

TANZANIA / JUDGMENT

odilia b kisiwa vs general w general

2024 tzhc 449 26 february 2024

COURT
TZHCDECIDED
26 February 2024

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IN THE HIGH COURT OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) ATSUMBAWANGA
LAND APPEAL NO. 20 OF 2023 (Originating from the Land Dispute No. 16 of 2022 before the
District Land and Housing Tribunal for Rukwa at Sumbawanga) ODILIA B.
KISIWA..... APPELLANT VERSUS GENERAL W.
GENERAL..... RESPONDENT

JUDGMENT

13h November, 2023 & 2dh February, 2024 MRISHA, J. The appellant Odilia B. Kisiwa, being totally aggrieved by the decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga henceforth the trial tribunal, which was delivered on 22.03.2023 in favour of the respondent General W. General, has approached this court with a Petition of Appeal containing the following grounds of appeal: -

1. That the Trial Tribunal erred in law and fact by not properly evaluating and considering the weight of the evidence adduced by the Appellant wherefore it has failed to reach a proper decision. i
2. That the Tribunal erred in law and fact to decide the matter by concluding that the disputed land is under the ownership of the respondent by considering a defect of the sales agreement as the same (sic) didn't endorsed and stamped by the proper authority being chairman or commissioner for oath hence reached the wrong decision.
3. That the Trial Tribunal erred in law and fact to decide the matter by failure to considered that the respondent trespassed to the Appellant's land and use a defective sales agreement.
4. That the Trial Tribunal erred in law and fact by failure to consider the (sic) Applicant's roots of ownership of the disputed land, hence reached the wrong decision.
5. That the Tribunal erred in deciding the dispute in (sic) favor of the Respondent for lack of cogent evidence in proving the ownership of the land. With the above grounds, the appellant has urged the court to allow her appeal, quash the decision of the trial tribunal with costs, declare her as the lawful owner of the disputed land and make an order that the respondent be evicted from the disputed land. On the adversary side, the respondent filed his reply to

the appellant's petition of appeal through which he disputed all the above named five grounds of 2 appeal and prayed that the appeal be dismissed with costs and the decision of the trial tribunal be upheld. Subsequent to the filing of those two documents, the matter was scheduled for hearing, both parties entered appearance and made their oral submissions for and against the raised grounds of appeal without legal representation. On her side the appellant submitted that she filed her petition of appeal and served the same to her counterpart. She also submitted that the grounds of appeal contained in her petition of appeal are self-explanatory; hence she prayed to adopt the same in order to form part of her submission in chief. She also prayed that the court be pleased to consider her grounds of appeal and allow her appeal. a W On the other side, the respondent prayed that the appellant's appeal be dismissed for want of merit. He submitted that the disputed land belongs to him as he purchased the same from one Paschal Mpemba and he annexed the sale agreement to prove ownership of the said land. The respondent also prayed to adopt his reply to petition of appeal in order to form part of his submission in chief. It was also his prayer that the appeal be dismissed with costs. Upon being given a chance to make a rejoinder, the appellant had nothing to do so. 3 I have dispassionately gone through the proceedings of the trial tribunal, the impugned judgment, the grounds of appeal as well as the rival submissions of the parties herein. The issue for determination of this court is whether instant appeal has merit. In my careful examination of the grounds of appeal, the first, fourth and fifth grounds of appeal revolve around the standard of proof in relation to ownership of the disputed land; hence, I will deal with them seriatim. Starting with the first ground of appeal, the appellant has faulted the trial tribunal for not evaluating and considering the weight of evidence adduced by her hence failed to make a proper decision. In other words, if I have understood her properly and I believe so, it is her argument that had the trial tribunal properly evaluated and considered her evidence, it could not entered its judgment in favour of the respondent as her evidence was stronger and sufficient to prove her claim against the respondent in respect of the disputed land which according to the available records is located at Makutano Village. The respondent has strongly disputed that claim and has put the appellant to a strict proof. This being the appeal, there is no way the appellant can be called upon to prove her claim; what is to be looked at, is the evidence which had already been adduced before the trial tribunal. 4 I have examined the typed records of the tribunal and the impugned typed judgment in order to find out whether it is true that the trial chairperson did not properly evaluate and consider the weight of the appellant's evidence. In her judgment the trial chairperson reasoned that despite claiming to be the owner of the disputed land since the year 1964, the appellant failed to tell how she acquired the said land. This is shown at page 5 of the typed

judgment.

With all due respect to the honourable trial chairperson, that is not correct. The records are very clear that the appellant explained before the trial tribunal how she acquired the disputed land. This is shown at page 4 of the typed proceedings where she stated the following: - "ODILIA.B.

KISIWA UMRI: 74 SHUGHULI: MKULIMA DINI: MKRISTO Anaapa na kusema kwamba eneo gombewa ni langu tangu 1964 nilipoolewa. Mume wangu amefariki na kuniacha kwenye eneo gombewa. Mjibu maombi amevamia eneo gombewa 2018." 5 The above except tells that while adducing her evidence before the trial tribunal the appellant testified that the disputed land has been belonging to her since the year 1964 when she was married and her husband passed away leaving her in that land. She also testified that the respondent invaded the disputed land on 2018. This piece of evidence was not challenged by the respondent during cross examination because no question was posed by the respondent in relation to acquisition of the said land. Again, there is evidence of Thomas Sangu (SM2) who was the appellant's first witness before the trial tribunal. His evidence depicts that the disputed land was given to the appellant's late husband by one Jacob Sangu who was his father. That evidence was corroborated by Charles Chunda (SM3) during examination by the trial tribunal. Surprisingly, when composing her judgment, the trial chairperson raised a doubt on the evidence of SM2 stating that his evidence was not corroborated by the evidence of SMI (the appellant) and SM3 (the appellant's second witness). However, as I have pointed out before, the evidence of SM2 was well corroborated by SM3, as it is shown at page 6 of the trial tribunal typed proceedings where upon being examined by the trial tribunal SM3 responded by saying that, "Baba alipewa eneo gombewa na baba mzazi wa SM2" 6 The above except when literally translated in English, entails that the late father of SM3 who is also the late husband of the appellant was given the disputed land by the biological father of SM2 and according to the testimony of SM2, it is apparent that there is correlation between what was said by SM2 and by SM3. Therefore, it was not correct to say that the evidence of SM2 was not corroborated by that of SM3. Also, even if the evidence of SMI is silent on what was said by SM2, that cannot affect her evidence because hers was preceded by the evidence of SM2 and she was not given a chance to re-examine her witness who is SM2. It is due to the above reasons that I am in agreement with the appellant that the trial tribunal failed to properly consider and evaluate the watertight evidence of the appellant in relation to the disputed land; had it properly done so, it would have not hesitated to decide in favour of the appellant. That being said and done, I find that the first ground of appeal is meritorious. The above takes me to the fourth ground of appeal in which the appellant has complained that the trial tribunal erred in law and fact by failure to consider the appellant's roots of ownership of the disputed land, hence reached to a wrong decision. 7 A large part of this issue has already been discussed in the course of addressing the first ground of appeal. It is undisputed fact that the appellant has been in possession of the disputed land with her late husband since 1964 and has been using the same after the demise of her late husband undisturbed up until the year 2018 when the dispute between her and the respondent emerged. As I have pointed earlier, the trial tribunal typed records bears her out that she has been in long occupation of the disputed land until 2018 and the respondent failed to cross examine her on that assertion. Not only that, but also, it is on record that the evidence of the appellant in relation to the ownership of the disputed land was well corroborated by her two witnesses who testified before the trial tribunal as SM2 and SM3; this can be inferred at page 5 of the trial tribunal typed proceedings. On the other hand, the respondent has submitted that he purchased the disputed land from one Paschal Mpemba. However, despite claiming that he purchased the disputed land from that person, the respondent

did not bring Paschal Mpemba before the trial tribunal in order to support his claim that he purchased the same from that person. Worse still, the respondent did not tell the trial tribunal why he did not summon that person to testify for him. Since the omission was not backed by any explanation, it is my view that the said 8 sale agreement was doubtful and ought not to be relied upon by the trial tribunal. With the above reasons, I am of the settled view that the fourth ground of appeal has merit. In the fifth ground of appeal the appellant has argued that the trial tribunal erred in deciding the land dispute in favour of the respondent for lack of cogent evidence in proving the ownership of the disputed land. In dealing with the first ground of appeal I pointed out that the evidence of the appellant before the trial tribunal was stronger than that of the respondent to the extent of proving her claim against the respondent. On his side, the respondent has submitted that the disputed land is his and he attached the sale agreement in order to prove ownership of the disputed land. Also, through his second and third grounds of appeal, the appellant has challenged the said sale agreement saying that the same is defective as it was not endorsed by the chairman of the area the disputed land is located or the commissioner for oaths. Due to the above rival arguments, I decided to examine the said sale agreement and observed that the same is a photocopy and has not been certified by the commissioner for oaths. Also, I have observed that such document does not have an official stamp and signature of the street chairperson of the place the suit land is located. It is my settled view that 9 those flaws are what caused the trial chairperson to refrain from according any weight to that sale agreement as it is seen in her judgment. Since the evidence of the respondent based solely on the said defective sale agreement, the rest of the oral evidence by the respondent together with his witnesses cannot outweigh the evidence of the appellant which as I have alluded above, was corroborated by her two witnesses and proved her claim over the disputed land and how she acquired the same. If that is not enough, the fact that the respondent failed to summon the person who sold to him the disputed land, makes the court to doubt his claim over the disputed land. Hence, based on those reasons, I also find merit in the fifth ground of appeal. The remaining grounds of appeal are intended to question the competence of the sale agreement relied upon by the respondent to prove ownership of the disputed land. However, I do not see any need to dwell much in putting my hand on them because I have already talked about that document in the course of addressing the fourth and fifth grounds of appeal. All I can say is that it is the appellant who has had a point by challenging the validity of that document and his argument is backed by the fact that even the trial chairperson did not accord any weight on that sale agreement. In the absence of proof of ownership of the disputed land by a sale agreement, the respondent cannot be said to be the owner of the disputed 10 land, rather he remains to be the trespasser of the disputed land as correctly argued by the appellant and opined by one of the gentlemen assessors who sat with the presiding trial tribunal's learned chairperson. That marks the end of my deliberation in regard to the second and third grounds of appeal which I also find to be with merit. In the premise and owing to the foregoing reasons, I find that the present appeal by the appellant has merit. Consequently, the instant appeal is allowed with costs and the judgement of the trial tribunal is quashed, the orders passed thereto are set aside, the appellant is declared as the lawful owner of the disputed land and the respondent is ordered to forthwith vacate from the disputed land. It is so ordered. ■ iivawI ■r JUDGE 26.02.2024 DATED at SUMBAWANGA this 26th day of February,

2024. A.A'. M JUDGE 26.02.2024 11

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Prepared on 13 October 2026 · Esheria