that the Seller, Jakwenga Nasoro was the owner of the suit land. But legally 17 he was not as his mother Pill Ismail(DW2)and his siblings (including the appellant herein) had not consented to the sale as there is no evidence that they had surrendered their succession rights to their brother (Jakwenga Nasoro) who sold the suit land. When DW2 was cross examined she said she was later on 08/01/2018 appointed as the administratix of the estate of the late Selemani Nasoro Jakwenga. Though the Sale Agreements by respondents reflects that they were executed between 2010 to 2012 but it is an obvious fact that even at that time the Seller was not an appointed administrator and so he had no mandate to dispose of any part of deceased's estate. In that regard the Seller had no good title to pass to respondents as he had no title over the suit land. In the case of Farah Mohamed vs. Fatuma Abdalla [1992]TLR 205 it was stated: "he who has no legal title to the land cannot pass good title over the same to another" It should be noted that the Seller was only a beneficiary of the estate of the iate Nasoro Seleman Jakwenga, and so he had no good title as against DW2 (his mother) or his siblings to pass on to the respondents. As stated in the proceedings his siblings were still young at the time, he was taking care of the suit land, he therefore used his 18 elderly position to deprive the other beneficiaries their right in the estate of their late father Nasoro Suleiman Jakwenga. In view thereof there was no good title that passed from the Seller Jakwenga Nasoro as he had no legal title to the land in terms of the case of Farah Mohamed (supra). On the other hand, the respondents as purchasers of the suit land were bound by the principle of "buyer beware" {caveat emptor) which assumes that buyers will inspect and otherwise ensure that they are satisfied with the integrity of the product or land before completing a transaction. In fact, a buyer of landed property is supposed to make a search, make on-site inspections of the property and make enquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of

roads and the like. It was therefore the duty of the respondents to make enquiries as to who is the original owner of the suit land and a thorough investigation would have led them to discover that the Seller was not the owner but his late father. From such discovery they would have then asked for the Letters of Administration. However, no such due diligence was exercised by the respondents and they ended up buying the suit land from Seller who was neither the owner of the suit land nor the administrator of the estate of his late father. The Seller did not even seek consent from, his mother and siblings who were the beneficiaries of the said estate and he never entered appearance at the Tribunal even to debar the state of affairs as he knew what he did was not lawful. In that regard no title had passed from Jakwenga Nasoro to the respondents and therefore the sale was unlawful and hence null and void. Mr. Living pointed out that DW2 (the mother of the appellant) also signed the Sale Agreements between his son Jakwenga Nasoro and the respondents as a witness. However, in cross-examination she denied signing the said agreements Exhibit PI and P4 and she even argued that she was ready for investigation of the signatures at the police. I had a look at the two signatures in the said exhibits and there are obvious differences in the signatures of DW2 as such this argument cannot be relied upon. It is also an obvious fact that Jakwenga Nasoro would have been the best witness for the respondents at the Tribunal as he was the Seller of the suit land. However, the respondents did not find it necessary to call him as a witness and this, as correctly pointed out by Mr. Kisyeri 20 draws a negative inference on the part of the respondents that it was not a mistake that he was not called as a witness but by design to cover up his misdeeds which is detrimental to the respondents' case. The reasons above founded on the 3rd and 10th grounds disposes the whole appeal and I find no reason to dwell on the other grounds of appeal raised by the appellant. In view thereof, the court finds the purported disposition by Jakwenga Nasoro to the respondents to be null and void, and any conduct, or agreement ancillary to such sale is also void. Consequently, the appeal is hereby allowed with costs. The decision of the Tribunal is hereby quashed and set aside; and the suit land is hereby reverted to the estate of the late Nasoro Selemani Jakwenga for proper administration. It is so ordered. coBl^h V.L. MAKANI JUDGE^h .s- 21/02/2022 orvib 21

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