IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 5 OF 2020

(Appeal from the decision of the District Land and Housing for Manyara at Babati, Application No. 2 of 2018)

ELIYAHU ISRAEL ..... APPELLANT

Versus

GODFREY LIKINDISHU ..... 1ST RESPONDENT

DAUDI MUKAINE ..... 2ND RESPONDENT

JUDGMENT

25th March & 17th May, 2021

Masara, J.

This appeal arises from the decision of the District Land and Housing Tribunal for Manyara (the trial Tribunal) which dismissed the Appellant's claim against the Respondents over two pieces of land located at Kifaru Village within Babati District, one measuring 4¾ acres and the other 1¼ acres respectively (the "suit land"). Before the trial Tribunal, the Appellant was claiming to be declared the lawful owner of the suit land. The Respondents were declared lawful owners of the suit land instead. That decision did not please the Appellant. In an effort to have the said decision varied, he has preferred this appeal on the following grounds:

(a) That, the trial Tribunal erred in law and fact for failure to consider the evidence adduced by the Appellant;
(b) That, the trial Tribunal erred in law and fact for failure to determine lawful ownership of the suit land; and
(c) That, the trial Tribunal erred in law and fact by giving judgment based on an invalid contract.

At the hearing of the appeal, the Appellant was represented by the Legal and Human Rights Centre through the services of Mr. Richard, Manyota,

learned advocate. The Respondents engaged the services of Ms. Natujwa Bakari, learned advocate. The appeal was heard through filling of written submissions.

In support of the appeal, Mr. Manyota submitted on the first and second grounds of appeal combined. He stated that matters relating to ownership of land are legal matters that need a decision maker to take into account all legal aspects. He was of the view that the Appellant's evidence in the trial Tribunal was credible and sufficed to warrant the Tribunal to hold that he did not sell the suit land but had only pledged it as security for a loan of TZS 70,000/= from the 1st Respondent. Mr. Manyota contested the trial Tribunal's holding that the Appellant did not bring witnesses to substantiate his claims, citing section 143 of the Evidence Act, Cap. 6 [R.E 2019] which provides that there is no particular number of witnesses required to prove existence of certain facts. Mr. Manyota also made reference to the case of ***P.T. Kasikana Vs. Registered Trustees of Archdiocese of Dar es Salaam***, Land Appeal No. 95 of 2019 (unreported). The learned counsel also submitted that the Chairman of the trial Tribunal did not consider the evidence of the Appellant maintaining that failure to consider evidence of either party before pronouncing a decision renders the decision a nullity. He cited this Court's decision in ***Kizuwa Kibwana Vs. Gibson Baingaye***, Misc. Land Appeal No. 35 of 2017 (unreported).

Submitting on the third ground of appeal, Mr. Manyota stated that the contract that was tendered in the trial Tribunal had the Appellant's disputed signature and also included alleged signatures of some persons

challenged at this stage. She maintained that the witnesses who witnessed the signing of the contract testified as RW1 and RW2. She distinguished the decision in ***Hamis Hassan Kudura*** (supra) cited by Mr. Manyota stating that it is irrelevant since it is not the Court's duty to call witnesses to the Court and, as such, the Appellant failed to call any material witnesses to build up his case. Ms Natujwa therefore implored the Court to uphold the decision of the trial Tribunal and dismiss the appeal.

In a rejoinder submission, Mr. Manyota reiterated that the purported sale deed had a number of irregularities making it an invalid contract. He cited the irregularities to include the fact that it is in a form of a letter aiming at selling two separate pieces of land at the same time. Also, that it does not bear the names of witnesses nor does it give description and boundaries of the said sold land. He was of the view that the case by the Respondent was not proved on the balance of probabilities as required in law.

I have dispassionately considered the grounds of appeal, the trial Tribunal records and the rival submissions of the parties. The issue for determination is whether the appeal should be sustained on the grounds stated by the Appellant. To respond to the issue stated, I will determine the grounds of appeal in the same manner as canvassed by the parties in their written submissions.

