IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 33 OF 2021

(Originating from Application No. 154 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi.)

EMMANUEL MAKALA.....1ST APPELLANT

ZUBERI EMMANUEL MAKALA.....2ND APPELLANT

VERSUS

JOSEPH PETER MUSHI.....RESPONDENT

JUDGMENT

22/3/2022 & 13/05/2022

SIMFUKWE, J.

The respondent herein successfully filed a land dispute before Moshi District Land and Housing Tribunal claiming to be a lawful owner of the suit land measured 4 acres situated at Mserikia Village, Mabogini Ward within Moshi District in Kilimanjaro Region. The respondent herein alleged before the District Tribunal that he had bought the disputed land from the 1st appellant on 18th day of November 1988 for the sum of Tshs. 28,000/. That, in 2016 the 2nd appellant herein the son of the 1st appellant herein invaded the suit land by cutting down trees claiming that he was the lawful owner of the said land on allegation that he was given the same by his

father. The respondent tried to solve the matter through the village council and the village executive officer in vain. Then, the respondent filed a land dispute before the District Land and Housing Tribunal. In their defence the appellants alleged that the suit land belonged to the 1st appellant herein. The District Land and Housing Tribunal declared the respondent herein to be the lawful owner of the suit land. The appellants herein were ordered to vacate from the disputed 4 acres of the respondent. That, since the 1st appellant alleged that 7 acres were allocated to him in 1974, while executing the decree of the District Tribunal, 4 acres which were purchased by the respondent were ordered to be handed over to the respondent.

After being aggrieved by the decision of the trial tribunal the appellants filed the instant appeal of the following grounds:

1. *That, the Trial Tribunal erred in law and facts by finding that the Respondent's evidence on sale was credible.*
2. *That, the Trial Tribunal erred in law and fact by not making a sketch of the suit land to ascertain boundaries or at all take evidence of neighbours on site.*
3. *That the Trial Tribunal erred in law and fact by rejecting the Appellant's evidence regarding acquisition and use of suit land since 1974.*
4. *That, the Trial Tribunal simply glossed over the evidence without an in-depth analysis.*

The appellants prayed that this appeal should be allowed with costs.

When the matter was set for hearing, both parties were unrepresented. The respondent Joseph Peter Mushi prayed the appeal to be argued by way of written submissions. The prayer was conceded by the appellants,

then the matter was ordered to be argued by was of written submissions. Parties adhered to the schedule of filing their submissions.

In their submission the appellants consolidated the 3rd and 4th ground of appeal.

In support of the 1st ground of appeal that, *the Trial Tribunal erred in law and facts by finding that the Respondent's evidence on sale was credible;* the appellants submitted that the trial tribunal made its decision based on the purported sale agreement between the 1st appellant and the respondent that was tendered and admitted as annexure A1. They contended that looking at the said exhibit's authenticity, it is questionable. The appellants pointed out aspects on which they challenged the alleged exhibit, that:

a) The document in its entirety is handwritten and signed by the same person.
b) The purported sale agreement only looks as a 'handling over document' (sic) supported by phrases like *'Kutokana na hivyo amenifidia jumla ya sh 28,000/= ikiwa ni gharama ya kufyeka, kung'oa masiki na kulifanya kuwa kibua.'* Also, credibility of the said document is also tested with another phrase that *'Kuanzia leo shamba hilo ni lake asidaiwe na mtu au jamaa yangu yeyote na ofisi ya Kijiji impokee na kumtambua ndie mhusika wa shamba hilo.'*
c) Credibility of the purported sale agreement is also tested on the fact that a person addressed as Balozi of the seller one WILSON DAUDI could not be called as a witness to the sale agreement but rather the purported FANUEL NGIRUASHA was the one who witnessed the sale as Balozi.

d) The said Wansangula Emmanuel addressed as the wife of the seller and the contained signature purported to be the seller's signature were all denied by the appellants but were all disregarded, for the trial chairman only wanted a police report.

The appellants cemented their arguments by citing the case of **Stanslaus R. Kasusura and the Attorney General vs. Phares Kabuye [1982] TLR 338** in which it was held that:

> *"The trial judge should have evaluated the evidence of each of the witnesses, assessed their credibility and made a finding on the contested fact in issue."*

On the basis of the above cited case, the appellants submitted that, the same was not done by the trial Chairman for the purported evidence on the sale was not credible at all and that the trial Chairman did not make any assessment on such evidence hence, arrived to an unjust decision.

Arguing the 2nd ground of appeal, that, *the Trial Tribunal erred in law and fact by not making a sketch of the suit land to ascertain boundaries or at all take evidence of neighbours on site;* the appellants submitted that in framing of the issues the trial tribunal, among the issues framed was *"Whether the Respondent has been using the suit land since 1988."*

That, trying to satisfy itself the trial tribunal visited the suit land (locus in quo) but the visit to the suit land did not assist simply because the trial tribunal did not even make a sketch of the suit land or determine its boundaries or at all establish if the evidence adduced that the respondent has been on the suit land since 1988 is credible.

It was stated further by the appellants that, the trial tribunal did not even bother to ask the neighbours on the suit land on the reality of the

respondent's evidence. The appellants were of the opinion that the judgment of the trial tribunal is too general.

On the 3rd and 4th grounds of appeal *that the Trial Tribunal erred in law and fact by rejecting the Appellant's evidence regarding acquisition and use of the suit land since 1974, and that, the Trial Tribunal simply glossed over the evidence without an in-depth analysis*; the appellants averred that during the trial the 1st appellant alleged that he acquired the suit land since 1974 and that in 1985 he gave the same to his children. That, in 2018, the 1st appellant was reallocated the suit land by the Village government. They said that the exhibit was tendered to that effect (exhibit D1).

It was submitted further that in 1995, the 1st appellant constructed a well therein. The trial tribunal witnessed the same when it visited the locus in quo. The 2nd appellant alleged that he has been on the suit land since he was a child and that in 1985 his father allocated the suit land to them (his children). It was also alleged by the appellants that all other witnesses testified that appellants were the lawful owners of the suit land.

Furthermore, it was contended that no analysis was made by the trial tribunal on the adduced evidence. Thus, the conclusion of the trial tribunal was erroneous.

In his reply on the 1st ground of appeal, the respondent submitted inter alia that the respondent told the trial Tribunal that he bought the suit property on 18th November 1988 from the 1st appellant in the presence of witnesses who gave their testimonies in favour of the respondent.

Responding to the issue of the ten-cell leader (Balozi) named Wilson Daudi, the respondent replied that the said ten cell leader was the leader

at the place of residence of the seller (1st appellant) and not at the disputed land.

The respondent substantiated his argument by submitting that section 10 of the **Law of Contract, Cap 345 R.E 2019** provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object. That, the same are not expressly declared to be void.

He stated further that the document which was admitted as exhibit P1 clearly has all the four elements of contract:

1. FREE CONSENT OF THE PARTIES

   That, exhibit P1 has the following words, *"MIMI NDUGU EMMANUEL MAKALA.... NIKIWA NA AKILI TIMAMU BILA KUSHAWISHIWA NA MTU YEYOTE."*

   Th respondent submitted that the quoted words show the free consent from the 1st appellant and the same has been witnessed by the wife of the 1st appellant one Wansanguia Emmanuel.

2. CAPACITY OF THE CONTRACT

   That the above agreement has been made by the persons who are competent to enter into a contract and witnessed by persons of majority age who were called by the respondent to testify before the Tribunal. The respondent referred to **section 11 of the Law of Contract Act, Cap 345** which provides on capacity of contract, that:

   > *"11. -(1) Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."*

3. CONSIDERATION

That the phrase "...*AMENIFIDIA JUMLA YA SHS 28,000/= (ELFU ISHIRINI NA NANE TU),* on the eyes of the law is consideration.

In support of his point, the respondent made reference to **Blacks Law Dictionary, 9th Edition at page 347** where consideration has been defined as something bargained for and received by the promisor from promise, that which motivates a person to do something, so as a person who parts with value must be given value in return, which means nothing should go for nothing.

4. LAWFUL OBJECT

That the object has been well identified by the 1st appellant through the words: *"Eneo langu la shamba lenye ekari 4 (NNE TU) kijijini Mtakuja lenye mipaka kama ifuatavyo:"*

The respondent argued further that the purported sale agreement in the eyes of the law was SALE AGREEMENT, and the trial Chairman was right when he decided that the suit land belonged to the respondent because the 1st appellant sold the said land to the respondent. The said transaction has been proved by the document itself and the witnesses who were present when parties entered into the said contract in 1988. The respondent was of the view that the said document was genuine and its authenticity was not questionable at all. To cement his position, the respondent cited **section 100 (1) of the Law of Evidence Act, R.E 2019** which stipulates that when the terms of contract, grant, or any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in

proof of the terms of such contract grant, or other disposition of property or of such matter except the document itself.

On the 2nd ground of appeal, the respondent replied that there were no issues of boundaries but rather the issue of ownership. The dispute was on four acres, the remaining three acres were not disputed that the same belonged to the appellants. That, witnesses brought by the appellants also suggested that the appellants in one way or another were using the three acres only. The respondent buttressed his point by citing the case of **Nizar M. H. vs Gulamali Fazal Jan Mohamed [1980] TLR 29** in which it was held that visit to the locus in quo should be done only in exceptional circumstances by the trial court to ascertain the state, size, location of the premises in question. The court stated further that:

> *"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather that an adjudicator. At the trial, we ourselves can see no reason why the magistrate thought it was necessary to make such a visit. Witnesses could have given evidence easily as to the state, size, location and so on, of the premises in question. Such evidence could, if necessary, be challenged in cross examination. But at least the magistrate made his visit on the application of a party to the trail. We completely fail to see why the first appellate judge thought it was necessary for him to visit the premises. He was dealing with an appeal."*

The respondent contended that the honourable Chairman observed that evidence on the record was sufficient for the Tribunal to determine the suit justly, with clarity and certainty without even visiting the locus in quo. That, the Tribunal visited the locus in quo because it was requested by

the appellants. However, the said visit gave the trial Chairman real picture of the land in dispute and ended in entering judgment in favour of the respondent.

Replying the 3rd and 4th grounds of appeal, the respondent submitted that the Chairman made full analysis and elaborated the point on the disputed land and declared that the 4 acres belonged to the respondent and that the 3 acres belonged to the appellants.

Regarding Exhibit D1, it was submitted for the respondent that the person who gave that order had no authority or jurisdiction over land matters as stipulated under **section 167 of the Land Act, Cap 113, R.E 2019;** which states courts which are vested with exclusive jurisdiction to hear and determine all disputes, actions and proceedings concerning land.

The respondent prayed that this appeal should be dismissed with costs.

From the four grounds of appeal and submissions of both parties, it is not disputed that the suit land was acquired by the 1st appellant in 1974. The dispute is ***whether the suit land was sold to the respondent by the 1st appellant or not.***

This being a civil case in nature, the court will consider whether according the trial court's record on balance of probabilities whose evidence was more credible that the other.

The Court of Appeal in its decision in the case of **Paulina Samson Ndawanya v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (unreported) held that:

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply*

means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

On the first ground of appeal, the appellants fault the trial tribunal for finding that the respondent's evidence on sale was credible. In their submission in support of the appeal the appellants among other things challenged the sale agreement on various aspects. In his reply the respondent submitted that the impugned sale agreement had all the qualities of a valid contract pursuant to the law. In his decision at page 5 the trial Chairman found that:

"Mdai ametoa hati ya ununuzi ikiwa imetiwa sahihi na Balozi (Fanuel Ngirusha- AW2) na Katibu wa Kijiji M. C Mallya.....

Nilitegemea utetezi utoe Ushahidi kama hiyo hati siyo ya kweli na kama anayedaiwa kuwa ni mke wa Muuzaji, siyo mkewe."

On the basis of the above findings of the trial Chairman, this court is of considered opinion that the decision of the trial tribunal was justified as the trial Chairman analysed the sale agreement and found it to be credible.

It is trite law that in matters of assessment of credibility of witnesses and weight of evidence, courts of first instance are the best. In the case of **Ibrahim Ahmed v. Halima Guleti (1968) HCD** 71, **Cross J.** (as he then was) held that:

".... Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence."

In another case of **All Abdallah Rajab v. Saada Abdallah Rajab [1994] TLR 132,** it was stated that:

"Where a case is essentially one of fact in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to erroneous conclusion."

It is on the basis of the cited case law that I do not see any ground to fault the trial tribunal in respect of the sale agreement.

On the second ground *that the trial tribunal erred in law and fact by not making a sketch of the suit land and ascertain boundaries or take evidence of neighbours on site,* with respect the trial tribunal's record has a sketch map of the suit land dated 19/3/2021. Thus, the 2nd ground of appeal is unfounded, I dismiss it accordingly.

Regarding the 3rd ground of appeal which is in respect of rejection of appellants' evidence regarding acquisition and use of land since 1974, with respect the trial chairman noted at page 4 of his judgment on the 1st paragraph that:

"Mashahidi wote wa utetezi wameunga mkono utetezi wa Mdaiwa Na.1 kwamba alipata shamba lake la ekari 7 mwaka 1974. ***Hili halina ubishi sana kwani ubishi ni kama Mdaiwa na. 1 aliuza eneo lake la ekali 4 kwa Mdai mwaka 1988 ili aweze kuendesha kesi yake." Emphasis added.***

From the above quoted words, it is obvious that the trial Chairman did not reject evidence of the 1st appellant in respect of acquisition of land as alleged, rather he approved the evidence and found that the same was not in dispute. The learned trial Chairman made it clear that what was disputed was whether the 1st appellant had sold 4 acres out of the 7 acres to the respondent. Hence, the 3rd ground of appeal lacks merit and I hereby dismiss it.

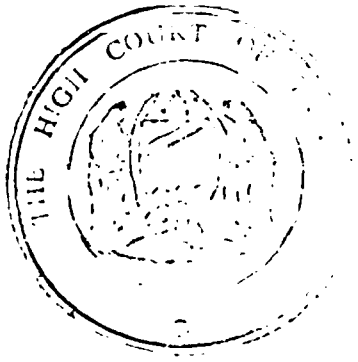
On the 4th ground of appeal on the basis of findings on the 3 grounds of appeal herein above, the trial court judgment speaks of itself that the trial Chairman made a thorough analysis of evidence of both parties prior to his decision.

In the event, I find this appeal to have no merit. The decision of the District Land and Housing Tribunal that the respondent is a lawful purchaser and owner of the disputed land; is hereby upheld. Appeal dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 13th day of May 2022.

Right of further appeal explained.



S.H. SIMFUKWE

JUDGE

13/05/2022