IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

MISC. LAND APPEAL NO. 20 OF 2022

(Originating from Land Appeal No. 130/2020 of the DLHT Kigoma)

MARIAM JUMA BAKARI----------APPELLANT

VERSUS

BILALI MOSHI SOUD----------RESPONDENT

JUDGMENT

17/6/2022 & 23/6/2022

MANYANDA, J.

The appellant, Mariam Juma Bakari is aggrieved by the judgement and decree of the District Land and Housing Tribunal for Kigoma (DLHT) in its appellate Jurisdiction. The said judgement was delivered on 23/11/2021 in Land Appeal No 130 of 2020.

The DLHT upheld the decision of the Machinjioni Ward Tribunal which tried the original Land Application No. 28 of 2020 and decided in favour of the Respondent, Bilali Moshi Soud.

In the trial ward Tribunal, the Respondent sued the Appellant for ownership of a piece of a piece of shamba which he contended that he purchased it from one Moshi Dandi in 2010.

Before the trial tribunal the Appellant contended that she was given the shamba by her mother-in-law in 1970 when she gifted by delivering the only baby boy to her husband. That all witnesses who witnessed the handing of the shamba are now dead and that she has been using it by cultivating crops and sometimes lending it to other persons who cultivated crops.

The Appellant raised four grounds of appeal but Mr. Rwegoshora dropped the third (3rd) ground therefore argued the remaining three grounds. The four grounds of appeal read as follows: -

1. That the Appellate Tribunal erred in law and facts for upholding the decision of the trial ward tribunal which did not take into account the evidence adduced by the appellant which were (sic) strong compared to the evidence of the respondent.
2. That the Appellate Tribunal erred in law and facts for failing to recognize that there was an irregularity of non-joinder in the ward tribunal thus the vendor, one Moshi David was not joined as a necessary party.

consider the facts that the appellant has been in full occupation of the land since 1970.

4. That the Appellate tribunal erred in law and facts for failure to analyze and find that the appellant had made different developments the fact that the area has been surveyed and it includes two plots.

Mr. Rwegoshora chose to start with the second ground. He submitted that it was an error for the appellate tribunal to fail to find that a necessary party was not joined. The Counsel argued that since the evidence led at the trial tribunal showed that the disputed plot was sold to the Respondent, the seller and his estate were known, if was dead was also known then it was imperative to join the seller who is known as Moshi Dandi.

The Counsel challenged application of the authority in the case of **Jeremia Charles vs Stafford Ndabashinze,** Misc. Land Appeal No 13 of 2021 where this court said that a seller becomes a necessary party where both parties allege to have purchased the suit land from the same seller. The Counsel was of the view that the authority in **Jeremia Charles's case (supra)** is distinguishable in the circumstance of this

case, hence, the seller ought to have been made a party in order for him to establish the title to the land he sold.

To bolster his point the Counsel cited the case of **Stanslaus Kalokola vs Tanzania Building Agency (TBA) and Another,** Civil Appeal No. 45 of 2018 where the Court of Appeal held that non-joinder of the Government (TBA) who was the seller of the suit land was not proper.

As regard to ground one, Mr. Rwegoshora argued it was wrong for the Appellate Tribunal to accept the evidence of the Respondent which was weak compared to that of the Appellant.

Mr. Rwegoshora went on analyzing the evidence presented by the Appellant that she was gifted with the land in dispute by her mother in law in 1971. The land was developed with some trees planted on it. She used the land herself for some time and leased it sometimes. That her evidence is corroborated by that of the persons to whom she leased it.

He analyzed the evidence of the Respondent which is to the effect that he purchased the plot from one Moshi Dandi but the said seller was not made a party to the case nor called to testify in support of the Respondent.

Moreover, the Counsel argued that the piece of paper purporting to witness the sale agreement falls short of a contract for want of

did not sign on it as a witness.

On a balance of probability, the Counsel was of the opinion that the Appellant's evidence is more weighty than that of the Respondent. He cited the case of **Hemed Said vs Mohamed Mbile** [1984] TLR 113.

Regarding ground four (4) Mr. Rwegoshora submitted that the DLHT in its appellate jurisdiction failed to observe that the land was developed. Therefore, the lower tribunals erred for failure to take into account the undisturbed occupation of the land a development made thereon.

On his side, Mr. Gilagiza for the Respondent, submitted opposing the appeal. He admitted the principle of law that a party with heavier evidence is the one who wins the case as per the case of **Hemed Said vs Mohamed Mbile (supra).** However, he argued in respect of ground one that the evidence favoured the Respondent because it was proved that the Respondent purchased the suit land from the said Moshi Dandi and the sale agreement dully witnessed by the chairman. He was of the views that non-signing of the contract did not affect the oral evidence of a witness who eye witnessed its making. He argued that the plot was undeveloped and there were no planted trees.

