

TANZANIA / JUDGMENT

serena temba vs moses david castico

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 53 OF 2023 (Arising from the District Land and Housing Tribunal for Ilala at Ilala in Land Application No. 86 of 2017) SERENA TEMBA..... APPELLANT
VERSUS MOSES DAVID CASTICO..... RESPONDENT

JUDGMENT

Date of last Order: 23.03.2023 Date of Judgment: 28.03.2023 A.Z.MGEYEKWA, J The instant appeal stems from the decision of Land Application No. 86 of 2017 from the District Land and Housing Tribunal for Ilala (DHLT). The DLHT decided the matter in favour of the respondent. The material background facts to the dispute are; Moses David Castico, the respondent lodged a case at the District Land and Housing Tribunal for Kinondoni i against Serena Temba, the appellant, and Primo Damian Lingamila. The dispute was involving ownership of an unsurveyed piece of land located at Minyerezi, Kifuru within Ilala Municipality measuring 400 sqm. According to the pleadings, the respondent alleged that he is the owner of the suit land. In 2014, the respondent purchased it from Primo Damian Lingamila. He developed it and was preparing himself to construct a dwelling house. In 2017, the respondent realized that the appellant has trespassed into the suit land and constructed seven business frames, later he discovered that Primo Damian Lingamila resold it to the appellant. The appellant on her side denied all the allegations. She claimed that she is the lawful owner of the suit land. The District Land and Housing Tribunal for Kinondoni determined the application and decided in favour of the respondent. Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal on the following three grounds of grievance:-

1. That the Honourable Trial Chairman erred in law when he failed to consider the opinion of assessors and unjustifiably differed with their unanimous opinions of which based on the strong evidence of the 2 Appellant, the assessors opined that the Appellant was the lawful owner of the disputed land.

2. That the Honourable Trial Chairman misdirected himself in law when he held in his Judgment that the Appellant's Sale Agreement (which was already admitted and acted upon by the Tribunal during the trial as Exhibit DI) was invalid for lack of stamp duty, and consequently went on to declare that the Appellant has no sale agreement at all which supports her purchase of the disputed land.
3. That the Honourable Trial Chairman erred in law and facts in ignoring the strong evidence of the Appellant and her witnesses including local leaders who proved with no doubt that the Appellant was the first to lawfully purchase the disputed land in 2013 while the Respondent purported to purchase the same land later in 2014, and still went on to hold that the Respondent is the lawful owner of the suit land and hence declared the Appellant a trespasser. When the appeal was called for hearing on 6th March 2021 the appellant enjoyed the legal service of Mr. Ramadhani Maleta and the respondent appeared in person unrepresented. The respondent urged this Court to allow the parties to argue the appeal by way of written submissions. By the Court's consent, the appellant filed her submission in chief on 13th March 2023 and the respondent filed his reply on 20th March 2023. The appellant filed her rejoinder on 23rd March 2023. Both parties complied with the Court order. Mr. Ramadhani, counsel for the appellants was the first one to kick the ball rolling. He argued all three grounds of appeal together because they are interrelated. In support of all grounds of appeal, Mr. Ramadhani contended that the tribunal erred in law when completely failed to consider the opinions of the two assessors; Mrs. Franisa and Mrs. Joba which were based on strong evidence of the appellant and her witnesses. To buttress his submission, the learned counsel for the appellant referred this Court to section 24 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and the case of Tubone Mwambeta v Mbeya City Council, Civil Appeal No. 287 of 2017, CAT. He stated that the appellant's evidence was supported by written evidence and two Sale Agreement exhibits DI and PI. The learned counsel for the appellant went on to submit that the Chairman erred and ignored the evidence of the appellant and misinterpreted the provisions of the Stamp Duty Act and consequently went on to hold that the appellant's Sale Agreement (Exh.DI) was invalid for lack of stamp duty and declared the appellant has no sale agreement to support her purchase of the disputed land. Instead, he declared the respondent the lawful owner of the suit land. The learned counsel went on to submit that section 47 (1) of the Stamp Duty Act, Cap.216 [R.E 2019] provides for the exemption of stamp on documents that have been executed before the Government authorities. The learned counsel for the appellant further argued that the appellant's exhibit DI was among the documents exempted from being stamped with stamp duty. To buttress his submission he cited the case of Esther Magege v Eraston Sayinoni, Misc. Land Appeal No. 52 of 2021 (unreported). It was his view that the sale agreement was executed and bears the stamp of the Chairman for Local Government Authorities at Kifuru. He went on to submit that the Chairman (DW4) testified in court and he was the one who prepared the said sale agreement. Thus in his view, the sale agreement was legal and hence admissible. The learned counsel for the appellant continued to there was no any legal and justifiable reason for the trial Chairman to differ from the opinion of

