

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

(LAND DIVISION)

LAND CASE APPEAL NO. 46 OF 2023

*(Originating from the Judgment of the District Land and Housing Tribunal for Songea
at Songea in Land Application No. 45 of 2019)*

MKUTAR MAULID SONGAMBELE 1ST APPELLANT

RABON CENTER MINISTRIES CHURCH 2ND APPELLANT

VERSUS

ZUHURA SONGAMBELE RESPONDENT

JUDGMENT

Date of Last Order: 10/10/2023

Date of Judgment: 06/12/2023

U. E. Madeha, J.

This appeal has its origin from the District Land and Housing Tribunal for Songea in Land Application No. 45 of 2019 in which the Respondent instituted a claim in respect to a piece of land in Plot No. 573, Block DD, located at Bombambili area within Songea Municipal. The Respondent sued the Appellants claiming to be trespasser in her land. Among the orders prayed by the Respondent were for the declaration that the Appellants are trespassers in the disputed land and payment of damages and costs of the suit.

Briefly, the facts of this matter are to the effect that, the Respondent and the first Appellant are sister and brother. On 16th September, 2015, they entered into an agreement for sell of the disputed land and it was in a written form in which both parties signed. The sale agreement was tendered and admitted as exhibit ZS1.

It is undisputed fact that the first Appellant agreed to sale to the Respondent the disputed land for TZS. 9,000,000.00. They agreed that the Respondent will pay the sale price on instalments and on the signing date the Respondent paid TZS. 3,500,000.00 only and the Respondent was given all documents including the deed of settlement which was not admitted during trial since it was an uncertified copy.

In 2019, the first Appellant sold the same piece of land to the second Appellant who built a church on it. According to the testimony given by the first Appellant, he sold the disputed land to the second Appellant since the Respondent failed to pay the remaining balance. After trial the Tribunal found the Respondent to have proved her claims and the second Appellant was ordered to be a trespasser and the sale agreement to be void.

Dissatisfied with the decision of the trial Tribunal and they appealed before this Court on three grounds of appeal. The ground of complaints are as follows;

- i. That, the trial Tribunal erred in law and in facts in hold that the first Appellant breached the contract while the contract was voidable at the option of the first Appellant for want of sufficient consideration.*
- ii. That, the trial Tribunal erred in law and in fact by failure to hold that that second Respondent was the bona fide purchaser for value.*
- iii. That, the trial Tribunal erred in law and facts in not holding that the contract was void for being uncertain as to the time of payment and breached of contract.*

At the hearing of this appeal, the Appellants were represented by Mr. Dickson Ndunguru, the learned advocate while the Respondent enjoyed the legal service of Mr. Kitara M. Mugwe, also the learned advocate. By consent of both parties this appeal was argued by way of written submission and both parties adhered to the orders of this Court.

Arguing in support of the first and third grounds of appeal, the Appellants' advocate submitted that, the trial Tribunal erred in law and fact in holding that the first Appellant breached the contract between him and the Respondent while the contract was voidable for lack of

sufficient consideration. He contended that the Respondent paid only TZS. 3,500,000.00, in 2015 and he failed make full payment of the remaining amount to make the contract enforceable. He submitted that under section 55 of the *Law of Contract Act* (Cap. 445, R. E 2019), an innocent party is empowered to avoid contracts when the other party fails to perform his contractual obligations.

He added that, according to provision of section 29 of the *Law Contract Act* (supra), the contract between the first Appellant and the Respondent was void since the period of time of its performance was uncertain and it was to be performed within a reasonable time as it is provided for under section 46 of the *Law of Contract Act* (supra) but the Respondent failed to perform it by paying the remaining balance of TZS. 5,500,000.00 within four years. To cement his submission, he made reference to the case of **Alfi East Africa Ltd vs. Themí Industries & Distributors Agency Ltd** (1984) TLR 256, in which the Court of Appeal of Tanzania stated that, in a contract for sale of goods for which price was not agreed becomes void.

Mr. Ndunguru went on submitting that the trial Tribunal erred in law by holding that the first Appellant entered into a contract with the Respondent while the said contract was void for want of sufficient

consideration. He made reference to the case of **Pinnel v. Cole** (1602) 5 CO. REP 117, in which it was held that a contract without consideration is always void and the party who has received benefit from a void contract is required to return to the other party. Thus, the first Appellant was entitled to refund the Respondent the amount of money received under the contract as it is stipulated under section 25 of the *Law of Contract Act* (supra). He added that, since the Respondent failed to make full payments there was nothing to prevent the first Appellant to sell the disputed land to the second Appellant.

On the second ground of appeal, the Appellants' advocate submitted that the second Appellant was the *bona fide* purchaser and he is to be protected for the value paid. He made reference to the case of **John Thomas v. KAM Commercial Services and Others**, Land Appeal No. 261 of 2020 and submitted further that the second Appellant was the *bona fide* purchaser since the information's from the relevant authorities shows that the ownership of the disputed piece of land is still in the name of the first Appellant.

On his party, the Respondent's advocate, Mr. Kitara M. Mugwe, argued that the Appellants' written submission is confusing since they have submitted that their appeal originates from the decision made by

the District Land and Housing Tribunal for Ruvuma at Songea in Land Application No. 49 of 2019 while in the memorandum of appeal filed in this appeal, they stated that the appeal originates from the judgment and decree of Land Application No. 45 of 2019. He added that even the second Appellant is a stranger in this appeal since he was not a party in any case with the Respondent and has no legal stand in this appeal. Mr. Kitara submitted further that, Rabon Centre Ministries Church is an organisation and the law requires an organisation to appoint a board of trustees, which shall be incorporated under the **Trustees'** Incorporation Act (Cap. 318, R. E. 2019). He further stated that it is the Registered Trustees of Organisation which has power to sue and be sued as it was stated in the case of **Ilela Village Council v. Ansaar Muslim Youth Centre and Another**; Civil Appeal No. 317 of 2019 and **Halima James Mdee & Others v. Board of Trustees of CHADEMA & Others**, Misc. Cause No. 16 of 2022 [2022] TZHC 10206: [22nd June 2022: TanzLII]. He argued that in this appeal Rabon Centre Ministries Church is incompetent.

Replying to the first ground of appeal, the Respondent's advocate submitted that the trial Tribunal was correct in law and fact to hold that the first Appellant breached the contract on the fact that the first

contract was not voidable on the ground that they had sufficient consideration in their contract and they agreed to pay the agreed consideration in instalments even though the contract did not expressly stipulate when to pay the remaining balance and it was still valid at the time the first Appellant sold the house to the second Appellant.

He went on contending that the first Appellant was bound with the contract he entered with the Respondent and he was to respect the terms of the contract as it was held in the case of **Unilever Tanzania Ltd. v. Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009 (unreported) and **Mariam E. Maro v. Bank of Tanzania**, (Civil Appeal 22 of 2017). [2020] TZCA 1789: [30th September 2020: TanzLII].

Having gone through the submissions made by the parties, I find on the first ground of appeal the issue is whether there was sufficient consideration in the contract entered between the first Appellant and the Respondent. In the law of contract, the term consideration has it is fundamental concept. It refers to something of value that each party to a contract gives or promises to give to the other party. As a matter of fact, consideration is an important element because it demonstrates that the parties have exchanged something of value, which creates a mutual

obligation and ensures fairness in the contract. It is an essential element for the formation and enforceability of a valid contract.

In any contractual relationship, there are some key considerations. **First** is mutuality. Both parties to the contract must provide consideration. This simply means that each party must give or promise something of value to the other. For example, in a sales contract, the buyer provides money (consideration) in exchange for the seller providing a product or service.

In the case at hand, the evidence shows that there were mutual obligations between the first Appellant and the Respondent. They agreed that the Respondent must pay TZS. 9,000,000.00 to the first Appellant for an agreement that the first Appellant will give Plot No. 573, Block 'DD' located at Bombambili area, Mtakuja Street within Songea Municipality and Ruvuma Region. The evidence shows further that, the Respondent paid TZS. 7,050,000.00 to the first Appellant and the remaining amount was to be paid according to their contract. For what they did, I am on the view that, it amounted to consideration.

The first Appellant, sold the disputed land to the second Appellant after finding that the Respondent has failed to pay the remaining party of the agreed costs and according to the Respondent's testimony, the

remaining amount is TZS. 1,950,000.00. In fact, the first Appellant sold the disputed piece of land to the second Appellant without informing the Respondent who had already paid some of the buying costs in respect to the same land. Therefore, I am of the view that, the first Appellant had no capacity to sell the land to the second Appellant without obtaining consent from the Respondent even if he had not paid full amount of the agreed price.

Second, any consideration must have legal value. This means that it must be something that the law recognizes as valuable. For example, a promise to do something illegal or impossible would not be considered as a valid consideration. As I have stated above, in this appeal, the consideration agreed by the parties has legal value and it was a result of genuine bargain between the parties.

Third, the consideration made between the two parties must be executory or executed contracts. It is important to note that, in an executory contract, consideration is exchanged at the time the contract is formed, but the actual performance of the contract occurs in the future. In fact, in an executed contract, the consideration has already been fully exchanged and the parties have performed their obligations.

In that regard, I find the first Appellant and the Respondent performed their mutual obligations. Thus, in any case, the second Appellant wrongly purchased the disputed land from the first Appellant and the contract for the sale was invalid.

The fourth element of consideration is nominal consideration. In some cases, nominal or token consideration may be used to make a contract legally binding. For example, a contract may be based on the exchange of money and documents as a symbolic gesture to signify the intention to create a legal relationship. This is the intention to create legal relationship. It creates legal agreement obligations to the parties.

In the instant appeal, the agreement between the first Appellant and the Respondent had an intention to have legal relationship since there was exchange of money which the Respondent paid the first Appellant for the purpose of buying Plot No. 573, Block 'DD', Bombambili area, Mtakuja Street within Songea Municipality and Ruvuma Region.

Another factor is capacity to enter into contract. The parties entering into a contract must have the legal capacity to do so. This simply means that they must be of sound mind and not under duress or undue influence. In this appeal the Respondent has capacity to enter into contract with the first Appellant.

It is true that, consideration is a crucial element in any contract. Without it, a contract may be unenforceable. It helps ensure that both parties in the contractual relationship have something to gain from the agreement and that the contract is entered into freely and with mutual benefit.

The evidence given before the trial Tribunal shows that, the Respondent paid TZS. 7,050,000.00 to the First Appellant for the aim of buying Plot No. 573, Block 'DD', Bombambili area, Mtakuja Street within Ruvuma Region. Exhibit ZS1 shows that the Respondent was the legal buyer of the disputed piece of land which later on the first Appellant decided to sale for the second time to the second Appellant.

At the time the first Appellant sold the disputed land to the second Appellant, the Respondent was already in possession of the title deed even though the ownership was not passed from the first Appellant to the Respondent. One might wonder where had she got the title deed if there was no any agreement between the first Appellant and the Respondent for the sale of Plot No. 573, Block 'DD', Mtakuja Street within Songea Municipality and Ruvuma Region.

In my view, I find there was a valid and sufficient consideration between the first Appellant and the Respondent for sell of the disputed

Plot No. 573, Block 'DD', located at Bombambili area, Mtakuja Street, within Songea Municipality.

I agree with the Respondent that, she has a valid legal claim over Plot No. 573, Block 'DD', located at Bombambili area, Mtakuja Street within Songea Municipality since her contract for the sale of that piece of land is not voidable but a valid contract. Thus, the first ground of appeal is unfounded and it is dismissed.

As far as the second ground of appeal is concerned, Mr. Dickson Ndunguru argued that; the trial Tribunal erred in law and fact by not holding that the second Appellant was a bona fide purchaser for value. From the original records of the trial Tribunal, it is clear that the second Appellant paid money to the first Appellant with the aim of buying the disputed piece of land. He averred that, money was paid after making an official search at the office of the relevant authority and found that the land was the property of the first Appellant and not the Respondent. His reference was on the decision made in the case of **John Thomas v. Kam Commercial Service and Others**, Land Appeal No. 261 of 2020 (unreported), the Court stated that a bona fide purchaser is always protected for value paid.

In his reply to the second ground of appeal, the Respondent's advocate, Mr. Kitara Mugwe, submitted that, the trial Tribunal was correct in law and fact in not holding that the second Appellant was a bona fide purchaser for value since the contract between the first Appellant and the second Appellant was made in 2019 while there was already another valid contract between the first Appellant and the Respondent, which was previously made in 2015. He submitted further that the contract between the first Appellant and the second Appellant was a subsequent contract and it was made at their own peril since the first Appellant was aware that there was another valid contract. He added that, in conveyance it is an essential rule of practice that a buyer of land must make sure that the seller or vendor has a valid title to the land and the land is free from any encumbrances or disputes.

Besides, he contended that, the rule of caveat emptor (buyer beware) plays a significant role in sales of land and transfers of land. Lastly, he stated that, the second Appellant was not a bona fide purchaser on a subsequent contract since it was made on its fault and negligence for failure to conduct physical search in order to have an actual notice on the suit land.

Before I embark in discussing on the second ground of appeal, I will start by giving the meaning of the term "*a bona fide purchaser*". This is a legal term used in the context of property law and contracts. Actually, it refers to a person who acquires property or assets in good faith for value (meaning they have paid something of value in exchange of the property) and without notice of any competing claims or interests in the property. Basically, Bona fide purchasers are often granted certain legal protections and rights in cases of property disputes.

The key characteristics of determining a bona fide purchaser includes; First, in good faith. The bona fide purchaser must have acted honestly and without fraudulent intent when acquiring the property. Thus, he should not have knowledge of any irregularities or competing claims to the property. *Second*, is value. The bona fide purchaser must have provided something of value such as money, goods or services in exchange for the property. Value distinguishes them from mere gift beneficiaries. *Third*, is lack of notice. *Bona fide purchasers* should not have any notice or knowledge of competing claims or interests in the property. If they were aware of any potential issues but proceeded with the transaction they might not be considered as bona fide purchasers. Generally, the term bona fide purchaser is often used to mean a third

party who innocently acquires properties without being aware of prior claims or disputes and they are always protected by the law.

In the instant appeal, I am of the view that, the issue of a bona fide purchaser is not established since the first and second Appellants entered into the contract while they were quite aware that the land has already sold to the Respondent. Thus, I agree with the Respondent's advocate that, in conveyancing, it is an essential rule of practice that a buyer of land must make sure that the seller or vendor has a valid title to the land and the land is free from any encumbrances or disputes. I find that, the second Appellant cannot claim to be a *bona fide purchaser* of the suit property since he failed to find if the first Appellant was the owner of the land in dispute.

Also, the Respondent's advocate argued that, in order for the second Appellant to claim for bona fide purchaser, he was to abide with the principle of caveat emptor. He averred that it was the responsibility of the second Appellant to have a constructive notice before deciding to buy the disputed piece of land. He was bound to ensure he uses all his diligence to find whether the disputed land has no any encumbrances. He would have did so by getting information from the neighbor's

surrounding the disputed land before paying the money to the first Appellant.

Normally, the caveator emptor principle requires the buyer to be aware and the seller to provide accurate and complete information about their products, when they sell to consumers. This is due to the fact that, the seller always has more information than the buyer. In the instant appeal, the first Appellant while knowing that he had sold the disputed land to the Respondent, he also received money from the second Respondent being the second buyer. I find both the first and second Appellants failed to disclose and find necessary information before making their transactions.

It has come into my knowledge that; the issue of caveat emptor highlights the importance of making due diligence for buyers. It is important to know that, the modern consumer protection laws have shifted towards "*caveat emptor*," which means that; "let the buyer beware." This concept places greater responsibility to buyers. The buyer is responsible for checking the quality and suitability of goods before the purchase process is completed. Actually, the seller is duty bound to provide accurate information and deliver products or services that meet the expectations and standards of the market (emphasize is mine).

But in practice, both buyers and sellers have rights and responsibilities in commercial transactions, and these are influenced by the *Law of Contract Act (supra)* and the *Sales of Goods Act (Cap. 214, R. E 2002)* which seek to strike a balance between the interests of both parties.

Thus, the first Appellant was supposed to adhere to the consumer protection laws, which have introduced some limits on the strict application of "caveat emptor" by requiring the buyer and the seller to provide accurate information, especially when selling to consumers.

Despite the principle of "caveat emptor," many industries and businesses voluntarily adopt practices and standards to provide transparency and build trust with customers. Similarly, providing accurate information and quality products or services is often seen as good business practice and can help businesses establish a positive reputation and customer loyalty.

For the condition I have mentioned above; the seller (first Appellant has an obligation to return the money received from the second Respondent by selling Plot No. 573, Block 'DD', located at Bombambili area within Ruvuma Region. Finally, I find the second ground of appeal has no merit and I dismiss it accordingly.

On the third ground of appeal that, the trial Tribunal erred in law and fact in not holding that the contract was void since the time for the payment of the remaining amount of money was uncertain, the Appellants' advocate has argued that without an express clause in the contract as to the limitation of time for the payment of the remaining sum, under section 29 of the Law of *Contract Act* (Cap. 345, R. E. 2019) such contract is termed as void contract. He added that, the Respondent's failure to pay the remaining sum contravened section 37 of the Law of *Contract Act (supra)*, hence breach of contract by the Respondent and not the first Appellant. He added that since the Respondent failed to make full payment there was nothing that could have prevented the first Appellant to find the new buyer and re-sale his land.

On the contrary, the Respondent's advocate, submitted that, the trial Tribunal was correct in law and fact by not holding that the contract between the first Appellant and the Respondent was void for being uncertain as to the time of its execution.

He added that, the law provides different kinds of execution of contracts in regard to the time and place of performance, and where the time of performance is not specified, it does not make the contract to be

void. To buttress her argument, he referred this Court to the provision of sections 46 and 55 (2) and 55 (3) of the Law of Contract Act (supra). He averred further that, a contract may be performed or executed in any manner and at any time as provided under section 50 of the Law of *Contract Act* (supra).

Thus, in this appeal, the sale agreement between the first Appellant and the Respondent has no time limitation, even though they agreed that the payment of the remaining balance would be made in instalments. It was agreed so after taking into consideration that the parties are family members.

On my party, after perusal of the Court records, I have observed that the contract between the first Appellant and the Respondent which was admitted as exhibit ZS1 before the trial Tribunal. The issue is on the terms of the contract. In the submission made by the Appellants' advocate, there is no doubt that the first Appellant had contract for the sale of Plot No. 573, Block DD located at Bombambili area within Songea Municipality.

Also, the available evidence shows that, they agreed for the payment of the purchase contract to be made by instalments since the Respondent had no capacity to pay the whole amount of the purchase

money in a lump sum. The Respondent paid TZS. 7,050,000.00 and she was owed TZS. 1,900,000.00 only which the first Appellant refused to receive from the Respondent and decided to sell the disputed land for the second time to the second Appellant.

Principally, a voidable contract is one that is fundamentally flawed and may be cancelled or voided under certain circumstances, such as fraud, duress, or lack of capacity. Since Plot No. 573, Block 'DD', located at Bombambili area within Songea Municipality was sold to the Respondent, the second Appellant was required to have constructive notice that there was another contract between the first Appellant and the Respondent.

Therefore, the contract of sale between the first Appellant and the Respondent was valid and not voidable as complained by the learned advocate for the Appellants.

In this appeal, several legal principles may come into play: First, is on the available evidence. The evidence presented by both parties, including the exhibits tendered, which are exhibits ZS1 and KU1, I find the question is whether the contract between the first Appellant and the Respondent was voidable. As it was emphasised in the first ground of appeal, to prove that the contract was voidable, the first Appellant was

required to show that there were factors for voidable contract such as fraud or lack of capacity. But the first Appellant has failed to show that there were any the factors for a contract to be declared voidable.

Lastly, I find the Respondent was the first buyer in the sense that she bought that particular piece of land before the second Appellant bought it. Both contracts were received as exhibit exhibits ZS1 and KU1. One important thing I would like to remind the trial Tribunal is that, when admitting exhibits, they are supposed to mark as exhibit P1, exhibit P2 for the plaintiff, applicant or prosecution and exhibits D1 or D2 for the defence or respondent.

Surprisingly, in this case the exhibits are given difficult names. It is not wrong to exhibit with letter ZS1, as in this case, the Applicant's exhibit and for the Respondent as exhibited as KU1. This system of naming exhibits gives long names. I am of the view that, the tribunal must use the regular system of naming exhibits. This will help to reduce confusion and for purpose of clarity and uniformity.

Conclusively, in the light of what has been discussed above; I find this appeal has no merit and it is dismissed in its entirety. The decision and orders of the trial tribunal are upheld. In the circumstances of this case, I give no order as to costs. It is ordered accordingly.

DATE and **DELIVERED** at **SONGEA** this 06th day of December, 2023.




U. E. MADEHA

JUDGE

06/12/2023

COURT: Judgment is delivered in the presence of the first and second Appellant and Mr. Kitara Mugwe, the learned Advocate for the Respondent. Right of appeal explained.




U. E. MADEHA

JUDGE

06/12/2023