IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE APPEAL No. 45/2015

(Arising from Land Application No. 2/2015 of Karagwe DLHT)

YUSTARD KIIZA ---------- APPELLANT

VERSUS

CLEMENCE NGEMA ---------- RESPONDENT

JUDGMENT

19/2/2018 & 16/3/2018

KAIRO, J.

This appeal was preferred by Yustard Kiiza after being dissatisfied by the decision of the District Land and Housing Tribunal of Karagwe in Land application No. 2/2015 delivered on 30/09/2015. The facts that can be discerned from the court record is that, the Respondent sued the Appellant at the District Land and Housing Tribunal of Karagwe for encroachment of the land in dispute which he claims to have been purchased from the Appellant himself in year 2010. The Respondent thus prayed from the District Land and Housing Tribunal for orders of vacant possession,

declaration that he is the legal owner and cost of the suit. After hearing the evidence from both parties; the District Land and Housing Tribunal found in favor of the Respondent. The Appellant was aggrieved hence this appeal raising the following grounds:-

1. That the trial tribunal erred in law and fact to entertain this matter which value was Tshs. 300,000/= contrary to its pecuniary Jurisdiction while the Ward Tribunal was a proper tribunal to entertain this matter and not the District Land and Housing Tribunal, hence wrong decision was entered against the Appellant.
2. That the trial tribunal erred in law and fact to receive forged sale agreement brought by the Respondent in the District Land and Housing Tribunal as the Appellant has never sold his land to the Respondent and still the Respondent forged the signatures of the Appellant's mother and Appellant's wife who were not knowing how to read and write according to the sale agreement tendered by the Respondent in the tribunal, hence the tribunal made wrong decision against the Appellant.
3. That the trial tribunal erred in law and fact in disregarding the principles of contract on this sale because the contract lacks stamp duty to prove the validity of the contract hence the Chairman relied on hearsay evidence brought by the Respondent.
4. That the trial tribunal erred in law to order the payment of Tshs. 8,000,000/= to be paid to the Respondent within two months contrary

to the mortgaged agreement made by the two parties hence wrong decision was made against the Appellant as the rightful owner of the disputed land.

5. That the trial tribunal erred in law to decide the case basing on cooked evidence adduced by the Respondent without visiting the *locus in quo* to ascertain the facts of the matter.
6. That the District Land and Housing Tribunal made a wrong decision basing on the rule against bias on the side of the Appellant to order the payment to be done to the Respondent without considering the evidence adduced by the Appellant.

The Appellant thus prayed the court to find the appeal to have merits and accordingly allow it.

The Respondent generally refuted all of the grounds of appeal and prayed the court to dismiss the appeal with cost for lack of merit. I will be touching the Respondent's reply in the course of analyzing the grounds of appeal hereunder. Both of the parties are self represented.

When invited to make oral submission to amplify the grounds of appeal, the Appellant informed the court that he has nothing useful to add to the raised grounds of appeal. He prayed the court to go through them and make its decision accordingly.

The Respondent as a reply to the submission by the Appellant contended that he sued the Appellant at the District Land and Housing Tribunal of

Karagwe following his action to sell the Shamba (land in dispute) then continued to use it. He further argued that, the decision which the Appellant is challenging is correct. He thus prayed the court to look at it together with the reply to the petition of appeal and give its judgment accordingly.

Having gone through the grounds of appeal and reply thereto together with the oral submission from both parties, the main issue for determination is whether the grounds of appeal have merits. I will analyze the grounds of appeal in seriatim.

Starting with the first ground of appeal wherein the Appellant argued that the value of the subject matter that is the disputed land was Tshs. 300,000/= as such it was to be instituted and determined by the Ward Tribunal and not the District Land and Housing Tribunal.

According to the evidence on record the Respondent who sued the Appellant at the District Land and Housing Tribunal testified that the Appellant sold the land in dispute at a purchase price of Tshs. 8,000,000/= and tendered the sale agreement as an exhibit (Exhibit A-I) to authenticate his contention. Further to that AW2, one Jonesia Max also echoed the price of the land in dispute to be Tshs. 8,000,000/=.

I understand that the Appellant has pegged Tshs. 300,000/= to be the value of the land in dispute basing on the alleged mortgage contract between the Appellant and the Respondent, however the said assertion had no

documentary evidence to prove the existence of the said mortgage agreement thus contrary to the requirement of the legal principle of *"he who alleges must prove"* and also contrary to section 110 (2) of the Law of Evidence Act Cap 6 Re 2002 which places an obligation of proof of any fact to the person who asserts that fact.

In that respect therefore I am inclined to agree to the Respondent reply to the 1st ground of appeal that the land in dispute had a value of Tshs. 8,000,000/= which amount is within the pecuniary Jurisdiction of the District Land and Housing Tribunal. Thus the first ground of appeal has no substance.

The court will deal with the second and third grounds of appeal collectively as both attack the District Land and Housing Tribunal to admit the sale agreement for alleged various shortcomings. The Appellant argued that the said sale agreement was forged because; first the Appellant has never sold his land to the Respondent and second the signatures of the Appellant's mother and wife were forged as they both don't know how to read and write. These contentions were vehemently refuted by the Respondent.

The court went through the record and observed that apart from the sale agreement, AW2 (Respondent's mother) has also testified that she was aware that the Appellant has sold the land in dispute to the Respondent. (proceedings page 14) she also went further that the sale transaction was written by the Appellants wife (proceedings page 14 – 15). The issue of

writing the said agreement by the Appellant's wife was also testified y the Respondent when cross examined by the Appellant at the District Land and Housing Tribunal (page 9). But further to that, the fact that the Appellant has sold the land in dispute was also testified by AW3 one Naftali Alphonce Gabikwa who was chairman of Kikonzi Hamlet where the disputed land situates. He testified to the effect that he was involved in execution of the decree of the District Land and Housing Tribunal's decision into which the land in dispute was held to be the property of the Respondent following the case instituted by the Appellant's brother (No. 80/2011) one Obadia Kiiza into which Obadia lost (proceedings page 16) AW3 Further on cross examination testified that in the said case (No. 80/2011) the Appellant who was testified on the side of Obadia Kiiza's side conceded to the Ihembe Ward Tribunal that, he actually sold the suit land to the Respondent (proceedings page 17). Not only that but AW3's testimony was echoed by AW4; one Boniface Martin Katetegilwe who was WEO of Ihembe. He informed the court that he was among the leaders who handed over the suit land to the Respondent following the execution proceedings filed as a result of Civil Case No. 80/2011 between the Respondent and Obadia Kiiza (page 19-20). I had an opportunity to go through the proceedings and decision of Ihembe Ward Tribunal in Civil Application No. 80/2011 and observed that what was testified by AW3 and AW4 was correct.

The Appellant has also attacked the admission of the sale agreement (Exhibit A-I) as it had no stamp duty. It is true that the evidence was not

stamped before admitted as an exhibit in court which is an error as correctly argued by the Appellant. I found fortification in this stance in the case of **Zakaria Bura vrs. Theresia Mari John Mbiu (1995) TLR 211 at page 216** wherein his Lordship Hon. Nyalali C.J (as he then was) held that;

> *"Failure to indicate payment of the stamp duty according to stamp duty act by law renders the sale agreement in admissible as evidence in court, ..."*

Following this discrepancy the court hereby expunges the said document (Exhibit A- I) from court record for want of stamp duty payment.

However the law is settled that the absence of stamp duty does not vitiate the sale if there are other evidence as was decided in the case of **Juma vrs. Habibu [1975] IEA.**

The wanting question therefore is whether there are other evidence to verify the presence of sale agreement to which its answer is in affirmative. The testimonies by AW3 and AW4 support the same as per above analysis. I thus hold that the second and third grounds of appeal have no merit as well.

With regards to the fourth ground of appeal, the Appellant argued that it was an error for the District Land and Housing Tribunal to order payment of Tshs. 8,000,000/= to the Respondent contrary to the mortgage agreement. Suffice to say that the allegation that there was mortgage agreement between the Appellant and the Respondent is not supported by any

documentary evidence as such they remains to be mere assertions which the court cannot rely on.

As earlier stated, the cardinal principle of law requires proof of a fact from the person who so assert. This principle has been stipulated in section 112 of the Law of Evidence Cap. 6 RE 2002 and I wish to quote it as hereunder

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by law that the proof of that fact shall lie on any other person".*

Thus in the absence of the proof of the said mortgage agreement, the court has found that the fourth ground of appeal has not been substantiated, thus it is bound to fail as well.

The court will also address the fifth and sixth grounds together.

On the fifth ground, the Appellant argued that the District Land and Housing Tribunal erred to base its decision on the cooked evidence. Unfortunately he didn't go further to pin point what evidence was a cooked one; as such the Appellant has not substantiated the given assertion. Nevertheless, I went through the evidence of the DLHT and I should confess that I found nothing to fault it.

On the question of visiting the *locus in quo* the Appellant has not explained the purpose of the said he argued to be omitted. In my understanding the *locus in quo* normally visit has to be done when there is a dispute over the

boundaries so as to verify the same. But in the matter at hand, there was no dispute concerning the boundaries of the disputed land. As such the question of visiting the *locus in quo* in my view was not necessary.

In the sixth ground, the Appellant contends the District Land and Housing Tribunal was biased in favor of the Respondent and that the evidence of the Appellant wasn't considered. To say the least, I don't subscribe to this assertion. The evidence on record shows that the District Land and Housing Tribunal has analyzed well both evidence adduced and reached a conclusion on the balance of preponderance that the evidence of the Respondent was heavier, to which I also concede. Thus even the fifth and sixth grounds of appeal have no merit.

All in all, having found that all of the raised ground of appeal lack merit, it goes that this appeal is bound to fail. Consequently I hereby dismiss it with cost and uphold the decision of the DLHT.

It is so ordered.

R/A explained.

HIGH COURT OF TANZANIA BUKOBA

L.G. Nairo

Judge

At Bukoba

16/3/2018