

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT SONGEA

(APPELLATE JURISDICTION)

LAND APPEAL NO 55 OF 2014

**(From the District Land and Housing Tribunal of Mbinga at Mbinga
in Land Application No. 10 of 2013)**

GODWIN NDELWAAPPELLANT

VERSUS

MASUMBUKO NGONGIRESPONDENT

JUDGMENT

10th March&05th May, 2015

KWARIKO, J.

Originally, the respondent herein successfully sued the appellantherein together with one Constantine Kapinga herein to be referred as the vendor who is not part to this appeal before the district land and housing tribunal of Mbinga over Plot no. 250 Block 'A' Mbinga

town to be referred as disputed premises. A brief history of facts leading to this case is a bit bizarre. It is in record that the respondent bought the disputed premises from the vendor, way back in 2006 for a consideration of Tshs 2,500,000/=, which sale was witnessed by Sigismund M. Kapinga and Kevin J. Mahai before Paschal S. Mwebesa, a primary court magistrate as commissioner for oath on 18/8/2006. After the said sale, the respondent did not effect transfer of title until 2009 when he started to process the same. However, the transfer did not materialize since he failed to produce the original title as the vendor communicated to him that it was lost and thus nowhere to be found and the loss report he obtained at police also could not serve a purpose.

Later, in 2010, the respondent found the appellant trespassed into the premises and learned that he had original title to the land. This scenario prompted the appellant to report the said vendor to police for the offence of obtaining money by false pretense as he was accused of double dispositions of his land, he was accordingly arrested. On his part the vendor said he had no any title to pass after the sale in 2006; he did not know how the appellant came into possession of his title and the transfer was done without his permission and that if anything the title was improperly

secured by the appellant by stealing and forging his signatures in order to effect treansfer. Whereas the appellant maintained to have obtained the title from the vendor as he bought the premises from him in 2010.

On being dissatisfied by the originaldecision, the appellant now is before this court through Mr. Ngafumika learned advocatetchallenging the same upon the following three grounds of appeal;

- 1. THAT, the trial tribunal erred in fact and law in failing to properly apply the law thus resulting into erroneous decision.*
- 2. THAT, the trial tribunal erred in fact and law in failing to give critical consideration of the evidence tendered.*
- 3. THAT, the trial tribunal erred in fact and law in putting as a legal requirement matters for which the law does not provide.*

During hearing of the appeal Mr. Ngafumika learned Advocate, submitted on the 1st and 3rd grounds of appeal together to the effect thatthe district tribunal erred for declaring the appellant and vendor's

disposition a nullity for want of sale agreement since there is no law which obliges that for a disposition to be effectual there must be sale agreement. That since the appellant had complied with the requirement of law in respect to a disposition of a registered land under Part VIII, VI and III of the Land Act and GN no 74 of 2001, the disposition was legally done. On the second ground, it was submitted that the tribunal failed to evaluate the evidence before it particularly the oral evidence tendered in respect on how the appellant got the land and as per exhibit D1. Further, it was argued that the tribunal and assessors ought to have considered the fact as to why the respondent failed to secure title deed from 2006 to 2009; and how the photos and signature of vendor were in the appellant's possession.

In reply, the respondent through Mr. Ndunguru learned advocates submitted that the law requires a sale agreement in order to prove disposition of the registered land. He cited section 64(1) (a) and (b) of the Land Act Cap 113 R. E. 2002 and regulation 1 of GN no. 74 of 2001. Also, it was argued that since there was no sale agreement, the tribunal was correct to hold in favour of the respondent. On the second ground of appeal it was submitted that it sufficed that the respondent tendered a

written agreement as evidence of disposition and the tribunal rightly held so.

Following the parties contending submissions the central issue for determination here is whether this appeal has merit.

In the circumstance of this case, I am inclined to hold that the grounds of appeal which I am going to deliberate together have no merit for the following reasons:

Firstly, while the appellant testified, to have entered into saleagreement with the said vendor and that the same was done before a commissioner for oath, he did not tender any written document to that effect. The tribunal was therefore correct as it observed that there was no any sale agreement to prove that he purchased the land especially where the vendor, vehemently disputed to have sold the said land and accuse him of stealing the title and forging the transfer documents. It is a settled law as rightly submitted by Mr. Ndunguruthat a contract for disposition of land must be in writing (section 64 of the Land Act (supra)).

On this the appellant is adamant that he is the winner since he has legally transferred the land into his name and has registered documents to

that effect. It is my considered view that transfer deed is a post contractual stage in the disposition of land. Therefore, it is not correct for the appellant to claim that he conducted official search which is pre- contractual stage and even if he did that he then ought to have brought evidence to the effect that after he was satisfied that the land had no any encumbrances he went back to the owner for the aim of concluding the sale agreement. As it is the appellant went directly to to post- contractual stage without passing into contractual stage.

Secondly, as it was correctly found before the trial tribunal, while the respondent successfully called the commissioner for oath to testify on the sale transaction; the appellant took no effort to bring his. However, his evidence on this contradicts; this is because while he testified in chief he said that the advocate prepared sale agreement for them where they signed but when he was cross-examined he said he had no sale agreement to that effect. The appellant failed to bring witnesses whose evidence was crucially important such as the alleged broker who first allegedly lured him to the disputed premises and the alleged vendor's children. Therefore there is a deliberate missing link by the appellant by not producing the sale agreement and bringing the material witnesses and in lieu he

tendered transfer forms to cover up the same. The duty to prove any fact under sections 110 and 111 of the Evidence Act Cap 6 R. E. 2002 lies to a party who alleges that the same exists and in this case the appellant failed to do so.

Thirdly, while the appellant testified that he paid shilling one million to the vendor as additional purchase price and tendered a bank cash deposit slip (exhibit D3) to that effect but there is no any exhibit to prove that he had earlier paid shilling 6,500,000/= as original agreed price. He did not prove that the bank account where the one million was deposited belonged to the vendor and the bank cash deposit slip is a copy.

As for the original title deed and the transfer documents the appellant is better placed to know how he came across the same and this court is not proper forum to decide that.

Finally, I agree with the respondent that it was not proper for the appellant to drop the vendor in this appeal since there might be court order which could also bind him. Hence since the law says that a seller is necessary party in a suit for recovery of land, it is equally necessary for

seller to be party in the appeal more so as he was party in the original suit
(See also JUMA KADALA V. LAURENT MNKANDE [1983] T.L.R 103.

In the end I find no reason to disturb the trial tribunal's decision but
to uphold it as I hereby do. The appeal is non- meritorious and thus is
dismissed with costs.

It is so ordered.

M. A. KWARIKO

JUDGE

05/5/2015

Judgment delivered in court today in the presence of both parties in person
Hobokela court clerk.

M. A. KWARIKO

JUDGE

05/5/2015

Court:Right of Appeal Explained.

M. A. KWARIKO

JUDGE

05/5/2015