IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 33 OF 2017

OMBENI KIMARO ..... APPELLANT

VERSUS

JOSEPH MISHILI t/a CATHOLIC CHARISMATIC RENEWAL..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Land Division) at Dar es salaam]

(Mjemmas, J.)

Dated the 30th day of October, 2015
in
Land Case No. 51 of 2010
.....

JUDGMENT OF THE COURT

25th May & 2nd August, 2021

GALEBA, J.A.:

The respondent, Joseph Mishili t/a Catholic Charismatic Renewal, instituted Land Case No. 51 of 2010 against Ombeni Kimaro, the appellant in the High Court of Tanzania (Land Division) at Dar es salaam. The dispute between the parties was in respect of ownership of an un-surveyed piece of land measuring 27 X 16.5 meters (the land in dispute) located at Ubungo peri urban area in the neighborhood of what used to be Ubungo Central Bus Terminal and Tanzania Bureau of Standards Headquarters in Dar es Salaam. According to the respondent, he acquired the land from

Honorina Mwakitosi as a gift so that the respondent could establish a religious service center, but sometimes in 2005 the appellant illegally trespassed onto the land and started to develop it. In the High Court, the respondent prayed to be declared the lawful owner of the land and issuance of eviction orders against the appellant as he was a trespasser.

On the other hand, the appellant dismissed the respondent's allegations as baseless, putting up a counter claim for a declaration that he was the lawful owner of the land because he had purchased it from Clara Mwakitosi, on behalf of Honorina Mwakitosi, the previous owner. He also prayed for a perpetual injunction restraining the respondent from interfering with his quiet enjoyment of the land and payment of TZS. 35,000,000.00 as compensation for denial of opportunity to develop the land. He finally prayed to be awarded TZS. 15,000,000.00 as general damages for disturbance and costs of the suit. The appellant's claims in the counter claim were disputed by the respondent in the defence to counter claim, putting the appellant to strict proof of the allegations he made.

Consequent to completion of pleadings, mediation was conducted but failed before Chinguwile J. who remitted the record to the trial judge. Upon full trial, the High Court, (Mjemmas, J.) was satisfied that the case against

the appellant was proved on a balance of probabilities and declared the respondent as the lawful owner of the land and the appellant, a trespasser. The latter was ordered to compensate the respondent with general damages of TZS. 50,000,000.00.

The appellant was aggrieved with that decision, and to vindicate his ownership of the land he lodged the present appeal. Initially, the appeal was predicated on five (5) grounds, but when it was called on for hearing on 25th May 2021, Mr. Methodius Melkior Tarimo, learned advocate who appeared for the appellant prayed to abandon the fifth (5th) ground thereby retaining the first four (4) grounds of appeal. The grounds that counsel maintained in this appeal are:

> *(1). That the High Court erred for holding that the appellant trespassed on the suit land despite the abundant evidence to the effect that the appellant purchased the suit land with consent of the owner.*
> *(2). That the High Court erred for failure to evaluate the evidence on record which was full of contradictions.*
> *(3). The High Court erred for basing its decision on oral evidence of PW1 and ignoring the documentary evidence of the appellant who was the first purchaser of the land in dispute.*

(4). That the High Court erred for failure to consider the evidence of PW2 and that of DW2 and come to a conclusion that the appellant acquired the land lawfully.

In our view, for us to adequately address the above grounds, which are essentially based on the complaint that the trial court failed to evaluate the evidence on record properly, we will have to reanalyze and reevaluate the evidence adduced, at the trial. This Court, being the first appellate court in this matter, is duty bound to reexamine the evidence adduced before the trial court and if necessary, come up with its own conclusion - See **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 (both unreported).

For us to be able to intelligibly reconsider the evidence adduced at the trial, at this point we think it is appropriate to recapitulate the substance of the material evidence.

At the trial, each party called three (3) witnesses. The respondent who was the plaintiff called Joseph Peter Mishili (PW1), Honorina Mwakitosi (PW2) and Evarest Joseph Minja (PW3), whereas the appellant being the

defendant relied on the evidence of Ombeni Kimaro (DW1), Clara Mwakitosi (DW2) and Ricky James Mbusi (DW3).

The substance of the evidence of PW1 was that he was coordinator of the Catholic Charismatic Renewal (the CCR) group and that in the year 1999 PW2 granted them land of between 1.5 to 2 acres including the land in dispute. At that time the land was bare with no one in occupation. A formal document, Exhibit P1, for conveying the land to the respondent was eventually signed on 21st August 2003 and by the year 2005, the respondent had built a hall for worship and also a toilet at the site. It was his evidence that in the same year, that is, 2005 the respondent trespassed on the land and demolished a cesspit and the toilet and hurriedly built a house when they were in Moshi and he later fenced the land trespassed upon. According to this witness, the respondent acquired the land before the appellant showed up in 2005.

PW2 testified that she had acquired about 23 acres of land at Ubungo, including the land in dispute in 1970's. She testified that she gave the land of nearly two (2) acres as a gift to PW1 who was a project coordinator of CCR activities in the year 2000. According to her, the land was granted to the respondent orally but they later reduced the

conveyance in writing as per exhibit P1. She testified that all of her 6 children knew of this grant and that in 2005 she authorized DW2, her daughter to sell part of her remaining land as she needed money for treatment. Instead of selling a particular land that she identified to her, DW2, sold the land that had already been granted to the respondent, she added. It is at that time in 2005, that the appellant was seen busy developing the land that had been granted to the respondent years back. She approached the appellant so that she could either refund the money or give him an alternative piece of land but the appellant turned down both offers. This witness dismissed the authenticity of the alleged agreement between DW2 and the appellant for among other reasons, because the agreement shows that it was witnessed by her late husband, Dismas Mwakitosi who passed away in 1972. She stressed that at no point in time did she permit DW2 to sell the land that she had granted to the respondent years back.

The last witness for the respondent's side was PW3. This witness was a mason by occupation and a member of the CCR. He recalled that PW2 granted land to the respondent officially in the year 2000 and that the document for that transaction was signed on 21st August 2003. He testified

that he participated in the construction of the present three big halls and a single storey building. He stated that the appellant encroached the respondent's land measuring 27 X 16 meters in the year 2005 and demolished a toilet.

As for the defence, DW1 stated that he bought the land in dispute from DW2 in the year 2001 for TZS. 1,500,000.00 after the latter had obtained consent of PW2, her mother. This witness tendered a sale agreement executed on 3rd July 2001 which was admitted as Exhibit D1. He testified that he started construction in 2001 and completed in 2002. DW1 added that the respondent wanted to buy his land but he wanted TZS. 25,000,000.00 which he was not ready to pay. He finally turned, tables around against the respondent, that it was the latter who was a trespasser on his land and sought damages in that respect.

DW2 testified that she obtained consent of PW2 her mother, in the year 2001 to sell anything in her family and she sold the land to the appellant based on that mandate. It is significant that during cross examination DW2 testified that the church started occupying the land in 1999. She testified further that although it is PW2, who was the owner of

the land and granted part of it to the church, the rest of the family members were opposed to the idea.

On his part, DW3 who witnessed a sale agreement (Exhibit D1) which was executed by the appellant and DW2 on 3rd July 2001, testified that the land was bought by the appellant for TZS. 1,500,000.00 and that DW2 sold it to DW1 on behalf of her family.

Thus far was the material evidence of parties relevant to the dispute as recorded at the trial.

At the hearing of this appeal, Mr. Methodius Melkior Tarimo, learned counsel appeared for the appellant and the respondent had the services of Mr. Julius Kalolo-Bundala also learned counsel. Other than abandoning the fifth ground of appeal, Mr. Tarimo informed us that he had nothing to add to the written submissions which had earlier been lodged in support of the appeal. On his part, Mr. Bundala had opportunity to elaborate briefly on his submissions in objecting to the grounds raised by the appellant.

We will now turn to the submissions of parties. In the appellant's written submission in support of the first ground of appeal, he argues that the trial court erred in holding that the appellant was a trespasser to the land in dispute, because there was sufficient evidence on record to

demonstrate that he bought the land from DW2 who had obtained consent of PW2, who was the owner of the land. It was his submission that such a sale was a lawful transaction and it ought not to have been disturbed by the trial court.

In reply to that ground and in line with the evidence of PW1, PW2, PW3 and even DW2 at some point, Mr. Bundala submitted that the land was granted by PW2 to the respondent between 1999 and 2000, although the deed of transfer was executed on 21st August 2003. He submitted that the consent to DW2 to sell land did not relate to the land in dispute.

As for grounds 2, 3 and 4, the appellant submitted that the trial court summarized the evidence but did not analyze it, specifically that of DW1 and DW2 and that had the court analyzed the evidence, it would have found out that DW2 sold the land to DW1 with consent of PW2 and that such consent was granted in the absence of the appellant.

The appellant submitted that there was a serious contradiction between the evidence of PW1, PW2 and PW3 as to when the land was granted to the respondent. According to him, whereas PW2 stated that she granted the land to the respondent in the year 2000 as reflected at page 86 of the record of appeal, at page 76 PW1 stated that the respondent was

shown the land in the year 1999. He submitted that the same witness changed the position as reflected at page 82 of the record of appeal and submitted that they were shown the land in 1998 and later on he stated that the land was acquired between the year 1998 and 2000. On the same point he submitted that although the allegations of the respondent were that the area trespassed was 27 X 16 meters, however while still on examination in chief PW2 stated that the appellant was occupying more than two acres. The learned counsel concluded the issue of contradiction by referring the Court to sections 111 and 112 of the Evidence Act [Cap 6 R.E. 2019] (the Evidence Act) urging us to hold that the respondent failed to prove the case on the balance of probabilities.

In reply, Mr. Bundala objected to the submission; arguing that the trial court's judgment meets and satisfies the requirements of Order XX Rule 4 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC). Adding that the appellant was supposed to confirm with PW2, on which land had DW2 been authorized to sell. Counsel stated that the appellant did not carry out his due diligence of the property before he allegedly bought the land. He submitted that, authority to sell land given to DW2 was not in relation to the land she unlawfully sold to the appellant because the land

had already been given to the respondent. To back his position, he relied on the evidence of DW2 in which she acknowledged that the respondent started to occupy the land in 1999. To finalize his written arguments on this point, he submitted that the land that DW2 sold to the appellant was sold without authority of PW2, the owner.

In Mr. Bundala's oral submission, he moved the Court to consider the evidence of PW2 where she testified that she gave mandate to DW2 to sell land other than the land that she had granted to the respondent and that she gave that mandate in 2005. He also stressed that even the evidence of DW2, a witness who had been called by the appellant supported the respondent's course that land was given to the respondent in 1999.

With a complete grasp of the evidence and a clear understanding of the parties' arguments, we think, we are now in position to tackle the grounds of appeal, which we will resolve in the sequence they were argued.

In our view, the real complaint in the first and fourth grounds of appeal that we are called upon to consider and resolve, as we understand it, is that the trial court erred in holding that sale of the land to the appellant was without consent of PW2 and it was therefore unlawful.

A thorough review of the evidence of PW2 and DW2, offers an answer to the prime question of consent of PW2 to DW2 to dispose of the land to the appellant. At page 87 of the record of appeal PW2 stated:

> *"In 2005, I instructed my daughter to sell part of my land as I needed money for treatment. The name of my daughter is Clara. I told her to sell a particular land but instead she sold the area which I had already given to the plaintiff....The area sold by Clara encroaches part of the land which I offered to the plaintiff...He encroached a land measuring 27 X 16 meters. This was the land erroneously sold to him by Clara."*

As to when and in respect of which land was the mandate to sell given, DW2, was of a completely different position. Her evidence at page 112 of the record of appeal, was that:

> *"In 2001...my mother gave me mandate to sell any of the family properties. My mother and family members trusted me. All documents executed are in my name. I do not have any documentary evidence giving me powers to sell family properties".*

From the reproduced part of the evidence of PW2 and her daughter DW2 on the same aspect, we note that the two differ greatly. Whereas PW2 states that in 2005 she gave her daughter mandate to sell a specified

piece of land other than that which she (PW2) had granted to the respondent, DW2 stated that she was given mandate to sell any family property and she was given that authority in 2001. As the evidence of PW2 and DW2 are diametrically opposed on the same issue, we will have to agree with a position of one of them and disagree with the other. We will also give our reasons for the step we will take in that respect because every evidence tendered is entitled to be believed unless there are reasons not to accord it the credence it deserves.

Here then are our reasons, for the stance we will take. **Firstly,** PW2, is a person who owned the disputed land previous to occupation by anybody else. **Secondly,** upon discovery that the land was unlawfully sold to the appellant, she offered an alternative land to the appellant or else accept a refund of his purchase price in order to avert collision of his interest and those of the respondent but the appellant turned down both offers. **Thirdly,** it was the testimony of PW2 that her husband, the late Dismas Mwakitosi, passed away in 1972, but the sale agreement which was relied upon by the appellant to allege that land was sold to him shows that the late Mwakitosi witnessed it in 2001. PW2, having not been cross examined on that point, it follows that that aspect remained as true and

unshaken leaving a dent on the authenticity of the sale agreement with regard to those who witnessed it. **Fourthly**, although the alleged sale was witnessed by a ten-cell leader of the area, Ms. Khadija S. Bunto who would have been a neutral witness at the trial, she was not called to testify that indeed, in 2001 the appellant started construction of his house on the disputed land and completed it in 2002. For these reasons we attach less weight to the evidence of DW2 and hold that in 2001, if at all she sold land to the appellant, the sale was invalid as she did not have title to pass to the appellant, for she would not give what she did not have. For this stance - see **Pascal Maganga v. Kitinga Mbarika**, Civil Appeal No. 240 of 2017 (unreported). In this regard we are settled that the acts of DW2 in the sale of the land to the appellant brought her within the famous Latin Maxim *nemo dat quod non habet*, meaning "no one gives what they do not have".

It is our further observation that, the acts of DW2, of selling land in 2001 without prior authority of PW2, could be lawful only if the sale transaction could be ratified by PW2 under section 148 of the Law of Contract Act, [Cap 345 R.E. 2019], which provides that:

"Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts and if he ratifies them, the same effects will follow as if they had been performed by his authority."

As we have demonstrated earlier on, instead of ratifying the acts of DW2, to the contrary, PW2 clearly disowned them because according to her, in 2001, she had granted the land to the respondent, and naturally she would not have authorized sale of the same land to any other person.

Be that as it may, for the reasons we have stated above, we hold that the disputed land having been sold by DW2 to the appellant in 2001, it was sold without mandate of its owner and the sale was inoperative as no title could pass to the buyer, the appellant. Accordingly, the first and the fourth grounds of appeal are hereby dismissed.

The third ground of appeal is, who between the appellant and the respondent was first on the land, or to put it legally, who amongst the two was the first to assume ownership of the disputed land. In this respect, PW1 stated that he was granted the land in 1999, whereas PW2 and PW3 stated that the respondent was granted the land in the year 2000. The evidence of DW2 had a complementary value to the above evidence of the

respondent's side. At page 112 of the record of appeal, DW2 stated that the church started occupying the land in 1999. That convergency of recollection of witnesses from both sides of the case enhanced the position that at least in the year 2000 the respondent was already owning the land in dispute.

As for the appellant's side, DW1, DW2 and DW3 supported by exhibit P1, a sale agreement, all testified that the alleged sale took place on 3rd July 2001.

We need not add anything to assist us to resolve the third ground of appeal, for it is beyond clarity that the respondent was granted the land by PW2 by the year 2000 and the appellant allegedly bought it from DW2 in the year 2001. That is to say the first to own the land was the respondent. In cases of double allocation of land, even when it is occasioned by an authority or a person with legal mandate to allocated or transfer the land, the law is that the authority or transferor would have no title to pass to a subsequent grantee or transferee, by the application of the priority principle. The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of

time will be deemed to have a better or superior interest over the other - see **Colonel Kashimiri v. Naginder Singh Matharu,** [1988] TLR 162 and **Melchiades John Mwenda v. Gizzelle Mbaga (administratrix of the estate of John Japhet Mbaga, the deceased) and Two Others,** Civil Appeal No. 57 of 2018 (unreported) amongst others. In this case, we are of the position that even if the seller of the land would have been PW2, the real owner, she would not have any title to pass to the appellant in 2001 after she had granted title to the same land in favour of the respondent earlier on in 1999 or 2000, because of the above priority principle. We therefore hold that the third ground of appeal has no merit and we dismiss it.

Last, is the second ground. This was a complaint that there were serious contradictions between the evidence of PW1, PW2 and PW3 as to when the land was granted to the respondent. The appellant also, complained that there was another contradiction in the evidence of PW2 because although the allegations of the respondent were that the land which was trespassed upon was 27 X 16 meters, at page 87 of the record of appeal she stated that the appellant was occupying more than two acres.

Admittedly, in this case the evidence of PW1 was that the respondent was granted the land in 1999 and that of PW2 and PW3 that he was granted it in the year 2000. However, the inconsistence in the evidence was immaterial. It would be material to the case if the dispute between the parties was the exact day that PW2 granted land to the respondent, which was not the issue between the parties. The issue between the parties was who got the land first. Further, before the trial court it was amply shown that the appellant bought the land on 3rd July 2001 well after both 1999 and 2000. That is to say, because both dates (1999 and 2000) are before 3rd July 2001 when the appellant alleges to have bought the land, we hold that the inconsistence of the evidence on exactly when the respondent was granted the land between 1999 and 2000 is an immaterial aspect to the dispute between the parties.

As to the contradiction on the size of the land trespassed, whether it was 27 X 16 meters or it was two (2) acres, in the evidence of PW2, it appears that counsel for the appellant misunderstood what PW2 meant at page 87 and 88 of the record of appeal. At page 87 specifically at lines 14 and 15, she stated:

"I am the one who gave the land to the plaintiff in the year 2000. The said land measures nearly two acres."

However, at page 88 of the record of appeal lines 14 and 16 the witness (PW2) stated:

"He encroached a land measuring 27 meters X 16 meters. This was the land erroneously sold to him by Clara. As of today, he has encroached more land three times the one sold to him by my daughter Clara."

In our view, the witness was talking about two different things in the above evidence. At page 87 of the record of appeal, she was referring to the size of land that she granted to the respondent whereas at page 88 she was making reference to the size of the land that DW2 unlawfully sold to the appellant and the magnitude of the appellant's encroachment onto the respondent's land. We find no contractions in the two pieces of evidence for each relates to a completely different aspect of the case.

The position of law is that for a contradiction or inconsistence or omission in evidence to be considered material, it must not be a minor contradiction, the inconsistence must be going to the very substratum of the case for it to be considered a material inconsistence - see **Dickson Elia Nsambwa Shapwata and Another v. The Republic**, Criminal

Appeal No. 92 of 2007 (unreported) and **Mohamed Said Matula v. Republic** [1995] TLR 3. In this case as observed above, there was no material contradiction between the evidence of one witness and that of the other. In the circumstances, the second ground of appeal has no merit and we dismiss it.

In light of the foregoing, we find this appeal lacking in merit and we hereby dismiss it in its entirety with costs.

DATED at **DAR ES SALAAM**, this 29th day of July, 2021

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of August, 2021 in the presence of Mr. Living Raphael, counsel for the Appellant and Mr. Living Raphael holding brief Bundala Kalolo, counsel for the Respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL