IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: JUMA, C.J., NDIKA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 17 OF 2021

JOHN MARTIN NDUNGURU ..... APPELLANT

VERSUS

MUSTAPHA ATHUMAN NYONI ..... FIRST RESPONDENT

JOHA ABBAS TAMBULU ..... SECOND RESPONDENT

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

(Moshi, J.)

dated the 10th day of October, 2019
in
Land Case No. 6 of 2019

JUDGMENT OF THE COURT

15th & 21st August, 2023

NDIKA, J.A.:

John Martin Ndunguru ("the appellant") lost an action, before the District Land and Housing Tribunal of Ruvuma at Songea ("the Tribunal"), for a declaration that he was the lawful owner of a piece of registered land described as Plot No. 295, Block 'Y', Mbalika Street, Mfaranyaki, Songea ("the property"). On appeal, the High Court at Songea ("the High Court") upheld the said decision, but now the appellant appeals further on four grounds of grievance.

Before turning to the substance of the appeal, it is essential to say something more about the background facts, and the way in which the

appellant's pleaded case was dealt with at the first instance and on the first appeal.

The appellant's action was against Mustapha Athuman Nyoni and Joha Abbas Tambulu ("the first and second respondents respectively") who were previously husband and wife, but they had their marriage end in divorce prior to the suit. Briefly, the appellant claimed that he had been the lawful owner of the property since 1986 and that in 1994 he gave its possession to the first respondent whom he asked to take care of it and develop it on his behalf. He pleaded further that on his instructions, the first respondent regularly collected rent from tenants occupying the property and remitted it to him.

The essence of the appellant's complaint was that he learnt in February 2015 that following a successful petition for divorce by the second respondent against the first respondent, the former had the property included in the matrimonial assets to be shared between her and the first respondent on the ground that it was acquired during the subsistence of their marriage. He claimed that the property was eventually but wrongly allocated to the second respondent. The second respondent, he added, was in the eyes of the law a trespasser on the property.

While the first respondent did not contest the appellant's claim in his defence statement, the second respondent stoutly opposed it. She averred that she and the first respondent as a couple bought the property from the appellant on 19th September, 1995 vide a sale agreement. Since then, she stated, her divorced husband and herself had been occupying the property as their own as evidenced by electricity and water bills issued and paid in the first respondent's name. She claimed that the property was rightly treated in the matrimonial dispute, adjudicated by the District Court of Songea and later, on appeal, by the High Court at Songea, as jointly acquired matrimonial property liable to be divided between the respondents, following the dissolution of their marriage. Quite unwaveringly, she asserted that the suit was brought by the appellant in concert with the first respondent to wrestle ownership of the property from her after it was allocated to her.

From the pleadings, the Tribunal framed two issues: one, who is the lawful owner of the property; and two, what reliefs are the parties entitled to.

In establishing his claim of title, the appellant, testifying as PW1, tendered in evidence the certificate of title number 1502-MBYLR over the property dated 3rd October, 1990 issued in his name (Exhibit P4). He also tendered various receipts, collectively admitted as Exhibit P5, as proof of

payment of fees to Songea Municipal Council made at the material time in relation to the property. His testimony was supported by PW2 Mrisho Msananga, a Land Officer from Songea Municipal Council ("the Council"). Apart from confirming that the appellant was the duly registered owner of the property, PW2 tendered the official file from the Council (Exhibit P6) containing relevant documents demonstrating the appellant's title.

Not unexpectedly, the appellant's claim was further supported in material terms by the first respondent, who, testifying as DW1, acknowledged the appellant's title as well as the tale that he and his divorced wife occupied and developed the property from 1994 as caretakers. The first respondent produced DW2 Egno Ndunguru, a carpenter who he hired to make doors for the building on the property, to support his testimony that he supervised the works at the property on behalf of the appellant. Apart from denying having bought the property in 1994 jointly with the second respondent, the first respondent expressed his surprise at the District Court of Songea's decision to treat the property as matrimonial property and allocating it to his divorced wife.

The second respondent adduced evidence as DW5. She was unyielding that she and the first respondent as a couple bought the property from the appellant on 19th September, 1995 at the price of TZS. 320,000.00 vide a

sale agreement. She added that they jointly developed the property into their matrimonial home. To support her claim, she tendered the following documents, among others: one, pictures depicting her and her divorced husband posing at the front of the house (Exhibit D2); two, electricity and water bills issued and paid in the first respondent's name (Exhibit D3); and three, the judgment of the District Court of Songea in Matrimonial Cause No. 1 of 2015 as well as the judgment of the High Court of Tanzania at Songea in DC Matrimonial Appeal No. 1 of 2016 (collectively admitted as Exhibit D5) allocating the property to the second respondent during division of the divorced couple's matrimonial properties. Her case was also supported by DW6 Dorothea George who told the Tribunal that she witnessed the alleged sale of the property.

Although the Tribunal found it undisputed that the appellant initially had title to the property, it found it established, on the evidence adduced by the second respondent and DW6, that the appellant sold the property to the respondents on 19th September, 1995 vide a written sale agreement even though the said agreement was never tendered at the trial. The Tribunal downplayed the absence of the alleged sale agreement, holding that the two judgments (Exhibit D5) collectively show that the second respondent was the adjudged owner of the property.

Furthermore, the Tribunal reviewed the appellant's case and found it wanting on various aspects: one, that the appellant failed to discharge his burden of proof on the arrangements he made with the first respondent for caretaking of the property and execution of the construction works; two, that no proof was led on the alleged understanding for collection of rent from tenants at the demised property, which, then, in the Tribunal's view, suggested that the first respondent must all along having been conniving with the appellant to deprive the second respondent of the property.

As indicated earlier, the High Court, on appeal by the appellant, upheld the Tribunal's verdict almost on the same reasoning. Apart from the court not finding the appellant's registered title as unveiled by the certificate of title (Exhibit P4) decisive, it also tempered the undisputed fact that the second respondent did not put in the evidence any documentary proof of the alleged sale of the property to the respondents. To illustrate the point, we extract from the judgment the following passage as shown at page 141 of the record of appeal:

> *"Despite the fact that the [second respondent] did not produce the written agreement as required under section 100 of the Evidence Act, yet I find her evidence more credible than that of the appellant.* ***The land was sold by the appellant to the***

respondents, but the transfer wasn't yet processed."[Emphasis added]

The court went to observe as follows as revealed at page 142 of the record:

> *"It is my great considered conviction that the applicant did indeed [sell] the suit property to the [first] and second respondents. I think I am not wrong to support the [second] respondent's assertion that there is an indication that the first respondent is trying to avoid and circumvent the court's order on division of matrimonial property by partnering with the appellant. This is apparent from the [first] respondent's contradictory and inconsistent testimonies."*[Emphasis added]

Troubled by the above reasoning and finding, the appellant now appeals on four grounds, which, for clarity, can be rephrased as follows:

1. *That in the absence of proof of fraud, the High Court erred in holding that proof of ownership of registered land by a certificate of title is inferior to and may be overturned by oral evidence.*
2. *That the High Court misdirected itself in law in holding that the mandatory provisions of section 64 (1) of the Land Act, Cap. 113 on disposition of land are dispensable.*
3. *That the High Court misdirected itself in law in effectively holding that the mandatory provisions of section 100 (1) of the Evidence Act, ("the Evidence Act") on proof of dispositions are dispensable.*

4. *That the High Court erred in law in relying on section 64 (4) (b) of the Land Act, Cap. 113 ("the Land Act") by deciding in favour of the second respondent bearing in mind that the disposition in issue was allegedly made in 2015 whereas ownership by the appellant was effective from 1986.*

The above grounds, in our view, need to be considered in the context of the concurrent finding by the Tribunal and the High Court that the appellant held title to the property as revealed by the certificate of title (Exhibit P4). Certainly, in terms of section 40 of the Land Registration Act, Cap. 334, the said certificate is supposedly conclusive proof of the matters contained therein, which include the fact that the appellant is the registered occupier of the property. What is hotly contested ultimately narrows down to whether the appellant sold the property to the respondents on 19th September, 1995 as alleged by the second respondent.

Submitting for the appellant, Mr. Edson Mbogoro, learned counsel, essentially made three key points: first, he argued that since the second respondent had acknowledged the existence of the appellant's title, the burden was on her in terms of section 110 of the Evidence Act to prove the alleged disposition. For this proposition, he relied on **Nacky Esther Nyange v. Mihayo Marijani Wilmore & Another**, Civil Appeal 169 of 2019 [2022] TZCA 507 [6 August 2022; TanzLII].

Secondly, Mr. Mbogoro posited that in terms of section 64 (1) of the Land Act, Cap. 113, a disposition of a right of occupancy by way of sale not made in writing is ineffectual. On that basis, he argued that the absence of documentary proof of the alleged sale defeats the second respondent's claimed disposition.

Finally, Mr. Mbogoro was emphatic that the second respondent failed to establish that the appellant's title was acquired by fraud or collusion, especially bearing in mind that collusion or fraud was not one of the issues framed for trial. For this proposition, he cited our recent decision in **Bilali Ally Kinguti v. Ahadi Lulea Said & 4 Others**, Civil Appeal No. 500 of 2021 [2023] TZCA 17337 [13 June 2023; TanzLII] in which, quoting our earlier decision in **Amina Maulid Ambali & 2 Others v. Ramadhani Juma**, Civil Appeal No. 35 of 2019 [2020] TZCA 19 [25 September 2020; TanzLII], we held that when two persons have competing interests in land, the person with a certificate of title thereto will always be taken to be the lawful owner unless it is proved that the certificate was not lawfully obtained.

For his part, the first respondent, appearing in person, conceded unreservedly to the appeal, maintaining his position that he had never purchased the property jointly with the second respondent from the appellant.

Conversely, the second respondent, who was also self-represented, supported the High Court's decision. She insisted to have purchased the property jointly with her divorced husband whom he blamed for conniving with the appellant to cheat her out of the property simply because the transfer of title was never processed. She added that her uninterrupted occupation of the property for more than twenty-one years should count against the appellant.

In determining the issue at hand, whether the Tribunal and the High Court decided the case against the weight of evidence on record, we think it is necessary to reiterate the basic rule, in terms of section 110 of the Evidence Act, that the burden of proof lies on who alleges the existence of a fact. Equally essential is the position that the standard of proof in a civil case is on a preponderance of probabilities. It means that the court will sustain such evidence that is more credible than the other on a particular fact to be proved – see **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 [2019] TZCA 453 [11 December 2019; TanzLII]. In that case, the Court also explained that the onus of proof does not shift to the adverse party until the party on whom it lies discharges his burden and that such onus of proof is not diluted or tempered due to the weakness of the opposite party's case.

In view of the settled position on the onus of proof as explained above, we would readily agree with Mr. Mbogoro that upon the second respondent having acknowledged the existence of the appellant's title as unveiled by Exhibit P4 and then claimed that the appellant disposed of the property to the respondents in 1995, the burden shifted to her to establish the alleged disposition of the right of occupancy by the appellant.

At the material time, such a disposition could not have been operative if it was not in writing. For one of the mandatory requirements under regulation 3 (1) of the Land Regulations, 1960 made under the old Land Act, Cap. 113 was that such a disposition had to be in writing – see **Abualy Alibhai Azizi v. Bhatia Brothers Ltd.** [2000] T.L.R. 288. To be sure, that position of the law has been retained under subsection (1) of section 64 of the Land Act, Cap. 113 ("the Land Act"), the current law, subject to the exemption under subsections (4) and (5). For clarity we extract the relevant parts of section 64:

> *"64.-(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if-*
> *(a)* ***the contract is in writing or there is a written memorandum of its terms;***

(b) the contract or the written memorandum is signed by the party against whom the contract is ought to be enforced.

(2) [Not applicable]

(3) [Not applicable]

(4) This section shall not apply to-

(a) a short term lease;

(b) ***a disposition by order of a court;***

(c) a disposition by operation of laws.

(5) This section shall not affect-

(a) the creation or operation of a resulting, implied or constructive trust;

(b) the making or operation of a will;

(c) an arrangement, recognised by customary law, for the temporary disposition of a customary interest in land."[Emphasis added]

Given the situation, we uphold Mr. Mbogoro's submission that the second respondent could not have proved the alleged disposition through oral evidence. She could only do so by tendering the alleged written sale agreement. The absence of that agreement, therefore, defeats her claim of acquisition of title through the so-called purchase.

Admittedly, in terms of section 43 (1) and (2) (d) of the Evidence Act, the judgment of the District Court of Songea in Matrimonial Cause No. 1 of 2015 together with the judgment of the High Court of Tanzania at Songea

in DC Matrimonial Appeal No. 1 of 2016 (Exhibit D5) would have constituted conclusive proof of ownership of the property in favour of the second respondent. In the instant case, however, it is inexorable that the property should not, in the first place, have been considered by the courts one of the matrimonial assets of the respondents liable for division between them upon the dissolution of their marriage because the respondents had not acquired any title to it at any point. Consequently, the two judgments cannot form a sound foundation for the second respondent to stake her claim of title.

Mr. Mbogoro also assailed the judgment of the High Court for dispensing with the mandatory requirement under section 64 (1) of the Land Act. The said court did so upon reasoning that the disposition in favour of the second respondent was made by the District Court, hence no written agreement was required pursuant to section 64 (4) (b) of the Land Act. With respect, we agree with Mr. Mbogoro and reiterate that there ought to have been a written agreement proving the alleged disposition. Oral evidence was not only implausible but also inadmissible. Certainly, the District Court's order dated 4th December, 2015 in Matrimonial Cause No. 1 of 2015, allocating the property to the second respondent, had no bearing on the legality and enforceability of the purported disposition, which preceded the order for over twenty years.

In the final analysis, we find merit in the appeal. Accordingly, we quash the decision of the High Court and declare the appellant the lawful owner of the property. In view of the circumstances of this matter that the second respondent sought to vindicate her entitlement to property based on the court decisions that have turned out to be inaccurate, we let costs lie where they fall.

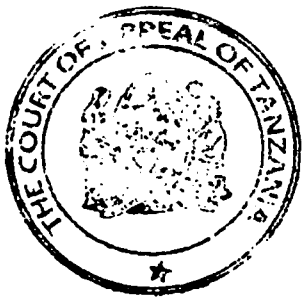
DATED at **SONGEA** this 19th day of August, 2023.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 21st day of August, 2023 in the presence of the Appellant in person and 1st and 2nd respondents appeared in person, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL