

TANZANIA / JUDGMENT

zaria seif ally vs fahme hamidu salum as administrator of the estate of fatuma issa barwany 2 others 2023 tzhclandd 17260 14 december 2023

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14 December 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 238 OF 2023 (Appeal from the Judgment and Decree of the Consolidated Land Application No. 524/2016 and 274/2020 of the District Land and Housing Tribunal for Ubungo by Hon. J.M. Bigambo-Chairman dated 2fM March 2023) ZARIA SEIF ALLY APPELANT
VERSUS FAHME HAMIDU SALUM (as administrator of the estate of FATUMA ISSA BARWANY..... 1st RESPONDENT ZEYANA SEIF ALLY..... 2nd RESPONDENT ABUBAKARI HAJI..... 3rd RESPONDENT

JUDGMENT

Date of last Order: 05/12/2023 Date of Judgment: 14/12/2023

- k. MSAFIRI, J. The appellant hereinabove was dissatisfied with the judgment and decree of the District Land and Housing Tribunal of Ubungo at Luguruni (herein as the trial Tribunal) in Consolidated Land Application No. 524/2016 and 274/2020 which was delivered on 28/3/2022. She has appealed to this Court and advanced a total of nine (9) grounds of appeal which I have no intention or reproducing here but I will refer to them during determination of the same. i Before going into the hearing of the appeal, the brief background of the dispute is apposite. As pointed earlier, this appeal originates from the Consolidated Applications Nos. 524/2016 and 274/2020. In the Application No.524/2016, Fahme Hamidu Salumu (as Administrator of the estate of the late Fatma Issa Barwany) then the applicant, sued Zaria Seif Ally(then 1st respondent) and Zeyana Seif Ally(then the 2nd respondent) claiming that she had bought a land from the 1st respondent Zaria Seif Ally. The land was described as the suit premises located at Mbezi- Msakuzi within Kinondoni Municipality. That after completion of sale agreement, then the applicant became the legal owner of the suit premises and started construction of a house on the suit premises. That when the construction reached foundation, the applicant received a stop order from Zeyana Seif, the 2nd respondent claiming to be the legal owner of the suit premises. The applicant demanded with other reliefs, that Zaria Seif Ally and Zeyana Seif Ally(the 1st and 2nd

respondents respectively) to pay her the specific damages to the land value of TZS 4,000,000/=. In Application No. 274/2020 Zaria Seif Ally (the applicant) sued Zeyana Seif Ally (1st respondent) and Abubakar Haji (2nd respondent). The applicant claimed that the suit premises is her lawful property having bought it from one Japhet Bazili. That she had entrusted the disputed land 2 to her blood sister the 1st respondent to take care of the same but in 2017 the 1st respondent sold the disputed land to the 2nd respondent, Abubakari Haji pretending that she is the lawful owner of the disputed land. The applicant prayed for the declaration that she is the lawful owner of the disputed land and the respondents are the trespassers. The two Applications were consolidated and heard jointly. After hearing the evidence of parties to the suit, the trial Tribunal declared that the applicant Fahame Hamidu Salum as the administrator of the late Fatuma Issa Barwany is the lawful owner of disputed area which measures 20 x 20 which she bought from Zaria Seif Ally (now the appellant). The Tribunal also ordered that the then 2nd respondent Zeyana Seif to pay the applicant Fahame Hamidu, general damage of TZS 3,000,000/= with the costs of that suit. The trial Tribunal dismissed the Application No. 274/2020 of the 1st respondent Zaria Seif Ally against the 2nd and 3rd respondents and ordered each party to bear its own costs. This decision aggrieved the 1st respondent Zaria Seif Ally and she has filed the current appeal. The hearing was by way of written submissions as per the consent of the parties and leave of the Court. The appellant's submission was drawn and filed by herself as she appeared in person. The reply 3 submission by the 1st respondent was drawn and filed by Mr. Richard D. Ernest, learned advocate while the reply submissions by the 2nd respondent was drawn and filed by Mr. Magwangala, H, learned advocate. There was an ex-parte order by the Court against the 3rd respondent upon proof that the same was dully served and for reasons known to himself did not appear in Court. In appellant's submission, she consolidated ground Nos. 1, 2, and 3 of the appeal. That the trial Tribunal erred by failing to evaluate the evidence raised by the appellant that she bought the two disputed pieces of land on 14/3/2011 from one Japhet Shirima as shown in the sale agreement admitted as exhibit D2. That being the legal owner, in 2014 she had three plots and decided to sell one piece to one Fahme Hamidu measuring 20x20 sqm and left with two plots which are now in dispute. That the appellant travelled to South Africa and gave her sister the 2nd respondent to oversee the suit premises. That the appellant received a call from the 1st respondent claiming that she has started construction on the suit premises she bought from the appellant but the 2nd respondent has issued a stop order for the 1st respondent to stop the building process. That the appellant filed the case against the 2nd respondent in the local government granted the appellant as the legal owner of the disputed 4 pieces of plots. The appellant stated that the evidence of the appellant was heavier on the balance of probability. The appellant consolidated the grounds No. 4 and 5 and submitted that the trial Chairperson erred by failing to analyze properly all the issues raised resulting in granting the 2nd respondent as the legal owner of the two disputed plots. That the trial Chairperson wrongly relied on the agreement between the 2nd respondent and the appellant on the transfer of title from the appellant to the 2nd respondent on the two disputed pieces of land in which the decision was made by the local government which have no legal authority to transfer titles. The appellant also consolidated grounds Nos. 6 and 7 and

