

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 227 OF 2019

JOSEPH F. MBWILIZAAPPELLANT

VERSUS

**KOBWA MOHAMED LYESELO MSUKUMA
(Legal Representative/Administratrix of the
estate of the late Rashid Mohamed Lyeselo)1ST RESPONDENT**

RASHID MOHAMED.....2ND RESPONDENT

JUMA MOHAMED.....3RD RESPONDENT

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

(Mugeta, J.)

dated the 27th day of June, 2019

in

Land Case No. 30 of 2017

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JUDGMENT OF THE COURT

2nd & 10th November, 2022

KOROSSO, J.A.:

The dispute that gives rise to this appeal is over a residential house built on a surveyed piece of land located on Plot No. 1 Block "A" within Kasulu District, Kigoma Region (suit property/premises). In the High Court of Tanzania at Tabora, the appellant, Joseph F. Mbwiliza (then the plaintiff), in Land Case No. 2017, sued Kobwa Mohamed Lyeselo Msukuma, in her capacity as the Legal Representative/Administratrix of the estate of the late Rashid Mohamed Lyeselo, Rashid Mohamed and Juma Mohamed, the 1st, 2nd and 3rd respondents (then, the 1st, 2nd and 3rd

defendants respectively) jointly and severally for a declaratory order that the appellant was the lawful owner of the suit property. Other claims included general damages accrued from the respondents' unwillingness to vacate from the suit property; costs and any other relief the Court may grant at its discretion. Through the filed joint written statement of defence (WSD) the respondents vigorously resisted the appellant's claims.

The appellant's case was expounded through his own evidence as PW1, and that of two other witnesses Yahya Muhanga (PW2) and Douglas Mabuga (PW3). He also tendered six exhibits. PW1 claimed that he is the lawful owner and occupier of the suit property having purchased it from the late Rashid Mohamed Lyeselo (the deceased) on 18/12/1989. According to PW1, upon agreement between them on the sale of the suit property, he, and the deceased had drawn a sale agreement which was concluded within the premises of the Urban Primary Court of Kasulu. PW1 contended that thereafter, he could not take vacant possession of the suit premises because he had granted a request from the deceased for him and his family to remain there until the time he can shift to other premises. Unfortunately, before the handing over of the suit property to him, the appellant visited Kasulu around 1/4/1990 and found the deceased critically ill, such that before taking possession of the suit property, Rashid Mohamed Lyeselo, died. Upon his death, it is alleged that the first respondent, the deceased's widow requested the appellant to let

the family remain in the house until the deceased's funeral and burial processes have been finalized. The appellant had no qualms and agreed to the said request.

According to PW1, on various dates, that is, 12/08/1991, 13/09/1995, and sometimes in 1999, he had requested the respondents to hand over to him the suit property to no avail. The appellant claimed that thereafter he had served the respondents with vacation notice which was to expire on 12/12/1991, but still, the respondents, this time, claiming to be the owners, refused to vacate the suit property. PW1 contended further that with the 1st respondent's refusal to freely vacate the suit property, he suffered the loss of peaceful use and occupation of the suit premises and in consequence, he and his family have been prevented from exercising proprietary rights to the same. Additionally, apart from the physical hardships, PW1 stated that the refusal by the respondents to vacate the suit property has also prompted some economic challenges caused by unending follow-ups from Dar es Salaam to Kasulu for an amicable settlement between the contending parties which unfortunately ended in vain, notwithstanding the involvement of various authorities of different levels including the Street Chairperson, Village Executive Officer (VEO), and the Hon. Magistrate of the Kasulu Urban Primary Court.

In defence, the first respondent, Kobwa Mohamed Lyeslo Msukuma (DW1) refuted having knowledge of any sale agreement on the suit

property between the appellant and her late husband, Rashid Mohamed Lyeselo. She claimed that her deceased husband had been a Lorry driver, they had started their lives living with relatives, and later when they got some money, they purchased the plot of the suit property for Tsh. 10,000/= from Seif Kaduguda. They started construction of a house and when it was finalized, they moved into the house, the suit property, where they have lived for all the years. Upon hearing both sides, the trial court decided in favour of the respondents, holding that the relevant contract was voidable for the appellant's failure to pay the balance of Tshs. 50,000/= or for want of sufficient consideration.

Aggrieved, the appellant has preferred an appeal to this Court through a memorandum of appeal containing five grounds paraphrased as follows:

- 1. That, as per evidence on record and while admitting that the sale agreement was executed, the trial Judge erred in law to hold that the contract was voidable for want of sufficient consideration.*
- 2. That, the honorable trial Judge erred in law to raise the issue of legal representative which was neither an issue during the trial nor was it disputed by the defendant.*
- 3. That, having admitted that the sale agreement was executed, the trial Judge erred in law not to order a refund to the appellant.*

4. *That, the trial Judge erred in law to apply the principle of adverse possession which was at variance with the evidence on record.*
5. *That, the trial Judge erred in law and in fact in failing to evaluate the evidence before it on the balance of probabilities thereby of reaching a wrong decision.*

On the day the appeal came before us for hearing, the appellant had the services of Ms. Stella Thomas Nyakyi, learned counsel whereas, Mr. Kanani Aloyce Chombala, learned counsel entered appearance for all the respondents.

When provided an opportunity to amplify the appeal, Ms. Nyakyi commenced her submissions by adopting the appellant's written submissions filed on 6/9/2019 and the five grounds of appeal. Expounding on ground one, the learned counsel for the appellant was of the view that the issue for determination is whether considering the evidence on record and having admitted the validity of the sale agreement, the trial Judge was correct in law to hold that the contract was voidable for want of sufficient consideration.

Ms. Nyakyi contended that in declaring the sale agreement voidable the trial Judge relied on the fact that the appellant failed to pay the balance amount of Tshs. 50,000/= for the sale of the suit property as stipulated by the agreement. She argued that this position was faulty

because section 39 of the Law of Contract Act [Cap 245 R.E. 2002, now R. E. 2019] (the LCA) directs the course to be taken in the circumstances where one of the parties fails to perform his part of the contract. She thus argued that since there was non-performance of the contract on one part for non-payment of the balance amount for the purchase of the suit property, thus, relying on section 39 of the LCA, upon the death of Rashid Mohamed Lyeselo, the respondents were entitled to do one of the following acts; first, put an end to the contract or second, to signify, by words or conduct, to acquiescence its continuance.

Arguing further, the learned counsel for the appellant was of the understanding that section 39 of LCA provides for the way one may be taken to have acquiesced in the continuance of the contract. That it provides that, a person may signify so, by words or conduct, however, it does not provide for the way under which a person may put an end to the contract. The modality of how a party can end a contract is provided under section 66 of the LCA, she argued, where this may be effected by notice of revocation from the proposer to the other party, which in the instant case, it was not done. Ms. Nyakyi thus contended that this being the case, in terms of section 39 of the LCA, failure to communicate such notice as it happened on the part of the respondents, signified acquiescence to the continuance of the contract.

The learned counsel asserted that consequential to such failure to communicate such notice, the respondents should have indicated their intention to comply with the provisions of section 65 of the LCA, which requires a person who has received any advantage under the respective agreement or contract, to restore it or to make compensation for it, to the person who received and, in this case, the appellant. This is because they had already received Tshs. 100,000/= for the purchase of the suit property, she argued.

According to Ms. Nyakyi, since the respondents had acquiesced to the continuance of the contract and upon the finding by the trial court that the sale was executed, then the trial Judge erred in law to hold that the contract was voidable for want of sufficient consideration. She argued that the trial court ought to have respected this and ordered for specific performance of the respective agreement.

The learned counsel concluded by stating that since there was no dispute on the terms of the contract and the balance amount to be paid and the fact that it was not paid on the date specified in the contract. The fact that non-payment was due to the death of the owner of the suit property, the other party, should have been considered. She argued that the trial Judge erred in not appreciating that the appellant had exercised diplomacy not to evict the respondents from the suit property which they

took advantage of. He thus prayed that the Court finds so and grants the claimed reliefs.

On the contending side, responding to ground one which challenged the validity of the sale agreement and the consequence of breach if any, Mr. Chombala submitted that parties are bound by the terms of a contract and cited some of the decisions including; **Simon Kicheie Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, **Yara Tanzania Ltd v. Unyiha Associates Ltd**, Commercial Casse No. 66 of 2020 (HC-Commercial Division Dar es Salaam) (both unreported), and **Philipo Joseph Lukonde v. Faraji Ally Saidi [2020] T.L.R. 576** to reinforce his arguments. Furthermore, he contended that the appellant had not fulfilled his contractual obligations and thus remedies for breach of contract should take effect. He cited the case of **Siri Napita Mtininko (the Administratrix of the Estate of the Late Abdallah Hamis Mbuni) v. Rumanyika Clemence and Mkilango Nkida** (HC) Land Appeal No. 12 of 2018 (unreported) to bolster his position. In the cited case, one party failed to pay his contribution and the High Court held that failure to fulfill the terms of an agreement is a breach of the terms of the contract. He argued that in the instant appeal, there is no dispute that there was a breach of contract upon the appellant's failure to pay the balance Tshs. 50,000/= amount within the time specified in the agreement on 01/4/1990.

Arguing further, Mr. Chombala stated that since the said agreement had not contained a clause stating that oral agreement between the parties will be part of the contract, then such become mere oral assertions and not part of the contract. He cited the decision of this Court in **Lulu Victor Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited**, Consolidated Civil Appeals No. 22 and 155 of 2020 (unreported) to bolster his contention. He contended that in the cited case, the Court held that where there is a written contract any subsequent oral agreement is not part of the contract, especially where there is no variation of the terms of the written agreement.

He concluded by stating that the High Court's holding that the respective contract in the instant appeal was voidable is proper as it is in line with section 55(1) of the LCA which states that where there is a party's failure to comply with the terms of the contract, it should be rendered voidable at the option of the innocent party. According to the learned advocate, the trial Judge, apart from considering the breach of contract, other factors taken into account included the delay to seek redress on the part of the appellant and the other reasons fronted were a failure by the appellant to fulfill the terms of the contract, particularly the term that required him to pay the balance of Tshs. 50,000/= not later than 01/4/1990. He thus urged us to find ground one to lack merit.

On our part, in the determination of this appeal, we shall begin with ground one. Having gone through the memorandum of appeal, the appellant's written submissions, and heard the parties' oral submissions, we are of the view that the central issue as determined by the trial Judge is whether there was a valid sale agreement between the appellant and the late Rashidi Mohamed Lyeselo (the deceased). This is because the appellant maintained the existence of the sale agreement in his amended plaint (paragraph 5) and in his testimony as PW1 and other witnesses he summoned. Yaya Muhanga (PW2) testified that he witnessed the said sale agreement between the appellant and the deceased on 18/12/1989. Douglas Mabuga (PW3) also testified that he witnessed the signing of the sale agreement. The respondents categorically denied this fact as found in paragraph 3 of the joint written statement of defence and evidence of DW1, stating that they were not aware of any such agreement.

The trial Judge upon consideration of the evidence on the issue made a finding on page 87 of the record of appeal that:

"...the purchase price was Tshs. 150,000/= where Tshs. 100,000/= was paid on the agreement date and the balance was to be paid on 1/4/1990. To date the balance is unpaid and the plaintiff has been refused vacant possession".

Later on, in his judgment on page 88 of the record, the trial Judge stated further:

"Even if it is disputed by the first defendant that she neither witnessed the sale agreement nor knows anything about sale of the disputed land, it is my view that the sale agreement was indeed executed. The plaintiff has managed to prove existence of the sale agreement by tendering it and producing two more witnesses who facilitated its procurement. The evidence of the plaintiff on this issue is more credible than that of the defendants which is a mere prevarication. I see no reason why three men, namely, PW1, PW2 and PW3 aged 75, 87 and 85 respectively, should lie against the first defendant that she was present at the primary court when the agreement was executed".

Therefore, in essence, the trial court held that there was a sale agreement as claimed and that up to the day of the hearing, the appellant had not paid the full amount of the purchase price as per the agreement. On the evidence before the trial court, we find nothing to move us to depart from the finding of the trial court which had the benefit of evaluating the demeanor of the witnesses who testified and there being no apparent misdirection, non-direction, or misapprehension of evidence.

The trial Judge rejected assertions by the appellant of having had an oral agreement with the deceased and later the respondents to delay vacant possession of the suit property, which was what caused him to delay finalizing payment of the balance amount of the purchase price of the suit property as per the sale agreement. It was the finding of the High Court that the appellant had paved the way for nonpayment of the balance amount and failure to take vacant possession of the suit property; first, by allowing the deceased not to shift from the suit premises when he was alive, and second, upon his death, to allegedly allow for funeral and bereavement processes to be completed. According to the trial Judge, once terms of the contract are reduced into writing, oral evidence as to the terms of that contract is excluded and unacceptable, a statement we concur with as being the position of the law.

Certainly, it is a cardinal principle of the law of contract that parties are bound by the terms of the agreements they enter on their own free will and this has been reiterated in various cases including; **Simon Kichele Chacha** (supra), **Philipo Joseph Lukonde** (supra), **Lulu Victor Kayombo** (supra) and **Uniliver Tanzania Ltd v. Benedict Mkasa Trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009 (unreported).

Indeed, the doctrine of sanctity of contract must prevail and deliberate or inordinate breach of the terms of the agreement should not

be allowed. Parties must fulfill their obligations to the contract they willingly entered. The principle of sanctity of contract was discussed in the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 which held:

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and not principle of public policy prohibiting enforcement".

Another general rule that governs contracts pertinent to the instant case is that once parties to a contract reduce their agreement into writing, the written agreement prevails in terms of section 101 of the Tanzania Evidence Act, Cap 6 R.E 2019 (the Evidence Act). This principle was restated by the Court in the case of **Lulu Victor Kayombo** (supra) stating that:

"Documentary evidence reflected repositories and memorial of truth as agreed between the parties and retained the sanctity of their understanding".

Plainly, it is uncontested that the appellant entered into an agreement with the late Rashid Mohamed Lyeselo on 18/12/1989. The sale agreement, admitted as exhibit P2, and stipulates the sale price of

the suit property between the appellant and the deceased to be Tshs. 150,000/= . It states that Tshs. 100,000/= have been paid and the balance payment is 50,000/= which is to be paid on 1/4/1990. There is no evidence of the agreement having been altered or amended through agreement or the consensus of the parties and added any clause embracing the alleged oral agreements between the appellant and the respondents or the deceased prior to his demise.

The reasons advanced by the appellant on having oral discussions and agreements that led to him deferring to pay the balance amount are, in law, not acceptable. Section 37(1) of the LCA stipulates the fact that parties are bound by their promises in a contract, it states:

"37. -(1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law".

Having perused through the record of appeal, like the trial Judge, we find nothing to conclude as urged by the learned counsel for the appellant that there was an acquiescence in terms of section 39 of the LCA on the part of the respondents. Evidently, by failing to pay the balance amount for the purchase of the suit property on the day stipulated in the sale agreement, renders failure on the part of the appellant to fulfill the terms of the contract from the time the deceased

was alive. Worth noting, is the fact that any oral agreements between the parties if they ever existed, could not override the written agreement where there is nothing to show the terms had been amended by the parties.

Having found that the appellant did breach the terms of the contract, the question before us is the remedy available. Section 55(1) of the LCA provides as follows:

"55. -(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract".

In the circumstances, having found that the appellant failed to fulfill his obligation of paying the balance of the purchase price for the suit property, and recognizing that the schedule of payment was part of the terms to be fulfilled in the agreement and therefore of essence to the contract, we are of the view that by virtue of section 55(1) of the LCA, the sale agreement dated 18/12/1989 became voidable as held by the learned trial Judge. We thus find ground one to be unmeritorious.

On ground two of the appeal, the learned counsel for the appellant averred that the issue arising therefrom is whether the trial Judge was correct to raise the issue of legal representative which was not an issue during the trial nor was it disputed by the defendants. Ms. Nyakyi argued that the trial Judge had raised an issue of the propriety of the legal representative which was neither one of the framed issues during the trial, nor was it disputed in the WSD. She thus prayed for the Court to find the trial Judge's finding improper and prejudicial to the appellant.

On his part, Mr. Chombaia contended that the trial Judge's finding was correct because, at the time of the trial, there was no appointed legal representative since the 2nd respondent had been unofficially appointed by the family and not by a court of law.

Having heard the counsel for the parties on this ground, we are alive to the challenged observation by the trial Judge that there is no evidence that the 1st respondent was duly appointed as the administratrix of the deceased's estate. We find this statement to be inconsequential to the determination of the claims before the trial court. The said statement did not in any way affect the determination of the suit and therefore it did not occasion any injustice. We are of the view, that notwithstanding what we have stated, in the absence of any record to show that the parties submitted on the issue, it was improper for the trial Judge to raise it at the time of the Judgment. Thus, the statement shall be disregarded.

In addressing ground three, Ms. Nyakyi urged the Court to find that, the issue for determination is whether having admitted that the sale agreement was executed, the trial Judge was correct in law not to order a refund to the appellant. It was her contention that under such circumstances the proper order would have been for the person who had gained an advantage (the respondents) to restore it or to make compensation for it to the other person (the appellant) whom they received from or order refund to the appellant based on the current market value. She cited the case of **Phillipo Joseph Lukonde** (supra) to cement her stance. She urged us to allow the ground and order that the appellant be refunded based on the current market value of the amount he had paid as the first installment of the purchase price of the suit property.

On his part, the respondents' counsel argued that since there was a breach of contract, the appellant cannot benefit from his own wrong. He asserted that it was proper for the trial Judge to consider the circumstances surrounding the contract performance and breach including the delay to seek redress and find that the appellant did not deserve any refund in the circumstances. Mr. Chombala also alluded to the fact that most of the communication alleged by the appellant to have been served to the respondents did not reach them since they were not part of the

contract, and they were thus unaware of it. He concluded by praying that the ground be dismissed.

Suffice it to say, on ground three, the appellant faults the trial Judge for his failure to order a refund to the appellant for the effected payment, having found that the sale agreement was executed. There is no doubt that the appellant had paid an advance payment of Tshs. 100,000/= for the purchase of the suit property, as adduced by PW1, a party to the sale agreement, PW2 and PW3 who witnessed the transaction. It is also plain, that, the appellant did not complete the balance payment. We have already held herein that the contract was voidable upon the breach by the appellant. What has taxed our minds on this issue is the fact that despite the fact that it was presented as a ground of appeal, a refund was not pleaded by the appellant in his plaint. In his testimony in the trial court, what the appellant prayed for, apart from what is stated in the plaint, was compensation, and not a refund. The Court has had the opportunity to deal with prayers that had not been pleaded. In the case of **Merchiades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga, deceased) and Two Others**, Civil Appeal No. 57 of 2018 (unreported) we held:

"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for."

(See also, **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161 and **Hotel Travertine Limited and Two Others v. National Bank of Commerce** [2006] T.L. R. 133).

Understanding that the appellant had duly paid the first installment under the terms of the contract, and considering the prayer found in the plaint that seeks being granted of any other reliefs the Court may deem fit to grant, we are of the firm view that the obtaining circumstances and the interest of justice, warrants us to order that the appellant be refunded Tshs. 100,000/= by the 1st respondent to recover the advance payment made for the purchase of the suit property.

According to Ms. Nyakyi, ground four of the appeal essentially addresses whether the trial Judge was correct to apply the principle of adverse possession while the evidence on record was the variance of the application of the principle. She argued that with the evidence on record, any claims relying on adverse possession cannot succeed since the person asserting the claim is in possession of the suit property having been permitted by the owner according to the agreement for sale, a fact which is on record and was not challenged. She thus faulted the trial Judge for his findings on this, arguing that they were not based on the evidence on record before him. She thus urged the Court to allow the appeal and grant the reliefs sought.

The learned counsel for the respondents, on the other hand, was in support of the finding by the trial Judge stating that there was no evidence of any permission from the appellant to the respondents. He contended that all the letters and communications which the appellant had presented have never been communicated to the respondents since they were not parties to the contract. That there is no evidence that such communications were served to them and thus from 1989 to 2017, the respondents had no information that the appellant purchased the suit property. He argued that even if, as stated by PW1, PW2, and PW3 that the 1st respondent had accompanied the deceased as his wife at the signing session of the contract, there is nowhere where her name appears in the contract, so she was not a witness. Thus, Mr. Chombala urged us to dismiss the ground.

In determining this ground, it is worth noting that the issue of adverse possession was never framed as an issue for determination of the trial court, it just cropped up in the judgment and it is a principle that the trial court relied upon in finding in favour of the respondents. In the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 (unreported), the Court held:

"Possession and occupation of land for a considerable period of time do not, in

themselves, automatically give rise to a claim of adverse possession."

The Court was inspired by the decision of a case from Kenya in **Mbira v.**

Gachumi [2002] 1 EA 137 (HCK) when it held:

"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupier's right to occupation was derived from the owner in the form of permission or agreement, it was not adverse."

Clearly, in the instant case, what is stipulated in the above excerpt does not apply, especially with our finding in the first ground of appeal that the appellant breached the agreement and thus the contract was voidable. Thus, this undoubtedly leads to a finding that the trial Judge erred in invoking the principle of adverse possession to justify the lack of ownership of the suit property for the appellant. Nevertheless, we find that having found above that the contract was voidable, such an assertion by the trial Judge on adverse possession, did not prejudice the appellant since it did not affect the findings above related to the status of the sale agreement.

In arguing ground five, the learned counsel for the appellant submitted that the trial Judge failed to consider that PW1's evidence was

that the respondents, particularly, the 1st respondent had requested him to continue to remain in the suit property until the finalization of the burial ceremony of her deceased husband. She contended that had the trial Judge properly evaluated the evidence of PW1, PW2, and PW3 on record then there will have been no concern about when the balance payment for the suit property as per the sale agreement was supposed to be paid. The learned counsel thus prayed for the Court as the first appellate court, to re-evaluate the evidence and come to its own findings which undoubtedly will be in favour of the appellant's claims. She concluded by imploring the Court to allow the appeal.

Mr. Chombala responded by conceding to the fact that the evidence of witnesses was summarized only, but he urged us being the first appellate court to reevaluate the evidence afresh and reach our own conclusion.

The duty of the court to evaluate evidence is well settled. Having gone through the record, we are in tandem with both rival counsel that the trial judge only summarized the evidence of witnesses and failed to analyze it as required. However, it is settled that, the first appellate court, which is the position in the instant appeal, has a duty to re-evaluate the evidence and come up with its own conclusion as held in some cases including the case of **Peters v. Sunday Post Ltd.** (1958) E.A. 424 and **Domina Kagaruki v. Farida F. Mbarak and 5 Others**, Civil Appeal No.

60 of 2016 and **Salhina Mfaume and 7 Others v. Tanzania Breweries Co. Ltd.**, Civil Appeal No. 111 of 2017 (both unreported). The gist of the cited decisions on the matter is that the appellate court has the power to reevaluate the evidence. This is also provided under Rule 36(1) of the Tanzania Court of Appeal Rules, 2019 (the Rules).

Suffice it to say, as we have already analyzed the evidence of PW1, PW2, and PW3 when determining ground one and thus we shall not dwell on this point any further. The trial court found them to be credible witnesses on the issue of having witnessed the signing of the contract and the presence of the 1st respondent at the time. The evidence of the appellant and his witnesses was mainly to expound on what transpired at the time of drafting and signing the sale agreement. The adduced evidence was unable to bring clarity on whether the respondents were served with all the documents alleged by the appellant to have been served to them. We thus remained with doubts on whether the respondents were aware of the letters said to have been sent to them by the appellant related to notices for vacant possession of the suit premises or the contents of the sale agreement as alluded to by PW1, upon the deceased's demise, who was a party.

We are satisfied that the evidence related to there being an oral agreement between the appellant and the deceased on one hand and the 1st respondent related to handing over the suit premises, cannot support

the appellant's case because as stated herein, in the absence of a written amendment to the sale agreement, which was in written form, the oral statements cannot be part of the contract or take precedence. We are thus of the view that the available evidence on balance of probabilities was insufficient to prove the appellant's claims.

In the end, for the foregoing, the appeal is substantially dismissed to the extent provided herein, except for the order that the appellant be refunded Tshs. 100,000/= by the 1st respondent. Having considered the peculiar circumstances of this case, each party to bear its own costs.

DATED at **TABORA** this 9th day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 10th day of November, 2022 in the presence of Ms. Stella Thomas Nyakyi, learned counsel for the Appellant also hold brief for Mr. Kanani Aloyce Chombala, learned counsel for the Respondents, is hereby certified as a true copy of original.


E. G. MRANGU

SENIOR DEPUTY REGISTRAR
COURT OF APPEAL

