**IN THE HIGH COURT OF TANZANIA**

**AT MOSHI**

**(PC) CIVIL APPEAL NO. 59 OF 2003**

**{C/F DC HAI CIV. APP. NO. 7/1999}**

**{ORG. SIHA P/C CIV.CASE NO. 4/1997}**

**ZEFANIA OTURUNYA ---------- APPELLANT**

**VERSUS**

**ELIABU JULIUS }**

**HAMPHREY T. MOSHI } - RESPONDENTS**

## JUDGMENT

**HON. JUNDU, J.**

This is a second appeal. The dispute of the parties centres on a piece of land measuring half an acre situated at Wanri Village, Wanri Kati, Siha Mashariki Ward in Hai District. The Appellant had sued the 1st and 2nd Respondents for the said suitland at Siha Primary Court in Civil Case No. 4 of 1997. He lost and appealed to the District Curt of Hai in Civil Appeal No. 7 of 1999 which he also lost. Having been aggrieved by the Judgment and Decree of the said first appellate court, the Appellant has appealed to this court vide (PC) Civil Appeal No. 59 of 2003.

The evidence of the Appellant on record is that he had bought the suitland in 1963 from one Sengena Salakana for shs.3500/= and that he has occupied it peaceful and continuously until on 26/2/1997 when the 1st Respondent invaded the same. The Appellant in his evidence alleged to have executed a sale agreement in the presence of PW.2, PW.3 and PW.4 and the same was tendered by the Appellant in the trial court. Further, the Appellant in his evidence

contended that upon asking the 1st Respondent why he had invaded the suitland, he replied that he had occupied the suitland on a licence from the 2nd Respondent.

On the other hand, the evidence of the Respondents and their witnesses on record was that the suitland previously belonged to one Sengena Salakana but in 1965 the same was sold to the mother of the 2nd Respondent by a court order following default on the part of the said Sengena Salakana to pay a debt owed to the Appellant. The proceeds from the sale of the suitland were used to pay the Appellant's debt. It was the evidence of the Respondents witnesses that upon the death of the mother of the 2nd Respondent the latter inherited the suitland. Thereafter, in 1992, the said evidence shows that the 2nd Respondent entrusted the suitland to the 1st Respondent and that in 1993 the Appellant requested and the 2nd Respondent agreed to permit him to use the suitland. However, after the death of the 2nd Respondent's mother in 1996, the Appellant in 1997 initiated efforts to dispose the 2nd Respondent the suitland according to the evidence of the Respondent's witnesses.

As I had earlier stated the Appellant had lost his appeal in the first appellate court. Having been aggrieved by the Judgment and Decree of the said court, the Appellant has appealed to this court listing five (5) grounds of appeal in his Amended Petition of Appeal. The Appellant is advocated by Mr. Jonathan, learned counsel while the Respondents acted on their own.

In ground 1 of the appeal, the Appellant contends that the first appellate court erred in acting on uncertified copies of documents which were not part of the record of the trial court and that if it had not so erred it would have allowed the Appellant's appeal. The complainant is based on the alleged uncertified copies of the proceedings and judgment in Siha Primary Court Civil Case o. 6 of 1964 which the Appellant contends that the same were allegedly supplied by the 2nd Respondent to the first appellate court. The Respondents in their submission

replied that the first appellate court in its Judgment relied on the evidence recorded by the trial court. My careful perusal of the record of the proceedings of the first appellate court does not show me that the said alleged documents were ever tendered as exhibits in the said first appellate court or that the same were tendered by the 2nd Respondent or supplied by him to the said court contrary to the contention of Mr. Jonathan, learned counsel for the Appellant. Though, Mr. Jonathan in his submission contended that the first appellate court quoted and relied on the said documents, my careful reading of the Judgment of the said court shows me that the said court had mainly held that the case in the trial court lied on the credibility of the witnesses who testified before it. The learned Principal District Magistrate who heard the appeal in the first appellate court stated as follows –

> "The case lied on the credibility of the witnesses who testified before the trial magistrate and the Honourable Assessors. The court below had ample time to determine the credibility of the witnesses and having visited the shamba and looked at the Exhibits tendered before it, some of which are now lacking in this case due to long age of the record, I concur with the lower court decision supported as it is by the trial magistrate and the Honourable assessors."

In my considered view, there is nothing in the decision of the first appellate court to conclude that the said court in arriving at its decision it had acted on or based the same on the alleged uncertified documents. Therefore, I hold that the first ground of appeal has no merit.

In the second ground of appeal, the Appellant contends that the learned Principal District Magistrate erred in not examining and considering the evidence

in greater detail, for if he had so done, he would allegedly have held that the evidence for the Respondents was essentially an afterthought, hence he would have allowed the appeal. The Appellant has, in his submission, argued the said ground of appeal collectively with the Fourth Ground of appeal in which he contends that the said learned magistrate erred in not adverting to the following facts, which, if he had allegedly done, he would have allowed the first appeal

(a) That the evidence of the Appellant, notably that he had bought the suit land in `963, that Exhibit "A" was the sale agreement and that he had occupied, developed and used the suitland uninterruptedly until in 1997, had gone unchallenged by the Respondents by way of cross – examination.

(b) That the Respondents had not put to the Appellant and his witnesses questions pertinent to their intended defence.

(c) That the Primary Court on the visit had been shown two distinative pieces of land marked "A" and "B" on the sketch which were totally different in dimensions and just apposition and

(d) That the piece of land ("B") sold to the mother of the Second Respondent was handily half an – acre in size, a far any from being one acre and a quarter.

The Appellant, in his submission, has made detailed explanation in support of the above named matters. He has maintained that the Appellant's case in the trial court, that he had bought the suitland from Sengena Salakana in 1963 as per Exhibit "A", the sale agreement and that he has been in occupation of the land ever since until in 1997 when the 1st Respondent invaded the same was not challenged, opposed or shaken by way of cross – examination by the Respondents in the trial court.

The Appellant, in his submission, reviews the case as presented in the trial court and contends that the same is an afterthought clearly concocted to give a

semblance of truth. He contends that if there was any truth in it, then the Respondents ought to have put the same to the Appellant and his witnesses by way of cross – examination. He further contends that had the first appellate court considered and examined the account of the trial court on its visit to the suitland, it would have held that the piece of land labeled "A" to be the suitland which the Appellant had bought from Sengena Salakana in 1963 while the piece of land labeled "B" was the piece of land sold to the 2nd Respondents mother in 1965.

In reply to the arguments of the Appellant in grounds 2 and 3 of the appeal, the Respondents in their submission strongly contend that the first appellate court had made a thorough scrutiny of the evidence that was adduced by the parties and their witnesses and in the final analysis concurred with the findings and decision of the trial court which had determined the case infavour of the Respondents.

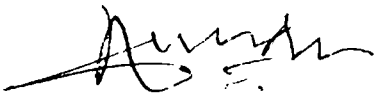
I have carefully read the submission of the parties on grounds 2 and 3 of the appeal. In short, the contention of the Appellant is that had the first appellate court considered and examined the evidence adduced in the trial court would have upheld the Appellant's case and allowed the appeal as it would have seen that the Respondents' case had no truth but merely an afterthought well concocted to hide the truth. In answer to the said Appellant's contention, the Respondents have strongly maintained that the first appellate court had made a thorough scrutiny of the evidence adduced in the trial court and at the end concurred with the findings and decision of the trial court.

In my considered view, the contention of the Appellant as above explained in actual fact calls upon this court to do what allegedly the first appellate court has allegedly not done, that is to consider and examine the evidence adduced by the parties in the trial courts in detail. That is nothing but reviewing and revaluation of the evidence on record. But in practice, that is the domain of the trial court and the first appellate court. This court, when sitting as a second

appellate court in a second appeal such as the present one is only limited to consideration of points of law arising from the decision of the first appellate court and not indulging itself in reviewing and re-evaluation of the evidence on record.

In this appeal, the Appellant has not raised points of law, that might have arisen from the decision of the first appellate court for consideration by this court. The main complaint of the Appellant is that the first appellate court did not consider and examine the evidence adduced by the parties in detail and that if it had done so, it would have allowed the appeal. I hold that the first appellate court judging from the contents of its Judgment which I have carefully read did consider the evidence on record adduced by the parties in the trial court and at the end concurred with the trial court.

The aforesaid, in my considered view, suffices to dispose the entire appeal before this court. I need not labour on grounds 4 and 5 of the appeal. I hold that this appeal has no merit. The same is hereby dismissed with costs. It is so ordered.



**F.A.R. JUNDU**

**JUDGE**

**16/11/2007**

Right of Appeal Explained.

**F.A.R. JUNDU**

**JUDGE**

**16/11/2007**

16.11.2007

Coram: F.A.R. Jundu, J.

For the Appellant: Mr. Jonathan, Advocate.

For the 1st Respondent: present

For the 2nd Respondent: present.

C/C: Muyungi

**Court:** Judgment delivered in the presence of Mr. Jonathan, learned counsel for the Appellant and in the presence of the 1st and 2nd Respondents.

**F.A.R. JUNDU**

**JUDGE**

**16/11/2007**

**AT MOSHI**