

TANZANIA / JUDGMENT

monica aloyce assey vs agatha fabian lyimo another 2022 tzhclandd 755 26 july 2022

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26 July 2022

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 221 OF 2021 (Arising from the District Land and Housing Tribunal for Kinondoni in Land Application No. 134 of 2020) MONICA ALOYCE ASSEY..... APPELLANT
VERSUS AGHATA FABIAN LYIMO..... 1STRESPONDENT PROSPER BALTAZAR MMASY..... 2nd RESPONDENT

JUDGMENT

Date of last order: 14.07.2022 Date of Judgment: 26.07.2022 A.Z.MGEYEKWA, J At the centre of controversy between the parties to this appeal is a parcel of land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Kinondoni in Land Application No. 134 of 2020, the respondent was the applicant and the appellant was the respondent. The appellant filed a Memorandum of Appeal on 18th i October, 2021 and the respondent's Advocate filed a reply to the Memorandum of Appeal on 5th November, 2021 disputing all the grounds of appeal. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant lodged an application at the District Land and Housing Tribunal for Kinondoni claiming that she is the lawful owner of the suit land. She claimed that she bought the suit land in 1996 from Salumu Saidi Kimaya who passed away on 20th October, 1996. The appellant alleged that she developed the suit land and constructed a house in 2003 and moved in 2004. According to the application, in 2018, the respondents invaded the suit land and constructed a house, and threatened the appellant to enter into the suit land. On their sides, the respondents denied the allegations. The 1st respondent testified to the effect that they bought the suit land together with the appellant, therefore, she claimed that the appellant and 1st respondent are lawful owners of the suit. The 2nd respondent testified to the effect that the appellant gave him a piece of land in 2018 and allowed 2 him to construct a house. The District Land and Housing Tribunal for Kinondoni determined the matter and dismissed the application without costs. Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal on two grounds of grievance; namely:-

7. That, the Kinondoni Land and Housing Tribunal erred in law and in facts when it declared that the disputed land located at Kibamba Kibwegere area, Ubungo District in Dar es Salaam is a jointly owned property of the Appellant and the 1st Respondent despite the evidence to the contrary, namely the tendered sale agreement, proffered by the Appellant proving she is the sole owner of the disputed land.
2. That, the Kinondoni District Land and Housing Tribunal erred in law and in facts for failure to consider the Appellant's evidence, hence arriving to an unjust decision in favour of the Respondents. When the matter was called for hearing before this court on 21st July, 2022, the appellant and respondent appeared in person, unrepresented. The appellant was the first one to kick the ball rolling. The appellant submitted that she was dissatisfied with the decision of the District Land 3 and Housing Tribunal hence she decided to lodge an instant appeal against the respondents. Monica (the appellant) claimed that on 20th October, 1996 Agatha, her biological sister (the 1st respondent) took her to Kibamba, Kibwegere area, where Fabian who was one of her sister's husband's relative was selling a plot. The appellant contended that she bought the plot to a tune of Tshs. 325,000/= and she paid the full amount and a Sale Agreement was prepared. She added that the 1st respondent witnessed the sale agreement and appended her signature to the Sale Agreement and a member of the Ward also appended his signature. The appellant went on to submit that in 1997, she constructed a house and moved in the year 1998, and later the Street Government of Kibamba Kibwegere issued her with another document. The appellant contended that in 2018, while on her business trip the respondents trespassed on her land and constructed a one-bedroom house and they started to harass her. Hence, she decided to file a Case at District Land and Housing Tribunal for Kinondoni. The appellant claimed that the Chairman declined to admit her Sale Agreement. She lamented that one Selemani was among the member of Street Government who claimed that she forged the Sale Agreement while he did not even witness the Sale. 4 The appellant valiantly argued that the respondents' witnesses were untruth worth. The appellant continued to argue that she bought the suit land while the 1st respondent insisted that they bought the suit land together, the 1st respondent witnessed the Sale Agreement and appended her signature. She insisted that the suit land belongs to her and it is not part of an inheritance. On the strength of the above submission, the appellant beckoned upon this court to allow the appeal. The respondents' confutation was strenuous. The first respondent contended that she was staying with the appellant and one day the appellant approached and they headed to buy a plot to one of his husband's side relative. The 1st respondent contended that they bought the suit land and both parties donated money and paid the vendor Tshs. 325,000/=. The 1st respondent testified the appellant constructed a house and moved in and after a while she approached the appellant asking for a pathway and the 2nd respondent also received a piece of land and constructed a one bedroom house and moved in. 5 The 1st respondent continued to submit that after a while, the appellant started to disturb the 2nd respondent. The 1st respondent added that at the District Land and Housing Tribunal, the appellant wanted to call the 1st respondent to testify on her favour but she refused. She submitted that the vendor's wife was called to testify in Court

