

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND CASE APPEAL NO 31 OF 2020

(Arising from Appeal No. 101 of 2012 of the District Land and Housing Tribunal for Mwanza at Mwanza dated 20/3/2020. Original Land Case No. 65 of 2017 of Nyasaka Ward Tribunal dated 10/8/2017)

ISAKA PIUSAPPELLANT

VERSUS

AGNES KAFULARESPONDENT

JUDGMENT

27/10 & 30.11.2020

RUMANYIKA, J.:

The 2nd appeal is against the concurrent judgment and decree of Nyasaka Ward tribunal (the wt) and Mwanza District Land and Housing Tribunal (the DLHT) dated 10/8/2017 and 20/3/2020 respectively. With respect to a particular plot against Isaka Pius (the appellant) Agness Kafula (the respondent) having had all through won the war and battle.

The 4 grounds of appeal revolve around 3 points essentially;

- a) That the DLHT improperly evaluated the evidence on record.
- b) That the DLHT grossly erred not holding that the w/t just ignored the appellant's evidence.
- c) That the DLHT grossly erred in law without reasons on record having parted company with the assessors.

Messrs V. Kiburika and John Edward learned counsel appeared for the appellant and respondent respectively.

Mr. V. Kiburika learned counsel submitted; **(1)** that the vendor one Mlangwa Kafula was not joined as a party and he was on record in that regard having so testified and some local leaders supported the former's evidence yes, but if anything, also the seller should have been put to task (the **case of Juma Kadala V. Laurent Mukande** (1983) TLR 103 **(2)** that contrary to the DLHT decision, actually the respondent's case was not on balance of probabilities proved in her evidence one having had not proved that indeed the deceased father had given her the plot over a clan meeting leave alone size of the land as at the time of the alleged sale the vendor's father was still alive but the latter did not object it therefore the vendor successfully passed the title **(c)** that although it was crucial, contrary to the principle in the case of **Translaus Rugaba Kasusula V. The AG V. Phares Kabuye** (1982) TLR 338 (CA) the local leader's evidence was not assessed or evaluated it was simply ignored. That is all.

Mr. John Edward learned counsel submitted; **(1)** that although the purported vendor was not joined as a party, yet still the latter appeared and he testified as such the legal requirement therefore no longer existed (case of **Juma Kadala** (supra) distinguishable). That according to provisions of Order 1 Rule 9 of the Civil Procedure Code, no case could be defeated just for a reason of non-joinder of the parties and an order for trial **de novo** may result to wastage of time and resources **(2)** that in fact the two tribunals bellow properly evaluated the evidence on record the respondent's sister one Katarina Kafula also having had supported the respondent's evidence and at times the purported vendor had no title to

pass one having had even undertaken to surrender the disputed land because the sale was void ab'initio. That is all.

Very briefly, the evidence on record reads thus;

SM1 Agness Kafula (the respondent) stated that her deceased father gave her the plot which comprised of a family cemetery but for quite sometimes she left it under care of her in law only on arrival to find it encroached and tilled by the appellant. That she complained and the local chair only ruled in the respondent's favor.

SM2 Katarina Kafura stated that the respondent and brother one Mlangwa had got a plot each from their late father only that in the respondent's absence the brother sold the latter's plot. That Sm2 and fellows did attempt it but they failed to redeem it.

Sm3 one Alex Nchina testified as replica as the evidence of Sm1 and Sm2.

Su1 Mlangwa Kufula stated that initially the disputed plot only belonged to him then he sold it to the appellant one Isaka where nobody bothered until father was reported dead.

Su2 Edwin Mchopa with respect to the disputed plot he witnessed the sale agreement between the said Mlangwa and the appellant.

Su3 Petro Luhele stated as per evidence of Su2 only that too, he witnessed the sale agreement but in capacity of the local Ten cell leader and it was sold for shs. 500,000/=.

Su4 Gaspar Ngwiji the local chair stated that the appellant purchased the disputed plot from Mlangwa for shs. 500,000/= That is it.

The central issue is whether the respondent's case was proved on balance of probabilities. The answer is yes for two main reasons shortly herein after shown.

In his findings and decision, the DLHT chair considered the respondent being a truthful witness;-

"... In the present case **the respondent** who was applicant at Nyasaka Ward tribunal **established well his case how she was given the suit land by her father before the clan meeting ... but the appellant and his witness Mulangwa Kafula have failed to prove** that the said Mulangwa Kafula was the lawful owner of the suit land **by even call clan members as their witness to prove** if the said Mulangwa Kafula was given the suit land by his late father **as she did the respondent Agnes Kafula** by calling the clan, members **Thus being the position the agreement between the appellant Isaka Pius and the respondent brother Mulungwa Kafula is null and void ... and the respondent is the lawful owner of the suit land and I differ with the opinion of both assessors"**

Literally means that as between the brother and sister, and, with respect to source of the plot, the latter's evidence weighed heavier than the other's. Unlike the brother (Su1), the respondent who claimed that their father had given her the plot, she had the reliable supporting evidence of Sm1 equally a family / clan member leave alone the two courts' concurrent factual findings which I am inclined not to disturb. I

would increasingly hold that with all such evidence the appellant may have had purchased the disputed land from one Mlangwa Kafula yes, but the issue is whether the latter had good title to pass.

As the respondent's case was more reliably supported by sister (Sm2), she may have been given the disputed plot by deceased father and before the latter died he sold it to the appellant yes, in which case therefore crucial as it was too, the said father or any other family member should have witnessed the purported sale agreement, only the local leaders (Su3 and Su4) did leave alone nondisclosure of the date of the sale. Now that for the above stated reasons the purported vendor had no title to pass, the sale therefore was void ab'initio non joinder of the purported vendor notwithstanding much as it trite law that misjoinder, or in this case non joinder of the parties it cannot defeat interest of justice (Order 1 Rule 9 of the Civil Procedure Code Cap 33 RE. 2019).

The issue of adverse possession in passing raised by the appellant it needs not to detain me because on that one, not only according to provisions of the Law of Limitation Act Cap 89 RE. 2019 with lapse of 8 years only the case was still within time, but also no evidence was sufficiently led with a view to computing time what exactly was the date of the purported sale agreement.

Moreover, now that disputed it was more or less a clan land and he had reasons to know, and as said, the purported purchaser (appellant) took no trouble at least to have a clan member witness it, not only the former did not make a diligent search to eliminate chances of there being encumbrances, but also he just risked it all.

In the upshot, the appeal is dismissed with costs. The concurrent decisions and orders of the two tribunals bellow are hereby upheld. It is so ordered.



Right of appeal explained.


S. M. RUMANYIKA

JUDGE

17/11/2020

The judgment delivered under my hand and seal of the court in chambers this 30/11/2020 in the presence of both parties.



A handwritten signature in blue ink, consisting of several horizontal strokes and a long, sweeping line extending to the right.

F.H. MAHIMBALI
DEPUTY REGISTRAR

30/11/2020