IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

HC. LAND APPEAL NO. 30 OF 2023
(Arising out from the decision of Land Application No. 47 of 2019 – in the District Land and Housing Tribunal for Maswa at Maswa, Hon. J.T. Kaare – Chairperson)

MILEMBE NG'WINA.....APPELLANT
VERSUS

CHONZA SHANG'WAWALWA.....1ST RESPONDENT
CHARLES NDALAHWA.....2ND RESPONDENT
JOHN MASOTA.....3RD RESPONDENT

JUDGMENT

Date of last Order: 01.11.2023
Date of Judgment: 15.11.2023

MWAKAHESYA, J.:

This appeal emanates from the decision of the District Land and Housing Tribunal for Maswa at Maswa (hereinafter referred to as DLHT) in Application No. 47 of 2019 that was delivered on 12.05.2023, Hon. J. T. Kaare, Chairman.

A brief background of the matter is that in the DLHT the appellant, Milembe Ng'wina, instituted Land Application No. 47 of 2019 seeking to be declared the lawful owner of the disputed piece of land measuring 25 acres. She alleged that in the year 2000 she left the disputed land in the

care of her son, Charles Ndalahwa (the second respondent) while she went to Tabora to seek medical care. Upon her return in the year 2011 she found the land in possession of the first respondent, Chonza Shang'wala. Meanwhile, the second respondent and the third respondent, John Masota, denied selling the disputed land to the first respondent but claim that they each took loans from the first respondent in the year 2001 and 2004, respectively pledging the disputed land as security. Upon seeking to redeem the land the first respondent refused. The DLHT found in favour of the first respondent and held that he had purchased the disputed land from the second and third respondents legally and the same were the rightful owners when they sold the land.

The appellant being aggrieved, has filed a petition of appeal containing four (4) grounds which are to the effect that:

1. The Hon. Chairman of the Tribunal erred in both law and fact by giving his judgment which does not reflect on the evidence adduced on record and without considering the judgment of this court (Land Appeal No. 08 of 2021 – Hon. Mkwizu, J);

2. The Hon. Chairman of the Tribunal erred in both law and fact by giving his judgment basing on the opinion of the assessors which was previously given in favour of the appellant;
3. The Hon. Chairman of the Tribunal erred in both law and fact by permitting documents which have been altered as evidence; and
4. The Hon. Chairman of the Tribunal erred in both law and fact by deciding that one can transfer to another ownership of land which he has no adequate ownership.

The appellant prays for the following orders:

a) The appeal be allowed with costs;
b) The appellant be declared as the lawful owner of the suit premises; and
c) Any other reliefs as this Honorable Court may deem fit to grant.

At the hearing of the appeal the appellant was represented by Mr. Alex Lwoga, learned advocate, while the first respondent was represented by Mr. Emmanuel Rugamila, learned advocate. The second and third respondents appeared in person and fended for themselves.

On the first ground of appeal Mr. Lwoga submitted that, the decision of the DLHT was to the effect that Application No. 47 of 2019 was time barred, while Land Appeal No. 08 of 2021 had already decided that the appellant's claim was not time barred. Therefore, the DLHT repeated the same mistake that had already been corrected by the High Court.

On the second ground of appeal the learned advocate submitted that, when Land Appeal No. 08 of 2021 was filed there was already an opinion of assessors and when the file was remitted to the DLHT a separate opinion, contrary to the previous opinion, was given.

On the third ground of appeal, Mr. Lwoga submitted that, exhibit D1 tendered at the DLHT has two distinct hand writings and was scribbled over (corrected). The DLHT was wrong in admitting and using such doubtful exhibit to make a decision.

Regarding the fourth ground of appeal the learned advocate submitted that, the second and third respondents were care takers of the disputed land and the first respondent testified that the disputed land was sold to him by the second and third respondents. Meanwhile, the second and third respondents had no good tittle to pass.

Therefore, he submitted, even after tendering exhibit D1 the same does not make the first Respondent the owner of the land because he got it from persons who had no tittle.

Mr. Rugamila responded to the first ground of appeal by submitting that, the matter before the DLHT was time barred because the disputed land was sold in the year 2001 and 2004 following the failure of the second and third respondents to redeem it. It was only in the year 2018 when the appellant complained at the DLHT (through Land Application No. 60/2018) that the disputed land belonged to her and not the second and third respondents.

He submitted further that, the second and third Respondents have not disputed that they had pledged the land as security for a loan and that later on the land was sold, the sale being witnessed by the Dutwa Primary Court. Mr. Rugamila submitted that, at the DLHT the appellant did not testify that she left the disputed land to the care of second and third respondents. Also, the second and third respondents did not deny that they pledged the land as security for a loan and sold it.

