IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 27004 OF 2023

(Arising from Land Application No. 07 of 2022 of the District Land and Housing Tribunal for Ruangwa at Ruangwa)

OMARI SEIF ONGOLI.....APPELLANT

VERSUS

HAMISA HASHIMU MAKOTA.....RESPONDENT

JUDGMENT

24th April & 29th May 2024

DING'OHI, J;

Omari Seif Ongoli, the appellant herein, is aggrieved by the decision of the District Land and Housing Tribunal (hereinafter to be referred to as the trial tribunal) for Ruangwa at Ruangwa in land application no. 07 of 2022. He has appealed against the said decision on two grounds of appeal as shall be reproduced hereinafter.

The factual background that gave rise to this appeal is that; The respondent instituted a land case, in the trial tribunal, against the respondent on an allegation that the appellant has trespassed into his land. As to how he

acquired the suit land the respondent claimed that she was the founder since 1979. It was alleged, that in 2012 the respondent borrowed the said land to one Shabani Saidi Juma @ Kodaki (PW2) for erecting a place (kibanda) for garage works. Kudaki used the place until 2021 when he returned the same to the respondent. After the land was returned to the respondent, and when one day visited the place, she found that it was invaded by the appellant who claimed that he was the rightful owner.

On his side, the appellant told the trial tribunal that he was also the true owner of the land in dispute. As to how he got the land, he told the trial tribunal that, it came to his possession after he purchased it from the respondent at Tshs. 800,000/= on 11/10/2012 through one Daudi Theo. According to him, the purchase exercise was completed, and he gave Daudi Theo the purchase money. Daudi then took and gave the money to the respondent in the presence of Sbabani Saidi Juma(PW2). Later, Daudi Theo and PW2 came up with the sale agreement to the effect that the respondent had already sold the suit land.

At the end of the trial, the trial tribunal found for the respondent. It declared her the rightful owner of the land in dispute. The appellant was ordered to

provide vacant possession for the respondent. He was also ordered to pay the costs of the suit.

Dissatisfied with the trial court's findings, the appellant has come before this court faulting the trial tribunal on the following grounds of appeal;

1. *That, the trial District Land and Housing Tribunal for Ruangwa erred in fact and law in dealing on respondent's favor based on biased and weak evidence adduced by the Applicant.*
2. *That, the District Land and Housing Tribunal for Ruangwa erred in fact and law in delivering decision on applicant's favor without considering the circumstances of the case.*

By the consent of the parties, this appeal was ordered to be disposed of by way of written submission. The appellant appeared in person while the respondent had the services of Mr. Emmanuel Ngongi, and Ms. Tabitha Raymond Ndumbalo, the learned advocates.

In supporting the appeal, the appellant joined the first and second grounds of appeal and argued them simultaneously. The appellant submitted that the trial tribunal was biased and relied on weak evidence by the respondent to base its decision. According to the appellant, the respondent did not prove

the case on a balance of probability but, on his part, he proved that he acquired the land by way of purchase from the respondent per the sale agreement (exhibit D-1) which was witnessed by MACHUNGA, S.A, the village executive officer of Machangani. The appellant went on to submit that, the contents and signature on the sale agreement were not confronted to by the respondent on admission. For that, the appellant built the view that the trial tribunal contradicted itself on page 5 of its judgment when it said that the exhibit was uncertain while in the trial court proceedings of 31/03/2023, it is evident that the sale agreement was supported by the evidence of DW2. To support his stance, the appellant cited the provision of section 110 of Evidence Act CAP 6 R.E. 2022, and the case of **Paulina Samson Ndawavya vs. Thersia Madah** (Civil Appeal No. 45 of 2017) 2019 TZCA 453 where the Court observed that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's.

The appellant further argued that the evidence relied upon by him was not inconsistent as found by the trial tribunal. According to him, the purported sale agreement (Exhibit P1) was also signed by the respondent which

indicated that it was legally made. He added that the trial tribunal should have satisfied itself with the correctness and authenticity of it per Regulation 10 (3) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003, and sections 100 (1) and 101 of the Evidence Act.

The appellant was of the view that the trial tribunal would have involved technical persons acquainted with the signature of the appellant and attached technical reports to support the allegation on the genuineness of the document per section 49 (1) of the Evidence Act.

In reply, Ms. Ndumbalo, the learned advocate for the respondent, began to differ from the submissions and case laws cited by the appellant. She opined that the precedents that were cited are irrelevant to the circumstances of this case. In furtherance, he blamed the appellant for his act of attaching a document as part of this appeal purportedly under Regulation 10(3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. According to her, that is contrary to the rules or principles regulating the submissions which prohibit tendering of evidence or exhibit. To support her stance, Ms. Ndumbalo cited the cases of **Veta vs. Ghana Contractors Ltd and Another,** Civil case No. 198 of 1995(unreported) and **Bish**

International and Another vs Charels Waw Sarkdole, Land Case No. 9 of 2006.

The learned advocate invited this court to disregard the document annexed in the appeal by the appellant. It is her further submission that the appellant's grounds of appeal can be resolved by only one issue; whether there was an agreement entered between the respondent and the appellant over the disputed property. In answering the issue, the learned advocate has outlined the co-elements for a valid contract as provided for under section 10 of the Law of the Contract Act, Cap. 345 R.E. 2019. According to the learned advocate, a legal contract must have an offer and acceptance, capacity of parties, lawful object, lawful consideration, and intention to create a legal relationship.

She further argued that there's a quiet difference between the admission of evidence and its admissibility. Ms. Ndumbalo was of the considered view that a document might be admitted before the court but that does not mean it has passed the test of being relevant. The learned advocate submitted that the fact that the sale agreement was admitted as exhibit D1 cannot make the document valid. She added that the appellant did not witness the sale agreement, even his witness never witnessed the initial amount of Tshs.

400,000/= being given to the respondent. Moreover, the amount that was written in the sale agreement is distinctive and/or quite different from the amount that the appellant alleges he gave to the respondent. The learned advocate contended that since the appellant established the existence of the sale agreement the burden of proof shifted to him to prove the legitimacy of the same. She added that the person who allegedly witnessed the sale agreement was not called to testify before the tribunal. According to him by looking at the evidence it is clear that there is nowhere showing that the trial tribunal failed to observe the principle of fair trial or the principle of natural justice to warrant this court to reevaluate the evidence in the record.

In a nutshell, that was a submission of the appellant and respondent. After dutifully going through the trial tribunal records, memorandum of appeal, and submissions by both sides, the issue for determination is whether the appeal has merit. From the records at my hand, it was not disputed that the land in dispute was, before the decision of the trial tribunal, owned by the respondent. The appellant alleges that he purchased that land from the respondent. He tendered the sale agreement in the trial tribunal to support his allegation. The said sale agreement was admitted as an exhibit. The relevant issue now is whether the respondent sold the said land to the

appellant. I have already hinted that the appellant believes that the land is his property as he purchased it from the respondent. The respondent disputes that belief by the appellant. He maintains that he did not enter and/or sign the sale agreement with the appellant over the land in dispute. The foregoing facts evoked me to draw up an issue as to whether the respondent agreed to sell his land to the appellant. In other words, whether there was a *valid* agreement/contract of sale of the respondent's land to the appellant.

Section 10 of the Law of Contract Act CAP 345 RE 2002, provides for elements of a valid contract. The section reads;

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for lawful; consideration and with a lawful object, and are not hereby expressly declared to be void"*

From the above definition of a valid contract, I have examined the sale agreement tendered and admitted as exhibit in the trial tribunal and see whether it was properly made, and by both parties, per the law. Having

dutifully examined the sale agreement, I have come up with the following observations;

First, the evidence adduced did not suggest that an agreement was made with the consent of the respondent. On records, the appellant stipulated that he did not see the respondent signing the agreement. He also stated that the sale agreement was made in the presence of the PW2 Shabani Saidi Juma but in his evidence before the trial tribunal, the said PW2 in cross-examination told the trial tribunal that he was not the witness to the said sale agreement. He was quoted stating: *"Hapana mimi sikuwa shahidi wa mleta maombi wakati unanunua hilo shamba"*. That piece of statement proves that there is no evidence showing that the respondent agreed and/or consented to the alleged sale of his land. I would, therefore, agree with the respondent that anything alleged to have been done by the appellant was one-sided and thus against the law. Section 13 of the Law of Contract Act, CAP. 345 R.E. 2019 provided the following as to the consent;

> *"Two or more persons are said to consent when they agree upon the same thing in the same sense."*

As to how the appellant entered on what he considers to be a sale agreement he was recorded as per page 8 of the trial tribunal typed proceedings testifying that;