the assessors. 5 The learned counsel for the appellant continued to argue that the trial Chairman after noting that the Sale Agreement lacks stamp duty, was legally bound to give the appellant time to pay the unpaid stamp duty and penalties and upon proof of such payment, he was supposed to proceed in admitting the sale agreement as an exhibit. To cement his submission he referred this Court to the cases of First National Bank (T) Ltd v Yohane Ibrahim Kaduma and another, Commercial Case No. 126 of 2019 (unreported), Sunderji Nanji Ltd v Mohamedali Kassam Bhaloo

[1958] 1 EA 762, the Court of Appeal of Tanzania cited with approval the case of Zakaria Barie Bora v Theresia Maria John Mbiru (1995) TLR 211 and Joseph L. K Lugaimukamu v Father Kanuti J. Mziwanda

(1986) TLR 69. In conclusion, Mr. Ramadhani, counsel for the appellant beckoned upon this Court to quash, reverse and set aside the tribunal judgment with costs and declare the appellant the lawful owner. In reply, the learned counsel for the respondents opted to argue the grounds of appeal separately. The respondent's advocate was brief and straight to the point. He submitted that the law allows the trial Chairperson of the District Land Housing Tribunal to differ from the 6 opinion of assessors. To buttress his submission he referred this Court to section 24 of the Land Disputes Courts Act, Cap.216. He insisted that the Chairman legally is not bound by the opinion of assessors, the law requires the Chairman to state reasons for differing with the assessors' opinion. Mr. Jerome went on to submit that in the instant appeal, the Chairman's reasons were sound and reasonable based on the law and circumstances of the case. Submitting on the second ground, Mr. Jerome contended that the trial tribunal admitted the sale agreement and was duty-bound to consider it while composing its judgment. He contended that the sale agreement was not admissible in the eyes of the law, hence the same was disregarded by the Chairman and stated reasons for invalidating the said sale agreement for want of stamp duty. To fortify his submission he cited the case of Malimo Montage Konsult AB Tanzania Branch v Margaret Gama, Civil Appeal No. 86 of 2001. Mr. Jerome went on to submit that exhibit DI was excluded as evidence, then there was no any legal evidence that proved that the appellant bought the suit land from Primo Damian Lingamila in 2013, hence DW1 and DW2 evidence could not stand in the absence of a written sale agreement. 7 The learned counsel for the respondent forcefully argued that exhibit DI is not among the exempted instruments under the cited section 47 (1) of the Stamp Duty Act, Cap. 189 [R.E 2019]. He added that the mere fact that the document was witnessed by the street chairman does not mean that it is exempted. He stated that exemption applies if the Government is a party to the case. He added that being executed by or on behalf of the Government is not the same as being executed before the Street Chairman. Mr. Jerome stated that the case of Esther (supra) does not bind this court. The learned counsel for the appellant contended that saying that the chairman was required to give the appellant time to stamp the sale agreement depending on the circumstances of the case, and the appellant was required to pray to the tribunal to allow them to stamp the sale agreement. On the strength of his submission, he cited the case of Malimo Montage Konsult AB Tanzania Branch (supra).

The learned counsel for the respondent argued that the appellant had no strong evidence to support his claims over the suit land. In conclusion, Mr. Jerome beckoned upon this Court to dismiss the appeal for want of merit and uphold the trial tribunal's decision. 8 In his rejoinder, the learned counsel for the appellant reiterated his submission in chief. Mr. Ramadhani stressed that the Chairman completely failed to consider the fact that the sale agreement (Exh.DI) was prepared and executed by the Local Government Office, thus, it is legally exempted from payment of stamp duty. Ending, the learned counsel urged this Court to allow the appeal. So much for the submissions of the learned counsel for both parties. The ball is now in my Court. I now turn to the gist of the appeal, the issue which is the bone of contention hinges on the question whether the appellant had good reasons to warrant this court to allow his appeal. In my determination of this appeal, I will argue the grounds separately and I have opted to start addressing the second ground of appeal. On the second ground of appeal, it is undisputable fact that the trial Chairman admitted the sale agreement (Exh.DI) but declined to rely on it for the reason that it lacks the stamp duty and the same tampered. As a result he ruled out that there was no strong evidence to support the appellant's evidence to prove that she purchased the suit land in 2013. I fully subscribe to the submission made by the learned counsel for the respondent that the mere fact that a Street Chairman signed the sale 9 agreement does not mean that the same is exempted from being stamped, the exemption applies in a situation where it is a Government document. Guided by the case of Josephat L.K Lugaimukamu v Father Canute J. Mzuwanda (1985) TZHC 9, 1986 TLR 69, as long as the Sale Agreement was already been admitted in court as an exhibit, therefore, the tribunal was supposed to allow the appellant to pay the requisite stamp duty and file a proper document within a prescribed period. The purpose of section 73 of the Civil Procedure Code Cap.33 [R.E 2019] is to enable the subordinate court to do substantial justice as opposed to justice based on purely technical grounds when determining an appeal. In the case of Elibariki Mboya v Amina Abeid, Civil Appeal No. 5 of 1996 BET, the Court held that:- "It would be lamentable to the law if it were competent for such court to reverse or substantially vary a decree of the trial court on the ground not affecting the merits of the case or the jurisdiction of the court. Subject to the law, justice ought to be administered in a manner that the common man in respect of the ordinary man. Section io 73 of the Code was enacted to enable relevant courts to achieve that noble goal." As rightly stated by the counsel for the appellant that justice demands an appeal be allowed, however, the Court needs to issue an order in terms of the provision section 46 (1) of the Stamp Duty Act that the stamp duty with which is chargeable to exhibit DI be paid. I am not in accord with the submission of the learned counsel for the appellant that since the purported Sale Agreement was executed at the Chairman of Local Government Authority's office, then automatically, it is exempted from being stamped with stamp duty under section 47 (1) (e) of the Stamp Duty Act, because as rightly pointed out by Mr. Jerome the said Sale Agreement was not executed on behalf of the Government rather it was executed before the Street Chairman. Therefore section 47

- (1) (e) of the Stamp Duty Act, Cap. 189 is inapplicable in the matter at hand. Under the circumstances, I see no need to determine the remaining grounds of appeal raised by the appellant's counsel doing so will be an academic exercise. li Accordingly, I allow the appeal, quash and set aside the Judgment and Decree of the District Land and Housing Tribunal for Ilala and remit the file to the District Land and Housing Tribunal to order the appellant to pay the stamp duty and its interests with which Exhibit DI is chargeable and compose a fresh Judgment. I make no order as to the costs. Order accordingly. Dated at Dar es Salaam this date 28th March 2023. O/< r i.^MGEYEKWA UDGE 2^.03.2023 Judgment delivered oh 28th March 2023 via audio teleconference whereas the appellant and the respondent were remotely present. Right of appeal fully explained. 12

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