

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT MOSHI**

**LAND APPEAL NO. 03 OF 2023**

(Originating from Land Application No. 82 of 2019 of the District Land and Housing Tribunal for Moshi at Moshi).

**GEMA IZAACK MUSHI ..... APPELLANT**

**VERSUS**

**ISRAEL ANDERSON MUNISI..... RESPONDENT**

**JUDGMENT**

25/05/2023 & 28/06/2023

**SIMFUKWE, J.**

This appeal originates from Application No. 82 of 2019 of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal). The gist of this appeal is to the effect that, before the trial tribunal, the respondent herein sued the appellant herein claiming that she had trespassed into his land measuring 60 x20 paces located at Shirimatunda Ward, Bonite street within Moshi Municipality in Kilimanjaro Region. The respondent alleged before the trial tribunal that on 14/09/2017 he bought the said land from one Benedicta Joseph Mushi, the appellant's mother-in-law at a price of Tshs 19,000,000/= . After he had bought the said land, he erected a house

and planted various trees. After such development, the respondent herein trespassed the said plot by putting beacons around it.

In his defence, the appellant herein contested the claims and alleged that the disputed land belonged to his deceased husband one Isaack Joseph Mushi.

After considering evidence of both parties, the trial tribunal decided in favour of the respondent herein. Dissatisfied, the appellant filed the instant appeal in which he raised seven (7) grounds of appeal as follows:

- 1. That, the trial Tribunal erred in law and fact by hearing the suit without considering the non-joinder of necessary party to the suit.*
- 2. That, the trial Tribunal erred in law and fact by relying on falsified sale contract.*
- 3. That, the trial Tribunal erred in law and fact by overlooking to who has the legal competency to enter into sale contract of the suit land. (sic)*
- 4. That, the trial Tribunal erred in law and fact by overlooking to who was the legal authority to sale the suit land.*
- 5. That, the trial Tribunal erred in law and fact by completely distorting the Appellant's [former Respondent] testimony thereby making erroneous conclusions.*

*6. That, the Tribunal erred in fact by holding that, the Respondent bought the suitland (sic) from one Benedikta Mushi in 2019, while Benedikta Mushi died on 29<sup>th</sup> January 2018.*

*7. That, the trial Tribunal erred in law and fact by failing to properly analyzing the available evidences. (sic)*

Both parties were unrepresented. Thus, their prayer to argue the appeal by way of written submissions was granted.

On the first ground of appeal which concerns *locus standi*, the appellant submitted that the appellant in her evidence stated that the land in dispute was the property of her late husband one Izaack Joseph Mushi, the fact which the respondent was aware with. However, instead of filing the application against the Appellant as an administratrix of the estate of the late Izaack Joseph Mushi, the respondent filed the case against the appellant in her individual capacity. The appellant was of the view that since the appellant lacked *locus standi* to be sued in her capacity the whole proceedings and judgment of the Trial Tribunal is null and void.

The appellant dropped the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal and opted to argue the 4<sup>th</sup> and 6<sup>th</sup> grounds of appeal collectively.

On the 4<sup>th</sup> ground of appeal, the appellant submitted to the effect that it was the appellant's evidence that during his lifetime, her husband Izaack Joseph Mushi was the owner of a big portion of land including the disputed property which one Benedicta Joseph Mushi in collaboration with her children wrongly sold without the consent of the Appellant, approval of local government leaders and even without heeding to the clan/family meeting dated 04/11/2016. The appellant contended that such piece of evidence was never considered by the trial Tribunal hence, it reached to an erroneous decision in favour of the respondent herein. For such reasons the appellant under the 6<sup>th</sup> ground of appeal faulted the trial tribunal for failure to properly analyse the evidence.

Basing on the above submission, the appellant insisted that the said Benedicta Mushi and her children did a falsified contract of selling the disputed land in order to falsely alienate the appellant from the land which in fact was left by her husband one Izaack J. Mushi.

The appellant prayed the court to allow her appeal by quashing and setting aside the decision of the trial Tribunal.

In reply, the respondent responded to the above submission generally. He submitted to the effect that before the trial Tribunal, he claimed that the appellant intruded into his portion of land which he lawfully purchased

from the principal owner one Benedicta Joseph Mushi on 14<sup>th</sup> September 2017. That, the trial Tribunal found that the respondent proved to be the lawful owner of the suit land in dispute as he lawfully purchased the same from Benedicta Joseph Mushi on 14/09/2017 at the price of Tshs 19,000,000/=. That, the sale agreement was witnessed by the Ward Executive Officer of Shirimatunda and other witnesses including Redempta Joseph Mushi, Magdalena Joseph Mushi and Gundelina Joseph Mushi who are the daughters of the seller. On part of the respondent, his witnesses were Peter Abednego Munisi, Severine B. Mrosso and Flora Israel Munisi.

Explaining the relationship which existed, the respondent submitted that the late Izaack Joseph Mushi was the husband of the Appellant and the son of the late Benedicta Joseph Mushi who sold the land given to him by her parent. Also, the late Izaack Joseph Mushi is a brother of Redempta Joseph Mushi, Magdalena Joseph Mushi and Gundelina Joseph Mushi who witnessed the sale of the disputed land.

The respondent submitted further that the late Izaack Joseph Mushi sold all his belongings including his portion of land and shifted to Shinyanga with the appellant prior to the death of his mother who later on sold the disputed land.

It was stated further that the land in dispute together with the land where the appellant is living is not yet surveyed by the village council so as to register it. That, the appellant returned to Moshi from Shinyanga after the death of her mother-in-law and her husband. The respondent was of the opinion that the appellant is not entitled to file a Probate and Administration Cause in respect of the properties of her deceased mother-in-law instead she ought to file Probate Cause in respect of her deceased husband one Izaack Joseph Mushi. That, through Probate and Administration Cause No. 145 of 2018 of Moshi Urban Primary Court it was discovered that, the appellant included properties which does not belong to her husband one Izaack Joseph Mushi and the probate was suspended.

Cementing the point that the respondent's case was proved before the trial tribunal, the Respondent told this court that SM3 Redempta Joseph Mushi testified that the disputed land belonged to the Respondent. That, on 28/12/2018 SM3 was appointed to be the Administratrix of the estate of the said Benedicta Joseph Mushi in Probate Cause No. 170 of 2018 at Moshi Urban Primary Court. He continued to state that the facts which were not disputed during the hearing were that the late Izaack Joseph Mushi sold all his properties including his shamba to Francis Kavishe and

shifted to Shinyanga with her wife (the appellant) who remained in Shinyanga till the death of her husband.

In his conclusion, the respondent submitted that basing on undisputed facts, the trial Tribunal reached into fair and correct decision. He prayed this court to dismiss the appeal with costs.

After going through the grounds of this appeal, submission of both parties and trial records, I am aware that this being the first appellate court, it is trite law that a first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact if necessary. This position was held in the case of **Future Century Limited vs Tanesco (Civil Appeal No. 5 of 2009) [2016] TZCA 200 (4 February 2016) [Tanzlii]** in which the Court of Appeal held that:

*"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

Turning to the grounds of appeal, I opted to group them into two cluster, the first cluster is in respect of violation of the law which covers the first ground of appeal while the second cluster is in respect of evaluation of evidence which covers the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal.

On the first ground of appeal, the appellant faulted the respondent for suing her in her personal capacity while she was claiming the disputed property of her late husband. Thus, the respondent should have sued her as administratrix of Izaack Joseph Mushi.

The respondent argued that the appellant ought to file a probate cause in respect of her late husband which up to now has not been done.

I have examined the entire proceedings of the trial Tribunal thoroughly. The appellant, neither in her Written Statement of Defence nor during the trial raised the concern that she was administratrix of her deceased husband. There is no evidence to substantiate the fact that she was administratrix of her deceased husband.

Be as it may, the applicant has a right to sue whomever he wishes. What is required for any applicant is to have evidence strong enough to prove the case on balance of probabilities. I therefore conclude that the first ground of appeal has no merit.

On the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal, the appellant faulted the trial Tribunal for failure to properly analyse the evidence. She argued that her husband was the owner of the disputed land. That, her mother-in-law sold it without her consent or approval by the local government leaders or clan meeting.



On the other hand, the respondent supported the Tribunal's decision. He submitted that his evidence proved that he bought the disputed land from Benedicta Joseph Mushi as per the sale agreement (Exhibit P1). That, the said sale agreement was witnessed by the Ward Executive Officer of Shirimatunda and the seller's daughters.

The trial Chairman when answering the issue of ownership had this to say at page 7 and 8 of his judgment:

*"Moja, Mleta Maombi/mdai aliinunua ardhi yenye mgogoro kihalali kutoka kwa mmiliki wake marehemu Benedikta Joseph Mushi tarehe 14/09/2019 kwa malipo ya sh. 19,000,000/= mbele ya uwepo wa mashahidi wa pande zote mbili wakiwepo watoto watatu wa kike wa marehemu Benedikta Joseph Mushi, muuzaji (tazama Kielelezo P1 na Ushahidi wa SM1, SM2, SM3, SM4 na SM5) ...*

*Mbili, hakuna uthibitisho kwamba, ardhi yenye mgogoro alipewa marehemu Izaack Joseph Mushi, hii ni kwa sababu ushahidi wa upande wa mleta maombi ambao umetolewa na mleta maombi na SM4 na SM5 (dada wa marehemu Izaack Joseph Mushi) unathibitisha kuwa watoto wote wa marehemu Joseph Mushi walipewa kila mmoja ardhi... na marehemu*

*Izaack Joseph Mushi alipewa ekari moja Shirimatunda,  
ambayo aliuza na kwenda kuishi Shinyanga na mkewe Gema  
Izaack Mushi (Mjibu Maombi) ...*

*Tatu, hakuna uthibitisho wowote kwamba, siku ya kuanua  
tanga la msiba wa marehemu Benedikta Joseph Mushi  
ilithibitika kuwa ardhi yenye mgogoro ni mali ya marehemu  
Izaack Joseph Mushi (mume wa mjibu maombi) ...*

*Nne, hakuna ukweli wowote wa kwamba ukoo ulikaa mwaka  
2016 na kuweka zuio la kuzuia kuuzwa kwa ardhi yenye  
mgogoro...”*

From the above findings of the trial Tribunal, I am of considered opinion that the trial Chairman did not evaluate the evidence of both parties properly since in every point of his scrutiny of the evidence, the trial Chairperson analysed only the evidence of the respondent herein. Thus, as a first appellate court, I will analyse and re-evaluate the entire evidence and come up with my own findings guided by the ever-cherished principle of law that in civil cases the proof is on balance of probabilities. In the case of **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168 [TANZLII]** at page 8, the Court of Appeal stated that:

*"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6."*

Summarily, before the trial Tribunal, evidence of the appellant was to the effect that the disputed land belonged to her late husband. That, the same was sold by her mother-in-law one Benedicta Joseph Kimario while at Shinyanga without her consent. The appellant tendered **exhibit D1** which is a settlement deed between Redempta Joseph Mushi in which they agreed that the disputed land belonged to the appellant. The appellant called the following witnesses: SU2 who was the Clan chairman who stated that the disputed land belonged to the late Izaack Joseph Mushi. SU3, Local government Chairperson, who testified that he was involved in the process of surveying the disputed area. According to SU3, the deceased Izaack Joseph Mushi paid the fee for the said process. SU4 the brother-in-law of the appellant testified that the disputed land belonged to the late Issack Joseph Mushi who inherited it from his late father Joseph Mushi.

SU4 added that the clan made a stop order to prohibit the sale of the disputed land. The last witness was SU5 a Ten cell leader who testified that the disputed land belongs to the late Isaack Joseph Mushi which was surveyed in 2018.

The respondent on his side asserted that he bought the said land from the appellant's mother-in-law as per **exhibit P1** (sale agreement). His evidence was supported by the evidence of SM2 the Ward Executive Officer who witnessed the said sale, SM4 and SM5 who are the daughters of the seller one Benedicta Joseph Mushi. The witnesses testified that the late Issack Joseph Mushi was given one acre which he sold and went to reside at Shinyanga.

From the above evidence, I differ with the findings of the trial tribunal and I am of considered opinion that evidence of the appellant herein is heavier than that of the respondent herein since the appellant through her witnesses including the Chairperson of their clan (SU2) and Secretary of the Clan (SU4) proved that the disputed land belonged to the deceased Isaack Joseph Mushi. Also, during the process of surveying the disputed land, the late Isaack Joseph Mushi paid the fee of Tsh 150,000/= and the said area was surveyed and beacons were set pursuant to the evidence of SU3 and SU5. This evidence is heavier than that of the respondent herein

who claimed to buy the disputed land from the late Benedicta Joseph Mushi.

With due respect to the Trial Chairman and the respondent herein, buying a disputed property is not a conclusive proof that the same is owned legally in absence of the evidence to prove that the seller had a good title to pass to the buyer. This principle is found under the Latin maxim; ***"Nemo dat quod non habet,"*** which literally means **no one gives what he doesn't have**. In the case of **Bishopsgate Motor Finance Corp. Ltd. v. Transport Brakes Ltd, 1902 AC 325 (326)** ( [Nemo dat quod non habet - Academike \(lawctopus.com\)](#)) Lord Denning LJ, elaborated that:

*"In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses..."*

In the instant matter, there is no evidence to prove that the seller Benedicta Joseph Mushi had a good title to pass to the respondent herein.

In view of what I have discussed above and having re-evaluated the entire evidence, I am of considered opinion that the respondent herein failed to prove the pleaded claims on balance of probabilities. In the upshot, I

hereby quash and set aside the findings of the trial tribunal and hold that the disputed land is part of the estate of the late Isaack Joseph Mushi.

Appeal allowed with costs.

Dated and delivered at Moshi this 28<sup>th</sup> day of June 2023.



X

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S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

**28/06/2023**