IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CIVIL APPEAL NO. 85 OF 2020

ENOCK KALIBWANI..... APPELLANT

VERSUS

AYOUB RAMADHANI.....1st RESPONDENT

ELIKANA MURO.....2nd RESPONDENT

RAYMOND JACOB ELIKANA

(As Administrator of the Estate

of the deceased JACOB ELIKANA MURO).....3rd RESPONDENT

YUSUFU MHANDO.....4th RESPONDENT

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

(Kente, J.)

dated the 13th day of August, 2015

in

Land Case No. 113 of 2008

.....

JUDGMENT OF THE COURT

15th March & 5th June,2023

FIKIRINI, J.A.:

This appeal germinates from Land Case No. 113 of 2008, in which the first respondent, Ayoub Ramadhani sued the appellant, Enock Kalibwani, second and fourth respondents namely Elikana Muro and

Yusufu Mhando. The suit was for breach of a contract of sale dated 5th September, 2007 by the second respondent. On the other hand, aside from filing a written statement of defence, the appellant raised a counterclaim, demanding to be declared the lawful owner of the part of the suit land. After a full hearing, the court determined the suit in favour of the second respondent. Aggrieved by the decision, the appellant preferred an appeal containing seven grounds. At the same time, the first respondent filed a cross-appeal listing eight grounds of grievance.

Before we consider the substance of the appeal, a brief factual narration underpinning the case's background is inevitable. From the evidence gathered on the record, it goes as follows: the first respondent sued the second respondent in Land Case No. 113 of 2008, for breach of a contract of sale dated 5th September, 2007 in respect of the landed property located at Plot No. 95 at Mwenge, Savei area. Since other parties were joined along the way, it called for the plaint to be amended, which the first respondent did and accordingly served all those involved. The three defendants then filed their written statements of defence. The second respondent and the present appellant, the then, third defendant,

raised counter claims. The second respondent claimed ownership over the same title.

In contrast, the appellant prayed to be declared the lawful owner of part of the landed property registered as Plot No. 95 in Mwenge, Savei area. The fourth defendant neither filed any defence nor defended the case against him. As hinted earlier at the end of the trial, the High Court entered judgment in favour of the second respondent (Elikana Muro) in the name of the third respondent (Jacob Elikana Muro), hence the present appeal.

We shall reproduce the grounds of appeal but not those in a cross-appeal for the reason which will be apparent shortly. Those grounds are as follows:-

1. That the trial court erred in law and fact in failing to properly extract the actual names of the parties in the original suit and in the counter claims raised by both the appellant and respondents thereby occasioning injustice by entering judgment in favour of the second respondent's counter claim while the plaintiff in the said counter claim was the third respondent and not the second respondent at all.

2. That the trial court erred in law and fact in entertaining the second respondent's counter claim without its leave to join as a party since the same was raised by a person not a party to the original suit, the second respondent's name is Elikana Muro while the plaintiff in the second respondent's counter claim is Jacob Elikana Muro, the third respondent.

3. That the trial court erred in law and fact by failing to pronounce default judgment in favour of the appellant's counter claim as no written statement of defence was ever filed by the respondents opposing his claims and, the suit being declaratory one falling within cases under Order VIII Rule 14 (1) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC).

4. That the trial court erred in law and fact in dismissing the defence of *res-judicata* put forward by the appellant against the first respondent's suit based on the available evidence on record that the same subject matter and parties had conclusively litigated on in Civil Case No. 92 of 2002 before the District Court of Kinondoni and a judgment was in place before the same subject matter

became an issue for determination in Land Case No. 113 of 2008 before the High Court of Tanzania.

5. That the trial court erred in law and fact in failing to record the court proceedings when visited locus in quo on 2nd July, 2015 contrary to law thereby occasioning injustice to the appellant by losing his case and he was condemned to pay costs.

6. That the trial court erred in law and fact in failing to assign reasons by the successor judge (Hon. Kente J,) as the suit was tried by more than one judge, Hon. Mansoor J, heard the plaintiff's case up to 17th October, 2014 and the defence case was heard by Hon. Kente J, to its conclusion contrary to Order VIII Rule 10 of the CPC, R. E. 2019.

7. That on the available evidence on record the trial court erred in law and fact in pronouncing judgment in favour of the second and third respondents by disentitling the appellant with his land without good evidence as part of the suit land the subject of the litigation and by virtue of exhibits P1, D3 and D4 the property belonged to the appellant, the evidence leaves no scintilla of doubts regarding

the land in dispute and the parties concerned over Plot No. 95, Mwenge, Savei Area, Dar-Es-Salaam comprising of Certificate of Title No. 39115 which the District Court of Kinondoni ordered the area to be resurveyed and subdivided accordingly between the appellant and the first respondent in the name of Ayubu Ramadhani Kajungo.

During the hearing of this appeal on 15th March, 2023, Messrs. Daniel Haule Ngudungi, Barnaba Luguwa, and Francis Mgare learned advocates appeared for their respective parties, the appellant, first respondent, and third respondent. The fourth respondent, duly served through his advocate, did not enter appearance. Mr. Ngudungi prayed, the prayer which was granted, for the hearing to proceed in terms of rule 112 (2) of the Court of Appeal Rules, 2009 (the Rules). During the hearing, Mr. Luguwa advocate for the first respondent contended that all the grounds in cross-appeal had been dealt with in the grounds of appeal, he opted to abandon the latter. The cross-appeal was thus marked withdrawn.

We have dispassionately reviewed the written submissions filed and followed up closely on the oral submissions made by the learned

advocates. In our determination, we have opted to start with the seventh ground on failure to consider the appellant's evidence found in exhibits P1, D3 and D4 leading to disentitling him of the piece of land he lawfully purchased.

Starting with Mr. Ngudungi, he prefaced his address by adopting his written submissions filed on 8th June, 2020. Expounding on his submission, he criticized the trial judge for failure to give weight to exhibits P1, D3, and D4. Instead, he only considered the sale agreement between the first and third respondents leaving out other evidence. The advocate referred us to pages 337 – 338 of the record of appeal, contending that had the judge considered exhibits P1, D2, D3, and D4, he would have realized that part of the landed property subject of the present appeal belonged to the appellant. Failure to consider exhibit D3, a sale agreement between the appellant and the first respondent dated back to 1996, had impacted and robbed the appellant of his piece of land legally purchased. Besides exhibit D2, the appellant exhibited in court exhibit P1, the ruling in Civil Case No. 92 of 2002 dated 3rd June, 2004 by the Kinondoni District Court and a drawn order of the District Court of Kinondoni. Similarly, the judge failed to appreciate that after

Civil Case No. 92 of 2002 was instituted, parties at some point agreed to settle out of court. A deed of settlement, as exhibited in D3, was prepared, and a court decree was extracted (exhibit D4). This was followed by the court order to conduct a resurvey and subdivision of the land on Plot. No. 95 Mwenge, Savei-area. All these occurred in 2004. At the time, none of the other respondents were in the picture.

Mr. Ngudungi further submitted that the second and third respondents came into the picture in 2008. By then, subdivision had already taken place. Had the judge considered all this evidence, he would have come up with a different outcome, he stressed. Mr. Ngudungi underscored that the first respondent in 2008 had no good title to pass on the already decreed piece of land.

Finally, Mr. Ngudungi urged us to allow the appeal with costs as it has merits, quash the High Court decision and set aside the orders.

On his part, Mr. Luguwa supported the submissions by Mr. Ngudungi. Adding to the submission, he submitted that by the time the second and third respondents entered the sale agreement, there was a caveat already. Mr. Luguwa referred us to page 289 of the record of

appeal, where there is an official search report-exhibit D5 showing the situation at the time. It was, thus, the buyer's fault for buying without due diligence. He concluded his submission by acknowledging that the judge erred in not considering the available evidence on record. On the way forward, he invited us to mull over all the grounds of appeal and nullify the proceedings.

Mr. Mgare also adopted his written submissions filed on 10th July, 2020. He opposed the appeal. In his submission, he contended that all the referred documents pertain to the farm (un-surveyed) situated at Mlalakuwa-Mwenge, and not Plot No. 95, located in Savei area. And that even the parties in the Civil Case No. 92 of 2002 differed from those in Land Case No. 113 of 2008. Insisting on the correctness of the trial judge findings, he contended that exhibits P1, D3 and D4 plus witnesses' oral evidence were analyzed properly as indicated on pages 337 – 340 of the record of appeal, confirming that these were two different pieces of land. According to Mr. Mgare, there was no merit in faulting the trial judge because the pointed-out exhibits were considered.

In a short rejoinder, Mr. Ngudungi responding to Mr. Mgare's submission on Mlalakuwa and Mwenge being different areas contended

that the site is the same, banking on DW5's testimony found on page 275 of the record of appeal. He contended further that, the names or even the explanation that the piece of land in question is a farm or Plot should not mislead the Court.

On the validity of the District Court of Kinondoni ruling, Mr. Ngudungi strongly argued that the decision is still binding to date. It was, therefore, incorrect for the trial judge to consider the sale agreement between the first and third respondents in isolation.

Being the first appellate court in this matter, this Court is duty bound to re-examine the evidence adduced before the trial court and, if necessary, come up with its own conclusion. There is a long list of cases on the aspect, but in this instance, we shall refer to these two **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 (both unreported).

What we have gathered as uncontested issues are as follows: (i) on page 225 of the record of appeal, the first respondent admits to

having sold the appellant a piece of land in 1996, before selling the same to the third respondent, (ii) the first respondent acknowledges the existence of the Kinondoni District Court ruling and drawn order, which concerns him and ordered for subdivision of the land in Plot No. 95 Savei-area, (iii) that the Kinondoni District Court ruling dated 3rd June, 2004 has not been challenged up to the time of filing of the present appeal, and (iv) that the Kinondoni District Court order for resurvey and subdivision has not been complied with.

Going by the evidence on record, it is evident the sale of the whole landed property, known as Plot No. 95 Mwenge, Savei area, between the first respondent and second and third respondents was invalid as the first respondent did not have a title to pass to the second or third respondent, for he would not give what he did not have. See, **Pascal Maganga v. Kitinga Mbarika,** Civil Appeal No. 240 of 2017 (unreported). The first respondent's move to sell the land to the second or third respondents brought him within the famous Latin Maxim "*Nemo dat quod non habet",* meaning no one gives what he does not have.

This is not the first time we are faced with a double allocation issue. We call it double allocation because the portion of land sold to the

appellant in 1996 was again included in the land sale concluded in 2007. In the case of **Farah Mohamed v. Fatuma Abdallah** [1992] T. L. R. 205, the Court, when dealing with the kindred issue, had this to state:-

> *"He who does not have legal title to the land cannot pass a good title over the same land to another."*

Since the Kinondoni District Court ruling stands unchallenged, any transaction that followed in respect of the portion of land already sold to the appellant is null and void. This is because the priority principle guides that where two or more parties vying over the same interest, particularly land, each claiming to have title over it, a party who acquired it earlier will be deemed to have a better or superior title. In our case, the appellant has a superior title over the second or third respondent over the portion of land sold to him in 1996.

See also: **Colonel Kashimiri v. Naginder Singh Matharu** [1988] T. L. R. 162, **Ombeni Kimaro v. Joseph Mishili T/A/ Catholic Charismatic Renewa**, Civil Appeal No. 33 of 2017, **Mechiades John Mwenda v. Gizzelle Mbaga (Administrator of the Estate of the late John Japhet Mbaga) & 2 Others**, Civil Appeal No. 57 of 2018

(both unreported) and **Selina Amadeus Masawe (as Guardian of Julius Amadeus Masawe) v. Said Chipelela & 2 Others,** High Court Land Case No. 24 of 2011 (unreported) cited by Mr. Ngudungi.

In our view, the trial judge's failure to take note of all the available and straightforward evidence warranted the concern raised by the appellant. Had the trial judge considered exhibit D2 the sale agreement between the first respondent and the second respondent, in tandem with exhibits P1, D3, and D4, he would have realized that, *one,* the pieces of land allegedly in dispute were both parts of land located on Plot No. 95 Savei - area, comprising of Certificate of Title No. 39115, despite the variance in names. *Two,* the said Certificate of Title had been the subject of litigation before, and a ruling existed as far back as 2003. This was even before the first and second respondents entered a sale agreement in 2007. *Three,* when Land Case No. 113 of 2018, was instituted, the appellant was already occupying his land since 1996. *Four,* with due respect, exhibit D5 would also have shade light had the trial judge bothered to evaluate and analyze it. This official search report dated 6th September, 2012, shows an injunction by the court of the Resident

Magistrates of Dar Es Salaam at Kisutu registered as FD No. 86667 dated 27th March 1995.

Moreover, Land Case No. 113 of 2018 was preceded by Civil Case No. 92 of 2002, whose decision remained unchallenged. In addition, on page 255 of the record of appeal, when cross-examined by Masaka, who appeared for the third respondent, the first respondent, apart from admitting that Ayubu Ramadhani and Ayubu Kajungo were his names, he admitted to having sold a portion of land to the appellant in 1997. He, therefore, could not have the power to sell the said portion to the second or third respondents.

As intimated earlier in this decision, we are of the view that the trial judge misapprehended the evidence by failing to consider evidence relevant to the material at issue. And as such, it has occasioned injustice to the appellant. The appellant was disentitled of the portion of land he lawfully purchased from the first respondent in 1996.

We think this ground of appeal sufficiently disposes of the appeal before us.

In light of what had transpired, we allow the appeal quash the High Court judgment, set aside the orders, and order that the decision in Civil Case No. 92 of 2002 dated 3rd June, 2004 be complied with.

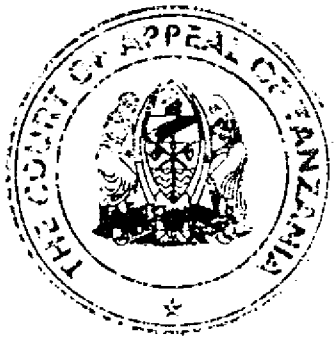
DATED at **DAR ES SALAAM** this 1st day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2023 in the presence Miss Benadetha Fabian, learned counsel for the Appellant and Mr. Barnaba Luguwa, learned counsel for the 1st Respondent, also holding brief of Mr. Mgare, learned counsel for the 2nd and 3rd Respondents and in the absence of the 4th Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL