IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL NO. 28457 OF 2023

(Arising from Land Application No. 44 of the 2022 before the District Land and Housing Tribunal for Dodoma at Dodoma)

BETWEEN

MEDAA SIMON..... APPELLANT

VERSUS

KEYAI NGUSHANGAA..... RESPONDENT

JUDGMENT

Date of last Order: 04/03/2024

Date of Judgment: 18/03/2024

LONGOPA, J:

This appeal arose from the decision of the District Land and Housing Tribunal for Dodoma which entered judgment and decree dated 24th November 2023 in favour of the respondent. The respondent instituted a Land Application No 44 of 2022 dated 16th February 2023 against the appellant allegedly on claim of trespass to land in Mwandaje Village, Azimio Hamlet within Chamwino District in Dodoma. The Application on Paragraph 6 (a) (i) stated that the respondent purchased 14 acres of the land through oral agreement from the appellant in 2020. It was further alleged that the appellant in December 2020 trespassed to that land without colour of right.

On the other hand, the appellant in his Written Statement of Defence dated 3rd March 2023 denied the claim. He stated that the legal owner of the disputed land is his

father one Mr. Matonya Chonya, and it has never been sold to the respondent. He asserted further that the appellant is using the land since June 2010 after being given by his father Matonya Chonya to take care of it and for his agricultural activities. At the end of trial, the District Land and Housing Tribunal declared that the respondent is the lawful owner of the said piece of land on account that evidence of the applicant established on balance of probabilities that he was the rightful owner.

Being dissatisfied by both judgment and decree, the appellant took arms up to institute a Land Appeal before the High Court of Tanzania at Dodoma Sub Registry challenging the whole of the decision of the District Land and Housing Tribunal. The grounds of appeal focused on four main aspects, namely:

> *(a) That the trial Tribunal erred in law and in facts in failing to properly examine and evaluate the evidence on record thereby arriving at the wrong conclusion.*
> *(b) That, the decision of the Tribunal lacks evidence and reasons to support the findings.*
> *(c) That, the trial Tribunal erred in law and in fact for failure to focus on and note gross controversy between facts in the application itself visa vis the prosecution evidence.*
> *(d) That the tribunal erred in law and in fact by disregarding in total defence evidence.*

On 4th March 2024, the parties appeared before me for viva voce hearing of the appeal. The appellant enjoyed the services of Mr. John Chigongo, learned advocate while the respondent enjoyed the services of Mr. Ayub Suday, learned advocate.

Mr. John Chigongo took the floor to argue in support of the appeal. He commenced advancing his argument by addressing the third ground of the appeal. He argued that there was failure of the trial Tribunal to focus and note gross controversy

between facts in the application as against the prosecution's evidence. As the appeal arose from the Land Application, the nature of the claim is provided for on Paragraph 6(a)(ii) of the application. According to him, the claim filed before the Tribunal indicates that that the disputed land was purchased in November 2020 a through an oral agreement. Also, Paragraph 6(a) (iv) of the claim covers the fact that appellant invaded/trespassed disputed land on January 2023. He argued that there is neither place nor price of purchasing agreement of the said piece of land.

It was argued that during hearing of the matter, PW 1 and PW 2 testified that land was bought in 2000 without specifying the date and month of the said transaction. PW 1 stated that appellant invaded the land on December 2022. There is contradiction on statement of the claim and evidence that was tendered. There is evidence tendered to establish that disputed land was purchased in 2020 and there was no evidence that the appellant trespassed to that land.

As a result, appellant argued that the claims that were filed in the Tribunal therefore have never been proved. The evidence was different from what was filed in the District Land and Housing Tribunal. Section 110(1) of the Evidence Act and Section 112 of the Evidence Act, Cap 6 R.E. 2019 the respondent did not prove the claims contained in the pleadings as the evidence was not tallying with claims in the pleadings.

It was argued further that this is contrary to Order XVIII Rule 2(1) of the Civil Procedure Code, Cap 33 R.E. 2019 which requires that the Plaintiff should prove the issues on pleadings. The trial Chairman did not focus on the pleadings as there was a departure. Thus, the judgment is fatally defective for not addressing the claims in the pleadings rather deciding on totally new issues. At this juncture, the appellant prayed that this appeal be granted on that ground.

