IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 22 OF 2023

(Arising from Land Application No. 25 of 2022 at the DLHT for Lindi at Lindi)

RASHIDI TANDAGA ---------- APPELLANT

VERSUS

KONDRAD ALEX MAKWINYA ---------- RESPONDENT

Date of last Order: 22.01.2024
Date of Judgment: 03.04.2024

JUDGEMENT

Ebrahim, J.:

This appeal arises from the decision made in Land Application No. 25 of 2022 of the District Land and Housing Tribunal for Lindi at Lindi (Hereinafter referred to as the tribunal) dated 15.06.2023. The said application was filed in the tribunal by the respondent against the appellant in the instant appeal. The claim by the respondent before the tribunal was on unsurvey land (ft 12.5x13). The respondent averred to have purchased unsurveyed land located at Rutamba ya Sasa

Village in Lindi District within Mtwara Region from Juma Ally Mchunda (SM3) and Kasimu Mohamedi Tandaga (SM4) on 01.03.1994 for a consideration of TZS. 95,000/=.

The appellant called **Juma Ally Mchunda (SM3)** and **Kasimu Mohamedi Tandaga (SM4)** as his witnesses. **SM2, Juma Hassani Kambwili** was another witness who drafted **and witnessed the sale. SM3** told the trial tribunal that himself and SM4 went to ask for a piece of land to do business from their brother (the respondent) and Bi. Njeta. They were given the piece of land and were allowed to build a temporary "banda" for their business. In March 1994 the business collapsed and they decided to sell the "banda" and all the things present in the "banda" to the respondent. SM3 testified further that they told the respondent they only sold him the "banda" but if it demolishes, he would have to leave the place. He contended that they did not sell the disputed land but what was sold was a kiosk and the equipments which were inside.

SM4 testified that they were the cause of this dispute and he reiterated the story of SM3.

Defending his position, the respondent testifying as **SU1** told the trial Tribunal that the "banda" was built by his children on the disputed land for business. By that time he was sick. He said initially the "banda" was built by using trees but later the respondent decided to rebuild it by using bricks. He asked his children about the "banda" and they told him that they have sold the "banda" and the things inside but the appellant shall leave the place once the banda demolishes. It was when the banda demolished the appellant attempted to rebuilt it but he was stopped by the respondent. Hence the instant case.

After hearing the evidence from both sides and considering the opinion of the assessors, the trial Chairman decided the case in favour of the respondent.

Aggrieved by the decision of the tribunal, the appellant opted to lodge an appeal in this court raising three grounds of appeal. The three grounds of appeal raised one issue for determination that;

Whether the appellant is the lawful owner of the suit land.

Hearing of the appeal proceeded by way of written submissions. Both parties appeared in person, unrepresented.

I shall however not recapitulate in full the submissions made by the parties but shall refer to them in the cause of discussing substantive issues.

Beginning with the 1st ground of appeal, the appellant submitted that the respondent ought to have joined a necessary party who was the seller and that failure to do so the suit was not effectually and completely adjudicated. To bolster his argument, he cited a case of **Juma B. Kandala vs Laurent Mnkande** (1983) T.L.R Civil Appeal No. 6 of 1982 where it was held that;

> *"in a suit for the recovery of the land sold to a third party, the buyer should be joined with the seller as a necessary party defendant not joined-joinder will be fatal to the proceedings....."*

He concluded that the seller was a necessary party and by not joining him in the application at the DLHT therefore it rendered the application a nullity.

On the 2nd ground of appeal the appellant submitted that the trial Tribunal did not take into consideration the evidence adduced by **SM3 and SM4** since their testimony resolved the matter because they testified that they all not the rightful owners of the disputed land.

He submitted further that the respondent had knowledge of the sale and he was supposed to take measures instead of waiting for 28 years. He referred to the doctrine of "*quicquid plantaur solo solo cedit*". In bringing an argument that the sellers sold the "banda" including what is affixed to it.

