IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUB REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO. 24 OF 2023

(Arising from the District Land and Housing Tribunal for Singida at Singida in Land Application No.37/2014)

REMIGIUS ALPHONCE MSUTTA *(administrator of the estate of the late Alphonce Msutta)* **.....APPELLANT**

VERSUS

ANDREA ALPHONCE MSUTTA *(administrator of the estate of the late Peter Alphonce Msutta)* **.....1ST RESPONDENT**

OLGA WILLIAM MWAMYALA *(administrator of the estate of the late Richard Gwau)* **.....2ND RESPONDENT**

JUDGMENT

Date of Judgment: 20/02/2024

MAMBI, J.

The appellant herein filed this appeal against the decision of the District Land and Housing Tribunal for Singida which declared the second

respondent as the rightful owner of the disputed land in Land Application No.37 of 2014. Aggrieved, the appelant appealed against the decision of the DLHT basing on four grounds to wit;

i. *That the trial tribunal erred in law and facts by holding to the effect that the 2nd Respondent is the bonafide purchaser while there is ample evidence which portrays that the 2nd Respondent before purchasing the suit land knew that it is the property of the family of the late ALPHONCE MSUTTA and not the property of PETER ALPHONCE who sold it to the 2nd Respondent.*

ii. *That the trial tribunal erred in law and facts when it failed to make proper assessment and/or analysis of evidence adduced by the Appellant's side which has greater weight than that of the 2nd Respondent's side.*

iii. *That the trial tribunal erred in law and facts by holding that the 2nd Respondent had developed the suit land by building a filling station which operated within a short period while there were only two big holes drilled for tanks and no operation for running filling station that has been undertaken by the 2nd Respondent in the suit land.*

iv. *That the trial tribunal erred in law and in facts to hold to the effect that the late PETER ALPHONCE has the legal right to sell the suit land while the same tribunal had already stated that the seller who is responsible for refunding the 2nd Respondent has died*

v. *That the trial tribunal erred in law and facts by holding that the late PETER ALPHONCE MSUTTA during his lifetime had*

been living in the suit land while he had never lived in the suit land and the land had been used for farming activities by the family members of the late ALPHONCE MSUTTA.

When the case came for hearing, the appellant was represented by the learned Counsel Mr Godwel Lawrence while the respondents enjoyed the services of Mr. Cheapson Luponelo Kidumge, the learned Counsel who both prayed to dispose of the case by way of written submissions.

The learned Counsel For the appellant Mr Godwel submitted on the first ground that a bona fide purchaser is a person who purchased the valuable property in good faith and without having any information about the defectiveness of the ownership of the property to the seller. He was of the view that in this case, the 2nd respondent was not a bona fide purchaser since he purchased the suit land while knowing that it belonged to the family of the late ALPHONCE MSUTTA and not the sole property of the 1st Respondent as he claimed.

He argued that this is so because when the 2nd respondent was asked to bring the minutes of the family meeting which show that the 1st Respondent was allowed to sell the suit land to the 2nd Respondent, he did not do so instead he used the distant clan relatives to legalize the sale agreement who have no any interests with the suit land as all of them are not heirs.

The learned advocate cited the case of ***SUZANA S. WARYOBA VS SHIJA DAWALA, Civil Appeal No. 44/2017 CAT at Mwanza*** which states that

"A bona fide purchaser is someone who purchases something in good faith, believing that he/she has the clear right of

ownership after the purchase and having no reason to think otherwise".

He averred that since the 2nd Respondent had noticed that the suit land was family land, he thus does not qualify to be a bona fide purchaser.

Mr. Godwel argued the 2nd and the 5th grounds of appeal jointly stating that the appellant's evidence on page number 61 of the typed proceedings shows that the disputed land is the property of the late ALPHONCE MSUTTA and after his death in the year 1986, his family continued to use the land for agriculture activities and have never divided to the heirs and/or beneficiaries. He submitted that the appellant's evidence was corroborated by the evidence of SM2 on page number 65.

He also argued that the evidence of SM3 on pages number 69 &70 of the typed proceedings shows that the 1st and 2nd Respondents approached SM3 (*Ikungi village chairman*) to witness the sale agreement of the suit land. SM3 was not ready to witness without having the evidence of consent from other heirs, and that is when the 1st and 2nd respondents secretly proceeded with the conclusion of the sale agreement by involving distant clan members of the Appellant who are not heirs to the suit land.

The learned Counsel further stated that the evidence of SU3 at page number 81 of the typed proceedings shows that the sale agreement in respect of the disputed land involved distant clan relatives who are not heirs of the estate of the late ALPHONCE MSUTTA. And that the evidence of SU2 and SU3 contradicted each other in the issue as to whether or not the 1st respondent had built a house in the suit land before he sold to the 2nd respondent.

The appellant counsel submitted that the records show that both assessors in their opinion conquered that the Appellant is a lawful owner of the suit land. He argued that looking at the evidence of the Appellant's side in comparison with that of the 2nd respondents, it is clear that the appellant's evidence is reliable than that of the 2nd respondent and cited the case of ***HEMED SAID Vs MOHAMED MBILU (1984) TLR 114***, where the court held that in measuring the weight of evidence, it is not the number of witnesses that counts most, but the quality of evidence.

With regard to the 3rd ground of appeal, Advocate Godwel averred that the trial tribunal visited locus in quo and witnessed the suit land to have one tank of petroleum on top of the land, any empty one big for fixing the tank, and two long pipes for the lamp which are not working. He argued that there was no building nor any roof for the petroleum pump and no pump. He averred that, the statements by the trial tribunal that the petroleum station had previously operated were wrong and that is why during the trial the 2nd Respondent did not tender any documents from EWURA.

Lastly, on the fourth ground of appeal, the learned advocate submitted that in the copy of the judgment, the trial tribunal gave two contradicting statements on page six;

> *"marehemu ametumia gharama kubwa na muuzaji wa kuzirudisha gharama hizo ni marehemu"*
>
> AND
>
> *"marehemu Peter Alphonce alikuwa na haki kisheria ya kuuza ardhi ya mgogoro"*

With regard to the contradictory statements, the learned counsel submitted that the trial tribunal seemed to agree that the 1st Respondent had no good over the suit land and therefore was supposed to compensate the 2nd Respondent for the costs he incurred. He argued that he wonders how the same tribunal shifted to the other position and stated that the 1st Respondent had the legal right to sell the disputed land the decision which amounted to a miscarriage of justice.

On the other side, Advocate Kidumge for the 2nd respondent submitted on the first ground of appeal that the Appellant contends that the 2nd Respondent bought the suit land from PETER ALPHONCE who is represented by the 1st Respondent while knowing that the same is a family land belonging to the family of ALPHONCE MSUTTA and not a personal property of PETER MSUTTA who sold it as such the 2nd Respondent is not a bona fide purchaser.

The learned advocate averred that this contention is a two-fold erroneous assertion in that; In the first place, at the time the suit land was sold by PETER MSUTTA to RICHARD GWAU, i.e. in the year 2008, there is ample evidence showing that the suit land was neither a property of the family of ALPHONCE MSUTTA as alleged or a personal property of the said ALPHONCE MSUTTA. He argued that this is so because the appellant did not bring any documentary evidence showing that at the time the family members of ALPHONCE MSUTTA convened a meeting to appoint the Appellant as the Administrator of the estate. He argued that the appellant also did not prove if the suit land was listed amongst the properties falling into the estate of the said deceased. He was of the view that, the minutes of the family meeting were supposed to be exhibited in court to prove that the suit land was listed during the meeting, as such.

The learned advocate also averred that the evidence available on the record of the trial tribunal shows that from the death of ALPHONCE MSUTTA (1986) to the appointment of his Administrator (2014) 28 years had elapsed without appointing any administrator of the estate, while there were elder brothers and sisters of the Appellant, a phenomenon that clearly shows that the deceased had left no property to be administered and be divided to his heirs upon his death.

The respondent counsel submitted that it is also on the records that the suit land was sold by PETER MSUTTA to RICHARD GWAU in the year 2008 and that the seller died in the year 2012. He argued that there were no disputes or complaints lodged against PETER MSUTTA from the family members during his lifetime but the dispute erupted after his death. Mr Kidumage submitted that the other thing is that the Village Council of Ikungi confirmed that the land was a personal property of PETER MSUTTA thus giving the 2nd Respondent assurance on the seller's Title to the property to be a good one, which made him obtain a go-ahead with the project of petrol station construction. He argued that the Appellant did not join the Village Council or Ikungi District Council to be a co-respondent in the matter, which fact indicate that they were not aggrieved by the Village Council's acts. The respondent Counsel was of the view that, this is a constructive admission that the representation of the Village Council on the seller's title to land was truthful one.

Mr. Kidumge also asserted that even if it were to be taken that the land was either a personal or a family property of ALPHONCE MSUTTA there is no reliable evidence on record that shows that the 2nd Respondent was a guilty buyer of the suit land so that he is denied the benefit of being a Bona fide Purchaser for Value. He argued that the seller of the suit land

was a public servant serving as a Village Executive Officer and even some members of the Village Council who sat to discuss the application by the 2nd Respondent to construct a petrol station and finally granted the application were close relatives of the Seller namely JUMANNE KIRUU MSUTTA and JUMANNE HUSSEIN HALULU.

Mr Kidumage averred that the record of proceedings tells us, it is safe to conclude that the suit land was not part of the estate of the Late ALPHONCE MSUTTA capable of being administered by the Appellant but the personal property of PETER MSUTTA and the sale by PETER MSUTTA was legal.

In respect of the second and fifth grounds of appeal, the learned advocate for the respondent contended that the same is a total misconception of the evidence adduced at trial. He referred the decision of this court in ***HEMED SAID vs. MOHAMED MBILU [1984] TLR 114.***

The respondent counsel disagreed the aplanat counsel submission that the evidence of the Appellant herein at trial has more weight than that of the 2nd Respondent and that there are no contradictions as alleged.

The learned advocate further submitted in regards to the third ground of appeal that it is based on an academic argument that the 2nd Respondent did not produce documents from EWURA to show that the petrol station operated. He argued that though there was no no prosecution witness at trial acknowledged this fact, there is evidence from them which admits that there were fixed electric light poles at the site and a generator was operated to light up the lights.

Lastly, regarding the fourth ground of appeal, Mr. Kidumage argued that the same lacks merits too. He contended that the alleged contradiction, if any, is very minor and does not affect the decision as a whole. He was of the view that the trial tribunal decided the matter on account of the findings that the Late PETER MSUTTA who sold the suit land was per the evidence the last person to live at and use the suit land till and that the family did not use it. He argued that, the trial tribunal visited the suit land and witnessed with their naked eyes that the family was not in use of the same as alleged in their evidence. The learned Counsel was of the view that the anomaly, if any, is curable under Section 45 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] since the circumstances of the present case have not occasioned a failure of justice.

On a brief rejoinder, the appellant's advocate Mr. Godwel averred that regarding the first ground of appeal and submission, the issue of minutes to show ownership has nothing to do with the Appellant for the reasons that the 1st Respondents were duty bound to prove that the 1st Respondent and 2nd Respondent had the legal right to sell the disputed plot.

As for the second ground of appeal and submission, he averred that the 1st and 2nd Respondents after being asked by SM3 to bring the minutes of the family meeting which shows that the 1st Respondent was allowed to sell the suit land to the 2nd Respondent, did not do so instead they used the distant clan relatives to legalize the sale agreement.

He further rejoined on the third ground of appeal and submission the Appellant insisted that there were no operating machines, no toilets,

and no offices to facilitate the said business. The statement that the 2nd respondent started a business is a complete lie.

Having gone through the submission from both sides, I now move to determine the appeal according to the grounds of appeal and submissions by the parties.

Starting with the first ground of appeal, that the 2nd respondent bought the suit land from the 1st respondent with the knowledge that it belonged to the appellant, I agree with the 2nd respondent evidence that there is no evidence of record showing that the suit land belonged to the late Alphonce Msutta. Indeed, there is no any evidence on records from the trial tribunal to show that the suit land belonged to the late Alphonce Msutta. The appellant had the duty to prove on the balance of probabilities that the land belonged to late Alphonce Msutta but he failed to do so.

It is trite law that he who alleges must prove, see section 110 of the Tanzania Evidence Act, Cap 6, [R.E. 2022]. It was therefore the duty of the appellant to prove the ownership of the suit land on a balance of probabilities. The Court of Appeal in the case of ***PAULINA SAMSON NDAWANYA V. THERESIA THOMAS MADAHA, Civil Appeal No. 45 of 2017*** stated that;

> *"It is equally elementary that since the dispute was in the civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved"*

Even if I am to assume that the alleged sale agreement was invalid,

which is not the case, then the same was supposed to be approved by the village council as correctly submitted by the 2nd respondent, which in my view complies with section 142 (1) of the Local Government (District Authorities) Act - Cap. 287 which provides;

> *"Village council is the organ in which is vested all executive power in respect of all the affairs and business of a village. "*

Under normal circumstances, it is expected that the village council had undergone all the legal procedures for disposing of a village land. In this regard, had the disputed land belonged to the appellant as he claims, a dispute would have arisen in the early stages before the suit land was legally disposed of to the 2nd respondent. In this regard, the first ground of appeal is therefore devoid of merit.

Therefore, since the appellant was claiming that the land belonged to him and the respondent is not the owner of the land, it was the duty of the appellant to disclose all the facts. Basing on the analysis of the evidence from the trial Tribunal in line with the grounds of appeal and submission made by both parties, I am of the considered view that the respondent at the trial Tribunal proved his claims on the balance of probabilities. It should be noted that it is a cardinal principle of the law that in civil cases such as land, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply means that he who alleges must prove as indicated under section 112 of the Law of Evidence Act, Cap 6 [R.E2019], which provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".

This means that the whole suit at the trial tribunal was proved to the required standard as per Section 110 and 111 of the Evidence Act Cap 6 [R.E. 2019]. More specifically section 110 provides that:

"The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".

Similarly, section 110 of the Evidence Act, cap 6 [R.E.2019] provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"

Similarly, the court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZANIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM,*** observed that:-

"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side".

The importance and extent of proof in Civil Cases was well underscored by the court in ***MCLVER V. POWER [1998] PFIJ No 4, Prince Edward Island Supreme Court,*** Trial Division where Moc Donald C.J. TD started that:

> *"In any Civil Case the plaintiff* ***must prove their case on a balance of probabilities if they are to succeed.*** *This means that the plaintiff must prove that his facts tip the scale in his favour even if it is only 51% probability that he is correct"* [emphasis is mine].

Various authorities have clarified the meaning of balance of probability. A good example is the remarkable decision of the court (a persuasive decision) in ***RE H (MINORS) [1996] AC 563,*** where Lord Nicholas observed that:

> *"The balance of probability standard means that the Court is satisfied an event occurred if the Court considers that on the evidence the occurrence of the event was more likely than no"*

Having answered and found that the first ground of appeal has no merit, the rest of the grounds in my view fall a natural death since they all revolve around the first ground of appeal on the ownership of the suit land before it was disposed of to the 2nd respondent. In my considered view since the appellant under his first ground failed to prove his claim on the ownership, the other grounds of appeal become nugatory.

In the circumstances, the appeal is hereby dismissed, and I have no reason to fault the decision of the District Land and Housing Tribunal rather than upholding it. No orders as to costs. Ordered accordingly.

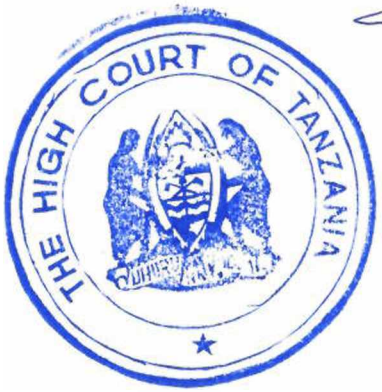
Judgment delivered online this day of 20h February, 2024 before the parties.

A. MAMBI

JUDGE

20.02.2024

Right of Appeal explained.



A. MAMBI

JUDGE

20.02.2024