IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB- REGISTRY

AT MOSHI

LAND APPEAL NO. 23 OF 2023

(C/F Application No. 91 of 2015 in the District Land and Housing Tribunal for Moshi at Moshi)

SAIDI IDDI MSEMO *(Suing in his personal capacity and as the guardian and next friend of Sammi Abdallah, Abbasi Abdallah and Anisa Abdallah who are all minors)*.....**APPELLANT**

VERSUS

ABDALLAH MPEMBA ……..……1ST RESPONDENT

SARAH JOFREY……..……..……....2ND RESPONDENT

JUDGEMENT

Date of Last Order : 19.03.2024
Date of Judgement: 16.04.2024

MONGELLA, J.

The appellant herein preferred Application No. 91 of 2015 in the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal, hereinafter) against the respondent, in his personal capacity and as a guardian/next friend of three minors namely; Sammi Abdallah, Abbasi Abdallah and Anisa Abdallah (hereinafter referred to as minors). His claim was over 40 x 20 paces of land with a house therein located at Njia Panda Magharibi Street at Njia

Panda Ward, Vunjo Magharibi Hamlet within Moshi district (the suit land or suit premises, hereinafter).

The appellant claimed to have given the suit land to one Ms. Batuli Zuberi Ally (deceased), who was the mother of the three minors for usufructuary purposes in 2009. The condition was that she could construct a house for her children and live therein and eventually her house would pass to her children. The late Ms. Batuli constructed a house in the suit land. In 2012, Ms. Batuli met her demise. Further that, sometime in 2014, he found out that the 1st respondent had sold the suit land to the 2nd respondent. He thus sought for the trial tribunal to: declare the minors as rightful owners of the suit land, declare the respondents as trespassers, declare the disposition between 1st and 2nd respondent void, award general damages of 8,000,000/=, cost of the suit and any relief it deems fit.

On the other hand, the respondents vehemently denied the claims. Their defence was that, the appellant sold the land to the 1st respondent and the late Ms. Batuli, who was his wife. He then lawfully sold the same to the 2nd respondent. Further, that, the 1st respondent was the legal guardian of the minors, however, amid proceedings, the 1st respondent vanished and the trial proceeded *ex parte* against him.

After trial, the tribunal found in favour of the respondents, declared the 2nd respondent the lawful owner of the suit land having purchased the same from the 1st respondent. The trial tribunal

awarded the 2nd respondent costs for the suit. Aggrieved by the said decision, the appellant preferred this appeal on following grounds:

1. *The Trial Tribunal erred in fact and law by failing to properly analyse the evidence adduced during trial.*

2. *The Trial Tribunal erred in law relying and enter judgment based on Exhibit D.2 adduced during trial while the Tribunal doubt the same.* (sic)

3. *The Trial Tribunal erred in law relying and enter judgment based on Exhibit D.2 adduced during trial contrary to the law and procedure.* (sic)

4. The Trial Tribunal erred in law and fact by holding that Sami Abdallah - SM.2 witnessed the alleged sale of the suit land and the same was enough contrary to the evidence adduced and the law.

5. The Trial Tribunal erred in fact and law by relying on the controversial evidence adduced for the Respondents during trial.

Arguing on the 1st ground, Mr. Paul averred that the trial tribunal did not analyse the evidence adduced properly which led the tribunal to an erroneous decision. He contended that the evidence adduced during trial was to the effect that the suit land is within the area owned personally by the Appellant and that it was obtained from the appellant. The appellant and his witnesses led evidence that the suit land being part of the land owned personally by the appellant was given to the late Batuli Zuberi, the biological mother

of Sami Abdallah, Abbasi Abdallah and Anisa Abdallah who were all minors to erect her residence thereon.

He contended that the appellant clearly denied disposing the suit land to the 1st respondent and the 1st respondent never appeared to testify as from whom he obtained ownership over the suit land as the matter proceeded in his absence. That, there was no tangible evidence laid by the respondents and their witnesses as from whom exactly the 1st respondent obtained ownership or proprietary interests, if any, over the suit land. That, the only evidence laid to prove the same was allegedly a sale agreement showing a purchase of suit land from one Mathayo Msemo.

Mr. Paul further contended that, not only was the said Mathayo Msemo not part of the trial tribunal proceedings, but also, no one testified to know him. That, there was no any evidence adduced by the respondents' witnesses on the alleged previous ownership of the suit land by the said Mathayo Msemo. He challenged the respondents' evidence for failure to present the 1st respondent and any witnesses to the said contract to prove the alleged sale. In the circumstances, he employed the court to draw an adverse inference on the failure to call the said witnesses. He buttressed his position with the case of **Aziz Abdallah vs. Republic** [1991] TLR 71.

Arguing further, he alleged that, the Court of Appeal in the case of **Charles Richard Kombe t/a Building vs. Evarani Mtungi & Others (**Civil Appeal 38 of 2012) [2017] TZCA 153 TANZLII and the East Africa

Court of Appeal in **Jos Hansen and Soehne vs. G.K. Jetha Limited** [19591 E.A. 1563 while interpreting **Section 101 of the Evidence Act** [Cap 06 RE 2022] held that oral evidence cannot be adduced to contradict, vary, add or subtract the contents of a written contract. That in this case there was no even oral evidence to contradict, vary, or subtract the names of the said Mathayo Msemo in the alleged contract of sale although oral evidence is inadmissible under **Section 101 of the Tanzania Evidence Act.**

Cementing on his stance that the trial court failed to properly analyse the evidence before it, Mr. Paul invited this court, being the first appellate court, to exercise its powers to analyse the evidence and come with its own findings. He supported his argument with the case of **Mwajuma Mbegu vs. Kitwana Amani** [2004] TLR 410.

Addressing the 2nd ground, Mr. Paul faulted the trial tribunal for considering Exhibit D2 in its judgement while it vividly doubted it in the beginning. He contended that this anomaly clearly manifests in the tribunal judgement. He contended that such act was contrary to law and practice. That, once the court is in doubt over an exhibit, it should not act over the same. If the court finds that the exhibit requires corroboration, then the same should be corroborated, otherwise it should not be acted upon.

He further pointed out that the trial Tribunal chairman, contrary to the law, came up with unfounded findings that the referred Mathayo Msemo (in exhibit D2) is the appellant herein. He termed

the act strange. He further challenged the trial chairman for shifting the burden to the appellant because he had not denied the signature. Mr. Paul contended that the appellant denied the whole alleged disposition of the suit land to the 1st respondent. What I discern from his argument is that that as well included denial of the signature in the alleged contract of sale.

Expounding the 3rd ground, Mr. Paul contended that **Section 8 of the Village Land Act**, [Cap 114 R.E. 2019] provides for administration of all transactions over the village land to be made in the village where the land is located. In that regard, he had the view that disposition of the village land without approval of the village authority where the land is located is invalid. In support of his view, he referred the Court of Appeal decision in the case of **Bakari Mhando Swanga vs. Mzee Mohamed Shelukindo & Others** (Civil Appeal 389 of 2019) [2020] TZCA 28 TANZLII.

Arguing further, he averred PW5, who was the village executive officer of Kilototoni village where the suit land is located, testified to the effect that the village authority was not involved in the alleged disposition contract. Further, he said that PW5 had warned the 2nd respondent that the suit property is not for sale, but she disregarded the warning. To substantiate his assertion, he added that even the 2nd respondent testified that the village authority, that is, the village executive officer and the village chairman of Kilototoni village did not verify the alleged purchase of the suit land. In the circumstances, Mr. Paul had the stance that the trial tribunal erred

in law relying and entering judgment based on an invalid contract of disposition of land (Exhibit D2) adduced during trial contrary to the law and procedure.

With regard to the 4th ground, Mr. Paul pointed out that SM2 denied to take part in the alleged sale of the suit land. Further, that he was a minor when the alleged sale of the suit land was made. Discussing on the competence of a minor to enter into a contract, he referred to **Section 11 of the Law of Contract Act** [Cap. 345 RE 2019] arguing that the provision provides that a person competent to contract is one of age of majority, with sound mind and not disqualified from contracting by any law to which he is subject.

In that respect, considering that SM2 was a minor at the time of execution of the alleged contract, he had the contention that the contract is void. He specifically referred to **Section 11(2) of the Law of Contract Act** in support of his contention. He contended that the court should not act on void agreements and in that respect, the trial tribunal erred in law in holding that SM2 was part of the alleged contract of sale of the suit land. He as well challenged the tribunal for committing an error in law for relying on a void agreement. He fortified his arguments with the case of **Savera Katisha vs. Yustinian Miao** (Land Appeal 16 of 2015) [2018] TZHC 2669 TANZLII. He prayed for the court to expunge the alleged contract of sale of the suit land from the evidence in the trial tribunal proceedings.

Arguing on the 5th ground, he first pointed out a controversy between exhibit D2 and the evidence on record regarding

boundaries. Explaining the same, he contended that while the evidence on record, especially Exhibit D2, states that the neighbour to the south part of the suit property is one Zairi Mongo, the pleadings did not support that assertion. He added that the said neighbour was never called to testify to that effect. That, that SU1 alleged that Exhibit D1 was executed at Njia Panda ward offices while SU3 stated that she signed the same at Kifaru, Mwanga. Considering the contradictions, Mr. Paul had the stance that the same discredit the evidence of the 2nd respondent and Exhibit D1 in general.

Still challenging the title passed to the 2nd respondent, Mr. Paul challenged the 2nd respondent's testimony denying knowing PW6. He contended that PW6 testified on how she came to his office and he advised her that the suit property is not for sale.

He continued to argue referring to a Latin maxim *'Nemo dat quod non habet'* which entails that a person with no title to pass cannot pass the same to another person. He referred to decisions by the Court of Appeal which cemented on that maxim, being: **Melchiades John Mwenda vs. Gizelle Mbaga & Others** (Civil Appeal 57 of 2018) [2020] TZCA 1856 (13 November 2020) TANZLII and **Ombeni Kimaro vs. Joseph Mishili t/a Catholic Charismatic Renewal** (Civil Appeal 33 of 2017) [2021] TZCA 343 (2 August 2021) TANZLII. On those bases he contended that the person alleged to pass title to the 2nd Respondent had no title to pass.

He finalized his submission by praying for the court to declare that the suit land belongs to the appellant, that the respondents are trespassers on the suit land. He as well urged the court to order the respondents to pay costs for this appeal and the trial and to issue any other order the court may deem fit and just to grant.

Through his legal counsel, Mr. Gabriel Shayo, the appeal was vehemently opposed. In reply to the 1st ground, Mr. Shayo averred that the appellant testified that the land in dispute is within his land of 4 acres. That, the suit land measures 40 x 20 paces and he offered to the late Batuli Zuberi (the biological mother of Samia Abdallah, Abbasi Abdallah and Anisa Abdallah who were minors) to make her residence thereon. Mr. Shayo averred that, the late Batuli Zuberi was married to the 1st respondent and they jointly owned the suit land. That, it was after the death of Batuli Zuberi that the appellant appeared before the trial tribunal and sued the respondents. He supported the trial court decision saying the tribunal Chairman properly weighed the evidence tendered before him and properly held the land in dispute was lawfully sold to the 2nd respondent. He challenged Mr. Paul's contention arguing that he did not specify which evidence was not properly analysed by the tribunal and thus failed to substantiate the 1st ground of appeal.

Arguing on the controversy regarding the names in the sale agreement, he contended that the appellant was a Muslim by religion and thereafter changed into Christianity whereby his name

was changed to Mathayo Said Msemo. That, even in his testimony the appellant was sworn as he identified himself as a Christian.

Mr. Shayo also raised a concern that the appellant lacked "*locus standi*" to sue the respondents as he sued on behalf of the beneficiaries of the 1st respondent, and the late Batuli Zuberi, while he did not have letters of administration of the estate of the late Batuli Zuberi. He argued that in his application, the appellant failed to prove that he was suing as the guardian or next friend of the minors as he lacked documentation to prosecute the case. In that respect, he was of the view that **Order XXXI Rule 1 and 2 of the Civil Procedure Code** [Cap 33 RE 2019] was not complied with.

Arguing further on the issue of locus standi, he contended that since the appellant offered the suit land to the late Batuli and the 1st respondent, he was estopped from suing them over the suit property as he no longer owns the same and cannot recover it from the respondents.

With respect to the 2nd ground, Mr. Shayo found the ground relating to the 1st ground. On the other hand, however, he contended that Mr Paul did not disclose the doubts held by the trial chairman in admission of Exhibit D1. He argued that the sale agreement was executed before the ward executive officer of Kilema Kusini on 02.10.2014 and the agreement was witnessed by PW2, the son of the 1st respondent and five other witnesses whereby a consideration of TZS. 10,000,000/- was given to the 1st respondent.

That, the sale agreement was clearly tendered in the tribunal and was well examined by the appellant and his counsel who had the opportunity to cross examine the 2nd respondent on the same. That, eventually tribunal members were satisfied that the suit land was properly sold. He made reference to the holding of the trial tribunal to cement his arguments.

Mr. Shayo appears to have refrained from replying to the 3rd ground as he jumped to the 4th ground. Replying to the 4th ground, he challenged Mr. Paul for not mentioning the law the trial tribunal contravened in holding that PW2 witnessed the alleged sale. That, he alleged that the contract made between the respondents was made between adults and witnessed by PW2 and 5 other people who were also adults. In maintaining that PW2 was a competent witness, he contended that no proof of age was tendered before the trial tribunal to prove that SM2/PW2 was a minor when the contract was executed. Further that, even if SM2 was a minor the sale contract would still be valid as the rest of the witnesses were adults in the same way the seller and buyer were.

Replying to the 5th ground, Mr. Shayo briefly submitted that it was not mandatory for the said Zairi Mkongo to be called as a witness as he only signed the sale agreement as a neighbour. In addition, he contended that other witnesses gave direct evidence in support of the 2nd respondent. He was thus of the view that the evidence tendered proved the sale of the suit land. He finalized his submission

by praying for the appeal to be dismissed with costs and the tribunal judgment to be upheld.

Rejoining, Mr. Paul, reiterated his submissions in chief and prayed for the appeal to be allowed with costs. He vehemently disputed Mr. Shayo's contention that Mathayo Saidi Msemo and Saidi Iddi Msemo are one and the same person. He argued that the mere fact that the appellant had sworn prior to his evidence being recorded did not means he was Mathayo Said Msemo. He challenged the assertion by Mr. Shayo for being a new fact and it was unprocedural for Mr. Shayo to raise the same. That, the statement, apart from being a new fact, was also false and unfounded. He emphasized that the appellant's name is Said Iddi Msemo and not 'Mathayo'. That, the latter is neither his alias nor does the appellant have a child bearing such a name. Further that, during trial PW3 testified that she does not know 'Mathayo Saidi Msemo' and neither did the appellant's or respondent's witnesses state that the appellant was named Mathayo Saidi Msemo.

As to the question of locus standi, Mr. Paul averred that the respondent's raising of the matter amounts to filing an unprocedural cross appeal. He further alleged that the question of locus was well dealt with by the trial tribunal at page 8 and 9 of its typed judgement.

In regard to the claim that the land in dispute was given to late Batuli Zuberi Ally by the appellant, Mr. Paul averred that there was

no evidence on record on the allegations made by the respondent's counsel that the said Batuli and the 1st respondent were jointly granted access to construct a house on the suit land. He averred that the same was unfounded. That, the 1st respondent testified to have given the suit land only to the late Ms. Batuli. Mr. Paul further contended that there was no evidence whatsoever that the late Ms. Batuli was married to the 1st respondent. That, the 1st respondent did not have proprietary interest over the suit land as he was not given nor did he purchase the same. That, the suit property was not a matrimonial property.

Referring to the appellant's testimony and that of his witnesses, he contended that the suit land was part of the appellant's land that he gave the late Batuli to construct a house to reside in with her children. He maintained that the appellant disputes the disposition of the suit land to protect the interests of the minors against the respondents.

Reacting to the argument that oral evidence cannot be adduced to contradict, vary, add or subtract a written contract, he stated that Exhibit D2 is a contract of sale executed between Mathayo Saidi Msemo and the 1st respondent. On the other hand, Exhibit D1 is contract of sale executed between the 1st and 2nd respondents. That the later states the neighbour to the south of the suit property as Zairi Mkongo while that was neither reflected in the pleadings nor in the evidence adduced. He reiterated his stance that the said neighbour, Zairi Mkongo, was never called to testify to that effect.

Mr. Paul further averred that the law provides that oral evidence adduced to vary documentary evidence is inadmissible. He cemented his argument with the case of **Umico Ltd vs. Salu Ltd** (Civil Appeal 91 of 2015) [2018] TZCA 90; **Agatha Mshote vs. Edson Emmanuel & Others** (Civil Appeal 121 of 2019) [2021] TZCA 323 and **Tanzania Fish Processors Limited vs. Christopher Luhanyula** (Civil Appeal 21 of 2010) [2011] TZCA 5 (all from TAZNLII). He further averred that exhibits D1 and D2 are both at variance with the adduced evidence.

He further contended the suit land belongs to the 1st appellant but such fact contradicts with Exhibit D2. That, the respondent's testimony that the suit land is neighboured by the appellant in all four sides contradicted and varied with Exhibit D1. He was of the view that both Exhibits were false and thus should not be accorded any evidential weight. He finalised his submission by maintaining the appellants prayers as stated in the petition of appeal and submission in chief.

I have considered the grounds of appeal and the rival submissions of both parties' counsels. Upon observing the grounds of appeal, I found that, save for the 3rd ground which the appellant challenges Exhibit D2 to have been adduced contrary to law and procedure, the rest are engulfed in the 1st ground in which the appellant alleges that the trial court failed to analyse the evidence before it hence reached a wrong decision. In that respect, I shall collectively deliberate on them.

Prior to resolving the grounds, I wish first to address the issue raised by Mr. Shayo in his submission. On this issue, he claims that the appellant lacks locus standi. It is imperative to note that while parties and courts are bound by pleadings, where matters of law are raised amid any stage of any proceedings, they ought to be resolved for interest of justice.

No doubt, the question of locus standi is a question affecting jurisdiction and thus ought to be resolved. In the case of **Registered Trustees of SOS Children's Villages Tanzania vs. Igenge Charles & Others** (Civil Application 426 of 2018) [2022] TZCA 428 TANZLII the Court of Appeal subscribed to the decision by the Supreme Court of Malawi in the case of **The Attorney General vs. Malawi Congress Party and Another**, Civil Appeal No. 32 of 1996, in which it was observed as that:

> "Locus standi is a jurisdictional issue, it is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently close relation to it so as to give a right which requires prosecution or infringement of which he brings the action."

Mr. Shayo's argument in regard to the appellant lacking locus standi was founded on the fact that the appellant did not submit proof to indicate that he was the guardian of the three minors he claimed to sue on behalf. On the other hand, Mr. Paul was of the view that the matter was wrongly raised as it had been initially determined. He as well contended that raising the issue at this

appeal stage amounted to un-procedurally making a cross appeal by the respondent. As I have explained, this being a legal matter it could be raised at any time/stage of proceedings, including on appeal.

Mr. Shayo based his argument under **Order XXXI Rule 1 and 2 of the Civil Procedure Code** which state:

> "1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.
>
> 2. (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the advocate or other person by whom it was presented.
>
> (2) Notice of such application shall be given to such person and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit."

Unfortunately, apart from citing the respective provision, Mr. Shayo did not offer any explanation suggesting breach of the provision. He only argued that minors were the 1st respondent's children and that there was no proof by the appellant that he was the guardian of the minors. The provisions referred to above, have only set a requirement that a suit against a minor be instituted in a minor's name by his next friend. While, this matter was instituted on the appellant's name, the appellant was also suing in two capacities, his and that of the minors. In that regard, the requirement under **Order XXXI Rule 1 of the Civil Procedure Code** was complied with.

I wish to point out that there is no any documentation needed for a guardian or next friend to prove his relationship to the minor. The court only needs to be satisfied that the guardian or next friend is of sound mind, majority age and has no interest controversial to the minor but is acting for the interests of the minor. This can be evidently seen under **Order XXXI Rule 4 (1)** which states:

> "Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff."

The appellant did state in his application that he was suing the respondents as the suit property which was to be inherited by the minors was illegally sold. His particulars, or whether he is of sound mind was never challenged at the trial court. Being that his interests were never found or challenged as being contrary to the minors, I think this suffices to show he had the interest of the minors at heart. The issue of locus standi thus lacks merit. It is overruled.

Having observed as above, I now move on to determine the grounds of appeal whereby as stated earlier, I shall deliberate on the 3rd ground separately and jointly on the rest of the grounds.

Under the 3rd ground, the appellant challenges admission of Exhibit D2 for being improper and contrary to the law. Mr. Paul's submission was centred on the fact that Exhibit D2, the sale agreement was

drafted contrary to the requirement of **Section 8 of the Village Land Act** since the same was not witnessed by the village chairman and the village executive officer as stated by PW5 and admitted by the respondent herself. Mr. Shayo did not reply to this ground.

From the submissions of Mr. Paul, it is evident that he was not contesting whether the law and procedure on admission of the exhibit was complied with or not, but rather the validity of the document itself. This is contrary to the wording of the ground. it is well settled that parties are bound by their pleadings and depart therefrom warrants this court to ignore or to refrain from acting on the extraneous matters introduced. I will herein consider the 3rd ground unaddressed and thus abandoned.

With regard to the rest of the grounds which cover analysis of evidence, I shall briefly evaluate the evidence on record while giving consideration to the arguments advanced in the specific grounds of appeal.

The appellant gave his evidence as PW1 and presented 5 witnesses. He testified that the late Ms. Batuli was his cousin and he gave her the suit land in the presence of one Pima, PW3, and his wife. That the suit land was part of his 4 acres and he gave the same to her so that she could build a home to live with her children who are the minors on whose behalf he filed the application. That, Ms. Batuli built a home on the said land. She demised on 29.10.2012 and one Merry Msemo was appointed as her Administratrix. The appellant took

guardianship of the minors and put a caretaker one Violet in the suit property. That, sometime later, he learnt that the 1st respondent had sold the suit property to the 2nd respondent. The appellant held the notion that the suit land was his property and the house therein the property of the late Batuli.

On his cross examination, he acknowledged that the 1st respondent was the father of the minors although he did not know him. He averred that the late Batuli had no husband. He also alleged that the sale agreement had not being witnessed by the village leader.

PW2's evidence was that, after the death of their mother, the late Batuli, in 2012, the appellant started taking care of them. He also testified that the appellant gave their mother land to build on. On cross examination, he stated that the 1st respondent was his father. That, Merry Msemo was appointed as administratrix of the estate of the late Batuli.

PW3 testified on the boundaries of the suit land being surrounded by the appellant on all 4 cardinal points. She too insisted that the house belonged to the Late Ms. Batuli and that the 1st respondent was absent when the late Batuli was allocated the suit land. She also stated that she was the Administratrix of the estate of the late Batuli and that together with the appellant, they looked after the minors. On cross examination, she stated that she was present when the land was allocated to the late Batuli.

PW4's evidence was that he was present when the appellant gave the suit land to the late Ms. Batuli. That, the suit property was constructed by the late Ms. Batuli who resided therein together with her children. On cross examination, he pointed out the boundaries of the suit land saying that the appellant bordered the same on all cardinal points.

PW5 testified that he was the Kilototoni Village Executive Officer in 2014, but was not involved in the sale of the suit land between the 1st and 2nd respondents. He had the view that the sale was void. PW6, a street chairman in Ngulungulani, Kilototoni village, testified to have warned the 2nd respondent on the suit premises and warned her that the 1st respondent had no house to sell to her.

On the other hand, the 2nd respondent testified as SU1 and tendered 2 exhibits. She had 3 witnesses: SU2, Miraji Selemani Mola; SU3, Sharifa Nuru Mpemba and SU4 Dismass Florian Minja.

She testified to have bought the suit land from the 1st respondent. That, the same was legally sold to her., She believed so basing on an agreement for hand over which she alleged to have been executed on 07.09.2009. The document was admitted as Exhibit D1. She further alleged that the appellant sold the suit land to the 1st respondent and his wife, Ms. Batuli. She also presented a sale agreement executed between her and the 1st respondent on 02.10.2014, which was admitted as Exhibit D2. Describing the land in dispute, she averred that it was bordered on the North, West and

East by the appellant and on the South by one Zahiri Mkongo. She also stated that she had already deposited materials on the suit land which include sand, marram and frames. On cross examination, she admitted not to have involved the village chairman and village executive officer in the alleged sale.

SU2 and SU3 made similar statements in regard to the sale of the suit land to the 2nd respondent. They alleged the sale was executed before a ward executive officer and they witnessed the same. SU4 stated that he was informed of the sale by the 2nd respondent who wanted to contract him for developing the suit land and property.

As observed, the appellant's evidence and that of his witnesses was to effect that the appellant gave the suit land to the late Batuli who built a house on the same. That, the 1st respondent is the father to the minors, the surviving children of the late Batuli. In 2014, the suit land was sold to the 2nd respondent. The appellant seems to condemn the sale as illegal as the 1st respondent, who he alleged to only identify as the father to the minors had no title to pass to the 2nd respondent. He as well contends the suit land belongs to him.

Strangely, the appellant in his pleadings attached documentation to prove the alleged allocation he made to the late Batuli, but for some unknown reason, the same was never tendered before the trial tribunal. Further, while the appellant pleaded that he allocated the land in 2009, such argument was never testified on.

In the premises, I am of view that the appellant failed to provide sufficient proof to establish that the suit land was given sorely to the late Batuli. Considering that in his application he described there being an event and a family meting to that effect, I think it was reasonably expected that he would present witnesses to testify on the alleged allocation and its arrangements. The witnesses he paraded only stated that the suit land is his and that he gave the same to Batuli.

Further, his averment on how he learnt of the sale while there was a caretaker in the suit premises when the alleged sale was executed raises concerns on whether there are more details lacking. Further that, he himself did not even elaborate in his testimony as to the arrangement he had with the late Batuli despite pleading such facts. A more concerning matter is that he did not even in his evidence state at any time that he intended that the suit property remains in control of the minors while he had initially pleaded the same. He only emphasized on how the suit land was his and the 1st appellant had no title to pass.

On the other hand, the 2nd respondent's case was that she was a *bonafide* purchaser to the suit land as she did receive Exhibit D1 showing that the suit land was sold to the 1st respondent and the late Batuli by the appellant in 2009 and the same was sold to her in 2014. Strangely, as pointed out by Mr. Paul, the name appearing on Exhibit D1 is Mathayo Said Msemo, a character that was never mentioned at the trial court. This itself is reason to discredit the 2nd

respondent's evidence that the appellant sold the suit land to the 1st respondent and the late Batuli.

Meanwhile, Exhibit D2 seems to have been witnessed by PW2, the son of the late Batuli. This agreement was executed in 2014. When PW2 appeared before the trial tribunal to testify on 15.07.2020, he was 21years. This means in 2014, PW2 was a minor as he was 15 years old by then. The Law of Contract Act does not prevent minors from witnessing contracts, but from making them. This means the fact that a minor was a witness does not make the contract void especially since the other witnesses were of majority age at the time the contract was made.

However, the allegation that PW2 was a witness, creates doubts as to the genuineness of the agreement especially, since no question was put to PW2 by the respondent's counsel in regard to him signing the said agreement. It is well settled that failure to cross examine a party on an important fact connotes admission of the same and bars the party from raising the fact to the contrary at appeal stage. See, **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012) TANZLII.

It is also well settled that in civil cases the standard of proof is on balance of probabilities. At the end of trial, the court must be able to identify the heavier evidence, meaning that the scales must shift in favour of one of the parties. See; **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453

and **Crescent Impex (T) Limited vs. Mtibwa Sugar Estates Limited** (Civil Appeal No.455 of 2020) [2023] TZCA 17501 (16) (both from TANZLII).

The appellant's case required him to prove that the suit land was solely offered to the late Batuli, that the 1st appellant was a stranger to the suit land and not her husband as claimed in the Written Statement of Defence. In turn, the respondents were to prove that the suit land was sold by the appellant to the late Batuli and the 1st respondent and thus the title passed to the 2nd respondent legally.

Having vehemently denied that the 1st respondent was the husband of the late Batuli, it was expected of the appellant to furnish evidence to prove the same. I say so because, the whole case depended on that fact. Offering a property to a spouse, would eventually subject the same to inheritance laws whereby the surviving spouse would have as much right as the children to the said property. This is different from cases of divorce that require other proof of source of ownership. Now, with the marital status of the late Batuli being uncertain, much is left to be imagined.

The usufructuary rights allegedly accorded to the late Batuli were also not explained by the appellant in his testimony. He simply stated that he gave her the suit land to build a house and live with her children. On the other hand, on his pleadings, he clarified that the arrangement was for the house to be passed on to the minors. I

am of view that the appellant failed to discharge his burden of proving the allegations he raised.

On the other hand, the 2nd respondent's attempts to discharge her burden to prove that the title was rightfully passed to her were clearly futile. While she averred that the 1st respondent had title to pass as he purchased the suit land from the appellant, Exhibit D1 bore the names of one Mathayo Said Msemo, a stranger to the case. His identity as being the appellant only surfaced in the submission of Mr. Shayo before this court. Clearly, this is a statement from the bar and raised as an afterthought. It thus cannot not be relied on.

As argued by Mr. Paul, the same cannot be entertained as it does not feature in the pleadings either. The law is trite that parties are bound by their own pleadings and factual matters outside pleadings cannot be entertained by the court. See, **Masaka Mussa vs. Rogers Andrew Lumenyela & Others** (Civil Appeal No.497 of 2021) [2023] TZCA 17339; **Barclays Bank T. Ltd vs. Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875; **Hood Transport Company Limited vs. East African Development Bank** (Civil Appeal No. 262 of 2019) and **Yara Tanzania Limited vs. Ikuwo General Enterprises Limited** (Civil Appeal 309 of 2019) [2022] TZCA 604 (All from TANZLII).

Concerning Exhibit D2, the validity of the same is also in question considering that it was never signed by the village council, but rather sent to the ward executive officer. In the case of **Bakari**

Mhando Swanga vs. Mzee Mohamed Shelukindo & Others (supra) it was held:

> "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** as correctly submitted by the second respondent, **which in our view is in compliance with section 142 (1) of the Local Government (District Authorities) Act - Cap. 287 R.E. 2002** 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 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. However, the appellant did not comply with this requirement."

Further, it appears that the appellant was also intentionally excluded in the alleged sale. The evidence offered by the 2nd respondent and her witnesses as to the boundaries of the suit land vary with the boundaries described in exhibit D2. In the circumstances I find the sale conducted between the 1st and 2nd respondent void.

In the foregoing, I declare the sale agreement between the 1st and the 2nd respondents void. I consequently order the 2nd respondent to remove all materials she deposited on the suit land and vacate with immediate effect. Apart from the said order, I refrain from

making any declaration in regard to ownership of the suit land as the appellant failed to prove the same as well. As such, the suit premises shall continue to be used by the minors as they used it before the purported sale to the 2nd respondent. Considering the outcome, each party shall bear his/her own costs of the suit.

Dated and delivered at Moshi on this 16th day of April, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA