IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

LAND APPEAL NO. 06 OF 2017

GEORGE WILLIAM GILLI.....APPELLANT

VERSUS

BASLEY HATIBU MREMA..... RESPONDENT

(From the Judgement of Kinondoni District Land and Housing Tribunal)

(Lung'wecha- Esq, Chairman.)

dated 10th April 2017

in

Land Application No. 343 of 2013

JUDGEMENT

10th December 2020 & 9th February 2021

A.K Rwizile. J

Background facts leading to this appeal are that, appellant herein was the owner of a suit land and he sold the same to the respondent. The parties entered into two sale agreement in November, 2009. One of the agreements shows that, the appellant had sold 2500sqm of land for the sum of 15,000,000/= and another agreement shows another 2500sqm sold for sum of 1,000,000/=. Appellant alleged that he only sold 2500 sqm to respondent for 16,000,000/= he claimed that having two sale agreements was designed to evade tax at ward executive office.

These facts differ from those of the respondent who claimed to purchase whole of the suit land measuring 5000 sqm.

It was also alleged that, in 2013 the appellant obtained a right of occupancy on the suit land in his name despite the fact that the same land was sold to the respondent. This is when the dispute between the parties arose. When, they did not reach a consensus on the matter, the appellant decided to file Land Application No. 343 of 2013 before the tribunal seeking a recovery of a part of land which he claimed was not part of the sold land. The case was heard and dismissed for lack of merit. Appellant was aggrieved by the decision; he is now before this court to appeal on the following grounds;

1. *The honourable court erred in law and fact in holding that, the applicant failed to prove his case without due regard to the evidence on record and appellant's final submission*
2. *The honourable court erred in law and facts in holding that, the appellant sold his whole piece of land which measures 6772 sqm without due regard to the evidence on record.*
3. *The honourable court erred in law and in facts in holding that the respondent has proved his counter claim*
4. *The honourable tribunal erred in law and in fact when it enforced a contract which is marred by uncertainty and illegality for the benefit of the respondent*

He therefore asked this court to set aside the judgement of the tribunal and that the sale agreements be declared illegal and unenforceable. The respondent be ordered to surrender the tenancy to the appellant and cost of this appeal be awarded in favour of the appellant.

At the hearing the appellant was represented by Mr Mfalla learned advocate while the respondent enjoyed the services of Mr Masumbuko learned advocate. In support of the appeal Mr Mfalla submitted on ground one to three together that, the tribunal did not take into consideration the evidence and submission of the appellant brought before it. He said, the record shows the suit land has a total of 5000sqm, he added that the dispute arose when the appellant claimed to have sold 2500 sqm to the respondent and not 5000 sqm. He asserted that, parties used two different contracts in respect of the same area of 2500 sqm, which the appellant wanted payment of 15,000,000/= while all taxes to be borne by the respondent.

It was his submission further that, it was the contract of 1,000,000/= which was presented at the local government. But to his surprise, he said, the respondent presented the contract of 15,000,000/= when they had agreed not to do so. According to him, that was the intention of the respondent to show that he had bought two pieces of land measuring 2500 sqm each. The learned advocate argued that, the same defeats logic to think that a plot of 2500 sqm could be worth 1,000,000/=. He said, the same could not be true that is why he claimed that, neighbours were the same.

His further submission was that, the decision of the tribunal mentioned that, respondent got 6772 sqm which he said, they did not know where are the same coming from. He said, the agreement between the parties were for 2500 sqm, so he claimed, the decision was erroneous. When submitting on ground four, Mr. Mfalla argued that, there is no dispute that the two contracts measuring the same are illegal and unjust. He said, the same cannot be tendered in court.

He added that the parties avoided tax with these contracts. According to him, the respondent refused to survey his plot for a right of occupancy since, the land was already surveyed. He said further that, the respondent obtained services of Mr Lamwai to confuse and defeat justice by writing a letter that the respondent bought 5000sqm. He cited the case of **Zakaria Barie Bura vs Theresia Marie John Muberu** [1995] TLR 211 that contract which are illegal are unenforceable in law. He therefore prayed for parties to return to their original position.

Disputing the appeal Mr. Masumbuko learned advocate argued on ground one to three that, advocate for appellant did not show any error in the judgement and proceedings of the tribunal. He argued that since the same was not present at the trial he therefore tries to create a new case. It was his submission further that, the evidence was clear that the sale agreements were not tendered by the appellant. He added that, the same were tendered by the respondent and they matched the evidence of the appellant. He submitted further that; the judgement shows that the appellant did not call any witness, as per page 4 of the judgement.

Moreover, his argument was that, the appellant prepared the contracts, under contra proferentem rule, where in case of doubt, it has to be construed against the maker. He asserted that, the tribunal went to the locus in quo, so he said the evidence in exhibit D1 was corroborated and which means land was sold as per agreements.

Mr Masumbuko argued that, the tribunal was clear that the appellant did not speak the truth. There was nothing illegal, according to him, in respect of paying taxes. He cited the cases of **Salma Mohamed Adballah vs Joyce Hume,** Civil Appeal No. 149 of 2015 at page 18 and **Pauline**

Samson Ndawavya vs Theresia Thomasi Madaha, Civil Appeal No. 45/2017 at page 15-16. It was held in the case that; it is the duty of the parties to make good evidence in court by calling witnesses.

As for ground four, the learned counsel submitted that, the amount of 16,000,000/= was paid and there was no proof that the local government taxes were not paid. He said that, the case of **Zakaria Bura** (supra) is distinguishable since, there is nothing illegal in this case at hand. He therefore prayed for this appeal to be dismissed with costs.

When re-joining, Mr Mfalla asserted that, it was not true that appellant prepared the agreements, he said, the same were drawn by the respondent's son. He asserted more that, the 6772 sqm were not part of the contract, since they were awarded by the tribunal. Further, the case of **Salma Mohamed Abdallah (supra)** is distinguishable, because it dealt with search, which is not the case here and the same applies to the case **Pauline Samson Ndawavya (supra)**. He argued further that, the contracts were in possession of the respondent when the case was brought to the tribunal.

Having considered the rival submission of the parties and the records of the tribunal, I will also determine the grounds of appeal in the same manner as submitted by the parties, starting with ground one to three together, then ground four will be treated separately. It has to be clear that, it is indeed not in dispute that parties entered into sale agreements on the suit land. It is also not in dispute that there are two sale agreements. It was submitted for the appellant that, the tribunal did not consider the evidence of the appellant brought before it.

It was also submitted further that the respondent had bought 2500 sqm for 15,000,000/= and not 5000sqm.

It would appear that the appellant was a sole witness. He tendered no evidence in connection with sale of the suit land. It is trite, he who alleges must prove. He claimed to have sold 2500sqm of the suit land to the respondent but failed to prove the same since it appeared that there are two sale agreements measuring 2500sqm each with a different amount of consideration. The law of Evidence is so clear that, a person who wants the court to decide in his favour has to prove each fact stated by him in court. The same is provided for under Section 110(1)(2) of [Cap 6 RE 2019] which states as hereunder;

> *110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

It was the appellant's duty to lead evidence that would prove that he sold 2500sqm to the respondent despite the presence of two agreements denoting a total of 5000sqm. Despite the analysis above, what I consider to be the issue here is whether the appellant sold 2500sqm or 5000sqm to the respondent as per sale agreements.

To begin with, in law, an agreement refers to *every promise and every set of promises forming the consideration for each other*, as per section 2(1)(e) of the Law of Contract Act [Cap 345 R.E 2019]. The same become contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object.

In the wording of section 10 of the Law of Contract Act, it is clearly stated thus;

> *All agreement are contracts if they are made by the free consent of parties competent to contracts, for a lawful consideration and with a lawful object.*

As for the issue at hand, those two agreements qualify to be contracts since there were no allegations from both parties that there was no free consent when making the same. It is so clear on the face of those contracts that, they were made freely by the parties competent to contracts, and there are lawful considerations on two of them, since one of the contracts is for 15,000,000/= and another one is for 1,000,000/=.

based on the foregoing it is my considered view that, the appellant sold 5000sqm for 16,000,000/=. The allegation by the appellant that he sold 2500sqm only and that other agreement was made just to avoid paying taxes to the local government authority are subject to proof as per Section 110 of [Cap 6 RE 2019]. The Court of Appeal in the case of **Paulina Samson Ndawavya (supra)**, held that;

> *It is a trite law and elementary that he who alleges has a burden of proof as per section 110 of Evidence Act, [Cap 6 R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.*

I therefore hold that, the tribunal was right when dismissing the appellant's case since the same was not proved, and I do not see anything to fault the findings of the learned Chairman on this aspect. Based on the evidence and submissions, the respondent is entitled to 5000sqm only proved in the two agreements, which is plot No. 1384 Block Q4 Kibamba Dar es Salaam. It is therefore of value to conclude that the 1st to 3rd grounds of appeal are merited and allowed partly to the extent explained.

As for ground four which states that; *The honourable tribunal erred in law and in fact when it enforced a contract which is marred by uncertainty and illegality for the benefit of the respondent.*

As argued by the appellant, there are two contracts with 2500sqm each. I have held so shortly when dealing with the first three grounds. It was submitted that land was not sold to him as per agreements, because one agreement was designed to evade taxes and so the same should be held to be illegal and unenforceable in law. It was unfortunate that this allegation was not proved, mere words do not support the case unless the court has reason to believe they are a true reflection of things.

But the question to be answered is which contracts are unenforceable in law or what amounts to unenforceable contract. The Law of Contract is very clear that all void contracts are not enforceable by law, and what amounts to void contracts are stated in Part III of the Law of Contract Act to mention the few; *when there were no free consent by the parties when making the same, unlawful consideration, unlawful object, parties were incompetent when making the contract* and other factors considered by this law. It is also clear that an agreement that breaks the law cannot be enforceable basing on the doctrine of the sanctity of contracts. That, as I

have said above is a serious issue to be proved by evidence, which has not been proved. It is my view that appellant ought to have proved the same against those two contracts to call them illegal and unenforceable, failure to do so renders his argument unjustifiable.

However, advocate for the appellant cited the case of **Zakaria Barie Bura (supra)** but his argument was not in connection with what was decided in this case. In this case the Court of Appeal held that *the agreement bearing no indication of payment of stamp duty under Stamp duty Act renders that agreement inadmissible as evidence in court.* While Mr Mfalla argued that the contracts were used by parties to evade tax at the Local Government. Depending on this argument I agree with the counsel for the respondent that this case is distinguished with the facts at hand. There is no evidence showing that the Local Government taxes were not paid. This ground lacks merit, it is dismissed.

For the foregoing reasons this appeal is partly allowed to the extent that respondent is entitled to 5000sqm and not 6772sqm on Plot 1384 Block Q4 Kibamba Dar es Salaam. I make no order as to costs.

A.K. Rwizile

JUDGE
9.02.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY