IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL NO. 23 OF 2023

(Arising from Land Application No. 55 of 2020 District Land and Housing Tribunal for Muleba)

PATRICE KAKOKO..... APPELLANT

VERSUS

SIMON NDYEKOBORA (As Administrator of the Estate of the late Anamaria Rushaka Galihomali)..... RESPONDENT

JUDGMENT

2nd and 18th October, 2023

BANZI, J.:

This appeal emanates from Land Application No.55 of 2020 before the District Land and Housing Tribunal for Muleba ("the trial tribunal"), where the appellant sued the respondent under capacity of the administrator of the estate of the late Anamaria Rushaka Galihomali for trespassing into his land located at Ihunga village (the suit land), which he claimed to acquire on 15/05/1967 by way of purchase from his brother Rushaka Golihomali Kakoko (Anamaria's father). In his testimony, the appellant tendered sale agreement (Exhibit P1) to substantiate his claim. It was also his testimony that, after selling the suit land, Galihomali remained with one land which he bequeathed to Anamaria, but later, she sold it to Leonard Clemence and since then, she

had never claimed to have another land. It was after her death when her son, the respondent claimed that, the suit land to belonged to her.

In his defence, the respondent stated that, he was born five years after the death of Galihomali. Following Galihomali's death in 1973, his two pieces of land were left to his wife Mwezanju and his sole child, Anamaria (the respondent's mother) whereby, the two went to live at the suit land. The respondent disputed about Galihomali to have ever sold his lands to the appellant. It was his evidence that, after the death of Anamaria in 1992, the suit land was entrusted to the appellant to take care on behalf of her children until they grew up. However, after growing up, they approached the appellant seeking to be handed over that land, but the appellant was not ready to hand over the same and later the appellant filed the case at the trial tribunal against him claiming to have bought that land from Galihomali.

After receiving the evidence of both sides, the trial tribunal invalidate the sale agreement between Galihomali and the appellant for want of approval from the village council. It proceeded to dismiss the application and declared the suit land to be the property of Anamaria subject to be distributed to the rightful heirs. Aggrieved with that decision, the appellant lodged this appeal containing three grounds thus:

1. *That, the trial tribunal erred in law and facts by nullifying the sale agreement of the Appellant.*
2. *That, trial tribunal erred in law and facts by failing to evaluate well the evidence adduced during the trial tribunal.*
3. *That, the trial tribunal erred in law and facts without considering that the Appellant proves (sic) his case to the required standard than the Respondent on balance of probabilities.*

At the hearing, the appellant was represented by Mr. Derick Zephurine, learned advocate, whereas the respondent had legal services of Messrs. Fumbuka Ngotolwa and Ibrahim Mswadick, learned advocates.

Starting with the first ground, Mr. Zephurine submitted that, the trial tribunal erred to nullify the sale agreement tendered for non-disclosure of village and ward where the transaction was conducted and also for not being endorsed by the village council. Besides, the land in question was not owned by village whose transfer would require approval of village council. According to him, the two defects cannot invalidate the agreement in question considering that, the sale transaction was made almost 50 years ago, and since it was made by laypersons the court cannot subject it to legal technicalities. He cited the case of **Sebastian Selestine Kalokola v.**

Sostenes Evalister [2023] TZHC 20494 TanzLII to support his argument. He further argued that, in that agreement the boundaries of each land were stated whereby the first land was bordering Rugimbana, Thomas Kakoko, Dominick Kasimbazi, Fredrick and Rugimbana. The second land was bordering with Fredrick Luanzi, Daudi Kakoko, Augustine Kakoko and on the bottom part, with his unsold land. Also, the sale was witnessed by clan members. It was also his contention that, as the vendor sold that land to the clan member and the same being witnessed by clan members and taking into consideration that, there was no dispute over that land for all those years, the agreement was valid and hence, it was not proper for the trial tribunal to nullify the agreement based on technical ground. Concerning the contention that, the sale was not witnessed by the vendor's wife, he argued that, at the time of sale, the vendor was living alone and therefore, her involvement was not needed.

Arguing the second and third grounds jointly, Mr. Zephurine submitted that, the trial tribunal failed to evaluate the evidence before it. According to him, after selling the suit land, the vendor left one plot as shown in Exhibit P1 which he bequeathed to Anamaria who later sold it to Leonard Clemence. The same was stated by the appellant in his testimony at page 11 of the proceedings. Therefore, had the Chairman evaluated the evidence properly,

he would have reached into conclusion that there was no land left after Anamaria had sold her land. In the circumstances, the evidence proves that the appellant legally bought that land. He urged this Court to quash the judgment of the trial tribunal and the appellant be declared as the lawful owner of the land in question.

In response on the validity of the sale agreement, Mr. Mswadick contended that, there is contradiction between the testimony of the appellant and the document he tendered. The fact about the appellant to buy the said land so that he would take care of the vendor until his death is not reflected in the sale agreement. He further argued that, the agreement was not approved by the village council as it been insisted in various cases including **Metthuselah Nyagwaswa v. Christopher Mbote Nyirabu** [1985] TLR 103 and **Prucheria John v. Wilbard Wilson and Another** [2021] TZHC 3667 TanzLII. In the latter case, it was emphasised that a villager should not dispose of his land without approval of the village council. It was also his contention that, when the alleged sale was made, the wife of Galihomali was alive but she was not involved in the transaction. Therefore, the Chairman correctly nullified the sale agreement. Also, the evidence shows that, the land was never sold to the appellant by Galihomali because after his death the suit land was left to Mwezanju, his wife and his daughter,

Anamaria. When Anamaria died, the land was put under care of the appellant. He distinguished the cited case of **Sebastian Selestine Kalokola** by arguing that, although the parties to that agreement were laymen, that cannot dispense the requirement of law. He was of the view that the tendered sale agreement was invalid and was doctored just for the purpose of this case.

On his side, Mr. Ngotolwa contended that, although the sale agreement was made by laypersons, the same does not disclose the intention of the parties. The appellant in his application mentioned the location of land to be at Ihunga village, Kigemu sub-village but, in Exhibit P1 the land was mentioned to be located at Kyarujuju although it is not disclosed whether Kyarujuju is the street, hamlet or village. He further argued that, there were contradictions between the persons bordering the land mentioned in the sale agreement and those mentioned by the appellant in his testimony. Since they reduced their agreement into writing, the written form must prevail pursuant to section 100 of the Evidence Act [Cap. 6 R.E. 2022] ("the Evidence Act"). Generally, there was no proof if Galihomali has ever sold that land to the appellant. Thus, he prayed for the appeal to be dismissed without costs as parties are relatives.

In rejoinder, Mr. Zephurine stated that, the transaction made in 1967 was governed by Haya Customary Law which required involvement of clan members and the same was done in the said agreement. In the circumstance, the case of **Metthuselah** is not applicable. According to him, in 1967 the current Law of Marriage which requires the presence and consent of wife in land transaction was not in place. However, the evidence shows that, by that time, the wife had already abandoned the vendor who was living alone, that is why he asked the appellant to take care of him until his death. He disputed the contention that the appellant was taking care of the suit land for the respondent because there was no any clan meeting held to bless that. He added that, there was no contradiction between the evidence and the contents of the sale agreement concerning the neighbours to that land because since 1967, which is almost 50 years, the neighbours cannot remain the same, although, evidence shows that, few people like Rugimbana are still the neighbour to both lands.

Having carefully considered the grounds of appeal and the rival submissions of learned counsel in the light of evidence before the trial tribunal, the main issue for determination is whether the appeal has merit.

It is worthwhile noting here that, in first appeal, the first appellate court is duty bound to re-evaluate the evidence of the trial court and where possible, to come out with its own findings. This position was stated in the case of **Domina Kagaruki v. Farida F. Mbarak and 5 Others** [2017] TZCA 160 TanzLII. In that regard, in course of re-evaluating the evidence of the trial tribunal, the main question to be answered will be who between the appellant and the mother of the respondent is the lawful owner of the suit land.

Before the trial tribunal, the appellant contended that, he bought the suit land from Galihomali and after selling that land, Galihomali remained with one plot which he bequeathed to Anamaria. However, Anamaria sold that land to Leonard Clemence before her demise. Therefore, after her death, no land was remained to be distributed to her children. On his side, the respondent stated that he was born in 1977, five years after death of his grandfather, Galihomali, and when their mother died in 1992, they shifted to Kishanda leaving the land to be taken care by the appellant until they grow up. However, after growing up, whenever they demanded the appellant to hand over that land, he was hesitant to hand it over to them. When he filed a probate cause at Mubunda Primary Court to administer the

estate of his mother including the suit land, the appellant sued him before the trial tribunal contending that, he encroached his land.

Substantially, at some point in their submissions, learned counsel of both sides were at consensus concerning existence of sale agreement between the appellant and Galihomali. However, their divergence point is on three complaints; one, involvement of vendor's wife in the transaction; two, location of the suit land and three, approval of the village authority. In that regard this appeal has to determine whether the sale agreement between the appellant and Galihomali was valid.

Looking closely at Exhibit P1, the same indicates that, it was witnessed by four persons who are said to be clan members. It is undisputed that, Mwezanju, the wife of Galihomali was not involved in that sale. According to the testimony of the appellant, Mwezanju was not involved in that sale because at that time, she was not living with Galihomali as she was living at Nyarutuntu, in Rushwa Ward where she was born. It was also in his evidence that, after dissolution of her marriage, Anamaria lived at Nyarutuntu with her mother, Mwezanju. This establishes that, Mwenzanju was not involved because she was not living with Galihomali. Nevertheless, at that particular time when the current Law of Marriage Act was not in place, her presence

and approval was not mandatory in the course of disposition of any family land. Besides, according to **Paragraph 570 of Customary Law of the Haya Tribe Tanganyika Territory** authored by **Hans Cory and M.M. Hartnoll**, the involvement of the wife in disposition of land was not a requirement in Haya Customary Law as the law required presence of man's relatives which according to the appellant, all persons involved in transaction were clan members. In the circumstances, non-involvement of Mwezanju cannot invalidate the sale agreement.

Concerning the location of the suit land, it is undisputed that, in the sale agreement the place where the land is located was not mentioned. However, this contention has no substance because no one among the parties who disputed on the location of the suit land and hence, the suit land is clearly known to both parties. Normally, description of the land becomes an issue where there is conflicting evidence on where the land is located and where the boundaries to that land are not certain. However, in the instant case, there was no conflicting evidence concerning the location of the land and its boundaries. Therefore, the requirement for description of the suit land was not important before the trial tribunal because the dispute was whether that land was sold to the appellant or was the property of Anamaria. Furthermore, since the agreement in question was drawn up by lay persons

way back in 1967 without using any legal language, this Court cannot interpolate it with any technical legal concepts rather than interpreting the sense of their agreement and the intention of the parties. Looking closely at exhibit P1, it is apparent that, the intention of the parties was for Galihomali to sell his two pieces of land and the appellant to buy the same for consideration of Tshs.600/=. Although the fact about the appellant to buy the said land for purpose of taking care the vendor until his death is not reflected in the sale agreement, that in itself cannot make the said agreement invalid. Besides, what he stated in his testimony cannot change the intention of the parties in the said agreement. In that regard, since their intention was very clear, there is nothing to make their agreement invalid.

Regarding the neighbours to the suit land, as it was rightly submitted by Mr. Zephurine, the sale transaction was conducted almost 50 years ago. Under the prevailing circumstances, it goes without saying that, the owners bordering the suit land cannot be same. Some may have sold their land and others bequeathed to others. For that matter, the issue of contradiction between Exhibit P1 and testimony of the appellant concerning the neighbours bordering the suit land is misplaced.

Lastly, is on non-involvement of village authority in the sale transaction. As it was observed by the trial tribunal, it is undisputed that, the village authority was not involved in the sale transaction which was conducted in 1967. However, the case of **Metthuselah Nyagwaswa v. Christopher Mbote Nyirabu** (*supra*) which was referred by the Chairman and relied by Mr. Mswadick in his submission is distinguishable with the matter at hand because in that case, the sale transaction was conducted after enactment of the Villages and Ujamaa Villages Act, 1975 whereby approval of the village council was necessary on disposition of land held under the control of the village. Conversely, in this case, the transaction was conducted in 1967 before the Villages and Ujamaa Villages Act was enacted. Thus, the approval of village council before disposition of the land was neither necessary nor the requirement of the law. Besides, neither the Land Ordinance, 1923 nor the Law of Property and Conveyancing Ordinance, 1923 which were in place in 1967 had the requirement of approval of village council in disposition of land between natives. Under the prevailed circumstances, since the clan members were involved as require by Haya Customary Law and since it was not the requirement of the law for disposition of land to be approved by village council, it is the finding of this Court that, the sale agreement made on 15/05/1967 between Rushaka

Golihomali Kakoko and the appellant was valid. Had the learned Chairman considered all these, he couldn't have invalidated the said agreement. Thus, the argument by Mr. Mswadick that, the sale agreement was doctored for purposes of this case is unfounded and uncalled for.

In that regard, I find the appeal with merit and I hereby allow it by quashing and setting aside the judgment and decree of the trial tribunal. The resultant, the appellant, Patrice Kakoko is hereby declared as the lawful owner of the suit land. Considering the nature of the dispute where parties are relatives, I make no order as to the costs. It is so ordered.

I. K. BANZI
JUDGE
18/10/2023

Delivered this 18th day of October, 2023 in the presence of the respondent and in the absence of the appellant who is reported sick.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
18/10/2023