IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

GEITA SUB-REGISTRY

AT GEITA

LAND APPEAL NO. 12594 OF 2024

(Arising from Land Application No. 20 of 2018 in the District Land and Housing Tribunal for Geita at Geita)

MAKARANGA JORAM ..... APPELLANT

VERSUS

1. **NYABATONDWA BUNDU**
2. **BUSWELU MIGIHA**
3. **HONDU MHUNGATI.....RESPONDENTS**

JUDGMENT

Date of last Order: 14/06/2024
Date of Judgment: 02/07/2024

MWAKAPEJE, J.:

The Appellant in the appeal at hand, Makaranga Joram, has approached this Court after dissatisfaction with the decision of the District Land and Housing Tribunal for Geita at Geita in Land Application No. 20 of 2018, which was rendered on 19th April 2024.

Briefly, the outline of the facts of the case are thus: The Appellant claims to have been allocated a parcel of land from his late father in 1988. In 2007, the 1st Respondent sold the land to the 2nd and 3rd Respondents, asserting it was rightfully hers. She stated it was allocated to her during a clan meeting in 2003 as part of her inheritance from her deceased

father, Bundu Mkanga, who had three children: The Appellant's father, Joram Bundu, and Martha Bundu.

In 2014, the Appellant filed a Land Application No. 44 of 2014 in the District Land and Housing Tribunal of Geita, which was dismissed for lack of merit. Dissatisfied with the decision, the Appellant lodged an appeal with the High Court in Mwanza under Land Appeal No. 58 of 2015, where a trial *denovo* was ordered, along with directions for the trial tribunal to visit the *locus in quo*. Instead of adhering to the court's directives of the High Court, the Appellant initiated a Civil Land Application No. 20 of 2018, which was ruled in his favour. Being discontented, the Respondents then appealed against this decision in the High Court in Mwanza under Land Appeal Case No. 56 of 2022.

The High Court in Land Appeal Case No. 56 of 2022 directed the parties to comply with its previous orders in Land Appeal No. 58 of 2015, including a trial *denovo* and an on-site visit to the *locus in quo*, with a subsequent judgment based on the evidence and findings from the inspection. Following compliance with the High Court's directives, the District Land and Housing Tribunal, under Land Application No. 20 of 2018, ruled in favour of the Respondents. This prompted him to file this appeal with the following grounds of appeal:

1. *That the trial tribunal erred in law and, in fact, entered judgment in favour of the Respondents contrary to the weight of evidence adduced by the Appellant before the trial tribunal.*
2. *That the trial tribunal erred in law and fact without warning itself that it decided beyond and contrary to the orders of the High Court of Tanzania at Mwanza.*
3. *That the trial tribunal erred in law and fact by entertaining invalid contracts due to lack of capacity by the 1st Respondent.*
4. *That the trial tribunal erred in law and fact by reaching conclusions that are misconceived, unsupported by evidence, and based on a misapprehension of evidence on record.*

Being the first appellate Court, I am compelled to re-evaluate the evidence adduced in the trial tribunal and come up with my own findings in addressing the grounds of appeal. See the cases of **Future Century Limited vs TANESCO** (Civil Appeal No. 5 of 2009) [2016] TZCA 730**; Leopold Mutembei vs Principle Assistant Registrar of Titles, Ministry of Lands Housing and Urban Development & Another** (Civil Appeal No. 57 of 2017) [2018] TZCA 213.

In recapitulating the testimonies of the parties in the trial tribunal, the appellant, PW1, called 2 witnesses, all of whom were his siblings Richard Joram (PW2) and Mariam Joram Bundu (PW3). On his part, PW1 testified that he was allocated a parcel of land by his father in 1988, part of the clan land. In 2003, his father distributed the remaining family

property among beneficiaries, with the 1st Respondent receiving a wooded area. He claimed that in 2007, the 1st Respondent encroached upon and sold his 12-acre parcel of land, with 7 acres sold to the 2nd Respondent and 5 acres to the 3rd Respondent. In 2009, the 2nd and 3rd Respondents further encroached upon the land and destroyed his lavatory. The PW1 tendered written documents to support his claims of the allocation by street leaders. PW2 and PW3 supported the Appellant's claims, asserting that the land in dispute was allocated to the latter by their father.

On the other hand, DW1 Nyabutondwa Bundu, the 1st Respondent, testified that the disputed land did not belong to the Appellant's father but was land that their father had cleared from the forest. Following their father's demise, the children of the deceased were each granted a parcel. She sold her allocated parcel to the 2nd and 3rd Respondents. Before the sale, they surveyed the land to delineate boundaries in the presence of the Appellant, purchasers, leaders, and relatives. Post-sale, the buyers continued cultivating their respective parcels for two years without any contention. DW1 concluded by affirming that she did not encroach upon the disputed land, as the partition was conducted in the presence of local leaders and boundaries were demarcated with sisal plants.

DW2 Buswelu Migiha stated that he is the rightful proprietor of a segment of the disputed land, which he procured from the 1st Respondent on 14th May 2007, for ten cows. According to DW2's testimony, the transaction was recorded in writing, and he submitted a deed of sale admitted as Exhibit D1 to validate his ownership. DW3 Jackson Ngololoka testified that in 2002, as the chairperson of the vicinity where the disputed land is located, he was summoned to witness the division of the family property among the Bundu family. The 1st Respondent, Nyabutondwa Bundu, Joram Bundu, and Martha Bundu, all progenies of the deceased Bundu, were each assigned their parcels and advised to construct on their respective parcels. Astonishingly, the Appellant erected a residence on the 1st Respondent's parcel and declined to vacate it after edifying it on the 1st Respondent's designated parcel. The 1st Respondent subsequently opted to sell his parcel to the 2nd and 3rd Respondents.

DW4 Shimo Kazungu Magadi testified that the 2nd Respondent lawfully acquired a 21-acre parcel of land in 2007, which included native trees. He further stated that the Appellant was living on the land at the time and agreed to vacate. The 3rd Respondent, DW3, Hondu Mhungati, stated that he bought a portion of the disputed land from the 1st Respondent for seven cows, supported by an agreement dated 10th April 2007. Lastly, Msenyele Kachembeho DW6 confirmed that in 2007, Hondu,

the 3rd Respondent, bought a 5-acre parcel of land for seven cows from the 1st Respondent, who is the daughter of Bundu.

The appeal was argued orally. The Appellant appeared in person, while Mr. Beatus Emmanuel, learned advocate, represented all the Respondents.

The Appellant, who was the first to address the Court, was succinct in his arguments and, in presenting his first ground of appeal, contended that the trial Chairperson erred in evaluating the evidentiary documents submitted regarding the ownership of the disputed parcel of land where he has resided for over two decades. He claimed that the 1st Respondent unlawfully intruded upon his residence in the property that was subsequently sold.

In arguing the second ground of appeal, the Appellant asserted that the Chairperson of the trial tribunal departed from the instructions of the High Court by neglecting to visit the *locus in quo* to verify the land dispute between the Appellant and the 1st Respondent, who is the Appellant's aunt, and to assess the value and contents therein. He alleged that the Tribunal did not conduct a comprehensive examination of the entire vicinity and cast doubt on the validity of the map of the area, which was purportedly created after the partition of the land among siblings. He

contended that this conduct by the trial tribunal directly contradicted the High Court's orders.

Expanding on his third ground of appeal, the Appellant argued that the trial Tribunal placed excessive emphasis on invalid contractual documents concerning the sale of land that was not disputed. According to him, these contracts related to a different parcel of land, and the land legally sold, as evidenced by the agreement, did not encompass the Appellant's portion. Nonetheless, the trial Chairman admitted and considered evidence unrelated to the Appellant's land section.

Finally, in the fourth ground of appeal, the Appellant contended that the trial Chairperson relied on hearsay evidence without any accompanying documentary evidence, undermining the credibility of the tribunal's decision.

In response to the Appellant's arguments, Mr. Beatus argued that the grounds of appeal put forth by the Appellant were unfounded. Concerning the first ground of appeal, Mr. Beatus maintained that the documentary evidence submitted by the Appellant held no legal merit. He asserted that the Appellant's assertion of having been granted a plot of land by his father prior to the land being distributed in accordance with clan traditions violated the principle that one cannot transfer ownership

of something they do not own. He substantiated his argument by referencing the case of **Farah Mohamed vs Fatuma Abdallah** 1992 TLR, 205 and **Enock Kalibwani vs Ayoub Ramadhani & Others** (Civil Appeal No. 85 of 2020) [2023] TZCA 17301, pages 11-12 in relation to the Latin maxim, *"Nemo dat quod non habet."* Moreover, he highlighted that the Appellant failed to produce a deed of gift allegedly given in 1988 by his deceased father.

In addressing the second issue raised in the appeal, Mr. Beatus contended that the High Court's instruction to visit the *locus in quo*, as seen in **Makaranga Joram vs Nyabatondwa Bundu & 2 Others**, Land Appeal No. 58 of 2015 (Unreported), made the use of a map discretionary. He argued that the Tribunal's decision not to utilise the map due to identified inconsistencies was reasonable and in line with the judgment in **Nyabatondwa Bundu & 2 Others vs Makaranga Joram** (Land Appeal No. 56 of 2022) [2023] TZHC 367.

Regarding the third issue raised in the appeal, Mr. Beatus maintained that the Respondents did not deceive. All witnesses provided sworn testimony and supported their claims with annexures D1 and D2, corroborating the testimony of DW3. He contended that the District Land and Housing Tribunal thoroughly reviewed the documents and concluded

that the 1st Respondent had the authority to sell the land allocated to her by the clan. The assertion that the plot allocated to the 1st Respondent lacked residential structures was contradicted by PW3's testimony, confirming that the Appellant had encroached on the 1st Respondent's land and had been instructed to vacate during clan meetings.

Concerning the fourth issue raised in the appeal, Mr Beatus argued that the Appellant had the opportunity to summon clan and village leaders but chose not to do so, opting instead to present his younger brothers, who were not part of the clan assembly. He contended that the DLHT justified its decision based on the witnesses presented. Mr. Beatus concluded by urging the rejection of the appeal, deeming it unfounded.

Rejoining, the Appellant reiterated that his father gave him the land he currently lives on and divided the land among his children. The 1st Respondent received a forested area separate from the residential part. The Appellant claimed that the witnesses for the Respondent lied in their testimonies. He couldn't gather clan and village elders due to their deaths and believed documenting family disputes over land distribution was unnecessary. He requested the Court to grant the appeal as outlined in the appeal petition.

After carefully considering the grounds of appeal and the arguments put forth by the parties, I am tasked with assessing and resolving each of the raised issues. In doing so, the main question that I will respond to is whether the appeal has merits.

I will commence with the second ground of appeal, in which the Appellant argues that the trial tribunal's decision was contrary to the directive given by the High Court. In order to address this ground, it is crucial to consider what was directed by the High Court. As pointed out earlier, the High Court in Land Appeal No. 58 of 2015 ordered a trial denovo, and in doing so, the *locus in quo* was to be visited. The wordings of the order was thus:

> *"I have observed that nowhere was it indicated in the proceedings of the trial court that the locus in quo was visited, nor was a rough sketch map drawn to that effect as rightly admitted by the parties. I think visiting the locus in quo in this particular case was vitally important to ascertain what parcel of land was inherited by the 1st Respondent and which part of the estate of Bundu Mkanga was bequeathed to the Appellant's father, bearing in mind that there is no dispute that the 1st Respondent has her piece of land by virtue of inheritance……. In our case, the trial tribunal ought to ensure that the locus in quo*

> *is visited and accordingly in order to be in a better position to justly and fairly determine the dispute between the parties"*

Further, in Land Appeal No. 56 of 2022, the High Court ordered the parties to comply with the order in Land Appeal No. 58 of 2018 and stated as follows:

> *"In conclusion, I find merit in the first ground and further order the trial tribunal to comply with the previous order of this court by visiting the locus in quo and ascertain whether the 1st Appellant sold her own portion of land or extended the boundaries, the trial court may use the sketch map attached to the application, after complying with the order of this court, the trial tribunal chairman should compose another judgment based on the existing evidence and findings observed from the locus in quo."*

Now, to ascertain whether the tribunal complied with the High Court's orders in the abovementioned cases, I was compelled to peek into its proceedings. On 10th August 2023, when the matter was scheduled for mention, it was ordered that parties visit the *locus in quo* on 16th October 2023, in compliance with the High Court's order. On the material date, i.e., at the *locus in quo,* the tribunal heard the Appellant, all Respondents and one Jackson Ngololoku, the Hamlet Chairperson who was present in 2002/2003 when the area was divided. Each part stated their case and

explained the way the said parcel of land was distributed and allocated and the portion the 1st Respondent sold to the 2nd and 3rd Respondents.

The contention that the trial tribunal failed to adhere to the court order is baseless, as the location in question was physically inspected, and its boundaries were established by the involved parties and the local hamlet leader. During the on-site inspection, the Appellant himself acknowledged that the sketch map was dated 29th December 2003, despite the land being divided on 13th December 2022 and lacking any identifying information of the individuals involved in its drawing. Conversely, Mr Jackson, the Hamlet Chairman, maintained that no sketch map was made during the land distribution unless it was done at a later date, unbeknownst to him. Therefore, it was incumbent upon the trial tribunal to conduct due diligence and not blindly comply with the High Court's orders, particularly regarding the usage of a sketch map in the circumstances of the case. To me, the option of the use of a sketch map by the trial tribunal, as stated by Mr Beatus, did not absolve it from verifying its authenticity beforehand. After ascertaining the evidence presented by the parties, the trial tribunal composed a judgment as per the directives. Consequently, I see no merit in this particular ground of appeal, and I proceed to dismiss it.

Regarding the first and fourth grounds of appeal, which are intertwined and I will jointly address them, it is a well-established legal principle that the burden of proof rests on the party alleging; see section 110 of the Evidence Act, Cap. 6 R.E. 2019 and the cases of **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556; and **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453. The court typically gives greater weight to evidence in support of the fact at issue. In the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434, it was stated that:

> *".....in civil proceedings, a party who alleges anything in his/her favour also bears the evidential burden and the standard of proof is on the balance of probabilities,* ***which means that the Court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved****."[Emphasis supplied]*

The Appellant claimed that the trial tribunal failed to evaluate and did not give his documentary evidence due weight about his ownership of the suit premises and ended up ruling in favour of the Respondents. According to the evidence on record, he stated to have been allocated the said land by his late father in 1988. The said land, however, was clan land,

i.e., it belonged to one Bundu Mkanga, the father of the 1st Respondent – Nyabatondwa Bundu, Joram Bundu, and Martha Bundu. In 2003, the trio, i.e., Nyabatondwa, Joram and Martha, apportioned the said land amongst themselves as heirs of their late father in the presence of the local leaders.

The questions the tribunal asked in determining ownership of the disputed land were that there was no evidence indicating when Bundu passed off and when the father of the Appellant (Joram) was appointed as administrator for him to distribute the same to his children, including the Appellant. If the same was the clan land, how could he distribute it to his children even without proper heirs' consent? Further, the trial tribunal asked itself about the power Joram had to distribute the land which did not belong to him and, if the said land was allocated to Joram, how come, therefore, another meeting seated to divide the area in 2003? To me, answers to these pertinent questions were crucial to prove the truthfulness of the facts claimed by the Appellant.

Another thing that struck me was the fact that, when the *locus in quo* was visited, the Appellant stated that his father, Joram Bundu, was buried in the area he was apportioned in 2003. From this piece of information, I expected to find evidence indicating that the area in which the Appellant was living was part of what his father was allocated, and he

inherited therefrom, as in the circumstances he ought to have inherited from what his father, Joram, was allocated.

Furthermore, there were undisputed facts that after the land was divided amongst the siblings of Bundu Mkanga in 2003, all the children of Joram, relatives to the Appellants, who were living therein in areas not allocated to their father, were told to vacate, and they did, save for the Appellant who did not. This, therefore, negates the contention of the Appellant's ownership of the land in dispute. On this, therefore, I entirely agree with the findings of the trial tribunal and the submission by Mr Beatus that Joram Bundu, the father of the Appellant, distributed what he did not have, and the Appellant failed to substantiate his claims to the standards required in civil law as far as section 110 of the Evidence Act is concerned.

Additionally, a sketch map the Appellant contends to have been disregarded was ruled wanting as it did not have the drawer's names or signatures of those who participated in drawing it, and it came after a clan meeting to apportion the clan land had concluded its business. Furthermore, Mr Jackson PW3, who was at the meeting when the clan land was being distributed to the children of Bundu Mkanga, disowned it.

Since there were doubts and holes in the evidence by the Appellant, it was right for the trial tribunal to give more weight to credible testimonies of the Respondents about land ownership, which was rightly distributed among the children of Bundu Mkama. The Appellant ought to seek to inherit directly from the father rather than relying on the grandfather's estates, which were intended for his children, including the Appellant's father. Additionally, it is crucial to point out that the Appellant ought to focus on building and acquiring his own properties, so he can create a legacy for himself and his future generation rather than causing disputes and chaos over the property to which he may not have a rightful claim, like in the present case.

Thus, the Appellant should lay claim to an inheritance from what his father possessed and was granted during the clan meeting, as opposed to the area indicated in the evidence as being allocated to the 1st Respondent. In my view, the tribunal scrutinised and deliberated on the testimony and documents provided by the Appellant and found them lacking. The tribunal also assessed the evidence put forth by both parties, including what was determined in the *locus in quo*, in arriving at its ruling. Therefore, I dismiss the first and fourth grounds of appeal due to their lack of merit.

Concerning the third ground of appeal, which questions the validity of contracts due to the 1st Respondent's capacity to dispose of the land, the issue at hand is whether the 1st Respondent possessed the capacity to sell the parcel of land to the 2nd and 3rd Respondents.

It is an established fact that the parcel of land in question, which the Appellant asserts belonged to Bundu Mkanga, his grandfather, was inherited by the 1st Respondent as one of Bundu's three offspring, among them the Appellant's father. In accordance with customary laws, progeny are entitled to succession from their forebears. In this instance, the 1st Respondent inherited a tract of land that was apportioned to her during a clan meeting in 2003. Consequently, it is self-evident that upon obtaining this land, she acquired the entitlement to hold, utilise, relish, and transfer the land through sale, donation, or other methods. Given these circumstances, the 1st Respondent opted to vend the land to the 2nd and 3rd Respondents. Thus, there existed substantial proof corroborating the acquisition of the land by the 2nd and 3rd Respondents from the 1st Respondent, who possessed the legal capacity to engage in agreements concerning the land assigned to her by the clan meeting in 2003, as affirmed by the tribunal's on-site inspection that she did not trespass onto the territory of the Appellant's father. Therefore, the Appellant's contention regarding encroachment by the 1st Respondent, who lawfully

sold what was rightfully hers, is baseless. I hereby dismiss this ground of appeal as well.

Based on the discussions I have undertaken, this Court is satisfied that the 1st Respondent substantiated her claims on the balance of probabilities. Consequently, there are no compelling reasons to interfere with the findings of the DLHT. Therefore, I find no merit in the appeal and I hereby dismiss it in its entirety with costs.

It is so ordered.

DELIVERED at **GEITA** on this 02nd day of July 2024.

G.V. MWAKAPEJE
JUDGE

This judgment is delivered this 02nd day of July 2024 in the presence of Mr Shija Jeremia, learned advocate for the Respondent, and the Appellant and Respondent in person.

G.V. MWAKAPEJE
JUDGE