

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

LAND APPEAL NO. 26 OF 2020

MARCO T. MWALONGOAPPLICANT
VERSUS
NYILIKO D. KILASI.....RESPONDENT

Date: 26/11& 07/12/2021

JUDGMENT

MATOGOLO,J.

This is an appeal by one Marco T. Mwalongo against the decision of District Land and Housing Tribunal (DLHT) for Njombe in Land Application No. 43 of 2013. Before the said Tribunal the appellant unsuccessfully sued the respondent one Nyiliko D. Kilasi over a piece of land alleged to be sold to the appellant by the respondent's father. Upon being aggrieved with such decision of the DLHT, the appellant has come to this court where he filed a memorandum of appeal with four grounds as follows:-

1. That, the District Land and Housing Tribunal erred in law and facts in disregarding the reliable evidence of the Applicant.
2. That, the District Land and Housing Tribunal erred in law and facts in relying on crystal clear lies from the Respondent and his witnesses.



3. That, the District Land and Housing Tribunal erred in law and facts in relying on fraudulent documentary evidence of the Respondent.
4. That, the District Land and Housing Tribunal erred in law and facts in not giving weight to the evidence of the applicant and his witnesses in relation to standard of proof.

The appellant therefore prayed for this appeal to be allowed with costs and the decision of the DLHT be quashed and set aside.

Before this court the appellant was represented by Mr. Batista J. Mhelela learned advocate. The respondent appeared in person. The appeal was argued by way of written submissions. The appellant abandoned ground 3, he thus argued first and fourth grounds jointly while second ground was argues separately. It is the appellant's submission in respect of the two grounds that it is trite law that he who alleges must prove, that is the burden of proof lies on the person who positively asserts existence of certain facts in accordance to Section 110(1) and (2) of the Evidence Act, Cap. 6 R.E. 2019. The standard of proof in civil cases is on the balance of probabilities as it was stated in a number of cases. The appellant referred to this court the case of ***MANAGER NBC TARIME VS. ENOCK M. CHACHA (1993) TLR 228.***

Mr. Mhelela argued that the appellant in this case has managed to prove his ownership of the suit premises at the prescribed standard by not only adducing evidence on how he acquired the suit premise but also the proof of his allegation by tendering both the sale agreement which clearly describes the suit premise and its size also the certificate of occupancy which was issued in respect of the suit land in favour of the Appellant. Mr.



Mhelela submitted further that it is trite law as it was put clear in the case of **ABDUL RAHIM JAMAL MOHAMED VS. WATUMISHI HOUSING CO. LIMITED**, Land Case No. 93 of 2015 H/Court Dar es Salaam (unreported). He said in that case at page 7 of its judgment the court stated that when the contract is reduced into writing but later a dispute arise between the parties as to the terms or content of the agreement and one of the parties is seeking to dispute or controvert the terms, recourse has to be sought from Section 100 of the Law of Evidence Act. He said in the instant case the sale agreement and the certificate of occupancy tendered by the Appellant before the trial Tribunal was sufficient enough to prove the terms of the agreement between the Appellant and the Respondent's father (now deceased) with regard to the size of the plot purchased by the Appellant in absence of proof at allegations of forgery leveled by the Respondent.

The learned counsel submitted further that both documentary proof was supported and preceded by oral evidence of the Appellant and his witnesses which shows how reliable his evidence of ownership was as opposed to the Respondent and his witnesses who merely alleged that the tendered documents were forged as alleged at page 35 and 37 of the typed proceedings by the Respondent without proving the allegations of forgery as required by law. To support his argument he cited the case of **MOHAMED AKBAR VS. MARK DANHI BOMAN & 3 OTHERS**, Land Case No. 63 of 2015.

He said they (Respondent) alleged that their deceased father knew how to read and write without proving the same as their sole exhibit to

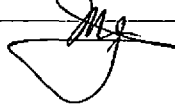
prove this allegation was not admitted in evidence before the DLHT for being doubtful as to its genuineness as it needed no expertism to challenge its genuineness.

Mr. Mhelela was of the view that the circumstance of the above cited case are similar to the case at hand particularly on the allegation of forgery advanced and relied upon by the Respondent and his witnesses who are not denying that their deceased father sold the plot of land to the Appellant rather that it was not of the size alleged by the Appellant and that the sale agreement was forged. He argued that there is no any document respondent tendered before the DLHT to the contrary, there is no even loss report produced to prove allegation of loss of the original sale agreement.

It is therefore the submission by the appellant that the proof of ownership by the respondent over the suit premise fell very far short of standard required in civil cases.

Regarding the second ground of appeal it is the submission by the learned counsel that the evidence of the Respondent and his witnesses is coupled with crystal clear lies which is exhibited in the following ways:-

Firstly while the Respondent (RW4) alleges to have built a house himself on the suit land when he was of fifteen years old as shown at page 36 of the typed proceedings of the DLHT, the same Respondent at page 38 while responding to the assessors question he said he sold the house was built by his father (deceased). Again while RW5 at page 40 alleges that the deceased died on 24/08/2001. The same witness at page 45 says the deceased died on 27/08/2001. Mr. Mhelela questioned the credibility of the

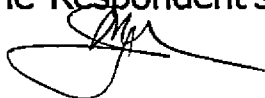


two witnesses. But secondly the Respondent has failed to bring his very witnesses who were to state the truth or otherwise of his allegation such witnesses are the street leaders of Mjimwema where the Respondent alleges to have reported the matter of forgery, and the other key witness is the Land Officer one Mr. Lubawa with whom the Respondent and his witnesses allege to have met and discussed with the Appellant on the issue of surveying their plots and that the said Land Officer advised them to settle first before a certificate of occupancy is issued. He said failure to call such key witnesses invite this court to draw an inference adverse against the Respondent as it was held by the Court of Appeal in the case of ***AZIZ ABDALLAH VS. THE REPUBLIC (1991) TLR 71.***

He argued that the street leaders of Mjimwema and the Land Officer were important witnesses for the Respondent and were within his reach but Respondent did not want to call them.

Thirdly, the Respondent was not present at the scene on the material day, when the sale agreement was executed, and even the purported witnesses who allege to have been present and witnessed the execution do not know the size of the purchased plot, they were just estimating.

Fourthly, that there is no death certificate tendered by the Respondent and his witnesses to prove that the sale agreement tendered by the Appellant at the trial Tribunal was executed after the death of the Respondent's father, as they orally allege that both the deceased and his witness to the sale agreement died on 27/08/2001 which means that at the material day the Respondent's father had already died. In the absence of



death certificate to prove the deceased death without that the allegations by the respondent remain an afterthought.

Fifthly, he said there is a lot of contradictions among Respondent's witnesses as to when the house (hut) was built on suit premises. While PW1 alleging to built it in 2005, RW5, the mason says they built together in 2002.

Mr. Mhelela pointed out that although the assessment of the witnesses credibility is within the domain of the trial court as held in ***AUGUSTINE PETER MMASI VS. TAUSI SELEMANI (2016) TLSLR 135.***

However he said this being the first appellate court can re-evaluate the entire evidence received at the trial and subject it to critical scrutiny and come with its independent decision per the decision in the case of ***IN THE HARVEST VS. HAMZA K. SUNGURA***, Civil Appeal No. 149 of 2017 CAT.

Mr. Mhelela prayed for this appeal to be allowed with costs, the judgment and proceeding of the trial Tribunal be quashed and its orders be set aside.

In his reply submission the Respondent stated that a mere tendering of sale agreement dated 25/09/2001 signed between the appellant and the late Daudi Yohana Kilasi and certificate of occupancy is not adequate in the circumstances of this case. Even the case of ***Abdul Rahim Jamal Mohamed*** (supra) does not hold water as the two cases are distinguishable as in ***Abdul Rahim Jamal Mohamed*** both parties were living and were present in

court to argue their competing claims there was less likelihood of one party taking the advantage of the absence of the other. But the opposite is true in the instant case. There was also a clear lack of diligence on the plaintiff and his advocate which made his case weak in the appellant's case. But in the in the instant case the seller and his alleged witness are both dead their death certificates were not tendered in court. But evidence of their death and date of their death was not refuted by any evidence. He argued that testimony of their death alone would not vitiate the legal position of this case further evidence was adduced on the fact that the alleged witness of the deceased seller of the suit premises, the late Yohana Daudi Kilasi had died on a date earlier before date of the alleged sale agreement. The appellant alleged that Exhibit A-1 was draw and witnessed by Yohana Kilas as shown at page 14 of the proceedings. He said all that evidence by the appellant was contested in court, and there is even allegation of fraud in the appellant's sale documents produced in court. On the alleged sale agreement the alleged seller of the suit premises is shown to have signed by a thumb. But the appellant alleged that the deceased seller could read and write. But this was also contested by kins of the deceased. RW3 the brother of the deceased testified to the effect that his deceased brother went Itulike Primary School and later Kibena Primary School and could read and write. He said RW3 used to exchange letters with the deceased as shown at pages 33-34 of the proceedings. RW5 testified that the deceased was tencell leader for years up to 1995. That to be given such a position you have to be literate. He said the Respondent's witnesses who had seen the sale document before testified that it was bearing the sellers written



signature, the voter's identity card of the deceased Daudi Yohana Kilasi with his written signature appended thereon was produced to prove his literacy. He said this testimony threw the appellants case off balance, the respondent strongly resisted the appellant's argument that a documentary evidence such as sale agreement can only be rebuttal by another documentary evidence as the circumstances are different. The respondent argued further that if a living persons produces a document bearing records that allege that certain acts were done by deceased during his life time and kins who were present at the time of that occurrence or were informed of the event casts serious suspicion on the document. The said rule of law above cannot be applied as it is, justice would not be served by such rule. That is the circumstances where the deceased kept the only copy of the sale agreement and the other copy is in the custody of the alleged buyer, appellant and loss being discovered during the funeral of the seller, it is known when the said copy got lost, but it is noted from the respondent's evidence that the deceased was living with his last born only, the respondent who was a minor then within close proximity of the appellant.

The respondent argued further that evidence was adduced of the fact that RW2 was the appellant's witness to the sale agreement and not Felista Raphael Mgaya. He said it is dangerous for this court to depart from the well considered decision of the DLHT. He said in the circumstance of the case it was very difficult for the respondent to get documentary evidence as contended by the appellant and he asked this court to give weight to



oral testimony of the respondent as the appellant did not prove his case on the balance of probability despite the documentary evidence fronted.

With regard to the second ground of appeal that, the trial Tribunal relied on crystal lies from the respondent , it is the respondent's submission that if the evidence of RW4 is well considered he said "Aidan Chafumbwe built the suit premises" meaning that he was employed to do the work. And that the house was built from the common resources for the common benefit of the family.

On the other hand he said AW5- Daudi Ndelage contradicted his own testimony as during examination in chief he said the appellant sent him to take iron sheets from the appellant's house to the suit premises but during cross-examination he changed and said he bought the iron sheets. Respondent asked this court to expunge the testimony of AW5 in relation to the iron sheets used on the suit premise as it has less evidential value.

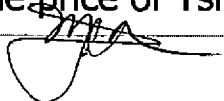
The respondent submitted further that he got difficulties in procuring attendance of witnesses, the land officer Mr. Lubawa and the village executive officer of Mjimwema Mr. Mkongwa as by the time the suit was instituted by the appellant the whereabouts of Lubawa was unknown but the VEO of Mjimwema did not cooperate with the respondent instead was called by the appellant as his witness. He said it was not his option not to call them as alleged by the appellant such that adverse inference cannot be drawn against him and that the rule in ***Aziz Abdallah case*** is irrelevant to the circumstance of the instant case. But he was of the same position with the appellant that assessment of witness credibility is the monopoly of the



trial court as it was held in the case ***Jummanne Buholwa vs. Juma Mkome***, PC Civil Appeal No. 55 of 2005 H/Court Mwanza.


The respondent prayed to this court to dismiss the appeal with costs. In rejoinder, the appellant almost reinstated what he submitted in the submission in chief in which he tended to link with the respondents reply submission.

Having read the rival submissions by the learned counsel from both sides and passing through the trial Tribunal records as well as grounds of appeal I am called up on to determine whether or not the decision of the trial Tribunal was properly procured and whether this appeal has merit. Starting with the evidence on record, the appellant asserted ownership to the suit premises on the ground firstly that, he invited the respondent's father to reside on the suit land upon his request. The respondent's father one Daudi Kilasi was living with his son, the present respondent. He said he invited him in 2005. It is also the evidence by the appellant that he had purchased that land in 25/09/2001 from the respondent's father and tendered in court the sale agreement (exhibit A-1). The seller Daudi Kilasi died in 2007. In 2008 respondent left to Iringa but returned in 2010 and requested appellant to continue residing on the suit premise. In 2011 respondent installed water system from water department appellant complained against him. Also in 2013 respondent installed electricity, it is when appellant told respondent to vacate from the premise but he resisted. Upon further examining the evidence on record there is no dispute that appellant had purchased piece of land from the Daudi Kilasi on 25/09/2001 for the price of Tshs 340,000/=. However it was not the whole

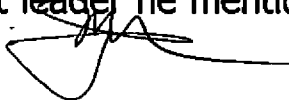


area as the said Daudi Kilasi remained with another plot now in dispute. The plot which was sold to the appellant is the place appellant built his house and where he is living now. But the plot which was sold to the appellant is on the northern part and the suit land on the southern part. The appellant has relied on the sale agreement, exhibit A-1 and the title deed/Right of occupancy issued to him (exhibit A-2). However there has been contention with regard to the two documents, exhibit A-1 in particular. The defence side has alleged fraud, that is exhibit A-1 is not the sale agreement entered into between parties on the following grounds; firstly that, in exhibit A-1 the seller appears to have signed on his part by affixing a thumb while he was a literate capable of reading and writing and according to the respondent's witnesses PW1, PW2-RW3, RW4 and RW5 he signed by writing his name. They even tendered before the trial Tribunal his voters registration card, exhibit R-1 on which he signed.

Secondly, the witnesses who are listed in exhibit A-1 were not present. RW3 said Felister Mgaya was not a witness in the sale agreement. Even Yohana Daudi Kilasi who is listed in exhibit A-1 to be among witnesses to the sale agreement on the date sale agreement was reduced had already died. He died on 27/08/2001 and buried on 28/08/2001. But the sale agreement was reduced on 29/08/2001. However the defence side did not tender an alternative sale agreement entered between appellant as purchaser and the late Daudi Kilasi as seller. According to the defence witnesses the same was misplaced or got lost during the mourning of the late Daudi Kilasi.

A handwritten signature in black ink, appearing to be 'JM' followed by a long horizontal stroke.

I will start with ground No. 2, there has been the argument by the appellant's counsel that the trial Tribunal chairman erred to rely on evidence of the respondent and his witnesses which is the clear lies. However the learned counsel did not substantiate such accusation of lies on part of the defence witnesses. It is trite law that every witness is entitled to credence and his evidence believed unless there is good reason for not doing so as it was cleared in the case of ***Goodluck Kyando vs. Republic***, Criminal Appeal No. 118 of 2003. And when it comes to witness credibility the trial court is best placed to decide on it because it had an opportunity seeing a witnesses and his demeanour as it was rightly observed by the learned counsel for the appellant and referred the case ***Angustino Peter Mmasi vs. Tausi Seleman*** (supra). The issue of assessment of the witness credibility is in the domain of the trial court than an appellate court which cannot get an advantage of seeing the witness while testified and observe his demeanor. The trial Tribunal enjoyed that opportunity and trusted the witness on the defence and acted on their testimonies. There is also argument that respondent failed to call material witnesses at the trial without good reasons and the appellant invited this court to draw inference adverse to the respondent. The mentioned material witnesses include one Lubawa the land officer who is said to be involved in the survey of the suit land and the street leaders of Mjimwema. In response to that, respondent submitted that at the time he was sued by the appellant in the suit the where about of Lubawa was unknown. Likewise for the street leader he mentioned one Genzi Mkongwa the street



executive officer of Mjimwema did not cooperate with him instead testified for the appellant as AWZ. I think there is substance in this argument.

Mr. Lubawa is said to be the land officer who dealt with this matter in 2011. This being a civil servant by the time respondent was sued is possible he had already been transferred to a different work station which respondent could not know, but for the street executive officer, he was already called by the appellant as his witness, it was not possible for the respondent to call him again as a witness on his part. So it is correct as it was submitted by the respondent in his reply submission that the circumstances of the instant case, the rule on adverse inference as stated in ***Aziz Abdallah case*** (supra) cannot apply as the circumstance of the present case to that of the cited case are different, it therefore my considered opinion that the appellant did not lead sufficient evidence or supply facts establishing that the respondent and his witnesses testified lies before the trial Tribunal upon which the trial Tribunal chairman relied. I think this argument ought not to have been raised before this court I therefore this court I therefore find ground No.2 baseless and without merit.

Now going to first and fourth grounds which were jointly argued, the complaint in ground No. 1 is that the DLHT erred in law and facts in disregarding the reliable evidence of the appellant. The complaint in the ground No. 4 is that the DLHT erred in law in not giving weight to the evidence of the applicant and his witnesses in relation to standard of proof. The argument put forward by the appellant's counsel is that he who alleges must prove as the burden is casted on him by virtue of the provision of

Section 110(1) and (2) of the Evidence Act, and as it was interpreted in the case of ***Manager NBC Tarime vs. Enock Chacha*** (supra). The appellant's argument is based on the document appellant tendered at the trial, the sale agreement (exhibit A-1) and right of occupancy (exhibit A-2) and the requirement under section 101 of the Evidence Act. Upon going through the DLHT proceedings the tendering and admission of the two documents has been contentious. The said documents particularly exhibit A-1 was not recognized by the defence side as according to their evidence as I have pointed out herein above was not the one reduced at the time of sale agreement. Exhibit A-1 appears to have been signed by the seller by affixing thumb while the one reduced at the sale agreement he signed by writing his name as he was able to read and write as he attended primary school at Itulike primary school and Kibena Primary school respectively. But in the sale document prepared at the sale, it was witnessed by Augustino Kilasi and Charles Saimon Njenjema. The seller's witness was Augustino Kilasi and the buyer witness was Charles Saimon Njenjema who testified as RW2. RW2 denied to know Felista Raphael Mgaya (AW3) as he said she was not present at the sale agreement and did not witness for the buyer but himself. RW2 stated further at that period he was employed by the appellant as a driver, he was driving his commuter bus.

AW3 on her part said he was not living on the suit land, is the sister to the appellant but witnessed the sale agreement and come from Uwemba. AW2 also disclosed that on that date they were just four which means the contracting parties (seller and buyer) and witnesses. But the local leader were not involved in the sale deed. Looking at this evidence

critically there are allegations of fraud on the part of the buyer as the seller appears to have signed by affixing a thumb while he was literate capable of signing by writing but the sale documents, exhibit A-1 contains names of persons who were not at the signing ceremony namely Felista Raphael Mgya (AW3) and Yohana Daudi Kilasi who is said to have been already dead on the date the sale agreement was signed. The Tribunal record revealed different size of the suit land while AW3 said it has (mzunguko) of square foot of 593 the sketch map drawn by the trial Tribunal at the visit in locus in quo is 160 square meters. But the title deed (exhibit A-Z) shows the plot size is 1,744.10 M².

Now I am trying to ask myself as to which is which as the area indicated in evidence then the sale agreement and what the trial Tribunal observed is small compare to that area indicated in the title deed. This led me to believe that the appellant did not buy the whole plot of Daudi Kilasi but in the process of applying for right of occupancy he encroached part of the piece of land not sold to him, as had he applied for Right of occupancy on the area he purchased from the late Daudi Kilasi the area would tally to what indicate in the sale agreement (though disputed) and what the DLHT observed at the locus in quo. Even the evidence by the respondent as can be seen in the trial Tribunal record and the document tendered I am inclined to believe that there was fraud committed regarding the purchase and registration of the suit land.

But despite that, there is one logical question I am trying to ask myself, the appellant claimed that he purchased a plot of land (suit land)



from the respondent's father then the latter asked him to permit him residing on the same plot together with his son, the respondent. This is unlikely as the late Daudi Kilasi had other children he could not sell the whole area in disregard of the fate of his children including the present respondent. But another thing, I have read the sale agreement, the same involve a plot of land within Njombe town, but there is no any stamp duty affixed to it for purpose of its validity. If there is fraud in the sale agreement then the requirement provided for under Section 110(a) of the Evidence Act comes into play. It appears the registration of the plot of land by the appellant is invalid as the same was procured by fraud. The trial Tribunal chairman evaluated the whole evidence before him and found for the respondent as the appellant did not prove his case on the required standard that is in the balance of probabilities. In actual fact the appellant had a burden to prove what he alleged before the DLHT, the burden which lied on him and never shift to the adverse party as it was held in the case of the ***Registered Trustee of Joy in the Harvest vs Hamza R. Sungura***, Civil Appeal No. 149 of 2017 CAT (unreported), in which the case of ***Paulina Samson Ndawavya vs. Theresia Thomas Madaha***, Civil Appeal No. 45 of 2017 was referred. The court clearly said that:-

"It is again trite that the burden of proof never shift to the adverse party until the party on whom the burden lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party case".



Having demonstrated as herein above I find this appeal without merit. The same is dismissed with costs.

DATED at IRINGA this 08th day of December, 2021.




F. N. MATOGOLO

JUDGE

08/12/2021

Date: 08/12/2021

Coram: Hon. F. N. Matogolo – Judge

Appellant: }

Respondent: } Present

C/C: Charles

COURT:

Judgment delivered in the presence of parties.




F. N. MATOGOLO

JUDGE

08/12/2021