IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 55 OF 2020

(Arising from Application No. 59 of 2015 District Land and Housing Tribunal for Kagera at Bukoba)

MARTINE CLEMENCE.....APPELLANT

VERSUS

CLEMENCE ERNEST.....1ST RESPONDENT

REVOCATUS BAJUMUZI.....2ND RESPONDENT

FR. FAUSTINE MUKYANUZI.....3RD RESPONDENT

PROJEST GABULYERI.....4TH RESPONDENT

JUDGMENT

06/05/2022 & 08/07/2022

E. L. NGIGWANA, J.

This is an appeal from the judgment of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Application No. 59 of 2015 delivered on 9th day of April, 2020 in favour of the respondents.

The brief facts that has given rise to this appeal are that; the appellant alleged that the disputed land located at Kyegoromola sub-village, Kishoju Village, Mubunda Ward within Muleba District in Kagera Region whose values is estimated to be Tshs. 10,000,000/= is a clan land inherited from his grandfather. The 4th respondent on his side alleged that he purchased the disputed land from the 1st respondent who is the father of the applicant/appellant. The 1st respondent disputed to have sold the said land to the

4th respondent alleging that the money he received from the 4th respondent was just a normal loan.

Later on, the 4th respondent sold the disputed land to the 2nd respondent, and then, the 2nd respondent sold it to the 3rd respondent.

It is from that point, the appellant herein instituted Application No. 59 of 2015 in the DLHT for Kagera at Bukoba praying for the following orders; an order that the applicant, now appellant on behalf of the family is the rightful owner of the disputed land, an order directing the respondents not to enter, occupy or construct any structure in the disputed land permanently, and costs of the suit. After a full trial, the DLHT decided that;

1. *The sale of the disputed land between the 1st respondent and the 4th respondent was lawful.*

2. *The suit land was not a clan land; the 1st respondent was not obliged to follow procedures for disposition of clan land.*

3. *The 3rd respondent is the lawful owner of the disputed land.*
4. *Applicant (Appellant) to pay costs of the suit.*

The appellant being aggrieved by the findings and decision of the D.L.H.T filed this appeal advancing five (5) grounds of appeal as follows;

(1) *The Hon. Chairman of the DLHT erred in law and fact to hold that the disputed land was not a clan land dispute as the evidence and exhibits adduced and tendered by the appellant and his witnesses that was supported by the first respondent.*

(2) *That the Hon. Chairman of the DLHT erred in law and fact for failure to consider the fact that the 1st Respondent had no good title to pass to*

the 4th respondent hence the subsequent transfer to the 2nd and 3rd respondents was illegal.

(3) *That the Hon. Chairman of the DLHT erred in law and fact to determine the application in favour of the 3rd respondent basing on a forged sale agreement (exhibit D2) purportedly to be executed by the first respondent*

(4) *That, in holding that the disputed land was solely the property of the 1st respondent who obtained the same by grant from Kishoju Village council in 1982, the Hon. Chairman erred in law and fact for failure to consider that the alleged grant was not proved in evidence to the required standard of proof in civil cases.*

(5) *That, the trial Hon. Chairman of the DLHT erred in law to ignore the evidence adduced by the applicant that was primateria with the application, hence resulted to the erroneous decision.*

Wherefore, the appellant is praying that this appeal be allowed with the following orders; the Judgment and Decree passed by the DLHT be set aside, the disputed land be declared a clan land as opposed to sole property of the 1st respondent; the purported sale between the 1st Respondent and the 4th respondent be declared void, **ALTERNATIVELY**, an order that the appellant is entitled to a legal right to redeem the disputed land; Any other relief(s) the honorable court may deem fit and proper to grant, and costs of the appeal and the lower tribunal be paid by the 2nd, 3rd and 4th respondents.

When the appeal came for hearing, Mr. John Lameck Erasto, learned advocate appeared for the appellant while Mr. Alli Chamani; learned advocate appeared

for the 3rd respondent. The 1st respondent appeared in person and unrepresented.

The 4th respondent neither entered appearance nor filed the reply to the petition of appeal because all efforts to serve him including service by publication proved futile, thus the hearing of this appeal proceeded in the absence of the 4th respondent.

Submitting on the 1st and 5th grounds of appeal, Mr. Lameck stated that

In the DLHT, the appellant explained how the disputed land was used by the **ABAHUTU CLAN**, and how they appointed the Appellant to prosecute this case on behalf of all clan members as per exhibit A1, (Minutes of the clan meeting).

The learned counsel added that the DLHT did not consider the said exhibit in its judgment. He added that PW2, PW3, and PW4 at page 25, 32 and 39 of the typed proceedings have explained how the disputed land was used by the clan, and how the 4th respondent trespassed into the said land.

He went on submitting that, even the 1st respondent himself had denied to have ever sold the disputed land to the 4th respondent. He added that the evidence was very strong to show that the disputed land is a clan land. The learned counsel invited this court as a 1st appellate court to re-evaluate the evidence on record, and he cited the case of **Kurwa Kabizi and 2 others versus R [1994] TLR 210** where the duty of the 1st appellate court was explained.

Arguing the 2nd and 3rd grounds of appeal, Mr. Lameck stated that it is the defence by the 2nd, 3rd and 4th respondents that the land sold by the 1st respondent Clemence Ernest was not a clan land but a land allocated to him by the Kishoju Village Council. He added that the evidence of the 4th respondent is at page 82 of the DLHT typed proceedings where the sale agreement dated

26/10/2006 shows that the 1st respondent sold the land because his wife was sick, and if the said land was acquired in 1982, it was a matrimonial property, and since the 1st respondent had two wives, the wives ought to have signed the sale agreement to make it valid.

The learned counsel made reference to section 59 (1) of the Law of Marriage Act Cap. 29 R: E 2019 arguing that the same was not complied. He added that the sale agreement was witnessed by witnesses who were not residents of the area in which the land situate, and one Mujahidi who is said to be the resident of that area was not called in court to testify. The learned counsel further argued that it is trite law that where a party fails to call a key witness with no reasons the court may draw an adverse inference against that party. The learned counsel supported his argument by citing the case of **Hemed Said versus Mohamed Mbilu** [1984] TLR 113.

The learned counsel further argued that the alleged sale agreement had the seal of Hamlet with neither the signature nor name of the Hamlet leader. He added that, apart from that, the Village Authority was also not involved in sale of the said land. He made reference to the case of Bakari **Muhando Swage versus Mazee Bakari Mohamed Shelukindo and 3 Others**, Civil appeal No. 389 of 2019 where involvement of the Village Authority in a sale agreement un-surveyed land was insisted. The learned counsel added that exhibit D2 is therefore, not free from doubt.

Submitting on the 4th ground, Mr. Lameck stated that the Kishoju Village Council has never proved that it has at any time allocated the said land to the 1st respondent. Mr. Lameck further argued that, the defence evidence, save for that of the 1st respondent appears to have been fabricated, and it is unfortunate that the DLHT did not consider the evidence of the 1st respondent. The learned

counsel ended his submission urging the court to allow this appeal and grant the reliefs as they appear in the Memorandum of Appeal.

Mr. Alli chamani for the 3rd respondent argued that, in this case it is apparent from the record that the 1st respondent sold the disputed land to the 4th respondent, and then, the 4th respondent sold it to the 2nd respondent, and then, the 2nd respondent sold it to the 3rd respondent. He added that in that respect, the 3rd respondent is a **"bona fide purchaser".** He made reference to the case of **Tom Morio versus Athumani Hassan Mohamed Siara and Two (2) Others**, Civil Appeal No. 179 of 2019 CAT (unreported) where the Court of Appeal refrained itself from faulting the validity of the sale which had already taken place as it found the appellant as a purchaser for value without adverse notice when the suit property was purchased.

He also referred this court to the case of **Bedict Tibashabwa versus albert Kagombola and 2 others**, (PC) Civil Appeal No. 245 of 1990 where the court; Lugakingira J, (as he then was) held that

"The respondent was a bonafide purchaser for a value without of notice of any irregularity in the seller's title. It would be inequitable to require him to give up the shamba for the wrong of others if any"

As regard the issue whether the land was a clan land or not Mr. Chamani submitted that, that issue has been extensively discussed by the Hon. Chairman at page 8 of the typed judgment and found that it was not a clan land since it was allocated to the 1st respondent by the Village Council. He added that even if it is assumed that initially, the disputed land was a clan land, currently, the same is not a clan land because it was bought by the 3rd respondent from the third party. The learned counsel cited the case of **Pancras Elias versus Gretian**

Pancras sand Another, (PC) Civil Appeal [1968] HCD 411 in which it was held that, a land bought from a third party is not a clan land.

The 1st respondent on his side submitted that he never sold the disputed land to the 4th respondent. However, he admitted to have obtained a loan from the 4th respondent in which the disputed land was the security for the loan. He added that, later on, the 4th respondent later took possession of the disputed land.

In his rejoinder, Lameck argued that unlawful transaction cannot be legalized by the principle of bonafide purchaser. He added that in the case of **Tom Morio** (supra) the Court of Appeal was dealing with a surveyed land, hence the case is distinguishable. He added that the finding by the DLHT that the 1st respondent was given the said land by the Village Council was not backed by evidence.

I have considered the rival submissions and critically examined the judgment and proceedings of the DLHT in line with the grounds of appeal. Therefore, the issue for determination is whether this appeal is meritorious. I have opted to combine the 1st and 5th grounds because they are intertwined. Both grounds relate to the issue of evidence on record mostly whether the disputed land was a clan land or otherwise.

In the case of **Jiku Sakilu V. Petro Miumbi** [1993] TLR 75 Mwalusanya, J (as he then was) had this to say;

"Clan land means land which has been inherited successfully without interruption from the great grandfathers or from a grandfather by members of the same clan. If a member of the clan sells or in any other way disposes of a clan land without the consent of the members of the clan, then the members of that clan can redeem it within 12 years -see the Customary Law (Limitation of Proceedings) Rules GN. No. 311/1964. If it is not redeemed within 12 years, then it is lost

and it is no longer a clan land. The said land becomes the property of the purchaser"

The question is whether right to redeem the clan land sold to a non-member is **absolute within the period of 12 years.** The answer is given in the case of **Pancras Elias versus Gretian Pancras and Another** (1968) HCD 411 where the court had this to say;

" *The court should demand strict proof of all conditions under which a relative could redeem clan land since otherwise, it would stultify the initiative and enterprise of purchase of land.(2)* ***Land bought from a third party is not a clan land*** *therefore, there was no right to redeem it."*

See also the case of **Rev. Innocent Muzinduki versus The Registered Board of Trustees of Church of God Phrophecy**, Land appeal No. 8 of 2020 HC Bukoba Registry.

In the instant case, one of the issues framed and agreed for determination in the DLHT was whether the land in dispute is a clan land or not. The trial tribunal considered exhibit A1 to wit; **Minutes of the Abahutu clan dated 13/06/2013** when addressing this issue. Part of the same read;

"*Sisi wanaukoo wa Abahutu tunasikitika kuona ardhi yetu ambayo ilipatikana baada ya kuuza shamba la Kabare Kata Nshamba na kuihamishia katika ardhi ya Omukishasha iliyo katika kijiji cha Kishoju ambayo tunakua tukiitumia kwa muda mrefu tulipoenda kulima, Projuesti alitufukuza na kutuambia kuwa alinunua na baba Kelensi Ernest. Ndipo tulipomuuliza kuwa kuna wanaukoo uliowahusisha, alikataa kuwataja na kusema twende popote tunapojua*---".

Eventually, the trial tribunal was satisfied that since the disputed land was newly acquired land, thus does not qualify to be termed a clan land, and not because it

was allocated to him by Kishoju Village Council as argued by Mr. Alli Chamani, learned counsel.

Being guided with what constitutes a clan land as defined in the case **Jiku Sakilu** (supra) and having gone through exhibit A1, I agree with the trial tribunal that the disputed land does not fall within the real meaning of a clan land.

However, after the finding that the disputed land was not a clan land, I think it was necessary for the trial tribunal to ask itself whether the disputed land was a family/matrimonial property, and if yes, whether the appellant had *locus standi* to institute the case. It is unfortunate that that duty was not performed; otherwise, this suit would have ended there because the correct position of the law is that, where the plaintiff is held to lack the *locus standi* to maintain his action, the findings goes to the jurisdiction of the court to maintain his action.

In the trial tribunal, the appellant's witnesses were four (4) and were all members of the same family. The clan should never be confused with the term "family" in the context of this case. A clan simply means a group of people all descended from a common ancestor while a family is group of people who are closely related to one another by blood or marriage; for example a set of parents and their children.

The trial tribunal record revealed that Martine Clemence (PW1) is the son of the 1st respondent, Helena Clemence (PW2) and Prudenciana Clemence (PW4) are the wives of 1st respondent while Theonestina Clemence PW3 is the daughter of the 1st respondent. The evidence of PW2 as per trial tribunal record is to the effect that she was married to the 1st respondent in November, 1979 and went on living together cultivating disputed land for their livelihood. PW4, who is over

60 years, told the trial tribunal that she was married to the 1st respondent and were blessed with nine (9) issues of marriage.

It was their evidence that they were given the said land by their father in law the fact which was admitted by DW1 in his defence. PW2 went telling the trial tribunal that she improved the disputed land by planting eucalyptus trees therein.

Reading the evidence of PW1, PW2, PW3 and PW4 read together with the evidence of the first respondent who testified in the trial tribunal as DW1, together and having considered submissions by Mr. Lameck, learned advocate for the appellant on whether the disputed land was a clan land or family property, it is my considered view that the disputed land is a family property/asset .My view also gains inspiration from the case **Bihawa Mohamed versus ally Sefu**, Civil appeal No. 9 of 1983 where it was held that;

"The Phrase "family "assets" has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by ***one*** *or* ***other*** *or* ***both*** *of the parties with intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole---".*

Another question is whether the appellant (PW1) being the son of DW1 and PW2 had locus standi to challenge sale (if any) of the disputed land. Section 59 (1) of the Law of Marriage Act Cap. 29 R:E 2019 provides that;

"Where any estate or interest in the matrimonial home is owned by the husband or the wife, ***he or she shall not, while the marriage subsist and without the consent of other spouse, alienate it by way of sale,*** *gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under*

any law for the time being in force relating to the registration of title to land or deeds".

Since the disputed land was a family property and not a clan land as alleged by the PW1, and since the appellant had no special power of Attorney from the wives of the DW1 that is to say; PW2 and PW4 to institute and prosecute this suit, it is apparent that the suit was instituted by a person who had no *locus standi.*

In the event, I hereby invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the whole proceedings, quash and set aside the judgment and decree of the DLHT emanating from Land Application No.59 of 2015. **Helena Clemence (PW2) and Prudenciana Clemence (PW4),** being wives of the 1st respondent Clemence Ernest are at liberty if they so wish, to institute a suit against the respondents subject to the law of Limitation. It is so ordered.

E. L. NGIGWANA

JUDGE

08/07/2022

Judgment delivered this 8th day of July, 2022 in chamber in the absence of the parties though they were aware of the judgment date.

E. L. NGIGWANA

JUDGE

08/07/2022