

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

LAND APPEAL NO. 46 OF 2023

(Originating from Land Application No. 26 of 2022 of the District Land and Housing Tribunal for Mbulu at Dongobesh)

EMANUEL DOMINICK.....APPELLANT

VERSUS

MARSEL GETAGNO @ MARSEL EMANUEL..... RESPONDENT

JUDGMENT

7th November 2023 & 22 February, 2024

Kahyoza, J.

Emanuel Dominick, the appellant, sued **Marsel Getagno @ Marsel Emanuel**, the respondent, (Marsel) for declaration that he is a lawful owner of a piece of land measuring one and a quarter acres (1.25 acres). The District Land and Housing Tribunal for Mbulu (the DLHT) dismissed **Emanuel Dominick**'s claim for want of proof with costs. In addition, it declared Marsel, the rightful owner of the suit land.

Aggrieved, **Emanuel Dominick** preferred this appeal with 6 grounds, which the following issues-

1. Was the respondent's evidence more credible than the appellant's evidence?
2. Is there evidence to prove that the disputed land was the respondent's property?
3. Did the respondent prove his case on the balance of probability?

The background is that; **Emanuel Dominick**, the appellant, sued **Marsel**, the respondent, for the declaration he (**Emanuel Dominick**) is the rightful owner of the suit land measuring 1 acre situated at Yaeda Village, Yaeda Ampa Ward within Mbulu District in alternatively for an order to redeem the suit land at Tzs. 1,400,000.00. He also prayed for costs and any other relief(s) the DLHT finds fit to grant. The disputed land was the property of the late Dominick Ami, who was the father of **Emanuel Dominick**, the appellant. Later in 2016, **Marsel**, the respondent took possession of the disputed land. **Emanuel Dominick**, and **Marsel**, are at issue on how **Marsel**, landed on the disputed land.

Emanuel Dominick's contention and evidence was that, the late Dominick Ami, his father distributed his estate or land *inter vivos* to his ten sons in 2012. He allocated the disputed land to him. In 2015, the late Dominick was in need of money as he fell sick, he asked him to lease the

disputed land. Emanuel accepted. The late Dominick Ami leased the disputed land to **Marsel** for six years at a consideration of Tzs. 900,000.00. At the end of the lease tenure and after **Emanuel Dominick's** father had passed on, **Marsel** refused to return the disputed land to **Emanuel Dominick**, as a result, **Emanuel Dominick** sued him.

Emanuel Dominick (Pw1) summoned **Andrea Luka Aweda**, (Pw2), the then Hamlet chairperson, who deposed that he witnessed the late Dominick transferring his land *inter vivos* to his heirs and that the handing was on the 15th of July, 2012. **John Mwinuka**, (Pw3), the then Acting village executive officer, testified that he neither knew the size or location of the suit land nor authored any document in relation to the suit land. **John Amsi**, (Pw4), the late Dominick Ami's brother, testified that he chaired the meeting on the day Dominick Ami distributed his land to his 10 sons. Another witness was **Clara Emmanuel**, (Pw5), the late Dominick Ami's second wife, who supported the appellant's evidence.

Damiano Dominick, (Pw6), the appellant's brother supported the evidence of his brother Emmanuel Dominick (**Pw1**) and added that their father died on the 6 April, 2015.

On his part, **Marsel** argued and tendered evidence that, he purchased the suit land from **Emanuel Dominick's** father in 2016 at a consideration of Tzs. 1,400,000.00. To establish his case, **Marsel** summoned **Maria Ama**, (Dw2), the late Dominick Ami's first wife and **Veronica Paulo, (Dw4)**, the late Dominick Ami's third wife testified that on 4.01.2016, they sold a suit land, measuring 1 acre, to the respondent, at a consideration of TZS. 1,400,000.00. **Maria Ama**, (Dw2), refuted the allegation that her husband distributed his land *inter vivos* to his sons in 2012. They added that their husband who fell sick in 2015 died in 2016.

Joseph Dominick, (Dw3), the late Dominick Ami's son, testified that his father had three wives and died on the 6th April, 2016. On the 4th day of January, 2016 his father sold the suit land to the respondent, as he was sick and needed money. He refuted the allegation that his father distributed his land *inter vivos* to his sons on 15th day of July, 2012 and the contention that his father leased the disputed land to the respondent in 2015

Marsel summoned also, **Petro Ngáida, (Dw5)**, who was the acting village executive officer in January 2016 and **Fanuel Tsere, DW6**, Hamlet chairman from 2014 to date the date he testified, both deposed that the appellant's father sold the disputed land to the respondent on 4th day of

January, 2016. They witnessed a sale agreement between Dominick Ami and the respondent. They added that the late Dominick Ami never distributed his land *inter vivos* in the year 2015. Dominick Ami died in 2016.

He tendered the sale agreement, which was signed by the late Dominick Ami and witnessed by **Emanuel Dominick's** father, **Emanuel Dominick's** father's three wives, **Emanuel Dominick's** three brothers, **John Mwinuka**, (Pw3), the then Acting village executive officer and **Fanuel Tsere, DW6**, Hamlet chairman.

The appellant, who was the claimant, he had a duty to establish his claim on a balance of probability. It is trite law as stated in **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR. 419, that "*... he who alleges is the one responsible to prove his allegations*". The standard of proof is well explained in **Paulina Samson Ndawanya vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (unreported), where the Court of Appeal stated:

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

It is also trite law that a duty to prove in civil cases is not static, it shifts, after a plaintiff adduces evidence, to a defendant. This position was stated by 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-

".... 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."

I wish to point out at the outset that the respondent though not categorically pleaded did raise a counter-claim. Regulation 7(4) of **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002** provides-

"the respondent shall not in his preparing his written statement of defence be required to follow any format and the tribunal shall be guide by content not the format."

At the hearing of this appeal, Mr. Shirima was assisted by Mr. Abdallah Kilobwa, both learned advocates appeared for the appellant, and Mr. Boay

learned advocate represented the respondent. They argued the appeal orally. I will refer to the submissions when answering the issues.

Was the respondent's evidence more credible than the appellant's evidence?

The record also shows that the DLHT was convinced that the appellant failed to prove his case on the balance of probability, rather the respondent proved that he was the rightful owner of the suit land. The trial chairperson discredited the testimony of the appellant and his witness.

The determination of this case is based on the credibility of witnesses. There is no dispute that the respondent is in occupation of the suit land. It is further not in dispute that the suit land was the property of the later Dominick Ami, the appellant's father. How and when the respondent took possession is an issue central to this dispute. The appellant's testimony is that the respondent took possession in 2015 when his later father leased the disputed land to the respondent for six years at consideration of Tzs. 900,000.00.

The respondent's version is that, he purchased the disputed land on 14.01. 2016 from the late Dominick Ami at a consideration of Tzs.

1,400,000.00. He refuted the allegation that he was a lessee and the lease tenure had expired.

The DLHT trusted the respondent's evidence and decided in his favour. The task of this first appellate court is to re-evaluate the evidence on record to determine whether the findings of the trial tribunal was justified. It is settled that this appellate court can only interfere with the findings of the trial court if they are wrong because; **one**, the trial court or tribunal has taken into account matters which were irrelevant in law; **two**, the trial court or tribunal excluded matters which were critically necessary for consideration; **three**, the trial court or tribunal has come to a conclusion which no court properly instructing itself would have reached; and **four**, the court's or tribunal's findings were not proper inferences drawn from the facts.

I had a cursory review of the evidence of both parties, to say the least, the respondent's evidence was more credible than the appellant's evidence. The appellant's evidence was inconsistent and contradictory, thus, not credible and reliable.

The appellant's evidence was that his later father convened a meeting to distribute his land *inter vivos* to his heirs. The date when the appellant's

father convened the meeting is in controversy. **Emanuel Dominick** (Pw1), the appellant deposed that, his father convened the meeting on 5.7.2012, whereas his witnesses, **Andrea Luka Aweda**, (Pw2), **John Amsi**, (Pw4) and **Clara Emmanuel**, (Pw5), deposed the meeting on 15.7.2012.

As if the above is not enough, there is another controversy as to who chaired the meeting and prepared the deed of distribution. **Andrea Luka Aweda**, (Pw2), the hamlet chairman at that time, deposed that he chaired the meeting and his secretary, John Baran, prepared the deed of distribution of the late Dominick Ami's land. However, during his examination in chief **Andrea Luka Aweda**, (Pw2), testified that he is the one who recorded deed of distribution. In his words, he said; during examination in chief, "*...niliwahi kuandika nyaraka ya mgawo huo kwa kuwa ina sahihi yangu na walioshiriki ni...*". During cross-examination, the same witness, **Andrea Luka Aweda**, (Pw2) deposed that "*... aliyeandika nyaraka hiyo ni John Barani katibu wangu,...*". **Andrea Luka Aweda**, (Pw2), deposed that there were two co-chairpersons and he was one of them.

John Amsi, (Pw4), the late Dominick Ami's brother, deposed that he chaired the meeting on the date of distribution and that it was Doita Dominick who recorded the deed of distribution. In his words, **John Amsi**,

(Pw4), deposed that "...*na aliye andika makubaliano hayo ni Doita Dominick na hivyo Doita Dominick hakuwa katibu wa Kata wala kitongoji... Mimi siku hiyo ya mgawo nilikuwa mwenyekiti...*". Literally ...*Doita Dominick recorded the deed of distribution and that Doita Dominick was not the hamlet secretary...I was the chairperson on the date of distribution...*"

The evidence of **Andrea Luka Aweda**, (Pw2) and **John Amsi**, (Pw4) are obviously contradictory as to who chaired and recorded the deed of distribution.

The respondent's evidence refuted the allegation that the late Dominick Ami, the appellant's father, convened a meeting on 15.7.2012 or on any date, to distribute his estate *inter vivos*. They negated the contention that late Dominick Ami allocated the disputed land to the appellant. The respondent summoned **Maria Ama**, (Dw2), the late Dominick Ami's first wife, **Veronica Paulo**, (**Dw4**), the late Dominick Ami's third wife, and **Joseph Dominick**, (Dw3), the late Dominick Ami's son, who vehemently testified that the late Dominick Ami did not distribute his estate *inter vivos* to his heirs on 15.1.2012 or on other date. They disavowed the appellant's contention that the late Dominick Ami allocated the disputed land to the appellant.

Given the contradictions and the inconsistencies in the testimonies of the appellant's witnesses, I find that the appellant's evidence is incredible. It is therefore my firm view that, the respondent's evidence is more credible than the appellant's evidence. Not only that but also, I find that **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4), the late Dominick Ami's first and third wives, who deposed that there was no meeting, more credible than **Clara Emmanuel**, (Pw5), the late Dominick's second wife, who testified that there was a meeting. **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4) had no interest to serve while **Clara Emmanuel**, (Pw5), the appellant's mother had the propensity to lie to ensure his son acquires the disputed land.

The appellant's advocate argued that **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4), **Joseph Dominick**, (Dw3), and **Petro Ngáida**, (Dw5) contradicted each other regarding boundaries of the suit land.

I perused the proceedings and I wish to state that I did not find any contradiction regarding the boundary in the evidence of **Maria Ama**, (Dw2), **Veronica Paulo**, **Joseph Dominick**, (Dw3), and **Petro Ngáida**. They all deposed the boundaries were, on the North- *Miti ya Halmashauri*, South- Dominick Ami, East – Dominick Ami, and West- *Miti ya Halmashauri*. Thus, the complaint of the appellant's advocate, with due respect, is baseless.

Even if, there was contradictions regarding the boundaries, I would have construed the contradictions as minor not going to the root of the matter. The dispute, in the present case, is not respect of the boundaries, rather it is whether the respondent bought the disputed land or he hired it.

In end, like the DLHT, I find that the appellant's evidence did not prove to the required standard that the late Dominick Ami, convened a meeting on 15.1.2015 or any other date to distribute his estate *inter vivos* to his sons. Consequently, there is no evidence that the disputed land was distributed to the appellant. Thus, I am in total agreement with the tribunal that, the appellant's exhibit M1 is untrue. It was fabricated to give the appellant *locus standi* to sue.

The next question to consider is whether the late Dominick Ami leased the disputed land or sold it to the respondent. The appellant's evidence from his witnesses was that his late father leased the disputed land for Tzs. 900,000.00 for term of six years from 2015. The appellant's evidence came from **Andrea Luka Aweda**, (Pw2), **John Amsi**, (Pw4), **Clara Emmanuel**, (Pw5), and **Damiano Dominick**, (Pw6), who all testified that the late Dominick Ami leased the disputed land to the respondent for six years. And they testified that the consideration was Tzs. 900,000/= which the

respondent paid upfront. Emmanuel Dominick (**Pw1**) added that the late Dominick Ami, their father, died on the 6 April, 2015. This piece of evidence was intended to render nugatory the respondent's evidence that the late Dominick Ami sold the disputed land in 2016.

The respondent's evidence was that he procured the disputed land from the late Dominick Ami on 4th day of January, 2016 at a price of TZS. 1,400,000/= . And a sale agreement, exhibit "U1" was executed, signed by the seller, the late Dominick Ami, and witnessed by the late Dominick's three wives, three children, the acting village executive officer and the hamlet chairperson. Unfortunately, **Clara Emmanuel**, (Pw5), the late Dominick's second wife, and **Damiano Dominick**, (Pw6) one of the late Dominick Ami's sons, who disproved the assertion that late Dominick Ami was sold the disputed land, signed the sale agreement. **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4), the late Dominick Ami's first and third wives and **Joseph Dominick**, (Dw3), one of the late Dominick Ami's sons deposed that the late Dominick sold the disputed land to the respondent. **Maria Ama**, (Dw2), **Veronica Paulo**, (Dw4), **Joseph Dominick**, (Dw3), were corroborated by the evidence of **Petro Ngáida**, (Dw5).

Petro Ngáida, (Dw5) was the acting village executive officer (VEO) in January 2016 deposed that the appellant's father sold the disputed land to the respondent on 4th day of January, 2016. He had no interest to serve. He narrated that the appellant's father went to the VEO's office on 2.1.2016 with his two wives and the respondent to execute a sale deed. **Petro Ngáida**, (Dw5) requested the late Dominick Ami to involve his third wife. On 4.01.2016, the late Dominick Ami went to the VEO's office with his three wives, the respondent, three children and the hamlet chairperson, **Fanuel Tsere**, (Dw6). **Petro Ngáida**, (Dw5) mentioned other two people to have witness the sale agreement.

Petro Ngáida, (Dw5) was a credible witness. He wrote the sale agreement, exh. SU1. He was consistent in testimony.

I find, like the DLHT, that **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4), the late Dominick Ami's first and third wives, respectively and **Joseph Dominick**, (Dw3), one of the late Dominick Ami's sons are credible witnesses. They had no interest to serve, to the contrast, **Clara Emmanuel**, (Pw5), the late Dominick's second wife, and **Damiano Dominick**, (Pw6) one of the late Dominick's son had interest was to support the appellant to acquire the disputed land. It is on record that, **Clara Emmanuel**, (Pw5) and

Damiano Dominick, (Pw6) are the appellant's mother and blood brother, respectively.

The appellant's evidence was that the late Dominick Ami, his father died in 2015, thus, there was no way he execute a sale agreement on 4.1.2016, unless he did that from the tomb. The appellant did not testify as to the date when his father died. **Andrea Luka Aweda**, (Pw2) like the appellant did not testify as the date Dominick Ami passed on. **John Amsi**, (Pw4), deposed that the late Dominick passed on between 2015 and 2016. **John Amsi**, (Pw4)'s evidence regarding the date of Dominick Ami's death had no evidential value. **Clara Emmanuel**, (Pw5), gave evidence that her husband Dominick Ami passed away on 7.4. 2022. She deposed that **"...mimi ni mke wapili wa Mzee Dominick Ami, na Mzee Dominick Ami alifariki tarehe 07/04/2022"**.

Damiano Dominick, (Pw6), one of the late Dominick Ami's sons deposed that his father died on 06/04/2015. It is self-evident that the appellant's evidence as to the date the late Dominick Ami passed on is very shaky and unreliable. The appellant's witnesses gave contradictory evidence, thus, unreliable. Even in the absence of the respondent's evidence, the

appellant's evidence regarding the date of death of the appellant's father was weak and unreliable.

The respondent's evidence was that the late Dominick Ami, died on 6/4/2016. **Joseph Dominick**, (Dw3), one of the late Dominick's sons deposed that Dominick Ami died on 6/4/2016 and was buried on 9/4/2016. I trusted the evidence of **Joseph Dominick**, (Dw3) who not only specified the date his father, the late Dominick Ami, passed away but also, he specified his burial.

Looking at evidence in total, it is my firm view that, the respondent's evidence was credible as it was not tarnished with contradictions or inconsistencies like the appellant's evidence. The trial chairperson, therefore made the findings after he had the opportunity to assess the credibility of witnesses and the opportunity and advantage of seeing and observing their demeanour and had become satisfied of the truthfulness of their testimonies touching on the issues before the court. These findings of the DLHT, in our view, were supported by the evidence on record. I support the finding that respondent's evidence was more credible than the appellant's evidence. The tribunal was justified to find in favour of the respondent. I dismiss the appellant's first ground of complaint.

Is there evidence to prove that the disputed land was the respondent's property?

I will not dwell on the appellant's second complaint that the DLHT erred to hold that the disputed land belongs to the respondent without any evidence presented to prove that. As shown above, the respondent marshalled overwhelming evidence from **Maria Ama**, (Dw2), and **Veronica Paulo**, (Dw4), the late Dominick Ami's first and third wives, respectively, **Joseph Dominick**, (Dw3), one of the late Dominick Ami's sons, **Petro Ngáida**, (Dw5), acting VEO and **Fanuel Tsere**, (Dw6), the hamlet chairperson who witnessed the sale agreement, that the late Dominick Ami's, the appellant's father sold the disputed land to him. The respondent tendered the sale deed, exh.SU1. I find like the DLHT, that the respondent proved and did so not only on the balance of probability but even beyond that, that he purchased the disputed land from the appellant's father. Consequently, he is the rightful owner of the disputed land.

Did the respondent prove his case on the balance of probability?

The appellant complained that the DLHT erred both in law and fact to determinate the case which, was not proved on balance of probability. Mr. Kilobwa, the appellant's advocate submitted that, the tribunal erred to rely

on the unstamped sale agreement contrary to section 45(a) and (e) of the Stamp Duty Act. To support his contention, he cited the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] TLR 211.

It is trite law that, omission to a pay stamp duty in accordance with section 45 (a) (i) read together with section 5 and the Schedule, both of the **Stamp Duty Act**, render the document inadmissible as evidence in court until the duty is paid. I agree that it was improper for the tribunal to admit and act on unstamped document. However, even in the absence Exh.U1, I find that there is ample evidence from the appellant's step mothers, step brother and **Petro Ngáida**, (Dw5) acting VEO and **Fanuel Tsere**, (Dw6), that the late Dominick Ami sold his land to the respondent.

I find it settled that, a court may expunge an exhibit and rely on the oral evidence to hold that a fact in issue has been proved. See **Issa Hassan Uki V. R**, Criminal Appeal NO. 129/2017 (CAT unreported), where the Court of Appeal having expunged the exhibit, relied on the evidence of the witness which covers the contents of the exhibit to uphold the conviction. It stated-

"However, we haste the remark that even without Ext. P3, the testimony of Anthony Ndorosi Penia (Pw4) is quite sufficient to cover the contents of Exh. P3."

I wish to state that I did not expunge the exhibit, I stated that, even if, it is expunged, there is still, sufficient evidence to lead a conclusion that the respondent proved his case that he purchased the disputed land from the late Dominick Ami. As submitted by the respondent's advocate, I find the law is settled that the DLHT's decision shall not be altered because irregularity or omission in the proceedings during hearing unless the irregularity or omission occasioned failure of justice. Section of 45 of the Land Disputes Courts Act, [Cap.212 R.E. 2019] stipulates that-

"45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice." (Emphasis added)

The unstamped exhibit is not valueless or incompetent document, it cannot be admitted and acted upon after paying the duty. The DLHT's act of admitting it without ordering the respondent to pay duty was an irregular but the same did not occasion injustice to the appellant. That is why I was hesitant to expunge it. I wish to insist that even when it is expunged there

is still ample evidence that the respondent bought the disputed land from the appellant's father.

In the end, I dismiss all grounds of appeal, uphold the decision of the tribunal and dismiss the appeal for want of merit with costs.

I order accordingly.

Dated at **Babati** this 22nd day of **February**, 2024.



J. R. Kahyoza
Judge

Court: Judgment delivered in the presence of the appellant, the appellant's advocate, Mr. Shirima and the respondent. Ms. Fatina Haymale (RMA) present.

J. R. Kahyoza
Judge

22/02/2024