

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

LAND APPEAL No. 33 OF 2019

(Arising from application No. 226 of 2011 in the District Land and Housing Tribunal for Kagera at Bukoba)

MUNICIPAL DIRECTOR BUKOBA

MUNICIPAL COUNCIL.....1ST APPELLANT

RESTUTA NGAIZA.....2ND APPELLANT

ANNA ANDILE.....3RD APPELLANT

VERSUS

JAMES SIMON 1ST RESPONDENT

JACKEM AUCTION MART AND BROKERS LTD 2ND RESPONDENT

JUDGMENT

14th & 15th July 2021

Kilekamajenga, J.

In this case, the 2nd and 3rd appellants were allocated surveyed plots of land by the 1st appellant. It is alleged that the disputed land was declared planning area in 1994 and later surveyed in 1997. In 2003, the 2nd and 3rd appellants applied for the land and they were granted such plots by the Municipal Director Bukoba Municipal Council (1st appellant). It is further alleged that the 1st respondent bought the disputed land in 2000 from Paul Kamazima. In 2011, the 2nd and 3rd appellants sued the 1st respondent alleging that the 1st respondent invaded the 2nd and 3rd appellant's land. At the end, the trial tribunal was fully convinced that the 1st respondent owned the land under customary right of occupancy after purchasing the same from Paul Kamazima in 2000. As a result, the 1st respondent won the case. The appellants referred the instant appeal armed with four grounds of appeal thus:

- 1. That the trial tribunal grossly misdirected itself in law and fact to enter judgment in favour of the respondents without base as the key witness in exhibit RW1 (sale agreement) was not called to testify despite the fact that his whereabouts were known by DW1.*
- 2. That, trial tribunal grossly erred in law and fact by coming into conclusion without based that the 1st respondent (DW1) established customary ownership while the authenticity of exhibit RW1 (sale agreement) in record was not genuine.*
- 3. That, trial tribunal grossly misdirected itself in law and fact to enter judgment in favour of the respondents by ignoring heavier (water tight) evidence in record adduced by DW5 and DW6 in respect of survey of the disputed land.*
- 4. That, trial tribunal grossly erred in law and fact by failure to resolve issue No. regarding to the evidence adduced by 2nd respondent (DW3) in respect of execution of the trial Tribunal's decree in Application No. 213/2008.*

The parties finally appeared to defend the case. The 1st appellant was represented by the learned advocate, Mr. Athuman Msosole whereas the 2nd and 3rd appellants appeared in person and without representation. On the other hand, the 1st respondent was present and represented by the learned advocate, Miss Erieth Barnabas. The 2nd respondent was absent. This Court ordered the matter to proceed in absence of the 2nd respondent.

In the oral submission, the counsel for the appellant opted to abandon the 2nd and 4th grounds of appeal and argued the 1st and 3rd grounds. On the 1st ground, Mr. Msosole argued that the 1st respondent alleged to buy the land from Paul

Kamazima but he failed to summon him for a testimony. Paul Kamazima was a key witness and ought to be summoned to testify before the trial tribunal.

On the 3rd ground, Mr. Msosole argued that the land was declared a planning area in 1994 and the survey was conducted in 1994. The owners of the respective places were compensated but the disputed land was not owned by that time. The 1st respondent came to the area in 2000 when the survey was already conducted. Therefore, the 1st, 2nd and 3rd appellants were the lawful owners of the disputed land. To cement his argument, Mr. Msosole supported with the cases of **Amina Maulid Ambali v. Ramadhani Juma, Civil Appeal No. 35 of 2019; Mwalimu Omary and another v. Omary A. Bilali [1990] TLR 9**. He urged the Court to allow the appeal and set aside the decision of the District Land and Housing Tribunal. The counsel's submission was supported with the 2nd and 3rd appellants.

On the other hand, the counsel for the 1st respondent objected the allegation that her client failed to summon Paul Kamazima. She further confirmed that the 1st respondent bought the land from Paul Kamazima in 2000. The sale agreement which was tendered before the trial tribunal was sufficient to prove ownership of the land to the 1st respondent. Hence, there was no necessity of summoning the seller (Paul Kamazima). Miss Erieth was of the view that the 1st respondent's case was heavier than that of the 1st appellant. She further insisted that the 1st

respondent was the lawful owner of the land. To bolster her argument, the counsel invited the Court to consider the case of **Rashid Baranyisa v. Hussen Ally [2001] TLR 270** where the Court departed from the position of law stated in the cases supplied by the counsel for the 1st appellant. To cement her argument, the counsel further referred the Court to the case of **James Ibambas v. Francis S. Moshi [1999] TLR 364**. The counsel was content that the 1st appellant had no good title to pass to the 2nd and 3rd appellants. She finally urged the Court to dismiss the appeal with costs.

When rejoining, the counsel for the 1st appellant did not raise any substantial argument than reiterating the submission in chief.

In determining this appeal, the major issue is whether the 2nd and 3rd appellants proved their case on the balance of probability. It is an established principle of the law that a civil case must be proved on the balance of probability. See **Section 3 (2) (b) of the Evidence Act, Cap. 6 RE 2019**. The principle of law further demands that a person with heavier evidence than his/her adversary must win the case. This stance of the law was stated in the case of **Hemedi Saidi v. Mohamedi Mbilu [1984] TLR 113** thus:

"According to the 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 the case at hand, the appellant's case relies on the testimony AW1 (Anna Ndile). Her evidence was hinged on the fact that the land was allocated to the appellants who immediately commenced developments on their plots. Later, their construction was demolished by the 1st respondent. The evidence of AW1 was supported with DW4 who testified that the land was surveyed in 1997 and the process was completed in 2000. He further testified that the land was declared planning area in 1994 through Government Notice No. 607. The owners of the land were compensated in accordance with the law. DW5 further confirmed that the disputed land was allocated to the 2nd and 3rd appellants in 2003. DW6 who was the retired Ward Executive Officer further confirmed that the disputed land was allocated to the 2nd and 3rd appellants. He also testified that, as the Ward Executive officer, he received a letter about the survey the land in 1996. He convened a meeting and owners of the land were identified and compensated.

On the other hand, the 1st respondent's evidence relied on the sale agreement dated 18th June, 2000. However, the same sale agreement was tendered and admitted but not read in Court. Under the law, an exhibit which is admitted but not read in Court suffers the consequences of being expunged from the proceedings of the trial tribunal. On this pertinent point, I take the discretion to consider the case of **Robert P. Mayunga and David Charles Ndaki V. R; Criminal Appeal No. 514 of 2016**, CAT at Tabora where the Court of Appeal of Tanzania 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 instant case, after the expunge of the sale agreement, I am left with the oral testimony of the 1st respondent. However, I wish to highlight some key issues on the alleged sale agreement. The sale agreement was written as if the seller knew that there was a dispute ahead. For instance, two of its paragraphs read:

"Kwa kuwa: Eneo hili halina mgogoro wowote na halina rehani na majirani wangu wanaelewa kuwa eneo hili ni langu"

"Nitamlinda na kumtetea mnunuzi dhidi ya mtu mwingine atakayedai kumiliki eneo hili kwa gharama zangu".

Despite the above suspicious paragraphs, the sale agreement's date was written and later corrected. Both on top and the end of the document, the initial date was 18/06/1999 but later corrected to road 18/06/2000. Such corrections are apparent. It appears as if the document was doctored for the purposes of this case. Furthermore, the sale agreement was not blessed by leaders of the respective areas such as the Ward Executive Office or street leader. In my view,

the alleged sale agreement creates a lot of questions than answers and was not worthy to be believed.

In addition, the 1st respondent bought the land in 2000 when the same was already surveyed and owners were possibly compensated. In my view, the 1st respondent was conned after the compensation was done because even the alleged seller, Paul Kamazima also bought the land from Alphonse Mujaki. It may be very absurd for the Court to believe un-authenticated documents and discredit the legal procedures of allocation of land. In my view, the appellants' case was heavier than that of the 1st respondent. I hereby allow the appeal and set aside the decision of the District Land and Housing Tribunal. I declare that the 2nd and 3rd appellants are lawful owners of the disputed land. I further order the 1st respondent to vacate from the disputed land and pay the losses he occasioned to the appellants including the costs of this case. It is so ordered.

Dated at Bukoba this 15th July 2021.



Ntemi N. Kilekamajenga
Ntemi N. Kilekamajenga
Judge
15th July 2021

Court:

Judgement delivered this 15th July 2021 in the presence of the counsel for the 1st appellant, Mr. Athuman Msosole (Advocate) and the 2nd and 3rd appellants present in person. The 1st respondent was absent but Mr. Shakilu Hussein appeared for information. The 2nd respondent was absent. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga
Judge
15th July 2021