IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 8 OF 2023

(Arising from Land Application No. 15 of 2021 at the DLHT for Mtwara at Mtwara)

KILANGO SEMU MJEMA ---------- APPELLANT

VERSUS

ABDALLAH MOHAMED MNALIDI ---------- RESPONDENT

Date of last Order: 12.07.2023
Date of Judgment: 14.12.2023

JUDGEMENT

Ebrahim, J.:

This appeal arises from the decision made in Land Application No. 15 of 2021 of the District Land and Housing Tribunal for Mtwara at Mtwara (Hereinafter referred to as the tribunal) dated 13th January, 2023 filed by the appellant herein. The appellant's claim before the tribunal was on unsurveyed land. He averred to have purchased unsurveyed land located at Sokoine Village Miembeni, Chaume

Ward within Mtwara Region from the respondent on 04.04.2020 at a consideration of TZS. 1,200,000/=.

The appellant called one Fredrick Alexander Ammingi as his witness who testified as SM2. SM2 told the trial Tribunal that he purchased the suit land for the appellant from the respondent and he tendered Exhibit P1 (sale agreement). SM3 testified to have witnessed the sale of the suit land.

Defending his position, the respondent testifying as DW1 and told the trial Tribunal that the appellant purchased the suit land from him. His claim is on the fact that he has built a communication tower on the disputed land instead of building a residential house. Thus they entered into an agreement again to pay back the appellant TZS. 5,000,000/= so that he returns the suit land.

After hearing the evidence from both sides and considering the opinion of the assessors, the trial Chairman found that the appellant failed to prove his claim to the required standard and decided in favour of the respondent.

Aggrieved by the decision of the tribunal, the appellant opted to lodge an appeal in this court raising nine grounds of appeal. The nine grounds of appeal raised one issues for determination that is; **Whether the appellant is the lawful owner of the suit land.**

Hearing of the appeal proceeded by way of written submissions. The appellant had the services of Mr. Hussein Hashim Msekwa, the learned advocate while the respondent appeared in person, unrepresented.

Arguing the appeal, Mr. Msekwa abandoned the 4th, 6th, and 7th grounds of the appeal.

I have carefully considered the appellant's complaints. Starting with the 1st ground of appeal Mr. Msekwa argued that **Section 2 of the Village Land Act** defines village land to mean the land declared to be village land in accordance with **Section 7 of the Village Land Act**, the land to be termed as village land must be within boundaries of the registered village and it must be designated as village land under the **Village Tenure (Village Settlement) Act, 1965.** The suit land is within the boundaries of the village but it is not designated as village land under the Land Tenure. He further argued that village

council is a legal entity which has power to manage the use of the village land. The village council recognised the respondent to be the lawful owner of the suit land and they approved the sale of the suit land to the appellant. Hence there was no need of convening the Village Assembly. Due to that the appellant was a bonafide purchaser and lawful owner of the suit land.

Submitting against the 1st ground of appeal, the Appellant submitted that the trial Tribunal never declared the suit land to be a village land. The respondent is the legal owner of the suit land with regard to the ascertained truth that the appellant failed to follow the required procedure of obtaining land in the village which he does not reside thereto. He submitted also that DW2 was assigned by his employer to see as to whether the procedure to acquire the suit land by the appellant was properly done. Later on, they mutually agreed to rescind their sale agreement and the appellant agreed to be paid TZS. 5,000,000/= out of which TZS. 1,200,000/= being the selling price and the remaining TZS. 3,600,000/= as compensation. To cement his argument, he cited the case of **Priskila Mwainunu vs**

Magongo Justus (Land Case Appeal 9 of 2020) [2020] TZHC 3299 (16 October 2020).

In rejoinder, Mr. Msekwa insisted that the size of the land in dispute is 20X20 meters which does not require the village assembly for a person to sale his land. The law is very clear on the size of the land that require the village assembly to approve is fifty acres.

In adjudicating this case and being a civil matter, I shall be guided by the cardinal principle of the law that "*he who alleges must prove*". In the present case, the appellant seeks to be declared as the lawful owner of the disputed land. Therefore, the onus of proving his ownership of the suit land is upon him. This position was stated in **Godfrey Sayi vs Anna Siame as Legal Representative of the Late Mary Mndolwa,** Civil Appeal No. 114 of 2014 (CAT) (unreported) the Court of Appeal said that:

> *"it is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:*

> *110 Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist*
>
> *111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."*

Nevertheless, this being the first appeal, this Court has a duty to subject the entire evidence to re-evaluation and come to its own conclusion; aware of the necessity to do this cautiously acknowledging that the trial Tribunal was at better position to see, hear, and appreciate the evidence; see **Tanzania Sewing Machine vs Njake Enterprises Ltd** (Civil Appeal No 15 of 2016) [2016] TZCA 2041 (27 October 2016).

As hinted above, the appellant was accused by the respondent to have used the suit land contrary to their agreement.

As I have indicated above, the question whether the suit land was sold to the appellant was not at all an issue between parties. It is apparent on records that the appellant sued the respondent for claiming his parcel of land which he asserted that he purchased it from the respondent. To prove his claim, he recounted how he

acquired the suit land. He told the trial tribunal that he purchased the same from respondent and the two concluded a sale agreement (Exhibit P1) dated 04.04.2020 for the purpose of building a residential house. Later on, HTT infraco went to him and requested to rent the suit land and they built communication tower. Responding to cross-examination question, he told the trial tribunal that he has built a house with a single room occupied by a security guard. **SM2**, who assisted SM1 to buy the suit land, testified that they made a sale agreement with the respondent at Sokoine village office. They both signed the sale agreement and it was stamped by the Village Executive Officer (VEO). He further testified that HTT wanted to rent the suit land to build communication tower. HTT made all the arrangements to get the building permit which was obtained in the name of the appellant; then they started to build the tower. Sometimes later the respondent raised a dispute that the suit land is his. Following the respondent's claim, SM2 told him to refund them with TZS. 5,000,000/= so as they give him back the suit land. He contended also that there was no change of use of the suit land. **SM3**, testified to be a witness of the sale agreement. He added that

when the appellant was building his house reaching at the finishing stage, people emerged wanting to rent the suit land. When the building of the communication tower started, it was when the dispute on the suit land started. The respondent claimed that the suit land is for residential purposes only and not for building communication tower. SM1 told the respondent that he should pay him TZS. 5,000,000/= so as they end the dispute but the respondent did not have that money.

While advancing his testimony before the trial tribunal, the respondent (**DW1**) who was the seller did not dispute the fact that he sold the suit land to the appellant. He told the trial tribunal that he is disputing on what he had built there i.e., the communication tower instead of building a house. That they had an agreement that he reimburse the money so as to get back the suit land. He was required to pay the appellant TZS. 5,000,000/=. **DW2**, Legal Officer Tandahimba District Council testified before the court that he had to attend a file of people requesting for communication tower building permit. In the due process he discovered that those people have rented the suit land from the appellant. He made an inquiry to prove

how did the appellant obtain the suit land. He informed him that there were procedures which were not followed because there were only the minutes of the village council but there were no minutes of the village general meeting. At the same time the appellant requested for the communication tower building permit. Later on, they started to communicate with people who wanted to build the tower. So due to that they agreed with the appellant to return the suit land to the respondent with the consideration of TZS. 5,000,000/=. After that they had to rescind the contract between the HTT and the appellant. Later on they found no reason of disallowing the building of the communication tower so as the citizens could be availed services. They agreed to make a contract between HTT and the respondent. HTT refused to pay the respondent the rent fees until the issue of ownership is settled.

It is elementary principle in civil suits that parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. In the case of **Hemedi Saidi v. Mohamedi Mbilu**, (1984) TLR 113, the Court underscored that, it is not the

number of witnesses that counts most but the quality of the evidence.

In the instant case the sale agreement between the respondent and the appellant was witnessed and approved by the Village Executive Officer (VEO). In that context, the sale agreement between the respondent and the appellant is authentic.

Suprisingly, I cannot comprehend as to why did DW2 tell the appellant that he did not purchase the suit land procedurally. Consequently, he had to terminated the lease contract with the HTT but at the same time he told the HTT to sign the same contract lease with the respondent while he knew that the respondent had sold the suit land to the appellant?

As far as the available evidence is concerned, the appellant is the owner of the disputed land. The allegation that the respondent had an agreement with the appellant to build a residential house only has no proof.

Having determined the ownership of the disputed land, I now address some irregularities in the sale of customary rights of occupancy.

Section 61 (3) of The Land Act [CAP.113 R.E. 2019] provides that;

> *"For avoidance of doubt, dispositions of customary rights of occupancy shall be governed by customary law."*

And **Section 20 (1) of The Village Land Act [CAP. 114 R.E. 2019]** provides for the application of customary law on customary rights of occupancy. However, The Village Land Act [CAP. 114 R.E. 2019] does not provide any guidance on sale of customary rights of occupancy. The dearth of guidance obliges parties to revert to the principles of the law of contract whenever selling customary rights of occupancy. **Section 10 of The Law of Contract Act [CAP. 345 R.E. 2019]** provides for the basic elements of a contract. The said section provides that;

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void;"*

Therefore, the major requirements for contracts in disposition of customary rights of occupancy would be governed by the Law of Contract. The contract must be made in writing, it must be signed by the parties to signify consent; the parties must be competent to enter into a contract, there must be lawful consideration and such contract must be for the lawful object. However, customary rights of occupancy being a right over an immovable property just like any other right of occupancy, its transfer must be carefully documented to avoid further disputes.

Under the law, the grant and management of customary rights of occupancy is entrusted to the village council. A person wishing to have a customary right of occupancy may apply for it to the village council as per **Section 22 of the Village Land Act [CAP. 114 R.E. 2019]**. In my view, despite the fact that a certificate of customary right of occupancy may be applied for in a prescribed form; the village is still not excluded from the management of deemed right of occupancy because customary right of occupancy includes both the one given in a form of certificate and the deemed right of occupancy. In addition, **Section 8 (1) of the Village Land Act [CAP. 114 R.E. 2019]**,

imposes an obligation of the village council to manage all village land. The power of the village council on disposition of customary right of occupancy is further emphasized by **Section 31 (3) of the Village Land Act [CAP. 114 R.E. 2019]** which requires that a disposition of a derivative right shall require the approval of the village council having jurisdiction over the village land out of which that right may be granted.

Furthermore, **Section 147 (1) of the Local Government (District Authorities) Act [Cap. 287 R.E 2002]** empowers the village council to manage the affairs and business of a village. As may be gained from the above provisions of the law, the village council has power over the customary right of occupancy including deemed right of occupancy.

It is therefore inappropriate and illegal to disregard the approval of the village council whenever selling customary right of occupancy. The Court of Appeal of Tanzania when confronted with a similar situation in the case of **Bakari Mhando Swanga vs Mzee Mohamed Shelukindo & Others** (Civil Appeal 389 of 2019) [2020] TZCA 28 (28 February 2020) held that;

> *"Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council..."*

The Court of Appeal went on stating that;

> *"Under normal circumstances, it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings."*

Furthermore, the Court observed that;

> *"..... ..... The observation we make here is that there was no due diligence on the part of the appellant in the whole process of executing the purported deed of sale."*

Consequently, sale agreement on customary right of occupancy without the approval of the village council lacks authenticity and such disposition may be ineffectual as well. In my view, the sale of customary right of occupancy should take the following form: The seller after reaching an agreement with the buyer shall approach the village council. Members of the village council, the seller and purchaser shall identify the neighbours to the land and set-up

boundaries. It is always prudent to have standardised form for sale contracts which may be in the custody of the village council. At the end, the sale agreement may be signed by the seller, purchaser, neighbours to the land; and it may also be signed and sealed by the hamlet leader (Mwenyekiti wa Kitongoji), the Village Chairman and the Village Executive Officer.

In my view, the evidence adduced by Zuberi Seif Sarahani (DW2) leaves a lot to be desired. Moreover, placing reliance on this piece of evidence, there is no doubt that the respondent who sold the suit land to the appellant was a lawful owner of the suit land and he had good title to pass to the appellant. Due to that fact the procedure of selling the suit land was properly followed. Thus, the argument advanced by DW2 that the appellant did not follow the procedure to acquire the suit land, in my concerted position is devoid of merits because the suit land was properly sold by the respondent herein. The appellant acquired the suit land legally and he tendered documentary exhibit to prove ownership of the suit land. Once the seller has sold his land it means he has sold his rights over the said land. Therefore, the sale of the suit land (respondent)

had no rights over the suit land after he had disposed the suit land by way of sale.

Before I wind up, I must comment on the cited case of **Priskila Mwainunu vs Magongo Justus** (Land Case Appeal 9 of 2020) [2020] TZHC 3299 (16 October 2020) which was cited by the respondent. I have two observations; Firstly, the cited quote is quite different from the case at hand as of the fact that the appellant did not ask the respondent to top up the money but rather the appellant told the respondent to give him TZS. 5,000,000/= so that he can give him back the suit land, but he failed to do that. Secondly, as per page 14 of the cited case **Priskila Mwainunu vs Magongo Justus** (supra) the Court observed that: -

> *"However, this Court cannot bank on this information because, the seller did not testify before the trial tribunal and the WSD cannot be relied on due to the fact that it does not form part of evidence."*

Moreover, as the trial tribunal records reveals, the land dispute arose at the time when the appellant rented the suit land to HTT who were building the communication tower. There is when the respondent disputed that the said tower should not be built because it was not in

their agreement. Due to that the appellant and the respondent had an agreement that the respondent should pay TZS. 5,000,000/= to the appellant, but the respondent failed to do so.

I have keenly read and examined the trial tribunal's proceedings, documentary exhibits and judgment of the trial tribunal. I have also followed the rival contentious facts from both sides as per their written submissions. In my considered opinion, I find the grounds of appeal advanced by the appellant have merit. I allow the appeal and I hereby set aside the decision of the District Land and Housing Tribunal with costs. The appellant is a rightful owner of the suit land, the respondent or its agents are strictly restrained from interfering with the suit land.

Order accordingly.

R.A Ebrahim
Judge.

14.12.2023
Mtwara.