In ground two, the Counsel contended that the authority in the case of **Jeremiah Charles (supra)** is correct that is misjoinder of a seller as a necessary party is serious irregularity only where both parties allege to purchase the land in their dispute from one and same seller. He was of opinion that the principle in that case does not apply in the instant case because not both parties allege to purchase the suit land from the said Moshi Dandi.

As to ground four (4) the Counsel argued that the same was well canvassed by the DLHT, the land was undeveloped and bore natural trees including the Mlinzi tree found on the suit promises. He prayed the appeal to be dismissed with costs.

Those were the submissions by the counsel for both sides. I must confess they did a good job with professionalism.

The issue is whether the appeal is meritorious. From the submissions by the counsel for both sides and the record it is agreed that the principle of proof in civil case is that of balance of probabilities as held in the case of **Hemed Said vs Mohamed Mbile (supra).** I agree with them. In that case the evidence presented by both sides appeared to tally, but this Court went an extra mile in a much more deeper analysis and found that in some way the evidence showed that the respondent in that case

lighter than that of the Appellant. Hon. Sisya, J. as he then was, held; -

> *"According to law the person whose evidence is heavier than that of the other is the one who must win."*

In this case as submitted by the Counsel for the Appellant it was contended by the Appellant that the suit premises belong to her after been gifted by her mother-in-law in early 1970s. However, she could not bring her mother-in-law because she is dead.

On the other hand, the Respondent contend that he purchased the suit premises from Moshi Dandi. He too could not call him in court as witness because he is dead

The Counsel for the Appellant submitted that the seller of the suit premises to the Respondent ought to be made a party or else his estate because he is known. The Respondent's Counsel contended that a sale agreement sufficed because it was witnessed by a witness who even if didn't sign on it, gave oral account of its contents.

The DLHT found that there was no need of joining the seller because it was not contested by both parties that he double sold the land to them as it was in the case **Jeremia Charles vs Stafford Ndabashinze (supra).**

I have navigated through the evidence presented by the Appellant at the trial tribunal and found that it is true she testified that the suit premises were gifted to her by her mother-in-law in 1971. That since then, she was in occupation of it either directly or indirectly by leasing. The Appellant had no eye witnesses. However, there are eye witnesses who testified in her favour that the suit premises was gifted to her and she used it by cultivating crops and sometimes leasing it to other persons for cultivation of crops namely, SU1-Zera Misigaro Kalimanzila, SU2 – Hawa Hassan, SU3 – Mwamvua Mbumburi Matwi and SU4- Mariam Masahaka Pangama

On the other hand, the Respondent presented evidence that he purchased a plot from Moshi Dandi after been told by one Ahmed Lui Lukuba, the sale agreement was reduced into writing and witnessed by one Kesi Hamisi Rashidi. After purchasing it in 2010 he went for studies. He was later on informed that his plot had been invaded by the Appellant. He came back and filed the case at Machinjioni Ward Tribunal.

The Respondent also called Kesi Hamisi Rashidi who testified as SU2 that he witnessed Moshi Dandi selling the suit land to the Respondent and signed on the sale agreement.

SU3, Abu Ibrahim Omari also testified as a witness to the sale.

clear evidence that the Respondent purchased the land in dispute from a person known Moshi Dandi. However, the contention of the Appellant is that the plot which was sold to the Respondent by the said Moshi Dandi belongs to her after been gifted by her mother in law. To put it in other words, the title over that plot belongs to the Appellant. In her contention therefore, means the said Moshi Dandi had no good title to pass to the purchaser who is the Respondent.

In such circumstances truly as submitted by the Counsel for the Appellant it is inevitable for the buyer to avoid calling the seller of the plot either as a party as a witness in order for him to tell where and how he got the title over that plot.

Th evidence of witnesses called by the Respondent don't say whether the said Moshi Dandi was a lawful owner of that plot. All what they testified is that they witnessed the sale.

I have read the sale agreement and found that it does not describe the size or borders of the land sold. The Respondent's evidence is that he purchased a plot which he did not describe also. That evidence leaves a question as to what is the exact area of land was purchased.

In the case of **Hemed Said vs. Mohmamed Mbilu (supra)** this Court held also that it is not a duty of the Court to call witnesses. Where, for undisclosed reasons, a party fails to call material witnesses on his side the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interest.

This principle is applicable in the circumstance of this case because the purported seller Moshi Dandi was not called to testify in court not only to establish his title but also to tell the demarcations of the land he sold to the Respondent. I agree with the Counsel for the Appellant submissions that the record is silent as to whether the said Moshi Dandi was dead at the time of trial of the case before the tribunal, it came to be revealed on appeal in the DLHT. In fact, part of the testimony of the Appellant states as follows; -

> *"...na baadaye tulirudi kwa mw/sanga ndipo walipompigia simu Bw. mlalamikaji Ndipo aliposema kuwa huyu mama alikuwa wapi? Baada ya mazungumzo hayo mlalamikaji alisema huyu mama awe huru mimi nitadili na yule alieniuzia."*

Literally means that after returning to Mw/Sanga the Respondent was called, after arriving, he asked as to where was the Appellant, then he said he would deal with the seller.

existed, it stated as follows;

> *"2(a)katika maelezo yake anakiri kuwa yupo mtu ambaye ndiye aliyemuuzia maeneo hayo na si mwingine ni Moshi Dandi"*

Literally means that in explanation, the Respondent admitted that a person who sold the area exists.

It can be gleaned that the Respondent became aware of the earliest that the sale of the suit premises was dubious. However, after suspecting the sale to be dubious, not only that he did not pursue against the seller as he promised but also did not call him as a witness.

The omission brings a paucity in the Respondents evidence. Hence if weighed on a weighing scale it can be seen that the testimony of the Appellant appears to be heavier. Therefore, when the principle of law in **Hemed Said vs Mohamed Mbilu (supra)** is applied in this case, it is the Appellant who wins. The DLHT was wrong to find in favour of the Respondent because it did not analyze properly the evidence presented by the parties at the trial tribunal. Equally, the trial tribunal was wrong to hold that the evidence of the parties tallied and decided to award the suit premises to the Respondent. The first ground has merit.

As regard to the second ground, as I have analyzed the evidence, the contention by the Appellant has meaning. The evidence indicates that the sale transaction was obviously suspected the Respondent himself. However, he did not deal with the seller as promised. The evidence of the Appellant was not challenged on this aspect.

I my firm view the DLHT was not justified for failure to hold that the seller of the suit premises, in the circumstances of this case, where the purchase was dubious coupled with lack of specificity of the suit premises, ought to have found that the trial tribunal was flawed. The judgement of the trial tribunal is also ambiguous when it failed to identify the disputed premises and ended up on ambiguous order. It stated as follows; -

> *"kwa maelezo hayo ya mashahidi wajumbe (Baraza) wameona kuwa Bilali kama mlalamikaji analo eneo ambalo alilinunua kwa Moshi Dandi na mlalamikaji pia anayo maeneno hapo. Sasa kwa mamlaka tuliyonayo ya kifungu cha Sheria ya Utatuzi wa Migogoro ya Ardhi No. 76 ya Mwaka 1996 tunatamka kuwa Bilali Moshi Soud kama mlalamikaji ataendelea kumiliki eneo lake kama alivolipata toka kwa muuzaji aliyemuuzia Bw. Moshi Dandi na asivuke nje ya mipaka aliyouziwa na mteja wake."*

Literally means that both the Respondent and the Appellant have areas of land at the suit premises. Then, under the power vested into the

land. That the Respondent should not to exceed the borders of the plot he purchased.

However as explained above the sale agreement does not show any border demarcation of the purchased land.

This Court finds that the DLHT also fell under the same trap the trial tribunal fell into. In my views in order to resolve properly this, matter it was imperative for the seller of suit premises to be made a party or called as a witness. The second ground has merit also.

In respect of the fourth ground, the complaint is that it was wrong for the DLHT to make a finding that the suit premises was undeveloped. In my analysis of the evidence above I found that the disputed land had planted and nursed natural trees.

The testimony of the Appellant named the trees available in the suit premises as being cashew nut trees, mrumba and mlinzi. Cashew nut trees and mrumba are planted trees and mlinzi a natural nursed tree.

The Respondent simply said that the plot was a bush. All the Appellant's witnesses named a Mrumba and Mlinzi trees as being available in the suit premises. The Counsel for the Respondent argued that mlinzi tree is

a natural tree, yes it may be so, but the same tree was kept in the suit premises and nursed just like the other planted trees.

Moreover, the Appellant's witnesses testified that they used to cultivate the suit premises by leasing from the Appellant. SU1, Zera Misigaro Karimanzila stated that she used to cultivate crops in the suit premises and there was no any complaint. SU2, Hawa Hassan Songoro stated that she cultivated crops in the suit premises by leasing from the Appellant for many years. SU3, Mwamvua Mbumburi Matwi, cultivated the suit premises for two years on lease from the Appellant. SU4, Mariam Mashaka Pangama was found by the Respondent still cultivating in the suit premises after leasing if from the Appellant. The Respondent unshakingly cross examined these witnesses, hence their testimonies are credible and reliable.

The DLHT did not evaluate thoroughly the evidence presented by both sides, had it did so, it could have found that the Appellant was in occupation of the land from the time it was gifted to her in the early 1970s. This last ground four also has merit.

In the result I find that the appeal has merit. The Respondent failed to prove that he acquired good title over suit premises for he failed to prove good title of the person whom he claims sold the land in dispute to him.

judgement of the DLHT and set aside the decree thereof. The trial tribunal judgement is also quashed. The appellant is hereby declared to be a lawful owner of the suit premises. Order accordingly.

Dated at Kigoma this 23rd day of June, 2022.

MANYANDA

JUDGE