IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT IJC MOROGORO

LAND APPEAL NO. 62 OF 2023

LEONARD ELIMSU URIO.....APPELLANT

VERSUS

SELESTINE CLETUS LUSELO..... 1ST RESPONDENT

MASELINA SAIMON FIKIONI.....2ND RESPONDENT

ROBERT TEMBE.....3RD RESPONDENT

JUDGEMENT

11th Oct, & 30th Nov, 2023

CHABA, J.

The matter originated from the District Land and Housing Tribunal for Morogoro, at Morogoro (the trial Tribunal) in Land Application No. 47 of 2018. Celestine Cletus Luselo was the applicant, but in this appeal, he is the first respondent. The appellant in this appeal was the 1st respondent before the trial Tribunal.

Briefly, the background of the matter as could be gathered from the proceedings and Judgement of the trial Tribunal is that, Selestine Cletus Luselo, (who in this case shall be referred to as Luselo), is the owner of the property located at Mafisa Area within Morogoro Municipality, comprised in a Residential License No. 1045 (Leseni ya Makazi) issued by Morogoro Municipality (herein shall be referred to as the property).

On 19th January, 2015, Luselo sold the property to Marceline Simon Fikioni and Robert Daniel Tembe, the 2nd and 3rd respondents herein. The Agreement was reduced in writing, and this agreement was admitted by the trial Tribunal as an exhibit. The property was sold at a consideration of TZS. 12,000,000/= and the payment of the purchase price was to be paid in two instalments. The first instalment of TZS. 9,000,000/= was paid on 19th January, 2015, the date of execution of the Sale Agreement, and the balance of TZS. 3,000,000/= was agreed to be paid on 18th March, 2015. Before finalizing payment of the purchase price to Luselo, the 2nd and 3rd respondents sold the property to the appellant herein namely, Leonard Elimsu Urio (herein to be referred to as Urio). They sold the property to Urio on 9th December, 2015 at a consideration of TZS. 15,000,000/=.

However, Luselo did not hand over the property to the purchasers, i.e., the 2nd and 3rd respondents since the purchase price was not fully paid.

Unfortunately, the sale agreement did not show as to when the Vendor was required to deliver the property to the purchasers. The Agreement was silent. It appears from the records that, the property was not handed over to the purchasers, and the purchasers, i.e., the 2nd and 3rd respondents had sold the property to the appellant herein while the property was still under the possession and occupancy of the 1st respondent, Luselo who afterwards faced the threats of being forceful evicted from the property by the appellant herein. In the circumstances, Luselo had no other option except running to Court for remedies. In so doing, he filed Land Application No. 47 of 2018 at the District Land and Housing Tribunal for Morogoro claiming to be declared as the lawful owner of the property, and to declare the appellant herein the trespasser. The application was successful as the Chairperson of the trial Tribunal found in favour of Luselo. It was held that, the 2nd and 3rd respondents herein were in breach of the Sale Agreement as they did not finalize payment of the purchase price. The title to the property did not pass to the 2nd and 3rd respondents to enable them pass the title to the appellant.

Therefore, the property was declared to be the lawful property of the 1st respondent, but he was ordered to refund the sum of TZS. 9,000,000/= to the 2nd and 3rd respondent. Obviously, the appellant was declared to be the trespasser. Aggrieved by the decision of the trial Tribunal, Urio, the appellant herein preferred

an appeal to the High Court against the decision of the trial Tribunal, he raised four (4) grounds of appeal as follows:

1. The District Land and Housing Tribunal erred in law for failure to consider that the dispute between the parties was resolved by the Primary Court and District Court of Morogoro in favour of the Appellant herein. The first respondent herein did not challenge the Judgement and Decree of the District Court;
2. That, the District Land and Housing Tribunal erred in law and in fact for failure to consider the fact that, the Appellant herein is a bonafide purchaser in good faith for a valuable consideration and therefore entitled to be declared the lawful owner of the disputed premises;
3. That, the trial District Land and Housing Tribunal erred in law and in fact for declaring the first respondent herein as the lawful owner of the disputed premises while he sold it to the 2nd and 3rd respondents who ultimately sold it to the Appellant herein.
4. That, the District Land and Housing Tribunal erred in law and in fact for note (sic) and hold that the only remedy available to the first respondent is to claim for the remaining / unpaid balance of TZS. 3,000,000/=.

The appeal was argued by way of written submissions. The appellant was represented by the learned advocate, Mr. Ignas Seti Punge while the 1st respondent was represented by the learned advocate, Mr. Jackson Liwewa. The 2nd and 3rd respondents did not file their written submissions, as they were dragged

to Court as the respondents by the appellant, while they were also the judgement debtors by the Decree of the trial Tribunal.

I have dispassionately read and thoroughly considered the submissions filed by the Learned Counsels on behalf of the parties herein.

Regarding the first ground of appeal that, the dispute was already resolved by the Primary Court and the District Court of Morogoro in favour of the appellant, and the 1st respondent never appealed against the decision of the District Court, hence that decision is still valid and standing, the counsel for the appellant reinforced his stance by citing the case of **Kangaulu Mussa Vs. Mpughati Mchodo (1984) TLR 348,** at page 349 where the High Court had held inter-alia that; there should be some order and sanity in the institution of proceedings and to import disorders in the administration of justice is improper and thus discouraged. I had the opportunity to read the Judgement of the District Court of Morogoro dated 2nd February, 2018 passed by the Late Hon. A. Kimaze, RM. It is clear from the Judgement that, the District Court reversed the decision of the Primary Court for the Primary Court did not have the jurisdiction to entertain the application for execution and the attachment order was therefore lifted and execution proceedings were nullified. The proceedings of the Primary Court were all quashed and set aside, and there was an order to try the suit de-novo, and as submitted by the counsel for the 1st respondent, Mr. Jackson Liwewa that, the issue in the case before the Primary Court was with regards to a different subject

matter, and the issue decided by the trial Tribunal was with regards to ownership of the landed property. The trial Tribunal was well within its jurisdiction to entertain an issue of ownership of landed property, and the decision, if any, of the Primary Court, did not affect the jurisdiction of the District Land and Housing Tribunal to entertain a dispute over landed property. The first ground of appeal being meritless is hereby dismissed.

With regards to the 2nd, 3rd and 4th grounds of appeal, which were argued together, that the appellant is the bona-fide purchaser and ought to have been declared the owner of the disputed property, and that the trial Tribunal ought to have ordered the 2nd and 3rd respondents to complete payment of the balance of the purchase price amounting to TZS. 3,000,000/=. On this facet, the appellant argues that he is the bonafide purchaser for value, as he lawfully bought the property from the 2nd and 3rd respondents and has fully paid the purchase price. He also argues that, the property is located in an un-surveyed area and thus the requirements of Transfer Deeds and Commissioner's Consent are not applicable to un-surveyed land. He actually argues that, the requirements of the Land Act, 1999 are not applicable to the land which is a squatter land. To buttress his argument, he cited the case of **NITIN Coffee Estate and 4 Others Vs. United Engineering Works Ltd and Another (1998) TLR 203**, where it was held that; *"no disposition of a Right of Occupancy can be made without the consent of the Commissioner for Lands".*

The appellant also argues that, the law on breach of contracts, the remedy for breach is not rescission of the contract but rather to sue for the remaining balance. He cited the case of **Chandrakant Vinubhai Patel Vs. Frank Lionel Marealle and Another (1984) TLR 231**, wherein it was held that; "*the delay in paying the installments, even if true, could not entitle Marealle to rescind the transaction once it was completed.....the party in default could be sued for any sum due and owing.*"

To answer these three issues, it is true as argued by the counsel for the 1st respondent that, for one to be able to sell anything to another, the seller must possess the good title. The issue is whether the 2nd and 3rd respondents had a good title to sell the property to the appellant. It is evident that, the title to the property could only pass to the 2nd and 3rd respondents if they had paid the full purchase price. The 1st respondent did satisfactorily prove his title before the trial Tribunal, the 1st respondent was right, on the strength of his title to resist possession of his property to persons who have no better title than himself to the suit property. Once it is accepted, as the trial Tribunal have done, that the 1st respondent had a better title and was in possession of the property, and has never handed it over to the 2nd and 3rd respondents since they did not pay the balance of the purchase price, then his title and possession has to be protected as against interference by the appellant who is not proved to have a better title than himself to the suit property. On the findings arrived at by the fact-finding, the trial Tribunal

as regards to Title and Possession, the 1st respondent was entitled to the relief granted by the trial Tribunal.

Again, the transactions between the 1st respondent and the 2nd and 3rd respondents encountered a lot of defects as under the Registration of Documents Act [CAP. 117 R. E. 2002] and The Land Registration Act, [CAP. 334 R. E. 2019] for a conveyance to be effective it is required that, documents containing contract to transfer for consideration (agreements of sale, etc.), relating to any immoveable property, to be registered. It is thus clear that, a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of section 9 of the Registration of Documents Act (supra) and will not confer any title nor transfer any interest in an immovable property. According to the Land Registration Act, an agreement of sale, whether with possession or without possession, is not a conveyance as sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter unless it is registered. The Land Registration Act did not exclude the lands which are not surveyed.

In the circumstance, it is my considered view that, the 2nd and 3rd respondents did not acquire good title to sell it to the appellant, as they first breached the sale agreement, and secondly, the sale agreement which was reduced in writing was not registered, and no taxes or stamp duty was paid to make it a valid and effective agreement.

Again, as stated by the counsel for the 1st respondent, the appellant is caught up by the principles of Caveat Emptor, "Buyer Beware", and as held in the case of **Hope Stiftung (Hope Foundation) Vs. Sisters of St. Joseph-Kilimanjaro, the Registered Trustees of Sisters of St. Joseph Himo, Moshi Kilimanjaro and Ritaliza of Mt. Carmel Primary School, Land Case No 3 of 2020, HC,** it is the principle of law that:

> *"without prejudice to the above, it is also a cardinal principle of law in regard to sale and purchase of any goods including immovable property is that of caveat emptor, that is, let the buyer be aware. The purchaser is therefore under a general duty to inspect the property to be purchased before enter the contract. This is critical in order to establish if there are any defects in title, which could be discoverable with due diligence."*

Similar principle of law was underscored by the CAT in the case of **Joseph F. Mbwiliza Vs. Kobwa Mohamed Lyeselo Msukuma, and 2 Others,** Civil Appeal No. 227 of 2019, where the Court held inter-alia that:

> *"evidently, by failing to pay the balance amount for the purchase of the suit property on the day stipulated in the sale agreement, renders failure on the part of the appellant to fulfill the terms of the contract from the time the deceased was alive."……in the circumstances , having found that the appellant failed to fulfil his obligation of paying the balance of the purchase price for the suit property, and recognition that the schedule of payments was part of the terms to be fulfilled in the agreement and therefore of essence to the contract, we are of the view that by virtue of section 55 (1) of the LCA, the sale agreement dated 18/12/1989 became voidable as held by the leaned trial judge.*

Clearly, as can be depicted from the records of the lower Tribunal, and as admitted by the 2nd and 3rd respondents during trial, the 2nd and 3rd respondents did not complete paying the balance of the purchase price, thus they were in default, and consequently, as guided by the principles expounded in the cases cited herein above, and as provided under section 55 (1) of the Law of Contract Act, [CAP. 345 R. E. 2019], the Sale Agreement between the 1st respondent, and

the 2nd and 3rd respondents became voidable, and no Title passed from the 1st respondent to the 2nd and 3rd respondents. The 2nd and 3rd respondents had no good Title to the property, and could not as well sell what they did not have to the appellant.

The Hon. Chairperson of the trial Tribunal was not in any error of law or fact when he decided that, the 1st respondent is still the owner of the property situate at Leseni ya Makazi No. 1045, House No. 1045 Mafisa Area in Morogoro Municipality, and that the appellant herein is the trespasser. As hinted above, the Sale Agreement between the 1st appellant and the 2nd and 3rd respondents was voidable, and no Title passed to the 2nd and 3rd respondents to enable them pass it to the appellant.

Consequently, from the above analysis, the appeal lacks merits, and it is hereby dismissed with costs. It is so ordered.

DATED at **MOROGORO** this 30th day of November, 2023.

THE HIGH COURT OF TANZANIA

M. J. Chaba

Judge

30/11/2023

Court:

Judgment delivered on this 30th day of November, 2023 in the presence of Mr. Ignas Punge, Learned Advocate for the Appellant and in the presence of Mr. Ignas Punge, Learned Advocate holding brief for Mr. Jackson Liwewa, Learned Advocate for 1st Respondent also in the presence of 1st and 2nd Respondents and in the absence of the 3rd Respondent.

A.W. Mmbando

DEPUTY REGISTRAR

30/11/2023

Court:

Rights of the parties to appeal to the CAT fully explained.

A.W. Mmbando

DEPUTY REGISTRAR

30/11/2023