IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 106 OF 2020

JOACHIM NDELEMBI ..... APPELLANT

VERSUS

MAULID M. MSHINDO ..... 1ST RESPONDENT
MAHIMBO MTANDA ..... 2ND RESPONDENT
HAMISI ABDALLAH ..... 3RD RESPONDENT

(Appeal from decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Makuru, J.)

dated the 30th day of October, 2018
in
Land Appeal No. 189 of 2017

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JUDGMENT OF THE COURT

14th & 29th March, 2023

KITUSI, J.A.:

There are two contending claims of title to a piece of land located at Sanze area in Kisarawe District within Coast Region. All the way from the District Land and Housing Tribunal (DLHT) of Kisarawe in Land Application No. 7 of 2013, to the High Court in Land Appeal No. 189 of 2017 sitting on first appeal and to this second appeal, the real stakes

are between the appellant and the first respondent. The background of the matter gathered from the testimonies tells that fact.

The first respondent who instituted Land Application No. 7 of 2013 against the appellant (as first respondent then) and the other respondents, alleged ownership of the suit land by way of purchase from Mahimbo Mtanda, the second respondent. There was evidence from Omari Nassoro Jongo (PW2) who claimed ownership of the suit land by tracing it from his late father Nassoro Jongo, that he gave that piece of land to his in-law Hamisi Abdallah the third respondent, after receiving a token (*thumni*) from him. The third respondent who testified as DW6 supported this fact.

The third respondent testified that he, in turn, sold the suit land to Mahimbo Mtando the second respondent who testified as DW5 to confirm that fact. Eventually, DW5 sold the suit land to the first respondent. Alois Akwilini Mayumbo (PW3) and Omari Ramadhani Mangala (PW4) who held offices as local leaders at Sanze area during the times relevant to the case, testified in support of the chain of transfer of the suit land as narrated above.

On the other hand, the appellant alleged title to the same piece of land on the basis of the village council allocating it to him in 1997. One Isa Lukanga (DW2) recalled that in a year when he was serving as a chairman of the village in which the suit land is located, he received directives from the District Commissioner for Kisarawe District that he should prepare a list of people who wished to have land allocated to them. The village government identified an area at Gogo and approved the list of interested allocatees, including the appellant. So, DW2 confirmed the appellant's contention that the village government allocated a piece of land to him, but could not tell its location and size. He alluded to the fact that subsequently there arose a dispute over that piece of land between the appellant and the third respondent. The existence of the dispute was confirmed by one Siajabu Bakari Dilunga (DW3) who was then Chairman of Kisarawe Village Land Council, and Salum Kiwanga (DW4) who testified that the council resolved the dispute in favour of the appellant.

The DLHT rejected the evidence of the village leaders (DW2 and DW3) because, it reasoned, by their admission that there were claims of compensation over the area identified for allocation, it meant the village

government purported to allocate land belonging to other people without compensating them. In the end it found in favour of the first respondent. The High Court more or less took a similar view citing the case of **Nyahela Boneka v. Kijiji Cha Ujamaa Mutala** [1988] T.L.R. 156.

Before us Mr. Alphonce Katemi, learned advocate was at first prepared to argue four grounds of appeal on behalf of the appellant but thought better of it and abandoned the first ground of appeal. Under that ground of appeal the appellant had sought to establish title by long use of the land and that the first respondent's case to challenge it after 12 years was barred by law. We are, for the reason of abandonment of that ground of appeal, spared from pronouncing ourselves on that.

The second ground of appeal, is that:-

> *"... the appellate court erred in law and fact by its failure to hold that the two sale agreements in respect of the land in dispute dated the 24th, April, 2020 between Mahimbo James Mtanda and Maulidi Mhidini Mshindo and 31st May, 2008 between Hamis Abdallah Mangaya and Mahimbo James Mtanda were null and void."*

In our view, this ground of appeal may be considered jointly with the fourth ground of appeal which states:-

> *"That the appellate court erred in law and fact for its failure to determine that there was no any proof that one Omari Nassoro Jongo transferred the land in dispute to the 3rd Respondent."*

The respondents appeared through Mr. Mohamed Manyanga, learned advocate who had also featured both in the trial DLHT and the High Court on first appeal. Ahead of the date of hearing, both learned counsel had presented written submissions which they orally highlighted on during the actual hearing.

Mr. Katemi had two interrelated arguments in respect of the second ground of appeal. First, he attacked the two courts below for relying on the sale agreement dated 31st May 2008 which was not tendered as exhibit. Secondly, he faulted the sale agreements for not being authorized by the village council as per Village Land Act, Cap 115 R.E. 2002. The learned counsel cited the cases of **Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] T.L.R. 103 and

Bakari Mhando Swanga v. Mzee Mohamed Bakari Shelukindo & 3 Others, Civil Appeal No. 389 of 2019 (unreported).

The learned counsel also attacked the decisions of the High Court and the trial DLHT for accepting the testimony of Omari Nassoro Jongo that he was the original owner while there was no such proof. He faulted the finding that Omari Nassoro Jongo transferred the suit land to the third respondent without there being a deed of gift to prove it nor any witness to the transfer.

Responding, Mr. Manyanga submitted that the sales between the respondents were witnessed by PW3 and PW4 who were then local leaders as hamlet Chairman and Cell leader of the relevant area. On the arguments advanced in support of the fourth ground of appeal the learned counsel submitted that there was evidence from PW2 the original owner who acquired the land from his late father many years ago and that of PW4 the local leader.

What we gather from the decisions of the DLHT on trial and that of the High Court on first appeal is that both versions were accepted. On the one hand they accepted the first respondent's account that he

traced ownership from PW2 the original owner, DW6 the third respondent and lastly DW5 the second respondent. With respect, we agree with that concurrent finding on the evidence presented. We do not think that proof of PW2's acquisition of the land from his late father way back in 1980 must be documentary, because in the ordinary course of things such a transaction is not improbable. Nor would there be any reason to doubt PW2's oral account that he passed over the land to the third respondent who was his in-law. All this however was confirmed by PW3 and PW4 whose testimonies the DLHT and High Court believed. In **Barelia Karangirangi v. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (unreported), the Court considered an oral chronicle relating to ownership of the land in question and made a finding on that basis without documentary evidence to support it. The relevant part reads:-

> *"We have observed that the respondent's own evidence at the Ward Tribunal supported by that of Busanya Katamba (PW2) and that of Bwire Mwangwa (PW3) also that of the Ward Tribunal Officers who had an opportunity to visit the locus in quo on 04/06/2007, sufficiently proved that the land in dispute belonged to her as she inherited it from her father who acquired and*

owned it from one Mganga (her grandfather). The respondent then, had on the balance of probabilities, succeeded to discharge her duty".

Similarly, in the instant case, we have no reason of faulting the DLHT and the High Court in their concurrent findings that the land originally belonged to PW2 having acquired it from his late father and that it is from him that the transfers of that piece of land began till it reached the first respondent. The appellant has not made a case for us to interfere with the concurrent findings of fact by the DLHT and the High Court on this. The case of **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.L.R 297 and quite a few others demonstrate the circumstances under which this Court may interfere, that is, where there is misapprehension of the substance, nature and quality of the evidence resulting in unfair trial. There is nothing of that sort in this case.

On the other hand, the DLHT and the High Court accepted the appellant's story that he acquired title to the suit land by way of allocation from the village government. However, the two lower courts proceeded to find the allocation invalid because the village government

wrongly allocated that land without notifying the existing owner nor paying compensation to him. Specifically, the DLHT considered the evidence of DW2 and DW3 and observed that the mere fact that these witnesses who were then village leaders were aware of claims of ownership or compensation over that land, is an indication that the village government allocated an encumbered piece of land.

We have also noted and we make a finding on the basis of testimonies of PW1, PW2 and the appellant himself that prior to the application that has given rise to this appeal, there were litigations over ownership of the disputed piece of land. PW1 and PW2 were categorical that no compensation was given by the village government and the appellant has not attempted to suggest that it was so made. By our decision in the case of **Ombeni Kimaro v. Joseph Mishili t/a Catholic Charismatic Renewal,** Civil Appeal No. 33 of 2017 and **Merchiades John Mwenda v. Gizelle Mbaga (Administrator of the Estate of John Joseph Mbaga – deceased) & 2 Others,** Civil Appeal No. 57 of 2018 (both unreported), the principle of priority deems the title or grant or sale issued or made earlier as being superior to the one issued subsequently.

Like in **Anthony M. Masanga v. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014 (unreported), we proceed to address the issue; "*...whether the appellant had, in the required standard, discharged his duty of proving that the land belonged to him and not anybody else".* In our view, the existence of disputes between the appellant and other people as well as the appellant's failure to lead evidence proving payment of compensation to the original owner, cripples the appellant's claim over the disputed land.

On a balance of probabilities therefore, we conclude that the respondent has made a better case for the ownership of the piece of land as found above than the appellant who on a balance, has failed to establish that the piece of land was unoccupied at the time the village authority purported to allocate to him and that compensation was paid to the original owner. Therefore, we cannot fault the DLHT and the High Court on that finding. Consequently, we dismiss the second and fourth grounds of appeal.

The third ground of appeal which we shall consider last, runs like this:-

> *"That the appellate court erred in law and fact by holding that the allocation of the land to the appellant was unlawful without considering that the village council of Kisarawe village was never a party to the case".*

Although this features as a separate ground of appeal, when learned counsel's written arguments are considered, it is actually part of the discussion we have just concluded. The appellant's counsel submitted that the issue of payment of compensation was raised in the absence of the village council and that it is fictitious. He argued that such contention ought to have been made in the presence of the village council.

With respect, we do not see how this argument advances the appellant's case. First of all, the appellant cannot prove any point in his favour except by affirmative evidence. If the appellant considered the evidence of members of the village council vital to his case, he should have called them. Secondly, the first respondent had no duty to prove that compensation was not paid to him as one cannot prove a negative.

See the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported).

For the reasons shown, we dismiss first, second and third grounds of appeal rendering the entire appeal to be devoid of merit resulting in its dismissal. The respondents shall have the costs.

DATED at **DAR ES SALAAM** this 28th day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of Mr. Mohamed Menyanga, learned counsel for the Respondents and also holding brief for Mr. Alphonce Katemi, learned counsel for the Appellant is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL