IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 9 OF 2019

(Appeal from the judgment and decree of the District Land and Housing Tribunal for Geita at Geita in Land Application No. 27 of 2015 dated 30th of September, 2016.)

JOHN CHUMA ..... APPELLANT

VERSUS

PASTOLI LUBATULA..... 1ST RESPONDENT

FRANSISCO LUTOBELA ..... 2ND RESPONDENT

DAVID VICENT ..... 3RD RESPONDENT

COSMAS MSEKWA ..... 4RD RESPONDENT

JUDGMENT

18th August, & 31st August, 2020

ISMAIL, J.

This appeal arises from the decision of the District Land and Housing Tribunal (DLHT) for Geita at Geita, in respect of Land Application No. 27 of 2015. The DLHT dismissed the appellant's claim for disputed pieces of land which he alleged that they had been encroached by the respondents.

The decision by the DLHT has not gone well with the appellant. He has moved a ladder up by way of appeal which has three grounds of appeal reproduced as follows:

1. *That, the Honourable Chairperson erred in law and fact by dismissing the Appellant's Applicant have consequences of leaving the disputed land in the ownership of Respondents as there is no evidence that that the Seller one "Maria Wanzala" had good title to pass to the Respondents.*
2. *That, the Honourable Chairperson erred in law and fact by hearing the dispute and concluding the same without visiting the locus in quo, to satisfy itself as to boundaries and neighbourhood of the land in dispute.*
3. *That, the honourable Chairperson erred in law and fact by improper admission of the purported sale agreements as exhibits and basing the decision whereof.*

In order to appreciate the genesis of the matter, it behooves me to give brief facts of the matter. These are to the effect that the appellant's grandfather, a Mr. Chuma Lugaila, now the deceased, was the owner of an 85-acre piece of land that stretches from Kabelezo village to Mwangika, in Sengerema district. Upon the demise of the owner in 2006, the said land passed on to the deceased's grandchildren, including the appellant and they continued using it until 16th December, 2011, when the respondents' allegedly encroached on it. The appellant took the matter to the Ward

Tribunal but his complaint was struck out on 3rd May, 2012. It is at that point in time that he decided to institute proceedings in the DLHT. After a hearing that saw the appellant marshal three witnesses against eight for the respondents, the DLHT came to a conclusion that the alleged encroachment had not been proved. In consequence, the DLHT dismissed the application, effectively confirming the respondents' ownership of the suit land.

Hearing of the appeal was done by way of written submissions which were filed in accordance with a schedule which was duly conformed to by the Court.

Submitting on the first ground of appeal, the appellant contended that the DLHT erroneously dismissed the application without taking into consideration the fact that the seller of the suit land, the late Maria Wanzala, did not have a good title which would be passed on to the respondents. The appellant has also taken an issue that the seller, her estate's administrator or clan members, were not called to testify on whether she had a good title to the land. The appellant contended that, in view of this failure, the testimony of 1st respondent was unbelievable. The appellant further argued that none of the respondents' witnesses testified to the fact that Maria Wanzala or Hamis Wanzala were the owners of the

suit land. To fortify his contention, the appellant cited the decision of this Court in ***Farah Mohamed v. Fatuma Abdallah*** [1992] TLR 205 in which it was held that *"... He who doesn't have the legal title to land cannot pass good title over the same to another ...."*

With respect to the second ground of appeal, the appellant's contention is that there was a compelling need for the DLHT to visit the locus in quo in order to satisfy itself on the boundaries of the land which stretches to several villages. The appellant further contended that the visit would be held in establishing the genuineness or otherwise of the sale agreements signed or witnessed by leaders of different villages. He took the view that such failure constituted a fatal omission that bred a miscarriage of justice. To buttress his view, he cited the case of ***Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed*** [1980] TLR 29 in which the Court of Appeal held:

> *"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a court may unconsciously take role of a witness rather than an adjudicator."*

In their rebuttal submissions, the respondents maintained that the sellers of the suit land had good title and that such title was derived from inheritance of the said land under customary laws and norms. Whereas

Maria Wanzala sold the land to 1st and 3rd respondents, Hamis Wanzala sold his interest in the land to 2nd and 4th respondents. The respondents contended that DW2 was one of the clan members and came and testified in that behalf. They held the view that the appellant's contention in that respect is hollow. The respondents took an issue to what was contended as the appellant's act of instituting the proceedings in his name while he was acting as an administrator of the deceased's estate. They also contended that no evidence was adduced to prove that he was acting in that capacity. They, in conclusion, held that the 1st ground of appeal is not meritorious and, therefore, dismissible.

On ground two of the appeal, the argument by the respondents is that the DLHT did not have the mandatory obligation of visiting the locus in quo. Citing the decisions in ***Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed*** (supra) and ***Felician Selestine & Another v. Mashauri Misungwi & 7 Others***, HC-Land Appeal No. 26 of 2019 (Mwanza-unreported). In the latter, the Court held that the visit to the locus in quo can only be made where there is an order calling for additional evidence through the visit. It was the respondents' contention that in the circumstances where such requirement was not a necessity, as in the instant case, the visit to the locus in quo was not a necessity.

With respect to ownership, the respondents held the view that the testimony adduced in the DLHT proved that their continued occupation of the land was lawful and that the DLHT was right in its finding that the appellant had no right over the suit land. They prayed that the appeal be dismissed with costs.

These rival submissions raise one profound question and this is as to whether the finding made by the DLHT was erroneous.

Let me start by stating at the outset that this appeal is not meritorious and that the finding made by the DLHT is free from any blemishes. I shall demonstrate.

The contention with respect to the first ground is that since the sellers did not have a legal title to the land, transfer of title to the respondents was legally impossible, meaning that the respondents' ownership was derived from a faulty title. What is clear, from the testimony adduced in the DLHT is that when the respondents acquired the pieces of land constituting the suit land, they were not aware of any ongoing dispute between the sellers and the appellant. This means that matters relating to the dispute on ownership were kept under the wraps and no evidence has been adduced by the appellant or any of his witnesses to the effect that any or all of the respondents were aware of any such dispute. This means

that the respondents were totally oblivious to any defect in the sellers' title to the disputed land. Essentially, the respondents were bona-fide purchasers of the suit land.

The Law Dictionary *(www.dictionary.thelaw.com)* defines a bona-fide purchaser to mean:

> *"A purchaser for a valuable consideration paid or parted with in the belief that, the vendor had a right to sell and without any suspicious circumstances to put him to inquiry."*

Oxford Scholarship Online (Oxford University Press) has expanded the scope of the term to convey the following meaning:

> *"A bona-fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller believes fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property."*

Thus, a bona-fide purchaser has been described as an innocent purchaser. In ***Suzana S. Warioba v. Shija Dalawa***, CAT-Civil Appeal No. 44 of 2017 (Mwanza-unreported), the Court of Appeal quoted with approval, its own decision in ***Stanely Kalama Masiki v. Chihiyo Kuisia***

w/o Nderingo Ngomuo [1981] TLR 143. It was held in the latter as follows:

> *".... where an innocent purchaser for has gone into occupation and affected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims."*

See also: **Manual on Land Law and Conveyancing in Tanzania** by Dr. R.W. Tenga and Sist Mramba at p. 220.

In the instant case, the respondents' acquisition of disputed pieces of land was done through village authorities and had their agreements tendered in the DLHT to prove that the disputed pieces of land were acquired without any knowledge of any fraud (by the sellers). The witnesses who testified for the respondents have demonstrated, sufficiently in my view, that the sellers of the said land were holders of title to the disputed land. In the case of the 1st respondent, sale of the said land was effected in 2003, when the applicant's grandfather was alive, a fact which has been cemented by DW2, DW3 and exhibit D1. In the circumstances of this case, it cannot be said that any of the respondents would be able to suspect that the sellers' title to the suit land was fraudulent. The appellant has gone further to admit that he intended to institute proceedings against the deceased seller but his intention was shelved after the seller's demise.

The respondents cannot be used as a substitute to the sellers unless the appellant has demonstrated that they are the administrators or heirs of the seller's estate. Nothing has been established to that effect.

In view of the foregoing, I hold the view that the first ground of appeal lacks the basis for faulting the decision of the DLHT. I dismiss this ground of appeal.

In respect of the second ground of appeal, the appellant's gravamen of complaint is the failure by the DLHT to visit the locus in quo with a view to collecting more evidence that would settle the ownership contest. Let me begin by highlighting the objective intended to be achieved through a visit to the suit land or *locus in quo*. These visits are intended to get a visual appreciation of the area in contention and check the accuracy of the evidence given in the course of the trial. Invariably, this happens when the dispute relates to boundaries, and it happens after the parties have closed their respective cases. The legal holdings are to the effect that the court or tribunal must exercise great caution when doing that, in order not to constitute itself as a witness in the case. In ***Mukasa v. Uganda*** [1964] EA 698 at 700, the Court of Appeal for East Africa had this to say:

> *"A view of a locus in – quo ought to be, I think, to check on the evidence already given and where necessary, and*

possible, to have such evidence ocularly (sic) demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence".

See also: ***Nizar M.H. Ladak v. Gulamali Fazal Janmohamed*** (supra).

The quoted excerpt brings one singular message, and this is to the effect that courts and tribunals should not indulge in a fishing expedition by assuming the role of an investigator and gather fresh evidence at the locus. This will be tantamount to calling for fresh evidence where circumstances do not permit calling for such evidence. In the instant case, the question for settlement is not one relating to boundaries which would be resolved through a visit to the locus in quo. It is a contest on the validity of the sale of the suit land by a person who is allegedly without any claim of right to the said land. Importantly, as well, none of the parties moved the Court to order that such a visit be made, meaning that none of them saw the need for such indulgence. I find nothing convincing in the

appellant's contention on this ground, and I find the ground of appeal utterly underwhelming and lacking in substance. I dismiss it.

The appellant has not submitted on the third ground of appeal and the respondents' reply has not dwelt on, either. While I consider it as abandoned, let me state, albeit in passing, that an objection to admissibility of documentary testimony ought to have been done at the point of admission and not after. Since the appellant raised no objection on the admissibility of the documents, the rest of the appellant's contention is barren of fruits and I attach no weight to the contention. I choose to dismiss this ground of appeal.

As I pen off, I find it pertinent to address the nagging issue raised by the respondents. This is in relation to the appellant's failure to state or tender evidence that the appellant is an administrator of the deceased's estate. Let me state from the outset that this contention is hollow and untenable. The letters of administration that appointed the appellant were attached to the application instituted in the DLHT. While it is acknowledged that the legal requirement is that the applicant ought to have sued as an administrator and that such capacity ought to have been reflected in the title of the case, such omission is not of a fundamental effect. It is an omission that can be cured through tendering of the letters of

administration as was done in the trial proceedings, and the appellant stated in the application that he was suing as an administrator. I hold the view that the omission is tolerable (See: ***Suzana S. Warioba v. Shija Dalawa*** (supra)).

Overall, I am persuaded by the respondents' arguments that circumstances of this case are such that the findings of the DLHT should be left unscathed. Accordingly, I dismiss the appeal in its entirety with costs.

It is so ordered.

DATED **at MWANZA** this 31st day of August, 2020.

M.K. ISMAIL

JUDGE

Date: 31/08/2020

Coram: Hon. M. K. Ismail, J

Appellant: Mr. Kishosha, Advocate for Mr. Alfred Daniel, Advocate

Respondents: 1st, 2nd, 3rd, 4th — Mr. Kishosha, Advocate for Mr. Katemi, Advocate

C/C: B. France

Court:

Judgment delivered in chamber in the presence of Mr. Kishosha, Advocate holding brief for Mr. Alfred Daniel for the Applicant and Mr. Katemi for the respondents and in the presence of the parties themselves, this 31st August, 2020.

M. K. Ismail

JUDGE

At Mwanza

19th August, 2020