IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 353 OF 2019

AUGUSTINE AYISHASHE ..... APPELLANT

VERSUS

SABIHA OMAR JUMA ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam)

(Wambura, J.)

Dated the 9th day of March, 2018
in
Land Case No. 279 of 2015

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JUDGMENT OF THE COURT

6th February & 13th March, 2023

WAMBALI, J.A.:

This appeal emanates from the decision of the High Court of Tanzania (the trial court) at Dar es Salaam in Land Case No. 279 of 2015 delivered on 9th March, 2018. At the trial court, the appellant, Augustine Ayishashe sued the respondent, Sabiha Omar Juma claiming ownership of a piece of land measuring 5 acres (suit property) situated at Kulangwa Street, Goba Ward in Dar es Salaam Region. It was pleaded by the appellant in the plaint that he purchased the suit property from Jeremia Simon Uleka for a sum of TZS. 100,000,000.00 after they

entered into a sale agreement on 4th December, 2014 which was admitted at the trial as exhibit P1. It is also on record that the purchase price was paid through Bank of Africa (BOA) at NDC Branch Dar es Salaam on the same date as evidence by the Bank Cheques pay in slip which was admitted as exhibit P2.

It was further stated by the appellant that on 8th January, 2015, the respondent trespassed into the suit property and through her workmen she started building a structure. That efforts to stop the respondent from trespassing into the suit property was in vain, hence he instituted a suit as alluded to above, claiming the following reliefs:

> *"(a) A declaration that the defendant is a trespasser over the suit property on the surveyed plot measuring 5 acres situated at Goba Ward in Dar es Salaam which is bordered by a property belonging to Juma Mjura to the North, Athuman to the South, Kiango to the East and a road to the West.*
>
> *(b) An order of eviction against the defendant from the suit property.*
>
> *(c) An order for the Defendant to demolish the structure on the suit property.*

(d) Permanent Injunction restraining the defendant, her workers and/or agents from trespassing into the suit property.

(e) Payment of general damages.

(f) Costs of the suit.

(g) Any other reliefs this Honourable Court deems fit to grant."

The appellant's suit was supported by himself as PW1 and two other witnesses namely, Erick Joseph Mwaihoba (PW2) and John Mageni (PW3).

The respondent contested the suit in which in her written statement of defence lodged at the trial court, she also claimed ownership over the suit property. She stated that she bought the suit property from Jeremia Simon Uleka at a sum of TZS. 100,000,000.00 on 26th August, 2014 through a sale agreement which was admitted at the trial as exhibit D2. She maintained that she bought the suit property earlier than the appellant and that as an assurance she was given a sale agreement dated 3rd April, 2012 between the original owner one Professor Abdu Mtauka Khamis and Jeremia Simon Uleka.

It was the respondent's testimony at the trial that according to the agreement she was required to pay the seller in three installments; the first being on 26th August, 2014, the second on 30th October, 2014 and the third on 28th February, 2015. It was further a term of the agreement that if the respondent failed to pay the purchase price after three months from the date of the last installment, that is, on 28th February, 2015, the seller would exercise the right to sale the suit property to another buyer and refund her the money she had paid so far. It is not disputed as per the record of appeal that the respondent paid the first installment of TZS. 30,000,000.00 at the time the agreement was signed and the second instalment of TZS. 30,000,000.00 on 31st October, 2014.

Thus, until the dispute between her and the appellant started in January 2015, the outstanding balance was TZS. 40,000,000.00. The respondent stated that though the payment for the third instalment was due on 28th February, 2015, she did not manage to pay the money because the seller was nowhere to be seen. She also testified that she was surprised to find some persons clearing the suit property and as a result she reported the matter at the office of kulangwa Street Council.

The respondent defence was supported by herself as DW3, Sabri Salum Saidi (DW1), Shafii Salum Ukwaju (DW2), Alexander Kyaruzi (DW4) and Jaffari Ahmed Kunambi (DW5). Basically, the respondent maintained that she is the lawful owner of the suit property and urged the trial court to dismiss the appellant's suit in its entirely with costs.

At the conclusion of the trial, having considered the evidence on record for both sides, the trial court decided in favour of the respondent, hence this appeal by the appellant. The memorandum of appeal contains four grounds of appeal which we deem it appropriate to reproduce hereunder:

"1. *The learned trial Judge erred in law and in fact in finding and holding that the respondent had purchased the suit plot when the evidence on record showed that there was an outstanding balance of the purchase price which had not been paid by the respondent to the seller.*

2. *That the learned trial Judge erred in law and in fact in the holding*
that the seller one Uleka was estopped from entering another sale agreement with the appellant when there was no proof that the agreement that was purportedly entered on 28th August, 2014 between the respondent and the said Uleka was valid and binding.

3. *The learned trial Judge erred in law and in fact in holding that the respondent was the owner of the suit plot when evidence on record showed that the respondent had not fully paid the purchase price as required under the Sale Agreement.*

4. *The learned trial Judge erred in law and in fact in failing to consider, analyse and evaluate well the evidence adduced by the appellant, PW2 and PW3 which showed that the appellant lawfully purchased the suit plot."*

At the hearing of the appeal, Mr. Bernard Ngatunga, learned advocate appeared for the appellant and adopted the written submission lodged in Court earlier on without more. He however made minor rectification of the typographical error on page 5 of the written submission by replacing the words "line 11" with "line 22". According to the written submission, the first and third grounds have to be considered and determined together and the second and forth grounds separately.

We gather from the written submission in respect of the first and third grounds of appeal that, the epicenter of the appellant's complaint is that, the respondent could not be declared as a rightful owner of the suit property while she had an outstanding balance on the agreed price with the seller.

It is therefore submitted for the appellant that since according to the evidence on record both the respondent (DW3) and DW4 admitted both during examination in chief and cross examination that the last installment of TZS. 40,000,000.00 that was due on 28th February, 2015 was not paid as agreed, the trial judge could not have found that the suit property belonged to the respondent. The reason for this assertion, it is argued, is because according to the evidence of the appellant (PW1) and exhibit P1, he paid the purchase price of TZS. 100,000,000.00 on the same date, that is, 4th December, 2014 as agreed with the seller through BOA bank transfer. In this regard, it is contended that the appellant is the rightful owner of the suit property because he paid the agreed price promptly on the same day when exhibit P1 was signed.

It is thus prayed that the first and second grounds be allowed because the reliance by the trial judge on the case of the High Court of Uganda in **Muyingo John Paul v. Abasi Lugemwa and 2 Others**, Civil Suit No. 24 of 2013 concerning breach by one of the parties or both of the obligation as per the terms of contract is inapplicable in the circumstances of the case at hand.

On the counter argument, it is submitted for the respondent that Jeremia Simon Uleka's purported act of selling the suit property to the appellant on 4th December, 2014 while there was a subsisting agreement (exhibit D2) breached the agreement between him and the respondent. It is further argued that according to exhibit D2, clause 3 indicated in clear terms that the seller was not allowed to sell the suit property to another buyer unless the respondent defaulted to pay the remaining balance within three months from 28th February, 2015. The respondent therefore asserts that she did not breach the terms of the agreement as the seller purported to sell the suit property to the appellant contrary to the agreed schedule of payment in three installments. The respondent argues further that even her attempt to trace the seller to pay the last installment on the due date did not materialize as she could not be reached either physically or by phone.

We note from the record of appeal that in resolving the dispute between the parties with regard to the propriety of the seller entering into another agreement with the appellant while there was another agreement between him and the respondent, the trial judge stated and held as follows:

"In my view that the seller one Ulieka having already entered into a sale agreement with the defendant to sell his property, he was estopped from entering into another sell agreement with the plaintiff. This is because the sale agreement entered on 26th August, 2014 was binding both parties (the seller and the defendant) and was valid in the eyes of the law as it was still in the execution process."

She then proceeded and reasoned that:

"... clause 3 of the sale agreement clearly disclosed that the seller was not allowed to sale the disputed property to another person unless the defendant failed to pay the remaining balance within three months from 28/02/2015, the date which the defendant agreed to furnish the third installment as per clause 3 of the agreement ...."

Thus, according to the evidence on record, the seller breached the terms of the contract by selling the disputed land to the plaintiff on 4th December, 2014 before the end of the contractual period. The defendant was still within the time agreed to pay the remaining balance as the same was to end 28/7/2015 as disclosed under clause 3 of the Sale Agreement."

We entirely agree with the observation and holding by the trial judge on this matter. There is no doubt that according to exhibit D2, the seller, who according to the record of appeal his whereabouts is unknown, could not utterly breach the clear terms of the agreement with regard to the payment schedules and proceed to sell the suit property to the appellant while the respondent had not breached the agreement was improper. Indeed, even if the respondent could have failed to fulfil the terms of the agreement, the seller was duty bound to notify her and refund the money she had paid, that is, TZS. 60,000,000.00. It is a requirement of the law as per section 37 of the Law of Contract Act that, parties to the contract have to perform their respective promises. The respective provision provides that:

> *"Parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law."*

In the circumstances, though the respondent had an outstanding balance which constituted the third installment of TZS. 40,000,000.00, we find that the appellant complaint in this issue is unfounded as the title to the suit property could not pass from the seller to him while a sell

agreement (exhibit D2) which was still in the process of execution between the same seller and the respondent remained intact as correctly held by the trial judge. We thus dismiss the first and third grounds of appeal.

It is the argument of the counsel for the appellant in respect of the second ground of appeal that the holding by the trial judge that the seller was estopped from entering into another agreement while another agreement existed purportedly since 26th August, 2014 is fault because it was invalid and not binding. It is the consistent contention by the appellant's counsel that according to the evidence on record, the suit property was not surveyed and thus the person who wanted to buy had to make due diligence as to the ownership of the same. He argues that while the appellant testified on how he involved Kulangwa Street Council officials in acquiring the suit property, the respondent did not comply with this requirement. He asserts further that the appellant verified the property by knowing the boundaries and neighbours as reflected in exhibit P1. On the contrary, he submits, this is not the case on the part of the respondent as exhibit D2 and her testimony at the trial court do not show the boundaries and neighbours of the suit property.

It is further submitted for the appellant that according to the evidence of DW3, DW1, DW2, DW4 and exhibit D2 on record, it cannot be firmly concluded that kulangwa Street Council officials were fully involved by the respondent before she purchased the suit property from the seller. In this regard, the appellant counsel argues, the respondent cannot conclusively claim that what was sold to her by the seller is the same as the one sold to the appellant. In his opinion, estoppel does not apply in the circumstances of the present case.

The response of the respondent's counsel on this ground is that there is no provision of law which compels a private purchaser of land to involve the local government authority in the particular. Besides, he argues, the appellant's counsel did not refer to any provision of the law to that effect. On the issue of failure by the respondent to show the demarcation of the suit property and the neighbours compared to what the appellant did, the counsel argues that is not important. He maintains that the crucial matter is that according to the evidence on record, there is no dispute that when the appellant purportedly purchased the suit property, there was an existing agreement (exhibit D2) between the same seller and the appellant. Thus, in his opinion it was for the appellant to prove that what the respondent purchased is

different from that purchased by the appellant or that it is the same. He argues further that the appellant being the person who wants judgment in his favour had to establish before the trial court the allegation in the plaint as required by section 110 of the Evidence Act, Cap 6 R.E. 2019. He thus prays that the second ground be dismissed.

We have carefully reviewed the evidence on record with regard to the complaint. For our part, **firstly**, there is no doubt that the suit property is not surveyed. **Secondly**, according to evidence of PW1, PW2, PW3 and exhibit P1, there is indication that some officials from kulangwa Street Council were involved when the appellant purchased the suit property and that the boundaries and neighbours are indicated in exhibit P1. On the other hand, it is not contested that exhibit D2 which was tendered by DW3 was prepared and witnessed by a lawyer, DW4. There is therefore, no indication that any official from Kulangwa Street Council witnessed the transaction or signed the agreement between the seller and the respondent on 26th August, 2014. However, according to the evidence of DW5, DW3 went to Kulangwa Street Council Office during the preparation for surveying the suit property and introduced herself as neighbour.

At this juncture, having regard to the evidence of the parties on record, we are of the considered view that the complaint in the second ground can be resolved by considering the authenticity of exhibit P1 and exhibit D2.

According to the evidence of PW1, PW2, PW3 and exhibit P1, among the persons who were present and witnessed the sale agreement between the appellant and the seller was Jafari A. Kunambi from Kulangwa Street Council Office. It is however, unfortunate that he was not summoned by the appellant to testify in support of his case. On the contrary, according to the record of appeal, Jafari Ahmed Kunambi testified for the respondent as DW5. In his testimony, DW5 totally denied to have known and seen the appellant or the document (exhibit P1) which purportedly contained his signature. DW5 testified further that the said signature belonged to one Masoud whose services with the Kulangwa Street Council ended in October, 2014 before exhibit P1 was signed. At this juncture, we better reproduce the relevant part of DW5's evidence hereunder:

> *"I have worked at Matosa and Kulangwa ... from 2011 – 2014. I was transferred after elections of 2014. I do not know Augustine Ayishashe. I do*

not know Jeremiah Uleka. I have never seen this document at our office. This is not my signature that I did not sign it one Masoud signed. I know his signature. His term of service ended in October, 2014. It was signed on 14/12/2014. He was not in office by then. I do know where he is now. He was always coning people in respect of land matters. He is not in prison serving a sentence. I have to give him a letter authorizing him or I sign on the form if it has so been agreed. I never authorized any one to sign on my behalf. I did not find a copy of the same in my file."

It is noteworthy that when DW5 was cross examined by Mr. Ngatunga, the appellant's counsel, he stated as follows:

"This form is different from this one. We were never using the municipal nembo. I do not know the members by name. There are a lot of cells (shire). I know Erick Mwaihoba. If I see my signature I can recognize it. The street chair can act on my behalf ... Mwaihoba could know. I do not know his signature. One Sabha Omari came while preparing to survey. She had introduced herself as a neighbour..."

From the testimony of DW5, no one can doubt that he was firm that he was not part of the Kulangwa Street Council officials who witnessed and signed the sale agreement between the appellant and the seller as indicated exhibit P1. It is indeed not known why the appellant did not summon DW5 to testify in support of the suit if he was content that he took part on 4th December, 2014 when exhibit P1 was signed. In this regard, we are inspired by the passage on a book **Law of Evidence**, 17th Edition Vol. III by Sir John Wood-roffe and Syed Amir Alis, Butterworth, New Delhi at page 4625 on the failure by a party to produce or summon material witness:

> *"Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first account of the matters of controversy and throw light on them and who can refute all allegations of the other side, it is legitimate draw an adverse inference against the party who has not produced such a principal witness."*

Moreover, in **Hemedi Said v. Mohamedi Mbilu** [1984] T.L.R. 113 it was stated that:

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is*

entitled to draw an adverse inference that if the witnesses were called they would have given evidence contrary to his interests."

Reverting to the case at hand, it is beyond controversy that though exhibit P1 shows that DW5 signed it as a witness to the sale of the suit property, the appellant's failure to summon him to support the allegation cast doubt on its authenticity. The fact that DW5 was later summoned by the respondent and testified contrary to the appellant's interest, may probably explain the reason behind his failure to summon him as his witness. Besides, in his testimony on record the appellant did not specifically mention DW5 as being the person who signed exhibit P1. This also may explain why DW5 denied to have known or seen the appellant as reflected in his testimony reproduced above. The trial court was thus entitled to have drawn adverse efference. As it did not do so, this being the first appeal, in which we are entitled re-evaluate the evidence and reach a conclusion, we accordingly draw an adverse inference on the appellant's failure to summon DW5 as a material witness.

Moreover, DW5's evidence punched a hole on the substance of the evidence of PW2 who allegedly witnessed the sale agreement (exhibit

P1) and signed it. This is so because in his examination in chief, despite being a ten cell member of Kulangwa Street Council, PW2 did not mention the involvement of DW5 or others who participated on the day exhibit P1 was signed. It is apparent in the record of appeal that, during cross examination by Mr. Taslima, the respondent's counsel, PW2 stated as follows:

> *"The document was singed by the street secretary, two witnesses, the sell (sic) and two witnesses of the buyer and one member of the sell (sic), who was me. I know Jafari Kunambi, he is the VEO of the Street Council. Street representatives from each branch are also members..."*

Gauging from his testimony on record, even during cross examination PW2 only stated that he knew DW5 and refereed him as a Street Council Executive but said nothing in connection with the signing of exhibit P1. However, PW2 claimed to know the appellant and the seller. Indeed, he is the one who testified to have stamped exhibit P1 on which DW5 cast doubt on the appropriateness of using the municipal logo. In the circumstances, we are of the considered view that the evidence of PW2 at the trial court with regard to the authenticity of

exhibit P1 cannot be taken to be credible amid the unshaken evidence of DW5.

Similarly, the evidence of PW1 leaves much to be desired with regard to the authenticity of exhibit P1. It is clear that though PW1 claimed to have singed it before the ward secretary, he did not mention his name. More importantly, PW1 did not mention PW2 as being among the persons from Kulangwa Street Council who witnessed the sale agreement between him and the seller. PW1 only mentioned PW3 as the person who signed exhibit P1. It is therefore doubtful whether PW2 knew PW1 as testified. It is on record that during cross examination, PW1 testified that when he went to see the disputed suit property, he was with PW3 and street chairperson one Hamis. Unfortunately, it is not known who was Hamis as there is no indication that the said Hamis witnessed the signing of exhibit P1 on 4th December, 2014.

On the other hand, though exhibit P1 indicates the names of the neighbours to the suit property, in his testimony, the appellant agreed that he did not know them. Besides, none of the neighbours were called as witnesses to the sale agreement. It follows that from the evidence of PW1 on record, it is difficult to believe that he fully defended the

authenticity of exhibit P1. In short, PW1's evidence cannot be taken to be credible.

For his part, PW3 testified that he knew PW1 and stated that he signed exhibit P1 which was allegedly prepared by the Kulangwa Street Council and that he was a witness to the buyer but did not mention any other witnesses who were present during the signing of exhibit P1, including PW2 and DW5 except the seller. It is also on the record of appeal that during cross examination, PW3 denied to know PW2. In the circumstances PW3's evidence on the authenticity of exhibit P1 cannot also be believed as it leaves a lot of issues not answered.

In the result, considering the material lapses and inconsistences in the evidence of PW1, PW2 and PW3 when taken as a whole amid the evidence of DW5 from the respondent side, we have no hesitation to hold that the authenticity of exhibit P1 is questionable. We therefore do not discern from the evidence of PW1, PW2 and PW3 impeaching the credibility of DW1, DW2, DW3 and DW4 with regard to the authenticity of exhibit D2. On the contrary, we are satisfied that the respondent, proved that exhibit D2 was entered on 28th August, 2014 and thus it was valid and binding between her and the seller. The seller could not therefore enter into another agreement while there was no breach of

the terms by the respondent with regard to payment in installment as indicated therein. Consequently, we hold that the appellant's complaint that there was no proof that the agreement between the respondent and the seller entered on 28th August, 2014 was valid and binding, is unfounded as the appellant did not parade evidence to impeach the evidence from the respondent side on the authenticity of exhibit D2. We accordingly dismiss the second ground of appeal.

On the fourth ground, the appellant complaint is that the trial judge did not properly evaluate the evidence of appellant (PW1), PW2 and PW3 which left no doubt that the appellant purchased the suit property lawfully. It is argued for the appellant that all the witnesses proved on balance of probability that he lawfully purchased the suit property as reflected by exhibits evidence P1 and P2. The appellant therefore urges the Court to reverse the trial court decision and declare him as a lawful owner of the suit property.

This assertion is strongly contested by the respondent. It is submitted that the trial judge evaluated the evidence of the parties on record and in the end, she was satisfied that the appellant failed to prove his case on balance of probability.

On our part, considering the evaluation of the evidence we have made in the second ground with regard to the authenticity of exhibit P1 and the credibility of PW1, PW2 and PW3 and the evidence of the respondent and her witnesses, namely DW1, DW2 and DW3, we are satisfied that though the trial judge did no go to the extent we have gone in evaluating the evidence of the parties, the conclusion she reached is sound. According to the record of appeal, the evidence of PW1, PW2 and PW3 which contain a lot of lapses and inconsistencies as exposed above, cannot be taken to be credible to enable the Court to conclude that the appellant proved the case on balance of probability. We have no hesitation to state that based on the evidence of the parties on record, the appellant failed to substantiate his case before the trial court. We find it pertinent to reiterate what the Court stated in **Anthony M. Masanga v. Penina (Mama Mgezi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported) that:

> *"... Let us begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002."*

In the event, we find the complaint in the fourth ground to have no substance and proceed to dismiss it. Consequently, we dismiss the appeal in its entirety with costs.

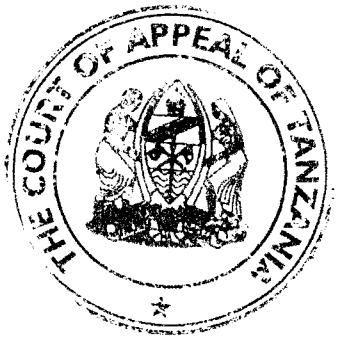
DATED at **DAR ES SALAAM** this 8th day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of March, 2023 in the presence of Mr. Bernard Ngatunga, learned counsel for the appellant and Mr. Jonas Kilimba, learned counsel for the respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL