IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

LAND APPEAL NO. 74 OF 2023

(Arising from Application No. 3 of 2022 District Land and Housing Tribunal for Muleba)

JOVENARY BUTAHE..... APPELLANT

VERSUS

RUDOVICK LEONIDAS..... 1ST RESPONDENT

JONAS PASTORY..... 2ND RESPONDENT

JUDGMENT

19th and 23rd February, 2024

BANZI, J.:

Before the District Land and Housing Tribunal for Muleba (the trial tribunal), the appellant instituted a land suit against the respondents alleging that, the first respondent trespassed into his land located at Itongo village, Nshamba ward within Muleba District which he bought from the second respondent in 2015 and constructed a septic tank. The first respondent denied the claim and contended that, he is the lawful owner of a piece of land where he built the septic tank (suit land) having acquired the same from the second respondent in 2001. On his side, the second respondent claimed that, the suit land belongs to the appellant.

After receiving the evidence of both sides, the trial tribunal invalidated the sale transaction between the second respondent and the appellant for

want of involvement of the first respondent as a neighbour to the suit land. Eventually, it dismissed the suit and declared the first respondent as the lawful owner of the suit land. Aggrieved with that decision, the appellant lodged his appeal before this court containing seven grounds as follows:

1. *THAT, the tribunal erred in law and in fact in failing to examine and evaluate evidence on record thereby arriving at the wrong conclusion.*
2. *THAT, the tribunal erred in law and in fact to dismiss the case on the ground that the appellant failed to identify the precise location of the land in dispute instead the tribunal would strike out the application so that the applicant can bring a fresh application so that can be heard on the same.*
3. *THAT, the trial tribunal erred in law and in fact to dismiss the case for want of merit while there is concrete evidence on record of the appellant over the description of the land in dispute.*
4. *THAT, the trial court erred in law and in fact by putting an ear deaf on the fact that the appellant and the first respondent had a core sharing agreement of the septic tank as one of the first step towards solving their dispute.*
5. *THAT, the trial tribunal erred in law and in fact to hold that the sale agreement between the appellant and second respondent had no legal stand on the ground*

that the first respondent as the neighbours to the land in dispute was not involved while the second respondent played both roles seller and neighbor.

6. *THAT, the trial tribunal erred in law and in fact by ignoring the evidence and testimony of 2nd respondent who is the source of ownership of pieces of land owned by the appellant and first respondent.*
7. *THAT, the trial tribunal decision is unfair and decided against weight of evidence.*

When the appeal was called for hearing, Mr. Medard Mutongore and Ms. Jackline Rubenge, learned advocates appeared for the appellant whereas, the first respondent was represented by Ms. Pilly Hussein, learned counsel and the second respondent appeared in person, unrepresented.

In his submission, Mr. Mutongore opted to argue the first, third, sixth and seventh grounds jointly and the rest were argued separately. Arguing in support of the consolidated grounds, he stated that, the chairman failed to examine and evaluate the evidence and hence, he arrived into wrong decision because the suit land was not the whole land of the appellant, but rather, a small area where the septic tank was built. According to him, the key evidence is that of the second respondent who sold his land to the appellant and the first respondent. Therefore, after raising a dispute on the

encroachment, the tribunal was obliged to visit the locus in quo before making its decision.

Concerning the second ground, Mr. Mutongore submitted that, it is not true that the suit land was not identified and had the chairman found that there was defect in identification of the suit land, the only remedy was to strike out the application and not to dismiss it. He supported his submission with the case of **Elidadis M. Rushikala v. Samuel Malecela** [2023] TZHCLandD 16761 TanzLII. He added that, the chairman failed to consider the agreement of sharing the septic tank that was reached between the appellant and the first respondent. Returning to the fifth ground, it was his submission that, as the dispute concerned a small portion of land from the land of the appellant which has no dispute, the sale agreement between the appellant and the second respondent cannot be invalidated simply because the first respondent was not involved. For that matter, the case relied by the chairman is distinguishable. He prayed for the appeal to be allowed with costs by quashing the decision of the trial tribunal.

In response, Ms. Hussein submitted that, the chairman was right to invalidate the sale agreement for want of presence of neighbour considering that, the centre of dispute was boundary. According to her, the first respondent was supposed to be involved in the sale agreement because they

were neighbours. She supported her submission with the case of **Edward Bubamu v. Pagi Kilauri and Others** [2022] TZHC 10268 TanzLII which was also referred by the tribunal chairman. She further submitted that, the appellant failed to prove that the first respondent trespassed into his land considering that PW1, PW2 and PW3 admitted that it was the first respondent who was the first to be at the said area. In respect of the fourth ground, she contended that, there was no agreement between the appellant and the first respondent on sharing the septic tank which was also disputed by the first respondent in his testimony. Besides, such agreement was not tendered as exhibit to prove its existence. Concerning identification of the suit land, Ms. Hussein insisted that, the suit land was not identified. However, that was not the main reason for dismissing the case and thus, the cited case of **Elidadis Rushikala** is distinguishable.

Responding to the first, third, sixth and seventh ground, she argued that, the chairman properly evaluated and considered the evidence of both parties before arriving into proper and right decision that the appellant failed to identify the disputed land, hence, the case was not proved to the required standard. Concerning the opinion of assessors, Ms. Pilly maintained that, such opinion is not binding to the chairman. She therefore, prayed for this court to dismiss the appeal and uphold the decision of the tribunal.

On his side, the second respondent conceded to the appeal stating that, the first respondent and him entered into agreement for the former to build a house for him in exchange of giving him a plot to build his house. After building the house for him, he gave the first respondent a plot where he constructed his house on the whole given plot. The remaining part of land continued to be under his ownership until 2015 when he sold it to the appellant who stayed with it for six years without interruption.

In rejoinder, Ms. Rubenge argued that, it is not a legal requirement to involve the neighbour in buying a land, thus absence of a neighbour cannot invalidate the sale agreement. In respect of identification of the suit land, she submitted that, the disputed area was where the septic tank was built despite the same being not specified in the application form.

Having carefully examined the grounds of appeal, evidence on record and the submissions of both sides, it is now pertinent to determine the merit or otherwise the demerit of this appeal. In doing so, this Court being the first appellate Court, has a duty to re-evaluate the evidence of the trial tribunal, and where possible, come up with its own findings as it was stated in the case of **Domina Kagaruki v. Farida F. Mbarak and Others** [2017] TZCA 160 TanzLII.

Starting with the second ground concerning identification of the suit land, regulation 3 (2) of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003 ("the Regulations") requires the application before the tribunal to contain among other things, the address of the suit premises or location of the land involved in the dispute to which the application relates. The rationale behind description of the suit land is to make it properly identifiable in order to make the decree executable. In the matter at hand, the location of the suit land is disclosed under paragraph 4 of the amended application. According to that paragraph, the same is located at Itongo Village, Nshamba Ward within Muleba District. Also, in his testimony at page 9, the appellant explained in details the boundaries and size of the land in dispute. Since the appellant in his application described the suit land by disclosing its location as required by law under regulation 3 (2) (b) of the Regulations and in his testimony, he disclosed its size and boundaries, it is the considered view of this court that, the conclusion by the learned chairman on this point is misplaced. Besides, if there was such omission, as correctly submitted by Mr. Mutongore, the remedy was to strike out the application for being incompetent. Thus, the second ground is merited.

Concerning the remaining grounds which I am going to determine jointly, as alluded above, this being the first appellate court has the duty to re-evaluate the evidence of the trial tribunal, and where possible, come up with its own findings. It is settled law that, a person with heavier evidence is the one who should win the case. This was stated in the case of **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113 where it was held that:

> *"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

In our case, it is undisputed that, the appellant and the first respondent, each at his own time bought a piece of land from the second respondent and therefore, the duo are neighbours. According to his testimony, the appellant bought piece of land from the second respondent in 2015 measuring 22 paces towards north, 22 paces towards south, 13 paces towards east and 19 paces towards west. Among the persons who bordered his land are the first respondent on northern side and second respondent on southern side. He produced the sale agreement which was admitted as Exhibit P1. He used his land from 2015 until 2021 when the first respondent invaded part of it and dug the pit hole.

The evidence of the appellant was supported by the evidence of his wife (PW3), the wife of the second respondent (PW2), second respondent

(DW2) and DW3. According to PW2, since 2001, they were using their farm until 2015 when they sold it to the appellant. However, before they sold it to the appellant, the first respondent expressed his interest of buying the same but he did not pay for it. They were surprised when the first respondent invaded it and built septic tank. Likewise, PW3 supported the appellant by stating that, the suit land is part of the land which they bought from the second respondent in 2015. On his side, the second respondent who testified as DW2 said that, following their agreement, the first respondent built the house for him in exchange of giving him a plot where he also built his house. He further stated that, the first respondent built his house on the whole plot and the remaining area was the farm which he continued to own until 2015 when he sold it to the appellant. According to him, the suit land belongs to the appellant. DW3 also claimed that, the suit land belongs to the appellant.

On his side, the first respondent testified that, he acquired his land from the second respondent in 2001 pursuant to their agreement which was duly executed. However, he claimed that, the appellant is not his neighbour. He also denied to trespass into the suit land claiming that it belongs to him.

From the evidence of both parties, it is obvious that, five out of six witnesses who testified before the trial tribunal affirmed that, the land where the first respondent constructed the septic tank is owned by the appellant.

It is also undisputed that, since 2001 when the first respondent completed to construct his house on the given land, there was no dispute on the farm that was used by the second respondent before he sold to the appellant in 2015. If at all the suit land was part of the land given to the first respondent by the second respondent in 2001, he could have interrupted the second respondent from using it.

Apart from that, there is evidence from PW2 and PW3 showing that, the appellant constructed his house on the whole land that was given to him by the second respondent. Likewise, there is another evidence from PW2 showing that, before 2021, the first respondent was using school toilet of Itongo. Despite such evidence, the first respondent in his defence did not deny the fact of him using school toilet of Itongo for all those years. Moreover, when he was cross-examined by the appellant, the first respondent admitted that, he built his house within the whole land and the remaining part was the farm of the second respondent. He admitted the same when he was answering the questions from one of the assessors. It is obvious from his admission that, the suit land is not part of the land that he was given by the second respondent. Thus, had the learned chairman evaluated the evidence properly, he couldn't have reached into conclusion that, the suit land belongs to the first respondent. Under these premises, it

is the finding of this court that, the evidence of the appellant was heavier than that of the first respondent.

Concerning the issue of sale agreement to be held invalid, according to section 10 of the Law of Contract Act [Cap. 345 R.E. 2019], for an agreement to be valid, it must be made by free consent of parties who are competent to enter into such agreement. Also, there must be lawful consideration and lawful object. It is apparent that, for any agreement on disposition of land to be valid, it does not require presence of neighbour to witness the transaction. In the presence of glaring evidence showing that, the first respondent had built within his whole land, his presence during the transaction between the second respondent and the appellant was neither necessary nor the requirement of the law. In that regard, the learned chairman misguided himself by invalidating the sale transaction basing on the position in the case of **Edward Bubamu v. Pagi Kilauri and Others** (*supra*) which had different circumstances compared to out case at hand. Unlike in the matter at hand where the sale transaction was witnesses by three persons, in the cited case, the vendor who at the time when the matter was before the court had already passed away, sold his land in the absence of any witness on his side.

That being said, I find the appeal with merit and I hereby allow it. The judgment and decree of the trial tribunal are hereby quashed and set aside. The Appellant is hereby declared as the lawful owner of the suit land. The first respondent is hereby restrained permanently from encroaching the suit land. Since parties are neighbours, each party shall bear its own costs.

I. K. BANZI
JUDGE
23/02/2024

Delivered this 23rd day of February, 2024 in the presence Ms. Jackline Rubenge, learned counsel for the appellant who is holding brief of Ms. Pilly Hussein, learned counsel for the first respondent, the appellant, the second respondent, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, B/C and in the absence of the first respondent. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
23/02/2024