IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPEAL CASE NO. 15 OF 2019

(From the decision of the District Land and Housing Tribunal for Ukerewe District at Nansio in Land Appeal No. 22 of 2018 dated 20th September, 2018)

FESTUS KATULA..... APPELLANT

VERSUS

LADSLAUS ALUMASI ..... RESPONDENT

JUDGMENT

20th May, & 10th August, 2020

ISMAIL, J.

This is a second appeal which arose from the proceedings commenced in the Ward Tribunal of Murutunguru in Ukerewe, in respect of Land Application No. 11 of 2011. It is in relation to two farm lands located at Bugombe locality within Murutunguru Ward in Ukerewe district. The contention by the respondent who instituted the trial proceedings is that the appellant trespassed onto the disputed land which is alleged to be part of the family land bequeathed to the respondent and his siblings, following the demise of their father. The appellant's contention then, was

that the suit land was sold to him by the respondent's brother, Patrick Almas for a consideration of TZS. 1,500,000/-, pursuant to two sale agreements which were signed on 30th March, 2012. The Ward Tribunal was convinced that the testimony adduced by the appellant and the witnesses he marshalled was credible and weightier. One of the witnesses that testified for the appellant is the alleged seller of the suit land. In the end, the trial tribunal declared him as the lawful owner of the suit land.

The appellant's triumph did not amuse the respondent. He swiftly moved to the District Land and Housing Tribunal (DLHT) where he instituted an appeal (Land Appeal No. 22 of 2018), whose decision was delivered on 20th September, 2018. The DLHT took the view that the question of ownership of the suit land could not be resolved until and unless probate and administration issues relating to the deceased's estate are resolved. The respondent's family was, consequently, ordered to institute a probate case to establish their ownership of the suit land.

The DLHT's decision was too hard to swallow for the appellant. He has decided to impugn it by way of an appeal which has grounds of appeal paraphrased as hereunder:

1. *That the Chairperson erred in fact in deciding that the land in dispute is a family land.*
2. *That having decided that the land in dispute belongs to the family the Chairperson went on and decided that ownership of the said land should be proved in a probate case.*
3. *That the Chairperson erred in law and in fact in ignoring the oral and documentary evidence adduced by Patrick Almas to the effect that the land in dispute belongs to him.*
4. *That the Chairperson erred in law and in fact in ignoring the evidence of the appellant that he is a bona fide purchaser of the land in dispute.*

This appeal was argued by way of written submissions, preferred by the parties consistent with a schedule which was drawn by the Court. Submitting in support of the appeal, the appellant contended, in respect of the first and second grounds of appeal, that the disputed land is not a family land, a fact that had been testified by Patrick Almas and three other family members who witnessed the sale. These included the respondent who subsequently denied that he witnessed the sale. Decrying the DLHT's decision, the appellant contended that the decision to order reference of the matter to a probate court treated the matter as if it relates to a dispute on inheritance while in fact it is not.

Arguing in respect of ground three of the appeal, the appellant submitted that he adduced sufficient evidence to prove that the land in dispute belonged to Patrick Almas who sold it to the appellant and that the disposition of the said land was duly witnessed by the village leadership. He contended that the intention to sell the said piece of land was advertised for more than two years to the date of the disposition. This means that there was sufficient time to ascertain if the disputed land was a family land as contended. In this respect, he cited section 100 of the Evidence Act, Cap. 6 R.E. 2019.

Finally on the fourth ground, the appellant contended that from the totality of the evidence, it was clear that he was a *bonafide* purchaser of the land in dispute. He prayed that his appeal be allowed.

In rebuttal, the respondent submitted in respect of grounds one and two to the effect that the disputed land is under the joint ownership of the heirs of their deceased father, and that the purported sale was done with the consent of the members of the family. He contended that sale of the said land was witnessed by people who were minors. He also contended that there was no proof of how Patrick became the sole owner of the suit land while the said land had not been distributed among the beneficiaries.

With respect to ground three, the respondent argued that the appellant's evidence was ignored because the DLHT was convinced that the sale was illegal and that the seller was not a legal owner of the suit property. This meant that the contract was invalid.

Submitting on ground four, the respondent made reference to section 29 of the Law of Contract Act, Cap. 345 R.E. 2019, and contended that the sale agreement was void. He argued that the sale could not be *bonafide* if the seller is not a legal owner of the suit land. He, consequently, prayed that the appeal be dismissed with costs.

From these rival submissions the question to be tackled in respect of this appeal is whether the sale of the disputed land was irregular and therefore void.

As I tackle this, let me state from the outset that this appeal is meritorious and I allow it. I shall demonstrate why.

With respect to the first two grounds, the appellant challenges the DLHT's decision to order that the question of ownership of the disputed land be decided through probate proceedings to be instituted by the respondent and his siblings. This implies that the DLHT was not sure about the respondent's contention that this was a family land. If this assumption

is true, then it means that the respondent had failed to convince the DLHT that a family land had been encroached by the appellant. This ought to have left the evidence of the appellant that proved, through the seller of the said property, that the suit land was his and was entitled to dispose it the way he felt was in his best interest. The DLHT ought to have understood that the law (sections 110 and 115 of the Evidence Act (supra)), is to the effect that a person alleging the existence of a certain fact has the duty of proving what he is alleging. This canon of evidence has a long history and it has been subjected to various comments, some of which were from the legendary such as the authors of Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis. At page 1896 of the said commentaries, the learned authors aptly state as follows:

> ***".... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot***

proceed on the basis of weakness of the other party..." [Emphasis added].

The learned authors' views are in all fours with the fabulous reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, cited with approval in the decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), in which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

It was erroneous for the DLHT to choose not to be convinced about the respondent's account of facts and choose to ignore the evidence which proved that the land in question was the property of Patrick Almas who subsequently disposed it of to the appellant. The probate proceedings to which the appellant cannot be a party would not resolve the question of

whether the sale was proper or not. If the sale was to be considered irregular, the blemish would lie squarely to the seller who is also a member of the respondent's family. In this regard, I find plausibility in the appellant's contention and I find fault in the DHLT holding. I allow these grounds of appeal.

The last two grounds fault the DLHT's decision to attach less weight to the testimony adduced by his witnesses. It should be recalled that the DLHT handled the matter as a first appeal, meaning that testimonies which were evaluated on appeal were adduced in the Ward Tribunal. This is where demeanor and credibility of the witnesses was assessed before a conclusion was made on which testimony was credible and therefore reliable. This is its domain and the trite position is that on those matters, the trial court's findings are binding unless circumstances exist, calling for re-assessment of the witness's credibility (See: ***Omari Ahmed v. Republic*** [1983] TLR 52). Emphasis to this position was laid down in ***Shabani Daudi v. Republic,*** CAT-Criminal Appeal No. 28 of 2000 (unreported) in which it was held:

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of*

that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused person. In those two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court..."

The foregoing position was built on the principle which was accentuated in the earlier decision in ***Ali Abdallah Rajab V Saada Abdallah Rajab & Others*** [1994] TLR 132 wherein it was held:

> *(i) "Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion.*
>
> *(ii) Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

The position in the foregoing decisions bred the holding in ***Goodluck Kyando v. Republic,*** CAT-Criminal Appeal No. 118 of 2003 (unreported) in which it was held thus:

> *"... it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

See also: ***Haji Ibrahim v. Republic*** (1975) LRT 56; and ***Nangera v. R*** (1972) HCD No. 24

No reasons were assigned by the Chairperson of the DLHT to justify her decision to disbelieve the evidence of Patrick Almas who testified to the effect that he was the lawful owner of the suit land. Instead, the decision was based on an unsubstantiated claim raised by the respondent. This defied the canon of justice emphasized in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 to the effect that ***"the person whose evidence is heavier than that of the other is the one who must win***. Since the testimony adduced by the appellant was heavier and reliable than that of the respondent, my unflustered conclusion is that the scale tilted heavily in the appellant's favour. The DLHT ought to have declared him the victor. Instead, the Chairperson gave the respondent's case a lifeline by allowing him to go, and knit evidence which would establish ownership of land. In so doing, the DLHT which is only charged with the responsibility of evaluating and making sense of what is presented before it was actively involved in plugging the gaps or stitch torn case in the respondent's interest.

In ***Haji v. New Building Society Bank*** [2008] MWHC 36, the High Court of Malawi held as follows:

> *"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case.* ***Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available."***

The quoted excerpt guides on what the DHLT ought to have done the moment it realized that the case for the respondent was deficient and less gluey to hold on to victory.

In the upshot, I find plausibility in the appellant's case and I allow the appeal. Accordingly, I quash and set aside the judgment and decree of the DLHT and restore that of the Ward Tribunal.

The appellant is to have his costs.

It is so ordered.

Right of appeal duly explained to the parties.

DATED **at MWANZA** this 4th day of August, 2020.

M.K. ISMAIL

JUDGE

Date: 10/08/2020

Coram: Hon. M. K. Ismail, J

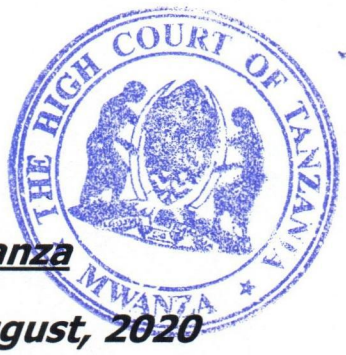
Applicant: Present in person

Respondent: Present in person

B/C: B. France

Court:

Judgment delivered in chamber and in the presence of both parties this 10th August, 2020.



M. K. Ismail

JUDGE

At Mwanza

10th August, 2020