On the fourth ground relating to total disregard of defense evidence by the Tribunal, it was submitted that in the Written Statement of Defence by the appellant in

Paragraph 4 disputed categorically that land in question was never sold to anyone. The appellant stated that he was given the right to use the land temporarily from his father who is the owner one Mr. Matonya Chonya.

It was reiterated that evidence of DW 1, DW 2 and DW 3 had common theme in their evidence that the land belonged to Matonya Chonya, a father of the appellant. It goes further to state that the same was only given to the appellant to use it and he has never sold it to anyone. The evidence is reflected on page 2-5 of the judgment. The trial Chairman disregarded this evidence and decided in favour of the respondent wrongly.

On the first and second grounds of appeal argued jointly on the failure of the Tribunal to properly analyse and evaluate evidence on record thus arriving at improper decision. The judgment relied on oral agreement to sell the land. The testimony contained a lot of controversies/weaknesses including: (a) The land was sold in 2000 without any specific dates; (b) there is no mention of witnesses of the Vendor/Seller to the oral Sale Agreement; (c) there are no details of the use of the land in 20 years since the date of purchase that is allegedly to have bought the same from the appellant prior to the alleged trespass; and (d) there is no mention of the price of the place where the oral agreement was concluded.

It was argued that though evidence of PW 3 is said to be a direct witness, that evidence did not disclose the dates, place and time of oral agreement. This is not within the ambits of section 62(1)(a) of the Evidence Act which was relied by the Tribunal.

PW 4 stated that he leased three acres from the respondent. The details as to when and for what purposes are not disclosed in the testimony. All these shortcomings were supposed to be addressed and analysed by the trial chairman of the Tribunal. This would have assisted the Tribunal to reach into a fair decision.

The decision in **Stanslaus Rugaba Kasusura and the Attorney General versus Phares Kabuye** [1982] TLR 338 was cited to address an aspect that require a judgment must evaluate and examine the evidence of every witness. Otherwise, the decision becomes fatally defective.

On these grounds, the appellant prayed that this Court be pleased to judgment be quashed and set aside the decree entered by the District Land and Housing Tribunal for Dodoma. He invited this Court to re-evaluate the evidence. As such, the case of **Deemay Daati and two Others vs Republic** [2005] TLR 132 was cited to elucidate that the first appellate have powers to re-evaluate of evidence of the trial Court. The appellant prayed that this appeal be allowed with costs.

On the other hand, the respondent did not stay silent. Mr. Ayub Suday learned counsel for respondent came up full armed. It was argued on the third ground of appeal that there existed no differences between the claims in the application with evidence. It was refuted vehemently that in the application, there is nowhere that it is stated that the land was purchased in 2020. It was argued that the respondent was claiming that the land was purchased from the appellant. With respect to the question regarding place of the agreement or purchase price, it was argument of the respondent that appellant did not cross examine on those facts thus the appellant admitted the same as correct situation.

The respondent argued that it is lucid from the evidence that the dispute arose in December 2022 as per PW 1 evidence on page 2 of the judgment and page 4 of the proceedings. This tallied with the testimonies of PW 2 who testified that respondent purchased for TZS 700,000/= from the appellant. PW 3 who testified that he was present on the date of oral agreement to sale/ purchase the land. All witnesses PW 1, PW 2 and PW 3 described size of the land and the value of purchase price.

It was reiterated that the appellant and his witnesses did not challenge on the place, time and dates of the oral agreement. It is submitted further that it was the respondent's view that there is no contradiction between the claim and available evidence. The evidence was sufficient under Section 110(1) of the Evidence Act, Cap 6 R.E. 2019 and the Tribunal was correct to award the Respondent.

On the fourth ground regarding non accommodation of the defence evidence, it was argued that the defence evidence was disregarded for being weak and contradictory evidence between the appellant and his witnesses. While the WSD stated that the land belonged to the appellant but evidence on page 4 of the judgment indicated that he was given by his father in 2018. DW 2 stated that the appellant was given the land in 2016, while DW 3 stated to have not been given. The land belonged to the appellant's father.

In the circumstances, it was argued that there are contradictions on the following aspects: (a) timing of grant the disputed land between 2016 or 2018; (b) DW 1 evidence is not supported by DW 3 who is a brother of the appellant and stated that it is appellant's father who remained the owner of the disputed plot of land in question.

