

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

LAND CASE APPEAL NO. 64 OF 2019

(Arising from Application No.119 of 2017 of Bukoba District Land and Housing Tribunal)

PRUCHERIA JOHN.....APPELLANT

VERSUS

WILBARD WILSON.....1ST RESPONDENT

WILLIAM WILSON.....2ND RESPONDENT

JUDGMENT

10th May & 18th June 2021

Kilekamajenga, J.

The appellant, being an administrator of the estate of the late John Kikalugaa, filed a suit against the respondents claiming ownership over a land located at Buyekera within Bokoba Municipality. During the trial, the trial tribunal framed three issues for determination thus:

- (i) Whether the applicant is the owner of the suit premises;*
- (ii) Whether the respondents are trespassers;*
- (iii) Reliefs.*

At the hearing of the case, the appellant's case was supported with the evidence of three witnesses while the defence relied on the testimony of the respondents and one more witness. The appellant informed the trial tribunal that the late John Kikalugaa died on 28th May 2002. The deceased had two wives; the first wife was Rose Raphael who bore two children namely William John and



Prucheria John (appellant). The second wife was Angela Kitale who had one child called Mektilida John. Later, the second wife was divorced by the deceased and got married at Kamachumu where she bore two children namely Wilbard John and William John (sic). Before his death, the deceased sold the appellant's clan land at Busimbe and bought the disputed land at Buyekera where he later constructed a house. Later, the relationship between the deceased and Angela Kitale revived. However, she found the deceased constructed the house. Before the death of the deceased, he instructed William John that Angela Kitale would remain in the land until her death then the land will revert back to the appellant's side. Angela Kitale died on 02nd May 2017 and the appellant was appointed the administratrix of the estates of her father and commenced the recovery of the house at Buyekera and then the rift arose. In her testimony, the appellant assailed the purported sale agreement giving title of the land to Angela Kitale. The same lacked the authentication from the street leader, names and signatures of the witnesses and parties to the agreement.

PW2 who was the deceased's brother further confirmed that the late John Kikalugaa owned a land at Busimbe which he sold it and bought the land at Buyekera and constructed a house. Later, the respondents' mother came back and joined the deceased in the house. He averred that the appellant's father had no child with the respondents' mother, and in fact, they were not legally married.

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The evidence of PW1 and PW2 was supported with the evidence of PW3 who testified that he lived with the deceased at Busimbe for more than 40 years. The deceased sold his land at Busimbe and bought a land at Buyekera from PW3's aunt called Blandina Nikodemu in 1993. He actually assisted the deceased to spot the land to purchase though he did not witness the sale transaction. PW3 further stated that the applicant's father lived at the disputed land until his death in 2002. Under Haya customs, the land is supposed to remain in the hands of the deceased's children who are William John Kikalugaa, Mektilida John Kikalugaa and the applicant.

On the other hand, DW1 (1st respondent) testified that when he came back from Mwanza in 2001, he found his mother living with the deceased at Buyekera until he (deceased) passed on. He further stated that, at the funeral of the deceased, his mother alleged to have bought the disputed land after they separated with the deceased. DW1 lived with his mother until 2017; when she died, the dispute arose. DW1 prayed to tender the sale agreement which was objected and the tribunal ordered the author of the document to be summoned. DW2 (2nd respondent) testified that his mother had three children with the deceased called Furaiska John, Mektilida John and Rwegoshora John. In 1963, his mother divorced the deceased and married to Wilson Mkulasi where he got three children namely, William Wilson, Willbard Wilson and Esther Willison. In 1976, his



mother was divorced by Wilson Mkulasi and came back to Bukoba where she bought the disputed land from Blandina Nikodemu in 1998. Later, the deceased came and lived with his mother. DW3 also testified that a woman called Angela bought a plot of land from Blandina back in 1998 at the price of Tshs. 70,000/=. He tendered to sale agreement which was admitted as exhibit D2

After the closure of evidence from the parties, the trial tribunal decided in favour of the respondents. The appellant was aggrieved with the decision of the trial tribunal hence appealed to this Honourable Court of Justice. She coined three grounds of appeal thus:

- 1. That, the trial tribunal erred in law and fact to rely on the sale contract of the suit premise adduced by the respondents to reach the decision while the said sale contract is not valid in the eyes of the law.*
- 2. That, the trial tribunal erred in law and fact for not considering the evidence adduced by the appellant, thus unjust on part of the appellant.*
- 3. That, in totality the trial chairman decided the case against the weight of evidence.*

The court invited the parties to argue the appeal; the appellant was present but enjoyed the professional services from the learned advocate, Mr. Ibrahim Mswadick. The 2nd respondent was present in person while the 1st respondent was absent. The 2nd respondent prayed for the case to proceed in absence of the 1st respondent because he died and his children are still youth and there was no

possibility of appointing his administrator of estate. The court finally ordered the appeal to proceed for hearing in absence of the 1st respondent.

On the first ground of appeal, Mr. Mswadick averred that the sale agreement was the main piece of evidence in deciding this case. However, the same agreement was invalid because its contents were marred with contradictions. For instance, the 1st witness to the sale agreement was not named; the sale agreement was not endorsed by any administrative leader (authority). The counsel invited the court to consider section 147(1) of the Local Government (District Authorities) Act which gives authority on the village council over the village land. On the essence of involving village leaders in the sale of land, the counsel cited the cases of **Sofia Hassan v. Abdu Athuman Kinuni, Misc. Land Appeal No. 66 of 2018, HC at Bukoba** and **Bakari Muhando Swanga v. Mzee Mohamed Bakari Shelukindo and 3 others, Civil Appeal No. 389 of 2019**. Mr. Mswadick was of the view that the sale agreement was doctored for the purposes of this case. He urged the Court to nullify the sale agreement for lack of approval from responsible area leaders.

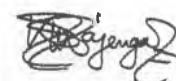
When submitting on the 2nd ground, Mr. Mswadick impugned the decision of the trial tribunal for failure to consider the weight of evidence adduced by the appellant's side which proved that the late John Kikalugaa bought the disputed

land from Blandina Nikodemu who was the PW3's aunt in this case. In his view, the appellant's case was heavier than that of the respondents. To bolster his argument, he cited the lionised case of **Hemed Said v. Mohamed Mbilu [1984] TLR 113.**

In response, the 2nd respondent insisted that the decision of the trial tribunal was based on the exhibits tendered by the respondents. He further assailed the appellant for failing to tender evidence proving ownership of the disputed land to John Kikalugaa. On his part, he was emphatic that the sale agreement proved their case and that the land belonged to respondents' mother. He further confirmed that the land was bought in 1998 when his mother was together with the deceased (John Kikalugaa). At some point, he changed his story and alleged that his mother (Angela Kitale) bought the disputed land when she separated with the deceased. He finally urged the court to uphold the decision of the trial tribunal.

When rejoining, the counsel for the appellant explained why the disputed land was not claimed for almost 17 years, because the appellant honoured the will from the deceased by letting the respondents' mother stay in the disputed land until her death then the land goes back to the deceased's children. He rested his case by insisting that the land belonged to the late John Kikalugaa.

In disposing of this appeal, there are three pertinent issues that I need to address; fortunately, the same issues are partly addressed in the grounds of appeal and in the submission of the counsel for the appellant. As rightly argued by Mr. Mswadick for the appellant, the trial tribunal's decision banked on the sale agreement to prove ownership of the disputed land. I was tempted to peruse the court file and bumped on the alleged sale agreement. I retracted my smile before giving my observation. It seems the sale agreement giving right over the disputed land to the respondents' mother called Angela Kitale was chronicled on 29th July 1998. As usual, every agreement needs witnesses; the alleged sale agreement was witnessed by two people whose names were not stated. Only the 'so called' signatures of the witnesses appeared on the sale agreement. Furthermore, the names of the seller and buyer are written but they did not sign to authenticate the alleged sale agreement. Possibly the greatest puzzle is how the tribunal admitted and considered a document which lacked authenticity. A signature is an identity of a person which must appear on the document in order to give it authenticity. Even an illiterate person must sign by punching a finger print which differentiates him/her from any other person. Where a document is not signed by the parties, its authenticity is questionable.

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Furthermore, it has been my call, unless disposition of landed property is formalised and involves administrative leaders of the area where the land is located, land disputes will continue to surge in our courts. My view, a villager should not be allowed to dispose of his landed property without the approval of the village council. This proposal dovetails the decision of the Court of Appeal in the case of **Bakari Mhando Swanga v. Mzee Mohamedi Bakari Shelukindo and 3 others, Civil appeal No. 389 of 2019, CAT at Tanga** (unreported) where it was stated that:

'Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council...'

The Court of Appeal went on stating:

'Under normal circumstances, it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings...The observation we make here is that there is no due diligence on the part of the appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the village council before embarking on the transaction.'

The above decision of the Court of Appeal was in line with **section 147(1) of the Local Government (District Authorities) Act, Cap. 287 RE 2002**

which empowers the village council to manage the affairs and business of a village. The section provides:

'A village council is the organ in which is vested all executive power in respect of all the affairs and business of a village.'

See, also the case of **Priskila Mwainunu v. Magongo Justus, Land Appeal No. 09 of 2020** where I espoused the need to involve neighbours and village leader in the sale of land in villages.

In the instant case, albeit the disputed land is located within Bukoba Municipality, administrative authorities are not in scant. In fact, the disposition of land in Municipality should be more stringent because of the higher possibility of double allocation. In such areas, the Municipality should approve every transaction to avoid the sale of land dedicated for certain projects or even surveyed land. In my view, I do not find injustice to disregard any sale agreement which was coined by only two parties without the hand of witnesses nor approval from administrative authorities. Such a sale agreement may be falling short of the legal glory.

In addition, DW3 tendered the sale agreement which was admitted and exhibit D2. However, the same agreement was not read in court, which under the law, suffers the consequences of being expunged from the records of the proceedings

of the trial tribunal. On this point, I seek instruction of the Court of Appeal in the case of **Robert P. Mayunga and David Charles Ndaki V. R; Criminal Appeal No. 514 of 2016**, CAT at Tabora where the Court stated that:-

"...documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings."

The court went further stating that:-

"In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his right to cross-examine the witness effectively."

In the case at hand, when the sale agreement is expunged, the only remaining evidence is the oral testimonies of the parties and their witnesses. The principle of law in proving civil cases has not been quaked in the jurisprudence of justice. A person who alleges a fact must prove. See, **section 110(1) of the Evidence Act, Cap. 6 RE 2019**. The standard of proof in civil cases rests on the preponderance of probability. See, **section 3(2)(b) of the Evidence Act**. In civil justice, the scale normally moves according to the strength of parties' evidence. It follows therefore, a party with heavier evidence deserves the right to win the case. In the celebrated case of **Hemedi Said** (*supra*), the Court expounded the doctrine of balance of probability thus:

'According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win...in measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence.'

The analysis of the above evidence does not leave doubt that the appellant's case was heavier than that of the respondents. The appellant and her witnesses described how the deceased John Kikalugaa got money to buy the land at Buyekera. The evidence shows that the deceased sold his land at Busimbe in order to acquire the disputed land in 1993. The appellant went further summoning a person (PW3) whose aunt sold the land to the deceased. Though PW3 did not witness the sale agreement, he connected the deceased to his aunt for the purchase of the land. On the other hand, the respondents' evidence tended to prove the ownership of the land to Angela Kitale who was the mother of the respondents. They alleged that their mother bought the land in 1998 from Blandina Nikodemo at the price of Tshs. 70,000/=. However, in 1998 this amount of money was so huge but the respondents failed to substantiate the source of money for their mother. The respondents simply stated that their mother cultivated spinach at Kanoni valley within Bukoba Municipality. I am therefore not ashamed of pronouncing that the appellant proved her case against the respondents. I hereby allow the appeal, set aside the decision of the trial tribunal and order that the suit premise is part of the estates of the late

Kikalugaa. The respondents should further pay the cost of this case. It is so ordered.

DATED at **BUKOBA** this 18th day of June, 2021.




Ntemi N. Kilekamajenga.
JUDGE
18/06/2021

Court:

Judgment delivered this 18th June 2021 in the presence of the appellant and respondent all present in person. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga.
JUDGE
18/06/2021

