THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

LAND APPEAL NO. 84 OF 2023

(Originating from Application No. 53 of 2022 in the District Land and Housing Tribunal for Mbeya)

SUBI NTALE.....APPELLANT

VERSUS

JANKEN ASUKILE MWALWEGA .....1ST RESPONDENT

SANDE KAISI KABUKA .....2ND RESPONDENT

ZEGELI BILISHANGA ZEGELI .....3RD RESPONDENT

JUDGMENT

24th October & 10th November, 2023

MPAZE, J.:

The appeal arises from the Judg ment of the District Land and Housing Tribunal for Mbeya in Land Application No. 53 of 2022, which declared the 3rd respondent a lawful owner of the disputed house located in Plot 1104 Block "S" Iyela area within the City and Region of Mbeya (the

suit property). Aggrieved by the said decision, the appellant knocked on the door of this court.

A brief background of the appeal is that on 10th September, 2012 the appellant Subi Ntale purchased the suit property situated at Iyela from Janken Asukile Mwalwega (the 1st respondent) at the consideration of Tsh 40,000,000/= and given title deed. A sale agreement (Exhibit P1) was executed and the sale was witnessed by advocate Mshokorwa. The appellant was given the title deed and was introduced to the tenants by the 1st respondent, where she started collecting rent from them.

Joel John Mwakasinga (PW2) and Augustino Kyando (PW6) are some of the tenants whom the appellant was introduced by the 1st respondent, they testified that in the year 2012 the 1st respondent introduced them to the appellant as the purchaser of the suit property and that from then onwards they will be paying rent to her which they have been doing from then.

Ezekia Kipondo PW3 and Ezekia Amos Kibonde (PW4) who happened to be leaders of the area between 1999-2014 and 2019 respectively, their

evidence was that the appellant is the owner of suit property and the office records reveal that.

Fredrick Starford Kabolinga (PW5) on his part testified that he was given the title deed of the appellant by the 2nd respondent to make a transfer into the appellant's name but was later taken by the 2nd respondent together with the 1st respondent.

In 2016, the appellant discovered the suit property was sold by the 1st and 2nd respondents to the 3rd respondent. It was also revealed that the title deed had been stolen from his car by the 2nd respondent who happened to be his driver. The appellant reported the matter to the police where the 1st respondent was interrogated and admitted. The admission statement was admitted as Exhibit P2. The 1st and 2nd respondents were charged and convicted of stealing and obtaining money by force pretense in the Resident Magistrates' Court of Mbeya, the judgement was produced and admitted as Exhibit P3.

The 1st respondent and 2nd respondent were not satisfied with the conviction and sentence they appealed to the High Court, where they were acquitted, the High Court judgment was admitted as Exhibit D2. The court

stated that the matter should have been referred first to the court of proper jurisdiction to entertain land matters and thereafter a charge of obtaining money by false pretence be preferred. This decision now led the appellant to institute this matter to the DHLT. The reliefs which the appellant sought at the DHLT were as follows;

i. An order for permanent injunction restraining the respondents from interfering with the suit property;

ii. A declaration that he was the lawful owner of the area and to be given a certificate of title;

iii. General damage of Tsh 20,000,000;

iv. Costs of the suit; and

v. Any other reliefs the tribunal may deem just.

The respondents filed a joint written statement of defence (WSD), the 1st respondent denied having sold the suit property to the appellant but admitted to selling it to the 3rd respondent in 2016. It was further stated that the 3rd respondent had affected the transfer of the title to his name.

On their party, they found the appellant had no valid claim against them they prayed for the application to be dismissed with costs.

DW3 also tendered proceedings of the Criminal Case No. 186 of 2018 which was admitted as Exhibit D4. DW1 on his part testified that he witnessed the sale agreement between DW2 and DW3, he denied having ever been a driver of the appellant and stole the title deed from the appellant.

In addition, the respondents called William Bandola (DW4) a police officer who happened to investigate the matter about the sale of the suit property between the appellant and 1st respondent. Hebel Kihaka (DW5) on his part testified that he executed a sale agreement between the 1st respondent and 3rd respondent after he had done a search in the land offices.

