THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 21 OF 2020

(From the Decision of District Land and Housing Tribunal of Nzega District at Nzega in Land Case No. 44 of 2018)

MASANILO NKINGA .....APPELLANT

VERSUS

CHARLES MWANDU KALELE.....RESPONDENT

JUDGMENT

Date: 8/6/2022 & 22/7/2022

BAHATI SALEMA,J.:

The appellant herein, **Masanilo Nkinga** being dissatisfied with the whole decision in Land Application No.44/2018 of the District Land and Housing Tribunal for Nzega before Hon.Waziri H.M delivered on 27.8.2020 that;

1. *That the District Land and Housing Tribunal for Nzega at Nzega erred in law and fact by its failure* ***to consider the appellant's evidence during the trial;***

2. *The District Land and Housing Tribunal for Nzega at Nzega erred in law and facts by its failure to consider that the*

applicant in the trial case, now the respondent in the case at hand, had ***no locus standi;***

3. *That the District Land and Housing Tribunal erred in law and fact by its failure to entertain the matter that is* ***time-barred;***

4. *That the District Land and Housing Tribunal for Nzega at Nzega erred in law and facts on its consideration of the mere words against the* ***written contract.***

The facts of the case can be gleaned from the case as follows, the dispute is on the piece of land situated at Mwakwangu village, Igurubi ward, Igunga District, Tabora which the applicant Charles Mwandu, herein claims to be his, but the respondent Masanilo Nkinga, alleged to **the trespasser** and reside therein claiming to buy the same from the late sister of the applicant one Ngolo Mwandu in 1995 for consideration of 20 cows which was alleged to be paid by the respondent to the purported sale agreement which was written in 2008 almost 13 years after the purported sale was done. After hearing of the case, the trial tribunal, decided in favour of the applicant now the respondent to be the lawful owner of the suit property.

When the matter was scheduled for hearing, with leave of the court it was ordered to be disposed of by way of written submission.

On the first ground of appeal to the fact that the trial tribunal erred in law and fact by its failure to consider the appellant's evidence such as a written contract which was the sale agreement of the land in dispute between the owner who was the sister of the applicant, and the respondent during the trial. On the ground that the sale was done in 1995 and the contract was executed in 2008.

The appellant submitted that it is not disputed that there was a sale agreement between the owner and the appellant, which was tendered and admitted by the trial tribunal during the trial, as is reflected on page 2 of the trial tribunal judgment in the case therein.

He stated that the trial tribunal failed to consider the contract based only on the reason that the sale was done in 1995 with the consideration of twenty cows but it was put into writing in the year 2008. Hence, in the view of the tribunal, the contract was not valid.

To support his argument he submitted that the validity of a contract is provided under section 10 of the Law of Contract Act, Cap.345 [R. E 2019]

Back to the case at hand, he stated that there is no dispute that the owner of the land in dispute sold the same to the appellant under section 10 of the Law of Contract, Cap.345 [R.E. 2019].

That the reasoning that was given by the trial tribunal was new in the legal fraternity as a written or oral contract could have stood so far as it had been reached before the witness as per section 10 of the law of contract Cap.345 [R. E 2019].

With respect to the second ground of appeal he submitted that, the respondent had no *locus standi* during the trial. He submitted that the appellant bought the land in dispute from one Ngolo Mwandu in 1995 and later in 2008, put the agreement into writing. Hence, the owner who sold the land in dispute to the appellant during her lifetime was the sister of the respondent, and there was no dispute before the owner at that time. He further contended that the respondent, who was the applicant during the trial, is not the administrator of the estate of the late Ngolo Mwandu the owner of the land in dispute, hence has no legal capacity to institute any legal action in respect of the late Ngolo Mwandu properties.

In regard to the third ground of appeal, he submitted that the trial tribunal erred in law and fact by its act in entertaining the matter which was *time-barred* contrary to item 22 of the First Schedule of the Law of Limitation Act, Cap. 89 [R.E 2019], which prohibits the institution of legal action or recovery of land. He prayed to this court to allow his appeal.

In his reply, the respondent submitted that, the appellant is misleading the court. The trial tribunal heard all the available evidence and weighed in favour of the applicant against the respondent's evidence, which was weak. To bolster his argument he cited the case of **Yusuph Kalabwe V Barahunga Athuman,** Misc. Land Appeal No. 25 of 2012, High Court of Tanzania at Tabora Land Division (Unreported), where the court held that:

> *"It is the law that whenever a case comes down to the question of the credibility of evidence (that is, which of the two accounts to believe, the plaintiff's/appellants or the defendant's/respondent's account), it becomes open to the trial court or tribunal to choose a story that appears believable."*

Similarly, in the case of **Miltiades John Mwenda V Gizelle Mbaga (Administratrix of Estates of John Japhet Mbaga- Deceased) and two others,** Court of Appeal Civil Appeal No. 57 of 2018 (unreported), the court held that:-

He submitted that the appellant at the trial tribunal failed to prove, on a balance of probabilities, that he bought the same land from the deceased. There is no merit in the law on this point.

On the second ground appeal in respect of **locus standi**, he stated that for one to be lacking *locus standi*, he/she must have no right or

interest in that particular matter at hand. In the case of **Mary Tuyate Vs. Grace Mwambenja and another, High Court of Tanzania at Mbeya Land Appeal** No. 42 of 2019 (unreported), Mambi, J stated that;

> *"Locus standi is the right or capacity to bring an action or to appear in a court. This means that the person with locus standi can appear in court to be heard or to address the court on the matter before it. This means that it is the ability of the party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case."*

There's no doubt that the respondent has **locus standi** because he has the right or capacity to bring the action in court on the matter at hand. The respondent has been using the land in dispute since he was young. Also he referred the case of **Lujuna Shubi Balonzi Vs. Registered Trustee of CCM** [1986] TLR 203, on locus standi.

He submitted that the respondent proved to the tribunal that his right or interest had been interfered with by giving a strong and believable story before the tribunal, and his evidence was heavier compared to the appellant's evidence.

On the **issue of time,** he submitted that the case was brought before the tribunal within the time prescribed by law. According to the law, time begins to run on the date when the cause of action

commences. In the case at hand, the cause of action arose in 2017 and the case was brought before the trial District Land and Housing Tribunal in 2018. Claiming that the case was time-barred is a narrow and wrong interpretation of the law. See the case of **Juma Shamte Mtambo Vs. John Roussos, National Insurance Corporation (Nic) and The Presidential Parastatal Sector Reform Commission,** High Court of Tanzania at Dar es Salaam. Civil Case No.457 of 2002 (Unreported) the court held that:-

> *"The period of limitation begins to run from the date on which the right of action accrues; that is the date the cause of action arises."*

He also refered to the Law of Limitation Act, Cap. 89 [R. E 2019] under section 4 which also provides *the date on which the right of action for such proceedings accrues."*

As to the fourth ground of appeal he stated that it is the principle of law that parties are bound by **their pleadings and** are required to stick to their pleadings. The purported written contract did not form part of the pleadings; it was a surprise document that was tendered during the hearing of the case, which is not allowed under the law. To substantiate his argument in the case of **Philips Anania Msasi Vs. Returning officer (Njombe North Constituency) and others**, High Court

of Tanzania at Songea, Misc. Civil Cause No. 7 of 1995 (unreported), where Samatta, J states that; "*Litigation is not a game of surprise.*"

Hence it was right for the trial Tribunal to reject the purported written contract because it was not part of the pleadings. The appellant had to follow the procedures as instructed by the trial District Land and Housing Tribunal on page 19 of the proceedings as I quote.

> *"The objection is hereby upheld as the document has not formed the procedure. If the respondent still has an interest in tendering it he is advised to follow the procedure as for regulation 10 of GN no. 174 of 2003. "*

He submitted that there is no record of the trial tribunal showing that the appellant followed the procedures as prescribed by the law. The appellant opted to ignore the procedures because he knew that the contract itself was forged.In the case of **Ratnam Vs. Cumarasamy and Another (1965)**, I WLR 8, Supreme Court of Malaya, which was adopted by the court in **Kalunga and company advocates Vs. National Bank of Commerce Ltd.** (2006) TLR 235, Lord Guest states: -

> *"The rules of court must, prima facie, be obeyed."*

He submitted that if the appellant had an interest in tendering it, he was supposed to follow the procedures. It had no signs of the seller, even though the said Balozi was not a real Balozi, but a fake Balozi who

colluded with the appellant to grab the land of the respondent. The really Balozi of the said year was Kasema Mwenda.

In his rejoinder, he reiterated his submission in chief and submitted that since it was the duty of the respondent to adduce his evidence against the appellant's evidence under sections 100 and 101 of the Law of Evidence Act, Cap. 6 [R. E 2019]. Also, he has forgotten that the appellant bought the land in dispute sometime in 1995 and reduced it into writing sometime in 2008 when Ngolo Mwandu was still alive and no dispute was experienced. The fact that she had left the land in dispute sometime in 2000 is baseless as there was no proof during the trial as to when she left for Mpanda.

On the issue of forgery, he submitted that if the respondent believed so, it was his duty to report the forgery to the police for criminal trial pending the determination of this civil case.

Lastly, the issue of tendering the contract is also an afterthought as the same case was properly tendered. That is why it was admitted during the trial that the respondent did not object the same, and the chairman delivered judgment based on it. Otherwise, for this court to discuss it, the appellant could have filed a cross-appeal on it because it is not among the grounds raised.

The trial tribunal chairman was wrong to hold the assertion that this contract could not be valid since it was executed in 1995 but put into

writing in 2008. Instead, he was supposed to challenge its validity, which was proper and hence, since the allegation by the respondent in the case herein is baseless and full of an afterthought, even the case cited in support of his argumentation is not relevant in the case at hand.

He further submitted that the appellant's response concerning ground number two is that the trial District Land and Housing Tribunal for Nzega at Nzega erred in law and fact by his failure to consider that the applicant during the trial, now the respondent in the case at hand, had no locus standi. This fact is not disputed by the respondent. Instead, he is wondering how the appellant left the land in dispute in the year 1995 and came back to the same sometime in 2017.

The respondent is misleading himself as the appellant has never left the land in dispute for even a single second from the year 1995 when he bought the same. That is why, even to this date, the land in dispute is under the occupancy of the appellant. However, the respondent in his submission was supposed to prove how he occupied the same rather than his baseless word that he owned the same without any proof as to how and when he owned the same, while the appellant proved how he bought it in 1995 orally and put it into writing sometime in 2008, and funny enough, the respondent did not disturb the appellant when his sister was alive. His disturbance started when his sister, the seller, died. All this shows that the respondent has never acquired any interest in

the land in dispute in his life. However, since all the respondent arguments are baseless, even the case law cited has no relevance.

In respect of the third ground, that the trial District Land and Housing Tribunal For Nzega At Nzega erred in law and fact by his act to entertain the matter which is time-barred, it is not disputed that the appellant acquired the land in dispute in the year 1995 and there is nowhere the respondent herein in his submission did prove when he owned the land in dispute rather than those baseless words against written contract. However since it is not disputed that the appellant is using the land in dispute from 1995 hence the trial tribunal entertained the land dispute which is time bared contrary to item 22 of the first schedule of the law of limitation Act, Cap.89[R. E 2019] which prohibits the institution of legal action for recovery of land after someone else is in its use for more than twelve years.As the respondent is claiming the recovery of land that the appellant has occupied for more than 27 years from 1995 to date.He prayed this appeal be allowed with costs and other relief this honorable court may deem fit to grant.

Having considered the competing submissions from both parties, the issue before this court is whether the appeal is meritorious.

To begin with the first ground of appeal, this court had ample time to go through the evidence laid down by both parties. Unfortunately, as it has been said in their submission, the important document which both

parties are mentioning is on the contract, and this court, having perused through the trial court records on pg. 19 never admitted the Sale Agreement since it did not follow the procedure as per Regulation 10 of GN. 174 of 2003. I do not see where this contract is coming from since it was never admitted in court. In his judgment, the chairman relied on the evidence from the oral evidence from both parties and also after visiting the locus quo. Therefore, I'm of the view that the trial District Land and Housing Tribunal considered the evidence of the appellant. The trial tribunal heard all the available evidence and weighed it in favor of the applicant against the respondent's evidence in the trial, which was weak. In the case of **Yusuph Kalabwe V Barahunga Athuman** Misc. Land Appeal No. 25 of 2012, High Court of Tanzania at Tabora Land Division (Unreported), where the court held that:

> *"It is the law that whenever a case comes down to the question of credibility of evidence (that is which of the two accounts to believe, the plaintiff's/appellants or the defendant's/respondent's account), it becomes open to the trial court or tribunal to choose a story that appears believable".*

Therefore, from the evidence, I have noted that the trial tribunal considered the evidence of both parties. This ground has no merit.

As to the second ground of appeal, in respect of locus stand in the said case. As rightly submitted by the respondent that, for one to have locus standi, he/she must have a right or interest in that particular matter at hand. In the case **of Mary Tuyate Vs. Grace Mwambenja and another High Court of Tanzania at Mbeya Land Appeal** No. 42 of 2019 (unreported).

Having perused through the trial tribunal records, there's no doubt that the respondent had locus standi because he had the right or capacity to bring the action in court on the matter at hand. According to the evidence of PW1, Charles Mwandu Kalele, on pg 8, he told the court that

> *"My mother had shifted to Mpimbwe, so when we shifted to Mpimbwe Village at Mpawa, she left the area where she was residing under my supervision."*

On pg. 12 PW2, Gwimalila Ngolo stated that "The applicant was also suing the area as is among the family members of the Sayi Salage, the applicant is the head of the family." Also the evidence of *PW3 Malale Charles* supports In the case of **Lujuna Shubi Balonzi Vs. Registered Trustee of CCM** [1986] TLR 203, Samatta J, as he then was held that *locus standi* is governed by the common law principle that a person bringing the matter to the court must show that his or her interest has been interfered with or breached.

I find this argument also has no merit since the respondent's interest has been interfered.

As to the third ground in respect of time, Item 22 of the First Schedule of the Law of Limitation Act, Cap 89 [R.E 2019] in recovering of land is 12 years.

As rightly submitted by the respondent, according to the law, time begins to run on the date when the cause of action commences. Having perused the court records, it is clear that the cause of action arose in 2017 and the case was brought before the trial District Land and Housing Tribunal in 2018.Guided by the said law, I find no merit in this argument.

On the last ground of appeal, the District Land and Housing. Tribunal for Nzega at Nzega erred in law and facts, in its consideration of the mere words against the written contract.

As I have stated earlier, having perused through the court records, I never came across the written contract admitted in this court. However, the evidence adduced by the DW1, Masanilo Nkinga noted that the contract went in two phases. The first one was entered in 1995, witnessed by Balozi Jocha but had no written contract, and the second one was in 2008, where on the second he went with 9 cows to the Kitongoji Chairman who witnessed and the written. And the children or witnesses from the seller Ngolo Mwandu was never there as

submitted by the appellant in which creates doubts. I understand that oral contract could have stood so long as it had been reached before the witness as per section 10 of the Law of Contract, Cap. 345 [R. E 2019] but in this case it was not.

Therefore, from the evidence adduced, I see no reason to fault the decision of the trial tribunal since, throughout the proceedings; it is clear that the appellant brought essential witnesses and all these witnesses testified in favor of the respondents. However, the appellant brought witnesses whose evidence was unreliable. Also, through the proceedings, it is clear that the Chairman of the District Land visited the disputed area and observed what he found. In the case of **Ali Abdallah Rajab Vs Saada Abdalla Rajab and Others [1994] TLR 132,** the court stated that;

> *"Where the decision of a case is wholly based on the credibility of a witness, it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

Also, in the case of **Hemed Saidi vs. Mohamed Mbilu** [1984] TLR 113 (HC) on page 116, the court stated that:-

> *"According to law both parties to a suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win."*

With those observations I do not think that the trial court ignored the evidence of the appellant. It should be understood that in civil cases the standard of proof is on the balance of probability, and for that, I can hardly fault the conclusion reached by the trial court. In respect of all, I make no order as to cost in the circumstances of the matter.

Order accordingly.

Bahati

A. BAHATI SALEMA

JUDGE

22/07/2022

Judgement delivered in chamber on this 22nd July, 2022 in the presence of both parties via virtual court link.

Bahati

A. BAHATI SALEMA

JUDGE

22/07/2022

Right of Appeal fully explained.

Bahati

A. BAHATI SALEMA

JUDGE

22/07/2022