submitted that the trial Chairperson erred when he held that the 2nd respondent is the legal owner of the two disputed pieces of plots as no proof given to the Court to ascertain whether the disputed land was bought on behalf of their relatives. That there was no proof of payment that there was transfer of money from their relatives to the appellant as the vendor of the two disputed land recognized the appellant as the lawful owner and buyer of the two disputed plots. The appellant consolidated the grounds Nos. 8 and 9 and stated that the trial Chairperson erred as the transfer of titles made by the local 5 government of Mbezi Msakuzi has no legal authority or mandate to transfer titles from the appellant to the 2nd respondent. The appellant prayed that the appeal be allowed and the impugned judgment and decree be quashed and set aside. In reply, Mr. Ernest for the 1st respondent submitted that in all nine

- (9) grounds of appeal there is no any ground which is against the 1st respondent as the appellant have not objected the fact that she sold her one piece of land to the 1st respondent. That at the trial Tribunal, the dispute involved three pieces of land while in this appeal, the appellant is complaining about her two pieces of land which was awarded by the trial Tribunal to the 2nd respondent. That, this shows clearly that the appellant has no cause of action against the 1st respondent. Mr Ernest prayed for the Court to dismiss this appeal with costs in favour of the 1st respondent. Also in the reply, Mr Magwangala for the 2nd respondent submitted generally that it is not disputed that the land in dispute was fraudulently written in the name of the appellant but later on the plots became into the hands of the 2nd respondent as it is seen at page 9 of the impugned

judgment.

That, furthermore when the Ward Tribunal was determining the rightful owner of the disputed land, it was of the view that the same 6 belongs to the 2nd respondent and that even the appellant was aware that the disputed land was under the ownership of the 2nd respondent. Mr. Magwangala submitted further that the appellant have proved herself that she received the money from the 2nd respondent to buy the land on her behalf. He concluded that the appellant allegations has no legal basis and the appeal be dismissed with costs to the 2nd respondent. Having gone through the submissions of the parties to this appeal along with the pleadings, and having read all nine (9) grounds of appeal, it is my view that they all mostly are based on the trial Tribunal's Chairperson failing to evaluate the evidence before him and hence arriving at the wrong and unjustifiable decision. Also the dispute surrounds the major issue of who is the lawful owner of the disputed plots between the two sisters, Zaria Seif Ally and Zeyana Seif Ally who are inhere as the appellant and the 2nd respondent respectively. This Court being the court of first appeal, it has duty or is entitled to revisit the evidence on record which was adduced during the trial and satisfy itself on whether the analysis and findings of the trial Tribunal was correct, (see the case of Lawrence Magesa t/a Jopen Pharmacy vs. Fatuma Omary & another, Civil Appeal No. 333 of 2019, CAT at DSM (Unreported). 7 During the trial, the appellant testifying as DW1 stated that, she bought three pieces of land with size of 20x20 each for TZS 6,000,000/= for all three plots. That she bought the plots from one Japhet Bazil. That she constructed one house which is not yet finished. That plots were purchased in 14/3/2011 and the plots are located at Mbezi Msakuzi. She

said that she sold one plot among the three plots to one Fatma Issa who is the mother of Fahmi Hamidu for TZS 4,000,000/= and that it was in 2014. That after that sale, DW1 travelled to South Africa but before that she hand over the remaining two plots to her sister Zeyana Ali (2nd respondent) asking her to take care of them while she was away. That the hand over was done at the office of the Street Government and was done in writing in a counter book at the said office. DW1 stated that when she was still in South Africa, the 1st respondent called her and informed her that Zeyana (2nd respondent) has stopped her from improving the plot which she has bought from the appellant claiming that she was the owner of said plot. That when she came back in Tanzania she confronted her sister Zeyana who claimed that the disputed area is hers and that she has stopped the 1st respondent from building on the plot and she (Zeyana) has sold the plot to the 3rd respondent Abubakari Haji. u- 8 That, DW1 filed a case against the 2nd respondent Zeyana Ally at the Street Local Government Office which decided that she is the lawful owner of the suit premises. That after that, she instituted an Application before the trial Tribunal which is the origin of this appeal. The decision of the Street Local Government was admitted as exhibit DI and the sale agreement was admitted as exhibit D2. DW2 was Andrew Evarist Urrio who said he was a Street Chairman of Mbezi Luis. That in 2015 Zaria (appellant) came at the office complaining that Zeyana(2nd respondent) has grabbed her three plots of land with size of 20x20 each located at Mbezi Msakuzi. That the street government leaders summoned Zeyana to the office and she arrived with other relatives. That Zaria was also present with a person who purportedly sold the three plots the leaders, one Japhet Shirima. That Zaria showed her sale agreement which was acknowledged by Japhet Shirima who admitted to have sold the disputed land to Zaria. DW2 said that the leaders asked Zeyana to show the proof of her ownership of the disputed land and she alleged that the plots were owned by their two brothers who are deceased. That Japhet Shirima denied to have sold the disputed land to Zeyana and denied the sale agreement of Zeyana. That there were two sale agreements, the first was produced by 9 Zaria was of 2011 and the second was produced by Zeyana which was dated 2012. That the leaders of the Street Government recognized Zaria as the lawful owner of the disputed land. DW3 was Zeyana Seif Ali. She testified that she is the owner of the three plots in dispute and she bought them at TZS 6,000,000/= in total. That each plot was bought at TZS 2,000,000/=. That she bought them from Abubakari Matole and Japhet Shirima and the one who received money was Japhet Shirima. That the sale agreement was entered at the Street Local Government before the Chairman one George Chanak, and the witnesses were Zaria Seif Ally and Bashiru Selemani Haji and Salum Hamis. She produced a sale agreement which was admitted as exhibit D3. That, in 2015 she was called by a cell leader of Mbezi Msakuzi and informed that there was a person who is constructing a house in her land and when she went there she found that it was one Fatuma Issa who was building in her area. That she complained at the Street Government office and Fatuma Issa was summoned. That when she was asked about the disputed plot, Fatuma Issa said that she bought the plot from Zaria Seif Ally. That Zaria refused to come to the Street Government office when she was summoned, and later the dispute was instituted at the trial Tribunal. L io DW3 said that Zaria Seif Ally and she, Zeyana Seif Ally are not the owners of the disputed land but the same was owned by their two brothers who were living outside the country and they sent the money to Zaria to buy the three disputed plots. She named the two brothers to be Majid Seif and Salum Seif. That it was

after the death of the two brothers when Zaria Seif Ally started to claim that the disputed land is her own. That Majid Seif died in 2014 and Salum Seif died in 2016. DW3 admitted to have sold a piece of disputed land to Abubakari Haji (3rd respondent) at a price of TZS 105,000,000/= and the sale was done on 26/10/2023 and it was not put into writings. That Abubakari Haji paid only TZS 80,000,000/=. That indeed Zaria bought the disputed land in 2011 but in 2013, the sale agreement was changed by Zeyana and their brothers. She produced two sale agreements which were admitted as exhibits D4 and D5. DW4 was one George Nchuma Chaiala who said that he was a member of the Street Government of Msakuzi Street. That in 2013, Zeyana Seif Ally, Zaria Seif Ally, Majid Seif Ally, Moza Seif Ally, Bashiru Selemani and Sahm Shamis came to the Street Government Office and requested for the change of ownership of the disputed plots from Zaria Seif Ally to Zeyana Seif Ally. That Majid Seif Ally wanted the changes to be made to the sale agreement to show the buyer of the plots to be Zeyana. That Zaria was asked to produce the sale agreement so that to effect changes but Zaria did not produce the said agreement stating that she did not have them at that time. Hence, they decided to draft another sale agreement showing that the buyer was Zeyana Seif Ally. That the new agreement was signed by both parties and witnessed at the Street Government Office. That Zaria was among the witnesses in the new sale agreement. Having gone through the records, it is clear that Zaria Seif Ally (appellant) claims to be owner of the disputed three plots, one of them she agreed to have sold to Fahme Hamidu Salum (the 1st respondent), while Zeyana Seif Ally claims to be the owner of the disputed land whereas she claims that the disputed plots belonged to their brothers Majid and Salimu who at first, sent money to the appellant to buy the plots but later effected changes of ownership from Zaria to Zeyana. She admitted to have sold the disputed pieces of land to Abubakari Haji. I have read the sale agreement Exhibit D2 which was produced by Zaria Seif Ally. It shows that on 14/03/2011, one Japhet Bazili Shirima sold pieces of land to Zaria Seif Ally which measured 20x40 m, 20x20 m 12 at TZS 6,000,000/= but she paid only TZS 3,000,000/=. That on 05/4/2011 the purchaser Zaria paid 700,000/= only. I have also seen exhibits D3, D4 and D5 which were produced by Zeyana. Exhibit D3 shows that on 06/9/2013 Japhet Basil Shirima sold a piece of land measured 20x20 to Zeyana Seif Ally for TZS 2,000,000/=. Exhibit D4 is also a sale agreement where it shows that Japhet Basil Shirima is selling a piece of land to Zeyana Seif Ally measured 20x20 and the sale was witnessed by Zaria Seif Ally and Salim Shamis. It was also signed before George Chawala, the cell leader of Msakuzi, and John Mabula, the Street Chairman. Exhibit D5 is similar to the contents of exhibit D4. In addition, I have noted that Exhibits D4 and D5 shows that they were entered on 06/10/2011. Having gone through the evidence of the appellant Zaria Seif Ally and the 2nd respondent Zeyana Seif Ally, I find that there is serious doubts on the evidence of the 2nd respondent Zeyana Seif Ally including the documents which she tendered in the trial Tribunal to prove her ownership of the disputed plots. My doubts are on the following pieces of evidence; First, Zeyana Seif Ally stated that the disputed plots belonged to neither herself nor her sister Zaria and that the plots were owned by their deceased brothers, Majid seif Ally and Salum Seif Ally. However, there was no proof on that claims. There was no proof either on the claims that the two brothers sent money to Zaria to buy the disputed plots. Second, despite the fact that Zeyana Seif Ally claims that neither of the two sisters own the disputed plots, she tendered the sale agreements which shows that she bought the disputed plots from Japhet Basil Shirima. I find

the evidence on the sale agreements wanting for reasons that Zeyana has three sale agreements, exhibits D3, D4 and D5. Exhibit D3 was entered on 06/9/2013, the exhibits D4 and D5 are similar and they were entered on 06/10/2011. This is contradictory to the evidence of Zeyana Seif Ally (DW3) who said that the sale agreements were changed in 2013. Furthermore, Exhibit D2 is a sale agreement between the same Bazili Japhet Shirima and Zaria Seif Ally. It was entered on 14/03/2011. I find it impossible for one vendor to enter into sale agreement with another vendor on the same disputed plot within a difference of about seven (7) months if these sale agreements are to be believed. If this was done then the sale agreements exhibits D4 and D5 between Zeyana Seif Ally and Japhet Shirima were void ab initio as there was already valid sale agreement between Zaria Seif Ally and the same vendor on the same disputed plots. At L- 14 Third, I have noted that despite oral evidence that the disputed plots are located at Mbezi Msakuzi, none of the sale agreements gives description and location of the purchased land in the sale agreement. Exhibit D2 only state the size of the purchased land and the purchased price but does not describe the purchased land. The case is similar to exhibits D3, D4 and D5. According to these documents, the parties to the dispute might be disputing on different pieces of land altogether. In addition there is no evidence whatsoever that Zeyana Seif Ally sold the piece of disputed plots to Abubakari Haji. It is only mere words of Zeyana Ally which was not supported by any other evidence be it oral or documentary. Even if there could have been evidence to support the claimed sale, the sale could have been void ab initio as Zeyana Seif Ally had no title to pass since she was not the owner of the land. In the circumstances, and weighing the evidence on balance of probability, I find that Zaria Seif Ally managed to establish ownership of the pieces of land as shown in exhibit D2. Having briefly analysed the evidence according to the evidence, I read the analysis, findings and the decision of the trial Tribunal in the Consolidated Land Application No. 524/2016 and No. 274/2020. The framed issues at the trial Tribunal were that first, who is the lawful owner of the disputed land? Second issue was if the answer to the first issue is in affirmative, then whether the sale of the disputed land between the 2nd respondent Zeyana Seif Ally and the 3rd respondent Abubakari Haji was lawful? The third issue was whether the sale of the part of the disputed land sized 20x20 m between the 1st respondent Zaria Seif Ally and the then applicant Fahame Hamidu Salum (administrator of Fatuma Issa Barwany) was lawful? On the first issue, the trial Tribunal determined and correctly found that there was sufficient evidence that the appellant Zaria Seif Ally purchased all three disputed plots from Japhet Basil Shirima on 14/3/2011. That this was proved by exhibits D2 and D1. The trial Chairperson found further that exhibit D3 was doubtful and disregarded it. This is clearly shown at page 11 and 12 of the impugned judgment. Exhibit D3 is a sale agreement which shows that Zeyana Seif Ally purchased the disputed plot from Japhet Basil Shirima. I subscribe to this decision by the trial Chairperson as I also found that the sale agreement produced by Zeyana Seif Ally was doubtful and could not stand in the presence of exhibit D2 which the trial Tribunal found to be authentic. It was surprising then that the trial Chairperson found that Exhibit D4 and D5 which were shown to be signed in 2011 were authentic and 16 that in the agreements, Zaria Seif Ally agreed to transfer her ownership of the disputed land to Zeyana Seif Ally. I am of the view that in this analysis, the trial Chairperson was misdirected and had he read the contents of exhibits D4 and D5, he would have found out that there was nowhere where Zaria Seif Ally, the appellant agreed

to transfer the ownership of the disputed plots to Zeyana Seif Ally, the 2nd respondent. Therefore the answer to the first issue should have been that the appellant (then the 1st respondent) was the lawful owner of the disputed plots. On the second issue, again, having correctly found that the appellant was the lawful owner of the disputed plot, the trial Chairperson erred when he decided that the said appellant agreed to transfer her ownership while there was no such evidence. The fact that exhibits D4 and D5 showed that Zaria Seif Ally signed as the witness on the disputed sale agreements was not evidence to prove that the appellant agreed to transfer her ownership. The trial Tribunal have already doubted the acts of Zeyana Seif Ally in the making and signing of exhibit D3 which was purportedly signed in 2013. It could not have then went on to believe the contents of exhibits D4 and D5 which were shown to be signed in 2011 and contradicting even the evidence of Zeyana Seif Ally who testified that 17 the changes were effected in 2013. This Court have already found that the contents of exhibits D4 and D5 were highly questionable. Basing on those facts, I find that the second issue on whether the sale of the disputed land between the 2nd respondent Zeyana Seif Ally and the 3rd respondent Abubakari Haji was lawful is answered in negative as Zeyana Seif Ally was not and is not the owner of the disputed land. On the third issue on whether the sale of part of the disputed land by the appellant to the now 1st respondent Fahame Hamidu Salum was lawful, it was correctly answered in affirmative by the trial Chairperson. The Chairperson was of the view that the appellant was the lawful owner of the said piece of land and I join hands to his findings. On the reliefs of the parties, the trial Chairperson correctly found that the 1st respondent Fahame Hamidu was entitled to his purchased piece of land on the suit plot and the costs of the suit. However, the trial Chairperson erred in his finding that the claims of the appellant against the 2nd respondent are not valid on the reason that the appellant had already transferred her ownership to the 2nd respondent. I differ in this position for the reasons I have already analysed herein above that the appellant has established to the satisfaction of the Tribunal that she was the lawful owner of the suit property. I have also disagreed with the trial 18 Chairperson's findings that the appellant transferred her ownership of the disputed plots to the 2nd respondent. There was no evidence that she did that. In that regard, I differ with the findings of the trial Tribunal on the ownership of the disputed land and hold that the appellant Zaria Seif Ally is the lawful owner of the disputed land and that she lawfully sold part of it to the 1st respondent Fahme Hamidu Salum (as administrator of the late Fatuma Issa Barwany). On the grant of costs, I share the views of the trial Chairperson that since the disputing parties are siblings, granting costs will fuel the already raging fire of dispute between them. I therefore issue no order as to the costs. In upshot and for the foregoing reasons, this appeal is allowed with no order as to the costs. A. MSFIRI JUDGE 14/12/2023 19

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Prepared on 14 October 2026 · Esheria