IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 60 OF 2021

(Originating from Maswa District Land and Housing Tribunal in Land Application No. 15 of 2018)

DILU MAHANGI.....APPELLANT

VERSUS

MIGENI MAHANGI..... RESPONDENT

JUDGMENT

21st April & 13th May 2022

MKWIZU, J:

This appeal ascends from the decision of the DLHT in Land application No. 15 of 2018 filed by the respondent above claiming ownership of 23 acres of land located at Mwabusalu Village in Meatu District. According to the application that was presented at the tribunal, respondent purchased the suit land in 1978 from Joseph Shigela at a purchase price of 800/=. He then used the land to 1984 and shifted to Mwamitumai Village and left the land with his father Mahangi Matinde as a care take. He came back to his land in 2014 after the death of his father in 2013. According to the records, respondent was in 2015 arrested by the police for trespass but the issue was resolved by the Village authority in his favour.

Appellant denied the claim sating that the Suitland belongs to his later fathers(Mahagi Matinde) estate who acquired it by clearing the bush land sometimes in 1958 and since 1987 was being used by Mahagi Matinde's

children namely Nkwimba Mahagi and Doto Mahagi before they were joined by the appellant in 1988.

Having heard several witnesses from both parties, the trial tribunal was satisfied that the suit land belongs to the applicant (now respondent). Appellant is aggrieved. He has filed this appeal on three grounds of appeal that:

1. *That the Honourable Chairman of the trial Tribunal erred in law and fact in holding that the respondent purchased the suit land orally in 1978 from one Joseph Shigela*
2. *That the Honourable Chairman of the trial Tribunal erred in law in holding that the evidence adduced by the appellant and his witnesses was*
3. *That the Honourable Chairman of the trial Tribunal erred in law in **not** holding that the suit land belongs to the estate of the appellant's and respondent's deceased father, one late **MAHAGI MATINDE***

Arguing the first grounds of appeal, Mr. Rugamila Emmanuel advocate for the appellant submitted firstly that, there is no evidence on the records adduced to prove the alleged purchase by the respondent. Secondly that the respondents failed to disclose the witnesses of the alleged sale in his pleadings. He, on this cited to the court the decision in **James Funke Ngwagilo V AG,** (2004) TLR 161. And thirdly that, no evidence on the records proving that the respondent had left the suit land to his father as a caretaker. He said, the claiming back of the land by the respondent after the death of his father in 2013 many years after he had shifted the village in 1970's is questionable.

On the second ground, the learned counsel blamed the trial tribunal for holding the appellants evidence hearsay. He said, though their evidence was based on the information from the third party, but that third party is their father who had a clear knowledge on how he acquired the suit land. The third ground of appeal was abandoned.

Mr. Sululu counsels for the respondent was straight to the points that the appellant counsels failed to tell the court on how the tribunal went wrong in approving the purchase claim by the respondent. He said, while admitting that both the pleadings and the evidence adduced by the respondent proved that the purchase transaction was not reduced into writing, the appellant counsel failed to show any contradiction on the said evidence. He stressed that, the appellant suggestion that the witnesses of the sale transactions ought to have been shown in the pleadings is a misleading proposition. He urged the court to find this ground without merit

Regarding the issue of the respondent's migration, Mr. Sululu submitted that, there is no evidence on the records showing that the respondent left the suit land immediately after its purchase in 1978. He said the trial tribunal had believed the respondents evidence and therefore this complaint should be disregarded. He also supported the tribunal's decision that the defence evidence is hearsay. Mr. Sululu contention was that none of the defence witnesses informed the court how they witnessed their father acquiring the suit land instead, all of them claimed to have been so informed by the deceased. He urged the court to disregard the submissions by the counsel for the appellant that the evidence was not hearsay only because the witnesses heard it from their father adding that

hearsay evidence need to be accorded low evidential value as rightly done by the tribunal. He lastly prayed for the dismissal of the appeal with costs. Citing section 62(1) (b) of the evidence Act, Mr. Rugamila Advocate for the appellant in rejoinder said, the evidence by the appellant and his witnesses is not hearsay.

After a careful review of the evidence on record and the submissions made by both parties, I am inclined to agree with the respondent's counsel that appeal is baseless. I will be guided by the canon of the civil principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 which require that;

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

The respondent's evidence that the tribunal relied upon in finding in his favour was in support of the claim registered in the respondent's pleadings. He claimed to have purchased the land and his witnesses' evidence supported him.

I had an advantage of going through the decision of **James Funke Ngwagilo V. Attorney General** (Supra) cited by the appellants counsel insisting that the witnesses of the alleged sale transaction were not pleaded in the pleadings and therefore fatal. In that decision, the issue of the pleadings identifying to the sale agreement was not at issue. The court had only insisted that parties are bound by their pleadings and once the evidence varies with pleadings should be disregarded.

In the present case, both the pleadings and oral evidence by the respondent proved his claiming that he orally purchased the 25 acres of land from Joseph Shigela and that the sale was witnessed by Kashinje Mwandu, Makene Chege, Masala Kulwa and Mbisa Mahangi. The mentioned Kashinje Mwandu and Mbisa Mahangi also gave their evidence before the tribunal as PW2 and PW3, and also mentioned the other neigbours of the suit land participated on the said sale as Masala Kulwa and Makene Chege. The respondent's pleadings were in all four angles supported by the evidence adduced by the parties and I think, it need no authority to state here that there is no law mandating a party to mention in the pleadings witnesses of a sale agreement.

In his second part of the first ground of appeal, Mr. Rugamila advocate invited the court to find that the claim that the suit land was left to the respondent's father had no proof. I think, this complaint should not detain me more. Both the pleadings and Respondents evidence demonstrate that respondent used the suit land to 1984 and left it to his father as a caretake after he had shifted to Mwamutani Village. And that he was regularly visiting the farm. These facts remained unchallenged during cross examination.

Appellant claim was that the land was acquired by his father in the year 1958 by clearing the virgin land but his WSD was to the effect that the suit land was from 1987 used by his two relatives namely, Nkwimba Mahangi and Dotto Mahangi and he joined them in 1988 but the two claimed users of the suit land were not called as witnesses to validate the appellant's claim that the land belonged to his father. I am inclined under the given situation to draw an adverse inference to the appellant for his

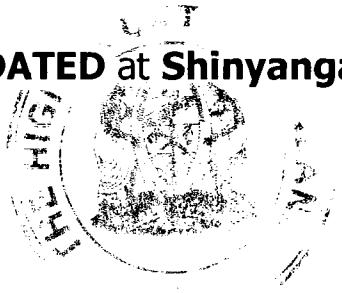
omission to call these two material witnesses without explanation. The first ground of appeal is dismissed.

The second ground is a blame to the trial court for declaring the defence evidence hearsay. Section 62 of the Evidence Act provides that oral evidence must in all cases be direct. The general rule is that statement/ evidence made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and therefore not admissible. So, two tests are central, one that, the statement must be made by a person who is not before the court and secondly, that its introduction must be aimed at establishing its truth.

Mr. Rugamila suggested that the appellants evidence fitted the definition of the oral evidence under section 62 (1) (b) of the Evidence Act Cap. 6 [R.E 2019]. Appellants and all his witnesses informed the court that they were informed of the alleged acquisition by their late father. That evidence is not direct evidence as Mr. Rugamila suggested. It is hearsay evidence, as the statement was made by persons who is not before the court and that it was made in proof of the asserted fact that the suit land was acquired by their later father. The rationale for the hearsay rule is, in my view to guard against the dangers of miscarriage of justice for relying on evidence where possibilities of falsehood cannot be eliminated and where the truth of the fact stands great chances of dilution. I find no reason to faulty tribunal's decision on this point. Like the trial tribunal chairman, I find the respondent's evidence hearsay liable to be disregarded as correctly done.

In the upshot, the appeal lacks merit, it is dismissed in its entirety with costs. Order accordingly.

DATED at **Shinyanga** this **13th** day of **May** 2022.



E. Y. MKWIZU
JUDGE
13/5/2022

Court: Right of appeal explained

E. Y. MKWIZU
JUDGE
13/5/2022