

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 38 OF 2023

(Originating from the judgment and decree of the District Land and Housing Tribunal for Kiteto at Kibaya, in Land Application No. 20 of 2022)

THERESIA THOMAS GENDAI.....APPELLANT

VERSUS

SALOME PHILEMON BILIA *(The administratrix*

of the late Tito Jacob Babu)..... RESPONDENT

JUDGMENT

7th March & 20th May, 2024

Kahyoza, J.:

Salome Philemon Biblia is **Theresa Thomas Gendai's** daughter in law. She was a wife of **Theresa Thomas Gendai's** later son, Tito Jacob Babu. It is alleged that before her son's death, **Theresa Thomas Gendai** transferred the disputed land to her son Tito Jacob Babu in 2018. The late Jacob built a godown or a store and leased it. Six months after her son's death, **Theresa Thomas Gendai** refused to have transferred the disputed land to his late son and sought to evict the tenant.

Salome Philemon Biblia, the administratrix of the late Tito Jacob's

estate, sued successfully sued **Theresia Thomas Gendai**, her mother, for declaration that, she was the owner of the suit land. Aggrieved, **Theresia Thomas Gendai, (the appellant)** appealed contending that the DLHT erred to, admit exhibit P3 in contravention of the Stamp Duty Act, to rely the exhibit obtained by forgery, to abandon the appellant's evidence, and to deciding the case in favour of the respondent who did not prove her claims on the balance of probabilities.

The appeal, as shown above raised three issues as follows-

- 1) Was exhibit P3 admitted in contravention of the Stamp Duty Act?
- 2) Did the tribunal rely on forged exhibit?
- 3) Did the respondent prove her claims on required standard of proof?

On the date fixed for hearing the appeal, the appellant appeared and the respondent was absent. Since the appeal had previously been adjourned because the respondent was reported sick, the Court decided not to adjourn it any longer and proceeded in the absence of the respondent. The appellant had nothing substantive to submit regarding her grounds of appeal. She simply insisted that she did not give her land to

late son.

After hearing the appellant, the Court ordered the tribunal to take and certify additional evidence of two witnesses. The first witness was Mr. Christopher Donald Mwaliba, the advocate who allegedly witnessed the appellant signing a transfer right of occupancy in favour of her late son on 13.3.2020. A second witness was the ward executive officer who ostensibly witnessed the execution of an agreement between the appellant and her late son on 5.3.2018.

Indisputably, the appellant's late son, Tito Jacob Babu, was the respondent's husband. He passed away on 16.5.2020. Before his death, Tito Jacob built the house on the disputed land and leased it. A lease agreement (Exh. P4.) was executed on 10.2.2020, between Titho Jackob Babu and Abdulkareem Ismail Abdulkareem. It is also not subject of dispute that the appellant procured the suit land from Patrick Isack Lema. The dispute is whether the appellant transferred the suit land to her late son.

The respondent's evidence on record depicts that the appellant, her mother in law, handed the land in dispute situated at Plot No. 50A Block

"E" Kibaya Area to her late son on 5.3.2018. She tendered the agreement as Exhibit P2. The agreement was allegedly signed by the appellant by endorsing a thumb print, Stephano Jacob Babu and Wilson Jacob Babu also signed it. Stephano Jacob Babu and Wilson Jacob Babu are the appellant's sons, the late Tito Jacob Babu's siblings. The agreement was witnessed by Vaileth Mwasibete (**Tw1**), the ward executive officer who did not testify by her evidence was recorded and certified as additional evidence.

Vaileth Mwasibete (**Tw1**), gave evidence on oath that the appellant and her later son went to her office with a family minutes stating that the respondent gave her son the suit land. She endorsed the document.

