IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM; MWARIJA, J.A., KWARIKO, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 28 OF 2020

GABRIEL MATHIAS MICHAEL .....1ST APPELLANT
HAMIS SHEHA RIKO .....2ND APPELLANT

VERSUS

HALIMA FERUZI ..... 1ST RESPONDENT
NURDIN ALLY SAID (Administrator of the Estate of the late BUNAIYA ABDALLAH KISESA -Deceased)..... 2ND RESPONDENT
EGBERT KALUGENDO ..... 3RD RESPONDENT

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

(Kente, J.)

dated the 28th day of April, 2015
in
Land Case No. 297 of 2009

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JUDGMENT OF THE COURT

22nd March & 10th August, 2023

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Land Division at Dar es Salaam (the trial court) in Land Case No. 297 of 2009. In that case, the respondents had sued the appellants for a declaration that the sale of a land situated at Salasala area in Kinondoni, Dar es Salaam (the suit land) by the second appellant to the first appellant was null and void. They also prayed for eviction of the first appellant from the suit land without compensation, general damages at

the tune of TZS. 100,000,000.00 and any other relief as the trial court deem fit to grant.

On the other hand, the appellants denied the claim and asserted that, the suit land was the property of the second appellant after having been allocated the same by the local Government of Salasala in May 1995 following his application. He later sold it to the first appellant.

At the commencement of the trial, the following two issues were framed, namely, *one,* who is the lawful owner of the suit land and, *two,* to what reliefs are the parties entitled. During the trial, the respondents had a total of five witnesses namely Halima Feruzi (PW1), Egbert Herman Ndyamukama Kalugendo (PW2), Ibrahim R. Muombo (PW3), Nurdin Ally Said (PW4) and Mariam John Nyakechi (PW5). They also tendered three documentary exhibits. The case by the respondents as it emerged at the trial can briefly be recapitulated as follows.

According to the sale agreement (exhibit P1) between PW1 and one Vicent which was concluded in 1983 and 1990, the suit land measuring four acres is situated at Tegeta area. However, in her oral account, PW1 testified that the suit land is situated at Salasala area near Benaco area. According to her, Salasala was formerly part of Tegeta Village. It was the respondents' further evidence that on 20th March,

2000, PW1 sold part of her land measuring 150 x 150 meters to her daughter Bunaiya Abdallah Kisesa, now deceased (the second respondent) whereas in 2007, the latter sold part of the land to the third respondent who had made part payment of TZS. 350,000.00 out of the agreed price of TZS. 2,000,000.00. The sale agreement between the first respondent and the second respondent was witnessed by the second appellant. The respondents complained that in the year 2009, the second appellant fraudulently sold the suit land to the first appellant.

On the other hand, the appellants' case was built by the following four witnesses; Hamis Sheha Riko (DW1), Gabriel Mathias Michael (DW2), Omari Mohamed (DW3) and Monica Timba (DW4). There were also four documentary exhibits. It was evidenced that upon application on 3rd April, 1995 (exhibit D1), the second appellant was allocated land measuring three acres by Salasala Village Council for residential and agricultural purposes vide a letter dated 16th May, 1995 (exhibit D2).

According to the second appellant, sometimes in the year 2000, the first respondent went to him with allegations that the suit land belonged to her since 1983 where she used to cultivate until 1986 when she fell sick. Following some conversation an agreement was reached for amicable settlement whereby the first respondent would pay the second appellant compensation of TZS. 2,500,000.00 for improvement

on the suit land. The agreement was reduced into writing (exhibit D3). However, the first respondent did not heed to the terms of the agreement as a result, the second appellant decided to dispose of the suit land to the first appellant on 12th June, 2009 and 23rd September, 2009 for TZS. 9,500,000.00 and TZS. 12,000,000.00, respectively vide an agreement which was executed before the local authority's office.

Subsequently, the area was surveyed and the first appellant was granted title deeds No. 86660 and 86661 (exhibit P4 collectively). While in the process of carrying out construction work, the third respondent approached him with a claim that the suit land belonged to him. He informed the second appellant of that matter who told him not to worry as that might be a conman since the land belonged to him.

The appellants were first sued at the Ward Tribunal but due to the issue of pecuniary jurisdiction, the case was transferred to the District Land and Housing Tribunal. However, the matter was withdrawn and filed afresh before the trial court.

At the end, the trial court was satisfied that, the respondents had proved their case on balance of probabilities. It observed that the first respondent bought the suit land from the said Vicent and thereafter she sold it to the second respondent and then the third respondent.

In rejecting the second appellant's claim, the trial court, among other things, wondered as to why the second appellant was ready to receive TZS. 2,500,000.00 as compensation for development made if at all he was allocated the suit land by the village authority. The trial court declared the sale of the suit land to the first appellant by the second appellant null and void under the principle of law *nemo dat quod non habit,* that means, he could not sell what he did not own.

Aggrieved by that decision, the appellants came to this Court on appeal. In the memorandum of appeal which was filed on 13th February, 2020, the appellants raised eight grounds. On 22nd March, 2023, in terms of rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), they were granted leave to argue one additional ground. The following are the nine grounds of appeal:

1. *Mediation, being a mandatory requirement in procedure, was not properly conducted after one of the parties was reported dead, without joinder of a legal representative.*
2. *The learned trial Judge erred in law and in fact in taking over the trial of the proceedings from another judge without indicating the reasons for the same.*
3. *The learned trial Judge erred in law and in fact in entering judgment which did not cite the names of all parties thereto.*

4. *The learned trial Judge erred in law and in fact in entering judgment in favour of respondents on contradictory evidence tendered by the 1st respondent (PW1). He further erred in law and in fact in resolving the contradiction on the basis of the demeanour of the witnesses while the case was based on documentary evidence.*

5. *The learned trial Judge erred in iaw and in fact when he rejected the reliable and credible evidence of the 2nd appellant (DW1) as regards ownership of the disputed land. He further erred in law and in fact in rejecting the said evidence on the basis of the demeanour of the witness while the case was based on documentary evidence.*

6. *The learned trial Judge misinterpreted the offer by the 2nd appellant (DW2) to be paid Tshs. 2,500,000/= by the 1st respondent (DW1) in order to surrender the disputed shamba, as concession that the land did not belong to him but belonged to the said 1st respondent. He further erred when he received in evidence, acted upon and gave weight to a printout of phone text massages without the phone from which they were alleged to have been printed out.*

7. *The learned trial Judge erred in law and in fact in condemning the 1st appellant (DW1) for processing the survey and Title Deed on the ground that he could not have done so due to the dispute involving the suit land,*

without considering the timing of the said survey and application for the title deed and, further, without consideration of the readiness by the land allocating authorities of the Government to process for the same, notwithstanding the alleged existence of the alleged serious dispute.

8. *The learned trial Judge erred in law and in fact in holding that the 2nd appellant (DW2) did not pass good titie to the 1st appellant (DW1) on the ground that he had no title over the suit land he sold to the later, while on preponderance of probability he had a better title as compared to the 1st respondent (PW1).*

9. *The learned trial Judge erred in law and in fact in not appreciating that since the appeliant had developed the suit land, the respondents, if could have proved ownership, prior to such development, would only be entitled to unexhausted improvements, If any.*

Further, in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, both parties filed their respective written submissions for and against the appeal. On the date the appeal was placed before us for hearing, Mr. Samson Mbamba, learned advocate, represented the appellants while the respondents appeared in person, unrepresented.

When Mr. Mbamba was invited to argue the appeal, he abandoned the second ground of appeal, adopted his written submissions and made some oral clarification on the grounds of appeal. His submission in respect of the first ground of appeal was that, mediation being a mandatory stage in the trial of the suit, was not properly conducted in the instant case. He amplified that, the mediation was conducted and marked failed on 28th August, 2013 after a report on the death of the second respondent Bunaiya Abdallah Kisesa, on 7th August, 2013 before her legal representative was made a party to the case whereas the legal representative was enjoined in the case on 17th July, 2014. Which means, the mediation was conducted in the absence of the legal representative He argued that, the omission was fatal supporting his contention with the decisions of the Court in **Abas Salum Kichenje v. Shehe Mohamed Zayumba & Another**, Civil Appeal No. 49 of 2005 and **Abdallatif Mohamed Hamis v. Mehboob Yusuf Osman & Another**, Civil Application No. 6 of 2017 (both unreported).

In response, the respondents admitted that the mediation was conducted in the absence of the second respondent. However, despite that omission, the respondents argued that no injustice was occasioned since the first respondent, who is the mother of the second respondent, attended the mediation session.

Having considered this ground, we are of the view that, no injustice was occasioned when the mediation was conducted after the death of the second respondent and before her legal representative was made a party to the case. This is because the mediation did not succeed and thus no any rights of the parties were affected. We have found that, the case of **Abasi Salim Kichenje** (supra) is distinguishable from the instant case because in that case the trial judge also mediated the case, that is when the Court observed that:

> *"The judge or magistrate assigned to try the case cannot, in our view, be the mediator judge or magistrate. So, it was wrong in this case for the judge to assume the role of a mediator and a trial judge in the same case."*

Likewise, the case of **Abdullatif Mohamed Hamis** (supra) is distinguishable. In that case, the Court found that, from the inception the first respondent wrongly sued the second respondent in her personal capacity instead of her capacity as a legal representative over a disputed property which belonged to her late father. In the instant case, the second respondent died during the pendency of the case and her legal representative was made a party on 17th July, 2014 *albeit* after the mediation had been conducted. The first ground fails.

Mr. Mbamba argued in respect of the third ground that, the judgment did not mention names of the parties and more so, after the death of the second respondent where her legal representative was made a party in her place but instead the judgment reads **Halima Feruzi & Two Others v. Gabriel Mathias Michael & Another**. He contended that the learned trial Judge contravened Order 20 rule 6 of the Civil Procedure Code [CAP 33 R.E. 2019] (the CPC) which requires that the decree shall agree with the judgment by indicating the names and description of the parties. He contended that, the omission rendered the judgment incompetent deserving to be quashed and set aside and a retrial be ordered. To bolster his argument, the learned counsel relied on the decision in the case of **Juma Marumbo & 42 Others v. Regional Commissioner, Dar es Salaam Region & Two Others,** Civil Application No. 242 of 2016 (unreported).

In response, the respondents admitted the omission complained of but they quickly argued that this is an error which is curable under section 96 of the CPC because the pleadings and proceedings which are part of the record show the names of the parties. They further urged us to invoke the overriding objective principle enshrined under sections 3A and 3B of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] to attain a

substantive justice rather than to embrace issues of technicality taking into account that the case has been in court since 2009.

We have considered this complaint. Admittedly, the judgment as well as the decree did not mention all names. However, this omission is curable for the following reasons: **one,** the appellants knew who were the parties at the trial. This is so because in the amended plaint which was lodged pursuant to the court order dated 17th July, 2014 following the death of the second respondent, all names for both parties were mentioned. The title read as follows:

> *"**HALIMA FERUZI**.....**1st PLAINTIFF***
> ***NURDIN ALLY SAID** (Administrator of the*
> *Estate of the late **BUNAIYA ABDALLAH***
> ***KISESA**- Deceased) .....**2nd PLAINTIFF***
> ***EGBERT KALUGENDO**.....**3rd PLAINTIFF***
> *Versus*
> ***GABRIEL MATHIAS MICHAEL**..**1st DEFENDANT***
> ***HAMIS SHEHA RIKO**.....**2nd DEFENDANT"***

Two, no one came to claim to be a party to the case outside those mentioned in the amended plaint. Therefore, the omission is curable under section 96 of the CPC such that the names of the parties ought to appear both in the judgment and decree as indicated in the amended plaint. This ground thus fails.

The appellants' fourth and fifth grounds of appeal have raised two complaints. The first one is that, the trial court erred to decide the issue of contradiction in the evidence of the first respondent on the basis of the demeanour of witnesses. The second complaint is that, the trial court erred to decide the issue of ownership of the suit land on the basis of contradictory evidence of the first respondent while rejecting the reliable and credible evidence of the second appellant.

Beginning with the first complaint, Mr. Mbamba submitted that, although the evidence as to the demeanour of the witness is the province of the trial judge who sees and hears the witness's testimony, there must be an indication on the court record regarding the conduct and behaviour of the witness in a witness box consistent with the provisions of Order 18 rule 8 of the CPC. The learned counsel also referred us to the *Commentary by Mulla on Civil Procedure Code,* 16th Edition at page 2328 that:

> *"The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination."*

On the strength of the foregoing, Mr. Mbamba argued that, in the absence of the court record indicating the demeanour of the first respondent, the trial court erred to refer and use it in its judgment.

In response to the above, the respondents argued that, the purported contradictions were not resolved on the basis of the demeanour of witnesses but on the consideration of the credible evidence of the first respondent.

According to Mr. Mbamba, the said contradictions are two-fold as follows: **One,** is the locality of the disputed land. It is the contention by the learned counsel that, while in exhibit P1 the locality of the suit land is indicated to be Salasala area near Benaco, in her evidence in court, the first respondent said it is located at Tegeta area. For their part, the respondents contended that there was no contradiction as regards the location of the suit land. The first respondent clearly stated that, the suit land is situated at Salasala area which is part of Tegeta and this evidence is corroborated by the second appellant's testimony at page 164 of the record of appeal.

Having revisited the evidence and the pleadings, we have found that the parties are at one that the suit land is situated at Salasala area. According to the amended plaint, and the joint written statement of defence to the amended plaint and the evidence by the appellants and the respondents, the suit land is located at Salasala area. Further, both the first respondent and the second appellant testified that Salasala area was formerly part of Tegeta. Had anyone wanted anymore proof of this

matter to the contrary, he could have brought evidence from the relevant authorities.

Two, the alleged contradiction is the size of the disputed land. Admittedly, the first respondent stated that she bought a piece of land from one Vicent measuring four acres and sold part of it measuring two acres or 150 x 150 meters. However, exhibit P3 indicates that she sold a piece of land measuring 150 x 250 meters to Bunaiya Abdallah Kisesa. Clearly, these measurements differ. However, since there is no evidence to show the measurement of land in terms of acres, it is our considered view that, the first respondent meant the same and one piece of land. This view is cemented by the fact that, the suit land had not been surveyed at the time of the purported transactions, hence the difference of measurements does not in our view invalidate the evidence of ownership. What is common is that the parties are referring to the one and the same suit land. There is no evidence to prove that the first respondent and the second appellant are contending over two different pieces of land.

Having found that, the contradictions complained of were, in effect, reconcilable by evidence, we find with respect that the use by the learned trial Judge, of the witnesses' demeneour to resolve the

contradictions was unnecessary. In the circumstances, we find no need of determining its effect thereto.

Mr. Mbamba also raised a complaint concerning the name of the vendor who sold the land to the first respondent. Mr. Mbamba contended that, the purported vendor was referred by only one name of Vicent which creates doubt as to the whole transaction and thus a discredit to exhibit P1. In countering this complaint, the respondents argued that the appellants ought to read the evidence by the first respondent as a whole and not to pick some pieces out of it. That, as a whole, the evidence given by the first respondent was believed by the trial court, they argued.

On our part, we find that the issue of the name of the vendor cannot invalidate the sale agreement, more so as, apart from the said Vicent, there is no any other person who had claimed that he/she sold the land to the first respondent. During the trial, the first respondent firmly stated that the vendor chose to write only one name and she could not force him to write more names.

The appellants also complained about the delay to pay Government levy in respect of the sale transaction between the first respondent and the vendor, the said Vicent. Truly, the sale transaction

was concluded on 24th March, 1983 while the local Government levy of 10% was paid on 2nd February, 1990. Mr. Mbamba argued that this delay casts doubt on the legality of the sale agreement. The respondents' response on this complaint is that the evidence tendered by the first respondent's side as a whole proves that the suit land originally belonged to her before she sold part of it to her daughter. They submitted further that, the burden of proof in a civil case is on balance of probabilities and not beyond reasonable doubt and thus the party's evidence ought to be looked wholistically and not in pieces.

We have considered this complaint and we are satisfied with the explanation given by the first respondent in respect of the delay to pay the Government levy. She stated that, soon after signing the sale agreement, the vendor was not traceable hence she could not conclude the formalities until 1990 when he resurfaced. We have no doubt with this explanation in the absence of the factual or legal explanation to the contrary. Mr. Mbamba did not cite any provision of the law which sanctions delay in paying the Government levy. For what we have shown above, we find the alleged contradictions immaterial and thus are rejected.

We now move to consider the sixth ground whereby the appellants have faulted the trial court, first; for misinterpreting the second

appellant's offer to be paid TZS. 2,500,000.00 by the first respondent in order to surrender the suit land as concession that the land did not belong to him. Secondly, for acting upon the evidence of text messages without the phone from which they were retrieved. Arguing the first complaint, Mr. Mbamba submitted that by the said offer, the second appellant did not admit that the suit land did not belong to him and the trial court erred to conclude that he needed compensation. He contended that; the second respondent gave the offer without prejudice to his right of ownership of the suit land.

On the other hand, the respondents denied any involvement of the first respondent in exhibit D3. However, they argued that according to the said exhibit, if the land belonged to him, the second appellant could not have demanded compensation for improvement effected on it. We have considered this complaint and we are in agreement with the respondents as rightly found by the learned trial Judge that, the second appellant could not have demanded compensation for improvements on the land from the first respondent had he believed that the suit land belonged to him. He ought to have fought for his right of ownership instead of claiming to be paid compensation for purported improvements.

The second complaint on text messages by the respondents without production of the phone from which the messages, Mr. Mbamba argued that, the reliance on that evidence was contrary to Electronic Transactions Act No. 13 of 2015. He also fortified his contention with the decision of the Court in the case of **Onesmo Nangole v. Dr. Steven Lemomo Kiruswa & Two Others,** Civil Appeal No. 177 of 2017 (unreported). To counter the complaint, the respondents argued that, all evidence was admitted in court without any objection from the counsel for the appellants despite being given opportunity to do so and therefore, the appellants are precluded from objecting any evidence at this stage.

We have combed the entire record of appeal but we have neither come across any portion showing that a printout of text messages was tendered by any witness and received in evidence as exhibit nor the same being acted upon by the learned trial Judge in the judgment. We thus find this complaint as totally unfounded.

The learned trial Judge is faulted in the seventh ground for condemning the first appellant's act of processing the survey and title deeds while aware of the existing dispute over the land. Mr. Mbamba submitted that, according to the testimony of the first appellant, the processing of title deeds began in 2009 and completed in February

2010, which means the survey which followed all procedures must have commenced in the early months of 2009 before the suit was filed. He added that, when all these processes were done, there was no complaint, objection, caveat or injunction from the respondents. He contended that, in view of the foregoing, it was erroneous for the learned trial Judge to nullify the title deeds without the land allocating authorities being joined in the suit or be heard in the circumstances.

For their part, the respondents contended that, although the appellants claimed to have executed the sale agreement in 2009, no documentary evidence was tendered to prove the alleged transaction and the first appellant admitted in his evidence that he had nothing to prove that the suit land was transferred to him by the second appellant as required in law. They argued further that, although the suit was filed in 2009, there is no proof as to when the survey was conducted. That the first appellant did not give explanation as to why he rushed to survey the suit land and obtain title deeds while being aware of the existence of this dispute. They added that, the absence of document in respect of the application for survey and title deed to the relevant authorities and failure to call any witness from thereat, indicates that the title deeds were fraudulently procured. Regarding failure to join the land allocating authorities in the suit, the respondents argued that, since the

first appellant was the one who alleged to have surveyed the suit land and obtained title deeds, he was the one who was obliged to call witnesses from those authorities to prove his assertion.

Having perused the record of appeal, we have found that, although the parties evidenced that the second appellant sold the suit land to the first appellant on 12th June, 2009 and 23rd September, 2009, there is no documentary proof to that effect. There is also no evidence as to the exact time when the first appellant initiated the survey process which led to the grant of the two title deeds dated 23rd March, 2010 (exhibit D4 collectively). Neither the first appellant nor the allocating authorities gave evidence to that effect. Further, despite the evidence that the original suit before the Ward Tribunal was lodged in 2009, no exact date and month was given. With this scenario, it cannot be said that the first appellant hurriedly initiated the survey and processed title deeds while being aware of the land dispute. However, whether the first appellant legally acquired the title to the suit land, is the question that we shall answer in the following grounds. This ground thus succeeds.

It was submitted in the eighth ground that; the first appellant legally bought the suit land from the second appellant and the same was properly allocated to him by the Government through grant of title deeds. It was argued also that the alleged fraud as held by the learned

trial Judge was not proved by evidence. On the other hand, the respondents argued that the second appellant had no good title to pass to the first appellant and the title deeds were fraudulently obtained. Actually, this was the finding by the learned trial Judge.

We have given this complaint due consideration and found that although the respondents alleged fraud in their amended plaint, they did not tender concrete evidence to prove it. It is trite law that, allegation of fraud in civil proceedings is required to be specifically pleaded and proved on a higher degree of probability than what is required in ordinary civil cases. In the case of **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314, the former Court of Appeal for East Africa stated thus:

> *"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

Similarly, in the case of **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169, the Court held among other things that:

> *"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."*

Therefore, in the absence of proof of fraud on the part of the appellants, we shall decide the issue of ownership of the suit land on the basis of standard of proof in civil cases, that is on the balance of probabilities. We have reviewed the evidence on record and found it wanting on the part of the appellants for the following reasons: **One,** the evidence shows that, on 3rd April, 1995 the second appellant applied for and was allocated the suit land on 16th May, 1995 (exhibit D1). However, if that is the case, it is surprising why he did not raise concern when he witnessed a sale agreement of part of the same land between the first and second appellants on 20th March, 2000 (exhibit P3). This sale agreement was received in evidence without objection from the appellants and there were no questions asked concerning the second appellant's involvement on that sale agreement (pages 135 to 138 of the record of appeal). This shows without doubt that he had no claim of ownership over that land at that time. Therefore, in 2009 the second appellant had no good title to pass when he purported to dispose of the suit land to the first appellant.

Two, although the appellants claimed to have entered into a sale agreement of the suit land sometime in 2009, there is no sale agreement tendered to prove that allegations. It follows therefore, that in the absence of the sale agreement, one would wonder how the first

appellant initiated the survey of land and ultimate grant of title deeds to land which belonged to another person. This ground fails.

In the last ground, since the foregoing ground has been determined in the negative, there cannot be any question of entitlement to unexhausted improvements to the respondents even if the first appellant has effected development on the suit land.

From the foregoing analysis, we are settled in our mind that, the suit land formerly belonged to the first respondent after she bought it from one Vicent and later sold part of it to the second respondent. PW5 supported this evidence when she testified that she was sharing a common boundary with the first respondent since she bought hers in 1987 and the second appellant was the ten-cell leader ("mjumbe") of the area. Either, it is not disputed that the second respondent sold part of it to the third respondent. In conclusion, the suit land is a lawful property of the respondents and therefore, the learned trial Judge did not err to hold as such.

Finally, we find the appeal without merit and we dismiss it save for part of the fourth and fifth together with seventh grounds which we have allowed but which do not have an impact on the ownership of the

suit land. In the circumstances, we make an order that each party shall bear its own costs.

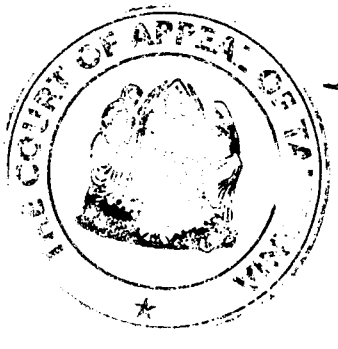
DATED at **DAR ES SALAAM** this 7th day of August, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of August, 2023 in the presence of Ms. Maryam Saleh Msemi holding brief for Mr. Samson Mbamba, learned Counsel for the Appellants and the Respondents in person - unrepresented, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL