IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 7 OF 2020

SPLENDORS (T) LIMITED..... APPELLANT

VERSUS

DAVID RAYMOND D'SOUZA (Under Irrevocable Special Power of Attorney by Mary Mushi & Jerry John as the Administrators of Christina S. Mugamba – Deceased)..... 1ST RESPONDENT

JANE PHILOMENA BABSA .....2ND RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 3rd day of August, 2018

in

Land Case No. 53 of 2014

JUDGMENT OF THE COURT

6th & 17th February, 2023

LEVIRA, J.A.:

This appeal is against the decision of the High Court of Tanzania at Arusha (the trial court) which declared the second respondent as the lawful owner of Plot No. 13 Block "I" Area "F" located within Arusha City (hereinafter referred to as the dispute land). It is on record that the appellant sued both respondents over ownership of the dispute land

which she claimed to have purchased from one Christina Mugamba in September, 2002. It is further pleaded that the said Christina Mugamba had been in possession of the dispute land since 1987 after she acquired it from one Emmanuel Shete and that she continued to occupy part of the said land even after selling it to the appellant until when she died in 2004. The appellant continued to pay all the bills including land rent throughout in the name of Christina Mugamba as the transfer process to her name was blocked by the second respondent who had raised a rival claim of the ownership of the dispute land between the years, 2004 and 2005. Before the trial court, the appellant prayed to be declared a *bona fide* purchaser for value of the dispute land and that the first respondent be compelled to transfer the said land to her name. The claim by the appellant was admitted by the first respondent and as such, the learned trial judge entered what she referred to as judgment on admission against him. Thus, as against the second respondent, the appellant prayed the trial court to declare that she illegally trespassed on the dispute land and order her to pay special damages which she pleaded among other reliefs.

On her side, the second respondent claimed to have derived her title to the dispute land from her mother, Louisi Zalaka who allegedly initially

owned the same together with Shete Kassa and Anna Birsau Kassa as per the letter of offer which was issued to them in the year 1970 after the death of Birsau, her great grandfather who formerly owned the same. The second respondent claimed further that when her mother passed away in the year 2005, she successfully applied for the registration of the dispute land in her name to the responsible authority and in fact, she had a Certificate of Title issued to that effect which however was not admitted during trial. According to her, all along she was aware that Christina Mugamba with whom she related was occupying the dispute land. She thus prayed for the suit against her to be dismissed with costs.

Having considered the parties' evidence, the trial court dismissed the appellant's suit on ground that she had failed to prove her case to the required standard and found the second respondent to have good title to the dispute land and thus the lawful owner of it. The appellant was aggrieved and hence the current appeal as earlier on introduced. Before us the appellant has presented ten (10) grounds of appeal. However, having thoroughly gone through them, we realized that they fall under three major complaints, to wit:

1. That the trial judge erred in law and fact in pronouncing judgment relying on the second respondent's Certificate of Title that was erroneously issued and the same was not admitted in evidence. (Ground - 3)

2. That the trial judge wrongly rejected to admit the appellant's evidence and prevented her witness to testify.

   (Grounds 5, 6, 7 & 8)

3. That the trial judge erred in failing to properly evaluate the evidence on record to determine that Christina Mugamba was the owner of the dispute land since 1987 and had uninterrupted possession; instead, she was wrongly found that initially the said land was jointly owned by Shete Kassa, Anna Birsau Kassa and Louisi Zalaka before passing hand to the second respondent.

   (Grounds - 1, 2, 4, 9 & 10)

On 26th January, 2023, the second respondent filed in Court a notice of preliminary objection against the appellant's appeal on the following grounds:

1. *That, the appeal is time barred as the judgment on admission against the first respondent was entered on 7th June, 2016 and the notice of appeal which includes the first respondent was*

filed on 7th August, 2018 contrary to Rule 83 (2) of the Tanzania Court of Appeal Rules, 2009 as amended.