As for the 3rd ground of appeal, the appellant complained that he was not given a right to be heard on the preliminary point of objection he raised contrary to **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.**

Arguing against the 1st ground of appeal, the respondent submitted that the respondent was a proper party to sue because his cause of action is against the appellant and not the seller. He referred to the case of **Amon v. Raphael Tuck and Sons** (1956)1 ALL ER. 273 where the Supreme Court observed that;

> *"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be questioned in the action which cannot be effectually and completely settled unless he is party....."*

He explained that the instant case concerns the ownership of the disputed land and it was not necessary to include the said sellers for they were called as witnesses.

As for the 2nd ground of appeal, he responded that the Hon. Chairperson took into consideration the evidence of SM3 and SM4 as reflected at page 6 of the impugned judgement and found that there was no evidence to prove that the sellers were owners of the disputed land.

Responding on the 3rd ground of appeal, the respondent submitted that the available records show that the appellant only filed the written statement of defence and there was no point of preliminary objection.

In rejoinder, the appellant reiterated his submission in chief.

In adjudicating this case and being a civil matter, I shall be guided by the cardinal principle of the law that "*who alleges must prove*". In the present case, the appellant seeks to be declared as the lawful owner of the disputed land. Therefore, the onus of proving ownership of the suit land is upon him. This position was stated in the case **Godfrey Sayi**

vs Anna Siame as Legal Representative of the Late Mary Mndolwa, Civil Appeal No. 114 of 2014 (CAT) (unreported) where the Court said as follows:

> *"it is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:*
> *110 Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist*
>
> *111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."*

Nevertheless, this being the first appeal, this court is obligated to subject the entire evidence to re-evaluation and come to its own conclusion of facts if merited while acknowledging that the trial Tribunal was better placed to see, hear and appreciate the evidence; see **Tanzania Sewing Machine vs Njake Enterprises Ltd** (Civil Appeal No 15 of 2016) [2016] TZCA 2041 (27 October 2016).

On the 1st grounds of appeal; SM3 and SM4 who were said to be the sellers appeared before the trial Tribunal as sellers in proving their involvement in the transaction between them and the purchaser (appellant). As intimated earlier, the testimonies of SM3 and SM4 before the trial tribunal were enough to prove that they sold the "banda" to the appellant such that there was no need to add them as necessary parties.

I am aware that the trial tribunal decided the matter in favour of the respondent basing on the doctrine of *"quicquid plantatur solo solo cedit"* meaning that everything attached to the land is part of the land. **Exhibit M-1** (Hati ya kuuziana Kioski) indicates that SM3 and SM4 sold the kiosk which is on the disputed land. As per the evidence of the sellers they claim to have sold the "banda" and the things that were inside and that they told the respondent after the demolition of that "banda" he will have to leave the place.

As I have indicated above, the question of whether SM3 and SM4 sold kiosk and the things inside it to the appellant was not at all an issue between the parties.

SM3 and SM4 testified not to be the rightful owners of the disputed land and that they were only licensed to use it for business purposes. After their business had failed they decided to sell the kiosk and the things that were in it. Indisputably is the fact that SM3 and SM4 sold the kiosk to the respondent as per exhibit M-1. Exhibit M-1, "hati ya mauziano ya kiosk" does not specify the sale of the disputed land as alleged by the respondent. Moreover, the sellers of the kiosk testified that they are not the lawful owners of the disputed land but were the owners of the temporary "banda" which they built in the licensed land.

For that reason, they had no legal right to sell the disputed land as one cannot give what he does not have " *nemo dat quod non habet*" I therefore find that the respondent is not a lawful owner of the disputed land and the DLHT did therefore err in entertaining the claim of the respondent that he purchased the said land from SM3 and SM4 who clearly established that they were mere licencees.

That being said I find this appeal to be meritorious. Accordingly, I allow the appeal and reverse the decision of the trial Tribunal. The

appellant is declared as the lawful owner of the disputed land. The appellant to have his costs.

Ordered accordingly.

R.A Ebrahim
Judge.

03.04.2024
Mtwara.