

**IN THE COURT OF APPEAL OF TANZANIA
AT Mtwara**

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

CIVIL APPEAL NO. 11 OF 2021

R. F. REAL ESTATE LIMITED APPELLANT

VERSUS

1. COCA-COLA KWANZA LIMITED

2. MOHAMED SAID KILUWA RESPONDENTS

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

(Ngwembe J.)

dated the 27th day of November, 2020

in

Land Case No. 1 of 2019

JUDGMENT OF THE COURT

23th & 31st March, 2022.

KENTE, J.A.:

At the centre of the controversy between the parties to this appeal, is the ownership of a piece of land known and described as Plot No. 2 and 4, Block "A" Shangani Low Density Area within the Municipality of Mtwara-Mikindani (hereinafter alternatively referred to as "the suit land", "the disputed property", "the disputed piece of land", or "the suit property"). Before the High Court, (sitting at Mtwara), the appellant R. F. Real Estate Limited sued the respondents Coca-Cola Kwanza Limited and Mohamed Said Kiluwa (the first and second respondent

respectively), claiming to be the lawful owner of the suit land having purchased it from the second respondent on 26th September, 2014. Accordingly, the appellant beseeched the trial court to issue, *inter alia*, a declaratory order that it was the lawful owner of the disputed landed property.

Briefly stated, the appellant's case as presented before the trial court was that, it assumed ownership of the suit land effective from 26th September, 2014. That, its ownership of the suit land came about as a result of a purchase for value from the second respondent who had in turn purchased the same disputed piece of land from one Mbwana Abuu Bausi. Taking note at this earliest opportunity that, Mbwana Abuu Bausi is the administrator of the estate of his late father one Abuu Bausi Abuu will prove worthwhile in this judgment. With regard to the question as to how the first respondent could have been involved into this dispute, it was the appellant's case that, the first respondent's predecessor Mtwara Bottlers Limited from which the first respondent derives title, had sold the disputed land to the late Abuu Bausi Abuu and therefore, upon his death, the suit land formed part of his estate subject to the administration of his son, Mbwana Abuu Bausi.

The converse position taken by the first respondent herein was very brief and straightforward. Simply stated, the first respondent maintained that, it became the owner of the suit land following a court declaratory order issued by the High Court (Commercial Division) on 22 December, 2006 in respect of Miscellaneous Commercial Case No. 45 of 2006. For purposes of clarity, through the above-mentioned court order, which was received in evidence during the trial as exhibit D2, among other things, the affairs and undertakings of Mtwara Bottlers Limited (the transferor Company) were merged into those of the present first respondent (the transferee company) which took over all the assets and liabilities of Mtwara Bottlers Limited, the transferor company. With regard to the claim by the appellant that it had bought the disputed piece of land from the second respondent and that before that transaction, there were two other sale transactions involving the same piece of land starting with the sale between Mtwara Bottlers Limited and the late Abuu Bausi Abuu in the year 1990, the first respondent maintained that, there had never been such a sale or any other sale of the said piece of land to anybody ever since it was allocated to Mtwara Bottlers Limited way back on 24th June, 1978. Unlike the second respondent who has all along embraced the appellant's claim lock stock and barrel, the first respondent maintained, both before the trial and this

Court that, the appellant's title was tainted by fraud stemming from spurious sale transactions.

After considering the evidence on the record and the parties' submissions, the learned trial judge was not satisfied that the disputed piece of land belonged to the appellant. Dealing with the question as to whether or not Mtwara Bottlers Limited had sold the suit land to anyone, the learned judge took the view that upon dissolution of Mtwara Bottlers Limited who was the first owner of the disputed piece of land in 2006, not only that the said company ceased to exist but also assuming, for the sake of argument that, if it continued to exist, it had nothing to sell in 2014 after its assets and liabilities were taken over by the 1st respondent in the year 2006. As to the appellant's claim that the suit land was sold by Mtwara Bottlers Limited to the late Abuu Bausi Abuu in 1990, believing in the contents of a letter (Exh. D3 ("B")) which was written by the Assistant Commissioner for Land on 12th July, 2013 in response to another letter (Exh. D3 ("A")) written by the Mtwara Municipal Director requesting for a permit for transfer of ownership of the disputed piece of land from M/S Mtwara Bottlers Limited to Mbwana Abuu Bausi who was the administrator of the Estate of his father Abuu Bausi Abuu, the learned trial judge was convinced that indeed the appellant's claim was

based on fraudulent sale transactions. We shall lift the veil on the details of exhibit D3 (B) at a later stage of this judgment, but concerning the learned trial judge's final decision, suffice it to say for the time being that, he went on dismissing the appellant's claim for want of merit.

The appellant was aggrieved by the decision of the trial court, hence the present appeal. It advanced four grounds seeking to fault the learned trial judge whose decision it implored us to quash and set aside.

Through its learned advocate, the appellant complained that:

1. The trial Court's judgment left the main issues between the parties unattended.
2. The trial judge failed to judiciously and fairly analyse the evidence that was before him and as a result, he delivered judgment in favour of the respondents.
3. The trial judge, without any justification, ignored the vital evidence on the ownership of the suit land from the office of the Registrar of Titles; and
4. In his determination of the dispute between the parties, the trial judge considered extraneous matters that had no bearing on the framed issues.

In this appeal, while Mr. Salimu Mushi, learned advocate appeared for the appellant, Mr. Atlay Thawe and Mr. Denis Mwesiga, also learned advocates represented the first and second respondent respectively.

In support of the first ground of appeal, Mr. Mushi took off by referring us to Order XX Rule 5 of the Civil Procedure Code [Cap 33 R.E 2019) ("the CPC") which requires a court in its judgment, to state its finding or decision, with supporting reasons, upon each separate issue unless the finding on any one or more of the issues is sufficient for the decision of the suit. The learned counsel for the appellant contended that, the trial court's judgment was silent as to who is the rightful owner of the suit property. Mr. Mushi invited us to draw inspiration from the case of **Hemedi Said v. Mohamed Mbilu** [1984] TLR 113, where the High Court held that, according to law, both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. According to Mr. Mushi, anyone between the appellant and the first respondent can still claim to be the rightful owner of the suit land as the judgment of the trial court sends the parties back to the starting point. Considering this to be a fatal defect, the learned counsel invited us to step into the shoes of the trial court, reevaluate the evidence adduced and come up with our own finding and conclusion in

terms of Rule 36(1) (a) of the Tanzania Court of Appeal Rules, 2009 as amended ("*the Rules*") and the case of **Melchiades John Mwenda vs. Gizelle Mbagga (Administratrix of the estate of the late John Japhet Mbagga) & Two Others**, Civil Appeal No. 57 of 2018 (unreported). He also asked us to draw our attention to the definition of the word "*owner*" as defined under section 2 of the Land Registration Act [Cap 334 R.E 2019] together with our recent decision in the case of **Jane Kimaro vs. Vicky Adili (As Administratrix of the Estate of the late Adili Daniel Mande)**, Civil Appeal No. 212 of 2016 (unreported).

With regard to the complaint that the trial judge failed to fairly analyse the evidence that was before him ending up in deciding in the 1st respondent's favour a complaint which we will determine together with the complaint in the 3rd ground of appeal which faults the trial judge for ignoring the evidence of the Registrar of titles, Mr. Mushi faulted the learned trial judge for digressing and fishing for complementary evidence instead of being guided by the evidence led by the parties during the trial and their respective pleadings.

As to the main question in this appeal regarding the rightful owner of the disputed suit land, Mr. Mushi referred us to our earlier decision in

the case of **Amina Maulidi Ambali & Two Others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported) where we observed that:

"...When two persons have competing interest in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

Moving forward and raising concern about the observation made by the trial judge that the appellant's title over the disputed property was tainted with fraud, Mr. Mushi was emphatic that before being accepted as truthful, the allegation of fraud ought to have been proven on a higher degree of probability than that required in ordinary Civil Cases. The learned counsel cited the case of **Omari Yusufu vs. Rahima Ahmed Abdulkadr** [1987] TLR 169 in support of the above-stated legal proposition.

Coming to the order of the High Court (Commercial Division) (Exh. D2) which dissolved Mtwara Bottlers Limited and transferred its assets and liabilities to the first respondent, the learned counsel for the appellant contended that, by 22nd December, 2006 when the said order of the court was made, Mtwara Bottlers Limited had nothing to pass to

the first respondent as the property in dispute had already been sold to the late Abuu Bausi Abuu in 1990. Moreover, Mr. Moshi made some efforts to criticise the trial judge for not accepting as true the evidence of one Mpoki Mwakifunda (DW7) an Assistant Registrar of Lands for Mtwara Region who told the court that, while Mtwara Bottlers Limited initially owned the suit property, in 1990 it sold it to the late Abuu Bausi Abuu whose administrator Mbwana Abuu Bausi sold the said property to the second respondent in 2014 who, subsequently sold it to the appellant in the same year. Since the main issue before the trial court was the ownership of the suit property which was a registered land, it was Mr. Mushi's conclusion that, the evidence of DW7 was, in the circumstances, indispensable.

Finally, on the fourth ground of appeal which criticises the learned trial judge for considering extraneous matters that had no bearing on the framed issues, the learned counsel for the appellant submitted that, it was not proper for the trial judge not to accord weight to the evidence of DW7 for the sole reason that he (DW7) was employed as Land Officer in the year 2017 while all the sale transactions took place in 2014 and further that there was no evidence to establish that, if the suit property was sold in 1990 as alleged by the appellant, then the first respondent

was occupying the suit property as a tenant. Other two observations made by the trial judge which Mr. Mushi considered to be extraneous are the observations that, Mtwara Land Department approved the transfer of the suit property from Mtwara Bottlers Limited to Abuu Bausi Abuu in 2014 after it had declined to do so in 2013 without explanation and that, the said transfer was effected in the land register in 2014 after Mtwara Bottlers had orderly been dissolved.

Responding to the grounds of appeal and the respective exposition given by Mr. Mushi, Mr. Thawe submitted in the first place that, generally, there was nothing meritorious to fault the decision of the trial judge whose judgment resolved the real matters in controversy between the parties in compliance with order XX Rule 5 of the CPC. Referring to the judgment of the trial court particularly to pages 375 to 388 of the record of appeal, Mr. Thawe maintained that, contrary to the appellant's misguided thought, it was plain that it is the first respondent who was declared the rightful owner of the disputed property and not otherwise.

As for the complaint that the learned trial judge failed to analyse the evidence before him resulting into delivery of judgment in the appellant's disfavour, the learned counsel for the first respondent submitted that, not only that the learned trial judge analysed the

evidence of both sides, but he also did so with the commensurate characteristics of a wise judge. As a result, so submitted Mr. Thawe, the trial judge deduced from the evidence on the record and came to the conclusion that, all the sale transactions upon which the appellant's claim was founded were tainted with fraud. Citing some instances of the shortcomings in the appellant's case which led to the trial judge's decision in his disfavour, the learned counsel for the first respondent identified and pointed out some matters including: -

- i) PW1's admission during cross examination by the 1st respondent's counsel that, he did not have the sale agreement between the appellant and the 2nd respondent.*
- ii) PW1's contention during examination in-chief that, a total of TZS. 470,000,000.00 was paid in- to the bank accounts of the 2nd respondent's agent while during cross-examination by the 1st respondent's counsel, PW1 failed to give an explanation why the appellant authorised payments of TZS.220,000,000.00, into the bank account of Balance Investment Limited, TZS. 220,000,000.00, and TZS. 30,000,000.00 into the bank account of one Ramadhani Makondile who were both not parties to the sale transaction.*

iii) During cross-examination by counsel for the 1st respondent, the 2nd respondent who testified as DW6 denied to have received TZS. 470,000,000.00 saying that he received TZS. 370,000,000.00 only but without tendering any documentary proof.

Relying on **Hemed Said** (supra), Mr. Thawe invited us to draw an inference that, had the appellant called Mohamed Makondile and any witness from Balance Investment Limited, they would have given evidence contrary to its interest.

With regard to the finding by the trial judge that the appellant's claim was tainted with fraud and the appellant's complaint that the allegation of fraud was a serious allegation which could only be established on a higher degree of probability than that which is required in civil cases, the learned counsel for the first respondent submitted that, it is the evidence on the record particularly the evidence regarding the alleged disposition of the disputed land on 22nd January 2014 and the earlier and subsequent dispositions which were not proven at all, which led to the trial judge's inevitable and fair conclusion that the appellant's title over the disputed property was highly suggestive of fraud. In a bid to demonstrate the phony methods deployed by the

appellant and the second respondent on one hand, and the Mtwara Land Office on another hand, Mr. Thawe submitted that, there was no paper trail on the evidence to show compliance with the provisions of sections 36 (1) (a) and (b) and 37 (1), (5) and (6) of the Land Act (Cap113 R. E 2002) (now R. E 2019) and further that, the directives given by the Deputy Commissioner for Lands Southern Zone as contained in Exhibits D3 (A) and (B) were deliberately ignored. Relying on our earlier decision in **Madam Mary Silvanus Qorro vs. Edith Donath Kweka and Wilfred Steven Kweka**, Civil Appeal No. 102 OF 2016 (unreported), Mr. Thawe invited us to follow suit and hold in consequence that, in the absence of vital documents to prove the purported sale of the disputed premises, the registration of the appellant as the lawful owner was done dubiously. Mr. Thawe raised his eyebrows over exhibits P1, P2 and P3 contending that they were executed in "marathon" fraudulent transactions which incidentally, involved some of the Regional Land Officers of Mtwara. According to him, all in all, the appellant could not be the lawful owner of the suit property as the alleged transfer of ownership from the defunct Mtwara Bottlers Limited and the subsequent transfers were proven fraudulent.

For his part, Mr. Mwesiga had very little to say on behalf of his client, the second respondent. Having been accused of being privy to the fraudulent purchase and sale of the disputed piece of land, the second respondent's position and role in this appeal eventually narrowed down to supporting the appellant completely. To that end, after hearing Mr. Mushi, it was all downhill for Mr. Mwesiga as the hardest part of his assignment was almost done. He therefore submitted that, since neither the late Abuu Bausi Abuu, nor his legal representative was a party to the suit before the High Court, and as such, fraud could not be established in their absence and further that, since the second respondent admitted that the suit property belonged to the appellant, then the learned trial judge misdirected himself for not deciding precisely who was the lawful owner of the suit property. The learned counsel nodded when we asked him, if in the event of the appeal being dismissed, the second respondent would be prepared to refund the purchase price to the appellant.

As stated before, this appeal is predicated upon four grounds of complaint but, upon a close look at the said grounds, we think, the main point for consideration as it was before the trial High Court, is on the ownership of the disputed piece of land.

On record, the only evidence which was accepted and believed as truthful by the trial court and it was essentially not in controversy, is the fact that, until the year 1990, the disputed piece of land belonged to Mtwara Bottlers Limited and that in, 2006, Mtwara Bottlers Limited was dissolved and its assets and liabilities were taken over by the first appellant. From the above facts which were not contested by the parties, it follows logically that, whoever is the lawful owner of the disputed property today, he must have derived his title from the now defund Mtwara Bottlers Limited. For that reason, it was incumbent upon the trial court to probe as he did, into the legality or otherwise of the sale transaction between Mtwara Bottlers and the late Abuu Bausi Abuu. Considering that both the appellant and the first respondent claimed to have derived title from one and the same source, the determination of the most fundamental question as to whether, in 1990 Mtwara Bottlers Limited sold the disputed piece of land to Abuu Bausi Abuu or not, will be significant if not conclusive in the final determination of this appeal.

At this juncture, it is pertinent for us to start by addressing the complaint that the learned trial judge left the main issues between the parties unresolved. Upon a close scrutiny of the judgment of the trial court, it seems to us clear that, the learned judge dealt with and finally

resolved the issues either directly or indirectly but whichever way one looks at it, the end result is that, he could not find merit in the appellant's claim. Having evaluated the evidence from both sides, the trial judge went on at page 385 of the record of appeal, posing the most fundamental question in this dispute thus:-

"... the question is whether the plaintiff performed her duty to prove ownership of the suit land to the required standard of law?"

After revisiting the applicable statutory and case law on the burden and standard of proof in civil cases, he finally arrived at the conclusion that: -

"Considering all those factors together, I think they all lead to one conclusion, that the plaintiff abdicated her noble duty to establish and prove the case on a balance of probability or preponderance of probabilities. The transactions from the defunct Mtwara Bottlers Ltd to Abuu Bausi and from Abuu Bausi to Mbwana Abuu Bausi and later from Mbwana Abuu Bausi to Mohamed Said Kiluwa, and finally, from Mohamed Said Kiluwa to R.F Real Estate Ltd through her agent Godbless Kweka were nothing other than a marathon of fraudulent transactions. Even some Regional Land, Officers from Mtwara were involved, including the one who purported to sign those transfer forms".

The last straw that breaks the camel's back came on the last page of the judgment. There the learned trial judge stated that: -

" In the upshot, the 2nd defendant had no plot of land to transfer to the plaintiff. All what they did was nothing than fraudulent transactions which this court refrain from blessing".

This, to our minds, clearly shows that the learned judge addressed himself on the crucial issue of the ownership of the suit property which he resolved in the appellant's disfavour. For, it is apparent that the learned trial judge, having gone through the evidence before him, he found that, the appellant's claim of ownership was not proven for having been derived from dubious sale transactions. This, to us, clearly demonstrates a concerted effort on the part of the learned judge to resolve the question of the ownership of the disputed piece of land which was at the centre of the dispute between the parties. In the result, we are satisfied that, in the circumstances of the case, there was no issue which was left unresolved by the trial judge as alleged by the appellant. We shall come to the question with regard to the complaint that the appellant's claim against the second respondent was left unattended, as we embark on determining whether the learned trial judge was correct to hold as he did that, the transactions leading to the appellant's acquisition

of title over the disputed piece of land, were nothing but a range of elaborate deceptions.

Alluding to our earlier observation, the determination of this appeal essentially is contingent upon resolving the question as to whether or not, in 1990 M/S Mtwara Bottlers Limited sold the disputed piece of land to the late Abuu Bausi Abuu. As stated earlier, after hearing the evidence of both parties, the learned trial judge found that there was in fact no sale and therefore the suit property had never descended from its first owner to the appellant. His finding was premised on the conclusion that, the sale transactions culminating into the appellant's alleged ownership were marred by fraud.

For our part, on a careful reappraisal of the evidence, we agree with the finding of the learned trial judge. Given the evidence on the record, we are of the respectful view, that, if ever there was any sale of the disputed property, there can be no doubt that it was void. In so holding, we are fortified by several pieces of evidence including but not limited to Exhibit D3 "B" and the oral testimony of DW7 whose evidence, according to Mr. Mushi was erroneously discredited by the learned trial judge. We will go through the two pieces of evidence albeit very briefly, to demonstrate why we hold the view that before being accepted as

true, the alleged sale transaction of the disputed piece of land by its owner Mtwara Bottlers Limited required great judicial circumspection.

Starting with Exh. D3 "B", this is a letter from the Land Office Mtwara, dated 12th July, 2013 which was addressed to the Mtwara – Mikindani Municipal Director to inform him that, the Assistant Commissioner for Land had stopped the transfer of ownership of the disputed piece of land from Mtwara Bottles Ltd to Abuu Bausi Abuu for the reasons that:-

1. *"Mauziano ya miliki hii yamefanyika mwaka 1990 na nyaraka za mauziano hazikuandaliwa kwa kutumia Sheria ya Ardhi iliyokuwa inatumika kwa wakati huo yaani Land Ordinance ya 1923 na Land Registration Act ya 1954.*
2. *Nyaraka za mauziano hayo zinaonyesha kusainiwa tarehe 17/01/1990 na zimeandaliwa kwa kutumia Land Form zilizoko kwenye Sheria ya Ardhi ya 1999 ambayo ilianza kutumika mwaka 2001.*
3. *Wakurugenzi wa Kampuni ya Mtwara Bottlers Limited ndio wanaostahili kusaini nyaraka za mauziano hayo kwa niaba ya kampuni.*

4. *Sahihi zilizopo kwenye Land Form No. 35 zimetofautiana na zile zilizopo kwenye mkataba wa mauziano.*

Loosely translated, the above means:-

1. *While the sale of this property was done in 1990, the relevant documents were not in accord with the law which was applicable then that is, the Land Ordinance of 1923 and the Land Registration Act of 1954.*
2. *While documents evidencing the sale were signed on 17th January 1990, they were prepared in accordance with the standard Land Forms available in the Land Act of 1999 which came into force in the year 2001.*
3. *The Directors of Mtwara Bottlers Limited should have signed the sale agreement on behalf of the company.*
4. *The signatures appearing on Land Form No. 35 are at variance with the ones appearing on the sale agreement.*

However, as the evidence shows, notwithstanding the above crucial information which should have put any sober mind on notice, we are told by the appellant that, the sale and transfer of the disputed piece of land from Mtwara Bottlers Limited to Abuu Bausi Abuu, went on

undisturbed until its conclusion. According to DW7 to whose evidence we now turn, the transfer from Mtwara Bottlers to Abuu Bausi Abuu was officially effected on 12th January, 2014. Having given evidence which, at first seemed to support the appellant's position that the disputed property was initially owned by Mtwara Bottlers Limited but subsequently sold to the late Abuu Bausi Abuu in 1990, DW7 went on to spill the beans when he told the trial court, while under cross-examination by Mr. Thawe that, endorsement of the transfer was made sometime after the death of the purchaser Abuu Bausi Abuu and that the records of the Registry of Land were in contradiction with Exhibits D3"A" and "B".

It is needless to say that, as opposed to Mr. Mushi's complaint that the evidence of DW7 was erroneously discredited by the learned trial judge to the disadvantage of the appellant, it is the same evidence which should have put a lid on the appellant's claim. For, the import of DW7's evidence is nothing than that, the sale and subsequent transfer of the disputed property from Mtwara Bottlers Limited to Abuu Bausi Abuu was not recognised by the office of the Registrar of Land.

Given the above mentioned two categories of evidence and others which we need not canvass here, the true position and we so hold is that, the disputed piece of land had never been sold to anybody by the

now defunct Mtwara Bottlers Limited until the year 2006, when it became the property of the present first respondent pursuant to a court order. It can then be said with regard to the appellant's claim that, in 2014, he could not have bought the said piece of land without involving the first respondent who was the successor in title. As the matters stand, his claim is not supported by the necessary bond support between him and Mtwara Bottlers Limited the original owner nor the present owner of the suit property.

Having so found, it is clear that the piece of land in dispute remains the first respondent's property in whose name, we order the Land Register to be rectified to that effect. With regard to the appellant's complaint that the claim against the second respondent was left unattended, the most we can say is that, after holding that, what was done by the appellant, the second respondent and others in the pursuit of the same scam, was nothing than fraudulent transactions, the trial judge could not have turned around and sought to enforce what he had himself found to be fraudulent. Over and above that, there was no evidence upon which he could come to the finding that the appellant had paid the second respondent either TZS.470,000,000.00 or 370,000,000.00 or 60,000,000.00 as an unascertained purchase price of

the suit property. The learned trial judge must have felt obliged, correctly so in our view, not to enforce fraudulent business transactions. It should be recognised as a general rule that, a court of law, properly so called, cannot enforce a dubious business deal for, otherwise, it would amount to the violation of judicial oath.

All said and done, we are of the view that it is rather superfluous to belabour other points. We find no merit in the appeal which we accordingly dismiss with costs.

DATED at MTWARA this 30th 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 31st day of March, 2022 in the presence of Ms. Rose Ndemereje holding brief for Mr. Salimu Mushi, learned Counsel for the Appellant and Ms. Lightness Kikao, holding brief for Mr. Atlay Thawe, learned Counsel for the first Respondent and Ms. Rose Ndemereje holding brief for Mr. Dennis Mwesiga for the second Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL