

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CIVIL APPEAL NO 33 OF 2022**

(Appeal from Civil Case No. 53 of 2017 of Land Tribunal at Vuga)

ALI UDDI MWINYI	1ST APPELLANT
ABDI USSI MWINYI	2ND APPELLANT
HASSAN UDDI MWINYI	3RD APPELLANT
RAHMA UDDI MWINYI	4TH APPELLANT
ZAINA UDDI MWINYI	5TH APPELLANT

VS

ABDALLA JAFFAR SOUD	RESPONDENT
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JUDGEMENT OF THE COURT

27/06/2024

KAZI, J.:

The respondent instituted a suit against the appellants in the Land Tribunal at Majestic Vuga (the Tribunal), claiming ownership of a plot of land located in the Kisauni area within the respondent's farmland.

From the pleading, the respondent alleged that in 2001, he was given the disputed land for free by the appellants' father, who was the land owner, to build a madras and a school. He, therefore, started the construction in the same year. He alleged further that in 2002, the appellant's father drafted an agreement showing that he handed the disputed land to the respondent so that he could build madras and a school. After being given the disputed land, the respondent claimed that he applied with the appellant's father for the transfer of the land in dispute from the institution dealing with the land transfer. He claimed that the dispute with the appellants emerged in 2007 after the passing of the appellants' father, whereby the appellants wanted to encroach by

force on the disputed land. Thus, the respondent instituted the suit at the Tribunal, seeking for, among other orders, the declaration that he is the sole owner of the disputed land.

The appellants, in their written statement of defence, contended that they are the lawful owners of the disputed land, and their late father's plan was to make it wakf for the benefit of all Muslims. Further, they claimed that there was no agreement between the respondent and their late father regarding the land in dispute, and that what the respondent claimed to be an agreement had no legal force as it was a forged document.

On what contested from the pleading, the Tribunal framed and determined the following issues: One, who is the lawful owner of the disputed land; Two, whether there was any invasion of the disputed land; and Three, what are the remedies.

In establishing its case, the respondent (PW1), in his testimony, averred that he was given the disputed land, where he built a madrassa in 2001, by the late Mzee Udi (appellants father) by way of gift (Hiba). He claimed that on 09/07/2002, the land was handed to him where Saada Ahmed and Ali Salum were his witnesses, and a witness from Mzee Udi, who was there, was Moh'd Uddi, his son. After being given land as a gift, he was also given a site plan. Later, he started the construction of a madras, and after its completion, he began teaching in the same. In 2003, he started the process of transferring the land, and after the completion of the land transfer process, he was issued a title deed for

ownership of the disputed land. To support his averment, he presented a site plan and a land transfer form, which were admitted as exhibits AJS1 and AJS4, respectively. PW1 contended that after receiving a title deed, he continued teaching without interruption. But the problem started after the passing of Mzee Udi, when his children started causing trouble to him on the disputed land and accusing him of forging documents. PW1 testified that they went to the Mufti but couldn't resolve the dispute. Therefore, he decided to institute the suit in court.

In his testimony, PW2, Ali Salum Khalfan claimed that he was present as a witness when Mzee Udi gave the respondent disputed land. It was his testimony that, as a witness, he did sign the handing over documents. He contended that, apart from him, Mzee Udi, the respondent, Danda and a son of Mzee Udi were also present on the said day. He further testified that after the signing, the construction of madras started, and there was no dispute until after the passing of Mzee Udi.

PW3, Juma Slim Juma, contended that he was a member of Sheha during the period when the respondent was given disputed land in Kisauni. He claimed that the respondent went to them (Sheha's Committee) with the document showing that he was given land and wanted to build a madras. He testified further that the members of Sheha's committee who were present were Sheha, himself (PW3), Ahmada Khatib Shaaban and the late Abdalla Suleiman. He also averred in his testimony that a dispute arose after the death of Mzee Udi.

PW4, Kheri Ali Khamis, in his testimony, stated that the respondent informed him that Mzee Udi had given him land. Then, he visited

the said land with the respondent while accompanied by a son of Mzee Udi. After the visit, PW4 claimed that he assisted the respondent in erecting the foundation. When the foundation was constructed, PW4 claimed that he advised the respondent to apply for the title deed of the land in question. PW4 testified further that, later, the respondent returned to him with Moh'd, son of Mzee Udi, and showed him a document showing that Mzee Udi gave him a disputed land for free. He stated that he advised the respondent to pay something Mzee Udi for the disputed land, and they went to Mzee Udi for that purpose, but Mzee Udi rejected the offer and claimed that he gave away the land for free. PW4 testified further that the respondent managed to secure the title deed for the disputed land. Later, the construction of madras proceeded, and when it was completed, classes for children started.

In the defence, the third appellant, Rahma Uddi Mwinyi, as DW1, testified that their father surveyed their farm and gave all his children plots from the said farm. She also testified that their father told them that he reserved two plots as wakf for madras and mosque; the said plots were under the control of their father. She contended that after the death of their father in 2006, her brothers started to follow up on their father's estate to the relevant institutions. She also contended that before the death of their father, her brother Mwinyi Uddi was informed that a plot for madras was encroached. She contended that they visited the disputed plot and found a school was built, but the plots for the mosque were still vacant, not invaded.

In his testimony, DW2, Ali Uddi Mwinyi claimed that the disputed land belonged to his father, who purchased it in 1978 from Moh'd Abdalla

Salum. DW2 exhibited a sale deed, Exhibit UMHI, showing that their late father bought the said land. He testified further that the disputed plot was among the land that had been surveyed, and their late father wanted a madras and mosque to be built on the said land. It was his evidence that after the death of their father in 2006, they convened a meeting and decided to implement their father's wish. Therefore, they visited a disputed plot where they met the respondent, who claimed that he purchased the plot from their father for Tsh. 10,000,000/- and that the sale was not in writing. DW2 contended that they saw a sale agreement between their father and the respondent at the Regional Commissioner in 2007; however, he claimed they didn't accept it since the signature appended in the said document was not of their father. He stressed further that the respondent had a site plan and a statutory declaration to show that he was the owner of the disputed land, but both documents had flaws. He added that they sent a statutory declaration to the Police Headquarters for forensic examination, and it was revealed that the signature and stamp were forged. DW2 claimed that the respondent was never given a plot on their father's farm.

Inspector Mbwana Mussa testified as DW3; he is a forensic expert at the forensic lab of the Police Headquarters. It was his evidence that he received a copy of the statutory declaration, application of transfer, and other sample documents to compare the signature of Udi Mwinyi Haji and the stamp of the Sheha. He contended that he discovered differences between the suspected signatures on its dots, slang, and stroke after the examination. He also discovered differences in the stamps; they differ in cypher, figure and size. He also found that the

stamps were made from two different places. It was DW3's view that both documents were forged. DW3 forensic results were on the report, which was admitted by the Tribunal as Exhibit "EN5"

D7528 Dtc Moh'd Masoud Ameir, DW4, also a forensic expert from the Police Headquarters, testified that he was the one who received an application for forensic examination. He contended that he received the documents examined by DW3 and handed them to experts for examination.

Haji Suleiman Othman, Sheha of Kisauni testified as DW5. In his testimony, he denied signing any respondent's document and that he had nothing concerning them.

In its decision, the Tribunal unanimously concluded that the respondent owns the disputed land. They were of the view that the respondent acquired the disputed plot by way of gift which is one of the methods of acquiring land in Zanzibar. In deciding in favour of the respondent, the Tribunal relied on the deed of gift, Exhibit AJS2, a site plan, Exhibit AJS1, and a land transfer form, Exhibit AJS3. In rejecting the appellant's evidence, the Tribunal appreciated the Exhibit tendered in defence, such as the sale agreement, Exhibit UMH1 and documents which they claimed to be forged by the respondent, Exhibit EU5. However, the Tribunal wondered why the respondent was not criminally charged for the forgery of the title deed. Moreover, the Tribunal expressed its doubts about the appellants' evidence since the dispute arose after the death of

their father and concluded that the weight of the respondent's evidence was heavier than that of the appellant's.

The appellant was unhappy with the outcome of case and decided to appeal to this Court on ten grounds. During the hearing, however, the appellant's advocate abandoned ground number three and six, hence the appeal was argued on the remaining following ground:-

1. The trial magistrate erred in law and fact by failure (*sic*) to see that the Defendants are the rightful owners of the disputed land from the evidence adduced.
2. That the trial Magistrate erred in law and fact by proceeding with the case without ascertaining the jurisdiction of this Court.
3. That the trial Magistrate erred in law by failure analyse(*sic*) the testimony of DW4 and DW5 in the proceedings.
4. That the trial Magistrate erred in law and fact by taking into consideration unadmitted exhibit in his judgement.
5. That the trial Magistrate erred in law and fact by failure (*sic*) to appreciate fully the provision of Section 7 of the Land Tenure Act No. 12 of 1992 of the laws of Zanzibar.
6. That the trial Magistrate erred in law and fact by failure analyse (*sic*) the Defence exhibit "EN 5" in his judgement.
7. That the trial Magistrate erred in law and fact by reaching a conclusion that there was trespass which was never proved by any witness.
8. Generally the judgement and decree is (*sic*) against the weight of the evidence adduced.

At the hearing of the appeal, Mr. Abdulhalik Alley, learned advocate, represented the appellant, and the respondent had the service of Ms. Zena Juma, learned advocate.

I will begin with the second ground of appeal. In this ground, Mr. Alley submitted that the Land Tribunal has no jurisdiction to deal with the matter of eviction from the land. Ms. Juma, on the other hand, submitted that the issue before the Tribunal was concerning who is the lawful owner of the disputed land, which is within the jurisdiction of the Tribunal in terms of section 13 of the **Land Tribunal Act**.

As correctly argued by Ms. Juma, according to the pleading presented to the Tribunal, the main dispute of the parties was the claim of ownership of the land, which is under the exclusive jurisdiction of the Tribunal in terms of section 13 (a) of the **Land Tribunal Act** No. 7 of 1994 as amended. Thus, this ground has no merit, and I dismiss it.

Now, returning to the first grounds of the appeal, it was Mr. Alley's submission that the original owner of the disputed land was the late Udi Mwinyi Haji. He then dismisses the respondent's claim that he acquired the land from the late Haji for not exhibiting a document to support the same. It was Mr. Alley's submission that a site plan (Exhibit AJS1) does not confer a person a right to land and doesn't fall under section 7 of the **Land Tenure Act**. He stressed further that the sale document (Exhibit AJS2), which the Tribunal considered in its judgement, shows that the respondent is the owner; he added that the document is a letter

of sale while the respondent claimed to be given a gift. Moreover, Mr. Alley raised a concern that Exhibit AJS2 was not tendered in Court since it was not admitted pending the payment of the stamp duty. He, therefore, argued that there was an error under Order XV Rule 7 (1) (2) of the **Civil Procedure Decree**. He maintained that the Tribunal erred in using Exhibit AJS2 to confirm the respondent's ownership.

Regarding Exhibit AJS3, a land transfer form, he argued it was just a form. He claimed that DW3 testified that the said exhibit was forged and that DW5, a Sheha, denied that he signed and stamped the said form. Dismissing the respondent statutory declaration, Exhibit AJS4, Mr. Alley cited **Kaderina Yussuf Othman v Sadiq Othman**, CAT No. 15 of 2008 where it stated on page 8 that statutory declaration is just a declaration it was not evidence of ownership. It only favoured a person against whom the statutory declaration was made. Mr. Alley, therefore, argued that all respondent's exhibits do not confer rights under section 7 of the **Land Tenure Act**. He stated that the learned Tribunal Magistrate relied on section 7 (e) of the **Land Tenure Act** as it gave right to the respondent. On that, the learned advocate posed a question on whether the gift is a registered interest; his answer was no, and he said that it is the Department of Land that is responsible for registering interest on land under the Registered Land Act.

Responding against the first ground of appeal, Ms. Juma argued that the landowner may possess a site plan and that the late Uddi Mwinyi Haji gave the respondent a site plan. Regarding exhibit AJS2, Ms. Juma claimed that the Court received it after the payment of the stamp duty.

Regarding exhibit AJS3, it was her submission that it was signed by both parties, showing that the respondent was given the land and transfer of the same was in process. She further contended that the matter before the trial tribunal was civil in nature and that the police and Sheha did not prove that forgery was committed. She further stated that the land transfer process was not completed as the donor passed away, but she insisted that all documents were valid. She added that the appellants failed to prove that they were the owners of the land in dispute as they did not have any documents. To support her submission, she cited the authority of **Kamisheni ya Wakfu vs Kisra Shaibu Bakari**, Civil Appeal No. 15 of 2020 (HC), regarding proving the case.

I will start with the admissibility of exhibit AJS2. As Mr. Alley argued, it is on record that exhibit AJS2 was not tendered by any respondent's witness during the trial. It is evident in the proceeding that exhibit AJS2 was tendered in Court on 15/07/2020 by the plaintiff's advocate after she prayed to close her case. The Tribunal admitted the same after the plaintiff's case was closed and marked it as exhibit AJS2. It is evident that exhibit AJS2 was improperly admitted by the Tribunal since, as a matter of law, the proper person to tender the exhibit is a competent witness to the case, such as the maker of the document, addressee or custodian of the document, and the same should be tendered during the hearing and before a case from either side of the suit is closed so as to allow the opposite party to cross-examine the witness on contents of such exhibit. As a result, I expunge the exhibit AJS2 from the record.

Regarding exhibit AJS1, a site plan, I share the view of the learned advocate for the appellant that the same is not exhibited ownership of

land. Similarly, exhibit AJS3, a land transfer form and exhibit AJS4, a statutory declaration, do not confer a person a right to own land. Exhibit AJS3 is just a form used at the initial stages during the application of the land transfer, and a statutory declaration *per se* is not evidence of ownership of land. Moreover, in his submission, Mr. Alley challenged the validity of Exhibit AJS3, claiming that it was forged; Ms. Juma, on her side, maintained that this was a civil matter, and that the forgery was not proved before the Tribunal by the police and Sheha (respondent witnesses).

The appellant pleaded the issue of the validity of exhibit AJS3 and exhibit AJS4 through paragraphs 9 and 10 of their written statement of the defence. In proving the claim of forgery DW3, Mbwana Mussa Mbwana, an Inspector of Police from the Forensic Bureau of the Criminal Investigation Department of the Police Headquarters, Zanzibar, testified before the Tribunal that he examined the signatures of the late Udi Mwinyi Haji and stamp of Sheha appended and stamped to the exhibit in question in comparison to the sample he received which had the correct signature of late Haji and stamp of the sheha, and found that the doubted signature differs its characteristics in strokes, slants, dots and lower zone. Regarding the stamp, he found it differs in figure, size, content and design. Therefore, it was his finding that both documents, a land transfer form and a statutory declaration, were forged. DW3's document examination report was also admitted in evidence by the Tribunal as exhibit EN5. In exhibit EN5, DW3 opined that the disputed signatures and specimen signatures were different and were written

by different persons, and the disputed rubberstamp and specimen rubberstamp marks were different and produced from different sources.

Sheha of Kisauni, Haji Suleiman Othman, also testified regarding this matter. In his testimony as DW5, he disassociated in dealing with exhibits AJS3 and AJS4. He averred that he never appended his signature and stamped his stamp to any document relating to this matter.

In its judgement, the Tribunal ignored the above appellant's evidence. It questioned, if respondent forged the documents in questions, why he was not indicted. Therefore, the Tribunal did not resolve the dispute on the validity of the exhibit in question.

It is my view that the evidence of DW3 and DW5 was erroneously ignored. The Tribunal just escaped its duty to evaluate the evidence adduced in relation to the challenged exhibits and resolve it. It is paramount to state that, having the being pleaded by the appellant in paragraphs 8, 9 and 10 of their written statement of defence, the Tribunal was required to decide on that matter as well to satisfy itself on the validity of the disputed exhibit, See; **Ahmed Freight Limited & Another vs ECOBANK Tanzania Limited** (Civil Appeal No. 182 of 2020) [2024] TZCA 172 (12 March 2024). Since the Tribunal failed to discharge its mandate in resolving the validity of the disputed exhibit, this Court being the first appellate Court, I will step into the Tribunal's shoes by re-evaluating the evidence on record in considering the validity of exhibit AJS3 and AJS4.

As summarized earlier, DW3 demonstrated that the transferor signature appended in exhibits AJS3 and AJS4 was not of the late Udi Mwinyi Haji as it differs from the specimen signatures, and the stamp in both statements was not of Sheha of Kisauni. According to exhibit EN5, in making the comparison of the signatures, DW3 used signatures appended by the late Udi Mwinyi Haji in an ordinary course of business from a ruled paper dated 23rd March 2005 and his passport book with serial number A 0328682 to compare signatures, and a specimen rubber stamp to compare Sheha stamp in exhibit AJS3 and AJS4. Through the use of modern scientific equipment, to wit, the video spectral comparator (VSC 6000), it was discovered that both signatures purported to be of the late Udi Mwinyi Haji and the purported stamp of Sheha of Kisauni were forged on exhibit AJS3 and AJS4. The evidence of DW5 also supported DW3's evidence regarding his stamp. The testimony of DW3 and DW5 was not challenged on this aspect; there is no doubt, therefore, that exhibits AJS3 and AJS4 were not genuine, and the Tribunal committed serious error in giving them weight in its judgement.

It is a cardinal principle in civil cases that the burden of proof lies on the party who alleges anything in his favour and that the party with legal burden also bears the evidential burden, and the standard in each case is based on the balance of probabilities. See **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015). This burden never shifts until the party alleges discharged it. This position was emphasized

in **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019), thus: -

"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We are fortified in this view by the extracts from the celebrated works of Sarkar on the Indian Evidence Act, 1872 largely borrowed by the Tanzania Evidence Act, Cap 6 [R.E 2002]. At the risk of making this judgment unduly long, we take the liberty to reproduce the relevant passage from Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis as below:

"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason....Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party.... "

In the instant matter, therefore, the respondent had a duty to prove before the Tribunal that the land in dispute belonged to him that he legally acquired through gift.

Having viewed the tribunal record, I am certain the respondent failed to discharge that duty. The respondent failed to present any concrete evidence to establish his claim at the Tribunal. Besides, the respondent failed utterly to prove what he pleaded in his plaint. Apparently, in paragraph 5 of the amended plaint, the respondent claimed that the late Udi Mwinyi Haji gave him the disputed land for free with the condition that he should build a madras and school on the said land. In his evidence, however, testified as PW1, the respondent claimed that the Late Haji gave him the disputed land by way of Hiba (gift). It is clear that the respondent evidence, as adduced before the Tribunal, departed from his pleading.

As a matter of law, it is a settled principle that parties are bound by their pleadings and that no party should be allowed to depart from his pleadings, thereby changing the case from which he originally pleaded. See: **Theresia Thomasi Madaha (Supra) and Richard Kigaraba vs Jonas Laurent & Others** (Civil Appeal No. 377 of 2019) [2024] TZCA 268 (15 April 2024). Therefore, PW1's evidence regarding the upleaded facts that he acquired the land through a deed of gift is discarded.

To this end, I wish to reiterate that the respondent had failed to prove that he was given the disputed land by the late Udi Mwinyi Haji for free, as he claimed. There was no concrete evidence or document tendered in the Tribunal showing that the late Haji gave away his land to him.

Therefore, the Tribunal erred in law in holding that the respondent was a lawful owner of the disputed land.

In view of what I have determined above, I am satisfied that the respondent has failed to discharge his duty to prove his claim on the balance of probabilities. Consequently, the first ground of appeal succeeds.

My analysis and findings on the first grounds are sufficient to dispose of the appeal; therefore, I find no compelling reasons to consider the other grounds of appeal.

In the upshot, the appeal is allowed with costs.

Dated in Tuguu, Zanzibar this 27th day of June 2024.



G. J. KAZI
JUDGE
27/06/2024