IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

LAND APPEAL NO. 30 OF 2022

(Arising from Kigoma District Land and Housing Tribunal in Land Application No. 25 of 2021)

RAJABU SAIDI MASUMA .....APPELLANT

VERSUS

ABELLA JOSEPH FRANSIS.....1ST RESPONDENT

YUNUSA RASHID RUHOMVYA.....2ND RESPONDENT

Date of last Order: 02/08/2023

Date of Judgement: 18/08/2023

JUDGEMENT

MAGOIGA, J.

The Appellant, **RAJABU SAIDI MASUMA** aggrieved by the decision of the District Land and Housing Tribunal for Kigoma dated 08/09/2022 in Land Application No.25 of 2021 now appeals against the said whole judgment and Decree of the trial Tribunal to this Court.

In Land Application No. 25 of 2021, the 1st respondent sued the appellant and the 2nd respondent herein above. Briefly, the 1st respondent's claims against the appellant and the 2nd respondent in the said application was for judgment and decree, among others, is declaring her the owner of **Plot No. 1 Block "E" situated at Mwasenga in Kigoma/ Ujiji**

Municipality with Tittle No.979 KGLR. L.O. No. 1096441. She claims to have bought the suit plot from the 2nd respondent for a consideration of Tshs.9,000,000/= which they agreed to be paid by instalments to end on 28/2/2021. It is on record that on 18/1/2021, the 1st respondent completed payments but the same plot was resold to the appellant herein for a consideration of Tshs.10,000,000/= by the 2nd respondent. Therefrom, the 1st respondent prayed in the trial Tribunal for an order that the names in the tittle deed be changed and registered in her names and costs of the suit.

After hearing the parties on merits, the trial Tribunal found in favour of the 1st respondent herein and, among others, declared the 1st respondent the rightful owner of the disputed plot.

Aggrieved by the said findings, the appellant preferred this appeal armed with seven grounds of appeal faulting the trial Tribunal couched in the following language, namely:

1. *That the learned Chairperson erred in law and in fact by declaring the applicant herein first respondent as a lawful owner while the applicant she only pleaded to the trial Tribunal but not substantiated contrary to section 110(1) of the Evidence Act;*
2. *That the learned Chairperson erred in law and in fact to rely her finding on the sale agreement and it's part payment which is sharky and unreliable as of law;*

3. *That the learned Chairperson erred in law in entertaining and framing issues and determine the application between the purchasers of the suit premise;*
4. *That the suit was incompetent and bad in law as it does not show, I was sued by the applicant in what capacity.*

On the above grounds, the appellant urged that this court to allow the appeal with costs, quash and/or set aside the judgement and decree of the trial Tribunal dated 8th September, 2022, the sale agreement between Yunusa Rashid Ruhomvya and Rajabu Said Masuma be declared as lawful.

When this appeal was called on for hearing, the appellant was present in person and unrepresented, whereas the 1st respondent enjoyed legal representation by Mr. Ignatus Kagashe leaned advocate and he was as well present whilst the 2nd respondent was absent and unrepresented.

The appellant prayed this appeal to be argued by way of written submission which prayer was not objected by the learned counsel for the 1st respondent. Unreservedly, I granted the prayer. I truly recommend them for their inputs on the matter. I will not be able to reproduce each and every argument taken, but it suffices to say their respective contributions are accorded the weight they deserve.

On the first and 2nd grounds of appeal which the appellant argued them together submitted that, the gist of the complaint is based on section

110(1) and (2) of the evidence act Cap 6 [R.E 2022] which is couched on the burden of proof where he stated that the determination of the matter rests on the credibility of the witness and documentary evidence, hence, generally the court has to adopt carefully and dispassionate approach and critically evaluate the evidence in order to find out whether it is cogent, persuasive and credible. He cited the cases of **Abdulkarim Haji vs Raymond Nchimbi Alois and Joseph Sita Joseph (2006) T. L. R 419** and **Pauline Samson Ndawaya vs Theresia Thomas Madaha in Civil appeal no. 45 of 2017** to support his argument.

The appellant further submitted that the 1st respondent did not bring a witness to support her case. In this, Mr.Sadiki Aliki who witnessed the purchase of the suit land by the 1st respondent was not called as a witness, while, according to the appellant, was a material witness who evidenced the transaction. The appellant, therefore, invited the court to draw adverse inference to the 1st respondent for not calling such a witness without showing any sufficient reason. Reference was as well made to the court in the case of **Aziz Abdallah vs Republic [1999] T.L.R 71.**

Further submission by the appellant was that the 1st respondent's purchase was not fully paid, due to what he says that there was no supportive evidence that payment was done by installation nor did she bring any witness to support her.

Another reason advanced by the appellant in these grounds is that the 1st respondent was alone in the Tribunal and that she alleged to have purchased the suit land from Yunusa Rashid Ruhomvya and paid for the same but had no corroboration, hence, failed to discharge the burden of proving that she had better title to the suit land against the appellant.

On the foregoing reasons, the appellant contended that the 1st respondent failed to discharge the burden of having a better title to the suit land on the balance of probabilities.

On the 3rd ground of appeal, the appellant submitted that the trial tribunal in conducting the case between purchasers framed issues with them but delivered the judgement in favour of the 1st respondent, which, according to the appellant, was not correct in law because, the appellant too as a buyer should have got some reliefs and not declaring him as a judgement debtor.

About the 4th ground, with reference to the case of **Hassan Ng'anzi Khalfani and Njama Juma Mbaga & Another, Civil Application No. 336/12 of 2020 CAT** at Tanga on the issue of capacities, the appellant faults the trial tribunal that the suit was incompetent and bad in law as it does not show, he was sued by the applicant in what capacity. He submitted to this court that he strictly followed the principle of caveat emptor and found that no encumbrances on the suit land and he legally

bought the same on 12th January 2021 for the purchase price of Tshs.10,000,000.00. The appellant insisted that by presenting in the trial Tribunal an original title deed **exhibit D1** which was not controverted by the 1st respondent, it meant that, the principle of priority does not apply in the instant case as there is a sign of conmanship by the 2nd respondent to the 1st respondent but not him. The appellant finally prayed this appeal to be allowed with costs and the judgement and decree of the District Land ang Housing Tribunal be quashed and set aside.

On the other hand, Mr. Kagashe for the 1st respondent replying on the 1st ground of appeal submitted that, though he subscribes on the law and case laws cited by the appellant on requirement that whoever alleges must prove, however, he was quick to point out that the 1st respondent in this case proved her case to the required standard and that the trial Tribunal's decision in her favour was legally justifiable.

Mr. Kagashe added that the 1st respondent adduced evidence supporting the purchase of the suit land from the 2nd respondent and produced exhibits P1 and P2 being a sale agreement and evidence of payment of the purchase price all amounting to Tshs.9 million.

Further, Mr. Kagashe submitted that the appellant proved to have purchased the same plot from the same previous vender at a different consideration and produced both the sale contract and the title document

itself as D1 and D2, in the circumstances, therefore, the counsel submitted that the trial Tribunal was legally justified to apply the principle of priority to dispose of the case. The learned counsel cited the cases of **Ombeni Kimaro vs Joseph Mshili t/a Catholic Charismatic Renewal, Civil Appeal No. 33/2017** and **Colonel Kashimiri vs Navinger Singh (1988) T.L.R 161** to support his stance.

On the ground concerning the 1st respondent's failure to bring material witness that is Mr. Sadiki Aliki, Mr. Kagashe submitted that the 1st respondent just like the appellant himself all relied on the documents in their possession in support of their respective cases. The documents were the best evidence in law in terms of Sections 61, 63 and 64 of the TEA Cap 6 R.E 2019 referred this court to the case of **Tanzania Breweries LTD vs Felister Lazaro, Commercial Case No. 88 of 2005 (unreported)** in which His lordship Massati J. (as he then was) at page 6 of the judgement stated that, in a claim based on documented transaction, no evidence could be better than the documents themselves. He also referred the case of **Daniel Apael Urio vs Exim (T) Bank, Civil Appeal No. 186 of 2019 (unreported)** at page 21 where the same principle was re-echoed.

On that note, Mr. Kagashe argued that, in the appeal at hand, neither Sadiki nor Eliutha as advocates were material witnesses as there were no

disputes between the parties to the executed contracts on any part of the documents. He therefore submitted that the principle in the case of **Aziz Abdallah** was misapplied and thus should be discarded. The absence of such witnesses did not cause the failure of justice and fair determination of the application regards being made to section 143 of Tanzania Evidence Act, [Cap 6 R.E. 2019) that no particular number of witnesses is required to prove any fact.

On the issue of payment, Mr. Kagashe submitted that, the 1st respondent proved to have fully paid the purchase price to the 2nd respondent through the contract itself, bank slips and the 2nd respondent acknowledgements in writing where cash money was paid and received leaving the complaint by a third party thereto misplaced and insisted that exhibits P1 and P2 proved the payment. The learned advocate, therefore, prayed that the 1st ground of appeal be dismissed and that since the 2nd ground of appeal was not submitted on but relates to the 1st ground, then the same be similarly dismissed.

On ground three of appeal Mr. Kagashe submitted in line with **Regulation 20 of the Land Disputes Courts** (The District land and Housing Tribunal) Regulations, G.N 174 of 2003 that two major issues were framed and agreed upon by the parties present without reservation as reflected on page 5 of the judgement. The learned advocate faulted the appellant

that he did not substantiate his complaint with any violated section of law/rule thus he prayed the court to dismiss the 3rd ground of appeal.

Answering the 4th ground of appeal, Mr. Kagashe argued that the appellant was sued as the 2nd purchaser to the suit plot that the 1st respondent had previously purchased and claimed title over it. The learned advocate pointed out that, there is no way the same could be skipped or dropped in the dispute between respondents as the final decision of the court would affect him whether directly or indirectly hence a necessary party. He backed up his argument by the provisions of **Order I Rule 3 and 5 of the Civil Procedure Code [Cap 33 R.E 2019]**. In addition, Mr. Kagashe submitted that the appellant was not diligent enough and did not take precautions in purchasing the plot in January,2021 thereby falling a victim of the doctrine of **buyer beware**.

On the totality of the above reasons, Mr. Kagashe urged this court to dismiss this appeal with costs.

No rejoinder was filed by the appellant

This marked the end of hearing of this appeal and the duty of this court now is to determine the merits or otherwise of this appeal.

Coming now to the merits of this appeal, in particular, of the 1st and 2nd grounds of appeal as argued together by the appellant, having carefully followed the rivaling arguments of the appellant and that of the counsel

for the 1st respondent, and considered all argued and the record of appeal, in my considered opinion, I found the argument that the 1st respondent did not substantiate that she was the lawful owner of the plot in issue is unfounded. I say so because of the following; **One**, there is no dispute that the plot in question was the property of the 2nd respondent and the same plot was sold to the 1st respondent for a consideration of Tshs.9,000,000/= on 11/11/2020 and consideration was fully paid as agreed. **Two**, there is also evidence that the same plot was resold to the appellant for a different consideration of Tshs.10,000,000/=, which, in my considered opinion, the second sale was of no effect because the 2nd respondent had no saleable interest in the land after receiving consideration from the 1st respondent.

Three, there is no dispute on the sale contracts by both purchasers that they purchased the same plot owned by the 2nd respondent. On that note, in my views, I see nothing as unproved evidence which can be faulted on the 1st respondent that she did not get the plot lawful. On the issue of necessary parties, as correctly argued by the counsel for the 1st respondent that documents were the best evidence in law in terms of Sections 61, 63 and 64 of the TEA Cap 6 R.E 2019 of which I also subscribe to, because in the case at hand, nothing was raised in the trial Tribunal objecting the validity of those documents.

That said and done, so long as no dispute on those sale agreements, I see no need to look for the witness to be included in the suit as necessary parties. Equally important, the contents of P1 and P2 further proves that the 1st respondent by such evidence was a rightful purchaser of the plot in question and no evidence was tendered to negate that fact.

On that note, this ground must be and is hereby dismissed.

This trickles down to the third ground whose main complaint was that the learned Chairperson erred in law in entertaining and framing issues and determine the application between the purchasers of the suit premise. Mr. Kagashe in rebuttal submitted that major issues were framed and agreed upon by the parties present without reservation as reflected on page 5 of the judgement. He faulted the appellant that he did not substantiate his complaint with any violated section of law/rule.

Having considered the rivalling arguments and the evidence on record, I find this ground with no merits. No law has been violated in determining the framed issues by the trial Tribunal. The decision as I have read it, the trial Tribunal well determined the issues and came up with the decision which determined the rights of each party. The judgement did not exonerate the 2nd respondent from liability but him too was ordered to refund the money he had received from the appellant. At page 7 of the

judgement, it is written and here I quote **"Mjibu maombi wa kwanza amrudishie mjibu maombi wa pili fedha zake alizotoa kiasi cha shilingi milioni kumi tu. (10,000,000/=)".** And to my view, the chairperson correctly applied the **principle of priority.**

The principle of priority as well defined in the case of **Ombeni Kimaro vs Joseph Mishili (supra)** that;

> *"The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other..."*

In the results, I will also rely on the already developed jurisprudence in cases of double allocation, where in principle, first occupier takes precedence. Adding to the case cited above, there is a similar situation where Hon. Opiyo J having found double allocation in the case of **Helena Elias Choma vs Magambo Makongoro, Land Appeal No. 165 of 2019** High Court at Dar es salaam, (unreported) stated as follows;

> *"And thus, in case the application of the priority principle is put into play in solving the dispute between the parties, the respondent being the first person to be allocated the suit land, and first developer, he is the rightful owner of the suit land. The contextual meaning*

of the principle is that whenever there are two competing interest the earlier in time is stronger in law. Therefore, the first occupier in time prevails over the other".

This priority principle was well applied in the instant suit by the District Land and Housing Tribunal, hence, difficult for me to vacate it. Since the 1st respondent was first purchaser of the plot in dispute, the trial Tribunal was correct to give order of ownership to her.

On the above reason, this ground is found wanting in the circumstances of this appeal and is equally dismissed.

The last but not least ground four was that the suit was incompetent and bad in law as it did not show the appellant was sued by the applicant in what capacity.

The appellant argued that he strictly followed the principle of caveat emptor and found that no encumbrances on the suit land and he legally bought the same on 12th January 2021 for the purchase price of Tshs.10,000,000/=. The appellant insisted that by presenting in the trial Tribunal an original title deed as exhibit D1 which was not controverted by the 1st respondent it means that the principle of priority could not apply in the instant case as there is a sign of conmanship by the 2nd respondent to the 1st respondent but not him. In rebuttal, Mr. Kagashe argued that

the appellant was sued as the 2nd purchaser to the suit plot that the 1st respondent had previously purchased and claimed title over it.

Having considered the rivalling arguments and the evidence on record, without much ado, this ground is equally unmerited. It is the law that every necessary party must be joined as defendant where any relief may affect him/her when the decision is given. This principle of law was well stated in the case of **Abdulatif Mohamed Hamis vs Mehboob Yusuf Osman and Another, Civil Revision No. 6 of 2017 (unreported) that:**

> *"... on the other hand, under Rule 3 of-Order 1, all persons may be joined as a defendant against whom any right to relief which is alleged to exist against them arises out of the same act of transaction; and the case is of such a character that; if separate suits were brought against such a person, any common question of law or fact would arise."*

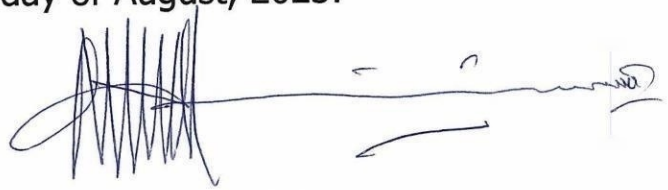
Guided by the above holding, while considering the arguments by the counsel for the respondent and as well guided by the provisions of **Order I Rule 3 and 5 of the Civil Procedure Code R.E 2019** that there is no way the appellant would be skipped or dropped in the dispute between respondents as the final decision of the court would affect him whether directly or indirectly. I find that, the appellant was a necessary and

indispensable party in the circumstances of this appeal, hence, rightly sued and given right to be heard.

On the foregoing reasons, I find the entire appeal with no merits and consequently proceed to dismiss it with costs in this appeal and in the trial Tribunal below because the 1st respondent as winner of the suit was denied costs without any reasons given.

It is so ordered.

Dated at Kigoma this 18th day of August, 2023.



S. M. MAGOIGA

JUDGE

18/08/2023