THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISC. LAND APPLICATION NO. 02 OF 2022

(Originating from the Decision of the High Court of Tanzania at Iringa in Land Appeal No. 18 of 2021 delivered by Hon. Mlyambina, J. on 16th December, Originating from the Decision of the District Land and Housing Tribunal for Njombe at Njombe in Application No. 79 of 2018)

BETWEEN

HASSAN NGOMELO ..... 1ST APPLICANT

GEOFREY KIDODELO .....2ND APPLICANT

JOHNSON KIBIKI .....3RD APPLICANT

VERSUS

EDWARD FRANZ MWALONGO ..... RESPONDENT

Date of Last Order: 23/06/2022
Date of Ruling: 28/07/2022

RULING

MATOGOLO, J.

The applicants in this application Hassan Ngomelo, Geofrey Kidodelo and Johnson Kibiki through their advocate Dr. Ashery Utamwa filed to this

court chamber summons under Section 47(2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019], praying for the following orders:-

(i) That, this court be pleased to grant leave for the applicants to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania Iringa in Land Appeal No. 18 of 2021.
(ii) That, costs follow the course of the event.
(iii) Any other relief(s) that this court deems fit to grant.

The application is accompanied with an affidavit of Dr. Ashery Utamwa.

Before this court the applicants were represented by Dr. Ashery Utamwa learned advocate while the respondent one Edward Franz Mwalongo was represented by Ms. Tunsume Angumbwike learned advocate.

The application was argued by way of written submissions.

In his submission in chief Dr. Ashery Utamwa prayed for his affidavit to be adopted to form part of his submission.

In his affidavit Dr. Utamwa in paragraph 5 has indicated issues which he intends to move the Court of Appeal to determine if this application for leave is granted. These are:-

1. Whether the appellate judge being the 1st appellate judge, erred in law and in fact for not considering and re-evaluating the evidence adduced before the trial court to find that the prosecution evidence was highly inconsistent and contradictory.

2. Whether the learned appellate judge being the first appellate judge erred in law and in fact for not considering and re-evaluating the evidence adduced before the trial court to find that the subject land was correctly sold to the 2nd respondent. Otherwise the land was acquired by the 1st and 2nd Respondents through adverse possession.
3. Whether the appellate judge, being the first appellate judge erred in law an in fact for not re-appraising the evidence adduced before the trial court and find that the subject land was illegally sold twice.
4. Whether the appellate judge being the 1st appellate judge erred in law and in fact for not considering and re-evaluating the evidence adduced before the trial court to find that acquisition of land by PW2 through gift inter-vivor was not adequately proved.
5. Whether the appellate court erred in law and in fact by comprehending the maxim "non est factum" wrongly and therefore arriving at a wrong decision.

Regarding the 1st ground Dr. Utamwa said he intends to invite the Court of Appeal to interfere and find that the evidence of the prosecution was highly inconsistent and sometimes contradictory such that it did not deserve any belief of the court for being incredible hence unreliable.

The learned counsel pointed out evidence of PW2 and PW4 who denied to have sold any land to the Respondents. But PW4 agreed to have leased land to 3rd Respondent by authority from her husband. 3rd Respondent said he bought a piece of land from PW4 but upon realizing that PW4 did not own any land he returned it to the family of PW2 that is

why her evidence 3rd Respondent was found unreliable and eventually expunged from the court record. He argued that the court believed in this contention but without proof of buying.

In short Dr. Utamwa contention is that this court as 1st appellate court wrongly interpreted the evidence on record and decided in favour of the Appellant.

In the second ground the learned counsel said he intends to show that had the 1st appellate court correctly found that the Respondents did not buy the land still it would have found that the Respondents were still legally in acquisition of that land by adverse possession because there is no dispute that Respondents are still in occupation of the land in dispute to date. The first interference on peaceful occupation of the said land by the two Respondents happened in 2019 when the matter was first filed in court as Land Application No. 79 of 2018, and that the Respondents have being occupying that land peacefully for 15 years between 2004 to 2019. He argued that if a person has been in peaceful occupation of the land and without interruption for 12 years consecutively he become entitled to it and acquires ownership by way of adverse possession. He relied on Section 3(1) of the Law of Limitation Act read together with part I item 22 of part 8 to the schedule of the same Act.

He said time begins to run from the date the original owner was dispossessed and cited Section 9(3) of the Law of Limitation to support his argument. Also referred the Case of ***Bhoke Kitang'ita vs. Makuru Mahemba*** Civil Appeal No. 222 of 2017 CAT (unreported) in which the

case of ***Registered Trustees of Holy Spirit Sisters Tanzania vs. January Kawili Shango and 136 Others***, Civil Appeal No. 193 of 2016 CAT (unreported) was cited, which also cited with approval the ***Kenyan Case of Mbira vs. Gachuhi [2002] EA 137 (HCK).***

Dr. Utamwa argued in relation to the case at hand that PW2 abandoned the land since 1990. DW2 entered into the land for the first time in 2004 that, is after 14 years. DW2 and DW4 are in actual possession of the land todate. Both PW2 and PW4 denied to have sold the land to DW2 in 2004 then the Respondents have no colour of right over that land. DW2 and DW1 have been using the land openly following the denial by PW2 and PW4 to have sold the land to them. They have been using the land without consent by the true owner PW2, a sign of dispossessing him the land by "animus possident". And statutory period of 12 years has been expired and there has been no interruption in between.

As to the third ground the learned counsel said he intends to invite the Court of Appeal to interfere with the decision of the appellate court and find that if the land belonged to the Appellant as the 1st appellate court held then the sale was illegal for lack of title by DW2.

To him the land was legally sold to the Respondents by PW4 upon obtaining authority from her husband. He argued that authority may be implied or express. He said it was wrong to require PW4 have express authority only. And requirement of authority would be necessary had the land was acquired by PW2 in 1970 and before marrying PW4, but there is

no proof of that. If the land was acquired after marriage then such authority was irrelevant.

Dr. Utamwa argued that if the land was sold to the Respondent in 2004, then any sale the same by PW2 in 2009 to PW1 would be illegal because title to that land had been transferred to DW2 in 2004. The second sale was therefore a nullity according to the decision of the Court of Appeal in the case of ***Ombeni Kimaro vs. Joseph Mshili t/a Catholic Charismatic Renewal***, Civil Appeal No. 33 of 2017.

He therefore submitted that the 1st appellate court erred to declare that selling of the land to PW1 was lawful amidst the aforesaid illegality.

Regarding fourth ground he intends to invite the Court of Appeal to find out if it was proper as the 1st appellate court did to believe that PW2 acquired the land from his parents in 1970 through gift inter-vivo and obtained it before marrying PW4.

For the 5th ground, he said interference by the Court of Appeal is required to find that the doctrine of "non est factum" was misconceived by the 1st appellate court the misconception which resulted into a wrong decision.

He therefore wants the Court of Appeal intervention. To his understanding the doctrine can only be invoked where the Applicant has signed a document though with a different intention in mind to what he is signing for. The doctrine cannot be invoked where the applicant refuses to have executed or scribbled any signature on a document as was the case

in this matter. He said invocation of the doctrine was misplaced. To that he cited the case of ***Saunder vs. Anglia Building Society (1970) 3 ALL E. R. 161.***

The learned counsel also said he wants to ask the Court of Appeal to find if it was correct to expunge Exhibit R.1 (the Sale Agreement between DW1 and PW2 through his wife PW4), on reason of the alleged denial by the trail court, to make a ruling on the objection raised during trial with regard to admissibility of that document.

Dr. Utamwa submitted further that the role of a 2nd Appellate Court is to re-evaluate the evidence and to consider the material issues involved as it was held by the Court of Appeal in the case of ***The registered Trustees of Joy in the Harvest vs. Hamza K. Sungura***, in which the case of ***Hassan Mzee Mfaume vs. Republic [1981] TLR 167*** was referred.

So he intends to invite the Court of Appeal to re-asses the evidence in the trial court if the 1st appellate court failed to make a thorough re-assessment of evidence and make its own findings.

In her reply submission counsel for the Respondent Tunsume Angumbwike first raised a concern regarding failure by the applicants to attach to their supplementary affidavit necessary documents including copy of decision. To that she referred cases of ***Benedista Vicent vs. Kambeya Simba Village Council***, Misc. Land Application No. 153 of 2016 High Court at Arusha (unreported) and ***Airtel Tanzania Limited vs.***

Ose Power Solutions Limited. Civil Appeal No. 26 of 2017 CAT (unreported).

Basing on that she prayed for the application to be struck out with costs as the same was filed contrary to the law. Responding to the grounds of the intended appeal to the Court of Appeal ground No. 1, 2 and 3 she said it must be noted that the 1st appellate court entered judgment in favour of the respondent/appellant upon being satisfied that the appellant bought from areal owner one PW2 Mussa Mwanzalila, the fact which was not challenged before the trial Tribunal and the 1st appellate Court held that PW2 was the sole owner before any party to the case to claim to buy from PW2 for the appellant and from PW4 one Furaha Mgeni (for the second respondent).

With regard to the 4th ground of appeal on applicability of the doctrine of non est factum the 1st appellate court clearly stated that this doctrine cannot apply in the circumstances of the case at hand against the PW4 as she denied in toto to conduct any disposition of the land in dispute with the 1st and 2nd Applicants.

She said the 1st appellate court at page 12 paragraph 5 stated that:-

> *"however, non est factum entails lack of knowledge or lack of understanding on the part of the maker".*

She said the purported agent in this case has denied the whole transaction. Hence the issue of expunging exhibit R-1 had never been

discussed in ground four by the 1st appellate Judge as alleged by the counsel for the Applicants. What was stressed by the 1st appellant court is that as the PW4 denied at all to engage in any transaction with the 1st and 2nd Respondent then since the applicants alleged that the signature belongs to PW4 the Applicants were required to prove that the signature is not of the wife of the owner of the land who signed on his behalf upon been authorized by the owner, as can be seen at page 12 of 1st appellate court judgment. Ms. Tunsume Angumbwike learned advocate did not agree with Dr. Utamwa that exhibit R-1 was expunged basing on the maxim of non est factum. She said the truth is that exhibit R-1 was expunged because the same was admitted without affording the appellant a right to be heard on the raised legal objection thus the admission of the document was improper and deserved to be expunged from the record.

The learned counsel for the Respondent argued that the learned counsel for the Applicants did not dispute that exhibit R-1 was admitted without hearing of the legal objection raised by the appellant's counsel during trial whereby the Court of Appeal of Tanzania had already established the position in case the exhibit was admitted contrary to the law and the remedy is to expunge it from the record as it was correctly reasoned by the 1st appellate court while determining fifth ground of appeal.

The learned counsel also disagreed with Dr. Utamwa learned counsel on the fact that the five grounds debated at the 1st appellant court are the same which are intended in the 2nd appeal. She said the latter are different

to the grounds of appeal in the 1st appeal, contrary to what the law dictates as decided in the case of ***Bukoba Municipal Council vs. New Metro Merchandise***, Civil Appeal No. 374 of 2021 CAT (unreported) at page 12 that:-

> *"It is trite law that, this court can only look into matters that came up in the first appellate court and were decided upon and not matters that were neither raised nor determined by the court from which the appeal emanates, unless they are points of law".*

She prayed to this court not to grant leave to all new matters raised by the counsel for the Applicants which were not raised and determined in the 1st appellate Court and no point of law is raised by the Applicants. She mentioned the grounds of appeal in the 1st appellate court to be the trial tribunal erred in law and in fact:-

1) By holding that the land in dispute was legally sold to the 2nd Respondent by the A.W 4 one Furaha Mgeni the wife of A.W.2 one Mussa Mwanzalila.

2) That the land in dispute was sold illegality to the Appellant by Mussa Mwanzalila.

3) That there was double allocation to the land in dispute.

4) Disregard the plea of non est factum adduced by Furaha Mgeni regarding Exhibit R.1.

5) Illegally admission of Exhibit R-1 (sale agreement between the 2nd respondent and one Mussa Mwanzalila) in evidence and act upon which was improperly admitted in evidence.

Ms. Tunsume Angumbwile submitted in respect of the first ground that the same is new. It was neither raised during the trial nor at the 1st appellate court on appeal. Applicants inviting the Court of Appeal to intervene to the matter which was not raised in the High Court and which was not dealt with at the trial Tribunal is untenable in law as it was held in the case of ***Elisha Moses Msaki vs. Yahaya Ngateu Matee [1990] TLR 90.***

On the alleged contradictions and lack of proof of the transactions between PW4 and the 3rd Respondent she said the point is misconceived since the 3rd respondent admitted to surrender the disputed land, hence there was no need of proof to the facts admitted. On the conclusion that PW4 signed the sale agreement or not she said the same is misconceived by the counsel for the applicants as the sale agreement itself was expunged from the court record after being admitted improperly in contravention of the principle of natural justice for the reasons which were also admitted by the applicants. The same cannot be discussed. But the 1st appellate court held that even if it could be proved that PW4 was engaged in the sale of the suit land, she had no title to sell the land as it was clearly stated that the land was solely owned by PW2.

The 1st appellate court re-evaluated the entire evidence in determining the appeal such that there is no need of interference by the Court of Appeal otherwise the court can deal with extraneous matters an act which is forbidden by law.

As to the second ground of the intended appeal that even though the 1st appellate court found that the respondent did not buy the land but the respondents were still legally in acquisition of that land by adverse possession. Tunsume Angumbike said this issue of adverse possession is new issue intended to be raised before the Court of Appeal. The same was not raised before by the respondents. The same cannot be dealt with in terms of the decision in the case of ***Jonathan Ernest Mgongoro vs. Judicial Officer Ethics Committee and Two others***, Civil Appeal No. 26 of 2021 CAT (unreported). The learned counsel prayed to this court not to grant leave basing on this ground. But on the alternative she argued that issue of adverse possession cannot be raised for a person who had already claimed that he has bought the suit land and alleged to have sale agreement. She said even the cited case of ***Bhoke Kitangita vs. Makuru Mahemba*** (supra) identify elements of acquiring land by adverse possession and those elements should be met cumulatively.

As to the intended grounds three and four of appeal that the sale of the suit land to the Respondent was illegal, she said the same have no importance and are intended to waste time of the Court of Appeal. The issue that PW2 failed to prove that he acquired the land from his parent in

1970 before been married to PW4 she said this issue is also new which has never featured before, leave cannot be issued basing on that ground.

The learned counsel submitted further that, after all the issue of PW2 to be owner of the land before being disposed to the respondent is not in dispute even at the trial Tribunal and before the 1st appellate court. She said all witnesses testified to the effect that before the dispute arose between the parties the land was owned by the PW2. Even PW.4 confirmed the same that the land is owned by PW2 and when she married to PW2 she found PW2 using the suit land. With that evidence she said it was enough for the trial Tribunal and the 1st appellate court to believe the same as the evidence was not challenged by either party to the suit. For the applicants requiring marriage certificate between PW2 and PW4 is an afterthought and to challenge the same now while there has been no dispute during trial and in the 1st appeal is uncalled for. Ms. Tunsume Angumbwike submitted further that, it appears the advocate for the applicants is not certain on how the applicants came into possession of the suit land either by adverse possession as alleged or they acquired by purchasing the same.

She said the learned counsel for the applicants states that the land was sold to the respondents in 2004, and that the sale of the same suit land to the Appellants/Respondent in 2009 is illegal believing that the purported sale of 2004 to DW2 by PW4 was legal in a belief that the suit land was acquired by PW2 after marriage.

She said these facts are misleading as PW4 unequivocally stated that the land owned by PW.2 as he acquired it from his parents before their marriage such testimony was not challenged at any stage.

She said in the case ***Omben Kimaro*** (supra) cited by the learned counsel for the applicants at page 15 the Court of Appeal clearly stated that:-

> *"the dispute land having been sold by DW2, it was sold without mandate of its owner and the sale was inoperative as no title could pass to the buyer".*

She said since PW4 was declared not to be owner of the suit land even if DW3 could prove that he bought the land from PW4 the transaction cannot stand.

However PW4 denied to have any transaction with 1st and 2nd applicants.

Regarding fifth ground on the doctrine of "non est factum" she said the learned counsel for the applicants has misconceived it or otherwise he intends to mislead the court. Exhibit R-1 was not expunged because of the above mentioned doctrine, but it was expunged because it was improperly admitted.

In rejoinder counsel for the applicant tried to elaborate as to what entails supplementary affidavit citing different law dictionaries.

Basically he wanted to explain that supplementary affidavit is an additional affidavit and not a substitute to the original affidavit.

As to the question of raising new issues Dr. Utamwa spent more time to explain the role of the 1st appellate court but he concluded by lamenting the 1st appellate court for not assuming powers conferred to it by Law and failed to re-assess the evidence adduced before the trial court adequately.

Dr. Utamwa then he insisted what he has submitted in the submission in chief.

Having carefully read the affidavit by the applicants and respondent counter-affidavit and the rival submissions by the parties the issue for determination here is whether the applicants have demonstrated arguable case to be entertained by the Court of Appeal.

But before indulge myself in answering that question, there is one issue raised by Ms. Tunsume Angumbwike learned advocate for the Respondent that in their joint supplementary affidavit applicants did not attach the necessary document they intended to reply upon which include copy of judgment sought to be challenged in the intended appeal, thus going contrary to the requirements of Rule 49(3) of the Court of Appeal Rules of 2009 as amended by G.N. No. 344 of 2019. Dr. Utamwa reply to that is that what was filled is not a new document/pleading but supplements what is already in existence. However without wasting much time, I have gone through the impugned supplementary affidavit filed to this court on 11/03/2022. The complained of necessary documents were

annexed to. It is perhaps a copy which was served to the learned counsel for the Respondent such necessary documents were not annexed thereto.

But for a copy which was filed in court as I have said has those necessary documents, the complaint raised is therefore baseless.

Now going back to the basic issue raised. In application of this nature, in order for the court to grant leave to appeal to the Court of Appeal the applicant must show that there is a point of law inviting the determination by the Court of Appeal as it was held in the case ***of British Broadcasting Corporation vs. Eric Sikujua Ng'maryo***, Civil Application No. 138 of 2004. It is also a settled principle of law that leave to appeal to the Court of Appeal is not automatic. It is granted in the discretion of the court the discretion which has to be exercised judiciously. However the intended appeal must also raise issues of general importance or a novel point of law or that the grounds show a prima facie or arguable appeal as it was explained in the case of ***Harban Haji Mosi and Another vs. Omar Hilal Seif and Another***, Civil Reference No. 19 of 1997, CAT (unreported).

Again the Court of Appeal of Tanzania in the case of ***Lazaro Mabinza vs. The General Manager Mbeya Cement Co. Ltd***, Civil Application No. 01 of 1999, (unreported), observed that, leave to appeal to the Court of Appeal should be granted in matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice.

In the application at hand the matter arose from a land dispute between the present parties. The present Respondent filed a suit against the applicants in the District Land and Housing Tribunal in which he prayed for a declaratory order that the applicant is the lawful owner of the land in dispute, an order for vacant possession, the Respondents now applicants be restrained from interfering with the applicant's land and costs of the suit.

After a trial, the District Land and Housing Tribunal decided in favour of the respondent/ now applicants.

Aggrieved the respondent successfully appealed to this court in Land Appeal No. 18 of 2020, hence this application. The applicants have raised five issues/grounds which they invite the Court of Appeal to consider and decide.

The first four grounds as it was elaborated by the learned counsel for the applicants are on the failure by the 1st appellate court to re-evaluate the evidence received at the trial Tribunal and at the end reversed the decision of the trial Tribunal. On the issue of sale of the disputed land to Geofrey Kododele (DW2) by Furaha Mgeni (PW4) on behalf of her husband Mussa Mwanzalila this was evaluated by the Tribunal chairman and on appeal it was re-assessed by the 1st appellate court as can be seen in its judgment from page 7 last paragraph to page 8.

Dr. Utamwa learned advocate cannot be rightly heard arguing that the 1st appellate court did not perform its duty of re-assessing the evidence on record. The 1st appellate court did re-assess the same.

There is no any complaint on serious misdirection or non-direction made by the 1st appellate court likely to result in a failure of justice. If the 1st appellate court re-assessed the evidence on record and there is no any misdirection or non-direction committed, this issue need not to be considered by the Court of Appeal. There is ample evidence, and that is what was rightly held by this court that PW2 was the only owner of the land in dispute, and this was not disputed at all. But also there is no ample evidence to show that PW2 authorized PW4 to sell the land to DW2 on behalf of her husband. It was correctly observed by this court on appeal and on the basis of section 67 of the land Act No. 4 of 1999 [R.E. 2019], that the sale of land should be in writing, which imply that every consent of sale of land by a third party should be in writing. But there is no such consent in writing issued by PW2 who also has denied to have given such consent to PW4. PW4 likewise has denied in her evidence to have sold the suit land to DW2 on behalf of her husband. Even if PW4 would have sold the said land to DW2 as alleged, no title could pass as PW4 had no title to pass to the DW2 Respondent definitely that sale would be illegal one as it was held in the case of ***Omeni Kimaro*** (supra).

The issue of whether or not the 1st appellate court re-assessed the evidence received by the trial Tribunal is on the court record.

If you read the 1st appellate court judgment at page 8 last paragraph the court disagreed with the respondents/ now applicants assertion that there are no circumstances on the record calling for the re-assessment of Respondents credibility and viewed it as misleading one, understanding

that, the 1st appellate court has the legal right to re-assess the evidence given before the trial Tribunal and arrive to its own findings.

But what can be gathered from the evidence of PW4 as did the 1st appellate court is that she did not sell the suit land to the present applicants.

In her own words she said she leased 3 acres to Johnson Kibiki who was 3rd respondent before District Land and Housing Tribunal for Tshs. 300,000/= but later he returned the land to PW2. She also clearly said the piece of land (3 acres) was sold to Edward Franz Mwalongo. It is not correct as alleged by Dr. Utamwa that the suit land was sold twice in 2004 to the applicants and in 2009 to the respondent.

Having carefully read the entire evidence there is no any seller be it Mussa Mwanzalila nor his wife Furaha Mgeni expressly said sold the land in question to the applicants. Had they sold it to the said Geofrey Kododele in 2004 they would have no title to land to sell it again to the respondent in 2009.

The 1st appellate court clearly re-evaluated the evidence and that is why it came to its own findings by allowing the appeal and thus quashing and setting aside the decision and order by the trial Tribunal. This is an issue of fact which was decided by the 1st appellate court, in no way is also a point of law. As to fourth ground like in the third ground it is a matter of fact. There is ample evidence from both Mussa Mwanzalila (PW2) and Furaha Mgeni (PW4) that PW2 has been in occupation of the land in dispute since 1970 after being given by his parents before he is married to

PW4. PW4 likewise has clearly stated in her evidence that she was married to the PW2 and found him owning the land. Dr. Utamwa argues that there must be proof that DW4 while being married to PW2 she found PW2 in possession of that land. To him proof is marriage certificate. I think Dr. Utamwa is not more right because marriages can take different forms, there are customary marriages which rarely can be proved by marriage certificate. But in this case spouses themselves have proved in their testimonies that at the time they marry already PW2 was in occupation of the land in dispute after being given by his parents. To me this is sufficient proof which does not need marriage certificate. Oral evidence is also admissible like documentary evidence, see the case of ***Abas Kondo Gede vs. Republic***, Criminal Appeal No 472 of 2017 CAT (unreported). For that reason any disposition of that land to a third part needed consent from PW2. Even if the said land was acquired while the two already married, consent from the other spouse in the event one spouse wanted to sale the land was a prerequisite in terms of Section 59(1) of the Law of Marriage Act, [Cap 29 R.E. 2019].

But in the present case, there is no proof whatsoever that PW2 consented and authorized PW4 his wife to sell the land in dispute to the 2nd applicant.

Both PW2 and PW4 were clear in their evidence. The learned counsel for the applicants has alleged inconsistency and contradiction in their evidence, PW4 in particular. This as it was rightly pointed out by the Respondent's counsel is a new issue, not raised at the trial or on appeal

before the 1st appellate court. This also apply to issue of acquiring the land by the applicants through adverse possession and failure to prove that PW2 acquired the land in 1970 from his parents before marrying PW4.

These are new issues which were not raised and discussed before. The same cannot be raised for the first time before the Court of Appeal. This is prohibited in law as it was held in the case ***Jonathan Ernest Mgongoro vs. Judicial Officers Ethics Committee and Two others***, Civil Appeal No. 26 of 2021 CAT (unreported). See also the case of ***Elisa Moses Msaki vs. Yahaya Ngateu [1990] TLR 90***.

Regarding fifth ground on the applicability of the doctrine of "non est factum" Dr. Utamwa argument is that the doctrine was wrongly invoked by the 1st appellate court, it misconceived it and misdirected itself.

Briefly the doctrine is a method whereby a signatory to a contract can invalidate it by showing that his signature to the contract was made unintentionally or without full understanding of the implication. It does not apply where a party to the contract had totally denied to have signed it.

In the case of ***Sluis Brother (EA) Ltd vs. Mathias and Tawari Kitomari (1980) TLR 294***, the Respondent pleaded non est factum. His contention was that he signed a contract without knowledge as to its contents and the implication notwithstanding negligence. The court agreed with him.

From the definition given in the above cited case and other cases including ***Saunder Vs Anglia Building Society*** (supra), for the doctrine

to apply, a party to a contract must have signed it, but without knowing the contents and the implication thereof.

It cannot be invoked when a party refused to have signed the contract. In the matter at hand PW4 denied to have signed sale agreement on behalf of her husband who is said was admitted at Peramiho Hospital and Geofrey Kidodele, she even disowned the signature. The doctrine therefore could not be invoked. In the judgment of this court in the first appeal while discussing on the doctrine of non est factum which was raised by the appellant now respondent in his fourth ground of appeal, at page 12 2nd paragraph, this court appears to agree with the appellant who was challenging the trial Tribunal for disregarding the aforesaid doctrine. But at the end it expunged it from the court record. This document is the center of controversy, all other arguments relating to failure by the 1st appellate court to re-evaluate evidence received by the trial Tribunal are actually based on this document. For this point I think there is a need for this issue to be looked at by the Court of Appeal. To me this ground appears to be arguable one. I agree with Dr. Ashery Utamwa's contention whether the 1st appellate court erred in law by comprehending the maxim non est factum wrongly and therefore arriving at a wrong decision.

However, I disagree with him on the fact that exhibit R-1 was struck out because of non est factum doctrine, according to the judgment of the 1st appellate court, the same was expunged from the court record on ground that there was objection raised to its admissibility, the appellant /Respondent was not given fair hearing the act which lead to unfair trial.

The 1st appellate court expunged it from the record because it was received contrary to the law.

Having stated as herein above I grant leave to the applicants to appeal to the Court of Appeal. But each party to bare his own costs

F.N. MATOGOLO

JUDGE

28/7/2022.

Date:	28/7/2022
Coram:	Hon. F. N. Matogolo –Judge.
L/A:	B. Mwenda
1st Applicant:	
2nd Applicant:	Absent
For the Applicants:	Nuru Stanley – Advocate
Respondent:	
For the Respondent:	Absent
C/C	Grace

Ms. Nuru Stanley - Advocate.

My Lord I am appearing for the applicants. I am also holding brief for Tunsume Angumbwike advocate for the Respondent. The matter is for ruling we are ready.

COURT:

Ruling delivered.

F. N. MATOGOLO,

JUDGE.

28/7/2022.