THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

LAND APPEAL NO. 25674 OF 2023

(Originating from the Decision of the District Land and Housing Tribunal of Mbeya at Mbeya in the Application No. 71 of 2017)

FRANCIS FESTO SUDI.....APPELLANT

VERSUS

FLAVIAN MBAGA.....1ST RESPONDENT

JUSTINE SIMWAWA.....2ND RESPONDENT

ISAACK SIMLEMBE.....3RD RESPONDENT

JUDGMENT

Date: 12 April 2024 & 31 May 2024

SINDA, J.:

This is an appeal from the decision of the District Land and Housing Tribunal of Mbeya at Mbeya (the **DLHT**) in Land Application No. 71 of 2017, delivered on 05 September 2023, in favour of the respondent (the **Judgment**).

The brief facts of the case are that the appellant bought a fifty (50) acres of land located at Ikana village, Momba District, in Songwe region (the **Disputed Land**). He claimed to have purchased the land from the third respondent, Isaack Simlembe. The Disputed Land was trespassed by the first and second respondents, together with Charles Simwawa (not a party to this case). The second respondent and Charles Simwawa allegedly sold the land in dispute to the first respondent, who started cultivating the same.

The appellant unsuccessfully sued the respondents at the DLHT. Dissatisfied with the decision, he appealed to the High Court before Hon. Mongela, J who remitted the file back to the DLHT.

The appellant being aggrieved with the decision of the DLHT, made this appeal on the following grounds that:

1. *The DLHT erred in law and facts to render the decision in favour of the first and second respondents, while Justin Simwawa never appeared before and heard as a necessary party.*
2. *The DLHT erred in law and fact by deciding in favour of the first and second respondents, whose evidence was contradictory regarding a person who sold the Disputed Land to the first Respondent.*

3. *The DLHT grossed erred in law and facts by saying the appellant failed to prove the boundaries and by his failure to critically evaluate the evidence adduced by both parties in respect of the boundaries of the Disputed Land.*
4. *The DLHT erred in law and fact to rule out that the appellant failed to prove the case on the required standard.*
5. *The DLHT erred in law and facts to decide in favour of the first and second respondent contrary to the evidence adduced.*
6. *The DLHT erred in law and fact by removing Charles Simwawa's name as the respondent for the best reason known to him.*
7. *The DLHT erred in law and fact by stating that the third respondent had no title without clearly identifying how the evidence adduced proved the same.*
8. *The DLHT erred in law and fact by deciding in favour of the first and second respondents while neither the second Respondent nor Charles Simwawa had a mandate (Locus Standi) to pass/dispose of the disputed land to the first Respondent.*

9. *The DLHT erred in law and fact to decide in favour of the first and second respondents despite the contradictory evidence adduced on their party.*

10. *The DLHT erred in law and fact by declaring Exhibit FSI irrelevant in respect of the Disputed Land and using narrow reasoning to do so.*

11. *The DLHT grossed erred in law and fact to discuss and rule out the matter not in issue (Boundaries of the Disputed Land) rather than the capacity and legality of the sellers to the buyers of the disputed piece of Land, which was neither disputed by parties.*

12. *The DLHT erred in law and fact by stating that the Appellant's advocate did not cross-examine the second and third respondents except for the second Respondent, who never appeared and testified before the court.*

13. *The DLHT erred in law and fact by including facts that never existed/were adduced in court in the judgment.*

14. *The DLHT grossly erred in law and fact by failing to draw the map when he visited the locus in Quo.*

15. *The DLHT erred in law and fact by ignoring the evidence of PW2, PW3, and PW4, who testified that they had seen the third respondent*

using the Disputed Land for more than twelve (12) years and that PW4 had sufficient knowledge.

The hearing of the appeal was by way of written submissions. The appellant was represented by Mr. Barnaba Pomboma, learned Advocate. The first and second respondents were represented by Mr. Victor C. M. Mkumbe, learned advocate, and the third respondent was unrepresented.

Submitting on the first ground of appeal, Mr. Pomboma argued that during the hearing of the suit at the DLHT, the appellant proved that he bought the Disputed Land from the third respondent and that the third respondent proved that he owned the said Disputed Land since 1970 and sold to the appellant in 2014.

Mr. Pomboma argued that the first respondent testified that he bought the Disputed Land from the second respondent and Charles Simwawa. He added, however, the second respondent never appeared before the DLHT to testify whether it was true that he sold the Disputed Land to the first respondent. The fact that he did not testify implies if he did, he would have given evidence contrary to the first respondent interests. In support of his argument, he referred to the case of ***Veronica Failos Massawa vs.***

Saimon Paulo Nhumbi and 4 others, Land Case No. 191 of 2022 HC at Dar es Salaam, which cited the case of ***Hemed Saidi vs. Mohamedi Mbilu*** [1984] TLR 113.

On the second and ninth grounds, Mr. Pomboma submitted that the appellant faults the DLHT decision, which relied on the contradictory evidence of the respondents and their witness which goes to the root of the matter.

Regarding the third and eleventh grounds, learned counsel submitted that the issue that was to be determined at the DLHT was who is the rightful owner of the Disputed Land, but the DLHT failed to evaluate the evidence during trial hence made an unfair decision and further point the demarcation of the land in dispute. Further, the appellant not only identified neighbors of the land but also provided the sketch map of the disputed land. He stated that the appellant bought the land in 2014, while the first respondent bought the same in 2016 from the second respondent. He added this means the first respondent bought the Disputed Land which was already purchased by the appellant. Mr. Pomboma further stated that the second respondent sold the Disputed Land without having a good title. He stated further that when the DLHT visited the Disputed Land it erred both in law and fact by determining

the matters of boundaries without first discussing on the ownership of the Disputed Land.

Turning to the fourth, fifth and tenth grounds, Mr. Pomboma submitted that based on the burden of proof, the appellant managed to prove his case by tendering the sale agreement and map showing that he purchased the Disputed Land. This evidence is corroborated by multiple witnesses. The appellant managed to prove the title of the third respondent by showing that Isaack Simlembe acquired the Disputed Land from his father. He added acquisition of land as a gift is valid in Tanzania. To support his argument, he cited the case of **Anderson Mgumba vs. Subira Hussein Nguzo** (Civil Appeal No. 31 of 2021).

With regards to the sixth ground, Mr. Pomboma argued that the DLHT removed Charles Simwawa on the judgment without any justifiable reason. The act is not tolerable and avail no legal stance in the ambit of law.

On the seventh ground, the counsel submitted that the third respondent testified he was given the Disputed Land by his late father, however the DLHT availed no weight to that assertion because it was not proved by documentary evidence. He added, not every acquisition of land is proved by

document example in this case the acquisition was by way of gift. He supported his argument by citing the case of **Joachim Ndelembi vs. Maulid M. Mshindo & 2 Others**, Civil Appeal No. 106 of 2020, CAT Dar es Salaam.

Addressing on the eighth ground, the counsel submitted that the second respondent and Charles Simwawa had no Locus Standi to dispose the Disputed Land being a family property. That, the DLHT erred by holding that the said respondents had good title over the Disputed Land while they were not the administrators of the estate of their late father and they did not bring any evidence to that aspect. Supporting his argument, he cited section 99 of Probate and Administration of Estates Act Cap 352 and the case of **Masanilo Kayandambo vs. Attorney General and Miswaki Village Council**, HC 2022 (Unreported) that cited and approved the case of **Joseph Shumbusho vs. Mary Grace Tigerwa & 2 Others**, Civil Appeal No. 183 of 2016.

With regards to the twelfth ground, the learned counsel submitted that the second respondent did not appear at the DLHT that's why he was never cross examined. He also explained that the third respondent and Charles Simwawa were both cross examined and hence the findings by the DLHT

that the appellant's counsel did not cross examine the second and third respondents has no merit.

Submitting on the thirteenth ground, Mr. Pomboma argued that the DLHT inserted in the judgment evidence never adduced during the hearing. He added that the incursion of extraneous evidence in the judgement renders the whole proceeding a nullity. In support of his contention, he cited the case of **Ismail Rashid vs. Mariam Msati** (Civil Appeal No. 75 of 2015) CAT at Dar es Salaam which reiterated what was stated in the case of **Shamsa Khalifa and 2 Others versus Suleiman Hamed**, Civil Appeal No. 82 of 2012. He also submitted that the issue of fraud on the third respondent's part was already resolved in preliminary objection and it should not have appeared in the judgment.

With regards to the fourteenth ground, the learned counsel submitted that visiting locus quo is at the discretion of the t to assist in reaching a proper and just decision. He stated that the DLHT ought to draw the sketch map of the Disputed Land but unfortunately it failed to do so, and that failure to do so is fatal. He cited the case of **Kimonidimitri Mantheakis versus Ally Azim Dewji and 7 others** (Civil Appeal No. 4 of 2018) CAT at Dar es Salaam [Unreported].

In relation to the fifteenth, Mr. Pomboma submitted that all witnesses some of which are neighbors on the Sisputed Land, testified to show that the respondent had title over the Disputed Land.

In replying to the submission, Mr. Mkumbe opposed the appeal and submitted that the fifteen grounds of appeal have no legal basis because the record is very clear that the appellant has no legal title to the Disputed Land. First, because the appellant needed approval of the Nkana Village Assembly (where the land is located) before he could claim ownership of the Disputed Land. He stated further PW2 stated that they never attended any village assembly with an agenda to sale the Disputed Land. In support of his argument, he cited section 8(5) of the Village Land Act Cap 114 R.E. 2019 (the **VLA**).

He further stated that the claim of ownership of the Disputed Land by the appellant is based on hearsay evidence, as he did not tell the DLHT that he was present when the third respondent was allegedly given the Disputed Land by his father.

He further submitted that, the appellant didn't know the boundaries of the land he claims to own, as he failed to name his alleged neighbors. He

referred to the case of **Daniel Dagala Kanuda vs. Masaka Ibeho and 4 Others** Land Appeal No. 26 of 2015.

On his reply to the submission, the third respondent supported the appeal. To a large extent his submission and arguments are more or less the same as that submitted by the appellant during submissions in chief making it unnecessary to reproduce in here.

However, with regards to the fifteenth ground of appeal, the third respondent insisted that he owned the Disputed Land from 1970 to 2014, as a gift from his father. He stated that he used it uninterrupted up until the appellant purchased the Disputed Land from him.

In rejoinder, Mr. Pomboma argued that Mr. Mkumbe brought new issues. For instance that the sale of the Disputed Land by Isaack Simlembe is void for want of approval by the village assembly. He argued that the appellant did not apply for customary right of occupancy rather he purchased, and the only requirement is to get approval from the village council not the assembly.

He further submitted that the sale agreement between the appellant and the third respondent is valid as it is executed by both the seller and the purchaser according to section 10 of The Law of Contract Act Cap 345 RE 2019. To

cement his argument, he cited the cases of **Kilango Semu Mjema versus Abdallah Mohamed Mnalidi** (Land Appeal No. 8 of 2023) HC Mtwara 14/12/2023 and the case of **Bakari Mhando Swaga versus Mzee Mohamed Bakari Shelukindo & 3 Others** Civil Appeal No. 389 of 2019.

Further, the learned counsel rejoined that the counsel for the first and second respondents cited section 8 (5) of the VLA to support his argument that the sale required approval of the Village Assembly to which in the instant case the provision is not applicable as the case does not involve neither first application for allocation of land nor application for Customary Right of Occupancy.

Rejoining on the submission of Mr. Mkumbe that the appellant didn't know the boundaries of the land, Mr. Pomboma submitted that this argument is pointless since the appellant managed to make proper identification of the Disputed Land as he mentioned his neighbors. Further, the DLHT visited Locus in quo and witnessed the boundaries of the Disputed Land.

He further stated that the case of **Daniel Dagala Kanuda vs. Masaka Ibeho and 4 Others** (**Supra**) cited by Mr. Mkumbe is distinguishable with the case at hand. He that even when the sale agreement and sketch map

were tendered, the counsel for the first and second respondents acknowledged them and did not object.

I have considered the record, the submission by both parties and the law. I will respond as follows.

On the first ground, the first respondent stated he bought the Disputed Land from the second respondent and Charles Simwawa. The Disputed Land being owned by Charles Simwawa. During trial, Charles Simwawa appeared but the second respondent did not. The appellant's counsel argued that, the non-attendance of the second respondent was intentional and if he had testified then he might have testified against the interests of the first respondent.

From the submission, the advocate is clearly assuming facts since there is no way of knowing what the second respondent would have said. The second respondent and Charles Simwawa sold the land together. Therefore, it is obvious that what the second respondent would have testified is already in the knowledge of Charles Simwawa. Although his presence was required, but his testimony would be a repetition of what Charles Simwawa had already said. I therefore find this ground baseless.

Turning to the sixth ground, Mr. Pomboma argued that the DLHT removed the name Charles Simwawa as the respondent with no particular reason. For the sake of proper record, it is important for the names of parties to remain the same in all court's documents and proceedings so as to avoid confusion. However, upon going through the records, it came to my attention that the omitted respondent actually attended court sessions – the only thing missing is his name on the record (title) of the case and its Judgment thereto. This, in my opinion is a minor error that can be solved by amendment since it does not go to the root of the case, and it hasn't prejudiced any party involved in the matter. The parties to a case cannot be punished by errors or mistakes done by the DLHT. Here is where the principle of overriding objectives come to play.

On ground twelve, Mr. Pomboma argued that the DLHT erred by deciding counsel for the appellant did not cross examine the second and third respondents during trial. After going through the submissions of the appellant's counsel, I realized that the counsel misdirected himself by thinking the third respondent is Isaack Simlembe, instead of Charles Simwawa. Even the quotation he made from the proceedings, reflects the cross examination he made to Isack Simlembe who in real sense was the

fourth respondent. With that being said, I find myself inclined to agree with the DLHT Chairperson, due to obvious reasons that the appellant's counsel in his submissions failed to prove he cross examined the third respondent (Charles Simwawa), save from the second respondents who never attended the DLHT as discussed above.

Discussing the fourteenth ground, that the DLHT Chairman grossly erred for his failure to draw the map when he visited the locus in quo, I will be guided with the case of ***Depson Balyagati versus Veronica Kibwana*** (Civil Appeal No. 21 of 2021) CAT at Dar es Salaam [TANZLII], to wit

> *…the procedure to be followed upon the trial court's visit to the locus in quo entails the following requirements which are certainly deducible from various court decisions, thus:*
> 1. *Ensuring, by the trial judge or magistrate that, all the parties, their witnesses, and advocates (if any) are present;*
> 2. *Allowing the parties and their witnesses to adduce evidence at the locus in quo;*
> 3. *Allowing cross-examination by either party, or his/her counsel;*
> 4. *Recording all the proceedings at the locus in quo, and*
> 5. *Recording any observation, view, opinion or conclusion of the court, including drawing a sketch plan; if necessary.*

As per the above case, especially on paragraph 5 the act of drawing a sketch map is in the discretion of the court, and will only do so when it deems necessary. A court cannot be coerced to draw a sketch map if it does not

see the need to. For that reason, this ground becomes baseless, with no urge to discuss it any further.

Arguing on the fourth ground that the DLHT Chairman erred in law and in facts to rule out that the appellant failed to prove the case on the required standard. I will reproduce section 110(1), (2) and 111 of the Evidence Act, that states to wit;

> *110.- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

The position was also discussed in the case of **Attorney General & Others vs. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002 CAT (Unreported).

Undoubtedly, the most important fact to prove is ownership and in order to prove a good title one must also show that the seller was in right to dispose

of the property. Since the appellant is the one that alleges, he was expected to convince the court concerning the truthfulness of his claims.

Mr. Pomboma during his submission in chief argued that the appellant managed to prove that the third respondent acquired the Disputed Land from his father as a gift. To prove the same the third respondent, PW2, PW3 and PW4 testified to that effect.

Mr. Mkumbe on the other hand argued that the appellant's claims over the Disputed Land are based on hearsay since he and majority of his witnesses were not present when the third respondent was given the Disputed Land as a gift by his father.

Revisiting the records, all sellers from both parties had been given the Disputed Land and/or inherited it from their families. As such, documentary evidence to that effect would be impossible to find. However, the fact that most witnesses gave their testimony based on hearsay brings a conundrum to the matter at hand. The sale agreement cannot be useful because it's undisputed that both the appellant and the first respondent bought the Disputed Land at some point from different people.

Initially when the matter came for appeal, the file was remitted to the DLHT for additional evidence especially from the village council who witnessed the sale of land. Additional witnesses, some of which were leaders when the transactions was made (for instance Mkundanji Nikson Sambaya) were of the view that the problem resulted from the boundaries of the Disputed Land. That, both the appellant and the first respondent bought the Disputed Land and were demarcated by a gorge in between. Apparently, one of them crossed over the gorge into the other's land.

I do believe, however important it was for the appellant to prove ownership, the respondents were also required to do the same. Contrary to criminal cases where the standard of proof is beyond reasonable doubt, in civil cases the evidence is measured through balance of probabilities and the court will decide in favor of a party whose evidence is more convincing than the other, as explained in the case of ***Hemed Said vs. Mohamed Mbilu*** (1984) TLR 113.

The testimonies by the first and second respondents were corroborated by the members of the Village Council who were involved in both sales. They clearly testified that the first respondent did not trespass into the appellant's

land. Based on the records, and when the DLHT visited Locus in quo, the appellant showed his land and neighbors but failed to show his boundaries.

In the case of **Gerald Kazimoto Lupembe vs. Michael Kihundo** Misc. Land Case Appeal No. 12/2012 HC Iringa, that court stated

> *"It is well known that every piece of land must contain its boundaries and before establishing the boundaries one cannot claim trespass"*

With reference to what has been said above, I agree with the findings of the DLHT that the appellant failed to prove his boundaries and as such cannot claim that the first respondent trespassed. It is evident that in reaching its decision the DLHT Chairman considered the law and available evidence. It has been a practice in most adjudicating bodies, whenever there are conflicting or contradicting ideas then the proceedings will be read as a whole. Mainly because the proceedings do not contain only contradicting facts, there are some that can help in bringing light to the matter.

Having found that the fourth ground has no merit, also considering it emphasized on the duty of the appellant to prove his allegations on the required standard. I find no need to discuss the remaining grounds, since they all draw back to the issue pertaining evidence most of which have

already been discussed herein above. I therefore dismiss the appeal with costs.

Dated at Mbeya on this 31 day of May 2024.

A. A. SINDA

JUDGE