Further, it is stated that the appellant was required to call the owner as a witness as Mr. Matonya Chonya was still there. It was the duty of the parties to bring witnesses not the Tribunal. The appellant's father did not appear before the Tribunal to prove that he was the owner. It was reiterated that pages 6-7 of the judgment analysed the appellant's evidence and found it to be contradictory thus awarding the respondent both judgment and decree in his favour.

It was argued that to cement the findings in favour of the respondent, it is important to refer to a decision in **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 where the Court stated that the person with heavier evidence must win. That is in line with section 3(2) (b) of the Evidence Act, cap 6 R.E. 2022 on proof of the civil cases to

be proof on balance of probabilities of the evidence of the parties. On that regard, The Tribunal was correct to award the Respondent and his evidence tallied with those of the witnesses while the appellant and his witnesses' evidence was contradictory. Thus, this ground of appeal lacks merits and should be disregarded.

On first and second grounds jointly, it was argued that respondent objects that ground as the Tribunal summarised, analysed and evaluated evidence from both parties before finding in favour of the respondent. The weaknesses stated by the appellants, we submit that there are solid reasons stated in the judgment as to why Tribunal's Chairman had to rely on the evidence of the respondent including PW 3 who was an eyewitness to the transaction. The evidence complied with section 62(2) (a) of the Evidence Act.

It was alluded that regarding timing, place and contractual value are all afterthought as they were not disputed by the appellant. The respondent argued that there were no issues regarding witnesses of the Vendor/Seller to the Sale Agreement. All these are afterthought issues, and they should be disregarded. Page 3 of the judgment reveals that respondent was using the land for different time. The appellant agreed with evidence of the respondent that PW 4 had leased three acres out of 14 acres from the respondent.

It was further argument of the respondent that there are attempts of discrediting evidence of PW 3 by the appellant. It was insisted that the evidence is watertight without any weaknesses whatsoever.

It was underscored that regarding Kasusura's case, the Tribunal evaluated both evidence of the appellant and respondent respectively. After the analysis, the reasons are stated for the determination of the case in favour of the respondent. Pages 5 to 10 of the judgment reveals reasons for determination based on strong evidence of the respondent's evidence and contradictions in the appellant's evidence.

It was the respondent's prayer that this Court find the grounds of appeal and submission lack merits and that the respondent was entitled to the judgment of the tribunal. The appeal be dismissed for lack of merits with costs.

Briefly, in rejoinder the appellant argued that non- disclosure of some crucial facts regarding the oral agreement like the place where the agreement was concluded, dates and month of the transaction together with witnesses of the Vendor/Seller in the transaction watered down the evidence of the respondent.

It was argued that regarding cross examination, it was the duty of the person who alleges to prove to have purchased the land. It was the duty of respondent to substantiate the claim of purchase of land. Failure to cross-examine the respondent is not fatal.

It was reiterated that there were no weaknesses of the appellant's evidence. DW 1 and DW 2 stated that appellant was given the land for temporary use i.e. the right to use only. DW 3 stated categorically that though the appellant was using the land, yet that land belongs to their father one Matonya Chonya.

It was reiterated that a minor difference on the timing the appellant was given the land to use i.e. 2016 or 2018 does not go to the root of the matter as the main issue is the ownership of land. It is therefore, not fatal to the appellant's case.

It was a further argument that decision **in Hemed Said versus Mohamed Mbilu** case is distinguishable for reasons that the evidence of the respondent was not strong to be entitled to the decision and award of the judgment and decree.

Additionally, it was argued that here is no use of land stated except the list of people who allegedly were present during the oral agreement to purchase the disputed piece of land. There were details as to the use of land throughout the period since

2000 when it is allegedly to have been purchased. It is re-emphasized that for PW 4 evidence that he leased land from the respondent, there are no details as to when did he lease the land, for what purposes and payment made are not disclosed.

Having heard both parties at lengthy in their detailed oral submissions, I have dispassionately perused the record of the District Land and Housing Tribunal for Dodoma considering the set grounds of appeal to determine validity or otherwise of this appeal.

I shall address the grounds of appeal as argued by the parties. The first aspect is on failure by trial Chairman to detect departure from pleadings. The appellant seems to argue that there was departure from pleadings. The source of such departure emanates from timing of the alleged oral sale agreement of the land in dispute. In case there was departure, then the evidence that does not support the claim is bound to be discarded.

It is true that under the law of Tanzania departure from the pleadings is not allowed unless leave is granted. To appreciate whether there is departure or otherwise, it is important to underscore the analysis of departure from pleadings. Departure from pleading would mean that the party states facts in the pleadings which are not at all supported by the evidence adduced.

There is a plethora of authorities that departure from pleadings is not allowed unless there was explicit amendment of the pleadings. In the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017), Court of Appeal of Tanzania, at pp. 9-10 stated that:

> *It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the*

other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight.

The parties are therefore expected to lead evidence that establish the cause of action. In case there is unauthorized departure, the evidence of the departing party should not be given weight. In other words, such evidence should have no effect on the proof of the case before the Court.

Also, in the case of **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) (TANZLII), at page 11 the Court of Appeal observed that:

We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored - see James Funke Ngwagilo v. Attorney General [2004] TLR 161. See also Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others, Civil Appeal No. 56 of 2012; and Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others, Civil Appeal No. 38 of 2012 (both unreported).

According to this decision, evidence that does not support the claim should be discarded. It means that if the evidence is tendered to support pleaded facts such evidence cannot be regarded to be in variance with the pleadings.

My perusal of the Land Application on Paragraph 6 which states the claim reveals that the oral sale agreement was entered into between the respondent and appellant in year 2020. It is expected that all evidence tendered before trial Tribunal would focus on establishing the acquisition of land at that period on one hand and lucidly enumerate all

necessary details pertaining to that purchase on the other hand. To underscore the point, the application on cause of action/Statement of facts constituting the claim is quoted in verbatim for easy of reference:

> ***6 (a) Cause of Action/Brief Statement of facts Constituting the Claim***
>
> *(i) That, the Applicant is a legal owner of the suit land measures 14 acres located at Mwendaje Village, Azimio hamlet, Haneti ward Chamwino District within City Council with neighbours above.*
>
> *(ii)* ***That, the Applicant own the same land since November 2020 after bought from the Respondent herein via the oral agreement****.*
>
> *(iii) That, since obtaining the suit land, the Applicant has been using it for agricultural activities without any interruption.*
>
> *(iv) That, surprisingly, on January 2023 the Respondent invade to the suit land and start to prepare it for agricultural activity whereby the Applicant made efforts to avoid him amicably but the Respondent neglected the situation which cause a great disturbance on the applicant.*
>
> *(v) That, the Applicant reported the matter before Haneti ward tribunal whereby the tribunal tried to make mediation in vain as a results of this Application.*
>
> *(vi) That, since the course (sic[cause]) of action arose at Mwendaje village, Azimio hamlet Haneti Ward Chamwino District with City Council and the estimated value of the suit property is Tanzanian Shillings Five million (Tshs. 5,000,000/=) only hence this Honourable Tribunal is vested with jurisdiction to entertain this matter.*
>
> ***6 (b) List of Relevant Documents Annexed, if any***

(i) A copy of Certificate of Mediation from Haneti Ward tribunal dated on 07/02/2023.

7. Relief(s) claimed:

(i) An order that the Applicant herein is the legal owner of the suit land measured 14 acres located at Mwendaje village, Azimio hamlet, Haneti ward Chamwino District within City Council.

(ii) An order for the Applicant to be awarded Five million (Tshs 5,000,000/=) as general damages for inconveniences/disturbance caused by the Respondent.

(iii) An order of permanent injunction to the Respondent, their agents or any other person acting under their instruction from interfering the land in dispute.

(iv) Cost of this suit.

(v) Any other relief (s) that this Honourable Tribunal may deem fit and just to grant.

VERIFICATION

*I, **KEYAI NGUSHANGAA**, the Applicant herein do hereby **VERIFY** that what I have stated in Paragraph 1,2,3,4,5,6 and 7 hereinabove are true to the best of my knowledge and belief.*

Dated at Dodoma this 16th Day of February 2023.

(Thumb print)

APPLICANT

I have noted that this application on record is the one that was filed and admitted by the District Land and Housing Tribunal for Dodoma on 16th February 2023. It contains the Tribunal's stamp of that date (16th February 2023) and it is endorsed that it is admitted. Thus, the basis of the respondent's claim on that piece of land is

based on the contents of this claim. The claim is based on the statement that respondent is lawful owner of the suit property through oral sale agreement between the parties herein in year 2020. That is what the reliefs intended to achieve and the same has been verified by the respondent to be true to the best of his own knowledge.

The trial Tribunal summary of evidence on page 2 -3 reveals from PW 1 and PW 2 that the land in question was purchased through oral agreement from the appellant in year 2000. The same averments appear on page 4,10, and 12 of the proceedings. The evidence of PW 1, PW 2 and PW 3 have one common aspect, that the oral sale agreement was concluded in year 2000. Is this evidence tallying with the claim as contained in Paragraph 6 (a) (i) and (ii) of the Land Application dated 16th February 2023? The answer is in the negative. The claim is that disputed land was acquired in year 2020 while the evidence adduced by PW 1, PW 2 and PW 3 is about acquisition in year 2000 which is a span of twenty years back. The two periodization are not the same at all. They are quite distinct. I shall revert at a later stage on another limb of this acquisition of land in year 2000 from the appellant which might have impacts on existence of alleged oral sale agreement transaction.

In the case of **Agatha Mshote vs Edson Emmanuel & Others** (Civil Appeal 121 of 2019) [2021] TZCA 323 (20 July 2021), Court of Appeal at pages 21-22, stated that:

> *It is settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This entails a party parading the evidence to prove or support what he has pleaded bearing in mind, as earlier stated that, he who alleges has a burden of proof as stipulated in section 110 of the Evidence Act [CAP 6 RE.2002]. The question to be addressed is if the appellant did prove to be the lawful owner of the disputed land at the required standard.*

On record, there is nothing indicating that the respondent was permitted by the trial Tribunal to amend the pleadings, namely the Land Application No 44 of 2022 to state that disputed land was acquired in year 2000. Conspicuous absence of such order is conclusive evidence that there was no amendment to such pleadings.

All the evidence of the respondent on record, especially PW 1, PW 2 and PW 3 have not established the claim of acquisition of land through oral sale agreement concluded in 2020 as per claim under Paragraph 6 of the Land Application. It is a clear departure from the pleadings.

I concur with the submission of the Counsel for the appellant that evidence of the respondent before the trial Tribunal was tendered to prove new issues that were not before the trial Tribunal. I am of the settled view that evidence adduced before the trial Tribunal did not support the claim contained in the pleadings thus it has evidently departed from such pleadings. Such evidence is worthless to say the least and it cannot be said to have established the claim of the respondent before the Tribunal. At this juncture, I find the third ground of appeal has merits and I uphold it.

It is certain that this ground of departure from the pleadings leading to adducing evidence that does not support the claim is singularly sufficient to dispose this appeal. However, for avoidance of doubts and to set the record straight I shall endeavour to analyse the rest of the grounds of appeal.

The second aspect of contention between the parties was based on total disregard of the defence evidence by the Tribunal. The basis of the trial Tribunal's Chairman disregard of the evidence is based on three aspects. First, that the defence evidence is contradictory as to when was the appellant given land to use by his father either in 2016 or 2018 as per DW 1 and DW 2 testimonies. Second, that contradiction that land belongs to appellant as per DW 1 and DW 2 while DW 3 stated that it belonged to appellant's father. Third, failure to call appellant's father as a witness in this

case while is alive thus drew an adverse inference against the appellant. These reasons are articulated in pages 6 and 7 of the judgment.

Without mincing the words, trial Tribunal's Chairman grossly erred to so held. The WSD is clear that the appellant was given the land by his father to take care and use it for agricultural activities as per Paragraphs 4 and 5 of the Written Statement of Defence. That is what evidence of DW 1, DW 2 and DW 3 reveals. DW 3 cemented categorically that the land belongs to the appellant's father who acquired it by clearing the same. The appellant's father gave it the appellant to use it temporarily for agricultural activities. There is nothing on record that evidence of the defence states that land belong to the appellant.

Eventhough, the defence evidence would have been contradictory as alleged by the Chairman of the Tribunal the yardstick would be whether the evidence of the respondent proved that he acquired the land through oral sale agreement to the required standard. In my view, trial Chairman hastened to so find without any tangible evidence on record. It was the respondent who alleged to have purchased the land from the appellant. He was required to prove the same and he failed to do so. It was inappropriate for the trial Tribunal's chairman to shift the burden to the defence.

I concur with submission by the appellant that evidence of DW 1, DW 2 and DW 3 had one common theme that land in question belonged to appellant's father and it has never been sold to anyone. Such evidence tallies with the WSD. I am not at one with the respondent's submission to capitalize on the weakness of the defence case. The most important aspect was the proof of the case by respondent to the satisfaction of the Court within the applicable standard. I shall uphold the fourth ground of appeal as it holds water as the total disregard of the defence evidence was an err on part of the Tribunal.

The last point of determination is 1st and 2nd grounds of appeal jointly. This is on failure of the Tribunal to properly analyse and evaluate evidence on record thus arriving at improper decision. The appellant argued that: First, the land was sold in 2000 without any specific dates. Second, there is no mention of witnesses of the Vendor/Seller to the oral Sale Agreement. Third, there are no details of the use of the land in 20 years since the date of purchase that is allegedly to have bought the same from the appellant prior to the alleged trespass. Fourth, there is no mention of the price of the place where the oral agreement was concluded.

The respondent vehemently resisted the contention by the appellant. The respondent asserted that: First, presence of solid reasons including the eyewitness on party of respondent i.e. PW 3. Second, issues of timing, place of concluding the agreement, contractual value of the oral sale agreement as well as failure to name witnesses of the Vendor/Seller are all afterthoughts thus should be disregarded as they were not disputed by the appellant. Third, contradictory evidence of the defence.

To address this joint ground of appeal, it is pertinent to state at this juncture that the whole claim is based on oral sale agreement allegedly entered between respondent as Purchaser and appellant as Vendor/Seller. Indeed, proof of existence of this oral sale agreement was vital to prove the case for respondent.

The respondent was required as a matter of law to prove the following aspects: First, there exists oral agreements between the parties. Second, what were the terms and conditions of the agreement. Third, have any of the parties performed their contractual obligations to warrant them be entitled to the rights under the agreement. Fourth, was there any breach of such agreement by either of the parties.

I am certain these aspects were crucial to be proved before arriving at a conclusion that appellant had trespassed to respondent's land. Without such proof, the respondent would lack locus standi to claim anything on that land. The main question at

this stage is whether there was proof of these aspects in the alleged oral sale agreement.

The evidence of PW 1, PW 2, PW 3 and PW 4 in common reveal the following aspects. First, respondent purchased the land from the appellant through oral sale agreement. Second, the purchase of that land was in year 2000. Third, the land size is 14 acres, located at Mwendaje village Azimio hamlet within Haneti Ward in Chamwino District in Dodoma region. Fourth, the purchase price was Tshs. 700,000/=. Fifth, the oral sale agreement was witnessed by the PW 3 among others. Sixth, the respondent had leased once three acres to PW 4. It is from these pieces of evidence that trial Tribunal Chairman found on page 8 of the judgment that the respondent had acquired the suit land through purchasing it orally. It was not doubtful to the trial Chairman that there was a contract as law recognises oral sale agreements.

I can partly agree with the reasoning of the Tribunal Chairman that it is true that law recognises oral agreements. That is correct position of the law. However, I am of the settled view that trial Chairman was carried away so easily for failure to ascertain other issues necessary to conclude whether an oral sale agreement existed. These are those related to terms and conditions of the oral sale agreement, certainty on timing, place of execution and performance of terms of the agreement. Without proof of these aspects, certainly the Tribunal was not right to find that there existed oral sale agreement in the circumstances of the matter.

I have carefully perused the evidence of PW 1, PW 2, PW 3 and PW 4 to ascertain existence of these crucial aspects. I have found that there is none. Apart from description of the land in question, year of purchase and contractual price, the respondent's testimony is silent on all other crucial aspects. First, PW 1 who is the purchaser failed even to state the purchase price. It is uncommon for the one who allegedly purchased the disputed land to fail to state the purchase price. Second, neither PW 1, PW 2 nor PW 3 stated when exactly in terms of date and month was the

oral sale agreement entered into. Third, neither of the appellant witnesses testified as to the place where the oral sale agreement was concluded. Fourth, there is no evidence regarding when and how was the purchase price of the allegedly oral sale agreement paid if at all the same was done.

I am aware of the guidance by the Court of Appeal on matters touching to sale agreement of land. In the case **of Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019), at pages 11-12, the Court of Appeal observed that:

> *Our examination of the plaint shows plainly that the appellant's cause of action against the respondent was founded on breach of contract for sale of a plot of land contained in Exhibit P1. Arising out of the alleged breach, the appellant sought reliefs largely, specific performance with ancillary reliefs, injunction and damages.* ***That means, the determination of the suit in the appellant's favour was conditional upon her proving; one, existence of the contract/agreement for sale of the plot of land, two, fulfillment of her part of the bargain under the contract and, three, breach of the terms of the contractual terms by the respondent entitling the appellant to the reliefs sought.***

In my view, the instant appeal lacks proof of all the three aspects. There is no proof with clarity that oral sale agreement was entered between the parties as there is uncertainty as to the place of conclusion of the oral agreement, and timing in terms of date and month when the same was concluded as well as lack of evidence on formalities including names of the appellant's witnesses.

Absence of material evidence on terms and conditions of the oral sale agreement risks more on the existence of the alleged agreement. There is conspicuous lack of

evidence regarding to when, and how the alleged purchase price was effected to entitle the respondent to claim any right whatsoever over that piece of land. Simply, absence of this proof means that the respondent never acquired any rights whatsoever on that land as there is no proof through word of mouth or otherwise that he performed part of his obligations in the allegedly oral sale agreement.

In short, all those weaknesses have the effect that of discrediting existence of an oral sale agreement of the disputed land. Failure to establish them by the respondent who was duty bound as he alleged its existence makes the evidence of the respondent so weak to establish anything regarding this claim. All these aspects tend to diminish the evidential value of the respondent's witness testimonies.

Before I conclude this joint ground of appeal on failure to analyse and evaluate evidence, I am compelled that I should state about two issues. First, credibility of the respondent's witnesses as revealed in the record and secondly, the question to oral sale agreement being concluded in year 2000 as per evidence considering age of the appellant. I think the available evidence is sufficient to allow me to analyse shortly on these two aspects in my view as first appellant Court with full legal mandate to re–evaluate the evidence of the trial Tribunal.

Evidence of PW 3 as an eyewitness of the respondent was much emphasized by the counsel for respondent while heavily criticized by the counsel for the appellant. I must demonstrate shortly on this evidence. It is short and straightforward thus I shall quoted in verbatim on pages 11-12 of the proceedings:

PW 3

Name: Karanga Lusghanga

Religion: Christian

Tribe: Masai

Occupation: Peasant

Age: 60 years

I hereby swear and state as follows:-

The suit land belongs to the applicant he purchased the same from the respondent in the year 2000. It is 14 acres he paid Tshs. 700,000/=. It is located at Mwendaje village. It was orally made. The applicant called me to witness that the respondent sales the land to me. The respondent was with his wife.

SGD
J.F. Kanyerinyeri
Chairman
11.08.2023

Cross Examination

You sold the land.

SGD
J.F. Kanyerinyeri
Chairman
11.08.2023

That is all regarding this witness so called eyewitness and the Chairman of the Tribunal relies heavily on page 5-6 of the Judgment that his evidence is not contradicted by the appellant's side. Essentially, the evidence of PW 3 is wanting. The witness never testified as when exactly in terms of date and month did he witness the conclusion of oral sale agreement, and where was the same entered into. He failed to demonstrate how was the purchase price effected if any, when was the same effected or the purchase price has never been paid. PW 3 failed to describe who were the witnesses on the part of the Seller/ Vendor or at least to name the said wife of the appellant in year 2000. In fact, he asserts to have been called to witness the sale of the land to him not to the respondent.

This evidence of the PW 3 deserved to be disbelieved thus discredited by the trial Tribunal for being incomplete and lacking any accuracy to establish the issue in contention. In my view, PW 3 failed miserably to assist in resolving the ownership of the

land with certainty that respondent purchased the same. In simple terms, implicitly by his failure to disclose PW 3 was never present at the place where the oral sale agreement was entered, he never witnessed any money being paid to the appellant, and he never saw the appellant hand over the plot of land allegedly to have been purchased. Further, he does not know any boundaries of the allegedly purchased land. Indeed, I am constrained not to rule otherwise than that PW 3 was not credible and reliable witness.

Similarly, evidence of PW 2 and PW 4 were shoddy evidence. PW 2 though mentioned by PW 1 to have been a witness to the oral sale agreement he failed to disclose all those pertinent issues that are lacking. It was only on cross examination and examination by the Tribunal where he disclosed the source of evidence he had adduced. It is my considered opinion that failure of PW 2 to disclose the source of information in examination in chief reveals mischievous nature of the respondent's witnesses in this case. I would have discredited this evidence.

The evidence of PW 4 also falls in the ditch. PW 4 testified to have leased three acres of land from the respondent. The timing in terms of months and years when such land was leased from the respondent is not disclosed. Further, rental payments for the lease of such part of the disputed land is not disclosed nor type of the crops he was cultivating is not revealed. He stated that appellant and his wife assisted him to cultivate the leased land, but he never disclosed what were the terms of engagement. Indeed, failure to disclose all these aspects leads to one conclusion that there was no lease of that land from the respondent as alleged. I have no flicker of doubt that trial Chairman failed miserably to observe the demeanour of the witnesses before him to be able to ascertain truthfulness of the evidence adduced.

More interesting about timing of the oral sale agreement in 2000, is the question of age as per record of the Tribunal. If the evidence of PW 1, PW 2 and PW 3 that the land was purchased in 2000 is to be believed, the appellant who in 2023 according to

evidence on record was aged 36 years in 2000 he was aged 13 years old. Was he competent to contract as per laws of Tanzania? The answer is in the negative. This is because the Law of Contract Act is categorically clear on the ingredients of a valid contract. Section 10 of the Law of Contract Act provides for the elements of a valid contract. It provides that:

> *10. All agreements are contracts if they are made by the free consent of **parties competent to contract**, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:*

Competency in contract is viewed on two main aspects, namely age of the party and soundness of mind of the party. The age permitted to enter a valid contract is the age of majority. That age commences on the 18th birthday anniversary of the party. Anyone who enters into an agreement while he is below the 18 years is regarded to be incompetent to enter such contract. The effect of any agreement entered by such person is a nullity thus void as per provisions of section 11(1) and (2) of the Law of Contract Act, Cap 345 R.E 2019.

Mindful of the available evidence, the appellant was aged 13 years old in year 2000 when the alleged oral agreement is said to have been entered. Strangely, PW 3 stated in page 12 that the appellant was with his wife when he entered into oral sale agreement of the disputed land.

I am of the settled view that the whole evidence of the respondent appears to be inconsistent with the evidence of DW 1. It is more improbable than not that such oral sale agreement never existed as the evidence points that disputed land was purchased from the appellant while he was 13 years old. This is the limb that completely water down the evidence of the respondent in this case.

It is my considered opinion that in the circumstances of this appeal, the conspicuous failure to establish these elements have only one viable conclusion there was no oral sale agreement with certain terms and conditions that would have made respondent entitled to any claim against the appellant. The evidence of the respondent was so disjointed, shaky and unpalatable to be relied upon by any judicial body to find in favour of the respondent. I shall at this point uphold this joint ground of appeal on failure to analyse and evaluate evidence by trial Tribunal for being meritorious.

As a result, the analysis revealed evidently that the respondent's evidence has not only failed to support the claim contained in the pleadings but also was too weak to warrant entering judgment and decree ensued in favour of the respondent. The trial Tribunal grossly erred to find in favour of the respondent in the circumstances of the case before it.

I am fortified by the decision in the above cited case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019), at pages 14-15, the Court of Appeal observed that:

> *It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. If any authority will be required on this, a statement by Lord Denning in* ***Miller v. Minister of Pensions*** *[1937] 2 All. ER 372 will be sufficient to emphasize the point and we think we can do no better than reproducing the relevant part as under: "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate*

conclusion one way or the other, then the man must be given the benefit of the doubt This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not... "

In the circumstances of this appeal, it is more probable than not that there existed no oral sale agreement between the respondent and appellant. Therefore, the respondent failed to prove the case against the appellant to the required standard of balance of probabilities.

In the upshot, this appeal has merits, and it is hereby upheld. The judgment and decree of the District Land and Housing Tribunal for Dodoma in Land Application No. 44 of 2022 is hereby quashed and decree is set aside. The respondent is categorically declared that he is not the rightful owner of the disputed plot of land. He has no rights whatsoever over that piece of land located at Mwendaje village Azimio hamlet in Haneti ward within Chamwino District in Dodoma. The appeal is allowed with costs.

It is so ordered.

DATED at **DODOMA** this 18th day of March 2024

THE HIGH COURT TANZANIA

E.E. LONGOPA
JUDGE
18/03/2024.