

TANZANIA / JUDGMENT

LAND APPEAL 59 OF 2023

COURT
TANZLIIDECIDED
1 January 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 59 OF 2023 (Originating from Application No. 575/2019, Kinondoni District Land and Housing Tribunal) SULEIMAN SAID MARHSED APPELUNT VERSUS MOSHI MUSA KONDO., .1ST respondent EASTERN CAPITAL LTD 2ND respondent

JUDGMENT

20/05/2024 to 25/06/2024 E.B. LUVANDA, 3 The Appellant above mentioned is challenging the decision of the Tribunal which dismissed his claim for ownership of a property described as Plot No. 229, Wibu Street Kinondoni Dar es Salaam, as per certified version of offer of right of occupancy exhibit K2, for reason that the Appellant failed to prove his claim alleged purchased for Tsh 100,000,000 as pleaded in the application, while on evidence he tendered a sale agreement exhibit K1 depicting a consideration of Tsh 35,000,000. This mismatch along failure to summon the attesting officer advocate Kiozya M.M. was the reason for turning down and disallowing the Appellant claim. 1 In the amended memorandum of appeal, the Appellant grounded that: One, the trial Tribunal erred in law and fact for failure to examine and evaluate the Appellant's evidence properly; Two, the trial Tribunal erred in law and fact for holding that the Appellant failed to prove his case; Three, the trial Tribunal erred In law and fact for determining issue which was neither disputed nor argued by parties; Four, the trial Tribunal erred In law and fact for failure to assess credibility of witnesses; Five, the trial Tribunal erred In law and fact for determining the matter relying on the number of witnesses; Six, the trial Tribunal erred In law and fact for holding that the First Respondent sold the house In dispute lawfully to the Second Respondent; Seven, the trial Tribunal erred in law and fact for encountering the Appellant evidence; Eight, the trial Tribunal erred In law and fact for holding that exhibit K1 was the only document to prove the sale of the house in dispute between the Appellant and the First Respondent; Nine, the trial Tribunal erred in law and fact for misbelieving the Appellant for failure to call the advocate who attested the sale agreement between the Appellant and the First Respondent; Ten, the trial Tribunal erred in law and fact for failure to determine when the title of the suit plot shifted from the First Respondent (seller) to another purchaser; Eleven, the trial Tribunal erred in law and fact by holding that the Appellant's contradiction on the purchase price resulted to misbelieving him as to whether he was the one who purchased lawfully the suit house; Twelve, the trial Tribunal erred in law for allowing the Respondent's counsel at hearing to represent the Respondent while there is a conflict of interest;

Thirteen, the trial Tribunal erred in law and fact for allowing BEMORA Attorneys to represent the Respondents while the same law firm prepared and witnessed the sale agreement of the Respondent; Fourteen, the trial Tribunal erred in law and fact for determining the matter relying on technicality. Mr. Jonas Kilimba learned Counsel submitted that the Appellant purchased the suit house from the First Respondent on 24/05/2008 for consideration of Tsh 35,000,000 as per sale agreement exhibit K1, and the original offer exhibit K2 was handed on to the Appellant, along an affidavit for consent of the late Mussa Kondo Mjenga to sale a suit house but upon probate of the late Musa Kondo Mjenga the house was granted to Radhani Musa Kondo (heir) and the First Respondent (heir and legal representative). He submitted that the duo decided to sale the house to the Appellant and requested to continue staying in the suit house pending completion of their house at Makongo, as per affidavit dated 24/05/2008 exhibit K4. He submitted that during transfer of the suit property at Kinondoni Municipal Council, it was discovered that the same property has been sold to the Second Respondent on 31/09/2009 by the First Respondent the very person who sold it to the Appellant. He submitted that the matter was reported to Oysterbay Police by the Second Respondent, where the Appellant was arrested and remanded for allegation of forging documents. He submitted that upon investigation it was discovered that it was the First Respondent who sold the property to the Appellant on 24/05/2008 and to the Second Respondent on 31/01/2009 as per copy of police letter for investigation exhibit K5. He submitted that the above evidence by the Appellant suffices to prove that he was the lawful owner of the suit house. He submitted that on the second sale dated 31/01/2009 the First Respondent had no property to sale for an argument that it was already the property of the Appellant, faulting the Tribunal for failure to analyze exhibit K5. He submitted that the Appellant was the first purchaser argued the First Respondent had no title to pass again to the Second Respondent. He cited the case of Abdallah Irunde vs Msunga Ntunda and Another, Misc Land Appeal No. 38 of 2019, for a proposition that a person without good title cannot pass a good title to the transferee. He submitted that it was the responsibility of the Second Respondent to investigate the title of the property before purchasing. He submitted that it is established principle of law that the buyer must obtain all available information before he finalize the purchase making reference to the doctrine of caveat emptor. He submitted that the Second Respondent had no any document concerning the suit property other than a contract of sale dated 31/1/2009, arguing the document for ownership are in possession of the Appellant. He faulted the Tribunal, arguing had it analyzed the Appellant's evidence properly could have discovered that the First Respondent had no good title to pass to the Second Respondent, for an argument that the suit house was already sold on 24/05/2008 to the Appellant along original offer, consent affidavit of the sons of the deceased, legal representative form signed by the First Respondent, sale agreement signed by the First Respondent as legal representative of the late Musa Kondo, affidavit to stay in the suit house signed by the First Respondent and his brother Ramdhani Musa Kondo, arguing the Second Respondent failed to do due diligence on the suit property. He cited Ombeni Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal No. 33 of 2017 CAT, for a proposition that the seller having first sold the suit land to the Appellant then had no good title to pass to the Second Respondent. Ground number two, the learned Counsel submitted that the Appellant proved his case, for the explanation that he tendered original offer exhibit K2, consent affidavit of

the sons of the deceased with coloured photographs exhibit K3, legal representative form signed by the First Respondent, sale agreement exhibit K1, affidavit to stay in the suit house exhibit K4 signed by the First Respondent and his brother Ramadhani Musa Kondo, investigation report exhibit K5 which proved that the First respondent signed both sale agreements dated 24/05/2008 and 31/01/2009, transfer forms and legal representatives form exhibit K3. He submitted that all these exhibits were sufficient to prove the Appellant case on the required standard of probability, citing page sixteen of the impugned judgment that the Tribunal agreed that the Appellant purchased the house in dispute from the First Respondent but the only problem is that the Appellant contradicted to his evidence. He submitted that the Tribunal deviated to determine substantive justice and deprived the Appellant property contrary to Article 107A(2)(e) of The Constitution of the United Republic of Tanzania, 1977 as amended, arguing exhibit K5 proved that the Appellant is the lawful owner of the suit house for the explanation that he was the first purchaser. He submitted that paragraph 7(b) of the application which was relied by the Tribunal, that the Appellant failed to prove the amount of Tsh 100,000,000, arguing still does not defeat the truth that the Appellant was the first purchaser of the suit house. He submitted that it was a technical error of typing from the advocate, for reason that sale agreement exhibit K1 depict a consideration stated above. He submitted that the Tribunal was under obligation to read the whole pleadings and annexures, for an argument that annexures are part to pleadings. He cited Elizabeth Solomoni Mbwilo vs Emmanuel Pius Msekwa and Another, Land Case No. 379 of 2017 Land Division; Investment House Limited vs Webb Technologies (T) Limited and Two 6 others, Commercial Case No. 97 of 2015; Yara Tanzania Limited vs Ikuwo General Enterprises Limited, Civil Appeal No. 309 of 2019 CAT. Ground number three, the learned Counsel submitted that the issue of Tsh 100,000,000 was not in dispute and the Tribunal dismissed the Appellant's application basing on technical ground, reiterating it being a typing error. Ground number four, the learned Counsel submitted that in investigation report exhibit K5 nowhere showing any fraud on the Appellant's side of inducing the First Respondent. He faulted the testimony of DW2, DW3 that they were lying to say the Appellant induced the First Respondent. He submitted that the truth is that the Appellant purchased the suit house from the First Respondent on 24/05/2008 and the Second Respondent purchased the same house from the First Respondent on 31/01/2009. He submitted that the evidence of the Appellant was credible enough compared to the Respondents, for the explanation that the evidence of the Appellant was in conformity with the documents tendered. Ground number five, the learned Counsel cited Florian M. Manyama and Another vs Maximilian Thomas, Civil Application No. 121 of 2020 CAT. He submitted that exhibit K5 was enough to prove the Appellant's case that the First Respondent sold the suit house to the Appellant citing the sale agreement dated 24/05/2008, arguing it was not objected on admission. He submitted that calling advocate Kiozya was of important if the exhibit could have been objected or disputed. Ground number six, the learned Counsel submitted that it is the law that the court cannot grant the relief not claimed or sought by the party, arguing the Second Respondent was granted relief which was not sought for the explanation that she ought to file a counter claim. Ground number seven, the learned Counsel submitted that the Appellant's evidence was sufficient enough even without calling the said advocate Kiozya. He submitted that exhibit K5 touches investigation done to Advocate Kiozya, arguing nothing new could have

testified by him to what is stated in exhibit K5. Ground number eight, the learned Counsel cited page fourteen of the impugned judgment, he submitted that exhibit K4, K5, K2 and K3 support the act of purchase by the Appellant, argued if the Tribunal could have evaluated well the evidence could have delivered the judgment in favour of the Appellant. Ground number ten, the learned Counsel submitted that exhibit K1, K2, K3, K4 and K5 reveal the Appellant was in possession of the suit house. He submitted that exhibit D3 the Second Respondent purchased the said property from the First Respondent. He submitted that all the transaction made after 24/05/2008 concerning the suit property by the First Respondent were illegal intended to deprive the Appellant's property. He faulted exhibit D2 that it contradicts on the years somewhere depict 2008 and below reflect 2009. Ground number nine, eleven, and fourteen the learned Counsel reiterated the same arguments that the testimony and documentary evidence reveal the Appellant was the first to purchase the suit house, argued was supported by DW1, DW2, DW3. He cited the same Article 107A(2)(e) of the Constitution, for the proposition of substantive justice, recited paragraph 7 of the application at the Tribunal. Faulted the Tribunal for making "U" turn for holding that the Appellant failed to prove his case. The learned Counsel repeated the argument regarding non summoning of Advocate Kiozya, M.M., for the explanation that it was cured by a report exhibit K5 along sale agreement exhibit K1. Grounds number twelve, thirteen, the learned Counsel submitted that the First Respondent's written statement of defence was prepared by Advocate Mluge Karoli Fabian from MK Law Chambers and was the one who was representing the First Respondent before commencement of hearing and the Second Respondent enjoyed the service from BEMORA Attorneys whom Advocate Mashaka Mfala (DW2) is a managing partner. He submitted that from 9/06/2021 the Respondents were both represented by Advocate Alphonse Kubaja from BEMORA Attorneys, arguing that the representation of the First Respondents prejudiced the Appellant right, for reasons that Advocate Kubaja was aware with confidential information from the First Respondent and the Second Respondent, arguing it is a reason during defence of the First Respondent, he notified the Tribunal that he made several communication with the First Respondent who later said is not interested with the matter. He submitted that Advocate Kubaja has conflict of interest for reason that it is his law firm which prepared the sale agreement dated 31/01/2009 by Advocate Mashaka Edger Mfala the managing partner of BEMORA attorneys. He submitted that the act of Advocate Kubaja representing both the First and Second Respondent, prejudiced the Appellant on the explanation that Mr Kubaja was aware with the outcome of the case if the First Respondent will appear for trial, arguing it is a reason the First Respondent dogged proceedings, He submitted that it prejudiced the Appellant's right to cross examine him, affected fairness and confidence, integrity and reputation of judicial/tribunal proceedings in administration of justice. He cited UAP Insurance Tanzania Limited vs Akiba Commercial Bank, Civil Appeal No. 135 of 2022; Ciemence O. Mbowe vs Donald A. Kimambo, Civil Appeal No. 240 of 2022. Mr. Alphonse Peter Kubaja learned Advocate for the Second Respondent, combined grounds number one, two, six, seven, eight, ten and fourteen, argued all together. He submitted that the spirit of these grounds of appeal is to establish Appellant's ownership to the suit property. He submitted that it's a 10 cherished principle of law that, generally in civil cases the burden of proof lies in the party who alleges anything in his favor, citing section 110 of the Law of Evidence Act, Cap 6 R.E 2019. He submitted that before the

trial Tribunal the Appellant had a duty to prove that he bought lawfully the suit property from the First Respondent. He submitted that the Appellant pleaded that he bought the suit property for Tsh 100,000,000.00 and in the sale agreement the First Respondent acknowledged to receive the said amount (sic). He submitted that as a matter of law the Tribunal was duty bound to make sure that it does not decide in favour of a party whose evidence contradict his pleading, citing National Insurance Corporation Vs. Sekulu Construction Company 1986] T.L.R 157, for a proposition that parties to dispute are not, during trial, allowed to depart from pleadings by adducing evidence which is extraneous to the pleading. He submitted that under the Appellant pleading (application) filed before the Tribunal, specifically under paragraph 7(b) pleaded that on 24.05.2008 he purchased the suit properly from the First Respondent for a consideration of Tsh 100,000,000.00 and the First Respondent acknowledged to receive the said amount in the sale agreement. He submitted that basing on the principle stated under the case National Insurance Corporation (supra), the Appellant was bound to give evidence that support the fact on the pleading that he brought 11 the suit property for Tshs 100,000,000.00 and the First Respondent acknowledged to receive the said amount in the sale agreement, but he failed to do so. He submitted that the Appellant tendered sale agreement (exhibit K.1) which reads he paid Tshs 35,000,000.00, arguing this is a clear proof that the Appellant failed to prove that he paid Tshs 100,000,000.00 as he pleaded and testified. He submitted that in his submission. Counsel for the Appellant quoted the case of Abdallah Irunde (supra). He submitted that the Appellant Counsel cemented that the First Respondent on 31st January, 2009 when he disposed the suit property to the Second Respondent he had no property to sale as he previously sold it to the Appellant on 24/05/2008. He submitted that he do agree with the position given in the case Abdallah Irunde (supra), however opined that the position is against the interests of the Appellant. He submitted that the Counsel for the Appellant tries to establish that the Appellant bought the suit property from a person with a good title (the First Respondent who at the time of sale was acting as administrator of the estates of Mussa Kondo), but the truth is that the First Respondent had no good title to pass to the Appellant. He submitted that it is a matter of law that an appointment of one being administrator does not give him a right to sell the property instead, he has to adhere to section 67 of the Land Registration Act, Cap 334 R.E. 2019 so as to acquire good title to pass. He submitted that it's undisputed that during trial the 12 suit property were registered under the name of deceased Mussa Kondo, citing exhibit K2. He submitted that before the trial Tribunal the Appellant testified that at the time of sale he was supplied by the First Respondent with application for legal personal representative, exhibit K3, arguing the said application for legal personal representative bearers the same date with the sale agreement between him and the First Respondent and they were under possession of the First Respondent, arguing it was not registered by the Registrar/relevant authority. He submitted that this is clear that the First Respondent at the time of executing sale agreement exhibit K1 with the Appellant the suit property still belonged to the deceased Mussa Kondo contrary to section 67 Cap 334 (supra). He submitted that it has to be clear that during trial the Appellant never tendered any evidence proving that the First Respondent was a registered owner in place of the deceased Mussa Kondo, arguing the only evidence the Appellant tendered is exhibit K2 which disprove First Respondent ownership. He cited the case of Philemon Vanai Saiteru Mollel Versus William Titus Mollel (as an

Administrator of the Estate of Late Titus Aron Moilel, Civil Appeal NO. 407 OF 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 9 and 10. He submitted that it's clear that the agreement between the First Respondent and Appellant were inoperative as the purported 13 vendor/First Respondent was not the owner hence, he had no good title to pass to the Appellant. Ground number three, the learned Counsel submitted that during trial, the Appellant's Advocate was representing the Appellant, and he was present when the Appellant was cross-examined by the Respondents' Advocate where he (Appellant) maintained that the agreed purchase price was Tshs 100,000,000.00, and that he paid Tshs 100,000,000.00 before his lawyer identified in the name of Kiozya. He submitted that if it was a typing error by the Advocate as suggested by the learned Counsel for Appellant, why did the Appellant proceed to maintain that he paid Tshs 100,000,000.00! He submitted that this is a Court of records, argued that this kind of devil spirit be not allowed to affect rights of the innocent party (Second Respondent). For ground number four, eleven, the learned Counsel submitted that in his testimony the Appellant said that he bought the suit property for 100,000,000.00, exhibit K1 shows that he bought for 35,000,000.00 but his pleading and his testimony in cross examination shows that he paid 100,000,000.00 to the First Respondent. He submitted that the Appellant's testimony and evidence reveal that he is unreliable witness. He cited Emmanuel Abraham Nanyaro v Peniel Ole Saitabau [1987] TLR 47 for a proposition that unreliability of witness conflicts, inconsistencies in their 14 evidence entitle judge to reject evidence. He submitted that the Tribunal was correct not to decide in favour of the Appellant. He submitted that before the Tribunal the Appellant alleged that on 24/05/2008 the First Respondent was the administrator of the estates of his late father one Mussa Kondo who is the original owner of the suit property, but in his testimony he did not tender letters of administration to prove that on 24/05/2008 the First Respondent was the administrator of the estates of his late father. He submitted that during defence hearing DWI tendered exhibit D1 (Form No 1 and 2) used by the First Respondent to apply for the letter of administration, they read that they were filed on 18/9/2008. He submitted that if counting monthly interval from when the First Respondent filed or applied for a letter of administration as per exhibit D1 (which is dated 18/9/2008) to the date of execution of sale agreement between the Appellant and First Respondent as per exhibit K1 dated 24/05/2008) one will realize that the sale agreement was executed four months before the First Respondent applied for a letter of administration of the estates of the late Mussa Kondo. He submitted that based on exhibit D1 it's doubtful if the First Respondent at the time of executing sale agreement he was the administrator. He submitted that to clear that doubt the Appellant had duty either to tender letter of administration or to call the First Respondent as his witness to testify on it, but he never did that. He submitted that it is a matter of law that a competent person to transact or to act on behalf of the deceased person is the executor or administrator, citing section 99 of the Probate and Administration of The Estates Act, Cap 352 R.E. 2019. He submitted that the Appellant's failed to clear doubt if the vendor was a proper person as per section 99 Cap 352 (supra). He submitted that the Appellant's credibility was doubtful before the Tribunal as himself on cross examination told the trial Tribunal that he paid to the First Respondent Tsh 100,000,000.00 and on the sale agreement the First Respondent acknowledged to receive the same but for the purpose of tax evaluation they wrote Tsh 35,000,000.00 in the sale agreement exhibit K1. He submitted that apart from the said act to shake

credibility of the Appellant but also is an offence which contravenes the provisions of tax laws, and this involves procedures provided by the Tax Administration Act, 2015, arguing it could have been awkward for the trial Tribunal to decide in favor of the Appellant while he has acknowledged that the sale of the suit property between him and First Respondent were purposively designed with intent to commit crime under the tax regime. Ground number five and nine, the learned Counsel submitted that it is a principle of law that any person present in a certain action or event in question, should be called as witness and failure to do so the court will draw an inference that if the witnesses were called they would have given evidence contrary to the 16 patty's interests, citing Hemed Said vs. Mohamed Mbilu [1984] TLR113. He submitted that in this matter the Appellant testified that Advocate Kiozya was a witness on the said agreement between him and the First Respondent, but the Appellant did not call the said Advocate Kiozya as his witness as the said agreement was in question. He submitted that the Appellant did not even say why he failed to call Advocate Kiozya, arguing it was proper for the Tribunal to draw inference that if Advocate Kiozya would have been called, he would have testified contrary to the Appellant's interests that is why he opted not to call him. He submitted that in the circumstances of the matter at hand a witness to the agreement between the Appellant and the First Respondent was a key witness to be called. Ground number twelve and thirteen the learned Counsel submitted that the argument of the Appellant's advocate is misplaced for the explanation that: first it's not a proper forum, secondly this concern were not raised at the trial Tribunal hence it's new fact which cannot be raised at appeal stage. He submitted that they have read carefully regulation 35 and 45(1) of the Advocate (Professional Conduct and Etiquette) Regulations, GN No. 118/2018 which prohibit Advocate to act for client where the interests of the client are in conflict with the personal interests of the Advocate or the interest of any person in his firm are in conflict. He submitted that under this regulation it's clear that the client's interest must be in conflict with personal interest of the Advocate or interest of the firm member of the Advocate. He submitted that the Appellant's Counsel argued that is Advocate Mashaka Edgar Mafala who is a Managing Partner of BEMORA Attorneys is the one who drafted sale agreement between the Respondents in 31/01/2009, the questions here are as follows: One, whether client has interests in the said contract; Two, whether Advocate Mashaka Edgar Mafaia draws the said contract; Whether Advocate Mashaka Edgar Mafala and Alphonse Peter Kubaja has interest on that contract; Four, whether the interests of the client are in conflict with interests of the advocates (Mashaka and Kubaja). He submitted that the issue that Advocate Mashaka is a Managing Partner of BEMORA Attorney is nowhere in the proceedings of the Tribunal, arguing it's a new fact in this case. For issue number one, the learned Counsel submitted that issue number one is clear that on the said sale contract the interest of the Respondents was to enter into sale transaction; issue number two, the records of the Tribunal reads that the sale contract between the Respondent were drafted by the parties themselves, citing exhibit D2. He submitted that it's untrue as submitted by the Appellant Counsel that it was prepared by Advocate Mashaka (BEMORA Attorneys); issue number three he submitted that there is no any records in the Tribunal that discloses the interest of Advocate Mashaka and Kubaja on exhibit D2, arguing they cannot assume; 18 issue number five, there is no any conflict as no Advocate claims any interest to the suit property, and the records and proceedings are silent on that. He submitted that they see the

said regulation is not fit in our circumstances. He submitted that they have ready carefully regulation 46(l)(b) GN No. 118/2018 (supra) which refers to Advocate acted as mediator or arbitrator. He submitted that this is a new fact and at no time both Advocate Mashaka and Kubaja either acted as mediator or arbitrator, arguing the records/proceedings are silent on that. On rejoinder, the learned Counsel for Appellant submitted that the Appellant proved to have purchased the suit property from Moshi Musa Kondo as an administrator of the estate of the deceased for consideration of Tsh 35,000,000 as per exhibit K1 which was part of pleadings. He distinguished the case of National Insurance Corporation (supra) for reason that it is irrelevant. He submitted that a figure Tsh 100,000,000 at paragraph 7(b) of the Appellant's pleading (application) was a typing error. He submitted that exhibit K1 was executed lawfully for an argument that the seller was the administrator of the deceased estate vide Probate Cause No. 26 of 2003 appointed on 27/02/2003. He submitted that the issue of administration was not in dispute, arguing letters of administration were filed on 26/05/2022 which form part of pleadings. He submitted that there is no claim for tax dispute here, arguing the dispute is 19 about a house at Plot No. 229 Wibu Street Kinondoni. He submitted that exhibit K5 was sufficient enough justification of the evidence adduced at the Tribunal, arguing even Advocate Kiozya could have appeared would have nothing new apart from the report of investigation. He submitted that the Counsel for First Respondent did not dispute the following facts: that Advocate Mashaka Edger Mfala (DW2) is not a managing partner of BEMORA Attorneys and the one who drafted the sale agreement dated 31/01/2009; BEMORA Attorney through Advocate Kubaja represented the seller and buyer at the Tribunal who entered sale agreement dated 31/01/2009; that on 24/08/2023 Advocate Mashaka and appeared in this appeal. He submitted that those acts prejudiced the Appellant's case and right for the Appellant whereas BEMORA Attorneys through Advocate Kubaja to represent both Respondent and Advocate Mashaka managing partner to act as a witness in the said case. On my part I will deliberate along the pattern adopted by the learned Counsel for Appellant. Ground number one. There is no dispute that the Appellant purchased the suit house from the First Respondent on 24/05/2009 as per exhibit K1. There is no dispute that the Second Respondent purchased the same house on 31/01/2009. There is no dispute that the vendor to both the Appellant and Second Respondent was the same to wit the First Respondent. There is no dispute that 20 the Appellant was the first to purchase the suit house. Indeed, exhibit K5 recognized both the Appellant and the Second Respondent as purchasers. At page two second paragraph from bottom of a letter drafted by the State Attorney In-charge part of exhibit K5, reads, 'Kutokana na ushahidi! huu tumeona ni dhahiri kuwa kiwanja hicho kinamilikiwa na watu wawHina hivyo hakuna ubishi kuwa mgogoro katika umiHki wa eneo hUo' On the same page second paragraph, the author opined, 'Kwa kuzingatia ushahidi huu tumebain! kuwa ni wazi kuwa mtuhumiwa MOSHI MUSSA KONDO (folio D) ndiye aiiyeuza kiwanja Na. 229 kiichopo mtaa wa Wibu kwa watu wawiii tofauti' Therefore I fail to get the logic of a complaint by the learned Counsel for the Appellant who forceful argued that exhibit K5 had it been considered, the Tribunal could had ruled in favour of the Appellant. On my part I am not seeing even a remote possibility for such verdict to be derived from exhibit K5. This is because exhibit K5 merely confirmed that the vendor disposed the suit house twice and that the evidence available suffices for lodging a civil suit. At page sixteen second paragraph seventh line from the bottom of the

impugned judgement, the learned Chairman considered exhibit K5 in line to what the learned State Attorney In-charge opined above. Arguably, exhibit K5 was not extensively examined and evaluated. However, even if you search and analyze contents of exhibit K5 day and night, still the Appellant could not yield the intended result suitable for him. As aforesaid, exhibit K5 merely establish a fact that the First Respondent disposed the suit land twice. As to who is having a good title, exhibit K5 cannot suffice to cure or solve. This findings take into board ground number five. Ground number two. At the Tribunal it is the Appellant who sued claiming ownership over the suit land. In other words it was his case. It was his primary obligation to prove all facts pleaded in order to establish that on the balance of probability he had a better title. Admittedly, the Appellant tendered all those documentations including: sale agreement exhibit K1; original offer exhibit K2; application for disposition, consent affidavit of the sons of the deceased with coloured photographs, application by legal personal representative, notice of a disposition all were admitted as exhibit K3 collectively; affidavit to stay in the suit house exhibit K4 signed by the First Respondent and his brother Ramadhani Musa Kondo, investigation report exhibit K5 which proved that the First respondent signed both sale agreements dated 24/05/2008 and 31/01/2009; assessment for property tax exhibit K6. But the question is whether the documentations enumerated above enabled the Appellant to prove his claim and pleaded facts. It is to be noted that a suit 22 before the Tribunal was initiated by way of pleadings (application), where at paragraph 7(b) the Appellant pleaded a purchasing price of Tsh 100,000,000/=. However, in evidence he tendered a sale agreement exhibit K1 depicting he purchased at a consideration of Tsh 35,000,000 only. The learned Counsel for Appellant termed this anomaly as topographic error. But this argument is not supported by any evidence in record. At the Tribunal the Appellant who testified as PW1 when he was cross-examined by Mr. Elisaria Mosha learned Advocate he stated that he purchased the suit house for a consideration of Tsh 100,000,0000, and he went on confirming the same fact for the second time that the actual purchasing price was Tsh 100,000,000. When was further cross examined, PW1 asserted that the vendor is the one who requested for a sale agreement to reflect a figure of Tsh 35,000,000. The question of typing error was not stated by PW1. Even on re-examination the learned Counsel for Appellant who was also representing the Appellant before the Tribunal, did not ask PW1 this fact for PW1 to clarify more and put records straight. As such, the uncertain and contradictions introduced by the Appellant regarding as to what was the actual purchase price, on it self amounted to a total failure to prove this fact. Again, the offer of a right of occupancy exhibit K2 reflect the name of Mr. Mussa Kondo. In a sale agreement exhibit K1 suggest that the vendor was the legal representative of the estate of the late Mussa Kondo vide Probate Cause No. 26 of 2003 Kinondoni Primary Court. However, Form No. I exhibit D2 and Form No. II exhibit D1 suggest the First Respondent petitioned to be an administrator on 18/09/2008. PW1 when he was cross-examined by Mr. Elisaria Mosha learned Advocate he stated, 'VHanza mkataba wa mauzo na niUpotaka fomu ya transfer ndio Moshi akafuata fomu za mirathi' Nowhere the Appellant tendered Form No IV for appointing the First Respondent as an administrator of the estate of the late Mussa Kondo Majenga. The law on probate is clear that only the executor and administrator formerly appointed by the court can act on the estate of the deceased. According to section 99 of the Probate and Administrate of Estate Act, Cap 352 R.E. 2019, provide, 'The executor or

administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such' Section 101 Cap 352 (supra) provide, 'An executor or administrator has, in respect of the property vested in him under section 99, power to dispose of movable property, as he thinks fit, and the powers of sale, mortgage, leasing of and otherwise in relation to Immovable property conferred by written law upon trustees of a trust for sale' 24 The argument of the learned Counsel for Appellant that letters of administration were filed on 26/05/2022 which form part of pleadings, is suspect. This is for reason that if the First Respondent was granted letters of administration since 27/02/2003 as reflected in the said notice to produce filed on 19/07/2022, why on 18/09/2008 the Appellant made another application for appointment vide exhibit D2, in the same file. And why the same probate court embarked on issuing citation for publication on 18/09/2008 vide exhibit D1. And why this letter of administration attached on a notice to produce, was not available during sale and transfer? Importantly the document annexed to a notice to produce was not tendered in evidence. And it was not stated as to where and when it was procured and it was filed belatedly during defence case. The said document which is in the form of a faded photostat, reflect having three court seal, and at the bottom was certified twice as follows 'HU NINAKALA HALISI Sgdn HAKIMU MAHAKAMA YA MWANZO KINONDONI WILAYA YA KINONDONI' Again, it was re-certified as follows, 'CERTIFIED TRUE COPY Sgn 18/04/08 MAHAKAMA YA MWANZO 25 MAGOMENI WILAYA YA KINONDONI' It is to be noted that the said letter of administration purport to have been issued by Kinondoni Primary Court, surprisingly the second certification was done at Magomeni Primary Court. This render the document suspect as far as its authenticity is concerned. This adumbration takes into board ground number three, four, eight, nine, ten, eleven as well. Ground number six, this ground is wholly unmerited. In both the impugned judgment and award, nowhere the Tribunal granted any relief to the Respondents. What the Tribunal ruled was that the Appellant failed to prove his claim and the suit was dismissed with costs. Unfortunately, the learned Counsel for the Appellant did not say which type of a substantive relief was granted to the Respondents in the absence of the said counter claim. This ground is mischievous. Ground number seven, at page sixteen paragraph one, the Tribunal ruled the Appellant to have failed to call crucial witness. This finding was made when the Tribunal was deliberating on the confusion of what was the actual purchase price, whether Tsh 35,000,000 as reflected in the sale agreement exhibit K1 or Tsh 100,000,000 as per oral account by the Appellant. Therefore, the Tribunal was of the view that had the alleged Advocate Kiozya had been summoned to testify could had assisted to clarify as to what he attested and witnessed during 26 sale. Therefore, as per the findings in ground number two above, Advocate Kiobya was a key witness. Hence failure to summon him was detrimental to the Appellant's case. Ground number twelve and thirteen. The argument of the learned Counsel for Appellant that Advocate Kubaja has conflict of interest for reason that it is his law firm which prepared the sale agreement dated 31/01/2009 by Advocate Mashaka Edger Mfala the managing partner of BEMORA attorneys, is misleading. As alluded by the learned Counsel for Second Respondent, the alleged BEMORA Attorneys or Advocate Mashaka Edger Mfala was not the one who prepared a sale agreement dated 31/01/2009 exhibit D3, rather reflect it was drawn by parties. Admittedly Advocate Mashaka Edger Mfala attested exhibit D3. But to my view I am not seeing any conflict of interest, for

reason that the Appellant was not privy to exhibit D3. Exhibit D3 was executed between the First and Second Respondent. To say the learned Counsel for Second Respondent had made several communications with the First Respondent who later said is not interested with the matter or dogged the proceedings, to my view it will be a mere speculation to say that the learned Counsel for Second Respondent was aware with the outcome of the case if the First Respondent will have appeared for trial. To my view, as alluded by the learned Counsel for Second Respondent that the client's interest must be in conflict with personal interest of the Advocate or interest of the firm member of the Advocate, which is not in this matter. Having said as above, the appeal is without merit. The decision of the Tribunal is upheld. The ap costs. AN DA UDGE /M/06/2024 Judgment delivered in the presence of Mr. Jonas Kilimba learned Counsel for 1/ the Appellant and in the absence of the First Respondent and Second Respondent. coURr E.B LUVANDA DGE 1/06/2024 28

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/313132/source_file/LAND_APPEAL_59_OF_2023.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/suleiman-said-marhsed-Ownershipofland-tanzlii-2023--6a3ea52c3b1caa91298259fb

Prepared on 14 October 2026 · Esheria