

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA SUB-REGISTRY)
AT MTWARA

LAND APPEAL NO 27 OF 2023

**(Originating from the District Land and Housing Tribunal for
Masasi at Masasi in Land Application No.3 of 2022)**

**YUSUFU HEMED CHIHEPO (Administrator of the
Estate of the late HEMED CHIHEPO)APPELLANT**

VERSUS

ABUBAKARI ADINANI HAMISI1ST RESPONDENT

ATHUMANI UTUKURU 2ND RESPONDENT

JUDGMENT

14/12/2023 & 27/02/2024

LALTAIKA, J.

The appellant herein **YUSUFU HEMED CHIHEPO** who is Administrator of the Estate of the late HEMED CHIHEPO, is dissatisfied with the decision of the District Land and Housing Tribunal for Masasi at Masasi (the DLHT) in Land Application No.3 of 2022. He has appealed to this Court on the following grounds:

1. *The trial District Land and Housing Tribunal erred in law and fact for failure to evaluate the evidence of the purported sale.*
2. *The trial District Land and Housing Tribunal erred in law and fact for taking for granted Section 62 of The Evidence Act [CAP. 6 R. E. 2019].*

3. *The trial District Land and Housing Tribunal erred in applying the principle "he who alleges must prove" vis a viz the provisions under Section 110 of The Evidence Act [CAP. 6 R. E. 2019].*
4. *The trial District Land and Housing Tribunal erred in law and fact for according weight the exhibits D1, D2 and D3 which were not corroborated.*
5. *The trial District Land and Housing Tribunal erred in law and fact for declaring that, the disputed land is the property of the 1st Respondent without proper legal cause taken by him.*
6. *The trial District Land and Housing Tribunal erred in law and fact for dismissing the Appellant's Application with costs basing on unbalanced evidence.*

When the appeal was called for mention, the parties suggested proceeding in disposing of the same by way of written submissions. A schedule to that effect was jointly agreed upon and the same has been spotlessly adhered to. It appears that while the Respondents enjoyed the legal services of Mr. Gide Magila, learned Advocate, the Appellant was assisted by an anonymous legal aid provider. I take this opportunity to register my appreciation for the invaluable services of both the learned Advocate and the anonymous paralegal.

At this juncture, a factual and contextual backdrop necessary for connecting the dots on the present appeal is considered imperative. On the **4th day of August 2018 Mzee Hemedi Chihepo died intestate** in his native village of Namyomyo in Chikoropora Ward in Masasi District. On the **5th day of January 2021**, the appellant was appointed as the administrator of the estate of his late father. During the normal course of his estate administration, the appellant allegedly discovered that the respondents were occupying land that, he claimed, belonged to his late father.

The appellant kickstarted the process by claiming that the land was initially leased to the 1st respondent thus, on behalf of the family, claimed the right to repossess the same. The appellant, however, was shown

documents to prove that his late father had sold the land before he was promoted to glory.

The appellant rejected the claims hence sought legal resolution from the Ward level before he approached the DLHT, arguing that the sale agreement was invalid and that the disputed land belonged to the deceased. The 1st and 2nd respondents defended the sale's legitimacy, presenting documents and witnesses. The DLHT determined the validity of the sale agreement based on documentary evidence. Consequently, the application was dismissed with costs hence this appeal anchored on the grounds listed above. I will now move to summarize the rival submissions by both parties.

Arguing in support of the first ground of appeal, the appellant asserted that Section 63 of the **Evidence Act [CAP. 6 R.E. 2022]** stipulates that the contents of documents may be proved either by primary or by secondary evidence. He further pointed out that Section 64 of the **Evidence Act [CAP. 6 R.E. 2022]** (hereinafter referred to by its acronym TEA) elaborates on primary evidence, stating that it means the document itself produced for the inspection of the court. The appellant highlighted the provisions regarding documents executed in several parts or counterparts and their status as primary evidence.

Referring to Section 65 of TEA the appellant explained the prescription on secondary evidence, including certified copies, copies made by a mechanical process ensuring accuracy, copies made from or compared with the original, counterparts of documents against parties who did not execute them, and oral accounts of document contents given by someone who has seen it.

Quoting from **The DPP vs. MIRZAI PIRBAKSH @ HADJI and THREE OTHERS**, Criminal Appeal No. 493 of 2016 (unreported), the

appellant conveyed the court's statement on the competency of a person to tender exhibits based on possession, custodianship, or ownership, emphasizing the need for knowledge and possession at some point in time.