After a full hearing, the chairman found that Exhibit P1 was doubtful and its authenticity was questionable, he declared it a forged document as the appellant had testified in a criminal case that they did not put into writing the sale. Therefore, the judgment was entered in favour of the 3rd respondent as a lawful owner.

Following this decision which the appellant was not comfortable with, as I stated earlier, the appellant decided to knock on the door of this court with the following grounds;

1. The trial tribunal erred both in law and facts for failure to consider Exhibit P1 (sale agreement) which is lawful.
2. That the trial tribunal erred in law and facts when it ruled that the Appellant had forged Exhibit P1 while there was no complaint by the 1st respondent in respect of the alleged sale agreement.
3. That the trial tribunal erred in law and facts for declaring that the 3rd respondent is the lawful owner of the disputed house while his evidence was not evaluated in the judgment.
4. That the trial tribunal erred in law and facts for considering Exhibit D1 (sale agreement) while the same contravened the law.
5. That the trial tribunal erred in law and facts for relying on Exhibit D4 while the same was nullified by the High Court of Tanzania at Mbeya and the 1st and 2nd Respondent were acquitted.

6. That the trial chairman erred in law and facts to declare that Exhibit P1 was forged while there was no evidence showing that the Exhibits were forged.

7. That the trial tribunal erred in law and facts for failure to consider and evaluate the evidence of the appellant and her witnesses at all

8. That the trial tribunal erred in law and facts for failure to consider other Exhibits tendered to the appellant in her evidence.

On the hearing date, the appellant was represented by Mr. Alfred Chapa whereas the respondents by Mr. Felix Kapinga both learned advocates. The appeal was heard orally.

Submitting on ground one, Mr. Chapa stated that Exhibit P1 was received without objection from the respondents and its genuineness was not challenged meaning that it was proper, he cited the case of **Shadrack Balinago vs Fikiri Mohamed @ Hamza & Others**, Civil Appeal No. 223 of 2017 (Unreported) on failure to cross-examine on particular point amounts to acceptance of its truthfulness.

Counsel for the appellant added that Exhibit P1 was signed by the 1st respondent, the signature resembled that in Exhibit D3 but no weight was

attached to it. He went on to state that the 1st respondent sold the suit property to the appellant and introduced him to PW2 and PW6. According to Mr. Chapa, the chairman's judgment was not based on evidence adduced. The case of **Ismail Rashid vs Mariam Msati**, Civil Appeal No. 244 of 2011, (Unreported) was cited to support the point.

Grounds two and six were argued together, Mr. Chapa submitted that the issue of forgery of Exhibit P1 was not raised in the pleadings and it was not complained by the 1st respondent. He argued that if Exhibit P1 was forged and did not contain the 1st respondent's signature, then the 1st respondent had a chance to follow the proper procedure of challenging it and report the forgery to criminal departments as the same could not be challenged in a civil case.

To bolster the proposition, he cited the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another**, Civil Appeal No. 270 of 2018 (Unreported). Mr. Chapa added that, issues which were farmed before hearing for determination none of them concerned the issue of forgery, according to him this issue was not supposed to be discussed he referred

the court to the case of **Makini Wasaga vs Joshua Mwaikambo & Another** [1987] TLR 89.

Mr. Chapa faulted the trial chairman for concluding that Exhibit P1 was forged without having any expert evidence on handwriting and there was no proof by a forensic scientist. To cement this argument, he cited the case of **Costancia Chaila & Another vs Evarist Maembe & Another**, Civil Application 227 of 2021 (Unreported).

In respect of ground three, it was submitted that the evidence of PW1, PW2, PW3, PW4, PW5, PW6, DW1, DW2 and DW3 was not evaluated. According to him, the 3rd respondent was declared the lawful owner of the disputed property without evidence which was adduced before the DLHT being evaluated.

In ground four it was stated that Exhibit D1 was tendered without being paid a stamp duty as required by sections 5(1) and 47(1) of the Stamp Duty Act. It was submitted that although the chairman ordered stamp duty to be paid within 20 hours it was not paid until when the judgment was delivered, adding that 1st respondent was supposed to

comply with a court order. He said failure to do so Exhibit D1 was to be treated as having no any evidential value.

To this argument Mr. Chapa refereed the case of **Pollo Italia (T) Ltd vs Euro Poultry (T) Ltd & 2 Others**, Commercial Case No. 62 of 2022, Commercial Division (Unreported). Regarding the effects of non-payment of stamp duty counsel cited the case of **Malmo montange Konrolt Tanzania Branch vs Magreth Gama,** Civil Appeal No 86 of 2001 (Unreported) that it lacks evidential value.

Mr. Chapa went on to argue that the contents of Exhibit D1 were not read after its admission and evidence of each witness was not read to the parties, the case of **Bulungu Nzungu vs Republic**, Criminal Appeal No. 39 of 2018 (Unreported) was cited. With all these arguments he made concerning Exhibit D1, he prayed the same to be expunged. He submitted, therefore, that without Exhibit D1 there would be no evidence to support the claim that the 3rd respondent bought the suit property.

Arguing ground 5, Mr. Chapa faulted the DLHT for relying on Exhibit D4 to the effect that the appellant gave contradictory evidence to previous proceedings without considering that Exhibit D4 was nullified by the High

Court. Counsel submitted that the effect of nullifying the proceedings and judgment meant there was no case. He further stated that Exhibit D4 was admitted while it was not attached to the WSD, Mr. Chapa invited the court to the case of **Yara Tanzania Limited vs Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019 (Unreported) in which it was stated a document not pleaded cannot be admitted as an Exhibit during the hearing.

On ground seven, it was submitted that the appellant's evidence was not evaluated, he said that PW2 was a tenant in the house while other witnesses stated that they knew the appellant as the owner. Counsel said nowhere in the judgment evidence of the appellant's witnesses was considered.

Mr. Chapa submitted that from 2016 which is allegedly the 3rd respondent purchased the suit property has never collected rents from the tenants but rather it is the appellant who is collecting rent. Counsel added that the tribunal did not consider evidence that the 1st respondent admitted before the police to have sold the suit property to the appellant.

The appellant's counsel, therefore, implored the court by virtue of being the first appellate court to re-evaluate the evidence and reach to its own conclusion and the appeal to be allowed with costs.

Responding to the Appellant's counsel submission, Mr. Kapinga argued grounds one, two, five and six conjointly, grounds three, seven and eight simultaneously and grounds four alone.

Reacting on grounds one, two and three, Mr. Kapinga argued that cases are decided depending on the weight of evidence as per section 110 of the Tanzania Evidence Act, [Cap 6 R.E 2022] herein after "the Evidence Act", which states he who alleges must prove. He said it was the appellant who was supposed to prove his ownership of the suit property through purchase from the 1st respondent.

The counsel submitted further that, Exhibit P1 was witnessed by Justinia Mushokorwa Advocate who now is the deceased, but there was no justifiable reason for not calling the said witness to testify as during that time when the case was ongoing was still alive. Failure to call such a witness according to Mr. Kapinga it was proper for the tribunal to order that the sale was not proper.

In regard to Exhibit D4 counsel submitted that although it is true the proceedings was nullified it was not a bar to use it as evidence as per section 123 of the Evidence of Act on the issue of estoppel. He said in the nullified proceedings the appellant admitted that there was no written sale agreement with the 1st respondent, but in the tribunal he produced a sale agreement. Therefore, to him, the trial chairman was right to cast doubt on Exhibit P1.

On the issue of rent being paid by tenants to the appellant, it was submitted that there was no contract tendered to prove that they were tenants of the appellant and were paying rent to her, hence the counsel found this argument is unjustified.

On Exhibit P2 and P3 not being considered by the tribunal it was stated that admitting Exhibit is one thing and according weight to it is another thing. Like the appellant's counsel, Mr. Kapinga implored this court to step into the shoes of the tribunal and re-evaluate the entire evidence.

Replying to ground 4 it was stated that the tribunal did not error to rule that Exhibit P1 was forged, he referred to section 4(3) of the CPA which requires exhaustion of civil remedy first before resorting to criminal.

He added that failure to report forgery did not mean 1st respondent was barred from reporting the same later.

Mr. Kapinga acknowledged that parties are bound by their pleadings. he stated that Exhibit D4 was pleaded in para 10 of the WSD. Furthermore, he argued that regulation 10 of G.N. 174 of 2003 outlines the procedure for tendering and admitting documents, and section 147 of the Evidence Act allows a witness to be recalled. The counsel contended that the procedure as described in these sections was complied with, and thus Exhibit D4 was properly admitted.

It was further stated that DW5 testified on how he prepared a sale agreement between the 1st respondent and 3rd respondent adding that if there was a sale agreement between the appellant and 1st respondent the Mr. Mushokorwa who is said to have executed the sale agreement between the duo was to be summoned to testify.

Countering grounds 3, 7 and 8 Mr. Kapinga submitted that, the evidence was properly evaluated by the tribunal. On the issue of stamp duty, he argued that the payment was done as ordered by the tribunal. With regard to Exhibit D1 not being read to parties after its admission, Mr.

Kapinga contended that the same was read unless the chairman did not record it. He however pointed out that the requirement of reading the content of the document in civil cases is not strictly applied as in criminal cases.

For all that he has submitted, he prayed the appeal to be dismissed with costs.

During the rejoinder, Mr. Chapa submitted that the record does not show if Exhibit D1 was read and the respondent's counsel did not show on which page in the record the same is reflected. He maintained the procedure was not observed. On recalling the witness, it was stated the order made by the trial tribunal was to recall DW2, but it was not the one who appeared. Mr. Chapa argued the court to examine the proceedings of the DLHT, which will reveal the defect.

On failure of the appellant to tender contracts with tenants and proof of rent payment counsel submitted that not all contracts are in written form adding that PW2 and PW6 were not challenged when testified on that aspect. In respect of Exhibit D4 not being pleaded it was stated that para 10 of the WSD refers to judgment of courts and not proceedings which was

tendered. On the applicability of estoppel, Mr. Chapa referred to the case of **CRSG (T) Trading Co. Ltd vs Ullaya Shomary Mohamed T/s Ushomo Enterprises & Others**, Civil Case 87 of 2021 (Unreported) which explains how the principle should be applied.

On whether the appellant proved his case on the balance of probabilities, counsel argued that on strength of evidence of PW1, PW2, PW3, PW4, PW6 and Exhibits P1, P2 and P3 the appellant managed to prove his case to the standard required in civil cases.

In regard to the failure to call advocate Mushokorwa who executed Exhibit P1, counsel argued that Exhibit P1 was admitted without any objection, as such there was no need to call him. Mr. Chapa insisted the appeal be allowed with costs.

Having considered the record and rival submissions of counsel for the parties, the appeal can be fairly disposed based on the following grounds; **One**; whether forgery was pleaded and proved (grounds two and six); **Two**, whether stamp duty was paid to Exhibit D1 (ground four); **Three**, whether it was proper to use Exhibit D4 which was nullified by the High

Court (ground five); and **Four**, whether the tribunal evaluated evidence of both parties (grounds one, three, seven and eight).

Starting with ground one on forgery of Exhibit P1, it was submitted that the issue of forgery was not pleaded in the WSD and the chairman wrongly based his decision relying on the issue of forgery, and that the 1st respondent was supposed to resort to criminal remedies. Respondent's counsel submitted that the 1st respondent sought first importance to resort to civil remedy and it was not a bar to raise it during his defence.

After going through the submission by counsel for the parties I agree with the appellant's counsel submission that the 1st respondent did not plead the issue of forgery in the WSD but rather the existence of the sale agreement. It is trite law that parties are bound by their pleadings and any evidence not supporting pleadings must be ignored. **In Makori Wassaga vs Joshua Mwaikambo & Another** [1987] T.L.R 88, the Court stated that;

> *"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."*

The issue of forgery having not been raised by the 1st respondent in pleading cannot therefore be determined by the court. After all, forgery is a criminal act which cannot be proved in a civil case. In **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another**, (Civil Appeal No. 270 of 2018) published on the website, www.tanzlii.org [2023] TZCA 102 the Court stated;

> *'Without prejudice to the aforesaid, even if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge.'*

As rightly, complained by the appellant despite the 1st respondent being put to alert of Exhibit P1 remained mute until he was testifying only to come up with the issue of forgery of his signature. It was too late for

the 1st respondent because he was already caught up in the web of pleadings and that could not be done in a civil suit. I thus find grounds two and six meritorious.

Next is the issue of non-payment of stamp duty on Exhibit D1 in ground four, before sailing the boat on this ground, I will start with preliminary issues raised by Mr. Chapa in the submission. **One**, that Exhibit it was submitted that Exhibit D1 was not read after being admitted thus praying the same be expunged.

On the adverse Mr. Kapinga argued that the rule of reading contents of Exhibits in a civil case is not strict, however, he pointed out that the same was read unless the chairman did not so indicate.

In the case of **Bulungu Nzungu vs Republic**, (Criminal Appeal No. 39 of 2018) published on the website, www.tanzlii.org [2022] TZCA 454, the Court stated that;

> *"It is now a well-established principle in the Law of Evidence as applicable in the trial of cases,* ***both civil and criminal****, that generally once a document is admitted in evidence after clearance by*

the person against whom it is tendered, it must be read over to that person."

I have perused proceedings of the DLHT I found that Exhibit D1 was not read, the argument that it was read is not reflected in the record and that cannot be impeached by mere words of the counsel that it was read but the chairman did not so indicate as the records ought to speak by itself.

Without such a record what remains is the argument by Mr. Kapinga that the requirement of reading exhibits after admission is not strict in a civil suit. I have given the argument weight it deserves and I tend to agree with him. This is because unlike in criminal cases where there is no exchange of pleadings, in civil cases parties are given a chance to make their cases through pleadings, where the document can be known even before the same is tendered as an exhibit.

Under consideration of Exhibit D1 which was pleaded in WSD and when sought to be tendered it was objected on the ground that stamp duty had not been paid. Meaning its contents were not in dispute at all. The akin situation was stated in the case of **Robert Mhando & Another vs**

The Registered Trustees of ST. Augustine University of Tanzania, (Civil Appeal No. 44 of 2020) published on the website www.tanzli.org [2023] TZCA 65 the Court held;

> *'Whereas Mr. Nasimire is on record as having strongly objected to the admissibility of the two exhibits saying, inter alia that they were not genuine for not having been issued by the respondents. DW1's evidence is remarkable of her discordant but conclusive statement that there was no doubt that all the disputed receipts were issued by the respondents. Given this state of affairs, one thing becomes clear. That is,* ***throughout the trial, the material contents of the disputed documentary exhibits were well known to the respondents as to render inconsequential the complaint by Mr. Nasimire that, they were not read out in court after being admitted in evidence.****' Emphasize supplied.*

Guided by the above authority, this court finds that failure to read Exhibit D1 did not prejudice the appellant and have not suggested any in this appeal. The argument is therefore rejected.

Two, that evidence was not read to parties. I have considered the argument and I know no law in civil trial which requires evidence of a witness to be read to witness after being recorded. Even if it was the case, borrowing a leaf from criminal law, the right to read evidence after recording is of a respective witness and not otherwise. In **Athuman Hassan vs Republic**, Criminal Appeal No. 84 of 2013 (unreported) the court stated;

> *'...However, we do not see the substance of the appellant's complaint because* ***it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence****. We do not even think that the omission occasioned a miscarriage of justice to the appellant.'*

In the present appeal, the complaint has been raised by the appellant's counsel in his submission, though improper but the counsel cited no law in support of his argument. I therefore find the argument misplaced.

Returning to the complaint that stamp duty was not paid on Exhibit D1, it was submitted that because stamp duty was not paid even after

being ordered by the chairman Exhibit D1 lacked evidential value. On his part, Mr. Kapinga stated that stamp duty was paid. I have perused the record of the DLHT and found that the chairman ordered stamp duty to be paid within 20 hours, a copy of the sale agreement Exhibit D1 in the record is affixed with stamp duty.

I have used the word affixed purposely to demonstrate that the stamp duty referred to under the Stamp Duty Act [Cap 218 R: E 2019] is not the same as what the counsel have in their mind. Even if stamp duty had not been paid still it would not be fatal per the case of **Mohamed Abood vs D.F.S Express Lines Ltd**, (Civil Appeal No. 282 of 2019) published on the website, www.tanzlii.org [2023] TZCA 57 which was stated;

> '... *section 73 of the CPC requires the Court to do substantial justice, it should not reverse or vary any decree nor remanded any case on account of among others, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. In that regard, we find that failure by the appellant to pay the chargeable stamp duty at the time the lease agreement was admitted*

in evidence cannot be a basis for this Court to vary or reverse the decision of the High Court. ***Let's say, if, at the time of the hearing of the appeal, the appellant would not have paid the chargeable stamp duty, what we could have done was to order him to pay the same before proceeding with the hearing of the appeal.***' Emphasize added.

With that above law, Exhibit D1 in record is affixed with stamp duty making the complaint unmerited. As such ground 2 fails.

Next is ground 3 in which the appellant complains that the nullified proceedings of the Criminal Case were considered. In this appeal Mr. Chapa has submitted that Exhibit D4 was nullified by the High Court through Exhibit D2, making it worthless to be relied upon. Mr. Chapa also complained that apart from the same not being pleaded and annexed to WSD it was tendered by an incompetent witness.

On the other hand, Mr. Kapinga was of the view that it was proper for the said case to be relied upon as per the doctrine of estoppel. Nonetheless, he argued that Exhibit D4 was pleaded under para 10 of WSD and was tendered by competent witness who was recalled.

Starting with whether Exhibit D4 was pleaded and annexed in the WSD, I agree with the appellant's counsel submission that Exhibit D4 was not pleaded in WSD. What was pleaded and annexed in the WSD by the respondents was the judgment of the trial court and that of the High Court. Exhibit D4 being not pleaded was wrongly admitted and form part of the records let alone being nullified by the High Court. This makes the complaint that the one tendered exhibit D4 was not a competent witness to die natural death.

In the submission of both parties, I have realized that counsel for the parties are in agreement that Exhibit D4 was nullified by the High Court through Criminal Appeal No. 141 of 2020, Exhibit P3 and D2. In the case of **Samwel Gitau Saitoti @ Saimoo @ Jose & Others vs The Director of Public Prosecutions**, (Criminal Application No. 73 of 2020), published on the website, www.tanzlii.org [2021] TZCA 554, the Court stated nullifying has the effect of rendering the same invalid.

Applying what has been stated in the cited case above, since Exhibit D4 was nullified it is as good as the said proceedings had never existed, save it is crucial for the 1st and 2 respondents to prove their innocence. It

is also important to highlight that Exhibit D4 pertained in a separate case with distinct criteria of standard of proof with the case at hand. Therefore, what was stated in Exhibit D4 does not necessarily to be the truth than was testified in the DLHT . Each case must be determined by its own circumstances.

Given this position therefore, the doctrine of estoppel as argued by the respondent's counsel, cannot be applied against the appellant. Consequently, I find the chairman's findings that the appellant lied about the existence of a sale agreement were based on misdirection of law. As a result, ground five is sustained.

He who alleges must prove is a legal term found in sections 110 (1)(2) and 111 of the Evidence Act. Mr. Kapinga in his submission has discussed the concept that in civil dispute the standard of proof is on a balance of preponderance, which simply means that the court will sustain such evidence which is more credible than that of the other on a particular fact to be proved. See the case of **M and M Food Processors Company Limited vs CRDB Bank Limited and Others**, (Civil Appeal 273 of 2020), published on the website, www.tanzlii.org [2023] TZCA 243. In this case, it

is the appellant who set the law in motion, the burden of proof was upon her.

This now takes me to the last issue which is whether the tribunal evaluated the evidence of both parties this issue encompasses for grounds one, two, three and eight. Bearing in mind this being the first appellate court it has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted to arrive at its own conclusion of fact. See **M and M Food Processors Company Limited** (supra).

In this appeal, there is no dispute that the appellant, 1st respondent and 2nd respondent knew each other well and that the appellant and 1st respondent had previously borrowed money from each other.

According to the evidence on the record the appellant and 3rd respondent trace their title in suit property from the 1st respondent, they all tendered sale agreement Exhibit P1 and D1 though the 1st respondent disowned Exhibit P1. The appellant pleaded and testified that he purchased the suit property in 2012 and was given the original certificate which was

later stolen by the 2nd respondent in corroboration with the 1st respondent, the contention which was disputed by the 1st respond and 2nd respondent.