2. *That, since the trial High Court passed judgment on admission against the first respondent by consent of the parties, the present appeal is incompetent for want of leave of the High Court to file the appeal under section 5 (2) (a) (i) of the Appellate Jurisdiction Act, Cap 141 R. E. 2019.*

3. *That, since the trial High Court passed judgment on admission against the first respondent by consent of the parties, the present appeal which includes the first respondent is incompetent because it is barred by section 70 (3) and Rule 1 of Order XL of the Civil Procedure Code Cap 33 R. E. 2019.*

At the hearing of the appeal, Mr. Meinrad D'Souza, Principal Officer of the appellant, entered appearance for the appellant, whereas the first respondent was represented by Mr. Alute Mughwai, learned advocate and the second respondent enjoyed the joint services of Mr. John Materu and Mr. Salim Mushi, learned advocates.

As it is common practice of the Court, we had first to dispose of the grounds of preliminary objection raised by the second respondent. We wish to state at the onset that, determination of the above grounds of the preliminary objection need not detain us much as on the face of it,

with respect, they are totally misconceived. We say so because the said grounds are in relation to the judgment on admission which is not a subject of the present appeal. In other words, there is no appeal against the judgment on admission presented before us. For that reason, we shall not reproduce the arguments of the parties' counsel for and against the raised grounds. Suffices here to state that the notice of appeal which was lodged by the appellant on 6th August, 2018 bears the evidence that the appellant is challenging the decision of the trial court which was delivered on 3rd August, 2018 as it can be seen at page 688 of the record of appeal. In that case therefore, time cannot reckon from the date of judgment on admission while the appeal before us is different and in fact, it was filed well within time.

In the same vein, even the second and third grounds of preliminary objection which were argued in alternative by the counsel for the second respondent cannot stand. This is due to the fact that they refer to the consent judgment which never existed. We therefore dismiss all the three grounds of preliminary objection raised by the counsel for the second respondent.

We now revert to the substance of appeal, which is not opposed by the first respondent. It is worth noting that this is a first appeal and thus we are enjoined to reevaluate the evidence on record and make our own

conclusion while considering the conclusions of the trial court (see: **Pendo Fulgence Nkwenge v. Dr. Wahida Shangali,** Civil Appeal No. 368 of 2020 (unreported).

As introduced above, the appellant's first complaint is that it was an error for the trial judge to rely on the second respondent's Certificate of Title which was not only erroneously issued but also not admitted in evidence to pronounce judgment against the appellant. In support of this complaint, Mr. D'Souza adopted his written submissions and argued that the appellant is the lawful owner of the dispute land as she bought it from Christina Mugamba but failed to register the same in her name as the process to do so was interfered by the second respondent who claimed to have a Certificate of Title over the said land.

Mr. D'Souza referred us to page 465 of the record of appeal where the second respondent testified that she had a Certificate of Title in respect of the dispute land and attempted to tender it as part of evidence. However, the same was not admitted in evidence following the objection by the counsel for the appellant as it was neither annexed to the pleadings nor produced at the first hearing as per the requirement of the law under Order X111 Rule 1(1) and (2) of the Civil Procedure Code, Cap 33 R. E. 2002 (the CPC). Mr. D'Souza went on to argue that it was wrong for the trial judge to rely on the rejected

Certificate of Title to decide in favour of the second respondent. According to him, the trial judge should have considered the evidence of Betty Sanare Mollel, the Land officer working with Arusha City Council (PW2) to arrive at a conclusion that Christina Mugamba was the owner of the dispute land with a caution that she was not able to complete transfer process to the appellant due to the interference by the second respondent. In justifying the importance of calling the land officer as a witness, Mr. D'Souza cited the decision of the Court in **Mary Agnes Mpelumbe (Administratrix of the Estate of Isaya Simon Mpelumbe v. Shekha Nasser Hamud,** Civil Appeal No. 136 of 2021 (unreported).

