IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

(APPELLATE JURISDICTION)

LAND APPEAL NO. 28 OF 2021

(Originating from Land Application No. 164 of 2016, in the District Land and Housing Tribunal of Morogoro, at Morogoro).

TAFUTA ABDALLAH MILONDOMO.....APPELLANT

VERSUS

JIDAI MAONA ..... 1st RESPONDENT
LWENGE NZILE ..... 2nd RESPONDENT

JUDGEMENT

12th Dec, 2022

CHABA, J.

In this appeal, the appellant Tafuta Abdallah Milondomo, is appealing against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT) in Land Application No. 164 of 2016. Before the DLHT the appellant unsuccessfully sued the respondents over trespass of the suit land. Aggrieved by the decision of the DLHT, the appellant is now before this Court seeking what he believes to be his rights through substantive justice.

Briefly, the facts which resulted to this appeal is that, the appellant alleged to be on full ownership of the suit land measured 40 acres in Mbwade Village,

Bwakira Chini within Morogoro Vijijini, until 2012 when he temporarily allowed the 1st respondent limitedly to use ½ an acre of it, the agreement continued well until 2014 when the 1st respondent cut 2 ½ acres of suit land and started to cultivate it contrary to their agreement. He also uprooted the sesame plants planted by the appellant and planted corn claiming that he purchased the suit land from the appellant. As the appellant alleged that the 1st respondent trespassed his suit land, he unsuccessfully sued him before the District Land and Housing Tribunal for Morogoro, at Morogoro. On the other hand, the respondent defended for himself and said that he purchased the suit land in the year 2011 from the appellant.

In a bid to pursue for his rights, the appellant preferred the instant appeal clothed with four (4) grounds of appeal enumerated hereunder: -

1. That, the trial tribunal erred in law and upon facts in holding that the respondents were the rightful owner of the disputed land.
2. That, the trial tribunal erred in law in holding that the appellant had the duty of proving that he, the appellant, DID NOT give land to the respondents on permanent basis.
3. That, the trial tribunal erred in law in holding that disposition intervivos of the village land did not require to be in writing.
4. That, the trial tribunal failed to analyses properly the appellants evidence adduced and produced at the trial which evidence conclusively showed

the appellant was the rightful owner of the suit land and that the respondents merely requested temporary and limited use.

At the hearing, the appellant appeared in person, unrepresented. However, he instructed Mr. Juma Ahmed Mwakimatu, learned counsel to draw and prepared (instructions limited to drafting only) the appellant's written submission in support of the appeal and the appellant filed in Court, while Ms. Khadija Shaban Juma, learned counsel drawn and filed the respondent's written submission in reply to submission in chief. With the parties' consensus it was agreed that the same be argued and disposed of by way of written submissions. Both parties complied with the scheduled orders.

The appellant preferred to argue grounds 1 and 3 altogether and also combined grounds 2 and 4 respectively. Arguing in support of the first and third grounds, the appellant contended that the trial tribunal erred in law when it holds that there was a disposition of land by the appellant to the respondents. He argued that, the law requires under sections 61 (3) of the Land Act [CAP. 113 R. E, 2019] read together with section 20 (1) of the Village Land Act [Cap. 114 R. E, 2019] that disposition of customary rights of occupancy be governed by customary law. However, the Village Land Act (supra) which is the specific law on customary rights of occupancy does not provides for step by step, clear cut procedures on disposition of land under customary law. He therefore, conceded with the finding of the Hon. Chairperson that due to the lacuna in the

Village Land Act (supra) application of the Law of Contract Act [Cap. 345 R. E, 2019] is inevitable.

He however, faulted the reasoning of the Hon. Chairperson when interpreting the provision of section 10 of the Law of Contract Act (supra), upon stating that, in disposition of customary rights, there is neither law nor need for a written contract (Sale Agreement). To fortify his argument, he referred this Court to the case of **PRISKILA MWAINUNU Vs. MAGONGO JUSTUS,** LAND CASE APPEAL NO. 09 OF 2020, wherein this Court insisted that, customary rights of occupancy being a right over an immovable property just like any other right of occupancy, its transfer must be carefully documented to avoid further disputes. He accentuated further that, neither the Village Council was notified in relation to the assignment made through the prescribed form, nor was the form itself tendered before the trial tribunal. He said, the finding of the Hon. Chairperson that, the disposition of customary right of occupancy does not lose authenticity for not being overseen by local village leaders or due to lack of involvement of village leaders, this is contrary to the provisions of sections 8 (1), and 30 (1) and (3) of the Village Land Act (supra). To reinforce his contention, he cited the case of **BAKARI MHANDO SWANGA Vs. MZEE MOHAMED BAKARI SHELUKINDO AND 3 OTHERS,** CIVIL APPEAL NO. 389 OF 2019, CAT – TANGA where the CAT held: -

"Even if we assume that the purported sale agreement was valid, which is not the case, ***then the same was supposed to be proved by the Village Council".*** *[Bold is mine].*

As regards to the 2nd and 4th grounds, the appellant's position before the trial tribunal is that, he never sold the disputed land to the respondents, and the respondents on their sides countered the claim by maintaining that they bought the parcel of land from the appellant. On these two grounds, the appellant's focus was on the burden of proof as far as civil matters are concerned. He submitted that, the appellant's evidence shows that he denied to have sold the disputed land to the respondent's. His witness, one Athuman Seif Mungi (AW.2) also told the trial tribunal how the appellant acquired the land in dispute. The respondents also explained how the appellant owned the land in dispute legally. He said, since the respondents wanted the Court to believe that the appellant sold them, in principle, the respondents had the duty to prove that such facts/allegation existed in terms of the provisions of sections 110 (1) & (2), 111 and 112 of the Evidence Act [Cap. 6 R. E, 2019].

He ended to submit by stating that, as the law requires that the sale agreement must be evidenced by a written deed and that the village council must be notified in a prescribed form, the respondent failed to bring vivid evidence, hence failed to meet the requirement set out in the above cited

provisions of the law. He therefore, prayed the Court to allow the appeal and reverse the award issued by the trial tribunal with costs.

Responding to the appellant's submission, the counsel for respondent Ms. Khadija Shaban Juma submitted on the 1st and 3rd grounds of appeal that, the validity of the disposition of customary right of occupancy cannot be questioned merely on absence of written document as it was expounded by the Court in the cases of **MWESIGE THEOPHIL Vs. BRUNO RUGEMALILA,** MISC. LAND APPEAL CASE NO. 4 of 206 HC BUKOBA and the case of **LEORNARD DOMINIC RUBUYE T/A RUBUYE AGROCHEMICAL SUPPLIES Vs. YARA TANZANIA LTD,** CIVIL APPEAL NO. 219 OF 2019. She submitted that, the case of **PRISKILA MWAINUNU** (supra) cited by the appellant is distinguishable with the instant matter as the same concerned with the resale of land while the matter at hand concerned with the question whether the appellant sold the land to the respondents or not. She highlighted that, the respondents proved that the appellant sold the disputed parcel of land to the 1st respondent for the price of TZS. 2,400,000/= cash money. She contended that, the evidence shows that, the respondents and their witnesses managed to prove before the trial tribunal how they became into possession of the disputed land through sale agreement concluded orally and it was witnessed by other persons as required by law and notification to the village council was done as required by law as exhibited in the judgement and proceedings of the DLHT.

She asserted that, based on the above discussion, grounds 1 and 3 lacks merits and deserves to be dismissed.

Responding to the 2nd and 4th grounds, Ms. Khadija contended that, the appellant misapplied the principle enshrined under sections 110 - 112 of the Evidence Act (supra). It was the duty of the appellant to prove his allegation. This appeal being a civil case, the standard of prove is based on the balance of probabilities. Thus, the one with strong evidence must win the case as it was underscored by the Court in the case of **HEMEDI SAIDI Vs. MOHAMED MBILU (1984) TLR 113. She** referred this Court to the typed judgement of the trial tribunal on page 5, wherein the respondents adduced heavy evidence than that of the appellant, hence the matter was decided in their favour.

On the strength of the above submission, the learned counsel submitted that, since the 2nd and 4th grounds of appeal have no merits, its remedy is to be dismissed for want of merits with costs. She also prayed the Court to uphold the decision of the DLHT.

In rejoinder, Mr. Juma Ahmed Mwakimatu, learned advocate commenced to highlight on the issue of representation. He said, the appellant has no legal representation after he had dropped the legal services from Advocate J. R. Mwambene. He therefore, sought and received legal assistance on drafting his written submission from the learned advocate Mr. Juma Ahmed Mwakimatu. The counsel reiterated mainly what the appellant submitted in chief. He however, added that, the case of **LEORNARD DOMINIC RUBUYE T/A**

RUBUYE AGROCHEMICAL SUPPLIES (supra) quoted by the counsel for the respondents while replying to the appellant's written submission in chief, is distinguishable from the matter at hand. He said, in this case, the CAT was making reference to a special type of contract, to wit; Contracts in Sale of Goods which is covered and provided for under section 3 (1) of the Sales of Goods Act [Cap. 214 R. E, 2019]. He averred that, while the CAT was interpreting the Law with regard to a commercial transaction governed by the Sale of Goods Act (supra), in the present case, the Court is invited to interpret a conveyance transaction governed by the Village Land Act (supra). He emphasized that, section 64 (1) (a) of the Land Act (supra) is relevant. The law says: -

> *"Section 64 (1) - A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if-*
>
> > *(a) the contract is in writing or there is a written memorandum of its terms.*

For clarity, the learned counsel rejoined that, different types of contracts are governed by different laws and principles. Though all agreements enforceable in law are contracts, different types of contracts are governed by different statutes which requires different procedures to follow.

As regards to the issue of contradicting views between the case of **PRISKILA MWAINUNU Vs. MAGONGO JUSTUS** (cited by the appellant in

chief) and the case of **MWESIGE THEOPHI Vs. BRUNO RUGEMALILA** (cited by the respondents in reply), Mr. Mwakimatu underlined that, this Court is not bound to follow any of the two decisions. He added that, in **MWESIGE's case**, while addressing the issue of contract, the Court had the view that, oral agreements can be contracts if they meet the criteria under section 10 of the Law of Contract Act (supra). According to him, this position is a general principle in Law of Contract Act, but it is contradictory and misleading if applied to some specific types of contracts. He accentuated further that, the most relevant and persuasive reasoning according to the law is the case of **PRISKILA MWAINUNU** as it was delivered on the 16th October, 2020, whereas that of **MWESIGA THEOPHIL's case** was made on 27th July, 2018. He invited this Court to follow the decision in the case of **PRISKILA MWAINUNU** on the ground that the same is of recent and persuasive as it clearly held that, sale agreements in disposition of customary rights of occupancy must be in writing to evade future disagreements.

As regards to the issue of requirement for notification to the Village Council in a prescribed form, the counsel argued that section 30 (3) of Village Land Act (supra) is clear that, *the parties to a proposed assignment shall notify the village council on a prescribed form of that proposed assignment not less than sixty days before it is proposed.* He insisted that, the law does not direct or requires the Village Chairman to be notified. That being the position of the law, in the present appeal, there is no even a single piece of evidence showing that the Village

Chairperson notified the Village Council. On this facet, the respondents have totally failed to establish and demonstrate that such a notification was done.

Finally, arguing on grounds 2 and 4 the appellant's counsel stressed that, since the crux of the matter before the trial tribunal was whether the appellant sold a portion of his parcel of land to the respondent, but the record is clear that, the appellant had never claimed nor alleged the said sale. Therefore, the appellant had no *onus of proof*. He underlined that, it would be irregular and outright unlawful if the appellant will be required to bring proof in Court that he did not sell the pieces of land to the respondents, yet his complaints before the trial tribunal were that, the respondents trespassed on his landed property. To back up his contention, the counsel referred to this Court to the case of **ZIAD MOHAMMED RASOOL GENERAL TRADING CO LLC Vs. ANNETH JOACHIM MUSHI** (Executrix of the Estates of Emmanuel Patrick Msoma), **CIVIL CASE NO 21 OF 2020 AT PAGE 3**, where this Court held *inter-alia* that: -

> *"It is a settled law that he who wants the court to give verdict in his favour on a certain right or liability depending on the existence of certain facts must prove that the same to exist, so the burden of proof lies on that person who alleges."*

He concluded that, proof of sale of land according to the law, required the respondents to bring written agreement witnessing the disposition and proof of

notification (prescribed form), which they could bring at trial. Failure of which, the respondents have failed to meet the onus of proof on balance of probabilities as required by the law.

Having summarized and dispassionately considered the rival submissions from both sides, the issue for consideration, determination decision thereon is whether this appeal has merit. I will commerce to deliberate on the 1st and 3rd grounds of appeal.

On these grounds, the counsel for the appellant argued that it was wrong for the trial tribunal to hold that disposition of customary rights of occupancy in respect of land matters does not need to be in writing. In the light of the authorities in the cases of **PRISKILA MWAINUNU** and **MWESIGE THEOPHIL** (supra), and the appellant's submission, I fully subscribe to his contention that, different types of contracts are governed by different laws and principles. As hinted above, though all agreements enforceable in law are contracts, but the truth is, different types of contracts are governed by different statutes which requires different procedures. As correctly submitted by the appellant, the authority in the case of **PRISIKILA MWAINUNU** (supra) is more relevant and persuasive in the circumstance of this case as its holding centered on the issue of sale agreement on disposition of customary rights of occupancy.

On this facet, the counsel for the respondents submitted that the respondents have been in occupation of the disputed parcel of land since 2011

after they had agreed with the appellant that the respondents had to use the parcel. Such an agreement was nothing but a contract of sale. She quoted an excerpt from the typed judgment of the trial tribunal on page 1 last paragraph and page 2 which read, *"(2) Kwamba mwaka 2011 mjibu maombi wa kwanza alienda kwa mleta maombi akihitaji ardhi ya kutumia na kwamba mleta maombi alimuonesha sehemu katika shamba ili afanye shughuli zaa kilimo...."* then the trial tribunal continued to state on page 5; *"DW.1 alitoa ushahidi kwamba mdai alimuuzia ekari 36 kwa milioni mbili na lakin nne....*On page 5 para 2, *DW.1 alitoa Ushahidi kwamba baada ya kununua, Mwenyekiti wa Kijiji aliwataka wasafishe pori na yeye atapeleka baraza la Kijiji kupima ukubwa wa eneo, baada ya hapo mkataba wa maandishi wa kuuziana ardhi uandikwe...".* The counsel submitted that, all this evidence was corroborated by the evidence of DW.3, DW.4 and DW.5 where they all witnessed the oral agreement between the appellant and the 1st respondent. She stressed that, as the transfer of the disputed parcel of land did involve the parties to this case, it implies that the two parties had capacity to form and enter into a contract as provided by the law under section 10 of the Law of Contract Act [Cap. 345 R. E, 2019] 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".*

With due respect to the learned counsel for the respondents, as noted above, though the sale of contract was witnessed by the 1st respondent's

witnesses, but as rightly submitted by the counsel for the appellant, section 64 (1) (a) of the Land Act (supra) categorically emphasis on the issue of disposition of land by stating that, ***a contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if, the contract is in writing or there is a written memorandum of its terms.*** *[Emphasis is mine].* Concerning the issue of notification, I find that this issue has no evidential value for two reasons, one; it is hearsay evidence because such piece of evidence was adduced by DW.1 who referred the statement of the Village Chairperson, and the worse thing is that such a witness was not called to prove such piece of evidence, and two; the said notification to the so-called Mwenyekiti wa Kijiji was against the law because management of village land is vested to the Village Council. Section 8 (1) of the Village Land Act [Cap. 114 R. E, 2019] provides that, ***"the village council shall, subject to the provisions of this Act, be responsible for the management of all village land".*** *[Bold is mine].* Having so analyzed, I find that grounds 1 and 3 have no merits.

As to the 2nd and 4th grounds, I am of the view that, since the first and third grounds of appeal have been answered in affirmative, grounds 2 and 4 also collapse. I say so because, the crux of the matter before the trial tribunal was whether the appellant sold a portion of his parcel of land to the respondent. While the respondents insisted that they bought a portion of parcel of land from the 1st respondent, the appellant denied the allegation. He asserted that, he temporarily allowed the 1st respondent to use the disputed land. On reviewing

the records, I see that the respondents were duty bound to prove before the trial tribunal in accordance with the required standard of proof that they bought the disputed parcel of land from the appellant, and not by based on mere words. As correctly submitted by Mr. Mwakimatu, the appellant had no *onus of proof*. Also, I am in agreement with the respondent's submission that, in the circumstance, it would be irregular and outright unlawful if the appellant will be required to bring proof in Court to the effect that, he didn't sell the disputed portion of land to the respondents, yet his complaint before the trial tribunal were that, the respondents trespassed on his landed property. As hinted above, to prove that the respondents bought a portion of parcel of land from the appellant, were required to tender a written agreement witnessing the disposition of customary rights of occupancy and proof of notification (prescribed form), in accordance with the law. As it was remarked by my brother on the bench (Kilekamajenga, J.) in the case of **PRISKILA MWAINUNU,** I am also of the same view that, the purported sale agreement as per DW.1's testimony, was absolutely necessary to be tendered at the trial tribunal to prove that during disposition of customary rights of occupancy the appellant and the respondents concluded the sale agreement. Such documentary evidence could be relied upon by the respondents to prove their allegations that they bought the said parcel of land from the appellant. In absence of such documentary exhibit, it is hard to establish that the respondents bought a portion of land from the appellant.

From the foregoing observations, I am satisfied that the trial tribunal erred both in law and facts to rely on mere words that the two parties concluded sale agreement orally and such piece of evidence acted upon to prove that the respondents bought the said parcel of land from the appellant. In principle, there was no legal transfer of the title from the appellant to the respondents in respect of the disputed suit land.

For the reasons I have endeavored to deliberate, this appeal is meritorious and it is hereby allowed with costs. Having allowed the appellant's appeal, I quash the proceedings and judgment of the trial tribunal (the DLHT) and set aside the decree and any other orders stemmed therefrom. **Order Accordingly.**

DATED at **MOROGORO** this 12th day of December, 2022.

M. J. CHABA

JUDGE

12/12/2022