and testified to the effect that the appellant and the 1st respondent bought the suit land together. The 1st respondent claimed that it was evident that the appellant wanted to forge the Sale Agreement. In conclusion, the 1st respondent beckoned upon this Court to peruse the District Land and Housing proceeding and decide fairly. The 2nd respondent had not much to say. He submitted that the appellant is his aunt who gave him a portion of land and he kept his building material in her house. The 2nd respondent stated that the dispute started when the appellant fought with his wife. He denied the allegations that he invaded the appellant's land. He stated that they stayed in the suit land for 2 years peacefully. 6 In her rejoinder, the appellant reiterated her submission in chief. Insisted that the 2nd respondent is an invader. Ending, she urged this court to allow the appeal. Having heard the submissions of both parties simultaneous with carrying a thorough review of the original record. I have opted to consolidate the two grounds of appeal and argue them together because they are intertwined. On both grounds of appeal, the appellant is claiming that the District Land and Housing Tribunal did not consider her evidence. She faulted the tribunal for declaring that the suit land is jointly owned by the appellant and the 1st respondent. The proceedings of the tribunal show that the appellant bought the suit land in 1996 from Salumu Kimaya and during cross examination by the assessor, the appellant testified to the effect that her sale agreement is within the file. The document clearly shows that the appellant bought the suit land from Salumu Kimaya. In case the same could have been admitted by the Chariman then his decision could have been different. In determining whether the appellant was the lawful owner based on the said evidence, it is clear that the appellant proved her case. The sale agreement dated 20th January, 1996 shows that Salum 7 Said Kimaya sold the suit land measuring 2.5 acres to Monica Assey to a tune of Tshs. 325,000/=. Agatha Lyimo was among the appellant's witnesses. Apart from mere evidence of DW3 and DW4 who testified that the suit land belongs to the appellant and the 1st respondent. I have not seen any documentary evidence to prove that the 1st respondent also bought the suit land. DW3 testified to the effect that his husband sold the suit land to the appellant and the 1st respondent and DW3 testified to the effect that the appellant and the 1st respondent bought the suit land to a tune of Tshs. 300,000/= while the appellant and the 1st respondent in their testimonies testified to the effect that they bought the suit land to a tune of Tshs. 325,000/= and this amount was stated in one of the documents which is in the trial tribunal records. The Chairman in his judgment stated that the appellant has failed to prove her ownership and the 1st respondent proved her ownership by stating that in 1996 the appellant and the 1st respondent bought the suit land from Salumu Kimaya. In my view, the tribunal entered into an error since the 1st respondent's testimony was mere words, and she did not tender any documentary evidence to prove her allegations. Unfortunately, 8 DW4 evidence that the appellant forged the sale agreement cannot hold water because his allegations were not proved. Reading, the 2nd respondent's evidence, his evidence proves that the suit land belongs to the appellant because the 2nd respondent stated that the appellant is the one who invited him to construct a house in the suit land. Had it been that the 2nd respondent had a portion of land within the suit land then it could have been presumed that the 2nd respondent constructed a house in the 1st respondent's piece of land.

In the upshot, I find that the appellant's grounds are merited. Thus, I allow the appeal to the extent stated above with no order as to costs bearing in mind the matter involves close relatives. Order accordingly. Dated at Dar es Salaam this date 26th July, 2022. MGEYEKWA ^07.2022 Judgment delivered ■&FF-26s,rJuly, 2022 via video conferencing whereas both parties were remotely present. 9 mgeVekwa JUDGE 6.07.2022 Right of Appeal fully explained. 10

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