Mr. Rugamila was adamant that, according to the law of Contract Act any agreement is enforceable when it is executed with free consent and lawful consideration. The consideration paid in 2001 was Tshs. 1 million for 15 acres and in the year 2004 the consideration was Tshs. 2 million and the second and third respondents signed the sale agreements.

The learned advocate submitted that, in the 2018 Application (Land Application No. 12/2018) it was testified to the effect that the appellant returned from Tabora in 2011. However, she started to demanding for her land after eight (8) years, and all along since she had returned the first appellant was using the disputed land undisturbed. This means that the appellant had acquiesced to the sale of the land.

Because the appellant did not complain, he submitted that the cause of action arose in the year 2001 and 2004 when the land was pledged as security and that the first respondent has been in uninterrupted possession of the land for more than twelve (12) years until the appellant came to disturb him in the year 2018.

The learned advocate referred to the Court of Appeal decision of **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019

(unreported) where the Court was of the view that uninterrupted possession for twelve (12) years or more makes the occupier of the land the owner.

Replying to the second ground of appeal, the learned advocate submitted that, the DLHT arrived at its decision after evaluating the evidence presented and the opinion of the assessors.

Section 24 of the Land Disputes Courts Act provides for the issue of opinion of the assessors. The chairman of the DLHT agreed with the assessors. There was no problem in the DLHT doing so. The opinion given in Land Application No. 47 of 2019 where the assessors were of the view that the evidence of the first respondent carried weight.

On the third ground of appeal, Mr. Rugamila submitted that, regarding the exhibits being overwritten it is a matter of evidence and no alterations were made. The document was prepared by the village government, the office VEO, the 2001 exhibit was also prepared by Mwakibuga, both do not have alterations. Even those made by the Primary Court of Dutwa at Bariadi do not show any alteration. All the exhibits were signed by the second respondent and the third respondent.

On the fourth ground of appeal the learned advocate submitted that, because the second and third Respondent executed the sale agreements it shows that they had authority over the land and nowhere was it shown that they were forced into entering the said agreements. Moreover, it shows that they are the ones who approached the first respondent and offered to sale the land.

The second respondent in reply submitted to the effect that the disputed plot belongs to his mother and he pledged it as security. He did not want to sell it but the first respondent insisted on the sale.

Meanwhile, the third respondent submitted that, he did not sign the second deed of sale of 2004 and that his name was superimposed on the document.

In a brief rejoinder Mr. Lwoga submitted that, regarding time limitation, the matter was already settled by this court, Hon. Mkwizu, J. He submitted further that, the assessors gave their opinion twice, which is an anomaly.

Having gone through the records and the rival parties' submissions I will proceed to determine the appeal and in doing so I will endeavor to

deal with the grounds of appeal as submitted by the parties and being aware that this being a first appellate court, I can reappraise the evidence at the hearing and come up with my own conclusion if need be, see: **Future Century Limited vs TANESCO**, Civil Appeal No. 5 of 2009 and **Melchiades John Mwenda vs Gizelle Mbaga & Others**, Civil Appeal No. 57 of 2018 (both unreported).

The first ground of appeal appears to have two limbs, which are: that, the DLHT judgment does not reflect the evidence on record; and that, the DLHT judgment did not consider the judgment of this court in Land Appeal No. 8 of 2021.

Regarding the first limb, the DLHT was of the view that the second and third respondents sold parts of the disputed plot in the year 2001 and 2004. However, a close scrutiny of exhibits Dw1 and Dw2, tendered by the first respondent as proof of the sale, reveal that the said exhibits are not sale agreements but rather agreements for the advancement of loans from the first respondent to one Charles Mbizo and John Mbizo. In securing the loans, plots of land measuring 15 acres and 10 acres were pledged.

The agreements for sale of land measuring 15 acres and 10 acres are contained in exhibit Dw3. The same are dated 16.9.2009 and 12.09.2014, respectively. However, they do not bear the second and third respondents' signatures.

Having found that exhibit Dw1 and Dw2 are not sale agreements, it goes without a doubt that the second and third respondents did not sell any land to the first respondent in the year 2001 or 2004. More proof of this can be found in the attempts of the first respondent to purchase land measuring the same acreage in the year 2009 and 2014.

It is trite law that every witness is entitled to credence unless there are good and sound reasons for not believing a witness, see: **Christian Ugbechi vs Republic**, Criminal Appeal No. 274 of 2019; and **Goodluck Kyando vs R** [2006] TLR 363. In this matter, the first respondent in his testimony, under oath, at the DLHT testified that the second respondent approached him in the year 2001 and offered to sell his land measuring 15 acres because he was shifting to another village. The first respondent testified further that, he paid the purchase price and the two executed a sale agreement dated 25.10.2001 (exhibit Dw1). However, as stated previously, exhibit Dw1 reflects otherwise. It shows that one Charles Mbizo

has pledged a 15 acres piece of land as security for a loan of Tshs. 1,000,000/=. In fact, exhibit Dw1 does not even suggest that the land belongs to the said Charles Mbizo.

The same goes with regards to the transaction of 2004. The first respondent testified before the DLHT that, the third respondent approached him in the year 2004 and offered to sell a piece of land measuring 10 acres at a price of Tshs. 2,000,000/= and the first respondent accepted the offer and executed a sale agreement, with the third respondent, dated 8.5.2004. However, exhibit Dw2 suggests otherwise. It shows that it is an agreement for a loan of Tshs. 2,000,000/= from one Chonza Shang'wa to John Mbizo, and a piece of land measuring 10 acres was pledged as security. Exhibit Dw2 is not a sale agreement as testified by the first respondent.

At the DLHT the second respondent testified that the 15 acres piece of land belongs to the appellant and that when he offered to return Tshs. 1,000,000/= to the first respondent, the latter refused.

The third respondent denied neither to have sold any land to the first respondent nor execute any agreement for sale. This is consistent with

what can be seen in exhibit Dw3 which are two sale agreements. The first being for land measuring 15 acres between Charles Mbizo and Chonza Shang'wa (dated 16.09.2009) and the second being a sale agreement for land measuring 10 acres between John Mbizo and Charles Mbizo on one side and Chonza Shang'wa, it is dated 12.9.2014. The agreement dated 12.9.2014 is inconsistent with the first respondent's version of events because if it was the third appellant who approached him to sell land measuring 10 acres, then there is no reasonable explanation as to why it reflects that the vendors are two people (John Mbizo and Charles Mbizo). It should also be noted that, in both agreements (exhibit Dw3) the vendors did not append their signatures. In fact, the first respondent when cross-examined by the second respondent responded that the second respondent did not sign a sale agreement when he sold the land to the first respondent.

It is equally important to note that, all the witnesses for the first respondent testified towards the first respondent purchasing the disputed land in two phases, the first being in the year 2001 and the second in 2004.

In light of the above, this court finds that the first respondent was not truthful in his testimony at the DLHT and had the DLHT made a proper evaluation and thorough analysis of the evidence produced before it, it would have reached a different conclusion.

Turning to the second limb of the first ground of appeal. It seems that, the honorable chairman of the DLHT still had the issue of time limitation in his mind when he was composing the judgment of the DLHT. I say so because at page 3-4 of the judgment it is stated:

> *"Katika maelezo yake mdai anaeleza tu kwamba aliondoka na kwenda Tabora na akamuachia mdaiwa wa pili eneo la mgogoro ili amtunzie. Lakini mdai haelezi aliondoka lini na wala haelezi ni lini alirudi na kukuta eneo hilo limeuzwa na kwa kuwa eneo la kwanza liliwekwa rehani na kuanza kuwa mikononi kwa mdaiwa wa kwanza mwaka 2001 na pili mwaka 2004, kufikia mwaka mdai anafungua shauri hili mwaka 2019 tayari ni zaidi ya miaka kumi na tano ilikuwa imepita.*
>
> *Kwa upande wa mdaiwa wa kwanza, amekuwa akilitumia eneo la mgogoro baada ya kulinunua bila bughudha yoyote. Hii ni kwa sababu alinunua eneo hilo toka kwa mdaiwa wa pili na wa tatu na alifanya hivyo mbele ya mashahidi akiwepo mwenyekiti wa kitongoji aliyethibitisha kwamba mdaiwa wa pili na wa tatu waliweka rehani na kuuza maeneno yao na wala sio eneo la mdai. Hivyo*

nakubaliana na wajumbe wa baraza kuwa mdaiwa wa kwanza amenunua eneo lake kihalali."

This can be translated as:

"In her testimony, the appellant stated that she left for Tabora leaving the disputed land in the care of the second respondent. However, she did not specify as to when she left and when she found out that the land was sold. ***Because the land was pledged as security and fell into the hands of the first respondent in the year 2001 and 2004, by the year 2019 when the applicant filed this application more than 15 years had lapsed****. On the part of the first respondent, he has been in uninterrupted possession of the disputed land since he purchased it. This is because he purchased it from the second and third respondents, a transaction that was witnessed by the kitongoji chairman who confirmed that the second and third respondents had pledged their pieces of land and sold them and not the applicant's land. Therefore, I agree with the assessors that the first respondent legally purchased his land."* (Emphasis supplied).

