IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

(APPELLATE JURISDICTION)

PC. CIVIL APPEAL NO. 4 OF 2020

(Arising from Kigoma District Court Civil Appeal Case No. 29 of 2019 before Hon. K.V. Mwakitalu, RM) Original Civil Case No. 148/2019 of the Primary Court of Kigoma District at Ujiji before Hon. Y. Busungu, PPCM)

MICHAEL S/O SABWEBWE.....APPELLANT

VERSUS

DR. FRANCIS S. RWEBANGIRA..... RESPONDENT

J U D G M E N T

30/04/2020 & 15/06/2020

I.C. MUGETA, J.

In Civil Case No. 148/2019 of the Primary Court of Kigoma District at Ujiji the appellant lost a case. He also lost an appeal to the District Court of Kigoma through Civil Appeal Case No. 29/2019, hence, this appeal.

The petition of appeal has five grounds of appeal. These are:-

(i) *That, the Hon. Magistrate erred in law and facts by deciding in favour of the Respondent while the evidence on record and as the law enjoins the Respondent started the down payment of*

Tshs. 4,000,000/= after having made physical search on the farm sold adhering to the caveat emptor rule and satisfied himself that the Appellant is owning unsurveyed farm from which the Appellant sold part of the farm with the fish pond.

(ii) *That, the Hon. Magistrate erred in law and facts by failing to hold that the Respondent ought and he in fact ascertained himself on the Appellant's land tenure of the suit land to be under customary tenure on unsurveyed land before the Respondent had made the down payment.*

(iii) *That, the Hon. Magistrate erred in law and facts in entertaining the claims of ownership of the land without having jurisdiction and without evidence proving that the land is owned by the alleged Tanganyika Valley Authority which is non existing Authority and a stranger to the Appellant.*

(iv) *That, the Hon. Magistrate erred in law and facts by failing to hold that the trial Magistrate misdirected herself by adjudicating the matter out of the issues raised and therefore failed to hold that it was the Respondent who breached the contract by failing to pay the remaining Tshs 6,000,000/=*

(v) *That, the Hon. Trial Magistrate erred in law and facts by neglecting to consider part of very important evidence by the*

Appellant including the cross examination and recording the parties evidence without taking an oath.

The appellant is represented by Sadiki Aliki, learned advocate, while the respondent appears in person unrepresented. The appeal was heard by way of filing written submissions.

The facts of the case are that the appellant sold to the respondent a fish pond worth Tshs 10,000,000/=. He paid Tshs 4,000,000/= as advance payment. The balance was not paid as the respondent claimed to be refunded her advance for a reason that the appellant was not owner of the land where the pond is built. It is this claim which led to this case.

In his written submission, counsel for the appellant combined the 1st and 2nd grounds of appeal. He argued the 3rd and 4th grounds of appeal independently and no submission has been made in respect of the 5th ground of appeal. I presume this ground has been abandoned.

On the combined grounds, counsel for the appellant has argued that the respondent ought to have known that he purchases property on unsurveyed land, therefore, the claim for title deed or that he believed to have purchased a surveyed land is unjustified. That the principle of "*caveat emptor*" operates against the respondent.

On the third ground, it has been argued that the first appellate court decided on extraneous matters. That its decision is grounded on the allegation that the suit pond is located on the land which belongs to the Lake Tanganyika Valley Authority which fact is not borne by evidence. That even if this fact

was in evidence, it ought to have been proved before a land tribunal with competent jurisdiction. That the respondent did not prove the land belongs to the said Authority.

Regarding the fourth ground, it has been submitted that the second issue ought to have been answered in favour of the appellant because it is the respondent who failed to pay the Tshs 6,000,000/= balance.

I have faced serious problems with the submission of the respondent because it is a general response to the submission of counsel for the appellant. The main challenge is that the response is not itemized per each ground of appeal or argument hence difficult to follow the arguments flow. I shall treat it as generally disputing arguments advanced to oppose the appeal.

Before I go further let me comment on the trial process at the trial court. According to the proceedings, which has not been typed, four issues were framed for determination. These are:-

(i) *Je ni kweli mdai alimpa mdaiwa Tshs 4,000,000/= kwa ajili ya kununulia bwawa na ardhi zikabakia shilingi 6,000,000/=.*

(ii) *Je ni kwa nini Mkataba huo haukuwa endelevu ni kwa hati ya eneo mdaiwa hakuwa nayo au ni kwa mdaiwa hakutaka kuandikiana kwa mujibu wa sheria*

(iii) *Je kati ya mdai na mdaiwa ni nani amevunja Mkataba? Aliyekataa kutoa hati ya eneo husika na maandishi yao kufanyika vyombo vya sheria au mdai kushindwa kulipa pesa iliyobakia?*

(iv) *Je kwa kuwa Mkataba haukuendelea, itakuwa halali mdaiwa kubakia na pesa pamoja na bwawa na ardhi au itakuwa haiali arudishe fedha abakie na bwawa lake?*

In my view, these issuing despite having some ambiguity, capture well the dispute between the parties. However, in the judgment, the trial court put the issues for determination thus:-

(i) *Je ni kweli mdaiwa alikataa maandishi ya kisheria?*

(ii) *Je nani aliyevunja Mkataba?*

(iii) *Je mdai ana haki ya kurudishiwa fedha yake au hapana*

These issues does not capture well the basis of the dispute. For example, in his evidence, the respondent, indeed, testified on refusal by appellant to go to record a proper contract before a lawyer. However, this evidence related to his major concern that the appellant had failed to show or prove his title to land. It is always a good practice to stick to the agreed issues when one writes a judgment. It is also important that issues must be determine one after another except where a determination on one issue determines the other issues. In this case, the trial court made a general determination of the dispute without reference to any particular issue. However, since his determination covered the issues framed before the trial, I hold that no party was prejudiced. I am satisfied that the parties when

they gave evidence, were aware of the basic issues framed and agreed upon. The trial court also, even though sparingly, considered the evidence of both sides.

The trial court decided that the appellant should refund the respondent the advance payment. It agreed with the respondent's decision to terminated the contract for want of proof of ownership on part of the appellant.

The trial court stated:-

> *"Kilichomfanya asiendelee na malipo ni baada ya mdaiwa kushindwa kumuonesha vielelezo vya kumiliki eneo lile..."*

The first appellate court confirmed the trial court's decision on this finding. This decision is what is being challenged in the first and second grounds of appeal. That the respondent ought to have known that he purchased property on unsurveyed land. With respect, the issue is proof of ownership in any form. The two lower courts found that the appellant failed to establish that he owns the pond which he sold not that the appellant has no title deed. The respondent having alleged that the pond is not his (appellant's) property, it was upon him to rebut this evidence by evidence of ownership, being customary little or a title deed. Even in his evidence the appellant while on cross examination stated:-

> *"Eneo hilo halikupimwa nilinunua kwa wenyeji hakuna hati..."*

Under the situation where his ownership is challenged, the sale agreement between him and the natives ought to have been tendered as proof of ownership. He failed to do so and I agree with the finding of the trial court

that the ownership documents which he tendered do not relate to the fish pond which he sold. The trial court held:-

> *"... Vielelezo vya kumiliki eneo lile ambavyo amevileta Exh. D4, D5, D6 vielelezo hivi havina uhusiano na bwawa la samaki alilouza".*

Under the circumstances of this case, the appellant cannot hide under the principle of "caveat emptor". The first and second complaint, therefore, have no merits.

Did the first appellate court's decision base on extraneous matter? The complained part of the judgment reads:-

> *"... the pond is constructed within the valley of Lake Tanganyika which is a property of the Lake Tanganyika Valley Authority".*

I have reviewed the first appellate court decision and found that the said statement is recorded where the learned magistrate summarized the respondent's arguments. In his ratio decidendi, the learned magistrate never referred to the submission on the Lake Tanganyika Valley Authority. He just agreed with the trial court that the appellant failed to show ownership documents. However, even if he so held, which is not the case, the evidence on the pond being in Lake Tanganyika Valley is on record. In his evidence, the respondent testified.

> *"... nilipomuuliza uhalali wa kumiliki eneo analoniuzia hakuonyesha niligundua ni tapeli ananiuzia isivyo halali amechimba eneo la bonde la ziwa Tanganyika..."*

With this evidence on record, even if it never so held, the first appellate court cannot be accused of relying on extraneous matters. On jurisdiction, as rightly held by the first appellate court, the trial court dealt with issues of breach of contract not ownership of land, therefore, it had jurisdiction to entertain the case before it.

Did the respondent fail to pay the Tshs 6,000,000/= balance? Both lower courts answered this issue in the negative. The respondent was clear on why he stopped the payment. He suspected, the appellant has no title to the land and the appellant, indeed, has failed to prove the contrary. Therefore, it is the appellant who frustrated the contract.

By way of obiter dictum, I have considered whether the suit was filed in time the cause of action having arisen in 2013 when the appellant promised to pay back the money before the police on 8/2/2013 per exhibit P4.

The parties had an oral agreement, therefore, it is governed by paragraph 5 (b) of the schedule to the Customary Law (Limitation of Proceedings) Rules, 1963 where the limitation period is three years. From 2013, this case being filed in 2019, the claim had been time barred. However, rule 4 of these rules provides:-

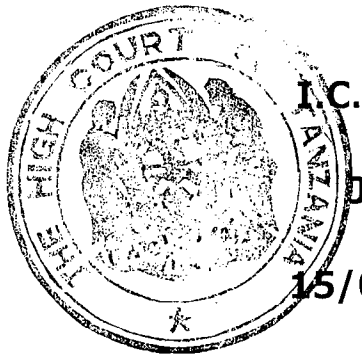
> *"The court may in its discretion admit any proceedings after the expiration of the period of limitation if it is satisfied that the person bringing such proceedings was unable for sufficient cause to bring the proceedings earlier".*

Before the hearing commenced at the trial court, the respondent is recorded saying:-

> "... *Mpaka sasa hajanilipa ndiyo nimekuja kufungua...niliugua kupooza ... nimepata nafuu".*

The proceedings of the trial court is not clear as to what prompted this statement. It also never ruled if it exercised its discretion to hear a claim which is time barred on a suffient cause of the delay being shown. However, with such statement on record, it is my view that the issue of limitation was discuss without recording and the trial court was satisfied that the respondent was prevented by illness to file the appeal earlier. I find no other reason which would have put such a statement on record.

In the event, I find the appeal without merits. I dismiss it with costs.



I.C. Mugeta

Judge

15/06/2020

Court: Judgment delivered in the presence of the respondent and in the absence of the appellant.

Sgd: I.C. Mugeta

Judge

15/06/2020