THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LAND APPEAL NO. 63 OF 2023

(Originating from Application No. 243 of 2019 of the District Land and Housing Tribunal for Mbeya)

NELUSIGWE MWAKITWANGE ..... APPELLANT

VERSUS

SULEMAN MWAKIPWETE ..... RESPONDENT

JUDGMENT

Date of hearing: 7/11/2023

Date of judgment: 6/2/2024

NONGWA, J.

In the District Land and Housing Tribunal for Mbeya at Mbeya, the appellant had instituted Application No. 243 of 2019 against the respondent for recovery of seven acres of land located Mhwela and Mapogoro village, Mwatenga ward within the district of Mbarali in Mbeya region.

In a nutshell, background of the case is that, the suit land was initially owned by Andrea Tweli Mwakitwange. It was pleaded that the suit

land was gifted to the appellant by Tukulamba Andrea Mwakitwange in writing which was admitted and marked as exhibit P1, the later got from her father Andrea Tweli Mwakitwange. That it was in 2019 when the appellant discovered the invasion of the respondent over the suit land.

From the records, the appellant testified as PW1, called other three witnesses Amos Tweli Mwakitwange (PW2) whose evidence was that after the demise of Andrea Tweli Mwakitwange, Ezekia Mwakitwange took charge of the farm who later handed to Tukulamba. Sekela John (PW3) her evidence was that Ezekia Mwakitwange left the land for the appellant in care of Tukulamba.

In his written statement of defence (WSD), the respondent disputed the claim pleading to have bought the land from Emmanuel Ezekia Mwakitwange and Kaunda Ezekia Mwakitwange. In support of his evidence, he called Kisa Samson (DW2) who testified that the suit land belonged to his Mother Tukulamba after being given by her father. Next was Franco Sanga (DW3) who stated that he ever cultivated suit land after being given by Tukulamba and that he witnessed sale agreement to the respondent. He tendered sale agreement dated 18/9/2017, exhibit D1. Newton Kipanga Mwakisendo (DW4) witnessed sale agreement dated

17/08/2018 to the respondent which was tendered and admitted as exhibit D2.

At the end of trial, the chairman was convinced that the appellant had failed to prove the case to the standard required especially that there was no link how the appellant's father Ezekia Mwakitwange got the suit land from Andrea Mwakitwange. The application was thus dismissed with costs.

The above result aggrieved the appellant who has filed memorandum of appeal consisting of four grounds of appeal and two alternative grounds hence six, they are reproduced hereunder as follows;

1. *'That the trial Chairman misdirected himself when he hold that the appellant failed to explain as how the land was transferred to appellant's father by ignoring the testimony of PW2, PW3 and exhibit Pl.*
2. *That the trial court erred both in law and fact by giving its verdict in favour of the respondent whose case was weak and full of contradictions which went to the root of the case.*
3. *That the trial tribunal erred both in law and in fact by admitting and relying on the sale agreements which were not mentioned neither annexed on the written statement of defence.*
4. *That the trial court erred in law by admitting exhibit DI from Dw3 who had no capacity in law to tender the same. a. IN ALTERNATIVE*

5. *That the trial Chairman erred both in law and fact when he hold that the vendor had right to sold their father's property without being appointed as legal administrator of the late Andrea Mwakitwange*
6. *That the trial court erred in both law and fact when holding that Emmanuel Jolam Kasambala/Emmanuel Andrea Mwakitwange was also a son of the late Andrea Mwakitwange contrary to the testimonies of Andrea Mwakitwange's sibling PW2 who denied being his blood related son.'*

On the date scheduled for hearing the appeal, parties were represented by Mr. Ezekia Mwampaka and Sambwee Shitambala, both learned counsels who appeared for the appellant and respondent respectively. Hearing was in the form of written submission, counsels complied with the scheduling order. The fourth ground was prayed to be withdrawn by the appellant.

When the court was preparing judgment, it discovered that the respondent did not file amended written statement of defence to the amended application. The proceeding was re-opened for the parties to address the court on whether it was proper to proceed with hearing in absence of reply to amended application as ordered.

I appreciate the argument of the counsels for the parties on the raised issue, however it will not be repeated here.

I have considered the arguments of the counsels on the raised issue, the record of the tribunal speaks loudly that on 5/3/2020 the appellant tabled a prayer to amend his application to remove the name of Emmanuel Jolam Kasambala who was the first respondent after his life had expired. Then the tribunal ordered the amended application to be filed on 11/3/2020 and reply to amended WSD on or before 31/3/2020.

Record further reveals that on 31/3/2020 parties appeared before the tribunal and Mr. Shitambala prayed to adopt the previous WSD, although record is silence if the prayer was granted or not then the tribunal proceeded with hearing.

Now it is clear that previous WSD was adopted by the respondent, purpose of amending the application was only to remove the name of the respondent who it was clear that has passed away. Meaning that the substantive part of the claim was not affected by the amendment. Although there is an order to file amended WSD but it is clear that the respondent prayed to the court to adopt the previous.

In my considered view, the respondent's counsel prayer to adopt the previous WSD was right and in order because the amendment was only to remove name of the deceased respondent. In the case of **Catherine**

Honorati vs CRDB Bank, Civil Appeal No. 314 of 2019 [2023] TZCA 17985 (TANZLII) the court stated that;

> *'Further, we gathered from the record of appeal that the amendment of the plaint was in respect of correcting the heading of the plaint, instead of reading "High Court" it read "Land Division". Also it geared at inserting exact amount in the paragraph conferring jurisdiction to the High Court. Essentially, it was more of a correction of some typos in the plaint which did not alter the claim of the appellant.* ***That being the case, we find that the trial judge was correct in allowing the first respondent to adopt the WSD because it was not affected by the amendments.'*** Emphasize supplied.

The above principle, apply to this case, so long as record is clear that the respondent instead of filing the amended written statement of defence opted to adopt the previous WSD save for the name of the 1st respondent which was removed in the amended application, in law, WSD was filed. Considering the nature of amendment made to the application it was right to pray to adopt the previous WSD and the tribunal rightly proceeded with hearing. With this holding the argument that evidence of the respondent be expunged from the record and matter be deemed heard *ex-parte* dies a natura death.

Reverting to merits of the appeal, in the first ground it was submitted that evidence of PW2 proved that the suit land was donated to the appellant's father Ezekia Mwakitwange by his father Andrea Tweli Mwakitwange which was supported by evidence of PW3 and exhibit P1.

Mr. Mwampaka faults the chairman for holding that evidence did not explain how the suit land was transferred from Andrea Tweli Mwakitwange to Ezekia Andrea Mwakitwange while witnesses were not cross examined on that aspect. Counsel cited the case of **Tegemeo Madindo vs Zacharia Chaula**, PC. Civil Appeal No. 13 of 2021) [2021] TZHC 9084 to support the point.

On the second ground that evidence of the respondent was contradictory, Mr. Mwampaka referred to sections 110(1) and 112 of the Evidence Act on burden of proof. He submitted that while evidence revealed that the respondent bought the suit land from Kaunda Mwakitwange and Emmanuel Mwakitwange a farm located at Mhwele in 2015 for a consideration of Tsh. 3,600,000/= and that of Mapogoro in 2018 at Tsh. 3,000,000/=. Evidence of DW1 and DW4 show that Emmanuel Mwakitwange died in 2018 and Kaunda Mwakitwange in 2017. It was stated that it was contradictory because sale agreements tendered

showed that he bought in 2018, because it was not possible for a person who died in 2017 to sell the suit land in 2018 to the respondent.

Another contradiction pointed by counsel for the appellant was on purchase amount paid. He stated that while exhibit D1 and D2 revealed that the whole purchase amount was paid, oral account of DW1, DW3 and DW4 reveals that only Tsh. 1,000,000/= was paid. He cited the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & Another,** Civil Appeal No. 197 of 2019 [2022] TZCA 434 to support the argument that contents of document cannot be contradicted by oral account of a witness.

Submitting on third ground that exhibits was admitted while not pleaded, it was contended that sale agreements which was admitted as exhibit D1 and D2 were not attached to the WSD. He said that despite the appellant registering objection to its admissibility, the chairman ordered stamp duty to be paid while it was not pleaded and no notice to produce was filed. He prayed exhibit D1 and D2 to be expunged from the record. To strengthen the point, the counsel referred to the case of **Yara Tanzania Limited vs Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019 (Unreported).

Submitting in reply and after either strategically or inadvertently skipping the second and alternative grounds of appeal, it was contended by Mr. Shitambala in the first ground that evidence of PW1 and PW3 did not explain how the suit land parted from hands of Andrea Mwakitwange to Ezekia Mwakitwange. He added that even exhibit P1 did not explain such exchange late alone that the suit land was handed to the appellant by Tukulamba Andrea Mwakitwange. Mr. Shitambala stated that parties were cross examined on that aspect and failed to prove the exchange.

On procedural admission of exhibit D1 and D2 in ground three, it was submission of the counsel for the respondent that all procedure was complied with and the respondent complied with direction of the chairman. He cited the case of **Ramadhan Sembejo Mongu vs Musoma Municipal Council & 3 Others,** Civil Case No. 6 of 2021 [2022] TZHC 14976 on the court applying objective principles and doing away with technicalities.

During rejoinder the appellant echoed same submission which I find inappropriate to reproduce here. On admission of exhibit D1 and D2, Mr. Mwampaka distinguished the case of **Ramadhan Sembejo Mongu** (supra) to the effect that non-adherence to procedural law cannot be applied to the contrary of the law.

Having considered the record of appeal and rival argument for and against the appeal, in the determination of the appeal I will start with the ground 3, 2, 1 and I will finish with alternative grounds.

In ground 3 the appellant complains that exhibit D1 and D2 were not annexed to WSD thus ought to have not been admitted. It was submitted that objection was raised but the tribunal admitted it. To the contrary counsel for the respondent stated it was all appropriate.

From the arguments, admission and rejection of document in the tribunal is regulated by regulation 10 of the Land Disputes (District Land and Housing Tribunal) Regulation G.N. 174 of 2003 (herein Regulation) which provides;

> *'10(1) The tribunal may at the first hearing receive document which were not annexed to the pleadings without necessarily following the practice and procedure under the civil procedure code, 1966 or evidence Act, 1967 as regard documents;*
>
> *(2) Not withstanding sub-regulation (1) the tribunal mat at any stage of proceedings before conclusion of hearing may allow any party to the proceeding to produce any material document which were not annexed or produced earlier at the first hearing;*
>
> ***(3) The tribunal shall before admitting any document under sub regulation 2***

(a) Ensure that a copy of a document is served to the other party

(b) ***Have regard to the authenticity of the document.'***

Emphasize added.

The above law is clear that the tribunal is not bound by rules applicable to admission of document under the Civil Procedure Code and Evidence Act. In the tribunal documents can be produced and received at any time before the conclusion of hearing, however, before admitting the document must **one,** be served to the opposite party, and **two,** the tribunal be satisfied to its authenticity.

In the present appeal, after going through WSD of the respondent, I agree with Mr. Mwampaka that sale agreements exhibit D1 and D2 were not annexed to the WSD, however I do not agree with him that it was not pleaded. Reading paragraph 4 of the WSD purchase is pleaded.

On whether it was right sale agreement to be admitted, what I gather from the record is that when DW3 sought to tender the sale agreement dated 19/8/2015 in evidence, it was objected by Mr. Mwampaka for clarity I reproduce what transpired in the tribunal;

Mwampaka: mheshimiwa sijawahi kupewa kivuli cha nyaraka hii wala haijawahi kutajwa popote. Pia nyaraka hii kama mkataba wa mauziano haina stamp duty. Hivyo naomba isipokelewe.

Shitambala: mheshimiwa kuhusu pingamizi la kwanza tunaomba baraza litupe muda ili tuilete badae. Kuhusu stamp duty tunaomba tupewe muda wa Kwenda kuilipia.

Mwampaka: sina pingamizi.

Baraza: nyaraka imerudishwa ili ikafuate taratibu za kisheria.

Imesainiwa

A. Mapunda
Mwenyekiti
4/5/2023

Shitambala: naomba ahirisho ili tukafuate taratibu hizo za kisheria. Sina pingamizi

Amri: shahidi anakuwa derrered (sic)

Utetezi utaendelea mchana saa 7

Imesainiwa

A. Mapunda
Mwenyekiti
4/5/2023

Wakili Shitambala: mheshimiwa baada ya kutimiza masharti ya kisheria naomba nyaraka hii ipokelewe.

Wakili Mwampaka: sina pingamizi

Baraza: mkataba wa mauziano ya shamaba wa tarehe 18/09/2023 umepokelewa kama kielelzo D1.

The proceeding above speaks loudly that although exhibit D1 was not annexed to the WSD but it was later admitted after complying with Regulation 10(3) reproduced earlier when the tribunal allowed the respondent to comply with the law before admitting it. If Mr. Mwampaka was not comfortable with the reply of Mr. Shitambala to his objection was supposed to raise the concern before the tribunal. Failure of Mr. Mwampaka to register objection to a prayer of Mr. Shitambala to go and comply with the law, it makes it a new issue which cannot be resolved by this court at this stage.

Regarding exhibit D2 I agree with Mr. Mwampaka that it was admitted without complying with the law. It was not annexed to the WSD and record is silence if it was served to the appellant before being tendered in evidence. Although the appellant did not object to its admissibility bearing that it was not annexed to WSD, in absence of evidence that it was served to the appellant before being tendered, the court cannot close its eye. Therefore, exhibit D2 is expunged from the record.

In the 2 ground, the appellant complain that respondent's evidence had contradiction, he pointed two area; **one,** payment of purchase price; **two,** that the second sale was transacted while one of the sellers had died. Mr. Shitambala did not make any reply on it.

After considering the alleged contradictions, I am of the view that the same are not contradictions rather it goes to evaluation and analysis of evidence. For evidence to be considered as contradiction, it must contradict with earlier assertion of the same witness or other witnesses on the same fact and proceeding.

What is seen in this appeal is that oral evidence of DW3 and DW4 was that they witnessed only Tsh. 1,000,000/= being paid as purchase price while sale agreements tendered echoed a different figure. That is to say oral evidence was contradicting contents of document, which is not allowable under section 101 of the Evidence Act.

Similarly, whether the one of the sellers had died when the second sale agreement was transacted, cannot not be termed as contradiction, by the way this statement came only from DW1 alone. DW4 in his testimony said nothing about death of Kaunda or Emmanuel as Mr. Mwampaka suggested. The second ground fails.

Coming to ground 1 which principally touches on the question whether the appellant proved his claim in the tribunal. It was submitted by Mr. Mwampaka that the appellant managed to prove how title changed from the original owner Andera Twehi Mwakitwange to Ezekia Andrea Mwakitwange, the appellant's father.

In opposition, Mr. Shitambala had different view, he added that even exhibit P1 did not explain how the suit land come into hands of the late Ezekia Mwakitwange from Andrea Mwakitwange.

Having scrutinised the records of appeal and rival arguments, it is pertinent to look on some of the principles. One, is the rule of pleadings, it is the position of the law that parties are bound by their pleadings and they cannot be allowed to raise new issues which are not backed by their pleadings unless by way of amendment. See **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others,** Civil Appeal 66 of 2019 [2021] TZCA 168 [TANZLII].

Two, burden of proof, it is a cherished principle of law that generally, in civil cases, the burden of proof lies on a party who alleges anything in his favour. The principle is embraced in section 110 of the Evidence Act [CAP 6 R.E. 2022]. It is also common knowledge that in civil proceedings,

a party with legal burden also bears the evidential burden and the standard of proof is on the 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.

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. I am fortified in this view by the extracts from the celebrated works of Sarkar from Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis cited in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) that;

> *'... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....'*

In the instance appeal, the appellant is the one who set the law in motion thus burden of proof lied on him.

In the application the appellant's claim on how he got the suit land is well stated in the application he filed,

i. *That the Applicant is the lawful owner of the suit land which all together are measured seven acres which the Respondent without any colour of right invaded and stated to cultivate and cutting downs trees since 2018.*

ii. ***That the applicant was given the suit land as gift from her aunt Tukulamba Andrea Mwakitwange on 10/8/2008, the later was also given the disputed land by Andrea Mwakitwange her father way back in 1980's.***

iii. *That part ofthe suit land has tombs, permanent fruits trees ofmangoes and natural trees which now, the Respondent is clearing for his own benefits and part of, is for cultivation of maize and the remaining four acres are for paddy cultivation.*

iv. ***That in January 2019, the Applicant discover that her gifted land were invaded by unknown person who cultivate maize and paddy****, and on 22/01/2019, applicant filed a complaint to VEO of Mhwela where the disputes was not resolved but the 2nd Respondent was left to harvest his maize and later on the parties should stop using the same until when their disputes shall resolved but up to date the 2nd Respondent continue using the same*

Now it is clear that the appellant expressed through his pleading that he got the suit land as gift from his aunt Tukulamba Andrea Mwakitwange. In his evidence, the appellant who testified as PW1 stated;

The suit land belonged to my father. He died while I was young. My aunt took care of them. when she was about to die and I was already of age of majority she convened a elder and declared that she handed the shamba of my father to me as she was just caring for them. she said she did so in order to avoid quarrels with her issues....

That being the respondent's evidence without mincing words it was against his own pleading, it changed the appellant's case from being gifted by his aunt Tukulamba Mwakitwange to the latter being the caretaker. In **Makori Wassaga vs Joshua Mwaikambo & Another** [1987] TLR 88 the Court said;

'A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case.'

The issue of Tukulamba Mwakitwanga being the caretaker of the suit land was not pleaded and evidence in record supporting such allegation is therefore ignored.

What follows is, was there any evidence to support the claim that the appellant was gifted the land. The term gift is defined by Black's Law Dictionary, 8th Edition as the voluntary transfer of property to another without compensation. Gift if made passes ownership and everything

attached to it absolutely unless it is condition. In **Salum Mateyo vs Mohamed Mateyo** [1987] TLR 111 **Mroso, J.** (as he then was) referring to Halsbury's Laws of England, 3rd Edition Volume 18 at page 366, stated;

> *'It is on legal and aquitable principles clear that a person sui juris acting freely, and with sufficient knowledge, ought to have and has power to make, in binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstances.'*

On the other hand, being caretaker implies that the person is given temporarily occupation or use of the thing, but does not have right to dispose or transfer ownership. In **Suzana Kakubukubu and Two Others vs Walwa Joseph Kasubi and Another,** Civil Appeal No. 14 of 1991 cited in **Jane Kimaro vs Vicky Adili**, Civil Appeal No. 212 of 2016) [2020] TZCA 1804 (TANZLII) in which the court held that;

> *'The caretaker might have been one in charge of the farm while the appellants were away but* ***he had no authority to dispose of the land or surrender the appellants' rights over the land.'*** Emphasize added.

Now it is clear that for one to gift land to another must be the owner with full authority to transfer title. In this case there is no evidence that

the said Tukulamba was the owner of the suit land, while it has been established that the land belonged to the late Andrea Tweli Mwakitwange, there is no evidence how it was transferred to Tukulamba who later gifted to the appellant. Exhibit P1 was tendered as proof of the transfer, part of it reads;

Mimi Tukulamba Andrea Mwakitwange nilikabiziwa mashamba na kaka yangu Ezekia Andrea Mwakitwange ambaye naye alikabiziwa na baba yake Andrea Mwakitwange. Nilikabiziwa ili niyasimamie mashamba pamoja na nyumba (mji) na kaka yangu Ezekia Andrea Mwakitwange. Na mimi leo namkabizi mashamba haya mwanangu Nelusigwe Ezekia Mwakitwange....'

What the above script tells is that the said Tukulamba was the caretaker of the farm which belonged to Ezekia Andrea Mwakitwange who was given by his late father Andrea Mwakitwange. To say the least exhibit P1 is at variance with pleading of the appellant, therefore the same is ignored for not support what was pleaded.

Going by evidence in record, it was not established how the late Andrea Mwakitwange gave the land to his son Ezekia Mwakitwangwe, also deceased. PW2 tried to explain how the land changed hands, his testimony was that;

Originally the suit land belonged to my brother who was called Andrea Tweli Mwakitwange has passed away. After his death his issue took over the shamba. The son is Ezekia Mwakitwangwe. Ezekia then handed the shamba to his sister Tukulamba, then handed it to her daughter, the applicant.

The above testimony does not explain how PW2 Ezekia Mwakitwange got the land after death of Andrea Mwakitwange considering that there were other children left by the later including Tukulamba, Kaunda and Emmanuel. Also, evidence of PW2 is silence if was present and witnessed the handing over from Ezekia Andrea Mwakitwange to Tukulamba Andrea Mwakitwange from whom the appellant derives his title, keeping my eye that it was stated in cross examination. The same evidence is found in evidence of PW3.

Mr. Mwampaka referred to evidence of PW3 during cross examination that the land was left to Ezekia Mwakitwange by his father forgetting that it ought to be disclosed first during examination in chief. See **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others**, Civil Appeal No. 66 of 2019 [2021] TZCA 168 (TANZLII), more important is that it was hearsay as PW2 and PW3 were told by Tukulamba.

It is complained that the chairman issue of transfer of the land from Andrea Mwakitwange to Ezekia Mwakitwangwe was not cross examined.

While I agree that failure to cross examine a witness on a material point implies admission of the truth of that witness evidence, the rule is not absolute, it all depends with circumstances of each case and a point at issue. In **Kwiga Masa V Samweli Mtubatwa** [1989] TLR 103 cited with approval in **Zakaria Jackson Magayo vs Republic**, Criminal Appeal No. 411 of 2018 [2021] TZCA 207 (TANZLII) **Samatta, J** (as he then was) stated;

> *'A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true.'*

In this case it was important for the appellant to establish chain of change of ownership from the original owner Andrea Mwakitwange to Ezekia Mwakitwange and later to Tukulamba because there was competing evidence on who was given the suitl land by the later Andrea

Tweli Mwakitwange. This is well seen in evidence of DW2 that the land was given to his mother Tukulamba Andrea Mwakitwange by her father.

My perusal of evidence has noted that PW2 and PW3 were all cross examined and stated that they were told by Tukulamba of Ezekia Mwakitwange being given the land.

In the instance case, the appellant's claim solely depends on exhibit P1 which still is lacking in merits when weighed against evidence of DW2, DW3 and DW4. It was not established that Andrea Mwakitwange gave the land to Ezekia Mwakitwange leaving aside other children. Therefore, the ground fails.

Arguing alternative grounds, it was stated that the administrator is the only person mandated to deal with the estates of the deceased. That after the demise of the owner, there is evidence PW1, PW2, PW3, DW1, DW2 and DW3 proved that estates were equally distributed to heirs and Kaund Mwakitangwe was given the estate at Nzovwe, the reason he never used the suit land. Counsel was of the view that if the deceased estates was not divided then Kaunda Mwakitwange not being the legal administrator could not have sold it to the respondent.

On Emmanuel Mwakitwange not being connected to Andrea Mwakitwange, Mr. Mwampaka submitted that all prosecution and defence

witnesses denied to know him and being son or close relative to Andrea Mwakitwange. It was argued that the chairman misdirected in holding that was the son of Andrea Mwakitwange, the matter not reflected in proceeding.

From the submission Mr. Mwampaka is arguing that sellers had no *locus standi* to sale the property of the deceased without being the appointed administrator. This ground will not detain me much as the issue was not pleaded and it is raised by the appellant who did not dispute it by filing reply to WSD after being alerted by the respondent that he purchase it from Emmanuel Mwakitwange and Kaunda Mwakitwange as pleaded in paragraph 4 of the WSD.

Much as there is no evidence how the land changed hands from Andrea Tweli Mwakitwange to Emmanuel Mwakitwange and Kaunda Mwakitwange, yet there is no evidence from the appellant to establish that his father, the late Ezekia Andrea Mwakitwange was given the land by Andrea Tweli Mwakitwange the original owner. The assertion is defeated by evidence of PW2 who stated Ezekia Mwakitwange took charge of the land after death of Andrea Mwakitwange. Ground 5 raised as alternative is dismissed.

Regarding ground 6 that Emmanuel Andrea Mwakitwange was not son of the late Andrea Mwakitwange. Mr. Mwampaka submitted that appellant's witnesses, PW1, PW2 and PW3 denied to know the said Emmanuel as their relative.

Having scanned the record and found that only two issues were framed for determination of the case one, *who is the lawful owner of the land,* and two, *what reliefs are parties entitled to.* After reading the proceeding and judgment of the tribunal I have found that the statement was just made in the passing and was not part of the decision of the tribunal. The same scenario was discussed in **Blue Rock Limited & Another vs Unyangala Auction Mart Ltd Court Broker**, Civil Application No. 69/2 of 2023 [2024] TZCA 8 (19 January 2024; TANZLII) and the court stated;

> *'... that statement did not, in our view, inform the final decision. This is evident in the statement made by the Court subsequent to that reiterating its earlier finding that there was no need to issue notice...'*

The same applies to the present case, the chairman made the statement after being satisfied that the appellant had failed to prove her case in terms of section 110, 111 and 112 of the Evidence Act. Ground 6 raised in alternative is also dismissed.

From the foregoing, I have come to the conclusion that the appellant's evidence did not discharge burden of proof and evidential burden as required by section 110 of the Evidence Act let alone that it was at variance with his pleading.

In the end I find the appeal devoid of merits and is hereby dismissed with costs.

V.M. NONGWA
JUDGE
6/1/2024

DATED and DELIVERED at MBEYA this 6th February 2024 in presence of Mr. Ezekia Mwampaka counsel for the appellant, appellant and respondent in person.

THE HIGH COURT OF TANZANIA

V.M. NONGWA
JUDGE