

TANZANIA / JUDGMENT

JUMANNE NGINGO SCANNED

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL CASE NO. 27638 OF 2023 (Arising from the decision of the District Land and Housing Tribunal for Kigamboni at Kigamboni in Application No. 112 of 2021) JUMMANNE NGING'O..... 1ST APPELLANT SAID SEIF MONGO.....
2ND APPELLANT VERSUS AIDA MULOKOZI..... RESPONDENT

JUDGEMENT

Date of last order: 22/05/2024 Date of Ruling: 24/05/2024 S. D. MWAIPOPO, J This appeal emanates from the decision of the District Land and Housing Tribunal for Kigamboni at Kigamboni in Land Application No.112 of 2021 which was delivered on 30th October 2023 by Hon. Wambili Chairperson. The brief history of the suit is that the Respondent herein who was the Applicant in Application No 112 of 2021 filed a case against the Appellants herein claiming to be the lawful owner of unsurveyed parcel of land located at Mwanzo Mgumu area in Somangila Kigamboni Municipality in Dar es salaam city. Upon hearing the matter the Tribunal i gave a decision her favour. Aggrieved by the said decision, the Appellants appealed to this court on the following four (4) grounds;

1. The trial District Land and Housing Tribunal erred both in law and fact by usurping the expert opinion role and issued expert's opinion in respect to the hand writing of the disputed signature when the Chairperson concluded that exhibit P3 was signed by SU3 Seif Athuman without any seeking expert's opinion from forensic bureau.
2. That the District Land and Housing Tribunal erred in law and fact for failing to properly analyse the exhibit and testimony tendered and admitted before the trial Tribunal by the Appellants hence arriving into a wrong decision.
3. That the District Land and Housing Tribunal erred in law and fact in relying on evidence of SM2 Anchila Medard Beichumila who didn't have good title to sale hence misleading the Tribunal to come up with a wrong decision that the Respondent is the lawful owner of the suit property.
4. That the trial chairperson erred in law by failing to consider all the relevant facts in evidence surrounding the matter before it and determine that the 1st Appellant herein as the lawful owner of the suit property. At the commencement of hearing, the Appellants were

represented by learned advocate Mangiteni Marwa and the Respondent enjoyed the 2 services of Mr. Nimrodi Msemwa learned Advocate. The Appeal was heard by way of written submissions pursuant to the timetable drawn by the court. Submitting in support of the Appeal, the learned counsel for the Appellants began by combining the 2nd and 4th grounds of appeal together and argued the 1st and 3rd grounds separately. In arguing the 2nd and 4th grounds of appeal the learned counsel for the Appellants stated that during the hearing the 1st and the 2nd Appellants tendered Sale Agreement marked as Exhibit DI and D2 which was duly signed by the parties to show how ownership was transferred from the 2nd Appellant to the 1st Appellant who was the owner of the suit premises before the trial tribunal nullified his genuine ownership in the favour of the Respondent herein. The Appellants testified before the trial tribunal that ownership of the suit property was transferred from the 2nd Appellant who was the owner to the 1st Appellant vide the Sale Agreement admitted as (Exhibit DI). The learned counsel further argued that, one simple question a prudent man may ask is how did the trial tribunal come to conclude that the Appellants counter claim and evidence adduced before the Tribunal are premised on lies without taking its time to examine and analyse the contents of Exhibit DI & D2 which were tendered before the Tribunal. He referred the Court to the quotation from the Judgement of the Tribunal which is written as follows. "..... ni kwa misingi hiyohiyo sisi baraza tumeshindwa kuamini madai ya wadaiwa na nyaraka zao za mauziano, vielelezo DI na D2, kwa kuwa ni mchezo 3 uliofanywa na SU3 ambae alikuwa ni Mwenyekiti wa Serikali ya Mtaa wa Mwanzo Mgumu". The learned counsel contended that there is nowhere in the Judgment of the trial Tribunal where the evidence adduced by the Appellants and exhibits tendered were analysed. The learned counsel wondered how could the tribunal conclude that the evidence was not trusted while in fact it was not considered at all. He thus called upon the trial court to analyse the evidence and do justice to the Appellants. He submitted that the Chairman satisfied himself with the assessors that the Respondent is the lawful owner of the suit property by just looking and examining exhibit P3 which was a Sale Agreement between the Respondent and SM2 (Anchila Benard Beichumila). He argued that it was their surprise that the same does not reflect what the trial tribunal Chairman said in the Judgment, the is SM2 owned the property with her husband. He contended that the real name of SM2 as per the NIDA card is Anchila Thionest Katabuzi as she revealed it during the cross examination session on 22.3.2023 and that no one is sure that she is a true spouse of Medard Beichumila since there is no any other document showing or proving that she is a wife of Medard. He added that the Chairman went ahead to work on the evidence given by SM3 without analysing it so that to draw a correct formed opinion reaching its conclusion to believe the same as seen at page 6 para 4, also. He argued that the Chairman failed miserably to analyse the evidence of the Appellants and their key witness, SU3 Seif Athuman, who could help the Tribunal to reach the truth and administer justice. He argued that, the chairperson instead of analysing the evidence given 4 by the Appellants' witnesses he actually used his feelings to decide the case hence no justice was done to the Appellants. He referred the court to page 4 and 8 para 1 and 2 of the typed judgment. He further added that SU3 witnessed the Sale Agreements in both Exhibit DI AND D2 since he was a street Chaiman between 2010 to 2019

whereby both Sale Agreements were executed so there was no any way he could miss to attest the same. Regarding the 3rd ground of appeal, the Appellants wished to fault the decision of the tribunal that the Respondent's second witness SM2 - Anchila Medard Beichumila who the trial tribunal certified that to have had good title to dispose the suit land to the Respondent had no property to dispose because during cross examination she admitted to have sold the suit property on behalf of Medard Beichumila who is her husband. Upon scrutiny of P4, the Appellants have found nothing to prove ownership of SM2. There is no any exhibit that shows joint ownership of the property before. Why later in 2012 someone obtains good title to sale to the Respondent herein. The learned counsel referred the court at page 5, 2nd para of the Judgement where Chairman stated that: *katika shauri hili hakuna ubishi kuwa mdai alinunua eneo bishaniwa kutoka kwa Anchila Medard Beichumila tarehe 07.10.2012 kwa bei ya sh. 5,300,000 sawa na Mkataba wa mauziano kielelezo P3, kabla ya hapa eneo lilimilikiwa na Patrick Emmanuel aliyemuuzia Medard ambae ni mume wa Anchila Medard tarehe 19.8.2010 sawa na kielelzo P4.*" 5 The learned counsel invited this court to analyse exhibit P3 and P4 in line with the evidence adduced in the trial tribunal by SM2 to see whether she has a good title to pass. He contended that the ownership under exhibit P4 does not show SM2 as the owner. Nevertheless, the Respondent knowing that the genesis of her ownership originates from Medard Beichumila then this was a material witness to be called. Failure to do that there was no way the truth could be reached on mere allegation that SM2 was a true spouse to Medard Beichumila. The learned counsel finalised his 3rd ground of appeal by submitting that it is their settled view that if ownership of the suit property is drawn from exhibit P4 then the seller in Exhibit P3 has no good title to pass. It is trite law that a person without a good title to a good cannot pass a title to the transferee than his own as it was stated in the case of *Farah Mohamed v Fatuma Abdalla* (1992) TLR 2005 which held that; *He who does not have legal title to a land cannot pass a good title over that land to another*" as it is supported by the ancient maxim that; *Nemo dat Quid non Habet*' that no one can transfer a better title that he himself has. Winding up with the first ground of appeal the learned counsel submitted that, the evidence of handwriting is well taken care under section 47, 49 and 75 of the Law of Evidence Act Cap 6 R.E 2019, generally handwriting or signature may be proved by admission by the writer or evidence of the witness in whose presence when the document was written or signed and there are three methods of proving hand writing which are;

- i. The opinion of handwriting expert (Section 47 of TEA)
 - ii. Evidence of the person who is familiar with the writing of a person said to have written or signed (Section 49 of TEA)
 - iii. Comparison of the court with the writing made in the presence of the court or admitted or proved to be writing or signature of the person (section 75 of TEA)
- He submitted that under section 47 and 49 of the Evidence Act, the opinion is scientific while under section 75 the opinion is upon familiarity. See the case of *DPP v Shida Manyama @ Seleman Mabuba* Criminal Appeal No. 285 of 2012 page 26 . He asserted that; reading between the lines, on page 6 para 2 of the Judgement, it is written as follows; ".....Mauziano kati ya mdaiwa wa kwanza na mdaiwa wa pili yalishuhudiwa na kusimamiwa na SU3 akiwa kiongozi wa serikali

