IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(LAND DIVISION)

APPELLATE JURISDICTION

LAND APPEAL NO. 21 OF 2021

(Arising from Land Application No. 45/2015 of the District Land and Housing Tribunal – Kigoma before M.H Waziri – Chairman)

KEVEN MAPENGU..... APPELLANT

VERSUS

MASUMBUKO MAPENGU..... RESPONDENT

J U D G M E N T

10th May & 17th May, 2021

I.C. MUGETA, J.

Mapengu Buhaga passed away on 19/12/2007 due to sickness. In order to meet the costs of his treatment he planned to sell his cattle. The cattle had been stolen and recovered from Burundi. Those who recovered them needed Tsh. 20,000/= as redemption fee. According to the evidence of the appellant, the deceased called his neighbors who are PW2 and PW3 and expressed his intention to sell the cattle to get Tshs. 20,000/= whereby her daughter (the appellant) volunteered the said amount and was given the dispute land by the deceased as refund. This story is supported by PW4 who is the deceased's son. After the death of the deceased, the said area was

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incorporated in the estate of the deceased by the respondent who administered the estate. He finally, allocated it to Moris Mapengu (DW2) as his inheritance. The appellant took the matter to the District Land and Housing Tribunal claiming for vacant possession of the dispute land. In the course, she brought the following witnesses to support her case. Garatom Liheye Yuma (PW2), Eucima Gerson (PW3) and Vasco Mapengu (PW4) the son of deceased. All of them testified that the dispute land was given to the appellant by her father before he died for the stated reason. No document was prepared to prove the grant on the ground that the issue involved family members.

In his defence, Masumbuko Mapengu (DW1) said that he was appointed to administer the estate of their father. That he collected the estates and distribute it to the legal heirs including the appellant who was given a plot with trees and 4 farms. The dispute land was given to Moris Mapengu (DW2). Moris Mapengu (DW2) testified supporting DW1. He said that his father had money and he could not be bothered to borrow from the appellant or sell his cattle to meet treatment costs.

After trial, the District Land and Housing Tribunal entered judgment in favor of the respondent. The appellant is discontented, hence, this appeal with three grounds of appeal, as summarised hereunder: -

i. *That, trial tribunal failed to properly consider the appellant's evidence which proved her claim.*
ii. *The trial tribunal erred to declare the suit land as forming part of the estate of the late Mapengu Buhaga.*
iii. *Moris Mapengu (DW2) ought to have been joined as a necessary party.*

During the hearing, the respondent appeared in person unrepresented while the appellant was represented by Mr. Silvesta Sogomba, learned advocate who submitted on the 1st ground separately and combined the 2nd and 3rd grounds.

On the first complaint, Mr. Sogomba faulted the District Land and Housing Tribunal for ruling that there was no document to prove the sale of the land to the appellant. He further submitted that a contract can be in written form or oral. He cited the cases of **Butimuliza Dioniz vs Esperance**, Civil Case No. 8/2019, High Court – Mwanza (Tanzlii) which held that oral agreements unless prohibited by the law are enforceable and **Mwisige Teophil vs Bruno Lugemalira**, Civil Case No. 4/2016, High Court – Bukoba (Tanzlii)

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which held that a contract can be oral or written provided that it is willful and for a lawful consideration. Since he did not supply them and my efforts to trace these cases on *TanzLii* has proved futile, I shall not discuss them.

On the 2nd and 3rd grounds, he submitted that the District Land and Housing Tribunal erred to hold that the dispute land is part of the deceased estate ignoring the fact that the land was sold before the death of the deceased. The respondent was sued as trespasser and not as administrator. He finally prayed the appeal to be allowed with costs.

In reply, the respondent submitted that his evidence was heavier than that of the appellant. In his view, if the deceased sold the land to the appellant, he could have invited other members of his families.

In rejoinder, Mr. Silvesta Sogomba, learned advocate submitted that there is no requirement of law to involve relatives in selling one's land. That since the respondent failed to cross examine the witnesses, which implied that appellant's evidence was not shaken, he cannot complain that appellant witnesses were not relatives.

I shall determine the appeal starting with the third ground. It is my view that the third ground of appeal is a surprise because it is the appellant who filed

the case. It is odd that she complains of failure to join a necessary party. I shall therefore, simply ignore it. Regarding the firstly and second grounds of appeal, I shall dispose of them on determining the issue: Who is the rightful owner of the suit land? The appellant alleged to have obtained the land from her father in exchange for money given to him to redeem his cattle. This fact is disputed by the respondent.

In determining this issue the learned Chairman perfunctorily repeated the evidence and made the following finding: -

> *"Since there is no sale agreement to show that the applicant has bought the land in dispute from her father in 2006 the land in dispute is hereby declared to be among the estates of the late Mapengu".*

It is my view that this conclusion was cursorily reached as it is not preceded by a slightest assessment of evidence. It is this finding which the learned advocate for the appellant faults for a reason that oral contracts are legal and the appellant proved existance of an oral agreement.

I agree with the submission of the learned advocate that if proved to exist, oral contracts are enforceable. Was there a contract between the deceased and the appellant? The answer in the affirmative. There is undisputed

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evidence from the appellant that she was given the dispute land by her father before she died. She is supported by all her witnesses mentioned above. All of them said she gave the deceased Tshs. 20,000/= and he gave her the dispute land in return.

In the defence the respondent confined his evidence to the fact that he is administrator of the deceased estate and he allocated the land to Moris Mapengu (DW2) who testified to confirm the allocation of the land to him. It is my view that this evidence did not address the real issue which involves a determination whether the deceased gave the land to the appellant before he died. I am satisfied that the appellant and her witnesses proved that the land was given to her. They all testified that the appellant gave the deceased Tshs. 20,000/= to redeem his stolen cattle from Burundi and the deceased gave him the dispute land in return. The testimony of PW2, PW3 and PW4 is positive evidence which, if believed, does not need to be supported by a written document. These witnesses namely Garatom Liheye Yuma (PW2) Eucima Gerson (PW3) and Vasco Mapengu (PW4) are entitled to credence unless there is a reason to disbelieve them. Considering the fact that their evidence is undisputed, there is no reason to disbelieve them.

To the contrary, the defence witnesses are neither reliable nor credible. According to Moris Mapengu (DW2) the deceased had money enough to redeem cattle and pay for his treatment bill. However, in his own evidence he said he lives far away in another village. He gave no evidence that he was there when the father needed the money. Therefore, Moris (DW2) who was far away at Nyasha Village cannot testify on what happened at Muganza Village before his father died without stating first how he was involved.

The evidence shows that it is the respondent who was present. According to PW3 after the Tshs. 20,000/= was paid by the appellant, it was given to the respondent. He testified: -

> *"The applicant gave Tshs. 20,000/= to his (sic) father. The money was given to the respondent and the father of the parties promised to give the plot to the applicant as she paid Tshs. 20,000/=".*

On cross examination by the respondent he said the respondent was given the Tshs. 20,000/= for purposes of going to bring back the cattle from Burundi. The respondent never disputed this fact in his evidence.

On the need for a written document, PW3 testified that there was no need of putting everything in writing as the deal involved family members. PW2

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testified to the same effect and the appellant testified that the deceased rejected the idea of putting things in writing. The trial tribunal based its decision on lack of a written agreement, as I have said this was an error.

In the event, I hold that the appellant proved her claim on a balance of probabilities. The complaint that the trial tribunal ignored her evidence is merited. The appellant, I hold, is the rightful owner of the dispute land.

I understand the respondent was sued in his personal capacity and not in his capacity as administrator of the deceased estate. However, since in his defence he clearly stated that he dealt with the dispute land not in his personal capacity but as administrator of the deceased estate, I hold that in terms of section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] the omission has not occasioned failure of justice. I order the respondent in his capacity as administrator to surrender the dispute land back to the appellant.

In the event, I allow the appeal without costs as the dispute involve family members.

I.C. Mugeta

Judge

17/5/2021

- **Court:** Judgment delivered in chambers in the presence of both parties.

Sgd: I.C. Mugeta

Judge

17/5/2021