

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 91 OF 2022

(C/F Application No. 48 of 2020 District Land and Housing Tribunal of Arusha at Arusha)

PAULO MICHEL LEO APPELLANT

VERSUS

ANNA WILLIAM RESPONDENT

JUDGMENT

27th June & 11th August, 2023

TIGANGA, J.

This appeal emanates from District Land and Housing Tribunal of Arusha at Arusha (hereinafter, the trial tribunal) in Application No. 48 of 2020 in which the appellant herein filed a complaint against the respondent for trespassing into his piece of land measuring 20 meters length and 22 meters width located at Engorora Village, Ematasya Hamlet within Kisongo Ward, Arumeru District and Arusha Region (hereinafter, the suit land).

According to the evidence as gleaned from the trial tribunal's records, the appellant claimed that, on 13th January 2007, he bought a piece of land measuring four (4) acres from one Thomas Zakaria for Tshs. 4,000,000/= (exhibit P1) and partitioned into six (6) different plots, the

suit land being among the plots resulting from that partition, to sell them. According to the appellant, he sold other plots, but not the suit land and it remained vacant until 2020 when he found the respondent trespassed therein and raised a boundary wall so that she could build a house. He reported the matter to the street and village authorities who ignored him thus, he decided to file his complaint at the trial tribunal praying to be declared as a rightful owner of the suit property and be paid general damages for the mental anguish and wastage of time he incurred.

The respondent and her witnesses had a different narration of events, according to them, after the appellant partitioned his land into six different plots he assigned the late Daudi Mollel as his agent (Dalali) to sell them. That, the respondent bought the suit land measuring 27 meters in length and 22 meters in width from the said Daudi Mollel for Tshs. 5,500,000/= (exhibit D1). The Ten cell leader, DW2, Hamlet leader, DW3, and the late Daudi's brother, DW4 all testified to witness the fact that the appellant authorised the late Daudi to sell his plots on his behalf. And that, before each sale DW2 and DW3 called the appellant to inquire if the sale should proceed and the appellant had always replied in the affirmative that he had assigned the said Daudi to supervise the selling of his plots because he was not staying there. Further to that, DW4 testified to have

accompanied his late brother to give the purchase money to the appellant after the respondent bought the same. And that, the appellant never complained about not being satisfied until 2020 when the respondent started developing the suit land.

At the end of the trial, the tribunal dismissed the appellants' claims on the grounds that, his witnesses' testimonies were contradictory, and the description of the suit land explained by the appellant during the trial was different from that in the application. The tribunal, therefore, declared the respondent as the lawful owner of the suit land and dismissed the appellant's claims with cost. Aggrieved, the appellant preferred this appeal on the following six grounds;

1. That, the trial tribunal chairperson erred in law and fact in failing to properly analyse and evaluate the evidence on record hence reached an erroneous decision.
2. That, the trial tribunal chairperson erred in law and fact in failing to consider the appellant's evidence and that of his witnesses that, he is the owner of the suit property hence arrived to an erroneous decision.
3. That, the trial tribunal chairperson erred in law and fact in holding that, the respondent is the owner of the suit property in the absence

of evidence showing that the appellant authorised the so-called Daudi Ole Mollel to sell his property to the respondent as he has never authorised him to sell his land.

4. That, the trial tribunal chairperson erred in law and fact in holding that, the appellant authorised the so-called Daudi Ole Mollel to sell his property in absence of evidence to prove that fact.
5. That, the trial tribunal chairperson erred in law and fact in failing to consider the principle of caveat emptor which require the buyer to make all due diligence over the property she intends to buy.
6. That, the trial tribunal chairperson erred in law and fact in failing to resolve all issues framed during the hearing.

During the hearing, the appellant was represented by Mr. Simon Mbwambo whereas the respondent had representation of Mr. Fadhili Nangawe both learned Advocates.

Supporting the appeal, Mr. Mbwambo submitted on the 1st and 2nd grounds of appeal that the burden of proof in civil cases lay on the one who alleges as per section 110 (1) and (2) of the **Evidence Act**, [Cap 6, R.E. 2019]. That, since the appellant raised the issue of the so-called Daudi Ole Mollel as the one responsible for the sale, the trial tribunal erred in failing to consider that, a third party has no authority to possess land

let alone pass it to another person without legal Power of Attorney. He argued that such evidence was not credible and it lacked proof as required by the law. He referred the court to the case of **Stanislaus Rugaba Kasusura and the Attorney General vs. Phares Kabuye** [1982] TLR 338. He prayed that this court re-evaluate the trial court's decision and come up with its own conclusion as held in the case of **Martha Michael Wejja vs. The Attorney General and 3 Others** [1982] TLR 35.

On the 3rd and 4th grounds of appeal, the learned counsel submitted that the appellant was not aware of the trespass until when the respondent started to develop the suit land in 2020. Thus, the trial tribunal erred in holding that, the appellant kept quiet about the suit land from when the deceased died in 2017 to 2020 when the dispute arose. He also challenged DW2 and DW3's testimonies that they called him to make sure he authorised the sale prior to the respondent paying for the suit land, to which he replied in affirmative. He contended that the trial tribunal erred in relying on such information while there was no proof if the person called was indeed him or somebody else hence there were some elements of fraud or misrepresentation.

As to the 5th ground of appeal, he submitted that the respondent did not make due diligence (*caveat emptor*) prior to purchasing the suit

land as provided for under section 67 (b) (11) of the **Land Act**, [Cap 113 R.E. 2019] which provides for a buyer to be aware and have full knowledge of the land s/he is about to purchase. To cement this argument he cited the case of **Bakari Mhando Swaga vs. Mzee Mohamed Bakari Shelukindo and 3 Others**, Civil Appeal No. 389 of 2019 CAT at Tanga in which the Court of Appeal underscored the importance of doing due diligence before purchasing the suit property.

On the last ground of appeal, the learned counsel averred that the trial tribunal chairman did not resolve all the issues raised such as the issue of the actual size and boundaries of the suit land remained unresolved. He prayed that this Court quash and set aside the trial tribunal's judgment and allow this appeal with cost.

In reply, Mr. Nangawe submitted on the 1st ground of appeal that, according to section 110 of the Evidence Act, the law is very certain that, whosoever desires for the Court to decide in his favour regarding facts which he asserts, must prove that, those facts exist. The appellant failed to prove his claims as the evidence brought by him was contradictory as well analysed in the trial tribunal's judgment. He argued that the main issue of controversy was who is the lawful owner of the suit land and

without a doubt, the respondent's evidence was strong hence she was declared the owner.

On the 2nd, 3rd, 4th, and 5th grounds of appeal, learned counsel submitted on them jointly that, the evidence is clear that the respondent conducted due diligence before purchasing the suit property. Further to that, her evidence was not controverted by the appellant even when subjected to cross-examination hence, the trial tribunal was correct to reach the decision it reached.

As to the last ground, Mr. Nangawe averred that, all issues were answered and the trial tribunal's decision was based on all of the framed issues. He prayed that this appeal be dismissed with cost for want of merit. There was no rejoinder submission.

Having gone through the trial court's records as well as both parties' submissions, I now proceed to determine the grounds of appeal filed. This being the first appeal, I am inclined to re-assess and re-evaluate the entire evidence and come up with my own conclusion. I will determine the 1st and 2nd grounds jointly, the 3rd, 4th, and 5th grounds, and the last one will be determined solo.

Starting with the 1st and 2nd ground of appeal, the appellant challenges the trial tribunal for dismissing the application while there was

enough proof that, he was the owner of the suit land. The law is clear and the Court of Appeal decisions are so that, whosoever alleges must prove. In the case of **M & M Food Processor Company Limited vs. CRDB Bank Limited & 2 Others**, Civil Appeal No. 273 of 2020 the Court of Appeal held thus;

*"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 [2019] TZCA 453: [11 December 2019: TANZLII], that:*

***"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."**[Emphasis added].*

Guided by these authorities, and having considered the evidence adduced by the parties, I as well do not find that the appellant discharged his duty of proving his case at the required standard, that is, at the balance of probabilities. I hold so for obvious reasons; starting with the boundaries, at the application, the appellant mentioned the suit land to be bordered by Dennis Kyaruzi on the West, Mr. Paulo on the East, and the North and South by the road. However, during the trial, he mentioned the suit land to be boarded by a road on the North, south by Happiness Nkya, East by Amani Mauya, and West by Denis Kyaruzi. This raises doubt if it is the same area that he pleaded in his application. More so, PW2 told the court that, the whole of the appellant's land measuring 2 acres was partitioned into six plots however, PW3 told the court that, there were only 3 portions hence contradictory evidence.

Apart from that, none of his witnesses were there when the suit land was partitioned, whether or not the suit land was ever sold or was vacant when the dispute arose, they did not even know the exact size of the suit land that has been trespassed apart from what they have been told by the appellant, hence a making their testimony regarding the suit land a hearsay. According to section 62 (1)(a) of **the Evidence Act**, oral evidence must be direct in all cases and if it refers to a fact which could

be seen, the relevant evidence must be of a witness who saw it. In the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 CAT at Arusha (unreported) it was stated that hearsay evidence has no evidential value. In that regard, the trial tribunal did not err in holding that, the appellant failed to prove his case as required by the law. These two grounds fail.

Regarding the 3rd, 4th, and 5th grounds, the appellant challenges the trial tribunal's decision by relying on the fact that, he authorized Mr. Daudi Ole Mollel to sell his plots for him. This was raised by the respondent and her witnesses that, when she wanted to buy the suit land she consulted all leaders of the local government among them was DW2 and DW3. These two told the court that, prior to sell, they called the appellant via phone put it on loudspeaker mode, and heard him authorizing the said Daudi Mollel to continue with the sale. This, to me, amounts to due diligence considering that both of these witnesses were local leaders and had no reason to lie against the appellant.

If that was not enough, DW4, the deceased younger brother, told the court that, after the sale of the suit land to the respondent, he accompanied his brother the late Daudi Ole Mollel to the appellant who was at his garage at Majengo area to give him Tsh. 5,500,000/=, as

proceeds of the sale. During cross-examination, the appellant did not controvert DW2 and DW3's testimony regarding calling him over the phone or even DW4 for bringing him the money in the company of his brother. In the case of **Tom Morio vs. Athumani Hassan (Suing as Administrator of the Estate of the late Hassan Mohamed Siara & 2 Others)** Civil Appeal No. 179 of 2019, CAT at Arusha (unreported), the Court of Appeal had this to say regarding failure to cross-examine a witness;

*"It is a trite law that failure to cross-examine a witness on a crucial matter ordinarily implies the acceptance of the truth of the witness evidence. See **Damian Ruhele v. R**, Criminal Appeal No. 501 of 2007..."*

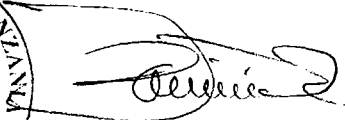
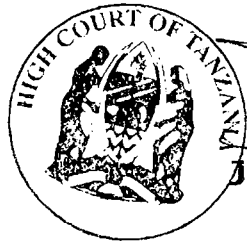
The appellant tried to establish that more proof was needed, but unlike criminal cases where the burden of proof is beyond reasonable doubt, in civil cases the burden of proof is on the balance of probabilities, and in the appeal at hand, the respondent's evidence is heavier than that of the appellant. These three grounds also fail.

The last ground of appeal raises a complaint that the trial tribunal did not resolve all three issues raised and determine them as required by the law. In resolving this, the only evidence to prove whether the trial court resolved all the issues can be found in the trial court's judgment. I

have keenly passed through the judgment of the trial tribunal, I find that all the framed issues were resolved. This ground lacks merit and is dismissed. In light of the above, this appeal lacks merit and the same is dismissed with costs. The trial tribunal's decision is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 11th day of August, 2023



J.C. TIGANGA
JUDGE