In support of the appeal, Mr. Mughwai joined hands with Mr. D'Souza to argue while making reference to his written submissions that, it was a serious error of law for the decision of the trial court to base on a document that was not admitted in evidence. He fortified his submission by citing Order XIII Rule 7 (1) (2) of the CPA and the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Ltd** [2006] T. L. R. 343. He concluded in respect of the first complaint by urging us not to give weight to the second respondent's oral testimony in respect of the ownership of the dispute land.

In reply, Mr. Materu opposed the appeal and submitted that he had gone through the judgment of the trial court but could not see that it relied on the rejected Certificate of Title. He was of the view that the trial judge might have been convinced by the testimony of Nicholous Steven Mbwambo (DW2) the Registrar of Titles Northern Zone who testified that the dispute land was registered in the name of the second respondent. He went on to state that the transfer and offer of Christina Mugamba were nullified and the offer was registered in the name of the second respondent as evidenced by the letter from the office of the Assistant Commissioner for Lands, Northern Zone addressed to David Raymond D'Souza and the second respondent (exhibit P7), which among other things indicated that the second respondent is the rightful owner of the dispute land. He thus urged us to find this ground of appeal meritless.

At this juncture we need to consider whether the decision of the trial court was solely based on the Certificate of Title of the second respondent which was not admitted in evidence to form part of the court record. Without much ado, we wish to state that there is no dispute between the parties that during trial the second respondent (DW1) unsuccessfully attempted to tender a Certificate of Title indicating that she is the owner of the dispute land. It is equally undisputed that in her

decision, the trial judge mentioned about the second respondent's title to the dispute land. However, the appellant's claim that the decision was based on the Certificate of Title only attacked part of the decision where the learned trial judge had this to say:

> *"It is my view that the evidence in its totality establishes that the second defendant is the owner of the property.* ***She got title over the land when the title deed was issued in 2nd defendant's name in 2011."***
>
> [Emphasis added].

We have thoroughly gone through the entire impugned decision but we are not convinced that it was based on the Certificate of Title as alleged by the appellant. This we say because even the referred part of that decision is preceded by a phrase which defeats the appellant's argument. The learned trial judge indicated clearly that she considered the evidence in its totality to arrive at a conclusion that the second respondent who appeared as the second defendant is the owner of the dispute land contrary to what the appellant and first respondent would wish us hold. At page 683 of the record of appeal, while answering the issue as to who is the lawful owner of the suit land (dispute land), the trial judge analyzed the evidence and appreciated the fact that the

appellant told the court that Christina Mugamba had lived on the property since early 1980's up to 2002 when the appellant intended to buy it. Moreover, all along she paid land rent and had a Transfer Deed from Emmanuel Shete as per the evidence from Municipal Land Office (a letter written by City Council dated 18/2/2010 - Exhibit P4). However, the trial judge also considered the evidence from the land officer (PW2) to the effect that, their office granted a right of occupancy to the second respondent after denouncing Christina Mugamba's purported title (see exhibit P7) and considering the evidence of the second respondent tracing the history on how she acquired the title after the death of Louisi Zalaka, her mother in 2005, the said Louisi Zalaka being the last surviving owner after the deaths of Shete Kassa and Anna Birsau with whom they initially owned the said land jointly since 1970.

In our considered opinion, the fact that the trial court did not admit the second respondent's Certificate of Title did not affect her case against the appellant as the evidence on record was sufficient to trace and prove her ownership. We note that the appellant admitted that the second respondent had a Certificate of Title in respect of the dispute land but only challenged that the title was issued erroneously (see: Paragraph 13 of the appellant's plaint at page 10 of the record of appeal). The fact that she possessed the Certificate of Title in the eyes

of the law, the second respondent remained to be the owner in terms of section 2 of the Land Registration Act, Cap. 334 R.E. 2002 which defines the owner to mean:

> *"in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered."*

So, in the present case the rejection during trial of the Certificate of Title was inconsequential. In our considered view, if at all the appellant had any issue with the land office that issued the certificate to the second respondent, she ought to have sued it and produced proof that the said certificate was erroneously or illegally issued, but he did not. In **Amina Maulid Ambali & 2 Others v. Ramadhani Juma,** Civil Appeal No 35 of 2019 (unreported), the Court stated as follows:

> *"... when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."*

Therefore, in the circumstances of the present case, the appellant cannot be heard making bare assertions that the second respondent's Certificate of Title was erroneously issued. We thus find this complaint baseless and we dismiss it.

In the second complaint the appellant claimed that the trial judge wrongfully prevented her witness to testify and rejected to admit her evidence. This complaint is twofold. The first part is about the witness who was allegedly not allowed to testify for the appellant and the second is on documents which were rejected. We shall start with the fist part. In respect of the first limb, it was the argument of Mr. D'Souza that in terms of section 127 (1) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act) every witness is competent to testify and thus it was wrong for the trial judge to deny his witness that opportunity.

On his side, Mr. Mughwai supported this complaint by cementing that since the first respondent had already been discharged after the judgment on admission was entered against him, he was a competent witness to testify on behalf of the appellant. He added that, if either the second respondent or the trial court believed that the first respondent had an own interest to serve, he was liable to cross examination by the second respondent and examination by court itself. To bolster his argument, he cited the book of **SARKAR LAW OF EVIDENCE**, 17th Edition Reprint 2011, Volume 2, by Sudipto Sarkar, V. R. Manohar, LexisNexis – Butterworths Wadhwa, at pp. 2487, 2488, 2511 (Sarkar in Law of Evidence). However, he said, although the appellant was denied

the right to produce the first respondent to testify on her behalf, there is sufficient evidence on record to prove the case. Therefore, he urged us not to order a retrial.

In reply, Mr. Materu acknowledged the error but contended that it was curable under section 178 of the Evidence Act as it did not go to the root of the matter. He was emphatic that there is sufficient evidence on record not affecting the merit of the case. Therefore, he urged us not to order for a retrial.

Following the submissions by the parties in respect of the first limb of this complaint, we find that it is no longer a contentious issue that the trial judge erred in misapplying section 127 (1) of the Evidence Act to refuse to allow the first respondent to testify. We agree with the parties as it is evident from the record of appeal (see page 419 – 420) that, the appellant attempted to produce the first respondent (David Raymond David D'Souza) to testify but was objected by the counsel for the second respondent on ground that in terms of section 127(1) of the Evidence Act, he was not a competent witness as he said, although the intended witness admitted the appellant's claims and the trial court entered judgment on admission, he was still a defendant in the case. The learned trial judge sustained the objection on that account. We agree

with the parties, with respect, that it was an error in law for the learned trial judge to so decide. In terms of section 127 (1) of the Evidence Act, the first respondent was a competent witness. Competency of a witness is not measured by a position he holds in a trial but his capability of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether body or mind) or any other similar cause but that was not the case to the first respondent herein. In **Sarkar in Evidence** at page 2511 the author states:

> *"A plaintiff can examine any witness he so likes – the witness may be a stranger, may be a man of his own party or a party himself or **may be a defendant** or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected."* [Emphasis added].

In the light of the above excerpt, we are of the considered opinion that the first respondent ought to have been challenged in terms of his

credibility and not the position he held in trial. Notwithstanding the trial court's error in refusing the intended witness to adduce evidence, all parties conceded that there was sufficient material on record to decide the issues framed for trial. We find that the error was innocuous. Therefore, we find the complaint not decisive on the appeal.

The second limb of the appellant's complaint is that it was also wrong for the trial judge to refuse to admit some documents in evidence which were tendered with a view of proving transfer of the dispute land to Christina Mugamba (land rent receipts, building permit, death certificate, letters of administration) and the Kenyan Passport showing that Jane Babsa, the second respondent was not the owner of the dispute land as she was not born in Longido as claimed, thus not a Tanzanian. However, at page 18 of his written submissions, the appellant stated that *"we are mindful of the fact that the Hon. Trial Court had appreciated that there was no dispute Christina Mugamba was the owner of the suit land for a very long time and paid land rent. The same was confirmed by PW-2 the Land Officer."* Finally, he urged us to allow this complaint.

Regarding this complaint, Mr. Materu argued that PW4 and PW5 who were alleged to be joint administrators of Christina Mugamba failed

to prove that indeed they were administrators and thus the trial judge was right. As regards the passport of the second respondent being tendered in evidence, he said, it was not part of the evidence and thus it was properly rejected by the trial court. Therefore, he urged us to find this part of the complaint baseless.

We have carefully gone through the record of appeal and considered circumstances under which the said documents were rejected. We are satisfied that they were rejected under valid grounds and in any event, they could not prove that the second respondent got the dispute land erroneously or fraudulently as alleged by the appellant. Apart from that, the appellant appreciated as demonstrated above that the trial court considered what would have been evidenced by the said documents. With respect, we find this complaint is hollow. We dismiss it.

We now move to consider the third complaint where the appellant claimed that the trial judge did not properly evaluate the evidence on record of appeal as a result, she failed to determine that Christina Mugamba was the owner of the dispute land since 1987 and had uninterrupted possession; instead, she wrongly found that initially the said land was jointly owned by Shete Kassa, Anna Birsau Kassa and Louisi Zalaka before it passed hand to the second respondent. Mr.

D'Souza submitted in support of this complaint to the effect that the trial court ought to have relied on PW2's evidence which allegedly proved that Christina Mugamba was the owner of the dispute land together with the judgment on admission entered in respect of the first respondent, but that was not the case. Had it done so, he argued, it could have realized that there were no receipts or other documents produced in court to prove that the second respondent was paying land rent in respect of the dispute land. He referred us to page 734 of the record of appeal where he said, the trial judge wrongly presumed existence of a joint ownership of Anna Birsau, Louisi Zalaka and Shete Kassa under section 159 of the Land Act Cap 113 R.E. 2002 (the Land Act) while the law forbids such joint ownership. He added that even the second respondent failed to prove the existence of the alleged joint ownership of the dispute land as in her evidence at page 484 of the record of appeal, she said Anna Birsau and Louisi Zalaka were given that land by the court after Shete Kassa was sued by George Hailu over the same. However, she could not tell which court. According to Mr. D'Souza, section 159 (4) of the Land Act abolished joint ownership unless leave is sought and obtained which was not the case herein. He thus urged us to find merits in this complaint and declare the appellant the *bona fide*

purchaser for value from Christina Mugamba who legally owned the dispute land.

Mr. Materu's response to the third complaint was that, the trial judge properly evaluated the entire evidence on record and was justified in her conclusion that the dispute land is owned by the second respondent and not Christina Mugamba as alleged by the appellant. He expounded his argument by stating that there was joint ownership of the dispute land which was confirmed by the Commissioner for Lands which eventually led to the second respondent's ownership as a beneficiary after the death of her mother who was the last survivor. He added that if at all the appellant was aggrieved by the decision of the trial court, she ought to have sued the office of the Commissioner for Lands for nullifying the purported title of Christina Mugamba but she did not do so. Thus, Mr. Materu was firm that the trial judge made a proper analysis of the evidence on record and was right to make reference to section 159 (4) (b) and (c) of the Land Act as regards the joint ownership notwithstanding the judgment on admission in respect of the first respondent. Finally, he urged us to find that the trial court was right to dismiss with costs the appellant's suit. He as well urged us to dismiss the third complaint for lacking in merits and the entire appeal with costs.

It is trite that he who alleges must prove. The trial judge is faulted by the appellant for failure to properly evaluate the evidence of, among other witnesses, PW2 so as to arrive at a conclusion that the dispute land was initially owned by Christina Mugamba who later sold it to the appellant.

We have carefully gone through the record of appeal and we wish to observe that the trial judge considered the evidence adduced by the witnesses for both sides, evaluated the appellant's evidence against that of the second respondent which traced the background of her claim over the same land. While the appellant claimed that she bought the dispute land from Christina Mugamba who allegedly owned it since 1987, the second respondent's evidence was to the effect that, initially, the said land was registered in the names of Anna Birsau, Louisi Zalaka and Shete Kassa and after the death of Louisi Zalaka who was her mother, as an administratrix of her estate, she applied for and obtained Certificate of Title. At page 735 of the record of appeal, the trial judge had this to say:

> *"It is evident that Christina lived in the suit property, she had paid land rent and she had a Transfer Deed from Emmanuel Shete and* ***an offer that was later nullified;*** *however,* ***it is***

evident that Christina had no title over the land. *In this respect see the case of* ***Farah Mohamed v. Fatuma Abdallah*** *[1992] T. L. R. 205 in which case the court held among other things that:*

1. *A right of occupancy or an offer of a right of occupancy cannot be inherited by mere possession of documents of title.*

2. *He who doesn't have a legal title to land cannot pass a good title over the same to another.*

3. *Documents purporting to transfer ownership of a right of occupancy must be registered otherwise those documents are invalid and ineffectual.*

4. *Transfer of a right of occupancy without consent of the president is ineffectual and unenforceable.*

The standard of proof in civil cases is on the balance of probabilities; it is my view that the plaintiff has failed to prove its case, ... the 2nd defendant has a good title over the land. I therefore find that the 2nd defendant is the lawful owner of the land." [Emphasis added].

Therefore, the claim by the appellant that had it been that the trial judge properly evaluated the evidence and considered the first respondent's judgment on admission it would have arrived at a

conclusion that Christina Mugamba was the lawful owner of the land in dispute holds no water in absence of a valid title over the dispute land as indicated above. In the same vein, Christina Mugamba could not pass good title to the appellant as it is trite that no one can give a title that he does not have to another person (see: **Furaha Mohamed v. Fatuma Abdallah** [1992] T. L. R. 205). Having said so we are satisfied that the trial judge properly considered and evaluated the evidence on record.

In answering whether the trial judge was right to invoke section 159 (4) (b) and (c) of the Land Act under the circumstances of the present matter, without mincing words we find that it was a misdirection on the part of the trial judge to hold at page 734 of the record of appeal, that the position of law as regards joint ownership in case of the death of joint occupier is section 159 (4)(b) and (c) of the Land Act as the claimed joint occupation existed before the enactment of the said law. We take note that Louisi Zalaka acquired the right of occupancy of the dispute land under survivorship as the last survivor after the death of Shete Kassa in 1975. However, despite the misdirection on the part of that trial judge, the evidence on record shows that the second respondent acquired ownership of the dispute land through her late mother as an administratrix. The evidence of PW2 and DW2 at pages

439 and 488 of the record of appeal respectively together with exhibit P7, that the dispute land was registered in the name of the second respondent cannot be discounted as every witness deserves to be believed unless there are cogent reasons not to believe him or her which is not the case herein. Therefore, we find the appellant's third complaint without merit and we dismiss it.

All said and done, we dismiss the entire appeal with costs.

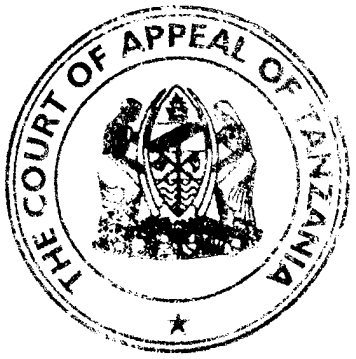
DATED at **Arusha** this 16th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 17th day of February, 2023 in the presence of Mr. Alute Mughwai, learned counsel for the 1st Respondent who also holding brief for Mr. Meinrad D'Souza, Principal Officer of the Appellant and Mr. John Materu, learned counsel for the 2nd Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
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