

**IN THE HIGH COURT FOR ZANZIBAR
AT TUNGUU**

CIVIL APPEAL NO 06 OF 2022

(Appeal from the Decision of the Land Tribunal at Majestic in Civil Case no 20 of 2016)

OMAR ALI OMAR APPELLANT

VS

SAID ALI KHAMIS RESPONDENT

JUDGEMENT OF THE COURT

27/03/2023 & 11/05/2023

KAZI, J.:

The appellant, Omar Ali Omar, was the petitioner before the Land Tribunal at Majestic (the Tribunal), while Said Ali Khamis was the respondent. At the Tribunal, the appellant claimed to own plot No. 943 with 2034.1 square meters, the plot which is located at Chukwani. According to the petition, the appellant contended that he purchased the disputed parcel in 2013 from Ms. Fatma Ali Salum. Subsequently, he acquired a certificate of the land transfer by sale, followed by the provisional certificate of a right of occupancy with number L.O. Z.53/S.52/2013/943 and R.O. No. Z-327/2013 dated 09/07/2013. The appellant alleged that on 02/01/2016, the respondent encroached the disputed plot and erected a boundary wall, claiming that he owned the said land. In order to settle the matter amicably, the appellant, without success, asked the respondent to stop the construction on the disputed land. Ultimately, the appellant filed a land petition at the Tribunal seeking the following reliefs :-

- (a) Tribunal to declare that disputed plot is under the ownership of petitioner.
- (b) Tribunal to order respondent to be evicted from petitioner's plot.
- (c) Tribunal to order respondent to pay petitioner, compensation cost of Tsh. 20,000,000 for disturbance and damage caused in the disputed plot.
- (d) Cost of the case to be paid by respondent.
- (e) Any other relief for petitioner's benefit.

Respondent, on his side, refuted that claim and alleged that he is the rightful owner of the disputed plot that he acquired in 1992 from one Khamis Hazan and built a boundary wall on it in the same year. The respondent further claimed that the land commission was not in existence during such time. Therefore, he registered with the Registrar of Documents, in Vol IV of Book A-3, his statutory declaration, showing that he was the owner of the land in dispute. According to the respondent, the appellant and land official surveyed the disputed land fraudulently when he was in Dar es Salaam for his army duties.

During the trial, the Tribunal was guided by three issues; **One**, who is the legal owner of the disputed land situated at Chuckwani; **Two**, who is the trespasser of the disputed land; and **Three**, what are the legal remedies. After hearing both sides of the petition, the Tribunal dismissed the petition. Before reaching the verdict, the Tribunal determined the first issue based on the historical background of the land in dispute and the document admitted in evidence during the trial. Regarding the

historical background, the Tribunal held that the evidence adduced by the petitioner's side lacks historical thread. It did not show how Ms. Fatma Ali Salum came into possession of the disputed land. In contrast, the Tribunal was satisfied that the evidence adduced on the respondent's side shows the historical background that traces back to 1992 when he purchased the disputed land. As regards the document admitted in evidence, it appears the petitioner's side tendered only one documentary evidence, a site plan which was admitted in evidence as exhibit A.A. In considering exhibit A.A., the Tribunal held that a site plan is insufficient to justify that the petitioner owns the disputed land since it doesn't mention the name of its bearer. The Tribunal, however, gave weight to two pieces of documentary evidence tendered by the respondent's side. The first documentary evidence was titled 'UTHIBITISHO WA KUPEWA ENEO LA KUJENGA NYUMBA YA KUISHI', admitted as exhibit DF1. The second document was a statutory declaration which was admitted as exhibit DF2. The Tribunal held that exhibits DF1 and DF2 connected with the historical background of the land in dispute, and it was satisfied that the respondent is the legal owner of the disputed land.

As regards the second issue, the Tribunal held that the partitioner purchased land from a person who has got no title to the land and that he cannot possess a good title to it. Therefore, he is a trespasser on the respondent's land located at Chukwani.

Finally, regarding the third issue on reliefs, the Tribunal, *inter alia*, declared the respondent as the legal owner of the disputed land. Thus,

the appellant was ordered not to disturb the respondent from using and enjoying his land.

The appellant was aggrieved by the Tribunal decision and filed the present appeal raising the following grounds: -

1. That the Honorable Magistrate of the Land Tribunal erred in law and in fact in reaching the decision by giving the respondent victory when he is aware that the entire course of the proceedings and the evidence presented by the respondent's side were flawed and highly controversial.
2. That the Magistrate erred in law in his decision in giving right to the respondent to be the Legal owner of the plot whereas in fact the appellant is a rightful owner of the disputed land (plot No.943) located at Chukwani, Zanzibar, as evidenced by the actual documents produced by the Plaintiff/Appellant before the Tribunal.
3. That the Magistrate erred in law for disregarding the documentary evidence of the Certificate of a Right of Occupancy (L.O. No. 53/S2013/943) issued by the Minister of Land of the Government of Zanzibar to the appellant, which legally proves the ownership of the appellant BUT in contrary, the Magistrate decided to take into account the 'Statutory Declaration' of the respondent's house which, in fact, it does not prove the REAL ownership of the respondent of the plot in dispute
4. That the Magistrate erred and misled himself legally, when he decided to deprive the appellant's ownership of his plot on the

pretext that he did not produce his documents of ownership during the trial in Court whereas, in fact, it was not true.

5. That the Trial Land Tribunal erred in law when reached a decision based on the historical evidence by the Court itself rather than the actual documentary evidence given by Plaintiff/Appellant dully attached with the plaint of the appellant.

Based on the above grounds, the appellant is praying for the following orders: -

- i. To allow this appeal and quash the Judgement and Decree of the Land Tribunal delivered on 25/02/2021.
- ii. Recognizing the appellant to be rightful owner of the disputed plot No. 943 located at Chukwani area.
- iii. Any other relief (s) that the Honourable Court may deem fit to the appellant.

In this appeal, Mr. Zahran M. Yusuf, learned Counsel, represented the appellant, while Mr. Rajab Abdalla Rajab, learned Counsel, represented the respondent. By order of this Court, the appeal was argued through written submissions.

Mr. Yusuf, in his submission, abandoned ground number 5 of the appeal and conjoined grounds number 1,2,3 and 4, then he contended that the appeal will be argued based on one ground that reads in Swahili as follows: -

*Kwamba, Mheshimiwa Hakimu wa Mahkama ya Ardhi
Majestic/Mwanakwerekwe, Unguja, alikosea kisheria pale*

ALIPOFIKIA UWAMUZI WAKE wa kumpa ushindi Muombewa Rufaa wakati akijuwa kuwa Mwenendo nzima wa kesi na Ushahidi uliotolewa na upande wa Muombewa Rufaa (Defendant) ulikuwa na dosari na wenye utata Mkubwa.

Afterwards, he submitted that the Tribunal did not comply with section 37 of **the Land Tribunal Act** when the Magistrate failed to receive the assessors' opinion before he delivered the judgement. He contended further according to the Tribunal records, the assessors did not append their signature after their opinion was recorded. Therefore, he equated that omission with non-delivery of the assessor's opinion. To support his stance, he cited Civil Appeal No. 68 of 2017. In addition, he submitted that the Tribunal erred in law for not following a procedure in conducting a visit of the *locus in quo*. He claimed that paragraph 48 of the proceedings shows that witnesses were not involved in the visit, contrary to what was held in **Zainab Omar Mwalim v Asha Seif Said**, Civil Appeal No 10 of 2021, H.C.Z.

In responding to the above two matters, Mr. Rajab argued that the issue of assessors and a visit to a *locus in quo* was not among the grounds of appeal hence they should not be considered by the Court.

Indeed, the issue of the assessor's opinion and visit of the *locus in quo* was not pleaded in the memorandum of appeal by the appellant. Thus, I agree with Mr. Rajab that they accord no weight, and I will not consider them in determining this appeal since it is a settled law that parties are bound by their pleadings. See; **Makori Wassanga vs Joshua**

Mwaikambo and Another [1987] T.L.R. 92 and **Ali Salum Haji & Others v Ali Murad Dilshad** (Civil Application No 85 of 2021) [2022] TZZNZHC 25 @ www.zanzibarlii.org.

Mr. Yusuf's subsequent submission is based on the evidence adduced at the Tribunal generally. He claimed that the learned Magistrate erred by deciding in favour of the respondent while the respondent failed to establish his ownership regarding plot No. 943. He averred further that the appellant had strong evidence that established his ownership of the disputed land. The learned Counsel maintained that the appellant tendered in Court a certificate of a right of occupancy (L.O. No. 53/S2013/943) dated 09/07/2013 to prove that he is the lawful owner of the disputed land. Moreover, he contended that PW5, the land commission officer, told the Tribunal that he surveyed the land in dispute and that during the survey, he did not receive any objection from any person regarding ownership. Therefore, it was his submission that the appellant's ownership regarding the disputed land is in accordance with sections 7 (a) and 55 of **the Land Tenure Act** No 12 of 1992, and the same was not revoked. So, revoking the appellant's title without following due process will be unlawful. He then cited **Salum Mateyo v Mohamed Mateyo** (1987) TLR 111 and **Mbarak v Patel** (1972) EAL 177? to support his position. In addition, Mr. Yusuf faults the Tribunal for giving weight to a respondent's statutory declaration, which shows that the respondent possesses a house on the disputed land. He claimed that the respondent's statutory declaration has no relationship to the land in question since the disputed land is vacant.

Finally, Mr. Yusuf contended that the certificate of right of occupancy was tendered in the Tribunal, but the learned Magistrate did not record the same for the purpose of denying the appellant his rights.

Responding to what was contended by Mr. Yusuf regarding the evidence adduced at the Tribunal, Mr. Rajab submitted that the respondent presented substantial evidence to the Tribunal, which his witnesses supported, the evidence that shows the background of the disputed land and how the respondent acquired it. He argued further that the appellant's evidence had flaws as he failed to tender any document establishing his ownership of the disputed land in the Tribunal. Mr. Rajab contended that the appellant did not tender the certificate of the right of occupancy in the Tribunal after identifying the same. Therefore, according to **Japan International Cooperation Agency v Khaki Complex Limited** [2006] T.L.R. 343 and **Total Tanzania Ltd v Samwel Mgonja**, Civil Appeal No. 70 of 2010 C.A.T. (Unreported), a document which is not admitted in evidence cannot be treated as forming part of the record. It was Mr. Rajab's further submission that the failure of the appellant to call a key witness, Ms. Fatma Ali Salum, justified that there was no land sale between the appellant and Ms. Salum. Responding to the provisions of law cited, Mr. Rajab believed that the provisions of sections 7 (a) and 55 of the Act No. 12 of 1992 are irrelevant since the issue at hand does not concern revocation of the right of occupancy. It is his view that the instant matter concerns the ownership of land and that in ownership, the focus should be on who owns first the disputed land. He submitted that the respondent possessed the land in dispute first, since 1992 and built a house on the

part of the same plot and left another piece to his security, DW5, for the security and DW'5 cultivation.

Regarding the statutory declaration, the learned Counsel submitted that the same establishes that he bought the disputed land in 1992, and the same came ahead of the certificate of right of occupancy of 2013. Mr. Rajab argued that a person who has uninterrupted possession of land for more than 12 years becomes the landowner, and the respondent has owned the same for over 12 years.

From my scrutiny of the Tribunal records, I am constrained to agree with what was submitted by Mr. Rajab, and I am fully subscribing to the case law cited. I will start with the appellant's complaint regarding the documentary evidence, to wit, a certificate of right of occupancy. According to Mr. Yusuf, the document was tendered in Tribunal, but the Magistrate did not deliberately record its admission to deny the appellants his rights. I have revisited the Tribunal records; according to pages 18 and 19 of the typed proceedings, PW1, in his testimony, mentioned and identified the certificate of the right of occupancy but did not tender the same as evidence in the Tribunal. I am hesitant to agree with Mr. Yusuf's allegation towards a learned land Magistrate because, if his allegation is true, Mr. Yusuf would have mentioned a mark or number that the Tribunal would have given after the admission of the said document. In his submission, Mr. Yusuf did not reveal to the Court the mark given to the document alleged to be tendered and admitted by the Tribunal. To me, that indicates the said document was not tendered in the Tribunal by the witness. It is the procedural law that when the exhibit is admitted, the Court or Tribunal mark it, which means the

exhibit is given an identity for easy reference, for instance, 'exhibit P1 or D1 or C1' etc. Usually, the parties are duly informed when the exhibit is admitted or rejected. Therefore, I find Mr. Yusuf's allegation towards the land Magistrate unfounded. The certificate of rights of occupancy was not tendered in evidence by PW1, and the Tribunal was correct for not considering the same in its decision.

In this appeal, both sides asserted that they had presented substantial evidence in the Tribunal. However, the Tribunal records clearly show that the appellant did not adduce any document to substantiate his claim. The appellant just narrated that he bought the disputed land from Ms. Fatma Ali Salum in 2013, the narration which was not supported by any documentary evidence such as a sale deed etc. Furthermore, during cross-examination, the appellant told the Tribunal that he did not involve Sheha when purchasing disputed land from Ms. Salum, contrary to what is entailed in a land sale agreement, a tripartite agreement involving a seller, buyer and superior landlord (Government). Therefore, in any deal involving the sale of land, the Sheha of the locality within which the land in question is located, who is a representative of the superior landlord or the Government, must be involved.

Moreover, PW4, who claimed to witness the sale of the said land between the appellant and Ms. Salum, confirmed the appellant's story. However, when cross-examined, he alleged that Ms. Salum was a conman. This insinuates that Ms. Salum conned the appellant as she did not have legal title to transfer the disputed land to the appellant.

On the other side, the respondent adduced sufficient evidence proving how he acquired the disputed land in 1992. His evidence was supported by the testimonies of the previous owner of the disputed land (PW4) and the Local Government leader of the locality (Sheha), together with exhibit DF1 (Sheha's confirmation letter as to the respondent ownership of disputed land), and exhibit DF2 (statutory declaration).

From the totality of the evidence adduced at the Tribunal, it is my view that the Tribunal was justified in reaching the decision made, and I don't find any reason to fault it. As a result, I see no merit in this appeal, and I hereby dismiss the same with costs. Order accordingly.

Dated at Tunguu, Zanzibar this date 11th May 2023.

G. J. KAZI
JUDGE
11/05/2023