

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

LAND APPEAL NO. 40 OF 2023

(Originating from the decision of the District Land
and Housing Tribunal for Iringa at Iringa in
Land Application No. 40 of 2016)

MESHACK ELIA MKELA APPELLANT

VERSUS

ANANIA JOSEPH LWOGARESPONDENT

JUDGMENT

Date of last Order: 25/04/2024
Date of Judgment 30/05/2024

LALTAIKA, J.

The Appellant herein **MESHACK ELIA MKELA** is dissatisfied with the decision of the District Land and Housing Tribunal for Iringa at Iringa (the DLHT or simply the trial tribunal) in Land Application No. 40 of 2016. He has appealed to this Court by way of a Memorandum of Appeal containing four grounds. I take the liberty to reproduce them for ease of reference:

- 1. That the judgement in question was obtained by fraud.*

- 2. That the respondent's failure to call the supposed to be key witnesses in agreement of sale vitiated the defense in wholesome.*
- 3. That the evidence of DW1, DW2, DW3 is of no value to the respondent's side but benefits the appellant especially the evidence of one DW1.*
- 4. That the learned trial Chairperson of the tribunal seriously erred in fact and law for omission of his/her duty to ascertain whether any pronouncement of the High Court exists on the point. Thus, the judgement stands awkward before the eye of the law. Briefly that is to say the judgement lacks authority.*

A brief factual and contextual background to the matter is considered important at this stage. The subject matter of this appeal is a house located at Changarawe Street, Mafinga Township, Mufindi District, Iringa Region (the suit property). Whereas the appellant is a retired police officer in his 60's who lives mainly in Dar-es-Salaam, the Respondent is a Member of the Tanzania People's Defence Forces (TPDF) in his 30's living in Mafinga. It appears that the appellant was married to one Edda Chaula, a local of Mafinga (now deceased) but their distant relationship meant that the deceased spent more than 26 years without the appellant.

It is on record that in 2011 the Respondent bought the suit property from the late Edda Chaula also known as Mama Elikana for consideration of TZS 4,000,000/= (four million shillings only). The late Edda Chaula left the suit property to the Respondent. However, shortly after the seller had left to live in Morogoro, the Appellant stormed in the suit property claiming that the house belonged to him. The Respondent suggested that he talked to the seller, but the Appellant refused. Attempts to resolve the matter amicably failed.

Surprisingly, the appellant instituted proceedings at the DLHT suing both the respondent and the late Edda Chaula. A relative of the deceased one Lea Gilauneka Chaula (74 years old back then in 2022) who testified as DW1 appeared perplexed that the Appellant would do so while knowing fully well that Edda Chaula was dead. Needless to say, that DW1's testimony, recorded in Kiswahili by the DLHT provides crucial insights on the personality of the Appellant and his purported relationship with the late Edda Chaula. I will come back to this later, albeit as an obiter dictum, as a way of finalizing this judgement.

When the appeal was called on for hearing on **the 21st of March 2024, Messrs Mourice Mwamwenda and Cosmas Kishamawe,** learned Advocates, appeared for the Appellant and Respondent respectively. Parties opted for hearing by way of written submissions. With a nod of approval by this Court, the following schedule was ordered accordingly: (i) Filing of the Appellant's written submission: 4/4/2024 (ii) Filing of the Respondent's reply 18/4/2024 (iii) Filing of the Appellant's rejoinder if any 25/4/2024 (iv) Mention for ascertainment of compliance of the ordered schedule and fixing the date of judgement 25/4/2024.

I hereby register my commendations to the learned Advocates for spotlessly complying with the court order. The next part of this judgement is a summary of such submissions.

Mr. Mwamwenda proceeded to analyze ground number one starting with the definition of "fraud." He referenced the decision of this Court (NANGELA J.) in **Velisas Elizabeth Deflosse Ingleton (Petitioning as the Legal Representative under the Power of Attorney of Gordon McClymont) vs. Joseph Ignatus Noronha, Gautam Jayram Chavda & Covell Mathews Partnership Limited, Misc**

Commercial Cause No. 20 of 2021 at pages 26-27, where it was stated that "fraud avoids all judicial acts, ecclesiastical and temporal" and defined fraud as an act of trickery or deception.

Mr. Mwamwenda further referred to the **Black's Law Dictionary**, where fraud is defined as an intentional perversion of the truth for inducing another to part with something valuable or to surrender a legal right. He also cited Section 17(1)(a)-(e) of **The Law of Contract Act** [Cap 345 R.E 2019], which defines "fraud" as any act committed with intent to deceive, such as suggesting false facts, concealing facts, making promises without intention to perform, or any act fitted to deceive.

Based on these definitions, he argued that fraud could be established from the subject matter of the sale agreement, which in Kiswahili referred to "**MANUNUZI YA NYUMBA KUKUU.**" He emphasized the testimony of PW3 and DW1, which indicated that the house was not in a dilapidated state when sold.

Mr. Mwamwenda further argued that the sale agreement in question left much to be desired, referencing **Martin Fredrick Rajabu vs. Ilemela Municipal Council and Synergy Tanzania Company Limited**, Civil

Appeal No. 1997 of 2019 CAT at page 13, where the Court noted deficiencies in the description of the suit property in the sale agreement. He translated the term "fraud" from the **English-Swahili Dictionary** as "Udanganyifu, Ulaghai, Hila" and addressed the issues raised by the evidence and law, particularly whether the disputed area was the marital property of the claimant and the first defendant. He cited Gabriel **Nimrod Kurwijila vs. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 CAT, where matrimonial assets are defined as property acquired by either or both spouses with the intention of providing for them and their children during their joint lives.

Regarding the third issue, Mr. Mwamwenda contended that proof of ownership in matrimonial property was not paramount, referencing the Law of **Marriage Act** [Cap 29 R.E 2019], Section 59(1), which requires spousal consent for alienating any interest in the matrimonial home. He criticized the tribunal's decision, arguing that it failed to comply with Section 62 of the **Evidence Act** [Cap 6 R.E 2019], which requires direct evidence for facts seen, heard, or perceived. He concluded that the judgment, allegedly obtained by fraud, should be deemed void ab initio and that the failure to comply with the evidence requirements nullified the proceedings.

In conclusion, Mr. Mwamwenda argued that the appeal should succeed without reservation due to the established fraud and noncompliance with legal evidence requirements.

Mr. Kishamawe, on his part, responded to Mr. Mwamwenda's submission by asserting that, the respondent's stance was that the appellant failed to establish and explain the alleged fraud as mentioned in the first ground. Referring to the appellant's attempt to establish fraud based on a discrepancy in the sale agreement, which was headed "MANUNUZI YA NYUMBA KUKUU" contrary to what DW1 stated as "NILISEMA NI NYUMBA NZURI INAUZIO" and issues related to the property descriptions, Mr. Kishamawe argued that the appellant failed to identify who committed the alleged fraud, whether it was the respondent or the trial tribunal. He emphasized that the burden of proving the alleged fraud in obtaining the judgment lay with the appellant, in accordance with **sections 110 and 111 of the Tanzania Evidence Act.**

Mr. Kishamawe contended that the difference in the sale agreement's heading did not constitute proof of fraud, noting that DW1 was not involved in the sale's execution. He cited the case of **EBONY AND COMPANY**

LIMITED v WATUMISHI HOUSING COMPANY LIMITED, CAT, CIVIL APPEAL NO. 29 OF 2021 and **Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (Unreported), emphasizing that courts should not alter freely agreed contractual clauses but enforce them as they are.

Regarding the suit property description, Mr. Kishamawe stated that the appellant had the duty to object to the sale agreement and cross-examine witnesses on this issue. He argued that the appellant's failure to do so did not qualify as fraud. He further asserted that for any contract to be legally valid, essential elements like offer, acceptance, mutual consideration, competence, and legal purpose must be present, all of which were met in this agreement.

Mr. Kishamawe urged the court to uphold the principle of contract sanctity, noting that DW1 referred to the same suit land. He argued that no evidence suggested that the respondent and DW1 testified about different pieces of land. He reiterated that fraud must be proven with specific knowledge and intent, citing the case of **GABRIEL MATHIAS MICHAEL, HAMIS SHEHA RIKO v HALIMA FERUZI, NURDIN ALLY SAID**

(Administrator of the Estate of the late BUNAIYA ABDALLAH KISESA-Deceased), EGBERT KALUGENDO, CAT, CIVIL APPEAL No 28 of 2020.