Regarding the document exhibits D1, D2, and D5, authored by local Government Authorities, the appellant argued that they are copies of the original local Government letters, and their admissibility is governed by Section 65 of the Evidence Act.

The appellant contended that the material sale agreement was supposed to be certified copies, a copy made by a mechanical process ensuring accuracy, or copies compared with the original. He underscored the Trial Tribunal's obligation to adhere to the prescription under Section 65 of the Evidence Act (supra) in assessing the admissibility of the exhibits tendered by the 1st Respondent.

Moving on to the **second ground of appeal** the appellant stated that despite all evidence adduced the DLHT accorded no weight to it and dismissed the Appellant's Application. He emphasized in the course of their defense, DW1, the 1st Respondent, DW3, the 2nd Respondent, and DW5, Swalehe Ibrahimu Chingomanje, unanimously testified before the Trial Tribunal that Jadili Chihepo Hemedi was not present during the sales contract of the disputed shamba and that he was in Nachingwea.

On **the third ground the appellant** asserts that the tribunal overlooked **Section 62 of TEA**, which mandates that oral evidence must be direct and prohibits hearsay evidence. The appellant claims that the testimony based on information received from his father about leasing the disputed shamba was hearsay, violating Section 62.

Another contention by the Appellant is the tribunal's alleged misapplication of the "he who alleges must prove" principle, contrary to **Section 110 of TEA**. The appellant argues that the tribunal erroneously considered the respondents' statements supported by exhibits DI, D2, and D5, disregarding Sections 100 and 101, which restrict the use of oral evidence to cancel documentary evidence.

On **the fourth ground**, the appellant challenges the weight given to exhibits DI, D2, and D3, asserting that they lack corroboration and contain inconsistencies regarding the magnitude of the disputed land. The appellant questions the necessity of presenting the sale agreement before the Namyomyo Village Land Committee, highlighting the committee's involvement as unexplained.

Moving on to **the fifth ground of appeal**, the appellant asserted that the DLHT committed a legal and factual error by erroneously declaring that the disputed land, located at Namyomyo Village, Chikoropola Ward in Masasi District and measuring 40 acres, is the property of the 1st Respondent. He asserted further that this declaration, found on page 13 of the Trial Tribunal's judgment, was based on "dubious exhibits" DI, D2, and D3. He emphasized that the Tribunal Chairman's position asserting the land's ownership by the 1st Respondent lacked proper legal justification.

On the sixth ground the Appellant strongly asserts that the DLHT failed to thoroughly analyze the elements and substance of the evidence related to the sale and purchase of the disputed land. He argued that as the biological son of the late CHIHEPO HEMEDI and despite residing in his father's home and having never left, he, along with his sisters, approached the 1st Respondent in 2015 to extend the lease, unaware of any prior sale.

Submitting on behalf of the Respondents, Mr. Magila argued that in the first ground of appeal, the appellant seeks to challenge the trial Tribunal's analysis of evidence, asserting that credibility holds more weight than the number of witnesses. Mr. Magila is of a firm view that the respondent presented credible witnesses, such as SALUMU ABDALA MWAMUZI (DW2), the chairman of the village land council, and SWALEHE IBRAHIMU CHINGOMANJE (DW5), a friend of the appellant's father. Both testified to witnessing the disposition of the farm in question. He went on to assert that PATRICK NAHODHA ERIO, the Village Executive Officer, confirmed his role in preparing the sale agreements and asserted that the late Chihepo sold the land to the first respondent.

Contrary to the appellant's claim, Mr. Magila argued, there is no support from the trial tribunal proceedings for the argument that the documents presented are secondary evidence.

On the second ground, Mr. Magila stated that the appellant alleged a contravention of Section 62 of TEA, which requires oral evidence to be direct and stated by a person who saw the incident. He noted that the appellant cited several authorities regarding this ground but unfortunately, lamented Mr. Magila, he had not pointed out even a single name of a witness whose evidence was not direct and was hearsay.

Mr. Magila emphasized that the witnesses who testified on the side of the respondents therein, as mentioned above, were those who witnessed the sale of the suit farm, and most of them had their names reflected in the sale agreements documents, namely, exhibit DI, D2, and D3. Consequently, Mr. Magila concluded that this ground of appeal also lacks merits, and the

authorities cited in respect of the same are not relevant due to a lack of alignment with material facts of the suit.

Moving on to the third ground, Mr. Magila explained that the sale agreement holds more credibility as evidence than any other in disputes of this nature, particularly when there is an allegation of the disputed land being sold. He pointed out that this proposition aligns with Section 101 of TEA. The learned counsel averred that the records of the trial tribunal indicated the respondents' evidence supported this proposition, as they submitted written sale agreements accompanied by oral explanations corresponding to the written evidence (sale agreement). Mr. Magila is of a strong belief that the respondents' evidence was not solely reliant on oral testimonies but also included written documents (sale agreements) to support the oral evidence. He referred to exhibits DI, D2, and D3.

Mr. Magila noted the appellant lacked a plausible explanation as to why his late father raised no objection to the first respondent, who had been using the suit farm since 2008 without disturbance while he was alive. All these points, according to Mr. Magila, rendered this ground of appeal devoid of merits and warranted its dismissal.

Winding up with the fourth, **fifth, and sixth grounds of appeal argued collectively**, Mr. Magila asserted that there is a connection to evidence, specifically exhibits DI, D2, and D3, as well as oral evidence given concerning the same. Without consuming the time of this Honourable Court, Mr. Magila claimed, the matters raised in the 4th, 5th, and 6th grounds of appeal had been thoroughly addressed during his response to the first three grounds, where he elaborated on how the sale agreement documents had

been supported by oral evidence provided by individuals who witnessed the transaction.

The learned Counsel averred further that the contents of documentary evidence presented and accepted as exhibits were confirmed by individuals who were involved in the sale of the suit farm and observed the transaction. He prayed for the entire appeal to be dismissed with costs.

I have carefully considered rival submissions and examined the court records. I am alive to the fact that as the first appellate Court, my role is akin to rehearing. I am duty bound to reevaluate the evidence adduced at the DLHT and come up with a different position if necessary. I will not spend too much time because the appeal is straightforward.

My first reaction is that the appellant has tried his very best to play with technicalities and bombarding the court with a lecture if not a treatise on the law of evidence. I must admit that the appellants documents were also very difficult to read. I sympathize with him that his late father probably did not disclose to him (and his sisters) that he had sold the suit land before he was passed on. It appears also that the Appellant lived in a Kilimahewa Street, Julia Ward -Newala Urban Newala District most of his life while his late father was in their native village of Namyomyo, Chikoropola Ward in Masasi District. That is too far, I suppose. As a Kiswahili saying goes: ***Fimbo ya Mbali Haiui Nyoka.***

The starting point on the law of evidence which, it appears, the appellant tried his level best to navigate through, is a canon principle that he who alleges must prove. The appellant alleged that his late father had leased the land to the first respondent. A very poor attempt was made at the DLHT to prove the allegation compared to the watertight evidence of the respondent.

Be it as it may, here is the drawing board: in **Antony M. Masanga v. (1) Penina (Mama Mgesi) (2) Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, (unreported) the Court of Appeal of Tanzania stated:

"In civil cases, the burden of proof lies on the party who alleges anything in his favour. It is common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."

It appears to me that the appellant all the way from the DLHT, is trying to avoid the "burden" and hide in the shadow of unfounded evidentiary theories. In summary, the appellant contends that the trial tribunal erred in accepting hearsay evidence, misapplying legal principles, and according to undue weight to uncorroborated exhibits, leading to an unjust dismissal of the appellant's application. I have no hesitation in dismissing these hyperbolic claims as baseless.

A careful read of the records leaves no iota of doubt that the 1st Respondent indeed purchased the land in 2008. The evidence of **SALUMU ABDALA MWAMUZI (DW2)**, the chairman of the village land council, and **SWALEHE IBRAHIMU CHINGOMANJE (DW5)**, and **PATRICK NAHODHA ERIO**, the Village Executive Officer leave no doubt that indeed the late Mzee Chihepo sold the land to the first respondent.

As alluded earlier, the Appellant has tried his very best (albeit with too long a submission) to convince this court to make a finding on alleged inconsistencies and the dubious nature of the evidence adduced at the DLHT. Unfortunately, the respondent's evidence, supported by credible witnesses and aligned with relevant legal authorities, stands as a solid foundation for the trial tribunal's decision. The appellant's assertion regarding secondary

evidence lacks substantiation from the trial records and is, therefore, considered unfounded.

Premised on the above, I dismiss this appeal in its entirety for lack of merit. Costs to follow the event.

It is so ordered.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

E.I. LALTAIKA
JUDGE
27.02.2024

THE HIGH COURT OF TANZANIA - Mtwara