> *"Nikamtuma Bakari Theo Daudi ambaye mmoja wa wafanyakazi wangu aende kwa mleta maombi akamuulizie kama anaweza kutuuzia hilo eneo. Akiwa anaenda alifuatana na Shabani Said Juma walipokwenda walirudi kunileta ujumbe kwamba eneo hilo mama alishauliuza kwa Shamte kwa Tshs 500,000/= lakini Shamte amelipa Tshs 250,000/= hivyo kama kuna mtu anataka kununua yuko tayari kuliuza kwa Tshs 800,000/= ili amrudishie Shamte Tshs 250,000/= kwa kuwa amenipitiliza muda mrefu.* ***Siku ya pili nilimkabidhi Daudi Theo fedha Tshs. 800,000/= wakafuatana na Shabani Saidi Juma kwenda kwa mleta maombi waliporudi walirudi na hati ya kwamba mleta maombi tayari ameniuzia eneo hilo."***

The bolded part of the above testimony suggests that contracting parties lacked a meeting of their minds to this essential term of the contract. Further, the fact that the appellant did not see the disputed contract being signed by the respondent, and in the absence of other evidence to prove that there was consent by both parties to enter into the alleged contract, there will be no convincing reason as to why I should not believe that the respondent was not a party to the alleged sale agreement. Equally, the evidence that the PW2 (SHABANI) and the appellant took the sale agreement to the respondent for signature was not proved. The witness of the appellant, Bakari Theo Daudi (DW 2), simply told the trial tribunal that the appellant gave him money to buy the land for him. He went on testifying that they approached the respondent for the purchase of the said land which resulted in the completion of the sale agreement in the presence of the Village Executive officer of Mchangani ward. According to the DW2, thereafter they returned the sale agreement document to their office. As to the signatories, the DW2 said he do not know who signed the sale agreement at the purchaser's party.

The evidence is not clear as to how the appellant believed that the SM2 and DW1 took the agreement to the respondent for consent and signature. Truly, the evidence to that effect is wanting.

In **AGGREKO International Trade vs. Triumphant Trade and Consultancy Services Limited** (Civil Appeal No. 83 of 2020) [2023] TZCA 17781, the Court of Appeal of Tanzania defined the term *"consent"* in extensive. It was observed *inter alia* that;

> *"That section is complemented by section 13 of the same Act on the issue of consent in that "two or more persons are said to consent when they agree upon the same thing in the same sense"*
>
> *It means therefore that, in order for the agreement or contract to be enforceable, it must satisfy several crucial elements which are: One, there must be an offer which must be* ***clearly communicated****. Two, there must be acceptance of the* ***communicated proposal****;*

three, parties must be competent or must have capacity to enter into the contract;and four, there must be a lawful consideration."

The **second** point is that the agreement shows that it was witnessed by the village executive officer (VEO) of Mchangani village. However, the said VEO who would be the crucial witness under the circumstances of this case was not called by the appellant to testify. Failure by the appellant to call that important witness to testify on the validity of the said contract drew up the adverse inference on the evidence of the appellant on that subject.

In **City Coffee Ltd vs. Registered Trustee of Ilolo Coffee Group** (Civil Appeal No. 94 of 2018) [2019] TZCA 645, the Court of Appeal quoted with approval the decision in the case of **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007; where it was articulated that;

"... under section 143 of the Evidence Act (Cap 6- RE 2002) no amount of witnesses is required to prove a fact - See Yohanis Msigwa v. Republic [1990] T.L.R. 148. But it is also the law (section 122 of the Evidence Act) that the

court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons."

In another persuasive decision of **Andrew J. M Kitenge vs. Maua Hamis Rai & Another** (Land Appeal No. 255 of 2022) [2023] TZHC Land D 16501, my fellow Hemed J on page 11 citing with authority the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 Where the Court had this to say;

"Like Mmasa Tumbatu, A/masi Sebarua was another material witness whom, for undisclosed reasons, the respondent failed to call as witness on his side. In such cases the Courts are entitled in law to draw an inference that if these witnesses were called, they would have given evidence contrary to the respondent's interests. The duty to call witnesses is not the courts but it is for the party who wants to be believed in his story and win the case."

It is upon the foregoing observations, that I do not have any glint of doubt that the appellant's testimony as to the ownership of the suit land was not properly corroborated by any other evidence. In other words the evidence by the appellant's side at the trial tribunal was light as compared with that of the respondent. The trial tribunal was therefore right to declare, as it did, that, the respondent is the rightful owner of the land in dispute.

Resultingly, I find that this appeal is devoid of merit. It is hereby dismissed with costs.

It is so ordered.

DATED at **MTWARA** this 29th day of May 2024

S. R. DING'OHI

JUDGE

29/5/2024

Court: Judgment delivered this 29th day of May 2024 in the presence of Mr. Emmanuel Ngongi, the learned advocate, for the respondent and the appellant in person.

S. R. DING'OHI

JUDGE

29/5/2024