

**IN THE HIGH COURT OF TANZANIA
(IN THE MWANZA DISTRICT REGISTRY)
AT MWANZA**

LAND APPEAL NO.149 OF 2016

(Arising from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Application No. 220 of 2007)

1. OSWALD GIMESE
2. LETICIA KALIKALI
3. KRISPIN KALIKALI }**APPELLANTS**

VERSUS

MUZUMA LWITAKUBI **RESPONDENT**

Last order: 06/02/2018

Final Submissions: 14/03/2018

Judgment: 06/04/2018

JUDGMENT

MAKARAMBA, J.:

The Appellants are aggrieved with the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in **Land Application No. 220 of 2007**, which the Respondent had brought against the Appellants. The suit ended in favour of the Respondent. The Appellants have presented four grounds of appeal. I propose to traverse the grounds in the course of my judgment. I shall therefore not set them out at the outset. The four grounds of appeal seems to me to be revolving largely around the issue of lack of locus standi on the part of the Respondent to sue the Appellants for reason of lack of a valid or legal sale agreement, and that the purported Sale Agreement was a forgery. The appeal by consent was disposed of by way of written

submissions by the Appellants in person unrepresented and by the Respondent who had the services of a lawyer.

In this appeal, the central issue is a dispute over the ownership of a piece of land, **Plot No. 31 Block "K" NansioUkerewe**, the suit land. The Appellants allege that the suit land was registered on **13th January, 1982** through **Land Form No.43 Offer** which was issued to **Leonard Gimese and MutesigwaLulinga** by the Ministry Land Housing and Rural and Urban Development, Land Division of NansioUkerewe District Council as its joint owners. The Appellants further allege that they are family members of the former rightful joint owners of the suit land, **Leonard Gimese and MutesigwaLulinga** who had constructed a house on the suit land in which the Appellants were residing until they were forcefully evicted by the Respondent.

In their submissions in support of the appeal, the Appellants are faulting the decision of the District Land and Housing Tribunal for failing to appreciate the fact that the Respondent, **MUZUMA LWITAKUBI**, had no locus to sue the Appellants due to the fact that there was no sale agreement by the former rightful owners of the disputed land, **Leonard Gimese and MutesigwaLulinga**, who the Appellants allege that they owned the suit land jointly.

In his reply submissions, the Respondent argued that he had **locus standi to sue** since he had a right and/or interest over the suit land since he had been in its occupation by virtue of a **Granted Right of Occupancy** by way of transfer. The Respondent discredited the allegation by the Appellants over **Land Form No. 43** alleged registered

in **1982** as evidence of joint ownership of the suit land by **Leonard Gimese** and **MutesigwaLulinga** for it does not exist anywhere on the record and thus the Appellants have failed to establish proof of ownership of the suit land by the former joint owners, namely, **Leonard Gimese** and **MutesigwaLulinga**. The Respondent submitted further that as per the testimony of **PW2**, one **Mr. Elias Mutakama**, a Land Officer from Ukerewe District Council before the trial Tribunal, **Leonard Gimese** owned the disputed land from **1976** until **1995** when he sold it to **AlphonseMsemakweli** who in turn in **2000** also sold it to **MuzumaLwitakubi** and the transfer of ownership was effected as per the records in the Land Office. The Respondent submitted further that the testimony of **PW2** make the allegations by the Appellants that the suit land was being owned jointly by **Leonard Gimese** and **MutesigwaLulinga** unfounded since there is no any proof of such ownership and thus the suit land was in the sole ownership of **Leonard Gimese** before selling it to **AlphonseMsemakweli** in **1995** who in turn sold it to **MuzumaLwitakubi** in **2000**. In buttressing his submissions on this point, the Respondent stated that as per the decision by Mrosso, J. (as he then was) in ***SalumMateyo vs. Mohamed Mateyo [1997] TLR 11 (HC)*** "ownership in relation to any estate or interest under section 2 of the **Land Registration Ordinance, Cap. 334**, is in the person for the time being in whose name the estate or interest is registered." This therefore will make **MuzumaLwitakubi** in whose name the disputed land in **Plot No. 31 Block "K" Nansio** is registered its sole owner.

In rejoinder, the Appellants reiterated their submissions in chief and maintained very strongly that, the Respondent has no **locus standi**

to sue the Appellants for reason of lack of legal sale agreement or right of transfer for want of official revenue **Stamp Duty**, which is in clear violation of the Stamp Duty Act.

The Appellants submitted jointly on the **second ground** of appeal that, the trial Tribunal erred in law and in fact in admitting in evidence a **forged sale agreement**, the **third ground of appeal** that, the trial Tribunal erred in law to accept a **forged sale agreement** between the Respondent and one **Alphonse Msemakweli**, and the **fourth ground of appeal** that, the trial Tribunal erred in law to grant a transfer of right of occupancy which is a forged document for it is not shown in its attestation clause the place where the transfer was made.

The Appellants submitted that, the purported uncertified **Sale Agreement** document between **Leonard Gimese** and **Alphonse M.C. Msemakweli** was obtained through **forgery** because the transfer of the suit land which was effected on **1st September, 1995**, was signed by only **Leonard Gimese** as the transferor to the purchaser without **Mtesigwa Lulinga**, the other joint owner of the suit land. **Leonard Gimese** could not therefore transfer ownership to **Msemakweli**. The Appellants submitted further that, the sale documents were not validly obtained due to failure by both owners of the disputed land at **Plot No.31 Block "K" Nansio** to sign them. Consequently, the Appellants further submitted, the whole process of sale agreement between **Leonard Gimese** and **Alphonse M.C. Msemakweli** and then by **Alphonse Msemakweli** transferring ownership of the suit land to now the Applicant/Respondent, **MUZUMA LWITAKUBI**, is incompetent and **void ab initio** and should not have been admitted as exhibit by the trial Tribunal. The Appellants prayed

that the appeal be allowed and the Judgment and Decree of the trial Tribunal be set aside.

In reply to the **second ground** of appeal, the Respondent submitted that, since the Appellants did not challenge the admissibility of the alleged forged sale agreement before the trial Tribunal when they had the opportunity to do so but did not seize it, they cannot be heard to contest its admissibility now at the appeal stage. In support of his submission on this point, the Respondent cited to this Court the decision in the case of ***IddShaban (Administrator of Estate of ShaabanIddi) and ShabanIdd vs Moshi JumaMzungu and Justine Leopold Timetheo, Land Case No. 31 of 2012 (HC)(Mwanza)(unreported)***, where it was stated as a matter of principle that, "*where a document (sale agreement) has been received in evidence it forms part of the record and thus the issue of its admissibility and authenticity is taken to have been overtaken by events.*" In that case, the High Court dismissed the argument on failure to pay stamp duty on an impugned sale agreement for lack of merits. Buttressing further his submission that given that the impugned document already forms part of the evidence on record, its objection on the ground of lack of paid stamp duty cannot be taken at the appeal stage, the Respondent cited to this Court the decision by Mwalusanya J. (as he then was) in the case of ***Boniface Jeremiah vs Stephen Lukumay [1995] TLR 112 (HC)*** where it was emphasized that "*where a party in a case has missed the chance to challenge the admissibility of a document in evidence at the trial, that party cannot raise such objection at the appeal stage.*"

In reply to the **third ground** of appeal, that the trial Tribunal erred in law to accept a **forged sale agreement** between the

Respondent and one **Alphonse Msemakweli**, the Respondent submitted that the sale agreement was valid and was admitted in evidence before the trial Tribunal without protest from the Appellants. The Respondent reiterated his earlier submissions with respect to the first ground of appeal on how the ownership of the suit land had changed hands from its alleged original sole owner, **Leonard Gimese** to **Alphonse Msemakweli** on **25/10/1995**, and then from **Alphonse Msemakweli** to **Muzuma Lwitakubi** in **2000** as per the records from the Land Office as stated by PW2 in his testimony. The Respondent surmised that, the sale agreement was valid because it involved the owner of the suit land, **Alphonse Msemakweli**, as the vendor/seller and **Muzuma Lwitakubi** as the buyer/purchaser. In support, the Respondent cited to this Court the decision in the case of ***Farah Mohamed vs Fatuma Abdallah [1992] TLR 205 (HC)***, where it was held among other things that, "*he who doesn't have legal title to land cannot pass good title over the same to another.*" The Respondent submitted that if **Leonard Gimese** had no legal title to the disputed land he could not have passed a good title to **Alphonse Msemakweli** and then to **Muzuma Lwitakubi** who as per the records now owns the suit land.

Submitting on the fourth and last ground of appeal that the trial Tribunal erred in law to grant a transfer of right of occupancy which is **a forged document for it is not shown in its attestation clause the place where the transfer was made**, the Respondent reiterated his earlier submissions on failure by the Appellants to challenge the admissibility of the document before the trial Tribunal, and therefore they cannot seek the sympathy of this Court at the appeal stage. In

support of this particular point the Respondent cited to this Court the decision in the case of ***Ramesh Rajput vs MrsSunanda Rajput [1988] TLR 96 (CA)*** where a contestation on the admissibility of a document, a counter-affidavit, had been taken at the appeal stage, and the Court held that,

"...by not objecting to admissibility of counter-affidavit at trial court the appellant, on basis of something I the nature of an equitable estoppel, had waived his right to object to the admissibility of hearsay to this appeal."

On the issue of **forgery in relation to the documents of transfer of the disputed land**, the Respondent took issue with failure by the Appellants to make any submissions on this particular allegation, and insisted that the transfer documents were not a forgery, since the relevant authorities were satisfied that the documents for the transfer of the suit land were proper without any element of forgery, which is why the transfer was effected.

On the issue of **place of attestation**, the Respondent submitted that as per the testimony of **PW4** one **Charles Mkama**, who worked at the Primary Court in Ukrewe District from 1989-2002, before the trial Tribunal, he confirmed to have witnessed the transaction and that from 1995 there has been no any objection or complaint to the transaction.

The Respondent prayed that the appeal is devoid of any merits and should be dismissed with costs.

The Appellants have taken issue with lack of paid stamp duty revenue on the transaction documents. The issue is whether the sale

agreement was not legal and whether for want of paid stamp duty the transaction was thereby vitiated. Before I traverse this issue, let me deal first with the main bone of contention in this matter. The Appellants have maintained very strongly that, the suit land was jointly owned by **Leonard Gimese** and **MutesigwaLulinga** as per the **Land Form 43** which was issued to them in **1982**. This being the case therefore the purported transfer of the suit land in **1995** by **Leonard Gimese** to **AlphonseMsemakweli** was without the consent of **MtesigwaLuhinga**, the other joint owner of the suit land and therefore the transfer was **void ab initio**. The Respondent on his part insists that the suit land had a sole initial owner, **Leonard Gimese**, and therefore he had the right to transfer its ownership to **AlphonseMsemakweli** who in 2000 transferred it to its current sole owner, **MuzumaLwitatubi**.

The record of the trial Tribunal shows that in **Application No.220 of 2007**, which had been brought by **MuzumaLwitakubi**, the present Respondent against the present Appellants, one of the issues which were framed by the trial Tribunal was ***whether the applicant is the rightful owner of Plot 31 Block "K" NansioUkerewe***. In the course of his testimony before the trial Tribunal the Applicant (the Respondent herein) testifying as **PW1**, stated that, he had bought the suit land in **2000** from one **AlfonseMsemakweli** vide a **Sale Agreement** which was concluded before a Primary Court Magistrate of Nansio. However, for some reasons which are not apparent in the record, the attempt by the Respondents (the Appellants herein) who were unrepresented as it is also the case now, tried unsuccessfully to object to the tendering in evidence of the Sale Agreement on the ground that they do not know Msemakweli. Their attempt was successfully blocked by the learned

Counsel for the Applicant, one Mr. Laurian, who simply stated that ***"Their objection will be presented by them during the defense hearing"***(as at page 7 of the typed proceedings of the trial Tribunal dated **10/09/2008**). The Sale Agreement was therefore admitted in evidence and marked as **Exhibit P1**.

Similarly, as per the record of the trial Tribunal the attempt by the Respondents (the appellants herein) to also object to the tendering in evidence of the document for transfer of a right of occupancy and **Land Form N. 47** on among other grounds that the process was un-procedural was also successfully blocked by Mr. Laurian, learned Counsel for the Applicant on the ground that ***"There is no substantive objection. What the respondents want to show is whether the sale was procedural."*** The **Land Form No. 47** and a transfer of Right of Occupancy were collectively admitted in evidence as **Exhibit P2**.

Furthermore as per the record of the trial Tribunal, the attempt by the Respondents (the appellants herein) to object to the admissibility in evidence of documents comprising a **letter of sale from Leonard Gimese to AlfonseMsemakweli** and an **Offer of a Right of Occupancy from Leonard Gimese to AlfonseMsemakweli** was also successfully blocked by Mr. Laurian who simply stated that ***"The said transaction was done before a Magistrate, we will call him to testify. The letter was not forged, we brought this document long time ago. They were supposed to take action early."*** (as at page 9 of the typed Tribunal proceedings dated **10/09/2008**). The Chairman of the Tribunal having admitted the documents as **Exh.P3**

gave an order that "***The Respondent shall prove the contrary when their time for adducing evidence comes.***"

The record of the trial Tribunal also shows that the attempt by the Respondents (the appellants herein) to object to the admissibility of the a **transfer of Right of Occupancy from Leonard Gimese to AlfonseMsemakweli** and **Land Form No.47** as well as a **receipt in proof of payment of land rent by AlfonseMsemakweli** and a **receipt from the District Council in respect of sale transaction,** and **stamp duty receipts** on among other grounds that, they were not legally prepared and the signatures are forged, was also successfully blocked by Mr. Laurian learned Counsel for the Applicant. The documents were collectively admitted in evidence as **Exh. P4.**

On the evidence on record from the trial Tribunal, it will make the argument by the Respondent that the Appellants did not object to the admissibility of the documents at the trial Tribunal to be without any substance. The Appellants who were the Respondents before the trial Tribunal, being persons not lettered in the law, made every effort possible, unrewarding as it were to object to the admissibility in evidence of **Exhibits P1, P2, P3** and **P4.** It is therefore unfair to just condemn the Appellants as persons who sat helplessly while those documents were finding their place on the record and for which there is little they can now do other than complaining as indeed they have done in their grounds of appeal and the their submissions in support of the appeal. It is in this regard, and with due respect, I find the various case authorities cited by the Respondent in his submissions in reply pertaining to the issue of admissibility in evidence of documents at the appeal stage, much as they may be good authority, misplaced and to

have been quoted out of context. They have no bearing at all to the facts of this case with regard to contest to admissibility of documents produced in evidence at the trial stage. Thus much on the issue of admissibility in evidence of documents produced at the trial stage and the raising of the issue at the appeal stage. Let me now address myself to the evidence on record with respect to the issues in dispute in this appeal. I should emphasize here that this Court being a first instance appellate court is perfectly entitled to re-assess the evidence on record with a view to determining whether on the evidence on record the Appellants have managed to prove joint ownership of the suit land by **Leonard Gimese** and **MutesigwaLulinga**.

The Appellants maintain that the initial ownership of the disputed land was in the joint ownership of **Leonard Gimese** and **MutesigwaLulinga** as per **Land Form No. 43** dated **13th January 1982** which was received by the trial Tribunal for Identification purposes. The Appellants aver further that they are relatives of the family of **Leonard Gimese** and **MutesigwaLulinga**, the initial joint owners of the suit land. The Appellants also aver further that, there was a house which had been constructed on the suit land by the initial joint owners in which the Appellants were residing. The fact of the Appellants living in the house that was constructed on the suit land is confirmed by the Applicant (**PW1**) (the Respondent herein). When **PW1** was cross-examined by the Respondents (**1st, 2nd and 3rd**) before the trial Tribunal, **PW1** is recorded to have responded that, indeed there was a **mud house** on the disputed Plot and the people residing therein who the **seller** had told him (**PW1**) that they are his relatives (as at pages 14-15 of the typed trial Tribunal proceedings). According to **PW2**, one

Elia Mutakama, a Land Officer at the Land Office of Ukerewe District Court, as per their office records since **1976**, when the suit land was already surveyed, it was the property of **Leonard Gimese**, who in **1995** sold it to **Alfonse Msemakweli** and who in turn sold it to **Muzuma Lwitakubi** in **2000**. When cross-examined by the 3rd Respondent, **PW2** stated that he had no proof that the disputed land was owned by two persons.

On the part of the Respondents (the Appellants herein) when testifying for the defence before the trial Tribunal, the 2nd Respondent stated that the disputed land was a family property and was being owned jointly by **Leonard Gimese**, who died in **1997**, and **Augustine Raphael Nzala Gimese** otherwise known also as **Mutesigwa Luhigwa**, who died in **2003** and who was his father.

On the evidence on record, there is no evidence as to how the suit land came to be in the sole ownership of **Leonard Gimese** in **1976**. There is no evidence on record either establishing the fact of the suit land, being jointly owned by **Leonard Gimese** and **Augustine Raphael Nzala Gimese** otherwise known also as **Mutesigwa Luhigwa**. The Appellants maintain that **Leonard Gimese** was only an overseer of the suit land on behalf of the family. The Respondents (the Appellants herein) tendered before the trial Tribunal a photocopy of a document, which was received for "*Identification purposes*" purporting to be a **Land Form No. 43** dated **13th January 1982** showing the names of the two owners of the suit land as being **Leonard Gimese** and **Mutesigwa Luliga**. Furthermore, Respondents (the appellants herein) also tendered a photocopy of another document which was also received but only for Identification purposes which is dated

09/04/1981 apparently prepared by **Leonard Gimese** addressed to the Land Office on dividing the disputed land into two halves and agreeing the two persons agreeing to live together on the disputed land upon **Leonard Gimese** giving **Tshs.1500/=** to **MutesigwaLuliga**.

If indeed as per the testimony of **PW2** that the suit land was surveyed in **1976** and since then it was in the sole ownership of **Leonard Gimense**, in whose hands then the suit land was before 1976. The Appellants have not been able to bring evidence to establish this particular fact. The only documents there are, **Land Form No. 43** dated **13th January 1982** was not received in evidence and therefore cannot be relied upon to establish the existence of either family property or joint ownership of the suit land. The Appellants merely argue that they have been living on the dispute land because the suit land is a family property but have not been able to establish the fact of the suit land being a family property. In the face of the strong evidence in the nature of sale agreement to which the Appellants have also failed to establish if it was a forgery, and the other transactional documents from the Land Office (**Exh. P1, P2, P3 and P4**) whose genuineness the Appellants have not been able to fault, the claim by the Appellants that the documents were a forgery crumbles like a pack of cards.

It is also on record that **Leonard Gimese** died in **1997** and **Augustine Raphael Nzala Gimese** aka **MutesigwaLuhigwa** died in **2003**. The suit property has changed hands in the span of five years between 1995 and 2000. Curiously, **MutesigwaLuhigwa** the alleged other joint owner of the suit property, who survived Leonard Gimense, did not protest anywhere about the alleged transfer transaction, which the Appellants now maintain that it was void ab initio for lack of

signature among other things. It was expected that, since **Leonard Gimese had predeceased MutesigwaLuhigwa** he would have sprung into action to protest the manner in which **Leonard Gimese** was dealing with the allegedly jointly owned suit property without his knowledge and/or consent for they had a joint interest in the suit property.

I should also point out it here that if anything it is the Appellants who lacked the requisite locus standi in his matter. There is no evidence that Appellants are the appointed joint administrators of the estate of their deceased relatives, namely, **Leonard Gimese and MutesigwaLuhigwa** or whether they had stepped into the shoes of their departed family members as successors in title to the jointly owned interest of their relatives in the suit property.

In the same vein the Appellants having brought before the trial Tribunal a photocopy of **Land Form No. 43** dated **13th January 1982** and a photocopy of a letter dated **09/04/1981** apparently prepared by **Leonard Gimese** and addressed to the Land Office, which were received for **Identification purposes** only, and the Appellants having failed to bring before the trial Tribunal the originals of the documents which had been received for Identification purposes, these two documents are therefore of no evidential value and do not form part of the record in this matter. They could not be relied upon by the trial Tribunal to find in favour of the Respondents (the appellants herein) or by this Court in determining this appeal. The two documents which were received by the trial Tribunal for Identification purposes have failed to meet the test of exceptions to the "best evidence rule" enshrined in the Tanzania Evidence Act, Cap.6 R.E. 2002. I need not emphasize here that

in a civil litigation, the production of originals of documents lies at the root of the adversarial system of production of evidence a civil suit in order to establish it on a balance of probabilities.

In the upshot and for the above reasons the appeal fails. It is hereby dismissed in its entirety.

The decision of the District Land and Housing Tribunal for Mwanza at Mwanza in **Land Application No. 220 of 2007** is hereby confirmed and upheld.

The Respondent, **MUZUMA LWITAKUBI**, is hereby declared to be the rightful and lawful owner of **Plot No. 31 Block "K" NansioUkerewe**, the suit property.

In the nature of this matter and given the condition and circumstances of the Appellants, I shall not make any order for costs. Each party shall bear its own costs in this appeal. It is so ordered.

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R.V. MAKARAMBA

JUDGE

06/04/2018