IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 151 OF 2020

MWANAARAFA ABUBAKAR BASHEIKH MIKIDADI
AND ZUHURA ABUBAKAR BASHEIKH MIKIDADI (Administratrices of the Estate of the Late ABUBAKAR BASHEIKH MIKIDADI) ..... **APPELLANTS**

VERSUS

KASSIM KAMTWANJE ..... **FIRST RESPONDENT**

HAMISI BASHEIK MIKIDADI ..... **SECOND RESPONDENT**

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mtwara)

(Ngwembe, J.)
dated the 30th day of July, 2019
in
Land Appeal No. 2 of 2019

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JUDGMENT OF THE COURT

25th & 29th March, 2022

NDIKA, J.A.:

The appellant, Abubakar Basheikh Mikidadi unsuccessfully sued his business associate Kassim Kamtwanje ("the first respondent") along with his brother Hamisi Basheik Mikidadi ("the second respondent") for ownership of an unsurveyed piece of land located at Matogoro within Tandahimba District. The District Land and Housing Tribunal of Mtwara ("the trial tribunal") was satisfied that the first respondent was the lawful owner of the disputed property having acquired it lawfully from the

second respondent. His first appeal brought forth no dividends, hence this second appeal.

The essence of the claim by the deceased appellant, who adduced evidence as PW1, was that he bought the property in dispute from the second respondent on 24th October, 2012 at the price of TZS. 800,000.00 as evidenced by a sale agreement executed at the Ward Office of the Matogoro Ward on that day (Exhibit P1(c)). Since then, however, he was unable to take possession of the property because the first respondent, who had its possession then, refused to yield up vacant possession even after he was served with a notice to vacate (Exhibit P1(a)).

The rival claim by the first respondent, who testified as DW1, was that he bought the disputed property in 2009 from the second respondent (DW2), who at the time owed him TZS. 2,500,000.00. According to him, the second respondent, having failed to repay him the money, agreed to an arrangement with him by which he (DW1) paid off by monthly instalments the second respondent's outstanding with the National Microfinance Bank (NMB) at Newala, Lindi, amounting to TZS. 5,500,000.00. At the time, the bank had advertised its intention to sell, by public auction, the disputed property, which had been mortgaged to secure the loan, following the second respondent's default to repay it. On

how the arrangement was made, the first respondent adduced that at the instance of the second respondent, the second respondent's wife (Hawa Saidi – DW3) issued him a letter signed by the second respondent addressed to the Branch Manager, NMB Newala. In that letter, the second respondent notified the bank that he owed the first respondent TZS. 2,500,000.00 and that he was selling the disputed property to him on the understanding that he would settle the outstanding loan. The bank accepted the arrangement and allowed the second respondent to repay the outstanding loan by monthly instalments of TZS. 265,000.00 each between April 2009 and March 2011. The said letter was annexed to the first respondent's written statement of defence but, for an obscure cause, it was not tendered in evidence.

The first respondent further testified that sometime in November, 2011, the second respondent called him demanding TZS. 3,000,000.00 so that the total purchase price would rise from TZS. 8,000,000.00 to TZS. 11,000,000.00. The first respondent rebuffed the demand, it being against their original agreement. Although the first respondent subsequently offered to hand over the disputed property to the second respondent if he refunded him TZS. 8,000,000.00 that he spent on it, his friend turned indifferent to the proposal.

A good deal later in 2015, the first respondent was served with a claim (Land Application No. 22 of 2015) instituted in the trial tribunal by the second respondent for ownership of the disputed property against him and three other persons who were occupying it as tenants. As part of his claim, the second respondent stated that, he had sold the said property to his brother (the deceased appellant) on 24th October, 2012 at the price of TZS. 800,000.00. The tribunal dismissed the matter with costs on the ground that the second respondent, by his own pleading that he had sold the property to the appellant on 24th October, 2012, lacked the standing to sue. The tribunal's judgment dated 18th January, 2016 was admitted in evidence as Exhibit D1.

In his testimony, the second respondent admitted to have borrowed money from the bank as well as from the first respondent and another business associate called Hamisi Hassan Mnamba as capital injection for his beverage selling venture. However, he strongly denied to have sold the disputed property to the first respondent. His version was that upon failing to repay the bank loan and refund the money he owed the first respondent, he allowed the first respondent to settle the outstanding bank loan on the agreement that his friend would manage the disputed property upon a lease for three years from 13th September, 2009 and that

he would recoup all his money from rental income and proceeds of sale of water from a borehole. Elaborating, he stated that the property contained three business stalls each rentable for TZS. 50,000.00 a month; two residential rooms each attracting monthly rent at TZS. 20,000.00 and water supplied from the borehole fetching between TZS. 5,000.00 and 7,000.00 a day. According to him, the first respondent undertook to yield up possession of the property upon the expiry of the three-year lease. On that basis, the second respondent directed his wife (DW3) to issue his friend a letter to take to the Branch Manager informing him of the arrangement for repayment of the loan. He stoutly denied that the letter concerned an arrangement for the sale of the property. On her part, DW3 supported her husband's claim regarding the letter that she issued. The second respondent bemoaned that his business associate reneged on his promise to vacate the property after the lease had expired.

The trial tribunal substantially determined the matter on credibility and reliability of the evidence on record. It disbelieved the claim by the appellant and his brother that the property was sold by the latter to the former at TZS. 800,000.00, which it found to be a throwaway price. It viewed the alleged sale as a ruse to shortchange the first respondent who

had settled the outstanding bank loan and redeemed the property in dispute on the understanding that he had bought it.

As hinted earlier, the appellant had his appeal to the High Court dismissed. In his judgment, the learned first appellate Judge referred to the letter DW3 gave to the first respondent at the behest of the second respondent. Having reproduced the contents of that letter, as shown in the judgment at page 108 of the record of appeal, the learned Judge reasoned that the first respondent acquired title to the property in dispute on 12th April, 2009 vide that letter and that acting on it he repaid the entire outstanding loan. He also took into account the fact that since 12th April, 2009, the first respondent enjoyed peaceful, continuous and undisturbed possession of the property. He rejected the claim that the appellant bought the property in dispute on 24th October, 2012 vide Exhibit P1(c) on the ground that the second respondent, having sold it to the first respondent 12th April, 2009, he had no right to resale it to his brother subsequently. Put differently, the second respondent at the time had no title to pass to his brother.

The appellant challenges the above outcome on five grounds of appeal, which we rephrase as follows:

1. *That, the proceedings before the High Court were irregularly conducted as the parties were heard orally without giving them a better option.*
2. *That, the parties' right to be heard was abrogated because they were not allowed to choose the best option for the hearing of the appeal.*
3. *That, the learned Judge erred in law and in fact by relying on the letter the first respondent received from DW3, which was not tendered in evidence as an exhibit.*
4. *That the learned Judge erred in law and in fact in upholding the trial tribunal's decision relying on unproven evidence over ownership of the property in dispute.*
5. *That, the learned Judge erred in law and in fact in deciding the appeal in favour of the first respondent without any evidence or acknowledgement from the bank in question.*

It is necessary at the outset to remark about a preliminary procedural matter we addressed ahead of the hearing of the appeal. When the appeal initially came up before us on 22nd March, 2022, the appellant and the second respondent did not appear whereas the first respondent appeared in person. It transpired that the appellant passed away on 25th November, 2019 and that on 20th February, 2020 the Urban Primary Court of Mtwara appointed Mwanaarafa Abubakar Basheikh Mikidadi and Zuhura Abubakar Basheikh Mikidadi the administratrices of the estate of the deceased appellant. The said administratrices moved us

informally to join them as appellants in the place of the deceased. There being no objection from the first respondent, we acceded to the prayer and ordered the requested joinder in terms of rule 105 (1) of the Tanzania Court of Appeal Rules, 2009. On account of the absence of the second respondent who was unserved with the notice of hearing, we adjourned the hearing to 25th March, 2022. On that day, all parties appeared in person, self-represented.

We begin with the first and second grounds of appeal, which the parties canvassed conjointly in their respective written submissions. In essence, the appellants contended that the High Court abrogated the parties' right of hearing by not allowing them to choose their preferred way of hearing of the appeal ending up with them being heard orally by the learned Judge. It was argued that the parties were not effectively heard. To buttress the point, reference was made to the case of **Bank of Tanzania v. Said Marinda & Another**, Civil Application No. 74 of 1998 (unreported).

Conversely, the first respondent denied that the hearing was a flawed process. Referring to page 103 of the record of appeal, he argued that the parties were heard orally after they notified the court that they

were ready to proceed with their respective cases. The second respondent, on his part, had nothing to say.

We have considered the opposing submissions of the parties and examined the relevant part of the proceedings of the High Court, shown from page 101 to page 104 of the record of appeal. It is evident that after the hearing failed to proceed as scheduled on three previous occasions, on 5th February, 2019, 14th March, 2019 and 25th April, 2019, the appeal came up before Ngwembe, J. on 18th June, 2019 in the presence of all the parties. The appellant was then recorded, at page 103 of the record, to have stated that, *"My Lord, I am ready to proceed with the hearing of this appeal today".* His adversaries followed suit as they beckoned their readiness for the hearing to proceed. Consequently, the learned Judge allowed the hearing to proceed. The parties, then, took turns to address the court on the merits of the appeal. None of the parties had indicated if they preferred a hearing by way of written submissions to an oral hearing. Given the circumstances, we find no justification to fault the learned Judge as each party was sufficiently heard on the matter. Accordingly, we hold that the two grounds of appeal are utterly misconceived and proceed to dismiss both of them.

In the third ground, the appellant criticized the learned Judge for relying on the letter the first respondent received from DW3, which was not tendered in evidence as an exhibit. The first respondent, however, countered that, the learned Judge did not rely on the letter as such but on the overwhelming evidence on record that supported the conclusion that he reached. The second respondent, yet again, made no submission on the ground at hand.

Having examined the High Court's judgment, at pages 107 and 108 of the record of appeal, we agree with the appellant that the learned Judge relied heavily upon the impugned letter, which, as indicated earlier, was neither tendered nor admitted in evidence even though it had been annexed to the first respondent's written statement of defence. It is manifest at page 108 of the record that the learned Judge excerpted the contents of that letter, as if they had been proved, and proceeded to rely on it, albeit partly, in finding that the first respondent acquired title to the property in dispute on 12th April, 2009.

Settled is the rule that an annexure to a plaint or written statement of defence is not evidence that can be relied upon. It becomes evidence once it is subsequently tendered and admitted in evidence. In **Godbless Jonathan Lema v. Mussa Hamisi Mkanga & Two Others**, Civil

Appeal No. 47 of 2012 (unreported), for instance, we extracted from our previous decision in **Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009 (unreported) thus:

> *"We wish to point out that annexures attached along with either the plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."*

In the same vein, we held in **Shemsha Khalifa & Two Others v. Suleiman Hamed Abdalla**, Civil Appeal No. 82 of 2012 (unreported) that:

> *"We outrightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice."*

See also: **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] TLR 343; **M/S SDV Transami (Tanzania) Limited v. M/S STE DATCO**, Civil Appeal No. 16 of 2011; and **Olais Loth (Suing as Administrator of the Estate of the Late Loth Kalama) v. Moshono Village Council**, Civil Appeal No. 95 of 2012 (both unreported).

In the premises, we hold that the learned Judge slipped into error in extracting the contents of the letter, which was neither tendered nor admitted in evidence, and taking them into account in his decision. As a result, we find merit in the third ground, which we hereby allow.

Finally, we deal with the apparently interwoven complaints in the fourth and fifth grounds questioning the lower courts' concurrent finding that the first respondent was the lawful owner of the property in dispute.

It was the appellants' contention that the lower courts' concurrent finding was made against the weight of the evidence on record. It was further contended that it was sufficiently established vide Exhibit P1(c) that the deceased appellant bought the suit property on 24th October, 2012 and that the sale agreement was executed in the Ward Office

before the Ward Executive Officer ("WEO"). This evidence, it was argued, was not fully considered by the courts below.

On the other hand, the first respondent countered that, if indeed the deceased's sale agreement was executed in the Ward Office, the attesting officer (WEO) should have been called as a witness and that the unexplained failure to do so should have resulted with an adverse inference being drawn against the deceased appellant's case. Relying on the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] TLR 211, he also argued that the alleged sale was void because there was no proof that the second respondent's wife, as a joint owner of the property in issue, consented to the disposition by her husband.

In resolving the issue at hand, whether the lower courts decided the case against the weight of evidence on record, we think it is necessary to reiterate the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019. Equally essential is the standpoint that the standard of proof in a civil case is on a preponderance of probabilities, meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved – see **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). In that case, the

Court also explicated that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case.

We have carefully considered the rival submissions of the parties on the issue at hand. We are mindful that the appellants presented evidence that the deceased appellant bought the property in dispute from the second respondent on 24th October, 2012 at the price of TZS. 800,000.00 as evidenced by the sale agreement (Exhibit P1(c)). That transaction, if true, might only be effective if it is established that the first respondent's rival claim that he bought the disputed property on 12th April, 2009 from the second respondent is untrue. For, if it is true that the alleged sale occurred on 12th April, 2009, the second respondent would necessarily have had no title to pass to the deceased appellant subsequently on 24th October, 2012.

There is no dispute between the two respondents that the second respondent owed the first respondent TZS. 2,500,000.00 and that the former entered into an arrangement with the latter for repayment of the former's outstanding loan with NMB (TZS. 5,500,000.00) so as to redeem the property in dispute. What is starkly disputed is whether the said

arrangement involved disposition of the property (as alleged by the first respondent) or whether it was a three-year lease in favour of the first respondent with an undertaking that the property would revert to the second respondent (as claimed by the second respondent and his wife). What complicates the matter is that no documentary proof was produced by either side to support its claim. Given the circumstances, the issue turned on the credibility of the witnesses.

As hinted earlier, the courts below, after evaluating the evidence on record, gave full credence to the first respondent (DW1), having disbelieved PW1, DW2 and DW3. Our jurisprudence is settled that when the credibility of a witness is a primary consideration as in this case, the findings of the trial court, its evaluation of the testimonies of the witnesses and assessment of the value thereof as well as conclusions made must be accorded respect, if not conclusive effect. For, the trial court was in the best position to determine whether the witnesses were telling the truth as it had the unique opportunity to observe the demeanour of the witnesses. Once affirmed by the first appellate court, the trial court's findings become generally binding upon this Court, as in the instant case, unless it is shown that the courts below misapprehended the evidence.

The foregoing apart, we think the second respondent's case, if viewed and examined closely, is plainly unconvincing and inconsistent with human nature and the normal course of things. We say so because, we recall that in his evidence in chief, the second respondent stated that he allowed the first respondent a three-year lease in the course of which the first respondent was to recoup the money spent for redeeming the property. He estimated the monthly income as being TZS. 50,000.00 a month for each of three business stalls; two residential rooms each attracting a monthly rent of TZS. 20,000.00 and a borehole for supplying water for daily income of between TZS. 5,000.00 and 7,000.00, translating into monthly income of about TZS. 180,000.00. In our computation, the aggregate monthly income from these sources was expected to be a minimum of TZS. 370,000.00. Furthermore, it is in the evidence that on being queried by the trial Chairman, as shown at page 58, the second respondent stated that he was supposed to repay the bank loan by monthly instalments of TZS. 265,000.00 each, which is what the first respondent subsequently assumed to pay. What is quite baffling is that if the property in issue could have generated more than enough money every month to meet the outlay for the loan repayment, why then did the second respondent have to enter into the alleged lease

arrangement with the first respondent for him (the first respondent) to rescue the property from being auctioned off by NMB? In our opinion, the first respondent's intervention would certainly have been unnecessary if the property in issue could have generated enough money on its own for the second respondent to repay the loan himself. Viewed this way, we think that the first respondent's claim that the arrangement between him and his business associate involved a disposition as opposed to a lease seems more credible and preponderant.

It is also in evidence, as revealed at page 47 of the record of appeal, that the first appellant renovated the property in dispute after he assumed its occupation and control and that he subsequently developed a part of it into business stalls in 2011. According to him, the renovation works cost him TZS. 2,000,000.00. All this testimony was not disputed by the second respondent in his evidence. In our view, the first respondent would not have readily spent money on the property had he not owned it at the time. That said, we find the fourth and fifth grounds of appeal without substance. We dismiss them both.

The upshot of the matter is that we uphold the lower courts' concurrent finding that the first respondent is the rightful owner of the property in dispute and that the second respondent had no title to pass to

the deceased appellant when he purportedly vended the property on 24th October, 2012 to him. The appeal is, therefore, bereft of merit. We dismiss it in its entirety with costs.

DATED at **MTWARA** this 28th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2022 in the presence of the Appellants inperson, unrepresented, Mr. Jamali Kamtwanje on behalf of Kassim Kamtwanje, first respondent and Mr. Shaibu Faisi on behalf of Hamis Basheik Mikidadi, second respondent is hereby certified as a true copy of original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL