IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISC. LAND CASE APPEAL NO. 1 OF 2021

(Arising from Land Case Appeal No. 58 of 2018 of the District Land and Housing Tribunal for Mbinga District at Mbinga and Original Land Case No. 29 of 2018 of Mbambi Ward Tribunal)

ENEKO PASCHAL MBEPERA ..... APPELLANT

VERSUS

JOACKIM ELENZIAN NGONYANI ..... RESPONDENT

Date of Last Order: 10/06/2021

Date of Judgment: 13/07/2021

JUDGMENT

I. ARUFANI, J.

The Appellant, Eneko Paschal Mbepela filed Land Dispute No. 29 of 2018 before Mbambi Ward Tribunal (hereinafter referred as the trial tribunal) complaining the respondent, Joackim Elenzian Ngonyani had trespassed into his land and cut down his tree. The appellant testified before the trial tribunal that, on 10th November, 2010 he sold a land measuring two acres to the respondent and signed a sale agreement which was admitted in the dispute as exhibit.

He said on 8th July, 2018 he was informed by his informer that, there was a person who had cut a tree for firewood in his farm which was bordering the land he sold to the respondent. The appellant said to have told his grandchild namely Thomas Komba to make a follow up to know who had cut the tree. Later on the grandchild saw John Sindila coming to take the firewood from the tree which had been cut and when he asked him who he gave him the said firewood he told him he was given by the respondent.

The grandchild reported the said information to the appellant and the appellant told the grandchild to find the respondent so that they can resolve the said dispute. The grandchild traced the respondent without success but left a message at the respondent's office that he was required to meet the appellant to resolve the dispute of the tree cut in the land of the appellant. The grandchild said to have left his phone number at the office of the respondent for communication but the respondent did not go to see the appellant to resolve the alleged dispute.

Thereafter the appellant found that, the respondent is not a good neighbour and became of the view that, if he will die the respondent will do bigger things on his farm. The appellant decided to take the matter

to the trial tribunal and prayed the trial tribunal to find the respondent had breached the sale agreement of the land he sold to him. He also prayed the land he sold to the respondent be returned to him, the respondent be ordered to pay him compensation for use of the land at the rate of Tshs 60,000/= annually for 7 years he used the land and be paid compensation to the tune of Tshs. 100,000/= for the tree cut in his farm by the person authorized by the respondent.

The respondent denied the claim of the appellant and said he had not sent a person to cut tree in his farm. The respondent went on stating that, the appellant followed him with Mama Moris to borrow money and he lent him more than one million shillings. The respondent said the appellant failed to repay the money he lent to him and decided to give the respondent a land in lieu of the money he borrowed from him.

The respondent said to have agreed to take the land given to him by the appellant and entered into an agreement of taking that land in lieu of the money he lent to the appellant. He said as from when he took the land the appellant has been disturbing him in the land he is now tired and said he was ready for the agreement to be terminated and the land be returned to the appellant. He however said that, he want legal

procedure to be followed so that he can be refunded the costs he has incurred in the land in dispute.

After full hearing of the matter the trial tribunal found the sale agreement had been breached by the appellant and ordered the appellant to refund to the respondent the purchasing price of the land which was Tshs. 1,050,000/=, the appellant to refund the respondent the sum of Tshs. 500,000/= being legal fees paid by the respondent to the lawyer, the appellant to pay the respondent the sum of Tshs. 1,450,000/= being compensation for costs of taking care of the land from 2010 to the date of the decision of the trial tribunal.

The trial tribunal ordered that, if the appellant will pay the respondent the stated sum of money which is Tshs. 3,000,000/= within forty five days it will be countered the sale agreement has been terminated and the land will revert to appellant but if he will fail to pay the stated sum of money the land will continue to be the property of the respondent and ordered each party to bear his own costs.

