IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 40 OF 2021

(Arising from Land Application No. 156 of 2014 of the District Land and Housing Tribunal for Moshi at Moshi)

JOYCE BATHOLOMEO MASSAWE *(As an Administratrix of the Estate of the deceased Bartholomeo Massawe)* **..... APPELLANT**

Versus

JIMY LEMA.....1st RESPONDENT

VICTOR KAVISHE.....2nd RESPONDENT

16/8/2022 & 09/9/2022

JUDGMENT

SIMFUKWE, J.

Before the District Land and Housing Tribunal of Moshi at Moshi, the appellant herein being an administratrix of the estate of the deceased Batholomeo Massawe unsuccessfully sued the respondents claiming 10 acres of the disputed land located at Sanya line Hamlet, Mabogini Village within Moshi District in Kilimanjaro Region.The trial Tribunal declared the 2nd respondent to be the lawful owner of the disputed land which was under supervision of the 1st respondent. The appellant was not happy with

the decision of the trial tribunal. He filed the instant appeal on the following grounds:

1. *That, the trial Chairman erred in law and in facts for refusing to admit the appellant's redemption agreement without any justifiable reasons.*
2. *That, the trial Chairman erred in law for denying the appellant the right to be represented and the right of fair hearing.*
3. *That, the trial Chairman erred in law and in facts for holding that, exhibit D1 proves that the 2nd respondent's mother bought the suit land from Satimia Masao and gave it to the 2nd respondent while it does not. (sic)*
4. *That, the trial Chairman erred in law and facts for agreeing with the assessor's opinion that the respondent's evidence was heavier while that evidence was fake, contradictory and unreliable.*
5. *That, the trial chairman erred in law and facts for concluding that the appellant failed to prove that the suit land belongs to her husband one Bartholomew Masao merely because she did not produce the redemption agreement while there was other sufficient evidence which shows that he redeemed it in 1984 and failure to tender redemption agreement was caused by the trial chairman himself who deliberately refused to admit that document.*
6. *That, the trial chairman erred in law and facts for failure to evaluate the parties' evidence properly thus reaching at a wrong decision.*

The appeal was argued by way of written submissions. Mr. Erasto Kamani learned counsel argued the appeal for the appellant. Mr. Martin Kilasara learned counsel opposed the appeal for the respondents.

Mr. Kamani argued the 4th, 5th and 6th grounds of appeal jointly while ground No. 1, 2 and 3 were argued separately.

Arguing the 1st ground of appeal, Mr. Kamani alleged that at the first hearing, the applicant who is now the appellant prayed to tender a copy of an agreement which her late husband one Bartholomew Satimiya Massawe signed in 1984 in order to redeem the suit land from one Rogasian Shilla Kavishe to whom it had been wrongly sold by his brother one Josephat Satimiya Massawe in 1982. That, the counsel for the respondents objected that agreement to be admitted on the reason that it was not the same as the one which was annexed to the appellant's application. The counsel's objection was sustained and the trial chairman refused to admit that agreement basing on the same reason. Mr. Kamani contended that the trial chairman committed a grave error for refusing to admit that agreement because there is no legal requirement that for a document to be admitted by the District Land and Housing Tribunal it should have been annexed to the application or it should be the same as the one which is annexed to that application.

It was submitted further that, unlike in other courts, District Land and Housing Tribunals are not bound by practice and procedures laid down under the **Civil Procedure Code, 1966** or the **Evidence Act, 1967**, when it comes to the issue of tendering and admission of documentary evidence at the first hearing. The learned counsel for the appellant referred to **Regulation 10 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** which provides that:

> *"The Tribunal may at the first hearing, receive documents which were not annexed to the pleadings without*

necessarily following the practice and procedure under the Civil Procedure Code, 1966 or the Evidence Act, 1967 as regards documents."

Mr. Kamani also subscribed to the Court of Appeal case of **Director of Public Prosecutions vs Sharif Mohamed Athumani and Others, Criminal Appeal No. 74 of 2016** at page 6 (unreported), where it was stated that:

*"The general rule is that, unless it is barred by any rule or statute, any evidence which is **relevant**, **material** and **competent** is admissible. On the contrary, any evidence which is irrelevant is inadmissible."* Emphasis added.

At page 12 of the same decision, it was stated as follows:

"Like any other type of evidence, documentary evidence would also be admissible if it were relevant, material and competent unless its admission is barred by some other statutes or rules of evidence."

In view of what have been stated above and the cited authorities, Mr. Kamani submitted that, since the redemption agreement was relevant, material and competent and it was not barred by any rule or statute from being admitted, it was irregular for the trial chairman to refuse to admit it. The learned counsel was of the view that, what the trial chairman was supposed to do was to admit it, inspect it and weigh its credibility during the analyzation of the parties' evidence and not to deny its admissibility completely.

On the 2nd ground of appeal, it was submitted that, right to be represented by an advocate and the right of fair hearing is expressly provided for under

Regulation 13 (1) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations 2003 and **Article 13(6) (a) of the Constitution of the United Republic of Tanzania** respectively. Mr. Kamani stated further that before the trial tribunal the appellant was represented by Advocate Erasto Kamani who was always present in the tribunal whenever the application was scheduled for hearing. When the last witness for the defence case went to testify, the said advocate was not present due to reasons beyond his control. That, the appellant prayed the matter to be adjourned for a short time so that she could find out what had happened to her advocate and if necessary to look for another advocate but the tribunal refused and it instead forced her to proceed on her own or else her application be dismissed.

Furthermore, it was contended that the act of forcing the appellant to proceed herself while her advocate was absent for only one day was a breach of **Article 13 (6) (a) of the Constitution** (supra) which emphasizes a fair hearing before the rights and duties of a party are being determined by a court or any other agency. That, the same act violated the provisions of **Regulations 13 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003.** According to that regulation, for a party to be forced to proceed himself, his advocate must have been absent for consecutive two dates without good cause and not otherwise. Mr. Kamani opined that because the appellant's advocate was not absent for two consecutive dates, the act of the tribunal to require her to proceed on her own was unlawful and was a breach of her right to be represented and the right of fair hearing and that the same act vitiates the proceedings of the trial tribunal.

In support of the 3rd ground of appeal which is in respect of exhibit D1, Mr. Kamani submitted that the trial chairman misconceived the contents of exhibit D1 as there is nowhere in that exhibit where it is shown that the mother of the 2nd respondent bought the suit land from Satimiya Massawe in 1982 or in any other year and gave it to the second respondent. That, the said exhibit purports to show that it is Victor R. Kavishe himself who bought the suit land from Satimiya Mariki Massawe in 1982, the explanations which he himself and DW5 denied when they were giving their oral evidence. The learned counsel quoted exhibit D1 which reads as follows:

> *"Mimi Satimiya Sariki Massawe wa S. L. P.... mwenye shamba lililoko Kijiji cha Mabogini, kitongoji cha Sanyaline, Kata ya Mabogini wilaya ya Moshi ambalo limepakana na..... namkabidhi ndugu Victor Kavishe shamba hilo kwa malipo ya sh 18,000 (elfu kumi na nane tu.)*

From the above quoted exhibit, it was submitted that the decision of the trial chairman is inconsistent with the facts contained in the above quoted exhibit. That, no doubt the said decision was based on assumption and had no legal justification.

On the 4th, 5th and 6th grounds of appeal, Mr. Kamani submitted that the most important issue which the parties were supposed to prove was "who was the owner of the suit land in this suit?" That, the appellant gave direct and convincing evidence which proved that the land in dispute was the property of her late husband. The appellant explained to the tribunal clearly that up to 1982 the suit land was owned by her father-in-law one Satimiya Massawe but in 1982 one of his sons one Josephat Satimiya Massawe wrongly and secretly sold it to the 2nd respondent's father one

Rogasian Shilla Kavishe. The appellant explained that when her father-in-law knew that his land had been wrongly sold, he became furious and instructed his son one Bartholomeo Satimiya Masao (appellant's husband) to redeem it and thereafter take it for himself. That, the suit land was redeemed at a consideration of Tshs 40,000/ in 1984.

It was alleged further for the appellant that the redemption agreement was concluded before advocate Asenga. The appellant prayed to tender the said agreement but the trial chairman refused to admit it for unjustifiable reasons as explained in ground No. 2. That, evidence of the appellant was corroborated by evidence of PW2 Aseri Moses Maeda who told the tribunal that he witnessed the redemption agreement between the husband of the appellant and the 2nd respondent's father. The appellant and her witnesses elaborated that the suit land started to be trespassed by the respondents in 2002 when her husband fell sick and failed to attend that land.

Mr. Kamani was of the opinion that evidence of the respondents was fake, contradictory and unreliable. While DW1 one Jimy Exaud Lema and DW2 one Mathias Noa testified that it is the 2nd respondent who bought the suit land from Satimiya Masao in 1982 and they witnessed him signing the sale agreement, DW5 one Wilfred Raymond Ulomi told the tribunal that it is the 2nd respondent's mother who bought that land and gave it to the 2nd respondent, and that the 2nd respondent was not there as he was still young and was at school. However, evidence of DW5 does not show how and when the 2nd respondent was given the suit land. In addition, DW5 said that when the suit land was being sold no document was ever prepared or signed on that date. Thus, exhibit D1 was forged and the same was not consistent with evidence of the 2nd respondent and DW5.

That, while DW5 and DW6 testified that the suit land was bought by the 2nd respondent's mother and gave it to the 2nd respondent, Exhibit D1 shows that the suit land was bought by the 2nd respondent (DW6) for a sum of 18,000/= and it was given to him by Satimiya Masao himself. There is nowhere in that document where the 2nd respondent's mother bought the suit land either for herself or for the 2nd respondent.

It was submitted further that even the evidence which the 2nd respondent adduced contravenes his own pleadings. Mr. Kamani referred to paragraph 4 (vi) of the Written Statement of Defence where the respondent pleaded that he was the owner of the suit land since November 1982 after he purchased it from Satimiya Mariki Massawe and he annexed the sale agreement (R1) which was admitted as exhibit 'D1' to support his allegation. When the 2nd respondent was giving evidence as DW6 he changed his claims and alleged that he was given that land by his mother. Mr. Kamani suggested that the reason for the 2nd respondent changing his claims came after DW5 had testified that the 2nd respondent did not buy the suit land but he was given the same by his mother. The 2nd respondent knew that after the testimony of DW5, his lies that he bought the suit land would no longer holder water.

The learned counsel for the appellant stated further that, despite all the confusions and contradictions which go to the root of the case, the tribunal concluded that evidence of the respondent was heavier and credible than that of the appellant.

In conclusion, Mr. Kamani submitted that, in respect of what they had discussed above, they submit that the proceedings and judgment of the trial tribunal is bad in law and prayed the appeal to be allowed with costs. That this court should re-evaluate evidence given by the parties and

thereby reverse the judgment and decree of the trial District Land and Housing Tribunal. In the alternative, Mr. Kamani prayed that the matter be retried before another Chairman.

In his reply to the submission in chief, in respect of the 1st ground of appeal Mr. Kilasara learned counsel submitted from the outset that the said ground is frivolous and devoid of merits. He said that as a matter of law especially **Regulation 10 (2) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN 174/2003,** it is clear that any party to the proceedings can produce any material documents which were not annexed or produced at first hearing. However, for such documents to be admitted they must first be served upon the other party and secondly, they should be authentic. The learned counsel averred further that the noted provision is self-explanatory and that Regulation 10 (3) is coached in mandatory term 'SHALL' which in terms of **section 53 (2) of the Interpretation of Laws Act, Cap 1,** it must be performed.

Mr. Kilasara stated further that from the pleadings it was clear that the purported redemption agreement whose copy was supplied earlier to the respondents prior to hearing, was distinct from the one which the appellant produced at the hearing on 30/8/2016. That, objection to its admission was raised at the trial because one, copy of the latter was never supplied to the respondents before and two, its authenticity was questionable as it had additional wordings that is, it appeared to have been altered. It was alleged that the said clear fact was never traversed by the appellant at the trial. Hence, the objection was sustained, with reasons duly assigned thereof; and the appellant was also duly required to comply with the law, that is file notice to produce additional documents.

However, the appellant never complied or at all sought to be recalled as a witness to produce the same until hearing on her part was closed. Mr. Kilasara cemented his argument by citing the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited [2006] TLR 343,** in which the Court of Appeal quoted with approval its decision in the case of **Sabry Hafidh Khalfan v. Zanzibar Telecommunication Limited, Civil Appeal No. 47 of 2009**, where it held that:

> *"We wish to point out that annexures attached along with either plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence, is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."*

In the premises, Mr. Kilasara contended that in as much as the purported document was never produced, served upon the respondents and tendered in evidence at the trial despite the ample opportunity availed to the appellant, she cannot now lament and or purport to condemn the tribunal. He opined that the 1st ground of appeal is devoid of any merit and accordingly it should be dismissed.

On the 2nd ground of appeal that the appellant was denied the right to be represented; Mr. Kilasara submitted that the said ground is frivolous and grossly misconceived. The learned counsel stated that there is no dispute that the appellant had the services of Advocate Kamani. That, there is

also no dispute that as of 24/4/2021 when the case was due for finalising defence hearing, the said advocate was disqualified and had no valid legal status to represent the appellant as he had no valid practicing licence since January 2021. Mr. Kilasara submitted further that in terms of **sections 39 (1) and 41 (1) of the Advocates Act, Cap 341,** the said advocate was unqualified person to act as advocate and includes representing the appellant.

The learned counsel for the appellant went on to submit that a prudent advocate had to exercise the duty of care to his client and promptly inform/advise her to fetch another duly qualified advocate to represent her. But instead, for four months Mr. Kamani never did so and the appellant never bothered to ask for time to fetch another advocate as the appellant is now trying to insinuate. Reference was made to **Regulation 13 (2) of the GN 174/2003** which confers discretion to the tribunal to afford a party the right to proceed himself with the hearing or make such orders as it may deem fit. That, in the present case the advocate for the appellant had no locus standi to represent the appellant since January 2021, so technically he had no audience before the tribunal which is tantamount to being absent. However, the appellant was duly accorded the opportunity to proceed herself with hearing and thereafter cross examine DW6; and she freely exercised that right. Mr. Kilasara referred to the proceedings of the trial tribunal dated 24/4/2021. He submitted that the appellant was never condemned unheard as the appellant tried to insinuate. She was afforded chance to proceed with hearing and she took that chance.

Regarding the 3rd ground of appeal which is in respect of the issue whether the sale agreement was valid; Mr. Kilasara submitted among

other things that the sale agreement (exhibit D1) of the suit land was admitted without objection from the appellant. Even during cross examination, the said exhibit D1 was not seriously impeached by the appellant to render it implausible. The learned counsel cited the case of **Paul Yustus Nchia vs. National Executive Secretary Chama Cha Mapinduzi and Another, Civil Appeal No. 85 of 2005** at page 12-13, at Dar es Salaam, in which the Court of Appeal while quoting with approval the learned authors of **Blackstone's Criminal Practice (1992)** stated that:

> *"A party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper cause is to challenge the witness while he is in the witness box or, at any rate to make it plain to him at that stage that his evidence is not accepted."*

Mr. Kilasara said that the same position was reiterated in the case of **Martin Misara vs the Republic, Criminal Appeal No. 428 of 2016** that:

> *"It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."*

The learned counsel for the respondents also cited **section 10 of the Law of Contract Act, Cap 345 R.E 2002** which provides that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

On the basis of the cited authorities, Mr. Kilasara contended that from the evidence on record of both parties and their respective witnesses, there is no dispute that the suit land was previously owned by PW1's father-in-law, Satimiya Massawe. That, it is further undisputed fact that the said Satimiya Massawe sold the suit land to the respondent's mother for and on his behalf since 1982. The present dispute arose more than thirty (30) years later. The sale agreement complained of was tendered and admitted as Exhibit D1. The said agreement dated 03/11/1982 was between Satimiya Massawe as a Vendor and the respondent as a Purchaser. The consideration over the suit land was Tshs 18,000/ which is indeed lawful and was duly paid to the Vendor in full. The Vendor, Purchaser and their respective witnesses duly endorsed/signed the said agreement.

Mr. Kilasara went on to state that defence witnesses DW1, Jimmy Lema and DW2 Mathias Mushi knew the suit land since 1982 and have been cultivating the same since then. Whereas the said DW5 Wilfred Ulomi was present during the sale and he also purchased a portion adjacent to the suit land on the same date.

In support of his arguments, Mr. Kilasara subscribed to **section 63** read together with **sections 64 (1) and 67 (1) (a) (2) of the Evidence Act, Cap 6 R.E 2019** which provides that:

"The contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the Court. Secondary evidence may be given of the existence, condition or contents of a document when the original is shown. When original is shown any secondary evidence of the contents of the document is admissible."

Section 83 (1) (c) of the same Act (supra) provides that:

"Court shall presume to be genuine every document purporting to be a certified copy or other document, which is substantially in the form and purports to be executed in the manner directed by law in that behalf."

Mr. Kilasara commented that in as much as the said sale agreement was freely consented; it contains the names of the Vendor, Purchaser and their respective witnesses; it involves lawful consideration and lawful object with its clear description; and that there was no proof of fraud and or forgery as alleged, the said written sale agreement was lawful and it is legally enforceable. He alleged further that the trial tribunal was impartial and it duly directed its mind on the law and facts of the case and even accorded the appellant opportunity to cross-examine DW6 on Exhibit D1. That, there is no serious anomaly or at all miscarriage of justice that can vitiate the said Exhibit D1 and or the whole proceedings.

On the 4th, 5th and 6th grounds of appeal which concerns evaluation of evidence, Mr. Kilasara started by pointing out that before reaching into a conclusion/holding, the presiding Chairman must analyse and evaluate the evidence before it in an attempt to answer the framed issues. He was

of the opinion that in this case, the trial tribunal duly complied with those requirements of the law. At the trial, three issues were framed to wit: *who is the absolute owner of the suit land; whether the respondents are trespassers to the suit land and what reliefs are the parties entitled to.* The learned counsel reiterated that the 1st respondent (sic) acquired ownership over the suit land from the previous undisputed owner Satimiya Massawe. The sale agreement dated 03/11/1982 was tendered as Exhibit D1. The 1st respondent DW1 (sic) testified how, when and where he acquired the suit land. DW1 (sic) also testified to had enjoyed quiet possession thereof for over thirty years until in 2014 when the appellant started claiming ownership thereof upon the death of the Vendor. Neither the Vendor nor his son Batholomeo ever filed any case claiming ownership thereto. That, the appellant's claim is frivolous, unfounded and time barred.

Furthermore, it was alleged that DW1 Jimy Lema, also testified that he was a care taker and occupier/farmer of the suit land since 1982 under authority of the 2nd respondent. DW2 Mathias Noah and DW5 Wilfred Ulomi testified as neighbours to the suit land and also for being present during the sale. It was insisted that these witnesses emphatically identified the suit land and testified that the Vendor and his son Josephat Massawe were duly involved, signed the agreement and none of them objected the sale.

Concerning the appellant's case, it was averred that she relied on the purported redemption agreement between Rogasian Kavishe (who was never a purchaser) and Batholomeo Massawe who was never the vendor or owner. In view of the fact that the said Rogasian Kavishe was never the purchaser, he never had any title to return to the vendor. That, as a

matter of law 'He who doesn't have legal title to land cannot pass good title over the same to another, as was held in the case of **Farah Mohamed v. Fatuma Abdallah [1992] TLR 205.** It was averred further that none of the appellant's witnesses were present or witnessed the redemption of the suit land even assuming for the sake of argument that there was any redemption. That, the purported redemption agreement was also never tendered as exhibit. PW2 Asseri Maeda and PW3, Stanley Sylvanus admitted that the said Satimiya Massawe was the previous owner of the suit land and that he sold it in 1982 though allegedly to be erroneous. That, the appellant did not adduce any proof to prove that signatures in Exhibit D1 were forged as alleged by her. Mr. Kilasara cited **section 110 (1) and (2) of the Law of Evidence Act, Cap 6** which provides that:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

Supporting his contention on the strength of the above provision, Mr. Kilasara submitted that the tribunal properly evaluated evidence before reaching to a fair and just conclusion that the respondent is the lawful owner of the suit land. He added that the tribunal's decision cannot be faulted based on evidence which was never adduced at the trial.

Reference was also made to the case of **Hemed Said v. Mohamed Mbilu [1984] TLR 113** in which his Lordship Sisya J. held 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. In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence."

The learned counsel went on to quote from the case of **Hemed Said** (supra) at page 114 where it was held that:

"Where, for undisclosed reasons, a party fails to call a material witness on his side or produce a relevant documentary material, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests."

Mr. Kilasara stated further that the above position was reiterated in the case of **Kimotho vs. Kenya Commercial Bank [2003] E.A 108** in which it was held that:

"Failure to call a material witness may prompt a court to infer that the person's evidence would not have helped the party."

The learned counsel was of the opinion that since in this case the said material witness was not called and no reason for their non-production has been assigned, this case is a fit case to draw that inference. Apart from that, Mr. Kilasara also submitted that the appellant was undoubtedly accorded the opportunity to tender the purported redemption agreement which she claimed to be in her possession but she never tendered it and no sufficient reason was ever assigned. He implored this court to draw

adverse inference against her that there was never any valid or at all authentic agreement to redeem the suit land as alleged by the appellant.

The learned counsel for the appellant concluded that on balance of probabilities there was ample and credible evidence adduced by the respondents at the tribunal that pointed to irreversible conclusion that the 2nd respondent duly acquired ownership of the suit land and has enjoyed prolonged quiet possession thereof. That, the appellant has no any equitable interest to the suit land but rather she is a mere trespasser to the suit land. He prayed that the appeal be dismissed in its entirety with costs for being devoid of merit and the decision of the trial tribunal be upheld.

In rejoinder, Mr. Kamani reiterated that it was not proper for the District Land and Housing Tribunal to refuse to admit the appellant's redemption agreement (document) at the first hearing for the reason that its copy had not been served to the respondents before or it was not authentic.

Responding in respect of the cited **Regulation 10 (2) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations** (supra), Mr. Kamani stated that the cited Regulation do not apply to documents which are tendered at the first hearing. He said that the procedures which regulate tendering of a document which was not annexed to pleadings at the first hearing are provided under **Regulation 10(1)** (supra) which he had quoted in his submission in chief. The learned counsel submitted further that the requirements that in order to be admitted by the court a copy of a document which was not annexed to the pleadings must have been served to another party and such a document must be authentic are procedures and practices under the **Civil Procedure Code** and **Evidence Act** which are excluded by this

Regulation. That, **Regulation 10 (2) (3)** (supra) is applicable to documents not annexed to the pleadings which were not tendered at the first hearing and the conditions imposed under the said Regulation are like those provided for under the **Civil Procedure Code** and the **Evidence Act**.

On the second ground of appeal, Mr. Kamani reiterated that it was improper for the trial Chairman to force the appellant/applicant to proceed herself while her advocate was absent for just a single day.

Concerning the allegations that the trial Chairman was correct to force the appellant to proceed herself because her advocate had been disqualified since January 2021 and he had no locus to represent her; Mr. Kamani submitted among other things that **Regulation 13 (2) of GN No. 174/2003** requires two conditions only to be taken into consideration before a party who has an advocate is required to proceed himself:

i. That, his advocate is absent for two consecutive dates.
ii. That, there is no good cause for his absence for those consecutive days.

Mr. Kamani was of the view that the above noted two conditions were the issues which the trial Chairman was supposed to consider in the instant case before forcing the appellant to proceed herself. That, the said act of the trial Chairman contravened the provisions of **Regulation 13 (2)** (supra) and denied the appellant right of being represented.

Regarding the issue that the learned counsel for the appellant was disqualified; Mr. Kamani stated that those were mere speculations as he had never been disqualified in his practicing history and that he was condemned unheard.

On the 3rd ground of appeal, Mr. Kamani reiterated his submission in chief. On the issue that the appellant did not cross examine on exhibit D1, with due respect, the learned counsel for the appellant submitted that the assertion was irrelevant as the submission of the appellant was to the effect that the explanation by the trial Chairman in his judgment that exhibit D1 proves that the suit land was bought by the second respondent's mother and that it was given to the 2nd respondent by his mother were not true. That, those explanation are not contained in exhibit D1 or any other document tendered by the respondents.

Regarding evidence of DW1 and DW2, Mr. Kamani stated that the said witnesses testified that the sale agreement was entered into by the 2nd respondent himself and Satimiya Mariki Massawe. That, DW1 and DW2 witnessed the 2nd respondent signing the sale agreement while DW5 testified that the sale agreement was oral and it was entered into by the 2nd respondent's mother and Satimiya Mariki Massawe. Mr. Kamani was of the opinion that the contradiction goes to the root of the case and the same destroys credibility of the said documentary evidence.

On the 4th, 5th and 6th grounds of appeal, Mr. Kamani reiterated that the trial Chairman did not evaluate the evidence on record properly, as a result he reached at a wrong decision. That, the learned counsel for the respondents decided to evaluate that evidence himself in the course of replying to the appellant's submission which is contrary to normal procedures.

Mr. Kamani reiterated his prayer that this appeal be allowed with costs. That this court be pleased to re-evaluate the evidence on the record and reverse the judgment and decree of the trial tribunal. Alternatively, the

application be ordered to be retried before another Chairman if it is found necessary.

I had time to examine carefully evidence of both sides on the trial tribunal's records. From the outset, the grounds of appeal in particular the 1st, 2ndand 5th grounds seemed to convince me that the trial before the trial tribunal was unfair and violated a Constitutional right of representation. That triggered me to examine carefully the proceedings of the trial tribunal in order to satisfy myself in respect of the raised issues in the grounds of appeal. My findings will be a response to the issue whether the grounds of appeal in this matter have merit.

Commencing with the 1st and 5th grounds of appeal which concerns refusal to admit the appellant's redemption agreement; the proceedings of the trial tribunal dated 30/8/2016 reveal that when the learned counsel for the respondents objected admission of the said document on the ground that the redemption agreement which the appellant wanted to tender was different from the agreement attached to her application; counsels of both sides were accorded with an opportunity to address the tribunal. In his response, Mr. Kamani stated inter alia that:

> *"The only difference is on the format but the contents are similar."*

The literal meaning of the quoted words of Mr. Kamani is that he admitted that the document which they sought to tender was different from the document attached to the application. In her ruling, the Hon. Chairman stated that:

> *"Having closely looked at both documents I see that the two documents are different on the basis that the one*

which was annexed to the application is different from what is sought to be tendered as exhibit. Therefore, the respondents were not served with the copy of the said document hence in contradiction of Regulation 10 (3) (a) of GN No. 174 of 2003. However, the witness may be recalled to produce the said document after serving a copy of the same to the respondents."

From the above quoted ruling of the trial tribunal, it is obvious that the appellant's redemption agreement was rejected because it was a different document from the annexed document and the appellant's counsel conceded to that difference. Apart from that, the said document was not served to the respondents. In his submission in support of this appeal, Mr. Kamani was of the opinion that tendering a document which was not annexed to the application at the first hearing may be admitted even without serving copy of the document to the other party pursuant to **Regulation 10 (1) of GN No. 174/2003.** With due respect, that would be taking the other party by surprise which is against the principles of fair trial. Otherwise, the appellant was granted leave to be recalled to tender the said document after serving copy to the respondents but she waived that right. It is for that reason that I find the 1st and 5th grounds of appeal to have no merit.

On the 2nd ground of appeal which is in respect of denial of right of representation; the proceedings of the trial tribunal show that Mr. Kamani the learned counsel for the applicant was reported to be sick since 26/2/2021. However, on 24/4/2021 when the matter was ordered to proceed in his absence, he appeared later after examination in chief of DW6. Then, Advocate Kilasara said that Mr. Kamani was disqualified for

not having a valid practicing licence. Thereafter, in his reply to the objection raised Mr. Kamani conceded that it was true that in the website of advocates it was indicated that he was not allowed to practice. However, he alleged that the said information was entered erroneously as he had renewed his practicing certificate. He prayed for adjournment so that he could make follow up or that the applicant could find another advocate. In his rejoinder Mr. Kilasara stated that the tribunal was functus officio as it had already ordered the matter to proceed. Then, the tribunal ruled out that Mr. Kamani had no locus even to address the tribunal, it dismissed his prayers and ordered the matter to proceed.

In his submission in support of the 2nd ground of appeal, Mr. Kamani alleged inter alia that he was condemned unheard. From my findings which I have just stated herein above, it is not true that he was condemned unheard except that, his prayers were dismissed. In the circumstances, I dismiss the 2nd ground of appeal for being frivolous.

Had the matter not been a backlog, I could have allowed this ground in the sense that the appellant could have been allowed to find another advocate. However, since the trial tribunal stated in its order that the application was a backlog and a witness (DW6) was from Dar es Salaam, thus the applicant should proceed herself in the absence of her advocate. I find that as a sound reason since the matter was instituted in 2014 and it had taken 7 years.

On the 3rd ground of appeal which is in respect of exhibit D1 that it contradicts with the findings of the trial Chairman that the 2nd respondent's mother bought the suit land from Satimiya Masao and gave it to the 2nd respondent. It is trite law that courts of law or tribunals should not rely on extraneous matters in reaching at their decision. In this matter,

I made a thorough follow up of the contradictions which were pointed out by the learned counsel for the appellant. I found out that the sale agreement which was tendered by the respondents shows that the suit land was handed over to Victor Kavishe the 2nd respondent. However, on balance of probabilities, evidence of the respondents together with that of their witnesses was that the suit land was bought by the mother of the 2nd respondent for the 2nd respondent. DW5 stated among other things that Mama Kavishe purchased ten acres of land for Victor Kavishe. When cross examined DW5 said that Victor Kavishe was a student by then, so his mother purchased on his behalf and she signed the sale agreement and Victor was absent. DW6 (2nd respondent) also stated that the suit land was being cultivated by his mother from 1982 to 1988 when he started cultivating his shamba which was being taken care by the 1st respondent for him. I subscribe to the case of **Caritas Kigoma vs K. G. Dewsi Limited, Civil Appeal No. 47/2004** (unreported) in which the Court of Appeal held that:

> *"It is trite law that he who alleges must prove his/her allegations."*

In this case since the appellant did not tender any document to prove ownership, while the 2nd respondent tendered exhibit D1. In the event, I dismiss the 3rd ground of appeal.

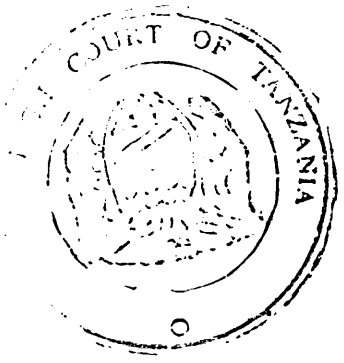
On the 4th and 6th grounds of appeal which are to the effect that evidence of the respondents was fake, contradictory and unreliable and that the trial tribunal failed to evaluate evidence of the parties; in his submission Mr. Kamani pointed out some contradictions on part of the respondents' testimonies before the trial tribunal. I have keenly examined submissions of the learned counsels of both parties and the alleged contradictions. I

have noted that DW5 who was among those who witnessed the mother of the 2nd respondent purchasing the suit land for the 2nd respondent, and wrote the name of the 2nd respondent her son, testified very clearly on what transpired. However, the contradiction between evidence of DW2 who was the Street Chairman by then and DW5 who introduced the mother of the 2nd respondent to the Vendor Satimiya Massawe, is minor which I am of considered view that does not go to the root of the case. On balance of probabilities, I am of considered opinion that evidence of the respondents was heavier than that of the appellant. Also, the learned trial Chairman evaluated evidence of both parties thoroughly and arrived at a justified conclusion. Judgment of the trial tribunal is very clear on that.

It is on the basis of the above findings that I find this appeal has no merit. I therefore dismiss it forthwith with costs.

It is so ordered.

Dated and delivered at Moshi this 9th day of September, 2022.



S.H. SIMFUKWE

JUDGE