Mr. Kishamawe emphasized that the allegations of fraud in civil proceedings require a higher degree of proof than ordinary civil cases, referencing **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314 and **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169. Concluding on the first ground, Mr. Kishamawe argued that the fraud claim was baseless and an afterthought, and he asked the court to distinguish all cited cases as irrelevant to the situation.

Addressing the second ground, Mr. Kishamawe stated that the respondent's failure to call a key witness did not vitiate the defense. He explained that all key witnesses, including DW2, were called, and DW2's testimony confirmed knowledge of the property and its rightful ownership. He argued that the appellant failed to prove that the property was a matrimonial asset or how he obtained it, noting that DW1 testified about the appellant's lack of a marital relationship with the deceased.

Regarding the third ground, which the appellant did not address, Mr. Kishamawe requested the court to disregard it, asserting that the respondent's evidence and witnesses were sufficient. In conclusion, Mr. Kishamawe, opposing the appeal, prayed for its dismissal with costs.

Mr. Mwamwenda, in his rejoinder submission, argued that the Respondent was responsible for the alleged fraud that led the trial tribunal to obtain the questioned judgment. He emphasized that the Appellant's written submission had clearly explained the concept of fraud using various authorities, including definitions from the English Swahili Dictionary (3rd Edition) and Black's Law Dictionary. He pointed out discrepancies in the sale agreement, which stated "**MANUNUZI YA NYUMBA KUKUU**", compared to witness testimonies, highlighting inconsistencies that suggested trickery.

Mr. Mwamwenda quoted testimony from PW3, who indicated that the house in question was in good condition and not dilapidated at the time of sale, contradicting the claims made in the sale agreement. He used an African proverb, "when the roots are deep, the tree has no reason to fear the wind," to emphasize that a properly executed sale agreement would not contain such discrepancies.

Addressing the Respondent's assertion that DW1's testimony could not prove fraud due to DW1's absence during the sale, Mr. Mwamwenda contended that this argument only reinforced the Appellant's point that the Respondent failed to call key witnesses, thereby weakening their defense.

Mr. Mwamwenda also addressed the Respondent's claim that the Appellant had a duty to prove whether the property was a matrimonial asset. He referenced the case of **Gabriel Nimrod Kurwijila versus Theresia Hassani Malongo**, Civil Appeal No. 103 of 2018 CAT Tanga Registry (Unreported), which defined matrimonial assets. He pointed out that the Appellant and DW1 had four children together, suggesting they lived together, and argued that the sale should not have been executed without the consent of the other spouse.

In conclusion, Mr. Mwamwenda asserted that the Respondent's arguments lacked merit. He encouraged the court to consider the detailed explanations and authorities cited in the Appellant's written submission, maintaining that the property in question was indeed matrimonial property. He ended with a note on the importance of experience in legal submissions,

suggesting that the Respondent's counsel should consider structuring arguments in paragraphs rather than numbered points.

I have dispassionately considered the grounds of appeal and carefully examined the records. Apparently, the Appellant alleges that the impugned judgment of the trial tribunal was obtained through fraud and contends that the sale agreement of the disputed property was improperly executed. The Respondent denies these allegations and asserts that the appeal lacks merit.

I must admit that it took me quite a while to ponder and understand what exactly Mr. Mwamwenda wanted this Court to consider as the basis for his submission in support of the first ground of appeal. Although I appreciate his admirable research skills and impressive discussions on the concept of fraud including the use of Kiswahili proverbs, the argument that a judgement of a court of law has been obtained fraudulently is not something that can be taken lightly.

Going as far as claiming that the Respondent fraudulently obtained the judgment in question by misrepresenting facts and failing to call key witnesses, added salt to the injury because, as argued by Mr. Kishamawe, it

remains unresolved whether the fraudster is the trial tribunal or the respondent. I think this pathway should have been the very last option an officer of the court can contemplate upon.

The appellant was the one who instituted the proceedings as alluded to earlier. In fact, the Respondent, who was the 2nd defendant at the DLHT hesitated a great deal to proceed with the suit claiming that the administrator of estate of the late Edda Chaula needed to be a party to proceedings. The learned trial Chairman acted in accordance with instructions he received from this Court via an order for retrial to get the ball rolling much to the advantage of the appellant.

I have carefully examined the records of the trial tribunal and I am convinced that Mr. Mwamwenda's argument does not hold water. I subscribe to Mr. Kishamawe's argument that fraud in civil proceedings must be specifically pleaded and proved to a higher degree of probability than is required in ordinary civil cases, as established in the cases of **Ratilal Gordhanbhai Patel v. Lalji Makanji** (supra) and **Gabriel Mathias Michael, Hamis Sheha Riko v. Halima Feruzi, Nurdin Ally Said**

(Administrator of the Estate of the late Bunaiya Abdallah Kisesa-Deceased), Egbert Kalugendo, (supra)

If I may add, it is not difficult for anyone to see that since both parties were represented by counsel and their witnesses offered their part of the story freely, and, more importantly I would say, the judgement was a reasoned judgement that considered, analysed and evaluated evidence from both sides, the same judgement cannot be said to have been obtained fraudulently. There is no such thing. I dismiss the first ground of appeal.

On the second ground of appeal, I think Mr. Mwamwenda allowed himself to slip into error by flipping the burden of proof. As alluded to earlier, the Appellant was the one who instituted proceedings and therefore the burden of proof was on his shoulders. How can the Respondent be blamed for summoning the witnesses of his choice. Was he expected to extend the list of the witnesses of the rival party or to prove the negative?

In the case of **Charles Christopher Humphrey Richard Kombe T/a Humphrey Building Materials vs Kinondoni Municipal Council** (Civil Appeal No. 125 of 2016) [2021] TZCA 337 (2 August 2021) the Court of Appeal of Tanzania, referring to the commentaries from selected cases in

India by the learned authors of **Sarkar's Laws of Evidence**, 18th Edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, (Lexis Nexis, 1896:15) stated:

"...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. ...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...."

Since the Respondent was not obliged to prove the negative, I dismiss the second ground of appeal for lack of merit.

Moving on to the third ground of appeal the Appellant claims that the evidence of DW1, DW2, DW3 is of no value to the respondent's side but benefits the appellant especially the evidence of one DW1. Again, I am inclined to state that this is a flipside of the burden of proof. It is very difficult to say after reading all the testimonies what exactly the appellant wanted to prove before the DLHT: that he was married to the late Edda Chaula? That the suit property was a matrimonial property? That the Respondent was a trespasser? That the suit property was not dilapidated when it was sold? The

Appellant's submissions, while highlighting inconsistencies, do not sufficiently prove that the DLHT failed to apply the evidence adduced to prove any of the above claims.

The crux of the Appellant's argument is that the sale agreement, described as "**MANUNUZI YA NYUMBA KUKUU,**" was inconsistent with the testimonies provided. On consistency and credibility of the Sale Agreement, the Respondent's submission relied on the principle that once parties have freely agreed on contractual clauses, it is not the court's role to alter those clauses, as reaffirmed in **Ebony and Company Limited v. Watumishi Housing Company Limited**, CAT, Civil Appeal No. 29 of 2021.

The sale agreement's heading, "**MANUNUZI YA NYUMBA KUKUU,**" though disputed by the Appellant, does not invalidate the agreement. The testimonies provided, while varied, do not necessarily undermine the validity of the agreement. Those who have been in the commercial law parlance or even tried the art and craft of marketing for sale know very well that the choice of word is meant to promote a product rather than to defraud. For example, the phrase "pre-owned" is used instead of "used" without necessarily trying to take advantage of either the seller or the buyer.

More importantly, the Appellant failed to object to the sale agreement or cross-examine witnesses on this issue at the trial stage, weakening the claim at the appellate stage. The third ground of appeal is hereby dismissed for lack of merit.

