IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB - REGISTRY)

AT IRINGA

LAND APPEAL NO. 27759 OF 2023

(Originating from the District Land and Housing Tribunal for Iringa at Iringa in Land Application No 59 of 2021.)

LAZARO MKONYI ..... 1ST APPELLANT

JOSEPH MKONYI ..... 2ND APPELLANT

VERSUS

ELIAS LUNYUNGU..... RESPONDENT

JUDGMENT

Date of last Order: 09/05/2024
Date of Judgement: 30/05/2024

LALTAIKA, J.

The Appellants herein **LAZARO MKONYI** and **JOSEPH MKONYI** are dissatisfied with the decision of the District Land and Housing Tribunal for Iringa at Iringa (the DLHT) in Land Application No 59 of 2021 delivered on 19th October 2023. They have appealed to this Court on five grounds as reproduced bellow:

1. *That the trial tribunal Chairperson erred in law and facts when failed to evaluate/assess evidence on record hence reached at wrong decision.*
2. *That the trial tribunal Chairperson erred in law and fact by holding that the respondent is a lawful owner without considering the strong evidence of the appellants against the weak, contradictory and unreliable evidence by the respondent.*
3. *That the trial tribunal erred in law and facts by declaring the respondent is lawful owner of the disputed land while the respondent failed to produce the sale agreement.*
4. *That the tribunal erred in law and facts by declaring that the respondent is lawful owner of the disputed land while the respondent failed to call material witness especially village authority.*
5. *That the trial tribunal erred in law and facts by wrongly applying the principle of proving the case on balance of probability by relying on the purported weakness of the defence case while the respondent herein was the one to establish his case.*

When the appeal was called on for hearing on the 9th of May 2024, the appellants appeared through **Mr. Marco Kisakali**, learned Advocate. The Respondent, on the other hand, enjoyed the legal services of **Ms. Neema Chacha & Gloria Kessi Mwandelema**, learned Advocates. Both the first appellant and the respondent were in court as their counsel made oral

submissions mainly in Kiswahili. The next part of this judgement is a summary of the submissions.

Mr. Kisakali requested to argue the first and second grounds conjointly as they pertained to evidence. He recounted that the respondent, in her application and the evidence adduced in the DLHT, claimed that she bought the suit land in 1999 for TZS 18,000/=. The respondent asserted that this amount was paid to the wife of the second appellant. Subsequently, the second appellant testified that he never sold the suit land but only allowed the respondent to use it temporarily for cultivating trees with the understanding that he would return the land after harvesting. Counsel argued that the DLHT failed to evaluate the evidence properly because the respondent did not produce any contract of sale to substantiate her claim of having bought the suit land in 1999. Furthermore, Counsel averred, the respondent did not specify the dates of the sale.

Mr. Kisakali pointed out that in her evidence, recorded on pages 9 to 14 of the Tribunal's proceedings, the respondent failed to bring any witnesses who were present during the purchase of the land. PW1 also did not summon neighbors who could have witnessed the sale. Despite being aware of the importance of witnesses in a land sale, PW1 admitted during

cross-examination that he had none. The witnesses mentioned by the respondent, including herself, Aurelia Mhagama (her wife), Stelina Lyuvale, and the second appellant, argued Mr. Kisakali, were not summoned to testify about the sale. The learned Counsel is of a strong view that this failure suggested that their testimony would have been unfavorable to the respondent.

Additionally, Mr. Kisakali noted that the respondent had summoned a person named Sauda Mkonyi (PW2), who shared a boundary with the respondent. PW2 testified that she saw the respondent using the suit land, confirming its usage. However, the second appellant contended that the respondent was merely an invitee, with an agreement to return the land after harvesting trees. The counsel argued that PW2's evidence was unreliable because she could not specify when and how the respondent started using the suit land, as recorded on pages 15 to 18 of the trial Tribunal's proceedings.

Mr. Kisakali emphasized the principle of law that the party who alleges must prove their case, as stipulated in sections 110 and 111 of the **Evidence Act** Cap 6 RE 2022. He referenced the case of **Valeria Karangirangi v. Asteria Nyarwangwa** [2019] 1 TLR 142, which affirmed that the burden

of proof in civil suits lies with the party making the allegations. He also cited **Paulina Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 245 of 2017 CAT, Mwanza (unreported), pages 14 to 16, which underscored the necessity for the alleging party to prove their case and that the burden of proof does not shift to the opposing party until the initial burden is discharged.

Mr. Kisakali asserted that the respondent should have produced a written contract of sale for the suit land, as required by section 64(1)(a) and (b) of the **Land Act Cap** 113 RE 2019. This requirement, reasoned Mr. Kisakali, was expounded in the case of **Priscila Mwainunu v. Magongo Justus**, Land Case Appeal No. 9 of 2020 HCT, Bukoba (unreported), pages 1 and 15, which highlighted the importance of written agreements for land sales and the endorsement of such agreements by village leaders when dealing with village land. He also referenced the case of **Bakari Mhando Swanga v. Mzee Mohamed Bakari Shelukindo**, Civil Appeal No. 389 of 2019 CAT, Tanga, page 8, which discussed the necessity of involving village leaders in land transactions as stipulated in section 142(1) of the **Local Government (District Authorities) Act** Cap 287 RE 2002.

He criticized the DLHT for failing to clearly explain and evaluate the respondent's evidence compared to that of the appellants, particularly on the first issue raised. On page 3 of his judgment, Mr. Kisakali averred, the learned Chairman concluded that the respondent had proven the purchase of the suit land merely by presenting PW2. However, as mentioned earlier, asserted the learned Advocate, PW2 had claimed ignorance of how the respondent acquired the land. Mr. Kisakali emphasized that the lack of corroboration on the land acquisition weakened the respondent's evidence, which should have benefited the appellants and led to the dismissal of the application.

Regarding the fourth ground of appeal, Mr. Kisakali argued that the respondent failed to summon material witnesses, specifically village leaders. He averred that the appellants believed that the respondent was obligated to summon any village leader, such as the VEO or Chairman, who could clarify the boundaries and neighbors of the suit land. It was Mr. Kisakali's strong opinion that these leaders were crucial, especially in conflicts like this, to verify the sale agreement and the legitimacy of the seller, thereby preventing multiple sales of the same plot of land.

The inability to do so [summoning a material witness], averred Mr. Kisakali, could be regarded as an adverse inference, as their testimony might have been detrimental to the respondent's case. He referenced the case of **Hemed Saidi v. Mohamed Mbilu** [1984] TLR 113, where the HCT stated that the court could infer that the testimony of an uncalled material witness would have been averse to the party's interest.

On the fifth ground, which concerned the misuse of the balance of probability doctrine by relying on the weaknesses of the defense case, Mr. Kisakali argued that the trial Tribunal, on page 3 of its judgment, erroneously stated that the appellants failed to prove that the respondent was an invitee on the suit land. He averred further that the Tribunal should not have investigated the shortcomings of the appellant's case until the respondent had proven the existence of a sale agreement. He referenced the case of **Paulina Samson** (supra), pages 15 and 16, in support of this argument.

Based on these submissions, Mr. Kisakali prayed that the appeal be allowed, the judgment and all orders of the trial tribunal be set aside, and the respondent be ordered to pay the costs of this suit and those of the trial Tribunal.

Ms. Chacha, responding to the submission by Mr. Kisakali, addressed the 1st to the 5th grounds of appeal conjointly. She argued that the learned Chairman had correctly evaluated the evidence from both parties and was convinced that the respondent had proven his claims against the appellant. According to the proceedings of the trial tribunal, Ms. Chacha asserted, the appellants failed to prove ownership of the suit land, did not know which land was in dispute, and even failed to identify the boundaries of the suit land. Therefore, Ms. Chacha contended, the claim that the tribunal failed to properly evaluate the evidence was unfounded.

To buttress her argument, the learned Advocate cited the case of **National Microfinance Bank v. Chama Cha Kutetea Haki na Maslahi ya Walimu Tanzania** (CHAKAMWATA), Civil Appeal No. 17 of 2019, which emphasized the importance of evaluating evidence before reaching a decision, asserting that this was what the learned Chairman had done.

Ms. Chacha also noted that during the DLHT proceedings, the dispute was not about the sale but rather borrowing, emphasizing that no one can lend an item they do not own. The respondent had tendered an agreement for the permission to temporarily use the land, which the appellants, represented by Mr. Kisakali, did not object to. She referenced the case of

Alotyce Masalu Mapembe v. Paulina Romanus Masonga, Matrimonial Appeal No. 3 of 2021, which referred to **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported), stating that failure to cross-examine indicates admission of the evidence tendered. Ms. Chacha emphasized that the appellant's lack of cross-examination during the trial indicated agreement with the respondent's statements.

Regarding the absence of a sale agreement, Ms. Chacha stated that this was not discussed in the DLHT. Nonetheless, she pointed out that SM2's evidence, as reflected on page 3 of the judgment, demonstrated that the respondent bought the suit land in 1999 from the second appellant through his wife for TZS 18,000/= and had been using it for 21 years. This evidence was not objected to. She cited section 10 of the **Law of Contract Act** Cap 345 RE 2019, which states that all agreements are contracts if made by free consent of competent parties for lawful consideration and with a lawful object.

She further referenced **Salumu Viale Kibwana v. Shabani Besa and Philipina Mchomvu** [2023] HCT (TANZLII), which acknowledged that oral agreements are as valid and enforceable as written contracts if they meet the essential ingredients of a valid contract.

Ms. Chacha argued that the sale agreement was oral and recognized by law if entered into by competent parties for lawful consideration and with a lawful object, as stated by the respondent's witnesses SM2 and SM1 during the trial tribunal. The appellants did not object to this. She contended that the learned counsel for the appellant misdirected himself by claiming a written contract was necessary, citing section 64 of the Land Act, which pertains to granted right of occupancy, while the suit land was under customary right of occupancy. She referred to section 14 of the Village Land Act, explaining that land held under customary right of occupancy is village land or general land occupied by persons under deemed right of occupancy. She argued that section 61(2) of the Land Act prohibits the use of sections 61 to 166 of the Land Act where the land is under customary right of occupancy, thus, the section cited by the learned counsel should be disregarded.

On summoning material witnesses, Ms. Chacha noted that the respondent had brought one witness, Sauda Mkonyi, who testified as a neighbor and relative of the appellant, thus an important witness to build the respondent's case. According to section 143 of the Evidence Act, asserted the learned Counsel, no particular number of witnesses is required for the

proof of any fact. She emphasized that the respondent believed that SM2's testimony, along with the respondent's unobjected evidence, was sufficient.

Addressing the 5th ground, Ms. Chacha argued that the appellants failed to prove ownership of the suit land. In the law of evidence, asserted Ms. Chacha, the burden of proof lies with the person who alleges the existence of certain facts and wants the court to decide in their favor, as per section 110 of the Evidence Act and the case of Paulina (supra), which stated that in civil cases, the standard of proof is a balance of probabilities. She emphasized that the respondent had proven his case by summoning a relevant witness and tendering an exhibit, while the appellants failed to prove their ownership or identify the boundaries of the claimed land, leading to confusion over whether there were two different areas.

She cited the case of **Bakari Mhando Swanga** (supra), pages 7-8, which stated that the appellant must prove ownership on a balance of probabilities. Ms. Chacha concluded by requesting that the appeal be dismissed and prayed for the costs of the case in both this court and the tribunal. Ms. Mwandelema concurred with her colleague's submission and supported the prayer for dismissal of the appeal and the awarding of costs.

Mr. Kisakali, in his rejoinder submission, argued that the burden of proof was on the respondent since he was the one who instituted the case at the DLHT. He emphasized that the cause of action emanated from the respondent's application at the trial tribunal. According to Mr. Kisakali, the four issues framed at the trial were not answered affirmatively by the respondent.

The first issue, Mr. Kisakali asserted, was whether there was a contract of sale between the respondent and the 2nd appellant, and Mr. Kisakali reiterated that the respondent failed to produce any documentary evidence or summon any witnesses to the sale.

He questioned the credibility of PW2 (Sauda Mkonyi), noting that her evidence recorded on page 16 of the trial tribunal's proceedings indicated she did not know how the respondent acquired the farm but assumed it belonged to him because they were neighbors and he had used it for many years. During cross-examination, as recorded on page 16, Mr. Kisakali averred, she admitted not knowing how the respondent acquired the land or who used it before 1999, asserting that it was his simply because he used it.

Mr. Kisakali maintained that the appellants did not dispute the respondent's use of the suit land but claimed that the respondent had promised to return the land after harvesting the trees. He argued that long-term use of the land did not automatically confer ownership to the respondent. While acknowledging that oral contracts are recognized by the law, he pointed out that the respondent failed to summon any witnesses to support an oral agreement, which falls under the principle of adverse inference.

Regarding exhibit P1, Mr. Kisakali contested the assertion that they did not object to it. He stated that they did cross-examine on it and highlighted that it did not meet the criteria for a contract agreement for borrowing the land. He emphasized that the agreement lacked the respondent's signature and a description of the land, making it unqualified as a sale agreement.

Mr. Kisakali agreed with the citation of section 143 of the TEA by his colleague, which states that no particular number of witnesses is required to prove a case. However, he argued that in this case, it was crucial to call witnesses present during the sale. He also acknowledged that the sections of the Land Act cited by his colleague were not applicable but reiterated that the sale of land must be reduced to writing and endorsed by the village

council, referencing the case of Priscila (supra) on pages 17 to 19. In conclusion, Mr. Kisakali prayed for the appeal to be granted with costs for this case and the trial tribunal.

I have dispassionately considered the rival arguments in the light of the grounds of appeal. At this juncture it is considered imperative to recapitulate what exactly transpired at the DLHT.

Apparently, the respondent instituted the original suit at the DLHT, claiming ownership of the disputed land which he asserted to have purchased in 1999 for TZS 18,000. The appellant contested this, claiming that the respondent was merely a temporary user of the land, allowed to cultivate it with the agreement that he would return it after harvesting trees.

The appellant argued, among other points, that the DLHT failed to properly evaluate the evidence, particularly concerning the existence of a sale agreement. The appellant also questioned the credibility of the respondent's witness and the sufficiency of evidence presented by the respondent to prove ownership.

Considering the above recap in the light of the grounds of appeal and submission by counsel, the central issue in this appeal is whether the DLHT

properly evaluated the evidence and whether the respondent met the burden of proof required to establish ownership of the disputed land.

The burden of proof in civil cases lies with the party who asserts the affirmative of the issue. This is clearly articulated in sections 110 and 111 of the Evidence Act, Cap 6 RE 2022. In **Valeria Karangirangi v. Asteria Nyarwangwa** (supra), it was emphasized that "he who alleges must prove," and that the standard of proof is on the balance of probabilities. In the present case, the respondent, as the initiator of the suit at the DLHT, bore the burden of proving his claim of ownership over the suit land. The DLHT found that the respondent satisfactorily discharged this burden.

The respondent provided evidence that he had been in possession of the land since 1999, cultivating it and planting trees. This continuous use of the land over an extended period was supported by witness testimony. PW2, despite the appellant's criticism, testified that she had seen the respondent using the land and identified him as her neighbor.

The art and craft of evaluating evidence, which is not peculiar to lawyers or courts involves evaluating, among other things:

(i) *The source of the evidence (where it comes from, who took over from who and who has tendered it in court)*

(ii) *The nature of the evidence (whether primary or secondary)*

(iii) *How the evidence compares with the rest of evidence in the same transaction/matter (whether there is corroboration)*

(iv) *How current is the evidence (whether it is still valid, or another evidence makes it redundant),*

(v) *The scope of the evidence (whether it proves a specific or a general item, direct versus circumstantial aspects)*

(vi) *What the evidence suggests (inference)*

(vii) *Whether the evidence is a part of common knowledge or new scientific/technological findings.*

(See generally Damaska, Mirjan ***Evaluation of Evidence: Pre-Modern and Modern Approaches*** (Cambridge: Cambridge University Press 2019).

In my opinion, the DLHT evaluated the evidence presented by both parties. The appellant's argument that the DLHT failed to properly evaluate the evidence lacks merit. The DLHT's decision was based on a thorough assessment of the testimonies and documents presented. The case of **National Microfinance Bank v. Chama cha Kutetea Haki na Maslahi ya Walimu Tanzania (CHAKAMWATA)** (Supra) cited by Ms. Chacha underscores the importance of evaluating evidence before reaching a decision. This principle was adhered to by the DLHT.

On Oral Agreements and Contract Law, Mr. Kisakali argued that the respondent failed to produce a written contract of sale, which he claimed was necessary. However, as noted by Ms. Chacha, the law recognizes oral contracts provided they meet the essential requirements of a valid contract. I subscribe to Ms. Chacha's submission that Section 10 of the Law of Contract Act, Cap 345 RE 2019, and the case of **Salumu Viale Kibwana v. Shabani Besa and Philipina Mchomvu** (supra), affirm that oral agreements are as valid and enforceable as written ones.

The respondent's evidence, albeit oral, was corroborated by consistent testimonies and continuous use of the land, meeting the threshold for proving an oral contract. The appellant did not effectively cross-examine the respondent's witnesses, thus failing to challenge their evidence.

Coming to credibility of witnesses there is no doubt that the credibility of witnesses is paramount in any case. The DLHT found PW2's testimony credible despite the appellant's objections. It is not the role of the appellate court to reassess the credibility of witnesses unless there is a clear error or misapprehension of the evidence. The DLHT was in a better position to observe the demeanor and reliability of the witnesses.

The appellant criticized the respondent for not summoning additional witnesses to the sale. However, as per section 143 of the Evidence Act, no particular number of witnesses shall in any case be required for the proof of any fact. The respondent was not obligated to call numerous witnesses if the evidence presented was sufficient, which the DLHT found it to be.

The DLHT correctly evaluated the evidence and found that the respondent proved his case on the balance of probabilities. The appellant's grounds of appeal do not demonstrate any error in the DLHT's judgment that would warrant a reversal. The arguments presented by the appellant fail to undermine the credibility of the evidence that supported the respondent's claims.

In the upshot, the appeal is hereby dismissed for lack of merit. The decision of the DLHT is upheld. Costs follow the event.

It is so ordered.

E.I. LALTAIKA
JUDGE
30.05.2024

Court

This judgement is delivered under my hand and the seal of this court this 30th day of May 2024 in the presence Marco Kisakali counsel for the Appellant and Ms. Neema Chacha of the parties and their counsel.

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
JUDGE
30.05.2024