

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**MISC. LAND APPEAL CASE NO. 4/2016**

*(Arising from the Land Appeal No 23/2015 of the DLHT for Karagwe & Originating  
from Civil Case No. 1/2015 of Kanoni Ward Tribunal)*

**MWESIGE THEOPHIL ----- APPELLANT**

**VERSUS**

**BRUNO RUGEMALILA ----- RESPONDENT**

**JUDGMENT**

*16/5/2018 & 27/7/2018*

*Kairo, J.*

The Appellant; Mwesige Theophil is appealing against the decision of the District Land and Housing Tribunal in Land appeal No. 23/2015 which decided against him on 17/12/2015.

Briefly the facts that resulted to this appeal is that the Respondent sued the Appellant at the Ward Tribunal of Kanoni for trespass and further claiming that the Appellant has uprooted the boundaries, selling the land and cultivating crops on his land. The Ward Tribunal found in favor of the Respondent. The Tribunal however went further and declared a portion of the land in dispute which has been planted with tress and banana to be the property of the Appellant following its finding that the same was given to him by his grandfather. The trial Tribunal further declared the rest of the disputed land to be the property of the Respondent herein. The trial Tribunal's decision aggrieved the Respondent and decided to appeal to the District Land and Housing Tribunal which made a finding that the Appellant was a trespasser and declared the Respondent a rightful owner of the whole suit land. The Appellant wasn't amused by the said decision hence this appeal raising first four grounds of appeal. However during the oral submission, he decided to argue on the following two and abandoned the other two;

1. That the Honorable Chairman immensely misdirected himself by reversing the findings of the Ward Tribunal over the developed parcel of land that was proved to be passed from the Appellant's father to him before developing the same.
2. That the Appellate tribunal failed to consider the legality of the oral sale agreement of the suit land entered by the Appellant and his grandfather when disposing the matter.

The Appellant thus prayed the court to allow this appeal. The Appellant was being represented by Advocate Lameck Erasto while the Respondent is self represented.

When invited for oral submission, Advocate Erasto started by informing the court that the appeal resulted from appeal No. 23/2015 of District Land and Housing Tribunal for Karagwe originating from Civil Case No. 1/2015 of Kanoni Ward Tribunal. He further informed the court that following his dissatisfaction, the Appellant preferred this appeal raising four grounds but later abandoned two of them and thus he will argue on the remaining two jointly which are couched as above and they appear as the 3<sup>rd</sup> and 4<sup>th</sup> grounds as per the list in the petition of appeal. Advocate Lameck submitted that in the 3<sup>rd</sup> ground, the Appellant is challenging the decision of the District Land and Housing Tribunal to reverse the decision of the Ward Tribunal which found that the Appellant is the owner of the suit land given to him by his late grandfather, one Theobald Kibwete. Further in the 4<sup>th</sup> ground, the Appellant is challenging the decision of the District Land and Housing Tribunal for finding illegal the sale agreement between the Appellant and the late Theobald Kibwete which was orally made. He went on submitting that, the Respondent has claimed that the Appellant has encroached into his land and instituted the claim at Kanoni Ward Tribunal. Further that the Respondent adduced evidence (document) showing that on 7/10/1984 the Respondent was given the land in dispute by his late father, Theobald Kibwete. The Advocate argued that close scrutiny to the

disposition document, it shows that he was just given a portion of the land and the remaining portion at the East was left to Theobald Kibwete himself. He went on that according to the evidence by the Appellant while at the trial Tribunal, it showed that the Appellant was first given the land by Theobald Kibwete so as to look at on behalf of other children who by then were still small kids. That the said land was later given to them when reached the majority age. The Advocate went on that, the said fact confirms that the other portion which is the land in dispute was sold to the Appellant by the late Theobald Kibwete in year 2006 through an oral agreement. That the said transaction was conducted before witnesses. He further submitted that, during the hearing, the trial tribunal visited the *locus in quo* and made the following findings:-

That there was a portion of land which was given to the Respondent by the late Theobald Kibwete. Thus resolved that the same belongs to the Respondent.

Further that the Appellant was also given another portion of the land by his grandfather Theobald Kibwete which he developed by cultivating banana and other crops. On top of that the trial Tribunal also found no trespass but each had its own piece of land (quoted page 4 of the Ward Tribunal's Judgment).

Advocate Lameck Erasto went on that however the District Land and Housing Tribunal quashed and set aside the Ward Tribunal's decision and

resolved that both pieces of land belonged to the Respondent adding that to be the centre of the Appellant's contention. The Advocate submitted that the District Land and Housing Tribunal erred in its decision arguing that the Ward Tribunal had the opportunity to visit the *locus in quo* and that the witnesses were clan members thus were able to look and conclude whether there was any encroachment. However they finally concluded that there was none as such the Ward Tribunal's decision was proper as their visit to *locus in quo* enabled them to witness the real situation. He substantiated his argument by citing the case of ***Basili Masale vrs Petro Michael [1996] TLR 226*** which resolved as follows: *"the trial court which visited the disputed shamba and found that it belonged to the Appellant was correct in so finding and there were no valid reason upon which the District court could have reversed the trial court's decision"*.

Advocate Lameck went on to submit that relying on the sale agreement document to give its decision, was an error on the part of the District Land and Housing Tribunal. He further argued that even the document which was relied on by the District Land and Housing Tribunal shows that Theobald Kibwete didn't give him the whole land thus the Respondent wanted to use the said document to verify the ownership of the other portion of land which was given to the Appellant. Fortunately the document tendered shows the neighbors, one being Theobald Kibwete at the East which was later given to the Appellant.

The Advocate concluded that, if the District land and Housing Tribunal would have been keen to note that fact, the Chairman wouldn't have reversed the Ward Tribunal's decision. He further stated that it was the Ward Tribunal which had the opportunity to assess the credibility of witnesses as decided in various cases. He cited the case of *Ibrahim Ahmed vrs Halima Guleti [1968] HCD 76* which observed "the question for a court on an appeal is whether the decision below is reasonable and can be affirmed ..... surely when the issue is entirely one of the credibility of the witnesses, the weight of evidence is best judged at the court before which that evidence is given and not by a tribunal which merely reads a transcript of evidence". Advocate Lameck concluded by praying the court to find that the Appellant was given the land in dispute legally and further that there was no encroachment, thus allow this appeal by affirming the decision by the Ward Tribunal.

In reply, the Respondent submitted that, he got the land in dispute in year 1984 while the Appellant was still a small kid. That in 2013, the Appellant trespassed the said land while he has utilized it for 32 years. He added that, by that time, his father has already died in year 2008. The Respondent further submitted that he decided to institute a claim at the Ward Tribunal. He further submitted that the Appellant when trespassing he uprooted the boundaries, planted trees and bananas alleging to have been given the land by his late grandfather. He went on that, he adduced evidence at the tribunal to the effect that the act of being given the land was witnessed by a clan Head one Theonest Theobald. He added that the Appellant's witnesses



(his father and relatives) gave contradictory evidence. He went on that he succeeded in the decision delivered on 23/7/2015 but later the Ward Tribunal decided to give the Appellant the portion which he has encroached and planted banana and trees, adding that to be the reason why he decided to appeal to the District Land and Housing Tribunal to challenge the same whereby the decision was reversed by the DLHT. He concluded that the District Land and Housing Tribunal's decision is proper and correct. He finally prayed this court to dismiss this appeal.

In his rejoinder, Advocate Lameck submitted that it is not true that the Respondent succeeded at the Ward Tribunal then the Tribunal took the land in dispute and gave it to the Appellant, rather according to its findings, the Ward Tribunal found that each party had got a separate piece of land given to them at different time by the late Theobald Kibwete. Besides, there was no evidence that the remaining part of Theobald Kibwete was given to whom, so it concluded that this is the one given to the Appellant.

Having gone through the grounds appeal and oral submissions by the parties, the main issue for determination is whether the appeal has merit. In so determining, the court has to determine who between the Appellant and the Respondent is the owner of the land in dispute.

The Respondent has argued to be the rightful owner of the land in dispute claiming to have been given it by his late father; one Theobald Kibwete in year 1984. He tendered a document to verify his claim. The Appellant on his

part claim to have bought the land from Theobald Kibwete; his grandfather for Tshs. 620,000/- through an oral contract. The Ward Tribunal having visited the *locus in quo* and heard the evidence resolved that the portion which was planted banana and trees belonged to the Appellant as the same was given to him by his grandfather. It further resolved that the remaining part of the land belonged to the Respondent. However this decision was reversed by the District Land and Housing Tribunal on appeal. The reason for the said reversal was the contradictions of the Appellant's witnesses on the purchase price. Besides, the Appellant did not tender the purchase agreement to verify the claimed sale by the late Theobald Kibwete to the Appellant. The DLHT added that the Respondent on the other hand has tendered the allocation letter dated 7/10/1984 to authenticate that he was given the land by the late Theobald Kibwete.

The Advocate for the Appellant has attacked the chairman's reasoning of disregarding the oral contract entered. Legally a contract can be entered in writing or orally provided they are made by free will of the parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void section 10 of the Law of Contract Act Cap 345 RE 2002.

