IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. LAND APPEAL NO. 52 OF 2019

(Arising from Land Appeal No. 15 of 2019 District Land and Housing Tribunal for Muleba Originating from Civil Case No. 7 of 2018 Kishanda Ward Tribunal)

GELARD MWESIGWA BONIPHAS.....APPELLANT

VERSUS

ELGIDIUS SOSTHENES..... RESPONDENT

JUDGMENT

7th and 29th September, 2023

BANZI, J.:

This is a second appeal which traces its roots from Kishanda Ward Tribunal (the trial tribunal) where the respondent instituted a suit against the appellant over a piece of land which each party alleged to have purchased it from Mamelitha Ngaiza ("the vendor"). While the appellant contended to have purchased it on 14th November, 2004, the respondent alleged to purchase it on 13th October 2018. Each party tendered the sale agreement to substantiate his claim. Alongside, each party called witnesses to testify before the trial tribunal.

The vendor who testified for the respondent stated that, she sold her land to the respondent after she inherited the same from his father. She denied to have ever sold that land to the appellant. Eveldistus Felesian

Ngeiza, Felesian Ngeiza and Gordian Godwini also testified for the respondent to support his claim. On the other hand, the appellant called Dalia Nyesi Ngeiza, Bonifasi Ngeiza, and Robert Eustas to support his evidence. At the end, the trial tribunal decided in favour of the respondent by declaring him as the lawful owner of the suit land taking into consideration that, the vendor testified to have sold it to the respondent.

Dissatisfied with the decision of the trial tribunal, the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Muleba (the appellate tribunal). In its decision, the appellate tribunal found that, the suit land belongs to the respondent since the vendor confirmed to have sold the same to him. In addition, it advised the appellant to institute a criminal proceeding against the vendor for obtaining money by false pretence. Still aggrieved, the appellant knocked the doors of this Court armed with seven grounds of appeal, thus:

1. *That, the learned chairman erred in for not taking into consideration the legal fact that the appellant's evidence at the trial tribunal had clearly portrayed the fact that the appellant was in occupation and ownership of the suit land for fourteen years since he bought the same from the vendor.*
2. *That, the learned chairman erred in law for not taking into consideration the appellant's evidence which was*

portraying the fact that the vendor of the suit land, one Mamelitha, had sold the suit land twice.

3. *That, the learned chairman erred in law for failure to take into consideration the fact that by the time the vendor, one Mamelitha, resold the suit land to the respondent, the said Mamelitha had no any good title to pass to the respondent.*
4. *That, the learned chairman erred in law for failure to take into consideration the fact that, the trial tribunal ought to have discredited the vendor's evidence since in the record of the trial tribunal, there was strong and reliable evidence of the witnesses who witnessed the vendor selling the suit land to the appellant in 2004.*
5. *That, the learned chairman erred in law for not taking into consideration the fact that the tribunal had erred in admitting and basing its judgment on the purported sale agreement dated 13th October 2018 which was tainted with a lot of illegalities.*
6. *That, the learned chairman erred in law for failure to ascertain the fact that the trial tribunal's judgment was against the weight of evidence adduced before the said trial tribunal.*
7. *That, the learned chairman erred in law for directing the appellant to seek, in the criminal courts, for the relief of his land rights against the suit land.*

Initially, the appeal was heard *ex-parte* against the respondent and finally determined by my learned brother, Hon. Ngigwana, Judge. However,

on 25th August, 2023, the respondent managed to secure the ruling which set aside the *ex-parte* judgment and the decree.

At the hearing, learned Advocates, Messrs. Lameck John Erasto and Derick Zephurine represented the appellant and the respondent, respectively. In his submission, Mr. Lameck began with the first ground by contending that, the learned chairman did not consider the trial tribunal's evidence which shows that, the appellant bought the suit land in 2004 for Tshs.160,000/= and at the time he was sued, 14 years had elapsed since he bought it. He further stated that the appellant's evidence was supported by Dalia Nyesi Ngeiza who explained how the vendor called her to witness the sale transaction. Also, the sale agreement was tendered to prove the transaction. He further argued that, as the appellant was the first to purchase the suit land in 2004 while the respondent bought it in 2018, the appellate tribunal was required to re-evaluate the evidence from both parties, but it misapprehended such evidence. He added that, the sale transaction conducted in 2004 was witnessed by neighbours as required by Haya Customary law while in the second sale neither of the neighbours signed it. In reliance of the case of **Salumu Mhando v. Republic** [1993] TLR 170, he urged this Court as the second appellate court to re-evaluate the evidence due to misdirection committed by the appellate tribunal.

In respect of the second and third grounds, he submitted that, in 2018 the vendor had no good title to sell the suit land while she had already sold it in 2004 to the appellant. He cited the case of **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205 to support his argument. Concerning the fourth and sixth grounds, Mr. Erasto submitted that, the chairman was required to analyse the whole evidence before reaching on the conclusion of proving the case, short of that, the chairman erred to disregard the basics before arriving into conclusion. He added that, the second agreement was tainted with illegality. In the last ground, he argued that, it was not proper for the chairman to direct the appellant to open the criminal case against the vendor while he was the first buyer as such principle could be applied to the respondent who was the second purchaser.

In reply, Mr. Zephurine argued that, the vendor had never sold the land to the appellant. According to him, for contract to be valid, vendor and purchaser must be present. In the matter at hand, the appellant was not present and the vendor denied to have sold her land to him. Boniface was just taking care of that land until 11th October, 2018 when he handed over to her in writing, in the presence of clan members and local leaders and thereafter, she sold it to the respondent. According to him, had Boniface been taking care the land for the appellant, he could not have handed it over to the vendor and he could have said so during the handing over before the

land was sold to the respondent. In that regard, the evidence of the respondent was heavier than that of the appellant because the vendor testified before the trial tribunal and confirmed that she sold the land to the respondent. Thus, she had good title to pass to the respondent at the time she sold to him.

Responding to the validity of the sale agreement, Mr. Zephurine contended that, the same cannot be tested by presence of neighbours as witnesses. He further submitted that, the sale agreement was valid because those who were involved in the transaction were laymen and cannot be subjected to legal technicality. The agreement contains boundaries of the land and the vendor denied to have sold that land to the appellant, instead, he verified the respondent as a buyer. It was his contention that, although the appellant contended to have sent money, he did not disclose the person to whom he sent that money and in the sale agreement, he was not a party to the sale. Therefore, the lower tribunals correctly held that, the land belongs to the respondent. He urged the court to dismiss the appeal with costs.

In his rejoinder, Mr. Erasto submitted that, the document concerning handing over the farm is a forgery because Boniface Ngeiza refused to do so although it did not arise at the trial tribunal. He also stated, that the sale agreement and the purported handing over had no stamp of the hamlet

leader, thus questionable. According to him, since the sale was on customary law as the land was not surveyed, neighbours were required to be involved to validate the sale. Moreover, the vendor had no title to pass over after she had sold that land to the appellant. Therefore, the chairman failed to analyse the evidence of both sides and he erred to direct the appellant to charge the vendor for recovery of purchased price.

Having carefully examined the grounds of appeal, evidence on record and the submissions of both sides, it is now pertinent to determine the merit or otherwise the demerit of this appeal.

This is the second appeal whereby, there are two concurrent decisions of tribunals below in favour of the respondent. It is settled that where there are concurrent findings of the lower tribunal on factual issues, the second appellate court will not routinely interfere with the findings of the two courts below except where there has been non-direction or a misapprehension of evidence causing injustice or violation of some principles of law or procedure. In the case of **Bomu Mohamed v. Hamisi Amiri** [2020] 2 TLR 144 [CA], it was stated:

> *"....on a second appeal, the Court will not normally interfere with a concurrent finding of fact of courts below unless there are sufficient grounds to do so. These grounds will be things*

like misdirection, non-directions or misapprehension of the evidence."

Before the trial tribunal, both parties contended to have bought the suit land from Mamelitha Ngaiza; appellant in 2004 and respondent in 2018. In his evidence, the appellant contended that he bought that land from the vendor 14 years back, *i.e.,* in 2004. His evidence was supported by Dalia Nyesi Ngeiza, Boniface Ngeiza and Robert Eustas. He also tendered sale agreement between himself and the vendor which was executed on 14th November, 2004 and witnessed by Dalia Nyesi Ngeiza, Boniface Ngeiza and Robert Eustas. It was his fourth witness, Robert Eustas who reduced their agreement in writing. Also, Robert Eustas in his evidence stated that, he was the one who measured the paces of the land and thereafter, he accompanied Boniface Ngeiza to the vendor to finalise the payment.

On the other side, there is another sale agreement of 13th October, 2018, tendered by the respondent concerning purchasing of the same land between the vendor and the respondent. According to that agreement, the sale was conducted in the presence of the clan members and local leaders, hamlet chairmen of Kishanda and Ruhija. Also, in his evidence, the vendor denied to have sold that land to the appellant, she argued that she sold the suit land to the respondent. In their evidence, Eveldistus Felesian Ngeiza and

Felesian Ngeiza stated that Boniface Ngeiza was just a care taker of that land on behalf of the vendor.

From the evidence of both sides, there are two existing sale agreements showing that the same suit land was sold by vendor to two different people in two different times. The only difference is that, the vendor in her testimony insisted to have sold her land in 2018 to the respondent and denied to have ever sold it to the appellant. However, it is the position of the law under section 101 of the Evidence Act [Cap. 6 R.E. 2022] that, once the agreement between parties is reduced into writing, then a party to such contract is not allowed to adduce oral evidence for the purpose of contradicting, varying, adding or subtracting from its terms. This position was underscored by the Court of Appeal in the case of **Charles Richard Kombe t/a Building v. Evarani Mtungi and Two Others** [2017] TZCA 153 TanzLII where it was stated that:

> *"Once it is shown as in this case that the contract was reduced into writing then in terms of S. 101 of the Evidence Act, Cap 6 R.E. 2002 (the TEA), a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting, varying, adding or subtracting from its terms."*

In another case of **Nicholaus Mwaipyana v. The Registered Trustees of Little Sisters of Jesus Tanzania** [2023] TZCA 17578 TanzLII it was stated that:

> *"It is the law, according to section 101 of the Evidence Act that if there be a contract which has been reduced to writing, verbal evidence will not be accepted so as to add to or subtract from or in any manner to vary or qualify the written contract. The rationale behind the rule is to uphold the value of written proof and effectuate the finality intended by the parties."*

The vendor in our case, gave oral testimony to contradict her agreement with the appellant that was reduced into writing which is contrary to the dictates of the law. Despite her denial to have ever sold the suit land to the appellant, in the same testimony, she did not deny presence of her signature in the appellant's agreements. Even her relative Dalia Nyesi Ngeiza was surprise to hear vendor sold her land for the second time while in the first transaction, she called her to be her witness. Thus, it is the considered view of this Court that, the appellant's agreement is genuine and the vendor sold the disputed land to the appellant but she decided to deny it in order to validate the second transaction. Dealing with akin situation of presence of two buyers over the same land, the Court of Appeal of Tanzania in the case

of **Melchiades John Mwenda v. Gizelle Mbaga & Others** [2020] 1 TLR 467 held that:

> *"In view of the above, we think, the trial court, having found that John Japhet Mbaga sold the disputed land to both the appellant and second respondent, it should have found that the appellant was the first buyer and that John Japhet Mbaga (the seller) had no good title to pass to the second respondent."*

In another case of **Farah Mohamed v. Fatuma Abdallah** (*supra*) it was stated that:

> *"He who doesn't have legal title to land cannot pass good title over the same to another;"*

Had the learned chairman re-evaluated the evidence on record in the light of position of the law above, he couldn't have blessed the second agreement between the vendor and the respondent. Besides, the issue of handing over the suit land by Bonifasi Ngeiza to the vendor is doubtful considering that, the in the alleged handing over document, it shows that, the said Bonifasi Ngeiza was absent and neither participated nor handed over the said land to the vendor. Under these circumstances, interference with concurrent findings of the two tribunals below is inevitable. Therefore, basing on the position of the law above, since the vendor sold the suit land to both the appellant and the respondent, it is the finding of this Court that,

the appellant was the first purchaser who bought it in 2004, and hence the vendor had no good title to pass to the respondent in 2018.

That being said, I find the appeal with merit and I allow it. As a result, I quash the judgments and set aside the decree and orders of both the appellate tribunal and the trial tribunal. I hereby declare the appellant, Gelard Mwesigwa Boniphas as the lawful owner of the suit land. The respondent is at liberty to initiate legal proceedings against Mamelitha Ngaiza in order to recover his purchasing price. Each party shall bear its own costs.

I. K. BANZI
JUDGE
29/09/2023

Delivered this 29th day of September, 2023 in the absence of the appellant and in the presence the respondent. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
29/09/2023