The issue of time limitation having been specifically ruled out by this court in Land Appeal No. 8 of 2021, Hon. Mkwizu, J. was not open for the DLHT to delve into. I therefore, find merit in the first ground of appeal and allow it.

The second ground of appeal was rather crafted in an unfathomable manner. However, the gist of it seems to be, as alluded by the appellant's counsel, that the DLHT assessors gave opinions twice, the first time being when the matter was before them prior to institution of Land Appeal No. 8 of 2021 and the second time being subsequent to the High Court remitting Land Application No. 47 of 2019 to the DLHT. The learned counsel for the first respondent replied that, the DLHT arrived at its decision after evaluating the evidence presented and the opinion of the assessors.

This ground need not detain us much. The decision of this court in Land Appeal No. 8 of 2021 was to the effect that the proceedings of the DLHT dated 23.11.2020 to 5.2.2021 were nullified. Going back to the typewritten proceedings of the DLHT, prior to Land Appeal No. 8 of 2021, at page 32 when the matter came before it on 23.11.2020 the assessors' opinions were not ready. It reads:

> *"The matter is coming for assessor opinion and not already (sic) fixed for another date."*

However, in the typewritten proceedings of the DLHT post Land Appeal No. 8 of 2021 at page 4 it reads:

"Nilikuwa ninatoa amri kwamba shauri lilikuwa lije kwa kusikilizwa lakini nimepitia hukumu ya Mahakama kuu na nimeona kuwa amri ni ya wajumbe wa baraza kutoa hukumu. Hivyo ninaondoa amri ya kusikiliza kwa sasa natoa amri kuwa shauri lije kwa maoni ya wajumbe wa baraza."

This can be translated that the matter was coming for judgment but the chairperson of the DLHT then ordered that it should come for assessors' opinions. And at page 6 of the same it goes:

"Shauri linakuja kwa maoni ya wajumbe wa baraza na wametoa maoni yao."

This is translated as:

"The matter is coming for assessors' opinion and they have given their opinion."

Bearing what is shown in the proceedings this court cannot find that the assessors gave their opinion twice. Therefore, the second ground of appeal is devoid of merit.

The third ground of appeal is to the effect that the chairman of the DLHT wrongly admitted exhibit D1 while the same had two distinct hand writings and was scribbled over (overwritten). Counsel for the first respondent replied that, no alterations were made to the said exhibit.

Before deciding on this ground, I have noted that there is not a single exhibit tendered at the DLHT bearing the marking (s) of "**exhibit D**"; rather the exhibits bear the markings of "**exhibit Dw**...". Since the counsel for the first respondent has referred to it as exhibits prepared in 2001 and 2004, upon a close look at the exhibits tendered at the DLHT and proceedings of the DLHT, prior to Land Appeal No. 8 of 2021, those exhibits bearing the year 2001 and 2004 are marked as **exhibits Dw1** and **Dw2**, respectively. I will therefore, treat reference to exhibit D1 to mean exhibit Dw1.

This ground need not detain us much either. Whether, the said exhibit was doctored or not and the weight to be accorded to it is a matter of evidence and it was upon the appellant to discredit it at the DLHT through cross examination of the witness who tendered it. A close look at page 16 of the proceedings of the DLHT (prior to Land Appeal No. 8 of 2021) shows that when the exhibit Dw1 was being tendered by the first respondent, on 15.07.2020, the appellant did not object at all. Therefore, the third ground of appeal fails.

In relation to the fourth ground of appeal. The DLHT was of the view that the second and third respondents sold their land and not the

applicant's land. That is clearly stated at page 4 of the judgment. In no explicit terms did the DLHT suggest that one can transfer to another ownership of land which he has no adequate ownership. The relevant part reads:

> *"...mdaiwa wa pili na wa tatu waliweka rehani na kuuza maeneno yao na wala sio eneo la mdai..."*

Translated as:

> *"...the second and third respondents had pledged their pieces of land and sold them and not the applicant's land..."*

Therefore, I find that the fourth ground is devoid of merit.

In the final analysis having found merit in the first ground of appeal, this appeal is allowed with costs. The judgment and decree of the District Land and Housing Tribunal for Maswa at Maswa is hereby quashed and set aside and the appellant is declared as the lawful owner of the suit land.

It is so ordered.

THE HIGH COURT OF TANZANIA

N.L. MWAKAHESYA

JUDGE

15/11/2023