Thus the absence of a written document cannot legally invalidate the agreement provided all the above ingredients of a valid contract have been met. I should hasten to add that the record reveals that none of the ingredients as per sec 10 of Cap 345 has been contravened.



The District Land and Housing Tribunal has attacked the evidence by the Appellant's witnesses with regards to the purchase price for being inconsistent. According to record the Appellant has testified that the purchase price was Tshs. 620,000/= his witness Theophil Thebald stated that the purchase price was Tshs. 800,000/= but he paid Tshs. 720,000/= leaving the debt of Tshs 80,000/=. Another witness Sabinian Simon stated that he didn't know how much the Appellant has paid but he left the debt of Tshs 80,000/=. The last witness one Joseph Josephat stated that the purchase price was Tshs. 700,000/= but he paid Tshs. 620,000/=.

I agree that there are inconsistencies. However I am of the view that the said inconsistencies doesn't go to the root of the matter having in mind the issue at hand is whether the late Theobald Kibwete sold the land to which all of the witnesses conceded that the said sale transaction between the Appellant and his grandfather took place. When Theophil Theobald was further asked with regard to the contradictions (on the purchase price) he gave explanation that the contradictions were possible due to forgetfulness to which I join hands with having in mind that the agreement was oral and further the time lapse from when the transaction took place ie year 2006 to when he testified in year 2015.[Refer the case **of Kachembeho & others vrs R[1978] LRT 70**] which observed that *"Human recollection is not infallible. A witness is not expected to be right in details when telling his story"*

I thus found that the inconsistencies didn't negate that the sale transaction took place and further explanation was given for such a situation.

The District Land and Housing Tribunal also based its decision on the fact that the Respondent tendered disposition document dated 7/10/1984 which verifies that he was given the land by his late father. However going through the said document, I observed that one on the neighbors in the said disposition was the late Theobald Kibwete himself at the East and South which means a portion of land remained in the hands of the deceased himself. According to the Appellant, the remained portion was the one later sold to him by the late Theobald Kibwete. Though the Respondent insists that the said portion was also given to him but the document he tendered doesn't support this contention. I am thus inclined to agree with the Appellant that the portion was later sold to him and thus belongs to him.

The analysis is further verified by the Respondent's testimony when testifying at the trial Tribunal. He contended that in year 2006 he got information that his land was encroached. He made a follow up and found that the person who was cultivating into his and was one Nkulanga who told him that he bought the land from the Appellant. According to record, he only warned him. I paused to ask as to why he didn't take further steps to enquire from the Appellant as to why he sold his land. Having in mind that by that time the late Theobald Kibwete was alive (he died 2008). Further to that he also testified that, in year 2008 he again got information that the Appellant was in the process of selling his land to one Koku Jacob. Again he took no step to confront the Appellant. To say the least his omission to act

creates doubts if at all the land belongs to him. It is my candid view that his omission negates his contention that the land belonged to him.

The Appellant has prayed this court to find that the Appellant was given the land in dispute legally and thus affirm the decision of the Ward Tribunal. According to record, the Tribunal has given the land to the Appellant not because he has purchased it, but because it found that the same was given to him by his grandfather, the late Kibwete. Either way, even this court is of firm view that there was a disposition in favor of the Appellant. The Ward Tribunal which also visited the *locus in quo* has categorically stated which portion of the land in dispute belongs to whom. I should state that this court wouldn't wish to disturb the said findings. The reason is not farfetched. The trial tribunal which visited the disputed land and heard the witnesses is better placed to reach a more realistic finding as it has the advantage of having firsthand information than the appellate court. To fortify this stance, I wish to borrow a leaf from Sir Kenneth O'Connor of the then Court of Appeal for Eastern Africa when deciding the case of **Watt v Thomas (1947) AC 484** at page 489 stated as follow

*"it is a strange thing for an appellate court to differ from the finding on question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appeal court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution ....."*

All having said and done, I find this appeal to have merit and accordingly allow it. The decision of the Ward Tribunal is thus confirmed without reservation. However no order to cost is given so as to foster harmony between the parties who are close relatives.

It is so ordered.

R/A explained.



  
L.G. Kairo

**Judge**

At Bukoba

27/7/2018

Date: 27/7/2018

Coram: Hon. L.G. Kairo, J.

Appellant: Present in person

Respondent: Present in person

B/C: R. Bamporiki

**Court:** The matter is for judgment. The same is ready and read over before the parties who are present in person in open court today.



  
L.G. Kairo  
**Judge**  
27/7/2018