ya mtaa. SU3 alipoonyeshwa P3 Mkataba wa mauziano kati ya mdai na Nchila alikana kuwa mwandiko sio wake na saina kwahiyo huo mkataba sio kutoka ofisini kwake". Further he quoted Page 7 para 3 as follows; "..... Nimepitia kwa makini kielelezo P3 na kubaini kuwa ni kweli shaidi SU3 ameshutadua mauziano akiwa Mwenyekiti wa mtaa wa mwanzo mgumu. Hakuna kinacho bainisha kuwa mkataba huo ni wa kughushi kama alivyodai SU3 alivyoukana mkataba huo..... 7 The chairman of the trial tribunal went on to state that he was convinced beyond reasonable doubt that SU3 signed exhibit P3 and his mere denial of the content of exhibit P3 was because he wanted to side with or help his brother (the 1st Appellant). The Chairman assumed the role of the witness rather than being a jury who was supposed to settle the dispute. He contended that there is nowhere in the Judgement the trial chairperson employed the three methods of resolving the facts of a handwriting or signature as per section 47,49 and 75 of the Evidence Act. The material witness SU3 before the trial tribunal during hearing and he denied to have authored the exhibit P3. Therefore, if the trial was the Chairperson doubted his credibility during the hearing, he could have told SU3 to write his signature so that he could make comparison or call a witness who in the cause of business have seen SU3's written document of signature to testify that indeed the handwriting belonged to SU3 or employ a scientific expert to distinguish the 2 signatures which was a born of contention between the parties. He emphasized that the Chairperson didn't have merit to give an expert opinion on handwriting since he does not meet the conditions stated in the case of DPP v Shida Manyama (supra) at page 30 to 34 as follows;

- i. That the expert must be within a recognised field of expert. ii. That the evidence must be based on reliable principle iii. That the expert must be qualified in discipline. He finalised his submissions by submitting that it is vivid that the Judgment failed the test of the good and correct judgment since the trial Chairperson assumed the responsibility which is not his core business, that of giving expert opinion, which denied the Appellants justice hence erred in law and fact. He referred the court to the case of Constancia Chaila & Another v Evarist Maembe & Another Civil Application No.227/17 of 2021 to drive a point home that; ".....the determination of authenticity of a signature on a questioned document is a specialised task for forensic document examiners in the forensic science field". Submitting in rebuttal, the learned counsel for the Respondent began submitting on the 2nd and 4th grounds of Appeal as follows; He argued that the Appellants have not clarified as to how the trial chairperson failed to evaluate, analyze, record and consider all the evidence and testimony adduced by the Appellants. The mere assertion that the trial Chairman failed to evaluate evidence without pointing out any proof from the judgment or proceedings remains to be mere words. The chairman clearly stated at page 6 on the last paragraph that; "binafsi nimeshawishiwa na ushahidi wa mdai kumiliki eneo hilo tangu mwaka 2012 kwa kuungwa mkono na ushahidi wa SM3 ambao ni Jirani yake ambao alinunua eneo hilo kutoka kwa mzee Medard Beichumila tangu mwaka 2011. Hivyo Jirani huyu SM3 anamtambua mdai kumiliki eneo bishaniwa tangu mwaka 2012". He further submitted that the trial tribunal was convinced with the evidence of the Respondent than that of the Appellants as provided in Hemedi Said V Mohamedi Mbilu (1987) TLR 113 which among other things provides that;

9 "The person whose evidence is heavier than that of the other part must win". He went on submitting that the evidence tendered during hearing is primarily based on the testimony and exhibits tendered by the Respondent, since the Respondent and her witnesses adduced evidence upon which the trial Chairperson based on to determine the Application, he added that the trial Chairperson correctly entered decision in favour of the Respondent, as it is clear that the 1st Appellant failed prove that he owns the disputed land over the Respondent. The testimony from SM Anchila Medard Beichumila was clear that the said sale of land was on behalf of her sick husband and her husband did not deny the said argument therefore, they pointed out that this argument is an afterthought, as the Appellants never raised the legality of sale from SM 2 to the Respondent. The learned counsel submitted that it was obvious that the Respondent proved her ownership on the disputed land on balance of probabilities. He stated that the case of Farah Mohamed (supra) is distinguishable from our scenario since there is no any dispute from Medard Beichumira from the sale of land done in 2012. Therefore he concluded that these two grounds of appeal had no merit With regard to the 1st ground of appeal, he submitted that this ground is disputed for being baseless and lacks legal support. He contended that the dispute between the parties is ownership of land located at Mwanzo Mgumu at Kigamboni District measuring one acre. With regard to the handwriting, he argued that the contention from the Appellants that; there was a dispute on signature or hand-writing is misconceived due to the fact that the trial chairperson gathered all the important information to prove that the Respondent is the owner of the disputed land, there was no need to seek for forensic department expertise in order to prove the said handwriting while all the facts were pointing at SU3 who signed both the Appellants' contracts and Respondent's contract but later on he denied to have signed the Respondent's contract while he was in power when the contract was signed. He submitted that section 110 of the Evidence Act, Cap 6 provides that; "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist". He contended that the Appellants have cited sections of the Evidence Act of 2019, which was repealed and amended by Evidence Act 2022. He argued that the law requires parties to cite existing laws and not repealed laws. He submitted further that the Appellants herein failed to prove how the said forensic department could help the trial chairperson to decide the matter and failure to do so reached to unjust decision. The Respondent further argued that this ground is an after-thought as it was supposed to be raised at the lower tribunal. See *Hadija Ally v George Masunga Msingi*, Civil Appeal No.384 of 2019 TZCA 17720 2023 it was held that; ".....A matter or an issue of fact not formally raised before the High court cannot be raised before this court as a ground of appeal li Furthermore, he submitted that in the case of *Patrick Edward Moshi vs. Commercial Bank of Africa (T) Ltd* Civil Appeal No.379 of 2019 (2023) the court stated that; "The law is now settled that procedural irregularities cannot vitiate proceedings unless it has an effect of occasioning miscarriage of justice". He went on submitting that the evidence from SU3 Seif Athuman whose real name is Seif Athuman N'gingo, the uncle of the 1st Appellant herein was trying to hide the truth of the fact in order to favour his nephew due to his position as a chairperson. Moving to the 3rd ground of appeal, he submitted that it is hard to grasp what

the Appellants meant when they stated that SM2 did not have good title to sale while she was the one who sold the land to Respondent. He referred the court at page 5 of the Judgement, which states that; "Kabla ya hapo eneo hili lilimilikiwa na Patrick Emmanuel aliyemuuzia Medard Beichumila ambae ni mume wa Anchila Medard Beichumila tarehe 19/08/2010 ". That the evidence clearly expresses who is SM2 and his involvement in the sale transaction, and the same was corroborated by evidence of SM3 who is the neighbour. The learned counsel wound up his submissions by stating that the trial chairperson correctly entered decision in favour of the Respondent therefore it is clear that the Appellants failed to prove the 12 case that they are the owners of the disputed land and the Appellants' grounds of appeal are devoid of merit. In rejoinder, the Appellants argued that it was vivid that the Defendant failed to show how the ownership of the suit land moved from one Medard Beichumila to Anchila Beichumila up to the time when the Respondent bought the land from Anchila. There was no evidence tendered before the court to prove that Anchila is a legal wife of Medard and that she failed to bring Medard as a material witness to testify hence failed to call a material witness and her defence should not be considered. The learned counsel contended that it was clear that the trial Chairman did not scrutinize and analyse the Appellants evidence, therefore, the Respondent should not be allowed to state that the Tribunal was convinced with her evidence. He argued further that there are no any paragraphs in the pleadings indicating that SU3 signed the contract in order to favour his relative. He wondered how could the tribunal come up with such a fact which was merely said in an examination in chief. He argued that that there is no way the said dispute could be solved without resolving an issue as to whether SU3 signed the sale agreements between the parties. Having meticulously reviewed the rival submissions of the parties, the crucial question to be resolved is whether the appeal has merit. In dealing with the grounds of appeal, I will begin to determine the 1st, 2nd and 4th grounds of appeal together as they all touch on the evaluation and scrutiny of evidence tendered in court. The evidence on records reveal that sometimes on 15/02/2014 the 1st Appellant herein bought the disputed piece of land measuring one acre from 13 the 2nd Appellant for Tsh. 8,000,000/=and that the 2nd Appellant bought the same from one Fatu Selemani. The facts further indicate that the Respondent bought the suit land estimated to be one acre from one Anchila Medard Beichumila on 17/10/2012 and prior to that the land was owned by Medard Beichumila who bought the same one from Patrick Emmanuel on 19/08/2010. The learned counsel for the Appellants has argued that the Chairman of the Tribunal erred in law and fact for failing to evaluate well the evidence before him since he did not consider Exhibit DI and D2 which are sale agreements from the 1st Appellant to the 2nd Appellant and the sale agreement of the 2nd Appellant where he bought the land from, and that instead of analysing the evidence before him properly he used feelings to decide the case hence occasioning injustice, he referred the court to the Tribunal's Judgement where it is stated as follows; "..... ni kwa misingi hiyo hiyo sisi baraza tumeshindwa kuamini madai ya wadaiwa na nyaraka zao za mauziano vielelezo DI na D2 kwakuwa ni mchezo uliofanywa na SU3 ambae alikuwa ni Mwenyekiti wa Serikali ya mtaa wa Mwanzo Mgumu". From the above quoted paragraph of the trial tribunal typed judgment, this court agrees with the Appellants submissions that the

