

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CIVIL APPEAL NO. 136 OF 2021

MARY AGNES MPELUMBE in her capacity
as Administratrix of the Estate of **Isaya Simon Mpelumbe**..... **APPELLANT**

VERSUS

SHEKHA NASSER HAMUD **RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Nchimbi, J)

**dated the 28th day of November, 2013
in
Land Case No. 89 of 2008**

JUDGMENT OF THE COURT

9th May & 8th July, 2022

MAKUNGU, J.A.

This appeal arises from the decision of the High Court of Tanzania (Land Division) at Dar es Salaam (Nchimbi, J as he then was) in Land Case No. 89 of 2008 (hereinafter "the suit"). In that court, the appellant, Isaya S. Mpelumbe (now deceased) instituted the suit against the present respondent, Shekha Nasser Hamud seeking to be declared the lawful owner of the parcel of land, Plot No. 224, Block "D" situated at Tegeta area within the City of Dar es Salaam ("the disputed land").

The appellant contended that he was the legal occupier of the disputed land by virtue of a right of occupancy granted vide a certificate of title No. 44083 issued to him on 8/12/1994. At the trial, the appellant who testified as PW1, tendered the stated certificate of title and the same was admitted in evidence as exhibit P1. His evidence was supported by three witnesses including Suzan Mallya (PW3) who was at the material time a legal officer in the then Ministry of Land, Water, Housing and Urban Settlement ("the Ministry"). She testified that the appellant was initially allocated the disputed land vide a letter of offer Ref. No. LD/118716/1/RTC of 10/5/1986 and was later on issued with exhibit P1.

The respondent denied the claim contending that the disputed land was allocated to her by the same authority vide a letter of offer dated 1/4/1986. The said letter was tendered and admitted in evidence as exhibit D1. Her evidence was supported by one Ndemi Festo Ulomi (DW2) who was at the material time an official of the Ministry in the Land Administration Department. He testified that his department dealt with the dispute between the parties over ownership of the disputed land. It was his evidence further that, after having inspected the file which related to the allocation of the disputed land, he found out that there was double

allocation which was perpetuated through a forgery whereby the folios in the relevant file were tempered with for the purpose of attempting to show that the appellant was the first to be allocated the disputed land. It was also his evidence that the Ministry intended to resolve the dispute by among other things, allocating to the appellant another plot of land No. 1370 Block "G" in Tegeta area, but he refused to accept the offer.

Having considered the evidence, the learned trial Judge found that the respondent was the lawful owner of the disputed land on account that she was the first to be allocated the plot. Relying on the High Court's decision in the case of **Frank Safari Mchuma v. Shaibu Ally Shemdolwa** [1998] TLR 278, the learned judge held that, although the appellant had in his possession a certificate of occupancy, the document was not superior to the letter of offer issued to the respondent prior to the date on which the certificate of occupancy was issued to the appellant. The High Court thus dismissed the suit with costs.

It is, perhaps, noteworthy that this is not the first time the appellant makes a quest towards the appeal against the referred Land Case No. 89 of 2008. In an earlier Civil Appeal No. 85 of 2017 the appellant lodged an appeal against the decision but, as it turned out, on the 23rd June, 2020 his

appeal was struck out for the reason that it was time barred. He started the process afresh, hence the present quest.

The appellant was aggrieved by the decision of the High Court and lodged this appeal on four grounds of appeal as follows:-

- 1. That the Honourable High Court erred in law and fact by failure to determine on issue of whether the letter of offer to the Defendant (Respondent) is a forged document on the grounds which were specifically raised and argued;*
- 2. That the Honourable High Court erred in law and fact by failure to analyse and evaluate the evidence on lack of authenticity of the respondent's letter of offer;*
- 3. That the Honourable High Court erred in law and fact by breaching duty to give reason contrary to Order XX Rule 4 of the Civil Procedure Code, Cap 33 R.E. 2002.*
- 4. That the Honourable High Court erred in law and fact by failure to endorse exhibits contrary to provisions of Order XIII Rule 4(1) of the Civil Procedure Code, Cap. 33 R.E. 2002.*

At the hearing of the appeal, the appellant was represented by Mr. Novatus Michael Muhangwa, learned counsel while the respondent had the services of Mr. Gasper Nyika, also learned counsel.

After going through the four grounds of appeal and hearing learned counsel for both sides, we propose to deal with the first and second grounds of appeal altogether so far as they touch on the issue of the authenticity of the respondent's Letter of Offer. We are satisfied that this appeal can be satisfactorily and conclusively disposed of on the basis of that issue.

In order to appreciate the force behind the proposed issue, a quick look at the impugned judgment is unavoidable. It went, as reflected on page 3 of the typed judgment (page 27 of the record), which in part reads in *verbatim* thus:

"It is plainly clear from the evidence that the basis of the plaintiff's [the appellant herein] claim is principally exhibit P1 a certificate of occupancy of 8/12/1994. He thinks that the defendant's [the respondent herein] letter of offer is inferior to that certificate of occupancy. That is also what PW2 put in evidence. That evidence is, however, played down by DW2, who was a Land Administrator who was involved in the attempt to resolve this dispute amicably. She categorically stated the land registry shows that there is original letter of offer which was issued to the plaintiff [the appellant herein] as was

supposed to be the case. She also stated that in law the first person to be issued with the letter of offer, is the rightful owner of the property in question and certificate of title, is not superior letter...”

It is clear from the above finding of the trial judge, the said Land Case NO. 89 of 2008 was dismissed based on our decision in the case of **Patman Garments Industries Limited v. Tanzania Manufacturing Ltd** [1981] TLR 303 wherein the Court held that the right of occupancy is not superior to the offer.

Submitting on our above proposed issue, Mr. Muhangwa attacked the trial court for failure to analyse and evaluate properly evidence on lack of authenticity of the respondent's letter of offer. He submitted that the finding on forgery was inevitable based on the pleadings as well as the evidence adduced by the appellant's witnesses. He invited the Court to re-appraise the evidence on record and come to its own conclusion which will reveal that forgery was proved to the required standard. The learned advocate drew our attention to the testimony of Patrick John Chitenje (PW2) at page 10 of the typed court proceedings. He added that the testimony of PW2 was ignored despite the fact that it comes from the only

expert with personal and first-hand knowledge about the allocation of plots of land within the area earmarked for Senior Government Officials (the project).

Not amused, the learned advocate for the respondent submitted that there was no evidence that the respondent's letter of offer was illegally procured or was somehow not authentic. He submitted further that the testimony of PW2 cannot be used to impeach the authenticity of a document which as admitted was not signed by him. There was no written evidence to show that by law or otherwise PW2 was the only one person with the authority to sign offer letters, and no evidence that it was the project area, he concluded. He prayed the appeal to be dismissed with costs.

Submitting in rejoinder the appellant's advocate replied that there was also no evidence on the record which shows that there was another person assigned by the Commissioner for Lands to issue or sign offer letters. He concluded that it was wrong for the trial court to ignore that piece of evidence of PW2. He invited us to allow the appeal with costs.

We have carefully scrutinized the evidence on record and taken into account the contending submissions of the learned counsel. To determine

the issue at hand, this being a first appeal, we are enjoined by Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-appraise the evidence on record and draw our own inferences and findings of fact subject, certainly, to the usual deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See for instance, **Jamal A. Tamin v. Felix Francis Mkosamali & the Attorney General**, Civil Appeal No. 110 of 2012 (unreported).

We are also guided by 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 as well as the position that 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 Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). In that case, the Court also restated 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.

In the instant case the appellant's late husband, Dr. Isaya Simon Mpelumbe instituted the Land Case No. 89 of 2008 in the trial court due to an act of unlawful occupation of the disputed land by the respondent. To establish his case he made conscious decision to bring the land officers (PW2 and PW3) from the Ministry to testify in the trial against the letter of offer to the respondent. At page 10 of the typed court proceedings PW2 stated that:

*"As a Land Officer I worked hand in hand with the project Manager and Permanent Secretary. **I used to write the offer myself. I do not remember the Sheha Ahmad Nassor (shown Annexure H1) I did not prepare this document. I did not sign on it.** This is not my handwriting at all. I do not even instruct any one to write it. **This was a specific project under the Ministry and basically for government officials.**"*

[Emphasis added]

In the cross examination he stated that:

"I know the allegations of fraud are very strong. I am no longer the Officer of Ardhi.

*Mama Sheha the defendant (the respondent herein) was not in the list of names earmarked to be allocated the plot. That list was prepared in 1986. I cannot remember all the names. I remember of this particular case. **I was the only person who was responsible for signing the letters of offer respecting the project.** I have taken oath to speak the truth before this court."*

[Emphasis added]

It is clear from the above testimony that exhibit D1 was not issued and signed by PW2. This means that it was not properly or legally issued. This piece of evidence was not rebutted in the evidence on record. It seems that the trial judge did not enquire into the authenticity of the documents tendered, he just concentrated on the respective dates of issue. We think that it is the duty of the court to examine whether the documents produced in court were legally issued. We have the view that the act of the trial court to ignore the evidence of PW2 who is purported to have written and signed the letter of offer to the respondent is contrary to section 34 C (4) of the Evidence Act, Cap 6 R.E. 2019 which states that:

"For the purposes of this section a statement in a document shall not be deemed to have been made

by a person unless the document or the material part of it was written made or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

It follows then that the credible evidence in the matter at hand is the testimony of the writer himself PW2 who said that the handwriting and signature in the Letter of Offer (exhibit D1) to the respondent are not his handwriting and signature. From the available evidence on record there was no dispute to the fact that a genuine letter of offer is exhibit P1 drawn in favour of the appellant.

It is on record that DW2 testified that "*they discovered that there was forgery involved/committed for back dating the documents*". It was not clear what DW2 was talking about and the trial judge did not enquire into this important piece of evidence. It seems to us that DW2 was talking about the respondent's letter of offer (exhibit D1) which was made to appear older than the appellant's letter of offer (exhibit P1). However, this portion of the DW2's testimony was totally ignored. The only portion of the DW2 testimony which was given attention by the trial court was that part when DW2 was talking about the principles which normally guide the status of the letter of offer in the process of grant of the right of

occupancy. She mentioned the principles that the first offer was given in May 1986 and for Isaya in July 1986, which means that the first person to be issued with the letter of offer is the rightful owner of the property in question.

It is clear from the above testimony that DW2 did not say that the said principles are applied without first establishing the authenticity of the letter of offer in question. We have observed on the record that DW2 who was Deputy Commissioner for Lands wrote an official letter with reference number LD118716/20/TG dated 13/4/2007 (exhibit P2) to the respondent stating that; *"it was unlawful to develop the land plot which has lawful owner (the appellant) and doing so it is contrary to section 175 of the Land Act 1999 Cap 113"*. A portion of the said letter is quoted at page 2 of the typed judgment of the trial court.

The learned trial judge did not address his mind to the two versions of the evidence of PW2 and DW2 and make an objective evaluation of them before coming to the conclusion that the evidence of PW2 played down by DW2 who was a Land Administrator and who was involved in the attempt to resolve this dispute amicably.

Just to cap it all, we also considered the following facts, which were established during the trial relating to the respondent (DW1) that, **one**, she was 15 years old in May, 1986 when her father allegedly acquired the land in dispute as her trustee. **Two**, DW1 did not tender Declaration of Trust (Trust Deed) before the trial court nor was there evidence that a registration of the Declaration of Trust (Trust Deed) against the offer or the Title at the Land Registry was done. **Three**, no evidence (document) was tendered before the trial court to indicate how change of name was done from that of the trustee to that of the beneficiary DW1. **Four**, DW1 never tendered any official search result during trial to prove her name was in the Land Registry in 2004. And **five**, which is more important, DW1 never tendered any evidence that herself or her father was Senior Government Official as the said area according to PW2 was earmarked for Senior Government Officials. These were the facts or matters peculiarly within respondent's own knowledge therefore she had the burden to introduce evidence regarding the matter.

As we have demonstrated above, it is our firm view that the learned trial judge would have found that the respondent's letter of offer was forged or fraudulent had he considered all evidence on record. Therefore,

we agree with the appellant's learned counsel that the evidence on the trial court was not analysed and evaluated properly.

Since the first and second grounds of appeal suffice to dispose of the appeal we shall not determine the remaining two grounds. In view of what we have endeavoured to discuss, the appeal is meritorious and we allow it with costs. Accordingly, we vacate the trial court's judgment and declare the appellant the lawful owner of the disputed land.

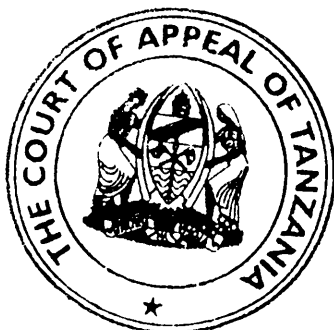
DATED at DAR ES SALAAM this 4th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2022 in the presence of Mr. Edwin Shibuda, Counsel for the Appellant and also holding brief for Mr. Gasper Nyika, Counsel for the respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL