

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 311 OF 2022

PROF. T. L. MALIYAMKONO APPELLANT

VERSUS

WILHELM SIRIVESTER ERIO RESPONDENT

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

(Mgeyekwa, J.)

dated the 20th day of April, 2022

in

Land Case No. 131 of 2016

.....

JUDGMENT OF THE COURT

7TH June, & 7th December, 2023

KOROSSO, J.A.:

The appeal is against the decision of the High Court of Tanzania (Land Division) in Land Case No. 131 of 2016 (Mgeyekwa, J. (as she then was)) in a dispute over ownership of six acres of land situated at Mapinga within Bagamoyo District (disputed property). The High Court decided in favour of the respondent and declared him to be its lawful owner.

A brief background giving rise to the appeal is that the respondent instituted a suit against the appellant for allegedly trespassing in the disputed land and prayed for a declaration that he was its lawful owner,

injunction and eviction order against the appellant, general damages, mesne profits and other monetary reliefs as specified in the plaint. According to the appellant, he had enjoyed uninterrupted possession of the suit land from 1989 to 2016 having purchased it in 1983 from one Abdallah Mohamed Mwanga. He tendered a sale agreement signed on 8/9/1983 (exhibit P1) to support his claims. In a filed written statement of defence (WSD), the appellant disputed all the respondent's claims and asserted ownership of the disputed land praying for dismissal of the suit with costs.

The High Court (Mallaba, J. (as he then was)) in a judgment delivered on 22/11/2019, decided in favour of the respondent, holding that the parties had purchased the land at different times and from different persons. The appellant was aggrieved, hence filed to the Court Civil Appeal No. 93 of 2021. The appeal came for hearing on 8/2/2022 and its judgment was delivered on 18/2/2022. The Court deliberated on two points of law therein, one, on the legality of the amended plaint and two, irregularities discerned from the visit in *locus quo*. Regarding the legality of the amended plaint, the Court overruled the objection and held that, despite the amended plaint having been filed out of time without leave of the trial court, it was a curable error that did not affect the proceedings or the end result. With respect to irregularities

discerned from the visitation of the *locus in quo*, the Court found the procedure for the visitation was flawed and touched on some decisive parts of the case and were thus fatal. In consequence, the Court nullified the relevant part of the proceedings starting from 6/11/2019 ordering for the relevant file to be remitted to the trial court for completion of the trial by a different Judge and ordered for requisite procedures to be followed where a visit to the *locus in quo* will be found to be necessary. After the remittal of the case file to the High Court, the suit proceeded before Mgeyekwa J. During the trial, visitation of the *locus in quo* took place on 25/3/2022. The judgment, which was in favour of the respondent was delivered on 20/4/2022.

The appellant was aggrieved hence, on 4/7/2022, filed the instant appeal premised on nine grounds of appeal which we have decided not to reproduce since it is our considered view they essentially address the following three issues; **One**, the authenticity and genuineness of the sale agreement (exhibit P1); **two**, propriety of the weight and value accorded to exhibit P1 by the trial court when deliberating on the respondent's (then plaintiff) case. **Three**, whether Mr. Mmanga had the best title to the disputed land for him to legally transfer it to the respondent.

When the appeal came before us for hearing, Messrs. Audax Kahendaguza Vedasto and Living Raphael, learned counsel, entered appearance for the appellant and the respondent, respectively. Both learned counsel prayed to adopt the written submissions filed previously to form part of their respective oral submissions respectively.

In amplifying issues number one and two above, Mr. Vedasto commenced by challenging the High Court's reliance on exhibit P1, whose authenticity he contended was disputed from the stage of the pleadings. He pointed out that the appellant's concerns raised against it included the fact that exhibit P1 looked too fresh to have been drawn in 1983 and that this is the reason during the trial, the appellant's side had moved the trial court to invoke section 47 of the Tanzania Evidence Act, Cap 6 R.E 2019 (the TEA) or give guidance for calling an expert in handwriting to examine its authenticity and genuineness. The trial court rejected the prayer holding that exhibits P1 and P2 were tendered and admitted in court without any objection from the appellant's side and that such should have been raised at the time of tendering the said document.

In his submission before us, the learned counsel for the appellant expounded his dissatisfaction with the ruling of the court on the issue,

arguing that; One, that the trial court did not apply the law since it based its decision on the failure of the appellant or his counsel to object to its admissibility in the course of the trial. It was his contention that the objection to the said document was essentially on its authenticity and the value it was accorded and not its admissibility. The second reason he advanced was that the trial court did not consider or appreciate the fact that the document was objected to from the start as seen in paragraph 8 of his WSD and also during the trial proceedings as revealed on page 109 of the record of appeal. The other anomaly pointed out by Mr. Vedasto was the fact that whilst exhibit P1 contained a stamp by the village government to show that the sale transaction was witnessed by village officials, on 8/9/1983 when the sale agreement is alleged to have been transacted, there was no village government council in existence to witness such contract transactions.

Furthermore, on the query on the authenticity of exhibit P1 and whether Mr. Mmanga had title to the disputed land, the counsel for the appellant argued that the respondent failed to prove its authenticity on balance of probability. He contended that taking into account of the evidence on record that showed that exhibit P1 was signed by Abdallah Mohamed Mmanga when selling to the respondent and since the appellant also showed that he had purchased the suit land from Shamsa

Binti Ally on 28/10/1989 as shown in the WSD pages 55-59 of the record of appeal, it was upon the respondent to prove that the disputed land belonged to Abdallah Mohamed Mmanga at the time it is alleged he sold it to him in 1983. He faulted the trial court for concluding that the said assertion by the respondent was true without critically considering the overall evidence on the matter.

The learned counsel for the appellant also questioned whether the said Mr. Mmanga, the person claimed by the respondent to have been the one who sold him the disputed property, had any title to the disputed land or owned it prior to selling it to the respondent as alleged. He faulted the High Court for failing to properly analyze the evidence before it on this issue. To augment his arguments and contention on the issues raised, the learned counsel relied on the following cases; **Bhoke Kitang'ita v. Makuru Mahemba**, Civil Appeal No. 222 of 2017, **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016, **Scan Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (all unreported). He concluded, by urging us to find that the respondent failed to prove his case to the standard required and the appeal be allowed with costs.

Mr. Raphael commenced his response by confronting issue number one which challenged the authenticity and genuineness of exhibit P1, the learned counsel argued that the respondent demonstrated that he acquired the suit premises from Abdallah Mmanga by outright purchase which was authenticated by the relevant local structures of the time in 1983. He argued that as can be discerned from the record of appeal, the appellant failed to disprove the existence of the said sale exhibited by exhibit P1 and that when doubts were raised on the fronted sale agreement, it was upon the appellant to bring evidence to disprove its authenticity, which the appellant failed to do despite having promised the trial court to bring witnesses for such purposes. It was his further contention that since the allegations that exhibit P1 is concocted and forged were unproved, it was not upon the court to bring evidence to establish the said allegations as suggested by the appellant's side.

On claims of there being no Village Council Authority, the respondent's counsel argued that the respondent had discharged his burden by showing how he acquired the land through structures that existed at that time, so it was upon the appellant's side to adduce evidence to disprove that fact which he however, failed to do. He contended further that after the respondent's case was closed it was the duty of the appellant to disprove the evidence fronted by the respondent

to prove his claims. He maintained that it was not the respondent's duty to prove the authenticity of the tendered documents.

Regarding whether or not Mr. Mmanga was the owner of the disputed land, the learned counsel argued that the respondent purchased it from Abdallah Mohamed Mmanga in August 1983, who had enjoyed peaceful occupation for about 45 years as discerned from the uncontradicted evidence of PW1. He argued that PW1's evidence was supported by exhibit P1, which was not objected to.

According to the respondent's counsel, the sale of the suit land to the respondent was witnessed by PW2 and PW3 who were neighbours and testified that it was purchased from the original owner, Mr. Mmanga. The learned counsel for the respondent further contended that the attempt by the appellant's side to discredit the evidence of PW2, PW3 and PW4 as hearsay evidence was futile because PW2's testimony was direct evidence of what he saw and observed and not otherwise. On the part of PW3's evidence on his failure to mention Mr. Mmanga in his testimony, the learned counsel argued that this assertion was incorrect since on page 130 of the record of appeal, PW3 mentioned having been asked by the appellant about his knowledge of Mr. Mmanga, as part of the investigatory work conducted by the appellant prior to purchasing

the suit land. It was the respondent counsel's further contention that, PW4's evidence was to show his knowledge of Mr. Mmanga from the time of his birth and as a resident in the village and he was one who assisted in showing the boundaries of the suit land to the appellant. The learned counsel for the respondent further argued that the issue of whether Mr. Mmanga was the original owner or not of the suit land was not an issue for determination before the trial court and hence no evidence was directly given to prove such.

Furthermore, he added that there was no rival evidence to show that the suit land belonged to someone else, since his claims were not supported by any credible documentary evidence as what was tendered wasn't even signed by the appellant or provided details of the suit land such as size and boundaries. With the available evidence, the learned counsel argued, the trial court correctly found that Abdallah Mmanga sold the suit land to the respondent based on exhibit P1 which was duly signed by the seller and the purchaser, thus conclusively providing evidence of the transaction between Mr. Mmanga and the respondent.

The learned counsel for the respondent also challenged claims by the appellant that he acquired the suit land by adverse possession since no neighbour testified on being involved in the alleged acquisition by the

appellant. He argued that exhibit D2 did not provide any further elaboration on the claims and DW2 who alleged to have witnessed the transaction did not sign on it nor did he know the boundaries of the suit land. He also challenged the argument that one Shamsa, alleged to have sold the suit land to the appellant was Mr. Mmanga's daughter since there was no evidence to prove this. He averred further that DW3, a neighbour to Mr. Mmanga claimed not to know Shamsa as the daughter or the heiress of Mr. Mmanga. He thus argued that there was no evidence that even if Shamsa was Mr. Mmanga's daughter, she had inherited it from him and had title to suit land to sell it to anyone let alone the appellant. The learned counsel concluded by submitting that the appellant's failure to prove that Shamsa had title to sell the suit land to him, disproved his claims on the balance of probability.

With regard to the challenge on the trial court for according weight to exhibit P1 when determining the case and its findings for the respondent, the learned counsel for the respondent urged us to find that the trial court properly directed itself in relying on exhibit P1 since the allegations by the appellant were not proved as required by law. He argued that it was upon the appellant to prove that exhibit P1 whose admissibility was not objected to was unauthentic, and urged us to draw an adverse inference for the appellant's failure to call the promised

witnesses to disprove claims on the authenticity of exhibit P1. He thus prayed that the appeal be dismissed as being devoid of merit.

The rejoinder by the learned counsel for the appellant was brief, a reiteration of what was stated in his submission in chief. He implored the Court to take into account the fact that the issue of the authenticity of exhibit P1 has been part of the appellant's pleading. He maintained that the respondent counsel had raised this concern when it was being tendered for admission as revealed on page 109 of the record of appeal. According to the learned counsel for the appellant, the appellant purchased the disputed land from Shamsa as per her testimony and the question of whether or not she had a title to the disputed land was raised at the time when the appellant could not bring any evidence to further corroborate Shamsa's evidence that she had title to it. He thus prayed that his earlier prayers be granted with costs.

After going through and considering the submissions from the learned counsel for the contending parties and the record of appeal, we proceeded to delve into the issues we had earlier found to address all the raised grounds of appeal. The authenticity and genuineness of exhibit P1 and the weight accorded to it by the trial court when determining the suit are issues of contention for the parties in this

appeal. While the appellant's counsel argues that exhibit P1 is not genuine and faults the trial court for having wrongly acted on it to find the case for the respondent, the respondent's counsel implores us to find it is authentic.

In the instant case, there is no doubt that the trial court relied on exhibit P1 to reach at its findings in the determination of the suit before it as exemplified by the holding of the court on pages 360 and 361 of the record of appeal, when it stated:

"... as gathered from the testimony of the disputants, it is clear that the plaintiff and Abdaliah Mohamed Mmanga entered into an agreement and a sale of Agreement was prepared. ... Consequently, I have no qualms that exhibit P1 is a valid contract as per sections 10, 11 and 12 of the Law of Contract Act, Cap 345 R.E 2019"

Suffice it to say that the admissibility of documentary evidence is governed by provisions of the law, as held in the case of **DPP vs Sharifu s/o Mohamed @Athumani and 6 others**, Criminal Appeal No. 74 of 2016 (unreported), where the Court expounded relevancy, materiality, and competence and reliability as principles to be considered when admitting exhibits. Indeed, the duty of the trial court is to ensure

that the conditions requisite in admitting exhibits are not at any time vacated and when a court is expected before admitting into evidence any exhibit, to ensure that the process is guided by the test of relevance and suitability of the exhibit as observed in **A.A.R Insurances (T.) Ltd vs Beatus Kisusi**, Civil Appeal No. 67 of 2015, and **Tanzania Cigarette Company vs Mafia General Establishment**, Civil Appeal No. 118 of 2017 (both unreported).

It is also well-established that the admissibility of an exhibit is one thing and its probative value is quite another (see, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported)). In the Indian case of **Bihar and Others v. Sri Radha Krishna Singh and Others**, AIR 1983 SC it was held that:

"...admissibility of a document is one thing and its probative value quite another- these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil"

In the instant appeal, upon admission of exhibit P1, it was the duty of the trial court to assess its probative value, a role we find was not properly undertaken. It is on record that when rejecting the query fronted by the appellant's counsel on the authenticity of exhibit P1, the

trial court only addressed what it decided was the failure of the appellant to object to its admissibility as submitted by the respondent's counsel. Having revisited the record, we find that such a finding is not supported by evidence, since as stated earlier, the concern raised by the appellant's counsel on its authenticity was an objection emanating from paragraph 8 of the WSD which questioned exhibit P1 on the following: One, the fact that it looked very fresh to have been executed in 1983, contended to be the year it was signed. Two, at the time it was executed and signed, the system of consent and disposition of land transactions were witnessed through CCM offices and not village authorities, and three, exhibit P1 is concocted evidence and/or forged.

Moreover, we have discerned that after the respondent's side closed its case found on pages 141 and 142 of the record, the appellant did request the trial court to call for expert evidence to testify to establish the presence of village authorities in 1983 and in the process address query on the authenticity of exhibit P1. This prayer was not granted for the reason that the appellant ought to have objected to its admission and asked for the prayer right at its admission and not when the respondent (then the plaintiff) had closed his case (see pages 180-183 of the record). We also find it pertinent to reproduce the record of what transpired during the trial in the process of admission of exhibit P1

found on pages 109-110 of the record of appeal to show what transpired in court.

"KIMARO ADVOCATE

Your Hon. I refer the witness to Document LRK1 in the plaint

L. MGONYA
JUDGE
13/2/2018

MS. RWEBANGIRA, ADVOCATE

I don't have any objection. However, I have observation that the handwriting on the same looks very fresh not old as it is said. I will request that from the same. I will bring witness to that effect.

L. MGONYA
JUDGE
13/2/2018

ORDER/COURT

The Document namely 'HATI YA MAUZIANO YA SHAMBA before ABDALLAH MOHAMEDI MMANGA and WILLIHELM SYLVESTER ERIC dated 8/9/1983 is admitted as Exhibit P1 respectively."

Plainly, the appellant had in essence challenged the admission of exhibit P1 per his recorded concern on its authenticity. Undoubtedly, the raised concern should have prompted the trial court to further examine

exhibit P1 especially since the doubts on exhibit P1 arose from the WSD. We are of the firm view that the trial court's failure to proceed to do the needful when considering the admissibility of exhibit P1 tarnished the process especially since exhibit P1 was heavily relied upon by the trial court in its determination of the case. The trial court's determination on the admissibility of exhibit P1 without having resolved pertinent concerns raised by the appellant's side as outlined above, including the reliability of exhibit P1, was with due respect improper. Another fronted concern that the trial court was expected to have considered in the process, is the different names used when referring the seller of the disputed land to the respondent as found in the amended plaint, the testimonies of PW1, PW2 and PW4 and exhibit P1. In the circumstances, it was essential for the trial court to expose exhibit P1 to the required test to determine its admissibility and thereafter accord it the appropriate value in determination of the suit in accordance with the law and the settled principles outlined above.

Notwithstanding the above, for the sake of argument, if, we are to take that the appellant's side did not object to the admissibility of exhibit P1 as found by the trial court, then, it is imperative to address some questions that arise therefrom; One, why did the trial court refrain from addressing the concerns raised by the appellant on the

genuineness and authenticity of exhibit P1? Two, in the interest of justice, what were the reasons for the trial court not to seek the opinion of an expert under the circumstances? Three, whether the trial Judge properly exercised her discretion on the issue under the circumstances. On our part, we are of the considered view that had the trial court addressed the concerns raised, it would also have considered whether under the circumstances exhibit P1 was properly admitted to accord it any weight when determining the case. The fact that there was no such consideration by the trial court, with due respect, renders any findings by the trial court related to the propriety of exhibit P1, misconceived. We thus agree with the appellant's counsel that this anomaly was fatal and prejudicial to the rights of the appellant.

Following that, we are of the view that in the circumstances of this case, the failure of the trial court to properly assess the weight to be accorded to exhibit P1, which was heavily relied upon in its final determination of the case was a fatal infraction that resulted in miscarriage of justice. Given our findings on the two issues above, we find no need to further delve into the remaining issue.

In the premises, and for the above reasons, we declare the judgment of the High Court erroneous and quash it, set aside the orders

thereto and order a retrial. We further order that the record be remitted back to the High Court for a new trial as soon as possible from the stage of the process of admission of exhibit P1. We make no orders as to costs.

DATED at DAR ES SALAAM this 30th day of November, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2023 in the presence of Living Rafael learned counsel for Respondent, also holding brief for Audax Vedasto learned counsel for the Appellant is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL