

TANZANIA / JUDGMENT

olive oswald mosha vs roman selasin swai another 2023 tzhclandd 16802 25 august 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 240 OF 2023 (Originating from Land Application No. 235/2016 District Land and Housing Tribunal for Kibaha) OLIVE OSWALD MOSHA.....APPELLANT VERSUS ROMAN SELASIN SWAI..... 1st RESPONDENT FREDRICK JERY HUNT..... 2nd RESPONDENT

JUDGMENT

21st to 25th August, 2023 E.B. LUVANDA, J The Appellant named above is aggrieved by the decision of the Tribunal which decreed infavour of the First Respondent named above as the lawful owner of the suit land of five acres located at Boko Timiza Kibaha and adjudged the Appellant as trespasser, therefore be evicted. In the memorandum of appeal there are four grounds of appeal, namely:-

1. That, the Honourable Chairman erred in law and fact by his failure to consider that the First Respondent failed to tender any proof of buying the suit property from the Second Respondent and instead i managed to establish how the Second Respondent bought the land from the family of Hussein Fazal.
2. That, the Honourable Chairman erred in law and fact by his failure to consider that the First Respondent failed to procure presence of the Second Respondent to be able to prove how he got ownership of the suit property.
3. That, the Honourable Chairman erred in law and fact by his failure to evaluate and determine the difference of names of the Second Respondent and the former husband of the Appellant.
4. That, the Honourable Chairman erred in law and fact by his failure to recognize the subsisted marriage between the Appellant and one Fredrick Charles for lack of marriage certificate while the Appellant through exhibit D2 managed to prove the same. Mr. Stephen Mosha and Fredrick Mpanju learned Counsel for Appellant submitted that, the First

Respondent failed to prove ownership of the suit property as he claimed that he purchased the same from the Second Respondent on 05/03/2013 for a consideration of Tshs 10,000,000 but failed to produce any sale agreement to that effect. They submitted that the First Respondent testified that the second Respondent purchased the suit land from Hussein Fazal and tendered a sale agreement exhibit 2 P3. They submitted that during trial the First Respondent summoned four witnesses to establish how the family of Hussein Faizal sold the suit land to the Second Respondent. They submitted that PW2 stated that he witnessed the sale agreement between Fredrick Jerry Hunt and Hussein Fazal in 2007, which was supported by PW3, PW4. They submitted that PW5 (the village chairman) stated that the suit land belonged to Mzee Gari Moshi who sold it to Hussein Fazal and the later sold it to the Second Respondent in 2007 and then sold it to the First Respondent but no any proof of sale was produced by PW5 showing the sale of the suit land between the Second and First Respondent. They submitted that the First Respondent never tendered any documentary evidence on how he become the owner of the suit land inspite of attaching the alleged sale agreement indicated at paragraph 6(1) of the application. They cited the case of Ernest Sebastian vs. Sebastian Mbele & Others, Civil Appeal No. 66/2019, Pages 8 & 9; Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama, Civil Appeal No. 305/2020 CAT. For ground number two, the learned Advocates submitted that the Appellant does not know the Second Respondent and she never come across the Second Respondent in her life time. They submitted that the 3 First Respondent who alleged purchasing the land from the Second Respondent was under obligation to procure the presence of the Second Respondent to testify in court if he had a good title to pass to the First Respondent. They submitted that failure of the First Respondent to procure the Second Respondent, then the Tribunal was supposed to draw adverse inference against the First Respondent. They cited Aziz Abdallah vs. Republic, (1995) TLR 71. For ground number three, the learned Counsel submitted that there was difference of names concerning the Second Respondent and former husband of the Appellant. They submitted that the Appellant tendered two decisions of court in Matrimonial Cause No. 3/2013 and Civil Revision No. 11/2016, indicating she married Fredrick Charles, while the First Respondent allege to purchase land from Fredrick Jerry Hunt. They submitted that the Tribunal being faced with two names had to determine whether Fredrick Charles and the Second Respondent was one and the same person or not, and in case could establish being the same person could mean the Second Respondent sold the suit property to the First Respondent fraudulently. They submitted that the Appellant tendered her marriage certificate in Matrimonial Cause No. 3/2012 and no one had contested. They submitted that the First Respondent was 4 duty bound to establish the entity of the Second Respondent for it to be matched with that of Fredrick Charles an obligation which the Tribunal neglected, but declared the First Respondent the rightful owner of the suit property. Ground number four, the learned Advocates submitted that the trial court neglected to consider exhibit D2 that is Civil Revision No. 11/2016, including exhibit DI that is Matrimonial Cause No. 3/2013, which indicated that the Appellant tendered a photocopy of a certificate of marriage which was admitted by the court as exhibit P1, arguing that the Appellant proved her husband name being Fredrick Charles and not Fredrick Jerry Hunt.

They submitted that the First Respondent being sold the suit land by a person having no title to the land (Fredrick Jerry Hunt), then it means he was defrauded. In reply, Mr. Edward Mtaki learned Counsel for First Respondent, submitted that PW1 First Respondent established the historical ownership of the disputed land from Gori Moshi sold it to Hussein Faizal family. He submitted that Fredrick Jerry Hunt acquired the land from Hussein Faizal in 2007, supported by exhibit P3. He submitted that the First Respondent tendered the sale agreement between him and the Second Respondent Fredrick Jerry Hunt, unfortunate a scanned copy of 5 the sale agreement was objected by the Appellant, and the Tribunal did not admit it. He submitted that exclusion of the sale agreement could not undermine the legitimacy of the First Respondent's title to the subject property. He cited the case of Splendors (T) Ltd vs. David Raymond D'souza & Another, Civil Appeal No. 7/2020, CAT. He submitted that the evidence on record undoubtedly establishes that the First Respondent is the rightful owner of the suit land. He submitted that both the Appellant and the First Respondent have a burden to prove their ownership of the suit land. He submitted that the Appellant have not tendered any documentary evidence that definitely establishes her ownership claim to the suit land, arguing that she merely asserted to have given the money to Yusuph Chanyika (DW2) to purchase the land on her behalf. He submitted that the Appellant was unable to provide the name of the person who sold the land to her, lack of knowledge of the name of the hamlet chairman, unable to recall witnesses to the agreement, purchase price. He submitted that the Appellant contradicted herself on the purchase price and her narrative of events was at variance with DW2. He cited the case of Zakaria Jackson Magayo vs. Republic, Criminal Appeal No. 411/2018. He faulted matrimonial court that is unsuitable for handling land related matters, 6 arguing it lacks the expertise and authority to determine ownership. He submitted that the matrimonial court decision lacks the necessary information to accurately identify the suit land. For ground number two, the learned Counsel submitted that the First Respondents diligent efforts and attempts to serve summons to the Second Respondent proved unsuccessful, hence resorted to service by publication. Ground number three, the learned Counsel submitted that the Tribunal's evaluation of the difference in names and the absence of the First Respondent documentary evidence was conducted fairly and judiciously. He submitted that the mere similarity or dissimilarity of names cannot serve as a justifiable basis for establishing ownership of the suit land. He submitted that the ex husband mentioned in the submission one Fredrick Charles who is not implicated in the sale of the suit land to the First Respondent, instead it was Fredrick Jerry Hunt who sold the land to the First Respondent and he is distinct from the individual named Fredrick Charles. He submitted that although the Appellant was able to prove the existence of her previous marriage in the context of matrimonial court, the same evidence should ideally be presented in the Tribunal for consistence and clarity. He submitted that the presence of 7 marriage certificate would help to alleviate ambiguity concerning the names of the Appellant's husband. On my part, I find merit on the ground number one. It is true that the First Respondent did not tender any sale agreement between him (first Appellant) and the purported Fredrick Jerry Hunt. The learned Counsel for First Respondent submitted that the same was tendered but was objected on account that it was a

scanned copy. Indeed the records of the Tribunal indicate that the sale agreement between the First Respondent and the purported Fredrick Jerry Hunt was a scanned copy, not original. However immediately after the ruling of the Tribunal rejecting admission of a scanned version, the learned Counsel for First Respondent addressed the Tribunal and bragged to recall PW1 in view of tendering the original. Of course, thereafter on 21/0/2018 PW1 was recalled. Surprisingly, PW1 tendered the sale agreement between Yusuph Mtagulwa (indicating he was transacting on behalf of Hussein Fazal's family, as a vendor) and Fredrick Hunt who was the purchaser, dated 25/12/2007 exhibit P3. When PW1 was cross examined after tendering exhibit P3, he conceded that he did not tender a sale agreement between him (First Respondent and Fredrick Jerry Hunt. It is to be noted that the purported Fredrick 8 Jerry Hunt never appeared to confirm that he disposed the disputed land to the First Respondent. On his submission, the learned Counsel for Frist Respondent argued that his client had a good title because he managed to establish an ownership of the disputed land from the first owner Gari Moshi, who sold it to Hussein Fazal's family, the later sold it to Fredrick Jerry Hunt in 2007 and eventually disposed it the First Respondent on 05/03/2013. Pangisa Basil Haule (PW2) stated that he witnessed at a capacity of hamlet chairman at Boko Timiza, a sale agreement between Fredrick Jerry Hunt and Hussein Fazal via Yusuph Mtaigulwa, also Said Bakari Mazoea (PW3) confirmed the same story. On cross examination PW2, stated that at a suitland there was a hamlet chairman at that jurisdiction, but he attested it. In other words PW2 had no jurisdiction to make attestation for sale over a suit land. It is to be noted that the alleged Yusuph Mtagulwa who alleged vended the suit land to the purported Fredrick Jerry Hunt, was not summoned. Indeed even if he could had appeared to testify, he could not salvage the situation. This is because the testimony of Said Bakari Mazoea (PW3) stated that Mr. Faizal (presumably he meant Hussein Fazal) who purchased the suit land from Gari Moshi Kimonga, is living in Kenya, and the suit land was under Yusuph Mtaragwa as care 9 taker who sold it to Fredrick Jerry Hunt. According to PW3, stated that Yusuph Mtagulwa was the agent of Hussein Fazal. In exhibit P3 reflect that Yusuph Mtagulwa was acting on behalf of the family of Hussein Fazal. It is unknown whether Yusuph Mtagulwa was holding power of attorney or not. To my view, a mere care taker of a farm cannot be a competent person to dispose a farm of his principlal. Now, in the circumstances where a sale agreement between the First Respondent and the purported Fredrick Jerry Hunt is missing; the purported Fredrick Jerry was not summoned, alleged is nowhere to be found and his phone unreachable; Yusuph Mtagulwa who vended a suit land to the purported Fredrick Jerry Hunt, was a mere care taker who also purportedly disposed to the purported Fredrick Jerry Hunt. Yusuph Mtagulwa his where about was not canvassed, no reasons was forth coming as to why he was not summoned. To my respective view, it cannot be said that the First Respondent had a good title to the suit land. In fact, the First Respondent failed to prove his case. The learned Counsel for First Respondent dwelled much attacking the case or defence of the Appellant, who too did not have a sale agreement for purchasing the suit land, neither mentioned as to who was the vendor. The Appellant also suggested to had purchased the suit land 10 under care of one Yusuph Chanyika (DW2). In the circumstances, the Appellant is luck for she did not raise a counter claim. Also she is

luck for having in possession of judgment for Matrimonial Cause No. 3/2013 (exhibit P1 or DI) and Civil Revision No. 11/2016 (exhibit P2 or D2). In exhibit P1 or DI at page 11, the matrimonial court, ruled, I quote, "The plots of land located in Boko Timiza and Bagamoyo as evidenced by P5 were solely bought by the Petitioner and there is no evidence that the Respondent has contributed anything for their development. Thus, in purview of section 114(3) of the Law of Marriage Act, (Cap 29 R.E 2002) leave the ownership of the same to the Petitioner". Arguably the matrimonial court was adjudging ownership in the context of matrimonial assets and individual spouse assets under family law. The matrimonial court was not deliberating on ownership within the context of the land matter. Indeed there was no dispute of ownership at the matrimonial court. Had the Appellant raised a counter claim and had she have no possession of exhibit DI and D2,1 could had dispossessed her as well. ii The First Respondent attempted to challenge exhibit P1 or DI, via exhibit P2 or D2, but the revision flopped. In exhibit P2 or D2, this court sitting as matrimonial appeal, at page 10 made the following reservations, I quote, "As can be gleaned from the very application, its supporting affidavit, the counter affidavit and submissions of both sides, there are three main issues calling for determination by the court. These are, first, the identity of Fredrick Jerry Hunt who sold the land in dispute to the applicant and Fredrick Charles, the respondent's ex spouse and a party to the Matrimonial Cause No. 3 of 2013 which is sought to be revised but who is not a party to these proceedings. Second, whether the vendor be it Fredrick Jerry Hunt or Fredrick Charles had title in the land in dispute to pass to the applicant and third, whether or not the sale transaction was not tainted with fraud". The first Respondent, tried a second chance to establish his title and ownership over the suit property, but failed to pass the test of three hurdles or propositions above quoted. At the Tribunal, the First Respondent failed to procure the purported Fredrick Jerry Hunt, to overcome a hurdle of whether the later had a good title to pass to the 12 First Respondent, and thereby clear a doubt on the air clouded by possible conning and fraud transactions. As I have said above, a case was for the First Respondent, is the one who sued, therefore the burden of proof lies upon him. In other words, the First Respondent cannot take a hide for failure of the Appellant to procure her alleged ex husband one Fredrick Charles, remained at large in hiding since the inception of exhibit P1 or DI, P2 or D2 as well. To this end, the reservation made by the Appellant (DW1) at the Tribunal that the alleged Fredrick Charles Kilangi dubbed as Fredrick Jerry Hunt, being a connman, reign. The adumbration above, take into board ground number two, three and four as well. The appeal is dismissed. I make no order for costs inview of a reservation 13 Judgment delivered in the presence of Mr. D. G. Rwegoshora Advocate and Mr. Edward Mtaki Advocate, for 1st Respondent, Mr. Fredrick Mpanjo 14

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