The appellant was dissatisfied by the decision of the trial tribunal and appealed to the District Land and Housing Tribunal for Mbinga at Mbinga (hereinafter referred as the appellate tribunal) vide Land Case Appeal No. 58 of 2018 but the appeal was dismissed and the decision of

the trial tribunal was left unaltered. Now the appellant has come to this court for the second appeal and his memorandum of appeal is made up of eight grounds quoted hereunder:-

1. *That, the chairperson erred in law and fact for the act of giving false information in the judgment copy dated 26/06/2020,*
2. *That, the chairperson erred in law and fact for purposely ignore the facts which were stressed in the rejoinder of the appellant,*
3. *That, the chairperson erred in law and fact for negligently failed to comprehend that Land Case No. 29 of 2018 was concern with the breaking of sales agreement dated 10/11/2020 which had been tempered by the respondent without the concern of the appellant for the payment of Tshs 500,000/= (five hundred thousand shillings),*
4. *That, the chairperson erred in law and fact by giving judgment to Land Appeal No. 58/2018 without tendering the appellant sales agreement dated 16/11/2010,*
5. *That, the chairperson erred in law and fact to entertain payment of 3m which had not been disclosed in the Mbambi Ward Tribunal by the respondent,*

6. *That, the chairperson erred in law and fact to entertain five hundred thousand shillings (500,000/=) which were paid by the respondent alone as lawyers' fee without the concern of the appellant as per party "C" of the sale agreement dated 10/11/2020 demanded,*

7. *That, the chairperson erred in law and fact for ordering the appellant to pay compensation of 3m without considering the years which were under the use of the respondent and that the respondent was accruing benefit (financial as well as material) from the area and that, he had tempered the sale agreement dated 10/11/2010 purposely and negligently part "C"; and*

8. *That chairperson erred in law and fact by failing to comprehend the inducement out come of free transport offered by the respondent to Mbambi Tribunal on the day of visit to locus in quo.*

When the appeal came for hearing on 25th March, 2021 before my learned sister Moshi, J the appellant appeared in the court in person and the respondent was represented by Mr. Nestory Nyoni, learned advocate. The appellant prayed and allowed by the court to argue the appeal by way of written submissions. After the parties filed their written

submissions in the court the appellant wrote a letter to the court expressing he had entertained doubt that justice would have not been done to him if the appeal would have been determined by my predecessor. The said letter prompted the learned justice to recuse herself from continuing with determination of the appeal and caused the appeal to be re-assigned to me.

After carefully going through the grounds of appeal contained in the memorandum of appeal filed in this court by the appellant the court has found that, the above stated grounds of appeal can be merged into one issue which is whether the appellate tribunal erred in law and fact to uphold the decision of the trial tribunal. For the purpose of avoiding making this judgment unnecessarily long I will not reproduce the submissions of the parties in the judgment. In lieu thereof I will be referring to the same in the course of determining the points raised in the memorandum of appeal and points raised in the written submissions of the parties.

Before entering into the grounds of appeal the court has found proper to state at this juncture that, as this is a second appeal against concurrent finding of the trial tribunal and appellate tribunal the court is supposed to be guided by the position of the law stated in the cases of

Amratlal Damodar and Another V. A. H. Jarawalla, [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige**, [2002] TLR 335 that, in the absence of misdirection or misapprehension of evidence, the appellate court should not interfere with concurrent findings of the two lower courts. Despite the fact that the cited cases refers to courts but to the view of this court the position of the law stated therein is equally applicable in the decision made by tribunals.

While being guided by the position of the law stated in the above cited cases and before dealing with the grounds of appeal the court has found proper to start with the points raised by the appellant in his written submission which are not featuring in the memorandum of appeal. The appellant states in his written submission that, as the respondent has not filed a reply to the memorandum of appeal it is his belief that the respondent accepted the facts stated in the memorandum of appeal.

The court has found that, as rightly stated in the submission of the respondent it is not a legal requirement for a respondent in an appeal to file a reply to the memorandum of appeal in the court. Similarly there is no law barring a respondent in an appeal to file in the court a reply to the memorandum of appeal filed in the court against him whenever he

found he wish to file a reply to the memorandum of appeal filed in the court against him.

The practice which has been followed by our courts is that, where a respondent want to oppose a fact or point raised in a ground of appeal is required to do so by either filing in the court a reply to the memorandum of appeal or reply to the same orally at the hearing of the appeal as it has been done by the respondent in the appeal at hand. In the premises the court has found it cannot be said as the respondent has not filed in the court a reply to the memorandum of appeal he has accepted what is stated in the memorandum of appeal of the appellant as he has opposed the appeal through his written submission.

The appellant also argued intensively in his rejoinder filed in the court on 11th May, 2021 that, the respondent was favoured by the court as he was allowed to file in the court a reply to his written submission out of time fixed by the court instead of the court to continue to determine the appeal ex parte against the respondent. The court has considered the appellant's argument but find there was no reason for the court to deny the respondent right of filing in the court his reply to the written submission of the appellant and proceed to determine the matter ex parte as argued by the appellant.

The court has arrived to the above finding after seeing that, under normal circumstances an appeal is entertained ex parte where the respondent has failed to appear in the court without sufficient cause on a date fixed for hearing of the appeal while is aware the appeal is coming for hearing or where he has failed to file in the court a reply to the written submission where the appeal is argued by way of written submissions.

The court has found in relation to the appeal at hand that, it is true that the respondent was required to file in the court his reply to the written submission of the appellant on 22nd April, 2021 and the reply to the appellant's written submission was not filed in the court by the respondent on the mentioned date. However, the court has found when the appeal came for mention on 4th May, 2021 the counsel for the respondent informed the court they failed to file in the court the reply to the written submission of the appellant within the time given by the court due to miscommunication with their client and were allowed to file in the court a reply to the written submission of the appellant on the same date of 4th May, 2021.

It is the view of this court that, as the court was satisfied by the reason given by the counsel for the respondent for the respondent's

failure to file in the court the reply to the appellant's written submission within the time given by the court and the court exercised its discretionary power to grant him extension of time to file in the court his reply to the written submission of the appellant the said issue cannot be opened and entertained by this court as the court is now *functus officio* to deal with the same issue.

Back to the first ground of appeal the court has found the appellant is challenging the judgment of the appellate tribunal by stating that, it gave false information in the judgment delivered on 26th June, 2020. The appellant argued in his submission that, the judgment of the appellate tribunal contains false information as it dealt with the issue of encroachment of the land while that was not an issue before the trial tribunal. He said the issue before the tribunal was about breach of the sale agreement dated 10th November, 2010 and not encroachment on the land.

The court has considered the stated argument but failed to comprehend how the stated fact is false information. The court has arrived to the stated view after seeing that, the root cause of the appellant to claim the respondent had breached the sale agreement was the allegation that the respondent had authorized a person to cut tree in

the farm of the appellant bordering the land he sold to the respondent. Under the stated circumstances it would have not been possible to determine whether the respondent had breached the sale agreement without saying whether the respondent encroached on the land of the appellant or not. In the premises the court has found it cannot be said the judgment of the appellate tribunal to contain the issue of encroachment on the land of the appellant is false information.

Coming to the second ground of appeal the appellant states the appellate tribunal ignored the arguments he stressed in his rejoinder. The court has found the appellant has not made it clear as to which specific argument was ignored by the appellate tribunal because as rightly argued by the respondent there are so many allegations in the submissions of the appellant. The court has taken the view that, may be the appellant is arguing on the allegations that the appellate tribunal failed to consider his argument that the respondent gave false information that there was a sale agreement dated 16th November, 2010 and there was Land Appeal No. 58 of 2087 while there was no such a sale agreement and such an appeal.

If that is what the appellant wanted to be determined in the second ground of appeal the court has found that, it is true that the trial

tribunal talked of a sale agreement dated 16th November, 2010 in its judgment. It is also true that the respondent indicated at the heading of his submission in reply to the submission of the appellant that, the appeal at hand is arising from Land Appeal No. 58 of 2087 while there is no such a sale agreement and such an appeal.

However, the court has been of the view that the stated wrong date of the sale agreement and number of the appeal are merely human typing errors which cannot be taken as a ground of faulting the decisions of both tribunals. The court has been of the above stated view after seeing that, the said error did not make the appellant to fail to understand the respondent was referring to the sale agreement dated 10th November, 2010 and not the agreement dated 16th November, 2010 and there was only Land Appeal No. 58 of 2018 which was concerning them and not Land Appeal No. 58 of 2087. That makes the court to find there is no any merit in the second ground of appeal. The court has also found the above answer is covering the fourth ground of appeal which states the appellate tribunal erred in giving judgment in favour of the respondent without receiving the sale agreement dated 16th November, 2010 from the respondent.

As for the third and sixth grounds which I will deal with them together as they are so much interrelated the court has found the appellant states therein that, the appellate tribunal failed to comprehend the respondent breached the sale agreement dated 10th November, 2010 by paying the sum of Tshs. 500,000/= to the lawyer for transfer of the land without his knowledge while the sale agreement required them to share the costs of the said transaction.

The court has found it is true that the sale agreement entered by the parties on 10th November, 2010 which was admitted in the case as exhibit shows at part (c) of its paragraph three that, the parties agreed to share all legal costs involved in the sale agreement. The court has also found that, although that was the agreement stipulated in the sale agreement but there is no any witness said before the trial tribunal there was a legal fees paid to a lawyer in relation to the stated sale agreement. It was also not stated by any witness if there was any legal fees paid, how much was paid and who paid the same as the appellant is contending he was not involved in its payment.

To the contrary the court has found the Tshs. 500,000/= which the appellant was ordered by the trial tribunal to refund the respondent as legal fees paid by him and upheld by the appellate tribunal is stated

in the decision of the trial tribunal without being supported by any evidence adduced before the trial tribunal to show the stated legal fees was paid by the respondent for any purpose in relation to the said sale agreement. To the view if this court that is contrary to the settled position of the law that as the stated relief was a specific relief it was required to be sought and strictly proved before being granted.

The court has also found that, the trial tribunal did not even state how it managed to know the respondent incurred the sum of Tshs. 500,000/= as legal fees for the transaction of the land sold to him. It is also the finding of this court that, as rightly argued by the appellant the trial tribunal did not state in its decision whether it considered what the parties had agreed at part (c) of paragraph three of the sale agreement which requires parties to share all legal costs relating to the sale agreement.

That being the position the court has found bound to agree with the appellant that, the appellate tribunal erred in upholding the award of Tshs. 500,000/= which the appellant was ordered by the trial tribunal to refund to the respondent while it was neither sought nor proved. To the view of this court and as stated in the case of **Amratlal Damodar** and **Bushanga Ng'oga** (supra) the trial tribunal misdirected itself in

granting the stated legal fees. Under that circumstance the court has found that, although this is a second appeal but the court is allowed to differ with the concurrent finding of the trial tribunal and the appellate tribunal in the said relief.

As for the fifth and seventh grounds of appeal which states the appellate tribunal erred in granting the respondent Tshs. 3,000,000/= while the respondent was using the land from when it was sold to him the court has found proper to deal with these grounds jointly. The court has found that, as rightly stated by the trial tribunal and the appellate tribunal the person terminated the agreement of selling the land to the respondent is the appellant who urged the trial tribunal to order the land he sold to the respondent be reverted to him.

The court has found the evidence by the appellant that the respondent is the one breached the sale agreement was not accepted by the two tribunals and this court has no basis of differing with the finding of the two tribunals. Having found the appellant is the one terminated the sale agreement the court has found that, as it was rightly found by the two tribunals the appellant was required to pay the respondent compensation for whatever loss or damage suffered by the respondent because of the stated termination of the sale agreement. The above

stated finding of this court is getting support from the position of the law provided under section 73 (1) of the **Law of Contract Act**, Cap 345, R.E 2019 which states as follows:-

> *"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

From the position of the law stated in the above quoted provision of the law it is crystal clear that, as the appellant is the one prayed to terminate the sale agreement entered in 2010 he was bound to pay the respondent compensation for any loss or damage caused by his termination of the sale agreement. The court has considered the argument by the appellant that, as the respondent has been in possession of the land from 2010 when it was sold to him then the respondent is not entitled to be paid any compensation and in lieu thereof is the one who is required to pay the appellant Tshs. 60,000/= annually for using the land.

The court has failed to see any merit in the argument of the appellant as the land was sold to the respondent as his property in perpetual and the respondent paid the appellant Tshs. 1,050,000/= as a consideration for the land sold to him. To the view of this court and as rightly found by the trial tribunal and upheld by the appellate tribunal the respondent is entitled to be refunded the said sum of money if the land will be reverted to the appellant. The court has also found that, as there is evidence adduced before the trial tribunal that the respondent has been developing the land by clearing the same and taking care of it he is entitled to be paid compensation for the stated costs.

Under that circumstances the court has found it is not only that there was no evidence adduced before the trial tribunal to show the respondent was getting financial as well as material benefit from the land as stated by the appellant in seventh ground of appeal but also there is no evidence showing how the appellant arrived to the amount of Tshs. 60,000/= he claimed from the respondent per annum. To the contrary and as stated hereinabove it is the appellant who decided to claim the land to be reverted to him is required by the law to pay the respondent compensation for any loss or damage suffered for being

dispossessed the land which had already been sold to him by the appellant.

In the premises the court has failed to see any error committed by the appellate tribunal to uphold the decision of the trial tribunal that the respondent was entitled to be refunded the money he paid to the appellant as a price of purchasing the land and compensation for taking care and developing the land the appellant is now claiming to be reverted to him. In fine the court has found the fifth and seventh grounds of appeal have no merit and there is no justification for the court to change the amount ordered to be refunded to the respondent and the compensation granted to the respondent for taking care of the land and develop the same from 2010.

As for the eighth ground of appeal which states the appellate tribunal erred in failing to see the trial tribunal was influenced to decide the matter in favour of the respondent because of the transport of visiting the land in dispute he gave to the members of the trial tribunal the court has found that, as stated in the submission of the respondent that is a mere allegation which is not supported by any material evidence. The court has arrived to the stated finding after failing to see anything making the court to find the trial tribunal favored the

respondent in its decision because of the transport he gave the members of the trial tribunal to go to the land in dispute.

The similar view has been taken by the court to the allegations made in the submission of the appellant that, the matter was decided in favour of the respondent as the respondent is a businessman who is financially and materially very strong. The court has arrived to the stated view after seeing there is no evidence in the record of the appeal to substantiate the decision of the trial tribunal was influenced by financial and material status of the respondent. Besides, the court has found the further allegation made in the submission of the appellant that there was a secret meeting between the respondent and the members of the trial tribunal is also not supported by any evidence and that make the court to find it is an unsubstantiated allegation.

Basing on all what I have stated hereinabove the court has found the appeal of the appellant deserve to be allowed partly to the extent that, the appellant is required to refund to the respondent the amount of money paid to him as the price of purchasing the land and pay the respondent compensation for taking care of the land and developing the same as assessed by the trial tribunal before the land being reverted to him.

The court has found that, the order of the appellant to pay the respondent the sum of Tshs. 500,000/= being legal fees for the sale agreement was erroneously granted by the trial tribunal as it was neither pleaded nor proved and is hereby set aside from the other reliefs granted to the respondent by the trial tribunal. Consequently, the appellant is required to pay the respondent the sum of Tshs. 2,500,000/= if he want his land to be reverted to him. As the appeal has been allowed partly each party shall bear his own costs. It is so ordered.

Dated at Songea this 13th day of July, 2021

I. ARUFANI

JUDGE

13/07/2021

Court:

Judgment delivered today 13th day of July, 2021 in the presence of the appellant in person and in the presence of Mr. Zuberi Maulidi, Advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.

I. ARUFANI

JUDGE

13/07/2021