Coming to the fourth ground of appeal, I choose to spend more time here. Apparently, after faulting the trial tribunal the Appellant concludes that "...the judgement stands awkward before the eye of the law. Briefly that is to say the judgement lacks authority." I think this is a very dangerous statement to make in a country that is committed to the rule of law. I want to emphasize that no decision of a Court of law "lacks authority" unless it is overturned by a higher court. Such a decision and consequential orders must be obeyed no matter the inconvenience. This is the beauty of the rule of law.

In **SUBRATA ROY SAHARA V. UNION OF INDIA (2014) 8 SCC 470**, the Supreme Court of India stated:

"Disobedience of orders of a court strikes at the very root of the rule of law which the judicial system rests. Judicial orders are bound to be obeyed at all costs. Howsoever grave the effect may be, is no answer for noncompliance of a judicial order. Judicial orders cannot be permitted to be circumvented."

While the Appellant (and his counsel) is entitled to the opinion that the learned Chairman of the tribunal "seriously erred in fact and law" unfortunately the decision passed remains binding to all until reversed by this Court. In the words of Romer L.J. in **HADKINSON V. HADKINSON** [1952] 2 All ER 567

*"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. **The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.**"* (emphasis added)

I decided to invoke issues of the rule of law and effects of disobeying court orders after a careful read of the proceedings of the trial tribunal. As alluded to earlier, testimonies of some witnesses give a glimpse of the personality of the appellant and the need to be reminded to respect the rule of law. I am inclined to reproduce a part of the proceedings as hereunder:

DW2 Charles Naftari Ngogwayi p.28

"Mwaka juzi nilikuwa serikali ya mtaa pale Changarawe nilipigiwa simu mida ya saa 10 jioni na mdaiwa na. 2 kulikuwa na vurugu na ugomvi kati ya mtu anayejita polisi na Anania nilisikia anasema kuwa nyumba ni ya kwake. Anania alisema kuwa alinunua nyumba hiyo kwa Edda au Mama Eliakana. Polisi hakutaka kusikia mtu yeyote. Anania alipiga simu kwa Edda lakini polisi alikataa kuongea na simu na yule mama. Wananchi walifanya vurugu walitaka kumpiga anayejita polisi...."

Directly translated:

"Three years ago, I was at the Hamlet's Office in Changarawe, I received a call around 16:00 from the second defendant. There was a misunderstanding between a person who was referring himself as a police officer and Anania. I heard him (the officer) saying that the house belonged to him. Anania stated that he had bought the house from Edda or Mama Eliakana. The policeman was not ready to listen to anyone. Anania telephoned [the seller] but the policeman refused to talk to her. The people were enraged and wanted to attack the so-called policeman."

A statement like that from a local leader is worrisome. It should not be taken lightly. To give a full picture of how worrisome the statement is to maintenance of peace and order, I will reproduce a statement of the witness

I referred to earlier as the relative to the late Mama Elikana who testified on her death but also indicated, plainly I would say, how remotely connected the appellant was to the suit property.

"Edda alikuwa anaishi peke yake. Ninaomba baraza litambue kuwa mdai ameweka vibaya ukoo wa Chaula. Yeye (mdai) anasema kuwa Edda mzima ninamshangaa alishiriki mazishi ya Edda Chaula."

Directly translated

"Edda was living alone. I pray that the tribunal takes note that the plaintiff has embarrassed the Chaula clan. He is saying that Edda is alive. I am surprised because he took part in the burial."

Based on the above analysis, it is determined that the Appellant has not satisfactorily proven the allegation of fraud. The sale agreement and testimonies provided do not constitute grounds for declaring the agreement fraudulent. The claim that the property is a matrimonial asset lacks sufficient evidence and may safely be regarded as an afterthought. More importantly the appellant is strongly argued to refrain from disrupting the peace or anyhow interfere with the Respondent's rights to the suit property unless this order is set aside by the apex Court.

In the upshot, the appeal is hereby dismissed with costs. The judgment of the trial tribunal is upheld.

It is so ordered.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
30.05.2024**

Court

Judgement delivered under my hand and the seal of this Court this 30th day of May 2024 in the presence of Mr. Mourice Mwamwenda Counsel for the Appellant and in the absence of the Respondent and his counsel.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
30.05.2024**

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
30.05.2024**