

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA**

MISC. LAND APPLICATION NO. 12 OF 2021

*(Originating from Land Application No. 27 of 2018 of District Land and Housing Tribunal
for Katavi at Mpanda)*

NTULI ANYANDWILE.....APPELLANT

VERSUS

GERALD KASELA.....RESPONDENT

JUDGEMENT

Date of Last Order: 15/09/2022

Date of Ruling: 04/11/2022

NDUNGURU, J

This appeal arises from the decision of the Katavi District Land and Housing Tribunal at Mpanda (hereinafter referred to as the trial tribunal) in Land Application No. 27 of 2018. The appellant herein sued the respondent herein over the ownership of piece of land (henceforth the land in dispute) measured 1/4 acres in land application No. 27 of 2018 before the Katavi

District Land and Housing Tribunal where the respondent emerged victorious.

Before the trial tribunal appellant was represented by Mr. Patrick Mwakyusa, learned advocate whereas the respondent was represented by one Illeth Mawala, learned advocate. Upon hearing the application, the trial tribunal decided in favour of the respondent, thus dismissed the application by the appellant.

Aggrieved by the decision of the trial tribunal the appellant has preferred this appeal with a petition of appeal comprised of three (3) grounds which are hereunder quoted: -

1. That the trial tribunal erred at law by admitting and working upon sale agreement which was procured fraudulently.

2. That the trial tribunal erred both at law and fact by giving its Judgement in favour of the respondent without taking into regard the submission made by the counsel for the appellant nor recognizing his (counsel) presence.

3. That the trial tribunal erred at law by giving its decision in favour of the respondent who failed to defend the case as required by law.

When the matter was called on for hearing before this court, with leave of the court the parties agreed for the appeal be disposed by way of written submissions. Submissions were filed as scheduled by this court.

In his submission, Mr. Patrick Mwakyusa, counsel for the appellant abandoned second ground of appeal and he went on submitting as regard ground one and ground two of appeal.

Mr. Mwakyusa submitted as regard ground one that it is trite of the law that in order for an agreement to be declared legal, it has to fulfil essential requirements as provided under **section 10 of the Law of Contract**, Cap 343 RE 2019. One of the essential elements is based on the requirement that agreement or contract must be made/entered with free consent. He however contended that contrary to law as above, the sale agreement admitted by the trial tribunal was entered in the absence of the appellant neither a power of attorney exhibited proving grant of permission by the appellant to the respondent permitting the same to dispose the suit

property in her absence, thus the said sale agreement was entered without the consent of the appellant. Further, he submitted that the appellant was not a party even in fixing the price.

Mr. Mwakyusa clarified that the value of the suit property as per original application is Tshs. 20,000,000/= and the respondents did not deny such fact as per reply to the application. Thus, he said it is impossible that the appellant could have permitted to dispose the suit property at a low and given away price of Tshs. 4,000,000/=. He said there is no proof of whatsoever proving the appellant and respondent agreed on such price, failure of which renders the sale void as per the case of **Alfi East Africa Ltd vs Thermi Industries and Distributors Agency Ltd** [1984] TLR 256

Mr. Mwakyusa submitted that witness one Pascal Mbangulile (DW3 at the trial tribunal) stated that he travelled to Kyela to hand over the price money, however failed to prove by tickets. Further he said DW3 failed to procure any evidence acknowledging that the appellant received the price money.

It was his further submission that the appellant could not report the matter before the police force nor return the price money vide M-PESA as she knew and indeed was convinced by one Josephat Itala. Following this fact, the appellant took an option of sending money an emissary instead.

Mr. Mwakyusa submitted that there is notable contradiction and inconsistency as regards signatures as appearing in the sale agreement. DW3 when cross examined stated that the sale agreement was signed after the appellant had signed it, while PW4 one Nasibu Katambala at the trial tribunal testified that sale agreement was signed on the same day he draw it but before the appellant signed it and the trial tribunal did not address on it as the same goes to the root of the suit as per the case of **Mohamed Said Matula vs Republic** [1995] TLR 3.

Mr. Mwakyusa further submitted that sanctity of contract does not apply to the sale agreement which was entered fraudulently rather to a legally entered contract. Further he submitted that the sale agreement is void for want of notification of the Usevya Village Council as per **section 30 (3)** of the Village Land Act, Cap 114 RE 2019. He referenced also the case of **Chandran Vinubai Patel vs Frank Marealle and Another**

[1984] TLR 23 where Court of Appeal stated that agreement for disposition of an interest in Land was void for want of consent from the Director of Land Development.

He finally prayed for the court to give decision in favour of the appellant.

In reply, Ileth Mawalla, learned advocate first drew attention of this court for direction as regard names of parties in the petition of appeal is different from the names in the judgement and decree which is appended. That the respondent in this petition of appeal is Gerad Kasela and not Antony Gerald Kasela. Also, the name of the first respondent in the petition of appeal was excluded. Mr. Mawala contended that as per the case of **Marwa Kachang'a vs Republic**, Criminal Appeal No. 84 of 2015 and **Denis Kasege vs Republic**, Criminal Appeal No. 359 of 2013 petition of appeal by the appellant is fatal as it goes to the root of the case.

Mr. Mawalla submitted that the contention by the appellant that sale agreement was procured fraudulently has to be proved. That the appellant was duty required to prove the fraud as per **section 110 of the Law of Evidence**, RE 2019. He said the testimony of the appellant was not

supported by any evidence or documents. The tribunal did not admit any phone or m-pesa transaction to prove. Likewise, no bus ticket, medical report was tendered that the appellant was outside Usevya when the agreement was negotiated.

Mr. Mawala submitted that since the representative acted according to the instructions ended up selling the two properties which the appellant ratifies, thus the issue of power of attorney does not hold water.

As regard inconsistency, Mr. Mawalla said DW3 did not take part in the execution of the agreement. DW2 was supported by DW3. That the appellant did not prove her claim as required by law.

Mr. Mawalla submitted that the suit property does not fall under Customary Rights of Occupancy, thus he said section 30 of the Village Land Act, Cap 4 does not apply. He finally prayed for the dismissal of the appeal with costs.

In rejoinder, learned counsel submitted that the petition of appeal is proper before this court as per **Order XXXIX rule 3 (1) of the Civil Procedure Code**, Cap 33 RE 2019. He contended that the names of the respondent as appear in the petition of appeal one Gerald Kasela instead of

Antony Gerald Kasela is not fatal as the same did not occasioned any miscarriage of justice. Further he submitted that the respondent's counsel raised unreported case in support of his objection, however the same were not appended. Thus, he said the objections be disregarded.

I have keenly followed the arguments of the learned counsel for the both parties and I have read between the lines the appellant grounds of appeal and the entire proceedings of the tribunals below.

Let me start with the irregularity as addressed by the learned counsel for the respondent as regards the different of names of respondents as appear in the petition of appeal and those as appear in the judgement and decree of the trial tribunal. That in the judgement and decree of the trial tribunal the respondent were two first is Josephat Itala and second is Antony Gerald Kasela while in the petition of appeal only one name which is also incorrect as it appear Gerald Kasela.

Admittedly, counsel for the respondent raised issue of names as a point of preliminary objection in the course of submitting his submission instead of the notice of preliminary objection at early possible time. However, am inclined to determine the preliminary objection by the

counsel for the respondent before going to the merit of the suit as he contended the same is fatal.

It is a general practice and now a law that where preliminary objection is raised in the course of hearing main suit, the court /tribunal is duty bound to dispose of it fully before determination of the main suit. The position has been stated in the Court of Appeal case of **Khaji Abubakar Athumani vs Daud Lyakugile TA. DC Aluminium and Mwanza City Council**, Civil Appeal No. 86 of 2018.

However, am of the considered opinion that the preliminary objections raised by the counsel for respondent as regards names of the respondents do not qualify to be pure point of law. The preliminary objections must be on a pure point of law as stated in the case of **Mukisa Biscuits Co. vs West End Distributors Ltd**, (1969) EACA 696. In my opinion, the points raised cannot stand as preliminary objections as they are not purely points of law. I said so because even if argued the raised preliminary objections would not dispose of the suit. Thus, the matters raised do not go to the root of the appeal. Therefore, the contention as

raised by the learned counsel for the respondent that petition of appeal is fatal is unfounded.

The fact that both parties do not dispute the error as appears in the trial tribunal's judgement, the drawn decree and as well the petition of appeal, for the interest of justice as per **Order XXXIX Rule 3(1)** of the Civil Procedure Code, Cap 33 RE 2019 let the names of the parties be amended to reflect proper names as appear in the original application.

Now coming to the complaints by the appellant, the first complaint being that the trial tribunal erred at law by admitting and working upon the sale agreement which was procured fraudulently.

Now this court has powers to re-evaluate the evidence on record and arrive at its own conclusion if there is mis-direction or non-direction of the evidence by the trial tribunal. In proving her claim at the trial tribunal, the appellant testified along with his witness. She testified that in a year 2011 she purchased suit land from Cecilia at a price of Tshs. 500,000/= measuring $\frac{1}{4}$ acres which is located Usevya village. That in March 2016 she travelled to Mbeya for medical treatment. While there she was informed by one Joseph Itala that she was terminated from employment

and that her employer (District Executive Director) was to confiscate her property due to debts. She was influenced to sell the property, but refused and while there at Mbeya she received money through M-PESA sum of Tshs. 4,000,000/=. She made a follow up contacting Joseph Itala however failed. Later on her children told her that Joseph Itala went to her home and he told children that the home has been sold. She tried to return the money to the alleged buyer but refused. She tendered sale agreement between herself and one Cecilia as exhibit NAK-1. Upon being cross examined she stated that after her return she informed her family to have received the money from unknown person. She stated that the signature on the sale agreement resembles to her signature but not her signature and that Joseph Itala is family friend.

Her first witness one **Godfery Hakimu Mwaisaka** testified that in a year 2016 he at form schooling at day teacher Itala came at his home and told them that the house has been sold. He informed teacher Mlamla who responded that he had no information. Upon being cross examined he testified to have not known Paschal Mbagulile and he does not know who purchased the house.

Her second witness Joseph Thomas Mlamka testified that he was a head teacher at Usevya Primary School and that the appellant got sick on 22/2/2016 and she was allowed by her employer to get treatment from 9/3/2016 to 23/3/2016. He was told by appellant's children that the house has been sold. He stated that one of appellant's relative met with the buyer for return of the money but the buyer one Kasela refused whole wanted Tshs. 5,000,000/= instead of Tshs. 4,000,000/=. In a year 2018 the buyer wanted to be given Tshs. 15,000,000/=. Upon being cross examined he stated that he does not know whether the appellant directed that her house to be sold.

Her third witness one **Nasibu Ramadhan Katambala** testified that he has been Ward Executive Officer for more than ten years. He testified that on 30/11/2016 while in his office came Gerald Kasela to prepare sale agreement of the suit property. He was informed by Kasela that Ntuli (the appellant) want to sell her house but she was not present. He was told by Paschal Mbangulile that the appellant and the buyer had already agreed. He directed to call family member and one Richard Abraham Mwasongwe came told him that her mother directed to sell the house. He prepared the sale agreement where Paschal Mbangulile took the sale agreement to the

seller who was not present. Upon being cross examined he stated to have been satisfied having been told by Mbangulile that the seller has signed sale agreement. He stated to have not seen Joseph Itala in the transaction. He said he never received complaint from the appellant over the sale agreement.

In the defence case, first defence witness one Joseph Afred Itala also the first respondent at the trial tribunal testified that he knew nothing about the claim and that the phone number alleged to send money does not belong to him and he did know why he has been involved in the claim.

The second defence witness one Antony Gerald Kasela also the second respondent at the trial tribunal testified that on 28/01/2016 one Paschal Mbangulile and Abraham Richard went to his house and they told him that the appellant is selling her house at Tshs. 10,000,000/= but he told them he had Tshs. 3,000,000/=. Paschal Mbangulile made communication with the appellant and they agreed Tshs. 4,000,000/=. They went to Ward Executive Officer (WEO) one Nasibu Katambala to reduce agreement into writing. WEO prepared the agreement and Paschal Mbangulile went to Mbeya to hand over the money. After his return he was

given a copy of the sale agreement signed by the appellant. He told the tribunal that after a year came relative of the appellant and teacher Mlamka to redeem the house he refused wanted Tshs. 5,000,000/=. Upon cross examined he stated to know only the child of the appellant one Abraham and Paschal Mbangulile. He stated that WEO called the appellant through the phone of Paschal.

Third defence witness one **Paschal Mbangulile** testified that he knew Gerald Kasela as his co-business man and that the appellant is his neighbor and friend too. That on 28/01/2020 he called by the appellant to find for her the customer of the plot and house. He said the appellant was at Mbeya while communicating. He called Kasela at his shop and he called the appellant who agreed the price and on 30/01/2020 they went at the office of WEO who prepared the sale agreement. He further stated that at all time they were with the child of the appellant. He went to Mbeya with sale agreement and handled the money to the appellant who also signed the agreement. He stated that the appellant gave him Tshs. 130,000/= for teacher Ludovick.

The fourth defence witness one Moses Kaegele testified that he is a teacher and that appellant was his fellow teacher owed him Tshs. 130,000/=. That on 5/2/2016 he was given money from Pascal Mbangulile said it was from the appellant.

Having subjected the entire testimonies of both sides under my scrutiny, it very obvious, there is a misdirection or non-direction on the evaluation of evidence by the trial tribunal. Upon my perusal of the records of this appeal, the appellant before the trial tribunal tendered documentary evidence (exhibit NAK -1) as a proof as regards the buying and owning of the suit property since 2011 which was not disputed by anyone. However, Hon Chairman misdirected himself to hold that the appellant did not deny her signature on the sale agreement (exhibit E1), thus it was satisfied that Paschal Mbangulile acted with full authority from the appellant in selling the suit property. Am mindful of the fact that the appellant in her testimony in cross examination and in re-examination had since disputed her signature on the sale agreement dated 30/01/2016 (exhibit E1) when she was referred to it for identification, the fact which was noted by the trial tribunal. However, her advocate did not object during its tendering of exhibit E1. The trial tribunal could have asked learned advocate to consult

her client first about the genuiness of her signature bearing in mind she denied it in her testimony. Otherwise, trial tribunal ought to have invited parties to address the tribunal on the need to summon a handwriting expert in terms of **Order VI rule 14 of the Civil Procedure Code**, Cap 33 RE 2019 to examine the authenticity of the disputed sale agreement. In the circumstance, it was wrong for trial tribunal chairman to conclude that the appellant in her capacity and through Paschal Mbangulile as her agent alleged to have full authority sold the suit property to the respondent basing on her signature while the appellant denied to have signed.

Though it is true that sale agreement (exhibit E1) was prepared signed before Ward Executive Officer of Usevya one Nasibu Ramadhan Katambala by alleged buyer of the suit property one Antony Gerald Kasela, but as per his testimony he informed the tribunal that Mbangulile told him that the appellant and Antony Gerald Kasela had already agreed, hence went on preparing the written agreement and he did not do further step to confirm from the appellant even through calling her if at all she consented to the selling of the suit property to the respondent. Even when he was informed by Paschal Mbangulile that he sent a copy of sale agreement to Mbeya for the appellant to sign, he did not confirm it if it was true. This

fact creates doubtful if at all the appellant signed sale agreement (exhibit E1). The allegation on the part of the appellant that the sale agreement admitted by the trial tribunal was procured fraudulently cannot be ignored in the circumstances of this case. Thus, ground one of this appeal holds water.

Am also in agreement with learned counsels for both appellant and respondent that in terms of **section 10 of the Law of Contract Act**, [supra] parties are bound by the terms of contract they freely entered. See the cases of **Simon Kichele Chacha vs Avelina M. Kilawe**, Civil Appeal No. 160 of 2018, **Unilever Tanzania vs Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009 and **Philipo Joseph Lukonde vs Faraj Ally Said**, Civil Appeal No. 74 of 2019, all unreported. Thus, since the trial tribunal mis-directed itself in determining issue of authenticity of the signature on the sale agreement as denied by the appellant to be her own, it was wrong to conclude that the appellant freely consented in selling suit property to the respondent and as well she granted permission to third party in selling the suit property without documentary evidence giving authority on the same.

Thus, as regards the third ground, it is the finding of this court that it was wrong for the trial tribunal decide in favour of the respondent while there is mis-direction of evidence as discussed above.

In the event, am satisfied that the trial tribunal chairman improperly analysed the evidence before him and reached to an inappropriate conclusion, thus there is justification to interfere with his findings.

As hinted above herein, it is not simple for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.

I proceed to hold that having seen the misdirection on the evidence by the trial tribunal as discussed above, I now reverse the findings of the trial tribunal below and declared the appellant as the rightful owner of the suit property against the 1st and 2nd respondents. The appellant is to return

back the price money Tshs. 4,000,000/= alleged sent through her mobile phone to 2nd respondent.

For the foregoing reasons, I allow the appeal with costs.

It is so ordered.




D. B. NDUNGURU

JUDGE

04. 11. 2022

Date - 04/11/2022
Coram - Hon. M.S. Kasonde - DR
Appellant - Present in person
Respondent - Absent
B/C - Zuhura

Appellant: The matter comes for judgment. I am ready.

Court: Judgment delivered this 4th day of November, 2022 in the presence of the appellant and in absence of the respondent.

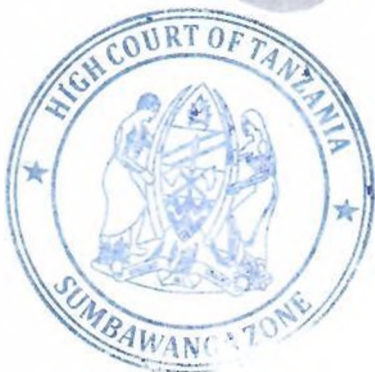



M.S. KASONDE

DEPUTY REGISTRAR

04/11/2022

Right of appeal fully explained.




M.S. KASONDE

DEPUTY REGISTRAR

04/11/2022