IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 71 OF 2020

MIRAMBO MABULA ..... APPELLANT

VERSUS

1. **YOHANA MAIKO SENGASU ..... 1ST RESPONDENT**
2. **SALUM OMARY KABORA ..... 2ND RESPONDENT**

(Appeal from the Decision of the High Court of Tanzania, Land Division, at Dar es Salaam)

(Makani, J.)

dated the 9th day of August 2019
in
Land Case No. 27 of 2016

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JUDGMENT OF THE COURT

27th October, 2021 & 8th March, 2022

KOROSSO, J.A.:

The appeal arises from the decision of the High Court of Tanzania (Land Division) dated 9/8/2019 in Land Case No. 27 of 2016. In that case, the 1st respondent (then, the plaintiff) sued the 2nd respondent and the appellant (then, the 1st and 2nd defendants respectively) claiming ownership of land located at Dumila Township, near the bus station bordering Morogoro- Dodoma Highway in Morogoro Region (the suit property) containing a godown and a factory with two rice husking machines. The 1st respondent claimed that he had paid the full amount

of Tshs. 65,000,000/- to the 2nd respondent and thus purchased the suit property. He therefore sought vacant possession of the suit property from the appellant and the 2nd respondent. He alleged that the 2nd respondent had illegally and without justification sold the suit property to the appellant.

On the other hand, through his written statement of defence (WSD), the 2nd respondent denied the claims and stated that the agreement he had with the 1st respondent for the purchase of the suit property was revoked upon his failure to honour the agreement, and the suit property sold to the appellant. He also filed a counter claim stating that the 1st respondent claims have tarnished his image and claimed for Tshs. 389,180,000/- as damages for breach of contract and Tshs. 1,840,000/- per day for loss of business from the date of the filing of the suit until the injurious publication is reversed, and general damages. The appellant through his WSD apart from denying the claims against him, raised a counterclaim asserting that he endured financial loss of Tshs. 25,000,000/- and to have purchased the suit land for Tshs. 70,000,000/= from the 2nd respondent. The High Court entered judgment for the 1st respondent and declared him the lawful owner of the suit property.

A brief background of the matter leading to the instant appeal is that in the year 2004 the 2nd respondent acquired the suit property. In 2009, he leased the suit land to the appellant in consideration of Tshs. 6,000,000/= per year after the appellant had failed to acquire enough funds to purchase it from the 2nd respondent having paid Tshs. 20,000,000/- to the 2nd respondent as down payment. While this was ongoing, the 2nd respondent sought other customers to purchase the suit property. The 1st respondent showed interest and subsequently entered into an agreement (exhibit P1) with the 2nd respondent to purchase the suit land for Tshs. 65,000,000/=. In line with the agreement, and as per the payment schedule, 1st respondent paid Tshs. 45,000,000/= as down payment and was subsequently expected to pay Tshs. 2,000,000/- per month for ten months, starting from 6/7/2013.

According to the 2nd respondent (who testified as DW1), having paid the down payment as agreed, the 1st respondent failed to pay the monthly installments on the dates set as agreed. DW1 contended that upon the said breach by the 1st respondent, he decided to revoke the sale agreement. Subsequently, the 2nd respondent drew an agreement with the appellant for the purchase of the suit property, whereby, the appellant was to pay Tshs. 70,000,000. The appellant fully paid the

purchase price and exhibit D4 was submitted to prove this fact. At the end of the trial, the High Court entered judgment for the 1st respondent. Aggrieved, the appellant has preferred to appeal to this Court.

The appeal is predicated on 25 grounds of appeal. However, in the written submissions filed by the appellant, 13 grounds were abandoned as confirmed by the counsel for the appellant at the hearing of the appeal, that is, grounds number 4, 5, 6, 7, 8, 9, 13, 14, 17, 18, 20, 24 and 25. Compressed, the remaining grounds of appeal address the following grievances: **one**, irregularity in proceedings upon failure of successor judge to provide reasons for the change of judges in the conduct of the trial; **two**, propriety in admissibility and consideration of the document titled *'Makubaliano ya Awali'* (exhibit P1) in determination of the rights of the parties in the case; **three**, the essence of specified time for payment of purchase price in validating or invalidating a contract of sale; **four**, burden of proof for rival contentions related to obligations on the contract of sale; **five**, matters for consideration in granting damages to a party; **six**, propriety in invocation of the principle of *caveat emptor* against the appellant as opposed to the 1st respondent; **seven**, faults inference of fraud in the agreement entered between the appellant and 2nd respondent (Exhibit P6) as against the 1st

respondent; **eight**, allege improper consideration in awarding general damages to the 1st respondent; and **nine**, faults the finding that the amount paid by appellant to 2nd respondent was rental fees and not purchase price of suit land.

When the appeal was called for hearing, Mr. Barnaba Luguwa, Mr. Audax Kahendaguza Vedasto and Ms. Jackline Kulwa, all learned Advocates entered appearance for the appellant. The 1st respondent was represented by Mr. Emmanuel Augustino, learned Advocate and Mr. Abraham Hamza Senguji, learned Advocate represented the 2nd respondent.

Mr. Luguwa commenced by addressing complaint number one and argued that whilst De Mello, J. recorded the testimony of PW1, subsequently, Makani, J. proceeded with hearing until delivering judgment, however, she did not give reasons on the absence of De Mello, J. and why she had to take over the trial. According to the learned counsel, the law directs that where there is a change of judges in proceedings, the reasons for the change must be recorded. He contended that this requirement is rationalized by the individual calendar which presupposes upon a Judge being assigned a file to hear and determine, he/she will do so up to delivery of judgment in line with

Order XVIII Rule 10(1) of the Civil Procedure Code, Cap 33 RE 2002, now 2019 (the CPC). He cited the case of **Mirage Lite Ltd vs Best Tigra Industries Ltd**, Civil Appeal No. 78 of 2016 to reinforce his contention. In conclusion, Mr. Luguwa contended that the anomaly leaves doubt on whether the successor judge was able to determine the credibility of witnesses properly and the envisaged transparency in the judiciary with the introduction of individual calendar for judges. He thus urged the Court to find the anomaly fatal and should lead to nullification of proceedings.

Mr. Augustino's response was to urge the Court to find it distinguishable, the case cited by the learned counsel for the appellant and contended that Order XVIII rule 10(1) of the CPC deals with takeover of cases and does not provide conditions or sanctions. He argued that in the instant case, there was a recorded explanation that the hearing was in consequence of BRN (see page 188 of the record of appeal) and thus in line with what is provided for under the respective rule that, reassignment of judges in hearing cases should only be upon good reason being reflected. He urged the Court to find that the hearing of the case was for purposes of expediting finalization of cases as reflected on record and thus a good reason for reassignment of judges.

The arguments by the counsel for the 1st respondent were supported by Mr. Senguji who argued that the hearing of the instant case having been part of BRN was a good reason precipitating change of judges considering the envisaged transparency was there. Alternatively, he argued, the appellant had failed to show how non assignment of reasons by the successor judge prejudiced him. He thus implored the Court to dismiss the ground for being devoid of merit.

Mr. Luguwa's rejoinder was mainly to reiterate his arguments expounded in the submission in chief, further urging the Court to refrain from considering the 1st and 2nd respondents' counsel arguments. He contended that the position of the law in terms of the consequences where such an anomaly takes place is restated in the case of **M/S Flycatcher Safaris Ltd vs Ministry of Lands and Human Settlements Development and the AG**, Civil Appeal No. 142 of 2017 (unreported). According to him, the failure of the successor judge to provide reasons was a fatal error that vitiated the proceedings.

Having heard and considered the submissions both oral and written, the cited references from all the counsel and the record of appeal on matters related to the complaint before us, we think it is pertinent to

reproduce the relevant provision argued to have been infringed, that is, Order XVIII rule 10(1) of the CPC that reads:

> *"10.-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

The import of the above provision has previously been discussed by this Court in **M/S Georges Centre Limited vs Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported). In that case, we emphasized that once the trial of a case has begun before one judicial officer, that judicial officer must bring it to completion unless there are some reasons hindering him/her to do so since the law imposes an obligation to the successor judicial officer to put on record why he/she has to take up the partly heard case from another judicial officer. Similarly, in **M/S Flycatcher Safaris Ltd** (supra), the Court stated:

"In essence, the law is well settled on succession of judicial officers. Successor judicial officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death, transfer or other cause."

In contemplation of what is restated above, as rightly argued by Mr. Luguwa, the record shows that on the 27/8/2018 De Mello, J. took over presiding the proceedings including the testimony of Yohana Michael Sengasu (PW1). Thereafter, Makani, J. took over and presided over the testimony of Salim Omary Kabora (DW1). The counsel for the 1st and 2nd respondents argued that since the take-over of the case by Makani, J. was during the hearing of cases listed as a BRN cases, this should suffice as a reason for the takeover. Our scrutiny of the record reveals that the High Court at page 188 of the record observed that:

"...the status of the case according to counsel is that the plaintiff has already closed her case and it is proceeding in respect of the defendants. Since the matter has been cause listed in the BRN I would wish to proceed on the dates so fixed..."

We are alive to the fact that cases listed in the BRN are those condemned as backlog cases requiring special attention so that they be finalized expeditiously. Therefore, taking into consideration the requirements of Order XVIII rule 10 of the CPC, we find the said fact by itself does not absolve the duty of the successor judge to provide reasons for taking over a partly heard case. Indeed, the rationale for the requirement for a successor judge or magistrate to assign reasons for taking over the hearing from the predecessor judge was expounded by the Court in the case of **Charles Chama and 2 Others vs The Regional Manager TRA and 2 Others**, Civil Appeal No. 224 of 2018 (unreported), stating thus:

> "***One***, *that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in the determination of any case before a court; and* ***two*** *that the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised.*"

The third rationale extrapolated from the case of **Fahari Bottlers and Southern Highland Bottlers Ltd vs The Registrar of Companies and the National Bank of Commerce (1997) Ltd**, Civil Revision No. I of 1999 (unreported), is that, assigning reasons where

there is a change of presiding judicial officer is to ensure compliance with individual calendar system that requires a specific judge or magistrate once assigned a case to proceed with it to its conclusion unless, exceptional circumstances occur to warrant this not to happen.

As can be discerned from the above cited decisions, the practice is meant not only to facilitate case management by trial judges or magistrates but also to promote accountability. We therefore agree with the appellant's counsel that failure to assign reasons when there is change of judges as was the case in the instant case, was an irregularity whose consequence we shall discuss at a later stage. For the foregoing, complaint number one has merit.

Mr. Vedasto who arose to amplify on some of remaining grounds of appeal, commenced by adopting the appellant's filed written submissions and essentially argued complaints number two and three conjointly. The complaints related to propriety of admissibility, consideration and validity of the document titled "*Makubaliano ya Awali*" executed on 7/6/2013 and admitted as exhibit P1. He asserted that exhibit P1 related to the purchase/sale of the suit land by the 1st respondent to the 2nd respondent for Tshs. 65,000,000/-. In the agreement, the 1st respondent was required to pay and paid Tshs.

45,000,000/- at the signing, and the balance amount of Tshs. 20,000,000/- was to be paid in monthly installments of Tshs. 2,000,000/- as expounded in clause 1 of exhibit P1. According to the appellant, as testified by DW1, the 1st respondent defaulted to meet the agreed payment time schedule on the balance amount for the purchase price of the suit property and that in defaulting, in essence, the 1st respondent was in essence in breach of the terms of the agreement. Mr. Vedasto further contended that, the breach was fatal and had the effect of ending the agreement for sale of the suit property between the 1st and 2nd respondent.

The appellant counsel challenged the fact that in the judgment of the High Court, having properly outlined the principles governing contracts when time is a matter for consideration as held in **Tanga Petroleum Co. Ltd vs CRDB**, Misc. Commercial Application No. 182 of 2018 (HCT Commercial Division DSM) (unreported), failed to consider the requisite guiding principles. He argued that the accepted principles of contract provide alternative ways by which the court can grasp that observance of time is of essence for the existence or continued existence of a contract between parties.

The appellant argued that the trial court did not properly test the application of the said principles to the contract in contention, having construed that the time factor was not of essence in the said contract. In the alternative, the appellant's counsel maintained that even if it can be argued that the parties had not stated in the contract that the consequences of non-observance would be to render contract void, this would not have had any effect, since that is what the law provides. The appellant thus prayed for reversal of the High Court's finding on this issue and find the complaint to have merit.

In response, Mr. Augustino, upon adopting the 1st respondent's written submission, contended that apart from challenging the propriety of admission of exhibit P1, the complaints under scrutiny invariably, address the validity of the contract of sale between the 1st and 2nd respondents. He thus reasoned that since the appellant did not object to the admissibility of exhibit P1, he should not be allowed to challenge its validity at this stage. The learned counsel also queried the fact that even though exhibit P1 was pleaded in the plaint, the appellant's pleadings did not challenge its validity then and thus challenging it at this stage is an afterthought. The learned counsel contended further that when the relationship between the appellant and the 2nd respondent as a tenant

and landlord is considered together with the obvious discrepancy in the dates when it is alleged the 2nd respondent sold the suit property to the appellant, there is obvious conspiracy to defraud the 1st respondent. He also questioned the fact that the appellant and the 2nd respondent had described different modes of payment for the purchase of the suit property arguing that whereas, the 2nd respondent stated that payment was in full via his CRDB bank account, the appellant testified that he paid the amount in installments and submitted payment slips.

Regarding failure of the 1st respondent to pay the amount of 2,000,000/- as agreed on the 6th of each month, for July and August, the learned counsel argued that this was a minor breach as found by the trial court and that in any case the 1st respondent did pay in lumpsum to cover the unpaid amount for the two months he defaulted to pay. He concluded praying the complaint be found to lack merit and for its dismissal.

Mr. Senguji prefaced his submission by adopting the 2nd respondent's written submission. He contended that inclusion of the 2nd respondent in the suit was flawed grounded on misinformation and untruths. He maintained that the 1st respondent failed to pay the monthly installments as specified in exhibit P1 and thus was in breach of

the agreement and the breach led him to rescind the contract and sell the suit property to the appellant who had earlier shown interest to purchase it but failed to get a loan to pay the full amount. The 2nd respondent's counsel denied any alleged conspiracy with the appellant with intent to defraud the 1st respondent and urged the Court to determine who had the best title among the parties to the suit considering the evidence.

In rejoinder, Mr. Vedasto reiterated his submission in chief and contended that the 2nd respondent concurred with the appellant's position that the 1st respondent failed to adhere with the time specified in exhibit P1. He argued that the appellant's superior title to the suit property was unchallenged and proven.

We have considered the submissions, arguments, the record of appeal and the cited references related to the grievances under scrutiny. This being the first appeal, this Court has a duty to subject the entire evidence to re-evaluation and come to its own conclusion, aware of the necessity to do this cautiously acknowledging that the trial court was at a better position to see, hear and appreciate the evidence. (See, **Tanzania Sewing Machine Co. Ltd. vs Njake Enterprises Ltd**, Civil Appeal No. 15 of 2016 (unreported)).

We agree with the appellant's counsel submission that the following facts are not contested. **One**, that the suit property was owned by the 2nd respondent prior to the disputed transactions; **two**, that exhibit P1 is an agreement on the purchase/sale of the suit property by the 1st respondent from the 2nd respondent for Tshs. 65,000,000/-; and **three**, according to exhibit P1 the 2nd respondent was to pay and paid Tshs. 45,000,000/- at the signing, and that the balance amount of Tshs. 20,000,000/-was to be paid in monthly installments of Tshs. 2,000,000/- per month for ten months as expounded in clause 1 of exhibit P1 which states:

> "(1) *Kwamba deni la Milioni ishirini (20,000,000) zilizosalia atazilipa kwa installments za Tshs. 2,000,000/- (Millioni Mbili tu) kila tarehe 06 ya kila mwezi kwa miezi kumi mfululizo."*

The above facts were also surmised by the High Court when it stated at page 378 of the record that:

> "... *It is not in dispute that there was a simple Agreement (Exhibit P1) between the plaintiff and 1st defendant in respect of the purchase of the suit land by the plaintiff. The terms were among others that the plaintiff deposits TZS 45,000,000/- on the date of signing the*

agreement on 7/06/2913 and the balance be paid in equal instalments of TZS 2,000,000/- on the 6th of the following months until the said debt is cleared on 06/03/2014. It is not in dispute that the first deposit was duly paid as agreed; but the balance was not paid on the dates agreed in the contract..."

The High Court while acknowledging the fact that the 1st respondent defaulted in payment of the monthly installments (for July and August 2013) found that the 1st respondent paid for 3 months installments in the third month, payment which was accepted by the 2nd respondent, a conduct which the High Court found showed that the 2nd respondent did acquiescence the continuance of the agreement as provided for in section 39 of the Law of Contract, Cap. 345 R.E 2019 (the Law of Contract).

Largely, we find the main contentious issue in the instant appeal is on who has the best title to the suit property amongst the parties. From the record, the 2nd respondent believes that the agreement between himself and the 1st respondent was revoked upon what he considers the breach of the terms of their agreement by the 1st respondent. It suffices that where parties have entered into an agreement binding upon them,

neither of them should interfere with the terms and conditions therein, a position restated by this Court in the case of **Philipo Joseph Lukonde vs Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 (unreported) which was inspired by the decision of the Court of Appeal of Kenya, in **Michira vs Gesima Power Mills Ltd** [2004] eKLR. The Court also subscribed to what was stated in an article titled "**The Nature and Importance of Contract Law**", Oxford University Press stating:

> *"A contract is a promise (or a set of promises) that is legally binding; by 'legally binding' we mean that the law will compel the person making the promise ('the promisor') to perform that promise, or to pay damages to compensate the person to whom it was made ('the promisee') for non-performance. Promises are a common feature of our lives; individuals make promises to family members and their friends, promises are made within workplace..."*

In the case of **Mohamed Idrissa Mohamed vs Hashim Ayoub Jaku** [1993] T.L.R. 280, the Court reiterated the duty imposed by the law on parties to contracts, to perform their contractual obligations and we subscribe to the restated positions.

In the instant case, exhibit P1, drawn on 7/6/2013 was an agreement between the 2nd respondent and the 1st respondent for the sale of the suit property on terms already alluded hereinabove. It suffices, that the essence of time in any agreement cannot be underscored. The general rule on this was discussed in the **Halsbury's Laws of England**, 5th Edition Reissued, Vol. 9(1) Para 931 at page 685, which states:

> *"The modern law, in the case of contracts of all types, maybe summarized as follows. Time will not be considered to be of essence, except in one of the following cases: 1) where the parties expressly stipulated that conditions as to time must be strictly complied with; or 2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of essence; or 3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of essence."*

A revisit of exhibit P1 shows that when condition 1 is considered, clearly, clause 1 of exhibit P1 stipulates the essence of what it is required. Clause 1 of exhibit P1 found at page 235 of the record stipulates the schedule of payment of the balance amount of Tshs.

20,000,000/- to be within ten months and payment of Tshs. 2,000,000/- to be made on the 6th of each month. As rightly stated by the counsel for the appellant when this is considered with clause 6 of the agreement at page 235, which expressly pronounces that non-compliance of clauses 1-5 will lead to collapse of the agreement and accentuates the relevance of the specified time therein means that the essence of time in the entered agreement is clearly expressed. For ease of reference, we reproduce Clause 6 of exhibit P1 which reads:

> *"(6) Ukiukwaji wa mojawapo ya vipengele (1), (2), (3), (4) na (5) hapo juu vitabatiiisha kabisa makubaiiano haya."*

Again, considering the nature of exhibit P1 and the fact that the aim was disposition of the suit property, condition number 2 was also fulfilled. Regarding condition number 3 found by the High Court not to have been proved having rejected exhibit D1, D2 and D3 which were text messages submitted by 2nd respondent intended to prove notification of revocation of agreement to the 1st respondent, we are of the view that the High Court Judge erred in finding this clause to mean that the appellant failed to prove the relevance of the time in the agreement. This is because, notably, only one of the conditions if proved, is sufficient to show the essence of time to the agreement. We

find that with due respect, had the High Court considered the obtaining circumstances and the fact that condition 1 and 2 were proved, the fact that time was a crucial factor in executing the agreement would not have been queried and it would have led to a different conclusion.

We are of the firm view, that for the foregoing reasons, as rightly argued by the learned counsel for the appellant, having taken into consideration the importance of the scheduled time to pay the installments, failure of the 1st respondent to adhere to the same, meant that the 1st respondent breaches the terms of the agreement, leaving the 2nd respondent with an option to draw a new contract with the 1st respondent or to revoke it, as he did. Additionally, it is also important to note that according to clause 3 of exhibit P1, issuance of a permanent contract of sale was conditional to payment in full as stipulated in exhibit P1. The breach to pay the monthly installments within time specified meant payment in full could not be actualized.

Indeed, we find that the finding by the High Court Judge that the 2nd respondent did acquiescence the default in payment of the installments as stipulated unsupported by available evidence. Having revisited the record of appeal there is no doubt that the 1st respondent did pay the balance amount to the 2nd respondent at various intervals

but clearly beyond the stipulated time in the contract as found in exhibits P3 to P9. The 2nd respondent conceded to this but argued that it was after he had notified him of revocation of agreement. It suffices that after breach of the agreement, undoubtedly, all the tendered documents to prove payment, that is exhibits P3-P9 were irrelevant in proving the case for the 1st respondent. Therefore, complaints number two and three have merit.

Moving to complaints number six and seven, on whether it was proper for the High Court judge to invoke the principle of caveat emptor in determination of contentious matters before the trial court, and allegations of the appellant and 2nd respondent having conspired with intent to defraud the 1st respondent. The learned counsel for the appellant argued that the principle is applicable against a *bonafide* purchaser, as a defence to justify purchase of the property. He argued that the defence is relied upon after the person who purchased the disputed land has found that the same land had another title or certain defects making it unfit to purchase. He argued further that in the instant case the circumstances did not warrant invocation of the principle since there was no evidence that the disputed property was on registered land and the appellant had been a tenant of the 2nd respondent when the

sale took place and nothing to show that the appellant was aware of the transaction between the 1st respondent and the 2nd respondent or any other person for the purchase of the suit property.

In the alternative, he argued that the principle could also have acted against the 1st respondent, since having acknowledged the fact that he knew the appellant as the tenant of the 1st respondent at the suit property, how was he sure that he was only a tenant? The learned counsel thus argued that taking all the obtaining factors in consideration, the High Court wrongly applied the principle of caveat emptor it being a contractual sale and only took place after revocation of the agreement between the 1st and 2nd respondents.

Confronting the complaints before the Court, the learned counsel for the 1st respondent argued that the fact that the 2nd respondent undoubtedly received money from more than one person for the purchase of the suit property should not draw an inference of there being conspiracy or intention to defraud. Similarly, no such inference should receive any consideration on arguments of existence of disparity in evidence of witnesses. Mr. Augustino contended further that the principle of caveat emptor was correctly applied by the trial court since the 1st and 2nd respondents and the appellant knew each other and

resided in Dumila and there was no need for due diligence. He urged us to find the complaint to lack merit.

The learned counsel for the 2nd respondent on the other hand categorically denied contention of the there being conspiracy and intention to defraud on the part of the appellant and the 2nd respondent. He argued that the 2nd respondent testified that he had consulted with the 1st respondent for him to stop payment after he had revoked the agreement and sold it to someone else and that at no time was the suit property sold to two people. He maintained that the principle of caveat emptor was improperly invoked in the instant case since the parties knew each other and thus there was no need to employ and search for due diligence. He urged us to evaluate the circumstances of the case and determine who amongst the parties had the best title to the suit property. The appellant's rejoinder was a reiteration of the earlier submissions.

Having heard the counsel for the parties on the complaints, the principle of *caveat emptor* meaning, "*let the buyer beware*" was properly expounded by the learned counsel for the appellant. The principle presupposes a buyer to take necessary steps to investigate on the title or ownership of the property before completing the purchase to ensure

that the property purchased is in good faith and without any incumbrances. In the present case, the trial judge at pages 384-5 observed:

> *"Accordingly, on the principle of "buyer beware" the 2nd defendant ought to have conducted a thorough search before he embarked on the purchase of the said plot of land. Since the 2nd defendant did not take any precaution to protect himself this court shall not award any general damages as claimed."*

Taking into account the circumstances of this case, we do not find that the principle of caveat emptor was properly invoked. This is because, the underlying issue is that the agreement between the 1st and the 2nd respondents was no longer valid from the date of breach of the agreement by the 1st respondent. This takes us again to the question who had a better title to the suit property whilst being reminded that it is trite law that he who alleges must prove in terms of section 110 (2) of the Evidence Act, Cap 6 R.E 2002, now 2019 (the Evidence Act). Thus, the burden of proving that the 1st respondent had a better title to the suit property as against the appellant fell upon him, especially to prove that the agreement between himself and the 2nd respondent was fully executed. We are of the view that had the trial judge considered the fact

that the agreement between the 1st and the 2nd respondents was voided by the breach, she would not have found that the appellant did not exercise due diligence in the purchase of the suit property. DW1 categorically stated that upon rescinding the agreement with the 1st respondent, he did revert to the appellant, where originally, they had a rental agreement on the suit property and received payment from the appellant to effect the sale of the suit property.

The High Court when enumerating discrepancies in the explanations given by the 2nd respondent and the appellant in their evidence stated that it is apparent that while the 1st respondent entered a signed agreement on 7/6/2013, the appellant had also started paying the purchase price to the 2nd respondent. Finding that this meant that the 2nd respondent entered into an agreement with the 1st respondent while already receiving money from the appellant. The High Court judge also had an issue with the fact that the 2nd respondent testified that the appellant paid the purchase price in full while the appellant claimed it was paid in installments.

The learned counsel for the appellant challenged the High Court's findings stating that nowhere what is referred to can be said to infer conspiracy or fraud between the 2nd respondent and the appellant. As

rightly argued by the learned counsel for the appellant, the inference drawn by the High Court judge is one where the incidents cited do not fall with the definition of a conspiracy or intention to defraud the 1st respondent. We find them to be minor discrepancies emanating from the way different people expound issues seen or heard. In any case, where there are discrepancies in the testimony of witnesses, the duty of the court is to consider credibility of the respective witnesses to determine which one was more reliable and not to infer there was conspiracy.

Having re-evaluated the evidence, we find nothing that can lead us to discredit the evidence of DW1, who stated that he received the purchase price paid in full by the appellant and his evidence was uncontroverted. All in all, we find that the complaint has merit. For the foregoing, in the case at hand, we find that the 1st respondent failed to discharge the burden of having a better title to the suit property on a balance of probabilities.

That said, in the interest of justice and on the above findings, at this juncture we find no urgent need to dwell on the consequences of the discerned irregularity upon the failure of the High Court judge to record reasons upon taking over the case from another judge as determined in complaint number one. We are of the firm view that the

position of the Court stated above in determination of complaints number two, three, four, six and seven is sufficient to dispose of this appeal.

In the end, the appeal is allowed. The judgment of the trial court is hereby quashed and substituted with an order that the sale of the suit property to the appellant was lawful. The appellant shall have his costs and under the circumstances we grant general damages of Tshs. 5,000,000/-.

DATED at **DAR ES SALAAM** this 4th day of February, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL
W. B. KOROSSO
JUSTICE OF APPEAL
P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 8th day of March, 2022 in the presence of Jackline Kulwa, learned advocate for the appellant and Emmanuel Augustino, learned advocate for the 1st respondent and Abrahamu Senguji, learned advocate for the 2nd respondent is hereby certified as a true copy of the original.

R.W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL