

IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT TUNGUU
CIVIL APPEAL NO. 49 OF 2022
(FROM CIVIL CASE NO. 12 OF 2021)

BETWEEN

1. OMAR SALUM SEIF
2. IBRAHIM BAKARI HUSSEIN APPELLANTS

AND

1. SAUMU ALI SAID
2. KHAMIS MOHD ALI RESPONDENTS

JUDGMENT

Dated: 30th May, 2023

S. HASSAN (J)

The appellants herein being dissatisfied by the judgment and decree of the Land Tribunal (Is-haka A. Khamis (RM)) dated 27th June, 2022, decided to appeal against the whole judgment and decree. In his memorandum of appeal, the appellants have advanced four grounds of appeals as follows:

1. That, the Land Tribunal erred in law and fact for disregarding the appellants' evidence and entering judgment in favour of the respondents.
2. That, the Land Tribunal erred in law and fact for failure to analyses documentary evidence adduced

3. That, the Land Tribunal erred by disregarding the 1st appellant evidence which proved that he was allocated the land in 2000 and developed it up to 2015 which is almost 15 years
4. That, the entire judgment of the Land Tribunal is problematic.

The brief background of this case is that, the appellants herein filed the petition No. 12 of 2021 in the Land Tribunal at Mwanakwerekwe against the respondents claiming that the respondents have encroached and trespassed part of the 1st appellant land situated at Langoni Maungani within Western District B in the Urban West Region. The appellants claimed that the respondents have constructed a house in the land illegally and hence prayed that the land tribunal to declare that the acre of land is the property of 1st appellant and ordered the respondent to stop trespassing in land.

On the otherside, the respondents denied the claim and stated that the 1st respondent purchased the plot No. 12 from Ghanima Mussa Haji on the 2018 he further aver that there is no evidence from the appellants to prove that they are the owners of such acre, they prayed the land tribunal to declare them as owners of such land.

The land tribunal heard the petition and final gave judgment and decree in favour of the respondents as follows:

1. Dai la waombaji halijathibiti hivyo linafutwa. (the petitioners have failed to prove their claim hence the petition is dismissed)
2. Muombewa Nam 1 ni mmiliki halali wa eneo lenye mzozo (that the 1st respondent is the rightful owner of the disputed land)
3. Waombaji wote wawili wanazuiwa mara moja kuwasumbua na kuwabughudhi Waombewa katika matumizi ya eneo hilo (that the petitioners are prohibited and stopped to interfere with the respondents while using their land)
4. Gharama za shauri kila upande ubebe zake (each part to bare its own costs)

The appellants are aggrieved with such decree hence this appeal.

In this appeal, the appellants were represented by learned Advocate Mr. Mohamed Idriss, while the respondents were represented by learned Advocate Mr. Emmanuel

John. On the 16 February 2023 when this appeal was fixed for orders, the parties were ordered to argue this appeal by way of written submissions. At this juncture, I must commend the advocates of both parties herein for the excellent work in the written submissions.

With respect to the 1st ground of appeal, Mr Moh'd submitted that, the evidence adduced by the respondents are weak and incredible and made reference to page 30 up to page 33 of the proceedings. He pointed out the weakness of DW1 evidence at page 33 of the proceedings and quoted the following words *'Omar Rashid mimi simjui, Ghanima hajanionesha umiliki wake kutoka taasisi nyengine ya Serikali zaidi ya kwa Sheha, sikumdadisi Ghanima kuhusiana na Omar Rashid alipokipata kiwanja, ila nimejiridhisha juu ya umiliki wa Ghanima katika eneo hilo, sijajua kama umiliki wa ardhi Zanzibar lazima utoke Serikalini, kipindi hicho Sheha alisimama kama shahidi na sio alotoa yeye kiwanja. Kwa mujibu wa karatasi zenu za mwaka 2015 mimi na Ibrahim, Ibrahimu inaonyesha kamiliki mwanzo. Mimi sielewi kati ya Omar Rashid na Omar Salum ni nani aliyekuwepo mwanzo. Ghanima kwa sasa yupo Dar es Salaam'* Mr. Omar went further to submit on the evidence of PW1 which shows that he was the owner of plot and eka as shown in the proceedings of the trial court from page 13 to page 15 where PW1 stated that *' nimekuja kutoa ushahidi juu ya eneo langu ambalo lipo Maungani. Eneo hilo nimelipata kwa kuomba Serikalini mnamo mwaka 2000 mipaka ya eneo hilo ni Kaskazini.* Furthermore Mr Moh'd submitted that the land tribunal Magistrate erred by not making efforts to check the validity of the agency document given to Omar Rashid to sell the plots, he made reference to the meaning of Power of Attorney as defined by the **Black's Law Dictionary 9th Edition at page 1289**. Mr Moh'd also made reference to **Order 111 Rule 10 (2)** of the Civil Procedure Rules Cap 8 of the Laws of Zanzibar, which provides for appointments either special or general to be made by an instrument in writing signed by the principal. To cement further his position Mr. Moh'd made reference to the Court of Appeal case of **Lujuna Shubi Balionzi, Senior v. Registered Trustees of Chama cha Mapinduzi [1996] TLR 203 and the case of Lazaro Kimbindu v. Athanas Mpondangi, High Court, Civil Appeal No. 137 of 2003** regarding the Power of Attorney. And on the issue of Agency, Mr Moh'd made reference to the following cases **Monica Danto Mwansasu**

(By virtue of Power of Attorney from Atupakisiye Kapyela Tughalaga) v. Esrael Hosea and 1 Other Land Revision No. 2 of 2021 High Court, Mbeya

With respect to 2nd ground of appeal, Mr Moh'd submitted that, the sale document of DW1 was made in 2018 while the appellants presented the title deed of the area since 2000 and that the trial tribunal accepted that the plot was sold to DW1 without a vendor of a plot having a power of attorney from the owner of the acre authorizing him to sell, he further made reference to **Order XV Rule 7(1) and (2)** of the Civil Procedure Rules Cap 8 of the Laws of Zanzibar and faulted the trial Magistrate by relying on document which was not admitted in evidence cannot be treated as forming part of the records. Mr Moh'd again cemented his position on Power of Attorney by reference to the case of **Japan International Cooperation Agency v. Khaki Complex Limited, Civil Appeal No. 107 of 2004**. Furthermore, he stated that the person with Certificate of Title is the lawful owner of that particular property and went on to cite the case of **Nancy Esther Nyange v. Mihayo Marijani Wilmore and 1 Other, Civil Appeal No. 207 of 2019** (unreported)

With respect to 3rd ground of appeal, Mr Moh'd submitted that, the acre has been granted to 1st appellant by the Government since 2000 and made reference to **exhibit LM2** a letter from the Commission for Lands Zanzibar and faulted the trial Magistrate by remove the ownership of the 1st appellant (PW1) and gave it to 1st respondent (DW1) at the end he prayed this court to recognize the rights and ownership of 1st appellant (PW1) in the disputed area.

With respect to the 4th ground of appeal, Mr Moh'd faulted the judgment of the trial Magistrate for lack of detailed analysis.

In the end he prayed this court to nullify the proceeding, judgment and decree of the land tribunal dated 27th June, 2022 and Order that Civil Application No. 12 of 2021 be heard de novo or in alternative he prayed this court to quash the judgment and decree of the land tribunal dated 27th June, 2022 in the Civil Application No. 12 of 2021 and order that the appellant is the lawful owner of the disputed property.

On the other side, in replying to the 1st ground of appeal, Mr. Ramadhan for the respondents submitted by making reference to pages 15 and 16 of the proceedings and stated further that, PW1 (1st appellant herein) declared that he owns acre which was given to him by the Government in 2000 and started selling plots with his grandson Omar Rashid, Mr Ramadhan further made reference to page 6 of the Judgment and concluded by saying that Omar Rashid Ali was given permission by his grandfather to sell plots which are inside acres owned by PW1 (1st appellant)

With respect to 2nd ground of appeal, Mr Ramadhan submitted that, he trial Magistrate did not fail to analyze documentary evidence and made reference to page 30 of the proceedings where the Magistrate after analyzing the documents as submitted accepted them and admitted as evidence and mark them as **exhibits JR1 and JR2** respectively and made reference to the case of **Jacob Mayani @ Boyi, Criminal Appeal No. 566 of 2016**

With respect to 3rd ground of appeal, Mr Ramadhan submitted that, the trial Magistrate did not disregard the 1st appellant evidence which proved that he was allocated the land in 2000 and developed it up to 2015 and the 1st appellant had sold the plot jointly with his grandson

With respect to 4th ground of appeal, Mr Ramadhan made reference to **Order XX111 Rule 3(2) of the CPD Rules Cap 8** and stated further that the judgment at page 5,6, and 7 shows the trial Magistrate made point of determination, decision and reasons for the decision. In the end he prayed this court to uphold the proceedings, judgment and decree of the land tribunal given in the Civil Application No. 12 of 2021 dated 27th June, 2022 and to dismiss the appeal with costs.

In his brief rejoinder, Mr. Moh'd prayed this court to reject the respondents reply written submission for the reasons that they failed to submit it on the scheduled date given by the court which was 27th March, 2023 and instead they submitted it on 28th March, 2023 without being granted extension of time. Furthermore Mr Moh'd did not agree with the submission made by the respondents and reiterated his prayers.

Having gone through the submissions of both parties, this being the first appellant court, this court has a duty to step into the subordinate court shoes by going through the evidence adduced in order to reach a just decision and arrive to its own independent conclusion as held in the case of **Hassan Mfaume v. R (1981) TLR 167**, where the Court of Appeal held the following:

" A judge on the first appeal should reappraise the evidence because an appeal is in effect a rehearing of the case"

Moreover, in **Union of India V. K.V. Lakshman and others AIR 2016 SC 3139**, the Supreme Court of India held that:

" The jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is open to the appellant to attack all findings of facts or/ and of law in first appeal. It is the duty of the first appellate court to appreciate the entire evidence and may come to conclusion different from that of the trial court"

Guided by the above principles relating to the duty of the first appellant court, I have considered the grounds of appeal, the evidence on record, the submissions made herein on behalf of the parties and the authorities cited. Having gone through the file case of the trial tribunal, I have discovered that the records shows that, the 1st Appellant was granted the right to use three acre of land situated at Maungani via a letter from the Land Commission of Zanzibar reference **KAM/MUN/A.40/3VOL. 111/ 116 dated 7th June, 2000** the letter was admitted at the tribunal and marked as **"exhibit LM2"**, the records of the trial tribunal also shows that, the 1st respondent had changed the use of three acre from agricultural land to residential area by demarcating the acre in plots through site plan admitted at the tribunal and marked as **"exhibit JR2"** and decided to sell such plots. At page 15 of the trial court proceedings 1st appellant (PW1) is on record testified the following:

"Omar Rashid ni mjukuu wangu na nimeishi nae tokea yupo mdogo. Omar nilimuamini na nilimkabidhi awe anauza viwanja"

Furthermore, the records shows that **exhibit JR2** Agreement to sell a plot dated 9 /02/ 2010 between Omar Rashid Ali (vendor) and Ghanima Mussa Haji (purchaser). Also **exhibit JR1** Agreement to sell a plot No.12 situates at Maungani dated 14/8/2018 between Ghanima Mussa Haji (vendor) and Saumu Ali Said (purchaser). **Exhibits JR1 and JR2** had the following boundaries:

North: Njia (road)

South: Kiwanja (plot)

East: Kiwanja (plot)

West: Njia (road)

The records also shows that, **exhibit LM1(b)** Agreement to sell a plot between Omar Salum Sef (vendor) and Ibrahim Bakar Hussein (purchaser) the Agreement does not show the date of transaction between the parties, also there is another Agreement dated 31/8/2015 between Omar Salum Seif (vendor) and Ibrahim Bakar Hussein (purchaser) **exhibit LM1 (b)** for the purpose of clarity between exhibits LM1 (b), this court will mark the first Conveyance Agreement as **exhibit LM1(a)** and the Agreement dated 31/8/2015 as **exhibit LM1(b)**. **Exhibits LMI(a) and LMI(b)** had the following boundaries:

North: Fatma Omar

South: Njia (road)

East: Mwanaharusi Omar

West: Njia (road)

Therefore, it is not disputed that, at Maungani, the 1st appellant and his grandson Omar Rashid sold number of plots and out of those plots which were sold either by 1st

appellant himself or by his grandson Omar Rashid Ali, the dispute is on one plot which is claimed to be sold to two different persons as it can be shown herein. So this court is tasked to make findings and determine based on the records in hands, the following question:

1. As between the parties who is the rightful owner of the disputed property?

In order to solve the above question, apart from making reference to the oral evidence adduced by both parties, I shall also make reference to the following documentary evidence:

1. The Commission of Land Letter - **exhibit LM2**
2. Site Plan – **exhibit JR2**
3. Sale Agreement dated 14/8/2018 - **exhibit JR1**
4. Sale Agreement dated 31/8/2015 – **exhibit LM1 (b)**
5. Sale Agreement not dated – **exhibit LM1**

Based on the above narratives, now it's a time for this court to decide and determine if this appeal has merit or not. In doing so, I shall start my determination by combining 1st and 2nd grounds of appeal,

I have considered in detailed the submissions made by both parties and in a nutshell the argument from the Appellants is that, there is no *Power of Attorney or Agency Instrument* given to Omar Rashid Ali (a grandson) by his grandfather (1st appellant) to sell the plots. I have also refer to the proceedings of the trial court to see if the issue of *Power of Attorney or Agency Instrument* was raised at any stage, from the testimony of PW1 to the testimony of DW3, I did not find the issue being raised by the advocate of the Petitioner or the Petitioner himself PW1 (1st appellant), the appellants have spent much time in their submission on the issue of Power of Attorney and Agency Instrument without directing this court where in the trial court proceedings that issue was either raised, pleaded or determined, thus, this court is of the view that, the issue of Power of Attorney and Agency Instrument given to Omar Rashid by Omar Salum Seif (1st appellant) is a new issue which was not raised nor pleaded in the trial court, therefore, it cannot be raised at this stage of appeal as held in the case of **Seifu**

Mohamed Seifu v. Zena Mohamed Jaribu, Misc Land Case No. 84 of 2021 (unreported) a decision from the High Court Land Division where it was held that:

" At appellate stage there is no room to raise any new matter or evidence that was not argued or raised during trial"

Also in the case of **Hassan Bundala @ Swaga v. R, Criminal Appeal No. 386 of 2015 (unreported)** the Court of Appeal held the following:

" It is now settled that as a matter of general principal this court will only look into matters which came up in the lower courts and were decided and not on new matters which were not raised or decided by neither trial courts"

Suffice to say that, the trial Magistrate did not address this issue of Power of Attorney or Agency Instrument, neither it was pleaded by the appellants. As it is now well established practice that the parties are bound by their pleadings and as such, claim must be pleaded and if not pleaded cannot be considered, see the case of **Stanbic Bank Tanzania Ltd v. Abercombie & Kente (T) Ltd, Civil Appeal No. 21 of 2021 (unreported)**.

Hence, this court disregard the issue of Power of Attorney and Agency Instrument raised by the Appellants as it did not come up at the trial court.

Furthermore, the 1st appellant had admitted in court that he trusted his grandson and gave him authority to sell the plot as shown at page 15 of the trial court proceedings 1st appellant (PW1) is on record testified the following:

"Omar Rashid ni mjukuu wangu na nimeishi nae tokea yupo mdogo. Omar nilimuamini na nilimkabidhi awe anauza viwanja"

Also at page 16 of the proceedings where the 1st appellant testified the following: ***" Mimi nimeuza viwanja vichache na mjukuu wangu ameuza viwanja vingi"*** 1st

appellant went on to testified that ***"sehemu ya pesa ya mauzo ya viwanja Omar alikuwa ananiletea na nyengine alikuwa anachukua yeye, Muombewa Nam 2 nilimuuzia kiwanja"*** from the above oral evidence it is clear that, the 1st appellant had trusted and orally authorized his grandson Omar Rashid to sell plots in his behalf and he was receiving money from sales made by Omar Rashid. The issue of oral evidence to prove fact was determined by the Court of Appeal in the case of **Abas Kondo Gede v. R, Criminal Appeal No. 472 of 2017** (unreported) where the Court stated the following:

" Therefore, oral evidence, if worthy of credit like in the circumstances obtaining in the present case, is sufficient without documentary evidence to prove a fact or title. Thus, where a fact may be proved by oral evidence it is not necessary that documentary evidence must supplement that evidence as this is the other method of proving a fact"

In the case in hand, the 1st appellant has admitted the fact that, he authorized his grandson to sell plots thus, the 1st appellant oral evidence is worthy of credit and therefore, there is no need of any other documentary evidence to prove that fact as state by the Court of Appeal in the above cited case.

And since both the 1st appellant and his grandson Omar Rashid were selling plots, surely confusion on who sold which plot and when it was sold may occurred, so it is worth to discover who was the first to sell the disputed plot between 1st appellant and his grandson?

My starting point will be consideration of a settled principle when considering ownership of the property, that no one can give a title that he does not have to another person (*nemo dat quod non habet rule*)

The records of the trial court reveals that, the plot **exhibit JR2**, was sold to Ghanima Mussa Haji by Omar Rashid Ali (grandson) on the *9/2/2010* and the same plot with same boundaries was on the *14/8/2018* sold to Saum Ali Said by Ghanima Mussa Haji,

therefore the ownership of the said plot was moved from 1st appellant to Ghanima Mussa Haji since 9/2/2010.

Interesting the 1st appellant tendered **exhibit LM1 (G2 (a))** which does not show the date which he sold the said plot to Ibrahim Bakar Hussein (2nd appellant) and the plot had a different boundaries from that of Ghanima, and after **exhibit LM1** the 1st appellant prepared **exhibit LM1(b)** dated 31 August, 2015. Therefore to shorten this episode, this court conclude that, the disputed plot was sold first by the Omar Rashid since 9th February 2010 and the 1st appellant lost the title to that particular plot from the date it was sold as held in the case of **Faraha Mohamed v. Fatuma Abdallah (1992) TLR 205** where the Court of Appeal held the following:

" He who does not have legal title to the land cannot pass a good title over the same land to another" see also the case of ***Pascal Maganga v. Kitinga Mbarika, Civil Appeal No. 240 of 2017 (unreported)***

Therefore, I see no merit with 1st and 2nd grounds of appeal, the evidence adduced at trial court show that, the plot was sold first to Ghanima a bonafide purchaser, who later on decided to sell it to Saum Ali Said (1st respondent). Therefore the 1st and 2nd grounds are hereby dismissed for lack of merits.

With regards to 3rd ground of appeal, I agree with the respondents that, the trial Magistrate did not disregarded the 1st appellant ownership of the acre as alleged by the appellants. The evidence **exhibit LM2** a letter from Commission for Land has granted the acre to the 1st appellant and that fact was not disputed. The dispute was in one of the plot which was sold twice to different people as shown herein above, hence as I have reasoned in the 1st and 2nd grounds of appeal, I also don't see merit in 3rd ground of appeal, because the 1st appellant had verbally authorized his grandson to sell plots in his behalf and he was receiving money from such sells. Therefore, I also dismiss the 3rd ground of appeal for lack of merits.

In determine the 4th ground of appeal, I will make reference to **Order XX111 Rule 3(2) of the CPD Rules Cap 8** which provides the following:

'Every such judgment shall contain a concise statement of the case, the point for determination, the decision thereon, and the reasons for such decision and where issues have been framed the court shall state its finding or decision with reasons therefore upon each separate issue unless the findings upon any one or more of the issues is sufficient for the decision of the suit.'

The said Order has provided the following conditions to be met in every judgment:

- 1. There should be a concise statement of the case*
- 2. There should be a point for determination*
- 3. The decision thereon*
- 4. The reason for such decision*
- 5. The findings or decision with reasons on each issue framed.*

In his submission, Mr Moh'd made a general claim without given detailed on which of the above conditions set by **Order XXIII Rule 3 (2)** (supra) were not met by the trial Magistrate judgment. On the other hand, Mr Ramadhan has pointed this court to pages 5, 6, and 7 of the judgment where the Magistrate has shown a points of determination, decision and reasons for the decision. I agree with the advocate for the respondents and I see no reasons to fault the judgment of the trial Magistrate because it has met the threshold conditions of **Order XX111 Rule 3(2) of the CPD Rules Cap 8**. The 4th ground of appeal is also dismissed for lack of merits.

The appellants have also raised in their rejoinder the issue that, the respondents have delayed for a day to file and submit their written submission to the applicants submission in chief, the respondents were Ordered to file their written submission on the 27th March, 2023 but instead filed on the 28th March, 2023 without seeking for the extension of time hence there is no reply by the respondents.

In resolving this issue, I am aware and alive to the fact that, written submission is equivalent to the hearing of the case. Thus, failure to file written submission equals a

non appearance of the party to a hearing. The question remaining is what is the consequence of such non appearance of the party?

To answer that question, I shall make my determination by making reference to **Order XI Rule 6 (1) of the Civil Procedure Decree (Rule) Cap 8** which provides the following procedure when only plaintiff appears when the suit is called for hearing:


6(1) *Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then:*

- (a) *If it is proved that the summons was duly served, the court may, subject to the provisions of rule 7, proceed ex parte:***
- (b) *If it is not proved that the summons was duly served, the court shall direct a second summons to be issued and served on the defendant***
- (c) *If it is proved that the summons was served on the defendant, but not in the sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day to be fixed by the court, and shall direct notice of such day be given to the defendant.***

In this matter no summons was issued to the respondents to appear for hearing because when the orders were made on the 16/2/23 the parties were all present, so each party was aware of the orders of the court, if that is the case, the only remedy is for this court to adopt **Order XI Rule 6 (1) (a)** which provides for the discretion of the court to proceed ex parte.

I don't think a delay of a single day has prejudice the right of the appellants in this appeal, after all it is the discretion of the court to either proceed ex parte or otherwise, therefore, for the interest of justice, it is the view of this court that, a single day delay will not move this court to proceed ex parte and therefore, I allow the respondents written submission.

All being said, this appeal is hereby dismissed with costs for lack of merits, and this court uphold the proceedings, judgment and decree of the trial court given on 27th day of June, 2022.


S. HASSAN (J) 30/5/23
30/05/2023

It is so ordered.

Dated: 30th May, 2023

Court:

Right of appeal is explained