In the first and second grounds of appeal, the Appellant's main complaint is that the trial Tribunal did not consider his evidence thereby occasioning

miscarriage of justice. The Respondents took an opposite view. In their view, the trial Tribunal was fair and that on the preponderance of evidence, their case was weightier. I do agree with the Respondents that the evidence from both sides were considered by the trial Tribunal. Whether the analysis and the final verdict was just, that is a different matter. In its judgment, the Tribunal chairman made it clear that the Appellant had no evidence to support his claims of having only loaned the farm to the 1st Respondent. The Appellant did not tender the loan agreement he stated to have made with the 1st Respondent. On their part, the Respondents tendered a purported sale agreement and an alleged police forensic report which showed that the Appellant had signed the sale deed way back in 1993.

In evidence, the Appellant stated that he pledged the suit land as security for a loan of TZS 70,000/= from the 1st Respondent for the purposes of taking his father to the hospital. He insisted that he handed the land to the 1st Respondent through signing a document which, in good faith, he left it with the 1st Respondent. This, according to him, was in 1999. When he got the money and took it to the 1st Respondent, the 1st Respondent declined to accept it and hand back the land. He maintained that he had purchased the suit land. Meanwhile, the 1st Respondent had given part of the suit land to the 2nd Respondent in exchange of another piece of land.

I am aware that proof in civil cases is on balance of probabilities. The Appellant had a duty to prove his ownership over the suit land and also prove that he had not sold the suit land to the 1st Respondent. As correctly stated by him and affirmed by the Respondent, the law does not specify

the number of persons required to prove a material fact. In this case, the Appellant only summoned one witness. His witness's evidence was not very coherent but proved two important facts. Those are that the suit land had tombs of the Appellant's family members and that part of the suit land belonged to his family and not to the Appellant. The record, not the proceedings, contains lamentations by the Appellant who wanted the alleged author of the sale deed to be summoned to testify. This is proved by his letter dated 26/11/2019 and cross examination of the Respondents. The trial Tribunal Chairman did not make any comments on the reasons why the said author was not summoned to testify either as the Appellant's witness or as witness for the Tribunal, considering that the Respondents were reluctant to call him allegedly because he favoured the Appellant. When the said "sell deed" was about to be tendered, the Appellant objected in the following words:

> *"**Applicant:** I objected it before Mr. Makwandi. It is Christopher (the alleged drafter) to be called to testify if real he wrote it".*

The objection was overruled whereby it was tendered as Exhibit R1. Similarly, when the 1st Respondent asked to tender a "police report on signatures", the Appellant objected in the following words: *"The report is not satisfactory. Also it was a maker was (sic) to produce it".* The Chairman overruled the objection using the following words: *"The document is a public one. So I admit it as exhibit R2".* None of these documents were read or explained to the Appellant. Exhibit R2 is written in English. Furthermore, it is a photocopy and was tendered with no explanations as to why the original could not be tendered. These two documents form the grounds against which the Respondents were

declared the owners of the suit land. In my opinion those two documents do not suffice to hold that the Respondents were the lawful owners of the suit land. They could be manufactured as the Appellant complained.

Exhibit R1, for example, is not conclusive as to which land was sold. It does not give description of the suit land nor does it show the boundaries of the sold land. Further, there are no sufficient details to identify the witnesses who witnessed the transaction. Being a village land, procedures for disposition of the same do not seem to have been complied with. Again, none of the seller's family members witnessed it, including the spouse. It is also on record that the person who allegedly authored it was denied the right to testify. This is exhibited in the responses given by the 1st Respondent on questions put to him by the Appellant. In the handwritten proceedings, the 1st Respondent while responding to cross examination by the Appellant is quoted to have said, *inter alia*:

> *"I am not in enmity with Christopher. Currently Christopher is siding with you that is why I failed to bring him to testify on our side.* ***The source of this dispute is Christopher who now turned a hostile****. Police proved it is Christopher and you signed the sell deed though your still denying the same".*

The above testimony was given on 19/11/2019. A week later, the Appellant wrote a letter to the Chairman of the trial Tribunal in which he said, *inter alia*:

> *"MUHIMU: Shahidi wa muhimu katika shauri hili ambaye ametajwa na wadaiwa na mashahidi wote upande wa utetezi walimtaja* ***Christopher Lukumay*** *kuwa ndiye mwandishi wa mkataba huo, kama ni kweli kwanini asiitwe atoe Ushahidi wake.* ***Mh. niliomba mara zote wakati wa kutoa Ushahidi wangu kuwa Christopher aitwe hapa Baraza na wadaiwa kwani ni yeye atakuja kuthibitishia Baraza ukweii****.*

LENGO: Baraza lako ni la usuluhishi kusikiliza pande zote mbili zenye mgogoro kuwapa HAKI sawa bila ubaguzi wa aina yoyote ..."

The said letter is stamped as received by the Tribunal on 3rd December, 2019. The Tribunal continued with the matter until it pronounced judgment on 18/12/2019 but there is no acknowledgment of the letter or evidence that the said Christopher was summoned. For fairness, even if the Respondents were reluctant to summon him, the Tribunal would have summoned him as a Tribunal witness. It is also not obvious why no policeman was summoned to testify on Exhibit R2 whose contents cannot be taken to be conclusively related to the suit land.

On that basis, I agree with the Appellant that the trial Tribunal was not partial in the way it dealt with the Appellant's evidence. I therefore uphold the first two grounds of appeal.

What I have endeavoured to show while dealing with the first two grounds cover the third ground as well. The Appellant contended that the tendered sell deed (Exhibit R1) was forged by the Respondents. There is no conclusive evidence that the said document was forged as alleged. In ***Yeriko Mgege Vs. Joseph Amos Mhiche***, Civil Appeal No. 137 of 2017 (unreported), where it was stated:

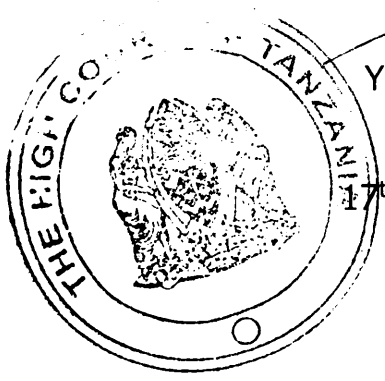
"In view of the foregoing authorities, it is obvious that the burden of proof of fraud in civil cases is heavier than a balance of probabilities generally applied in civil matters. Thus, the appellant must have applied the same standard to prove that the signature in the Sale Agreement was not his as asserted by the respondent. This was not done and to our mind the complaint is but an afterthought. We dismiss it."

Lack of such evidence, however, cannot be taken to exonerate the Respondents. The fact that the said deed does not contain essentials of a valid sell agreement as explained above and the fact that the Respondents were reluctant to have the author of the said document, if true, to testify on it, makes this Court to believe that the document (R1) was not genuine. The Appellant maintained throughout that he did not sell the land. The trial Tribunal did not seem to believe him. Their decision was based on unreliable documents including inadmissible evidence. For fairness, the trial Tribunal should have exercised diligence in the way it dealt with the evidence before it. In totality, Exhibit R1 cannot be taken to be a reliable document of disposition. In addition to what I have explained above, the said document misspelt the name of the Appellant and refers to "four acres of land plus a plot" as opposed to six acres that the suit related. The discrepancies on the suit land called for more evidence including, if need be, a visit to the locus in quo. That was not done. In the circumstances, the evidence before the trial Tribunal does not vindicate the sale of the suit land as alleged by the Respondents. I also note that the allegations that part of the land currently occupied by the 2nd Respondent was handed to him as an exchange with another plot is without proof. His occupation of that land is without justification. The third ground is to that extent sustained as well.

For the above reasons and findings, this Court finds that the appeal has merits. The trial Tribunal's decision is quashed and the orders thereof set aside. The Appellant is hereby declared the lawful owner of the suit land. The Respondents should vacate the suit land with immediate effect. For avoidance of doubts, the 1st Respondent is no longer entitled to a refund

of the loaned amount considering the time he has occupied the suit land. The Appellant shall have his costs.

Order accordingly.



Y. B. Masara
JUDGE

17th May, 2021.