

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SUMBAWANGA  
AT SUMBAWANGA**

**LAND APPEAL NO. 19 OF 2022**

(Appeal from the Decision of the District Land and Housing Tribunal for Rukwa in  
Land Application No 12 of 2022)

**BETWEEN**

**SEZA DONGEA.....APPELLANT**

**Versus**

**KACHACHE ILINDILO.....1<sup>st</sup> RESPONDENT**

**MBOJE MASANGU.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

**MRUMA, J.:**

This Appeal emanates from the judgment and decree of Hon. J. LWEZAURA Chairperson dated 22<sup>nd</sup> June 2022 in Rukwa District Land and Housing Tribunal Land Application No 12 of 2019 in which the Appellant's claim instituted by way of Land Application dated 6<sup>th</sup> June 2020 was dismissed with costs. The grounds in the Memorandum of Appeal are that:-

1. That the trial tribunal erroneously in absence of certainty in size declared the 1<sup>st</sup> Respondent owner of the whole disputed land whom claimed, testified for and in regard with 14 acres out of 25 acres pleaded and proved to be the disputed land hence its judgment and proceedings null and vitiated [sic];

2. That the trial tribunal erred in law by determining the matter in favour of the 1<sup>st</sup> Respondent by solely basing on the sale agreements which had no evidential value for not indicating size and location of the disputed land as required by law;
3. That the trial tribunal erred in law and in fact by determining the matter basing on contradictory evidence of the Respondents hence reached to a wrong decision;
4. That the trial tribunal erroneously failed to properly analyse the evidence brought before it which completely proved the Appellant's to be the owner of the disputed land, hence reached a wrong decision.

Before I can delve to discuss the merits of otherwise of the appeal, let me clarify on what seems to be confusing as regards to the parties in these proceedings. During the trial the Appellant herein was the Applicant whereas **Mboje Masango** was cited as the **first Respondent** and later on **Kachache Ilindilo** was cited as the **second Respondent** after being joined in the matter. However in this appeal and for reasons which were not disclosed the said **Kachache Isindilo** was cited as the 1<sup>st</sup> Respondent while **Mboje Masangu** was cited as the **2<sup>nd</sup> Respondent**.

The backdrop to the Appellant's claim over the suit land is that sometimes in 1974, and during operation Vijijini, he and his father were allocated a piece of land measuring 25 acres at Mji-Mwema area, Uzia Village in Muze Ward. In the suit land there is one mango tree and the Appellant's father tomb. It was the Appellant's case that his father handed over the whole suit land to him in 1990. Thereafter he continued to use it undisturbed up to 1997 when he left and went to Chunya for treatment leaving the land under the caretaker of his sister one Maria Dongea. When he came back from Chunya in 2010 he found one Mzee Masangu and his son Mboje Masangu using the land and when he asked his sister Maria Dongea why the two were using it, Maria told him that she had leased it to them, but when he asked Mzee Masangu Mboje and his son Mboje Masangu (2<sup>nd</sup> Respondent herein), they replied that they had bought it. He successfully instituted a land dispute before the Village Land Counsel against the two persons and according to handwritten records of the trial tribunal on 3. 10. 2012 Mzee Masangu Mboje handed over the suit land to him. In 2017 Mboje Masangu, the 1<sup>st</sup> Respondent herein, once again trespassed into the suit land and claimed ownership thereof. The Appellant first sued him at Muze Primary Court but he was advised to withdraw the case and institute it in the Land courts and

hence these proceedings which were instituted in the District Land and Housing Tribunal for Rukwa from which this appeal arises.

Initially these proceedings were instituted against the 1<sup>st</sup> Respondent Mboje Masangu only, but while the trial was going on the 2<sup>nd</sup> Respondent therein applied to be joined as Respondent on the grounds that he had interest in the disputed land as he claimed to be actual owner of the suit land having acquired it by purchasing 4 acres from one **Hida Zumbi** (DW2), 4 acres from one **Sinda Fumbuka** and another 6 acres from the first Respondent **Mboje Masangu**.

The 1<sup>st</sup> Respondent filed a defence denying trespassing on the suit land. He stated in his written statement of defence that the suit land belonged to his father who purchased it from one Mzee Makofila. He stated that he used the suit land for 18 years since 1998 and that the Appellant started to claim ownership of the said land after the demise of his father in 2012. However he didn't appear during the hearing to substantiate his assertions in the said written statement of defence despite the fact that he was dully notified.

This is the first appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it didn't have the

opportunity of seeing and hearing the witnesses first hand (See **Paulina Samson Ndawanya V. Theresia Thomas Madaha** Civil Appeal No 45 of 2017 (CAT Unreported).

Both counsel Mr Budodi for the Appellant and Ms Neema for the Respondent argued the four grounds of appeal concurrently and by way of written submissions. Mr Budodi had an opportunity to file a rejoinder.

It was argued for the Appellant it was wrong for the trial tribunal to determine the matter in favour of the Respondent basing on sale agreements which were not endorsed by the Village Land Council as held in the case of **Methuselah Paul Nyagaswa Versus Christopher Mbote Nyirabu (1985) TLR 103**. The learned counsel for the Appellant contended that in the totality of the evidence on record the Appellant's evidence was heavier than that of the Respondent.

In his reply submissions Counsel for the Respondent raised two legal issues relating to the validity of the Appellant's appeal. It was the learned counsel's argument that because the Appellant didn't join legal representative of the late Kachache Ilindilo despite of the facts that he is aware of his demise the appeal is a nullity and should be struck out.

I beg to deal with this point first. I have considered this legal point and I have noted that although it could be a valid point but the validity

of its presentation is problematic. As correctly observed by the counsel for the Appellant the information that the 1<sup>st</sup> Respondent is dead is questionable. It is questionable because on 15<sup>th</sup> February, 2023 when the appeal was called before Deputy Registrar for orders Ms Neema verbally informed the court that the 1<sup>st</sup> Respondent is dead and that process for appointment of administrator of his estate was underway.

The report of the death of first Respondent notwithstanding record of this court shows that when the appeal was called before the Registrar on 24. 4. 2023 the first Appellant was recorded to be present in person and his presence in person was also recorded on 7.8. 2023. Earlier on when the appeal was called for hearing on 5. 6. 2023 Ms Neema purported to represent the 1<sup>st</sup> Respondent whom she had reported to have died and she actually proceeded to file written submissions against the appeal on his behalf. The question that would arise is; If we assume that the report of the 1<sup>st</sup> Respondent's death was correct, then who was instructing Ms Neema to appear for the deceased (i.e. 1<sup>st</sup> Respondent) after the first Respondent's death?

It is trite law that the relationship of a party and his/her advocate is that of a principal and an agent. In law death of a principal automatically terminates the agency agreement even if the other party

is unaware of the death. In the present case the fact that Ms Neema continued to represent a person whom she had reported to have died raises suspicion on his death otherwise the learned advocate acted without having instructions. The question then is; does a verbal report of death of a party by the counsel for that party a proof of death of that person. I do not think so. In my view death of a person can be proved by production of a certificate of death, an order of presumption of death or some other written evidence of death as may be available (for instance, post-mortem report, burial permit e.t.c). A question as to death of a person is such a great matter that it cannot be speculated or be conjectured. Despite the fact that the obligation to apply for joining of legal representative is of party to whom the right to sue survives (See Rule 4(1) and (3) of Order XXII read together with Section 3 of the Civil Procedure Code and Item 16 of the Schedule to the Law of Limitation Act [Cap 89 R.E. 2019] and not of the deceased Respondent/Defendant as Mr Budodi's argument would suggest, the duty to prove death remains with a party who alleges that it had occurred. In the instant case I find that the report made by Ms Neema was not credible and cannot be relied upon by this court in determining the appeal. First as I have just said in two occasions after the report the first Respondent is marked to have had presented in court personally. Secondly as the

record of the trial court would depict, originally the Appellant sued the present first Respondent Mboje Masangu only, but the first Respondent Kachange Ilindilo on his own volition applied to be joined as the Respondent claiming that he was the rightful owner of the land. That fact coupled with the fact that the 2<sup>nd</sup> Respondent Mboje Masangu for undisclosed reason (s) didn't show up during the trial to give any evidence on the matter create doubt on the Respondent's case. Be that as it may, I will proceed to determine the Appeal as hereunder.

It was the Appellant's submission that the Exhibit tendered in evidence which were relied by the trial tribunal were not approved by the village land council as required by the law and therefore had no evidential weight or value worth being relied by any court worth the name.

I have carefully gone through the impugned exhibits. The two documents (Exhibits) are in a form of letters and in a reported form. The purported sale agreement between the one Hida Sumbi (DW2) reads as follows:-

"HUDUMA ZA SERIKALI ZA MITAA TANZANIA

OFISI YA MWWENYEKITI WA KITONGOJI CHA MKANYAGENI

KIJIKI CHA UZIA



S. L. P 229 SUMBAWANGA (V)

TAREHE 20. 7. 2019

YAH: MAUZIANO YA SHAMBA BAINA YA NDUGU HIDA SUMBI MUUZAJI  
PAMOJA NA NDUGU KACHACHE IRINDILO MNUNUAJI.

Watajwa hapo juu wamefanya Biashara ya kuuziana Shamba ndugu Hida Sumbi amemuuzia Shamba ndugu Kachache Irindilo Shamba Heka nne Zenye Ukubwa wa hatua Arobaini mapana Kwa Mia Moja. Kwa Kila Heka moja Hida Sumbi ameuza Shamba hilo Kwa thamani Shilingi Milioni Mbili 2,000,000/=. Zimelipwa Zote. Kuhusu Mipaka Kutoka Juu wa Shija Paulo pamoja na Rukanya, Luwatunzia, Matuwa juwa Kuzenza Fimbo. Kaskazini: Rukanya Luwinzunza; Kusini: Mboje Masangu. Kwa hiyo Kuanzia tarehe 20. 7. 2019 Shamba limebaki ni mali ya Kachache Irindiro.

Sahihi ya muuzaji.....Hida sgd

Sahihi ya Mnunuaaji.....K. Kachache

Sahihi ya Mashahidi:

S. Kuzenza Fimbo

Mwneyekiti wa Kitongoji.....Maiko.

Section 2 of the Law of Contract Act (e) provides that every promise and set of promises forming consideration for each is an agreement and under Section 2 (h) of the same Act an agreement enforceable by law is a contract. On the other hand Black's Law Dictionary 10<sup>th</sup> Edition by Bryan A. Garner defines a contract to mean:-

*"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"*

The question then is whether the exhibits tendered in evidence and relied by the trial tribunal constitute contracts. In my view they do not. They do not qualify to be contracts. At most they can be classified as reports and letters explaining about existence of purported sale agreements between the 1<sup>st</sup> Respondent herein and **Hida Sumbi** (DW2), and two other persons namely **Sida Fumbuka** and **Mboje Masangu Mutwata** (the 2<sup>nd</sup> Respondent herein) who was the 1<sup>st</sup> Respondent before the trial tribunal.

Secondly and still on the purported sale agreements, the said agreements do not describe the land in which they relate. While in his application the Appellant stated clearly that his claim was related to 25 acres of land located at **Mji Mwema** area at Uzia Village in Muze Ward,

the alleged sale agreements between the 1<sup>st</sup> Respondent and the named vendors, do not indicate where the sold lands are located but they were attested by the *Mwenyekiti wa Kitongoji cha Mkanyageni* which impliedly suggests that the sold lands were within his jurisdiction of Mkanyageni area. If that is the case then, in absence of the evidence that Mkanyageni area is the same as Mji Mwema, the land sold cannot be said to be the same as the Appellant's land which is within **Mjimwema** area. Thus, the trial tribunal was wrong to hold that the sale agreements supported the 1<sup>st</sup> Respondent's case. Further to that, the land purported to be sold to the 1<sup>st</sup> Respondent is estimated to be 14 acres whereas the Appellant's land is 25 acres. Apart from the alleged sale agreements and the testimony of Sida Sumbi (DW2) who gave evidence to the effect that he purchased part of the suit land from Mboje Masangu (i.e. the 2<sup>nd</sup> Respondent herein) and after one year he re-sold it to Kachange Ilindilo (the 1<sup>st</sup> Respondent in this appeal), there is no any other evidence suggesting how Kachange Ilindilo acquired the suit land. On the other hand whereas the evidence of Sida Sumbi (DW2) is that he acquired the 4 acres he sold to Kachache Ilindilo from Mboje Masangu, Mboje Masangu's who is the 2<sup>nd</sup> Respondent in this appeal disappeared before giving his evidence before the trial tribunal. The 1<sup>st</sup> Respondent didn't call as his witnesses the two other persons from

whom he claimed to have purchased the suit land. In the case of Hemedi Saidi Versus Mohammed Mbilu (1984) T.L.R 113, this court held inter alia that:-

*"Where for undisclosed reasons, a party fails to call material witness on his side, the court is entitled to draw an adverse inference that if the witnesses were called they would have given evidence contrary to the party's interest"*

In the instant case persons from whom the 1<sup>st</sup> Respondent herein claimed to have acquired the land by way of purchasing were all material witnesses and ought to have been called to testify on his behalf.

In his evidence the Appellant explained how he acquired the suit land from his father who later on passed away in 2010. His evidence was well supported by that of his young brother Ponsiano Dongea (PW2) and an independent witness Romward Mateka. According to the Appellant between 1997 and 2010 he left the suit land in the caretaker of her sister Maria Dongea (deceased). When he came back in 2010 he found the 2<sup>nd</sup> Respondent's father using the land. He successfully sued him in Village Land Counsel. In 2012 the 2<sup>nd</sup> Respondent's father handed over the suit land him only to be trespassed again by the 2<sup>nd</sup>

Respondent in 2017 and hence these proceedings. He also gave clear description of the suit land and its boundaries. The totality of his evidence was heavier than that of the Respondents. In law a person whose evidence is heavier than that of the other is one who must win (See Hemedi Saidi's case [supra]).

In the final result, this appeal has merit and it is hereby allowed with costs to the Appellant. The judgment and orders of the District Land and Housing Tribunal for Rukwa in Land Application No 13 of 2019 are quashed and set aside. The Appellant is declared the lawful owner of 25 acres of land located at Mjimwema area Uzia Village in Muze Ward.

Order accordingly,



  
A.R. MRUMA,

JUDGE

2<sup>nd</sup> November 2023.