judgment is based on feelings and facts which are not contained in the pleadings or are not in line with the procedure stated in the Evidence Act. This is also further evidenced by the following 14 paragraphs from the trial Tribunal judgment where it is stated as follows;

"..... naungana na maoni ya mama Kangwa -mjumbe kuwa shaidi SU3 ameamua kukana sahihi yake kwenye mkataba wa kielelezo P3 kwa sababu anataka kumpendelea ndugu yake ambaye ni mdaiwa wa kwanza, kiukweli hajatoa sababu za kuaminika za kukana kwake...."

Furthermore, the Tribunal went on to state as follows; "..... Mauziano kati ya mdaiwa wa kwanza na mdaiwa wa pili yalishuhudiwa na kusimamiwa na SU3 akiwa kiongozi wa serikali ya mtaa. SU3 alipoonyeshwa P3 Mkataba wa mauziano kati ya mdai na Nchila alikana kuwa mwandiko sio wake na saina kwahiyo huo mkataba sio kutoka ofisini kwake". Further, it is stated on Page 7 para 3 as follows; "..... Nimepitia kwa makini kielelezo P3 na kubaini kuwa ni kweli shaidi SU3 ameshuhudia mauziano akiwa Mwenyekiti wa mtaa wa mwanzo mgumu. Hakuna kinachobainisha kuwa mkataba huo ni wa kughushi kama alivyodai SU3 alivyokana mkataba huo I agree with the Appellants submissions that the procedure for handling opinion, comparison and evidence regarding handwriting of a person is well taken care of under sections 47, 49 and 75 of the Law of Evidence Act Cap 6 R.E 2019 and that generally handwriting or signature may be proved by admission by the writer or evidence of the witness in whose presence when the document was written or signed or by an expert in the field. Further, I share the position on the methods of proving handwriting of someone, which include;

- i. The opinion of handwriting expert (Section 47 of TEA)
 - ii. Evidence of the person who is familiar with the writing of a person who is said to have written or signed (Section 49 of TEA)
 - iii. Comparison of the court with the writing made in the presence of the court or admitted or proved to be writing or signature of the person (section 75 of TEA)
- Based on the Judgement of the Tribunal it is obvious that the Chairman did not employ any of the above mentioned procedures in dealing with the issue of the handwriting/signature of SU3 and that consequently, the following conditions stated in the case of DPP v Shida Manyama @ Seleman Mabuba (supra) were not observed since the Chairman is not a person within a recognised field of experts, the evidence was not based on reliable principle and that the chairman is not qualified in the said discipline. It is my further position that; it was the trial tribunal's duty to deal with the procedure enumerated under the Evidence Act Cap 6 RE 2019 for dealing with a witness who denies his signature/handwriting instead of assuming facts that the witness denied his signature because of the family relations or ties with the 1st Appellant. It is my settled view that the trial tribunal Chairman ought to have followed the procedure enumerated in section 47, 49 and 75 the Evidence Act and not to employ his own feelings. I thus hold that the chairman's action negated 16 principles of natural justice and violated the provisions of the Evidence Act as cited above by the Appellants. In this regard, I agree with grounds no. 1, 2, and 4 of the Appeal that Tribunal erred in fact and law by usurping the expert opinion role and ended up issuing expert opinion in respect of the hand-writing of the disputed signature and concluding that exhibit P3 was signed by SU3 Seif Athuman without seeking experts opinion from the forensic bureau. Further the

Tribunal erred in law and fact for failing to properly analyse the exhibits and testimony tendered and admitted before the trial Tribunal by the Appellants hence arriving into a wrong decision. These three grounds of appeal are enough to dispose this appeal. I thus see no need of labouring into the 3rd ground of appeal. In the end result I hereby proceed to allow the appeal, nullify the proceedings, judgment and decree of the trial tribunal and order that the matter be remitted to the trial court to be heard in accordance with the procedures, by another Chairman and a different set of assessors. Each party shall bear its own costs. It is so ordered. S.D MWAIPOPO ?\JUDGE 22/05/2024 17

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