In a bid to prove the case, the appellant called PW2 and PW6 who happened to be the tenant in the suit property, their evidence being that before they were tenants of the 1st respondent but in the year 2012 they were introduced by the 1st respondent to the appellant as their new landlord as he has purchased the house and they continued to pay rent to the appellant. While PW3 and PW4 happened to be leaders of the street the gist of their evidence was that they knew the appellant as the owner of the disputed house since she was the one paying rental fee and this is as per their office records.

In the submission, Mr. Chapa submitted that the chairman wrongly doubted the genuineness of Exhibit P1 based on the judgment which was nullified by the High Court and that evidence of the appellant's witnesses along with Exhibits were not evaluated. In response, Mr. Kapinga argued that the appellant failed to prove ownership as she failed to call material witnesses such as Mr. Mushokorwa who witnessed the sale agreement.

From the discussion of the preceding grounds issue of Exhibit P1 being forged has been settled, it will therefore be considered on equal footing with Exhibit D1. The other issue which in my view is pertinent is the argument that Mr. Mushokorwa who witnessed Exhibit P1 was not called. I agree with Mr. Kapinga that failure to call a material person who witnesses a transaction adverse inference may be drawn.

In the case at hand the circumstances are different because when exhibit P1 was tendered, it was admitted without any objection, thus making it unnecessary to call a witness who executed Exhibit P1. The argument would have been different if Exhibit P1 had been objected at the time of tendering and the witness had not been called then the court would have power to draw adverse inference.

The question which comes now is who is the lawful owner between the appellant and 3rd respondent. Exhibit P1 was authored in 2012 whereas Exhibit D1 in 2016, according to the appellant after purchasing the suit property he was introduced to tenants PW2 and PW6 who supported the appellant. DW2 in his evidence did not challenge such evidence except that the witnesses have not been able to show tenancy agreement.

In his submission, Mr. Kapinga argued that there was no tenancy agreement or proof of payment of rent to the appellant. On the other hand, Mr. Chapa replied that it is not always everything that is put into writing.

Having considered evidence and submissions on this aspect, I agree with the appellant's counsel that a document is not the only means of proving a certain fact. In the case of **Sixbert Bayi Sanka vs. Rose Nehemia Samzugi**, (Civil Appeal 68 of 2022), published on the website, www.tanzlii.org [2023] TZCA 227, the Court had this to say;

> *'It is ridiculous to treat production of receipts as the only way of proving purchase of hardware materials for construction of the house hence her contribution. Without there being a need to cite an authority, oral, documentary and physical materials are taken cognizance by the law as forms of evidence which, if their credence is impeccable, would be sufficient for determination of a dispute.'*

PW2 and PW6 were resolute that the 1st respondent introduced the appellant to them as the new owner of the suit property. They added that they were paying rent to the appellant. The 1st respondent did not deny knowing PW2 and PW6, further, he did not cross-examine on those aspects.

Evidence of the suit property having tenants was supported by DW2 during cross-examination.

Having weighed the above evidence it is my conviction that evidence of the appellant being introduced to tenants after purchasing the house and rent being paid to the appellant has not been seriously challenged by the respondents. To the contrary, the 3rd respondent gave no details of the suit property let alone that he had transferred the title to his name.

Now, Exhibit P1 was executed on 10/09/2012 and Exhibit D1 was executed on 21/1/2016 all being sale agreements executed by the 1st respondent to the appellant and the 3rd respondent as the seller. Who is among the two is a lawful owner.

The appellant testified that the certificate which was handed to her by the 1st respondent was stolen by the 1st respondent, she reported the matter to police, the admission statement of the 1st respondent Exhibit P2 was admitted without objection from the 1st respondent.

It was during the defence that the 1st respondent stated that "*mimi sikukiri chocolate Police nilipigwa na Polisi kama jambazi. Nilisaini kwa*

kulazimishwa baada ya kupigwa". This evidence presupposes that Exhibit P2 was involuntary recorded.

Reading between the lines Exhibit P2 does not suggest in any how that it was made involuntarily the statement clearly without any ambiguities narrates how the plan was plotted to its completion. The 1st respondent admits to having sold the suit property to the appellant and introduced the appellants to tenants, the statement which was supported by PW2 and PW6 in their evidence who testified that they are paying rent to the appellant after being introduced by the 1st respondent.

Section 19 of the Evidence Act, defines admission as;

"a statement, oral; electronic or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned'

One of the circumstances which have been mentioned and which is connected to the case at hand is section 23 (c) which reads;

'Admission is relevant and may be proved as against the person who makes them or his representative in interest, but they cannot be

proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases-

(c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.'

Based on this section this court is of the settled mind that, Exhibit P2 is relevant to the fact in issue and reflects the truth of what had transpired in connection with the sale of the suit property as what the 1st respondent has admitted suggests some inference as to the existing fact in issue and 1st respondent liability. Denying the same that he had never made such a statement this court takes it as an afterthought and without merit.

Another piece of evidence which proves that the suit property belongs to the appellant is that of PW3 and PW5 who although did not witness Exhibit P1 their evidence was that their office records recognized the appellant as the owner of the suit property through the records in the office and she is the one pays rental fee.

On the other hand, the 3rd respondent is saying he purchased the suit property from the 1st respondent, through Exhibit D1, the sale was

supported by DW1 who signed the sale agreement and DW5 who prepared Exhibit D1. DW3 added that he had completed the transfer to his name.

Exhibit P1 was executed in 2012 and Exhibit D1 in 2016, this show the appellant was actually the first buyer and that the 1st respondent had no good title to pass to the 3rd respondent based on the maxim nemo dat quod non-habit, that is, one can only give what they have or one can only transfer what they own. A similar scenario was discussed in **Melchiades John Mwenda vs Gizelle Mbaga** & Others, (Civil Appeal No. 57 of 2018), published on the website www.tanzlii.org [2020] TZCA 1856 where the Court stated;

> *"Thus in 2009 when the said John Japhet Mbaga purported to sell the disputed land to the second respondent, he had no good title to pass to him. We are of the view that the fact that the second respondent is in possession of the original Certificate of Title which allegedly disappeared from the office of the appellant, is not ipso facto proof that he is the lawful owner of the disputed land."*

[See also; **Pendo Fulgence Nkwenge vs Dr Wahida Shangali**, Civil (Appeal 368 of 2020), published on the website, www.tanzlii.org [2022] TZCA 309.

The 3rd respondent testified that after buying he effected the transfer of title to his own name, the certificate was admitted in the tribunal as Exhibit D3, surprisingly, it was returned to the 3rd respondent one day after the judgment of the tribunal. I have tried to trace the certified copy of Exhibit D3 in vain. Then I had to resort to pleadings, a luck may be the appellant and the respondents attached to their pleadings a copy of title deed No. 13178MBYLR not tendered in evidence.

The issue taxed my mind on how to go about it, at the end I have come to the conclusion that Exhibit D3 if considered in the context of Order VII Rule 9(1), 14(2) and Order XIII Rule 1(1) of the Civil Procedure Code [Cap 33 R: E 2019] together with regulation 10 of the Land Disputes (District Land and Housing Tribunal) Regulation G.N. 174 of 2003 was not among the documents to be relied upon by the 3rd respondent. The annexed copy of the title deed does not reflect that the transfer from the 1st respondent to the 3rd respondent had been affected. Even if it has been,

at the time the 3rd respondent purported to purchase the suit property, the 1st respondent had no title to pass to the 3rd respondent.

The fact that the 3rd respondent is in possession of the original certificate of title is not ipso facto proof that he is the lawful owner of the suit property. see **Melchiades John Mwenda** (supra). The explanation given by the appellant and PW5 that the title was taken by the 2nd respondent if considered along with Exhibit P2, in my view sufficiently proves that the original title did disappear from the appellant at the instance of the 1st respondent and 2nd respondents.

From the discussion above, I find that the appeal has merits the appellant managed to prove her case on balance of preponderance. Consequently, I quash the judgment of the District Land and Housing Tribunal for Mbeya, I proceed to set aside the decree entered in favour of the 3rd respondent and declare the appellant as the rightful owner of the suit property. The appellant will have the costs of this appeal.

Dated at **Mbeya** this 10th November, 2023.

THE HIGH COURT OF TANZANIA

M.B. MPAZE
JUDGE

Court: Judgment delivered in the presence of the appellant in person and in the presence of Mr. Alfred Chapa for the appellant and Mr. Felix Kapinga for all respondents.

M.B. MPAZE

JUDGE

10/11/2023