There is yet another evidence that, the appellant executed a deed of transfer of a right of occupancy on 13th March, 2020, transferring the suit land in consideration of love and affection to her son, Tito Jacob Babu. It is alleged that the appellant endorsed her thumb print. It is self-evident that although the transfer of right of occupancy was signed on 13.3.2020 before Mr. Christopher Donald Mwalwiba advocate, consent to transfer was issued on 6.8.2020. Consent to transfer was issued after the transferee Mr. Tito Jacob Babu had passed on. Further, Mr. Christopher Donald Mwalwiba advocate did not testify until I ordered his evidence to be recorded as an

additional evidence. Mr. Christopher Donald Mwalwiba (**Tw2**), advocate gave additional evidence that, he witnessed the forms from the appellant to Tito Jacob Babu. He deposed that the appellant went to their office with her late son for transfer of land.

Goodluck Kyando (**Pw2**), a land officer by then working at Kiteto supported the contention that the appellant transferred the suit land to her son, Tito Jacob Babu. He testified that the suit land originally was a property of Patrice Lema who transferred it to the appellant. And the appellant transferred it to Tito Jacob Babu. He added that before Tito Jacob Babu passed on there was no complaint. He denied the allegations that the transfer Form No. 35 (exh P.3) was forged.

The appellant refuted the allegations that she transferred the suit land to Tito Jacob Babu, her late son. She tendered family minutes executed on 2.10.2020 denouncing to have transferred the suit land to her son, the late Tito Jacob Babu. The minutes were admitted and marked Exh. D3. During cross-examination, the appellant deposed that her late son Tito Jacob Babu and herself built a go-down on the suit land. She contended that the go-down was leased before Tito Jacob's death. Referring to the transfer Form (Exh. P3), the appellant deposed that the

Form had his signature (thumb print), his passport photograph and that of her son. She deposed that she had not complained to anyone. She admitted that there was a family meeting in 2018 I quote-

"....In exhibit P3 it has my photograph and my son (dead person). It has my signature (thumb) in exhibit P3. I have not filed any complain about my signature being forged. see page 13 of the typed proceedings...."

The appellant's two sons, Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) gave evidence to support the appellant's evidence that she did not transfer the suit land to Tito Jacob Babu, her late son. Wilson Jacob Babu (**Dw2**) denied to have signed exh.P2 and denied the allegation that there was a family meeting in 2018. He admitted that the go-down on the suit land was leased by the later Tito Jacob Babu. Stephano Jacob Babu (**Dw3**) denied to have signed exh.P2. He denied the allegations that his mother, the appellant transferred the suit land to the late Tito Jacob Babu.

Stephano Jacob Babu (**Dw3**) refuted to know whether go-down onto the suit land was leased. After he was showed the lease agreement, he deposed that as per the lease agreement the landlord was Tito Jacob Babu.

He added that he discovered that his signature on exh.P.2 was forged on 10.2.2020 but he did not report anywhere.

The appellant's evidence was contravention of the evidence Vaileth Mwasibete (**Tw1**), the additional witness that, the appellant and her later son went to her officer with a family minutes stating that the respondent gave the suit land to her son.

Having reviewed the evidence on record, I am of the view that the appellant transferred the suit land to his son, the late Tito Jacob Babu. She acquiesced Tito Jacob Babu to build a go-down on the suit land without complaining to anyone. She deposed that she contributed to build the go-down. That the appellant and her late son build the go-down. If it is true that the appellant and her son, the late Toto Jacob Babu, built the go-down then Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) have no right to the suit land.

In addition, the appellant being a sole owner had no reason to consult Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) before she transferred. I gave less weight to the evidence of Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) that there was no family meeting

in 2018 to authorize the appellant to transfer her land. That notwithstanding, the appellant testified that in 2018, they had a family meeting while Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) refuted to have had a family meeting. The conflict between the defence evidence weakened their credibility.

The evidence on record tilted in favour of the respondent the suit land is part of the estate of Tito Jacob Babu.

Having reviewed the whole evidence on record I will proceed to determine the grounds of complain. However, before entertaining the appellant's ground of appeal, the respondent raised the preliminary point of objection that the appeal was time barred.

I examined the record and found that the appellant filed the appeal after 54 days from the date of delivery of the judgment. The tribunal did not certify when a copy of the judgment was ready to be collected or the date it extracted a copy of the decree. Section 19 of the **Law of Limitation Act**, [Cap. 89 R.E 2019] (the **LLA**) permits in computing time within which to lodge the appeal to exclude time required to obtain a copy of the judgment and a decree. It is settled that the deduction of time

under section 19 of the LLA, automatic, that a party does not need to apply to the court to exclude the time that person spent to obtain a copy of the judgment and proceedings. The record shows that the appellant delayed for 9 days to appeal. In the absence of the certificate from the tribunal as to when the judgment and the decree were ready to be collected, I take it that the appellant spent 9 days to obtain a copy of the judgment and decree. For that reason, the appeal was lodged within time specified by law.

Section 19 of the LLA stipulates that-

"19.-(1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.

*(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite **for obtaining a copy of the decree** or order appealed from or sought to be reviewed, **shall be excluded.***

*(3) Where a decree is appealed from or sought to be reviewed, the **time requisite for obtaining a copy of them judgment** on which it is founded shall be excluded." (Emphasis added)*

Was exhibit P3 admitted in contravention of the Stamp Duty Act?

The appellant complained that the tribunal admitted unstamped exhibit P3 in contravention to the law. The respondent replied that the exhibit was stamped.

It is trite law that omission to a pay stamp duty in accordance with section 47(1)(a) read together with section 5 and the Schedule of the Stamp Duty Act, [Cap. 189 R.E. 2019], renders the document inadmissible as evidence in court. However, failure to stamp the document does not render it useless as a court may admit such documents and rely upon after stamp duty is paid, as held in **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] T.L.R 21. The respondent annexed unstamped document to the application but she tendered a stamped document. It is established that documents attached to pleadings are not exhibits. They cannot be relied upon. One could argue that the Exh. P3 was different from the attachment. The attachment did not bear a stamp duty while the exhibit was stamped. The law permits a person wishing to tender a document to pay stamp duty before he tenders it in court as exhibit.

Section 47(1)(a) of the Stamp Duty Act, reads-

*"47.-(1) No instrument chargeable with **duty shall be admitted in evidence for any purpose** by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer, **unless such instrument is duly stamped:...**"*

It is evident that Exh.P3 is stamped, hence, I find no merit in the appellant's complaint in the first ground of appeal.

Did the tribunal rely on forged exhibit?

The appellant complained that the tribunal relied on forged exhibit. The respondent refuted the contention. I had an opportunity to consider the exhibits and the evidence on record. The appellant's evidence was that she did not sign a transfer of right occupancy (Exh.P3). Wilson Jacob Babu (**Dw2**) and Stephano Jacob Babu (**Dw3**) deposed that they did not sign exhibit P2. For that reason, exhibits P2 and P3 were forged.

I considered the appellant's evidence that her late son build a go-down on the suit land and leased it. Does the appellant wish to convince late Tito Jacob Babu trespassed to her land and built a go-down? I am dumbfounded why did the appellant not trespass or complain of forgery

when her son was still alive. There is evidence from Vaileth Mwasibete (**Tw1**) who signed Exhibit P2 on 5.3.2018 deposed that the appellant went to her office with her late son with a document executed by the family. Mr. Christopher Donald Mwalwiba (**Tw2**) who witnessed Exhibit P.3 deposed that the appellant executed the transfer of a right of occupancy in favour of her son. Both witnesses deposed when Tito Jacob Babu was alive there was no complaint that he had forged the documents. They complained after Tito Jacob Babu passed on. The respondent replied that she was not living harmoniously with the appellant and brothers in law. It may have been the reason for turning against her.

It is settled that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases. See the decision in **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R 169. I did not see the appellant's evidence proving by a higher degree of probability than that which is required in ordinary civil cases, that her late son forged the exhibits. The fact that the appellant's son built a go-down onto the suit land and leased without any objection or complained, negates the allegation that he obtained the transfer

documents fraudulently.

Once the respondent tendered evidence that the appellant transferred the suit land to her late husband, the burden of proof shifted to the appellant to prove on higher degree of probability than that which is required in ordinary civil cases, that the documents were forged. The Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others**, Civil Appeal No. 226/ 2020, took a stand that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. It stated-

*"To demystify, the burden of proof is the duty or responsibility cast on a party to put forth evidence in order to prove their claim. In civil cases, as a general rule, it is the party bringing the claim (the plaintiff) on whose shoulder the burden of proof lies. However, after the plaintiff has led evidence either in the form of oral testimony, documentary evidence or objects, the burden of proof as a matter of adducing evidence or the onus of proof (as it is otherwise called to distinguish it from the burden of proof which never shifts), shifts to the defendant to lead evidence either with the view to controverting the plaintiffs evidence or supporting his own case. According to the English case of **Pickup v. Thames Ins. Co.** 3 QBD, 594,600, the burden of proof in this sense, is*

always unstable and may shift constantly throughout the trial accordingly as one scale of evidence or the other preponderates.

*... For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary. This is so because as per the case of **Raghramma v. Chenchamma**, A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence."*

The appellant did not convince me that, her late son forged the transfer of right of occupancy and she acquiesced to his act of trespassing to the suit land, built a go-down and leased it. I do not find any merit in the second complaint. I dismiss the second ground of appeal. It is trite law that the allegation of fraud in civil case must be pleaded and proved specifically. See **Ratilal Gordhanbhai Patel v. Lalji Makanji [1957] E.A 314**, where the former Court of Appeal for East Africa stated thus-

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

Did the respondent prove her claims on required standard of

proof?

The appellant complained that the respondent did not prove her claims on the balance of probability. The respondent replied that she proved her claims. I have pointed above that the respondent tendered the evidence and summoned one witness who proved that the appellant transferred the suit land Tito Jacob Babu. The respondent tendered exhibits P.2 and P.3 to prove that the appellant transferred the suit land to her late husband. Based on exhibits P.2 and P.3, which I did not find to be forged as alleged by the appellant, there is evidence that the appellant transferred the suit land to late Tito Jacob Babu.

In addition, the evidence is loud that, from the handing over of the suit land to Tito Jacob Babu on 05.03.2018 as executed before Vaileth Mwasibete (WEO) (**Tw1**) followed by the transfer deed executed before Mr. Christopher Donald Malwiba (advocate) (Tw2) on 13.03.2020, there was no any dispute between the parties. As if that is not all, the lease agreement is clear that it was Tito Jacob Babu who leased the go-down, after he finished to build it, which confirms that the respondent's husband was the legal owner of the disputed landed property.

Goodluck Kyando (**Pw2**) who was the land officer at Kiteto,

confirmed what was staged by Vaileth Mwasibete (**Tw1**), Donald Malwiba (**Tw2**) and exhibits P2 and P3 that indeed the suit land which was formally owned by Patrick Lema was transferred to the appellant, then the appellant transferred it to Tito Jacob Babu and that the said exhibits were not forged.

The appellant's testimony, as well as the testimonies of Wilson Jacob Babu (Dw2) falls short of merit for; **one**, that the alleged family minutes (Exh. D.3), that purported to denounce the transfer dated on 02.10.2020 was a mere afterthought as it came only six months after the death of Tito Jacob Babu and before that there was no dispute at all; **two**, there was a contradiction between the testimony of the appellant and that of his two sons, as they denied to have a family meeting in 2018; **three**, the appellant acquiesced that Tito Jacob Babu was the one who did build the go-down and she kept quiet all along. Thus, she is estopped from denouncing the transfer after Tito's death; **four**, it was alleged by the appellant and Stephano Jacob Babu (Dw3) that they discovered that the transfer deeds were forged but they did not complain anywhere. All these shows that the documents were valid and lastly, the appellants did not plead and prove to the required standard that the documents (Exh. P.2 and

Exh. P.3) were forged.

The respondent proved her claims that the suit land was part of her late husband's estate.

In the end, I find that the appeal is meritless. I dismiss the appeal. Since the appellant and the respondent are related, mother-in-law and daughter in law, I make no order as to costs.

I order accordingly.



Dated at Babati this 20th day of May, 2024.

J. R. Kahyoza, J.

Court: Judgment delivered in the virtual presence of the appellant and in the absence of the respondent and her advocate. B/C Ms. Fatina Haymale (RMA) present.

J. R. Kahyoza

Judge

20/05/2024