IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 56 OF 2019

(From the Decision of the District Land and Housing Tribunal of Ilala District at Mwalimu House in Land Case Application No.98 of 2014)

LAMECK MWITA.....APPELLANT

VERSUS

SUZAN CHITEJI.....1ST RESPONDENT
MASSOUD HASHIMU NAYOPA.....2ND RESPONDENT

JUDGMENT

OPIYO, J:

Lameck Mwita, the appellant and Suzan Chiteji, the 1st respondent are the major rivals in this case, while the 2nd respondent came in as a necessary party, being the seller of the suit land to the appellant. However, he did not appear at the District Land and Housing Tribunal for Ilala, here in after called the trial tribunal, where this appeal originated. Hence the case was heard ex-parte against him.

Mr. Lameck Mwita and Suzan Chiteji are locking horns over a piece of land, measured 3 acres and located at Mgeule Street, Majohe Ward within Ilala Municipality and Dar Es Salaam Region. The 1st respondent who was declared the lawful owner of the suit land claimed to have purchased the same from one Blandina Taliani in 2004, while the appellant, Lameck Mwita has claimed to have acquired the land about 1.5 acre from the 2nd

respondent. The matter was heard and the first respondent emerged the winner.

Being dissatisfied with the decision of the trial tribunal, the appellant has filed this appeal with the following seven grounds:-

1. That the Hon. Chairman erred in law in giving legal force to the sale agreement, exhibit P1 which suffers from uncertainty, null and void.

2. That the Hon. Chairman erred in law and in fact in making the decision without taking into consideration the contradicting evidence between PW1 and PW2.

3. That the Hon. Chairman erred in law and in fact in making the decision relying on the exhibit P1 which differs with annexure SC1 to the Application.

4. That the Hon. Chairman erred in law and in fact by declaring the 1st Respondent owner of the suit land without the said 1st Respondent bringing to the Tribunal either as a party or witness the purported vendor of the suit land to her, one Bandita Tuliani.

5. That, the Hon. Chairman erred in law and in fact in believing the 1st Respondent's witness PW2 (Ten Cell leader) and gave no weight to the evidence of DW2 (former village secretary of Buyuni village).

6. That, the Hon. Chairman erred in law in discrediting and declaring unlawful exhibit D2, the Appellant's sale agreement, on ground that the agreement has CCM party rubber stamp.

7. That Hon. Chairman erred in law in making the decision by putting the appellant in a position to prove ownership of the disputed land, the duty which lied on the 1st respondent.

This appeal was heard by written submissions, Juma Nassoro, learned Counsel appeared for the appellant while the 1st respondent represented by Mr. Mrindoko, learned Advocate.

Submitting for the appeal, Mr. Nassoro argued on the 1st ground of appeal that, the sale agreement between the 1st respondent and Blandina Tilian is void as it doesn't describe the suit land in terms of size, boundaries and location. It is not known whether the said sale involved the suit land or not and the trial tribunal did not visit the locus in quo before reaching its conclusion in favour of the 1st respondent. Since the agreement is not certain on the size and boundaries of the suit land, then it is void as given under section 29 of the Law of Contract Act, Cap 345, R.E 2019 and the case of **Nittin Coffee Estate Ltd and 4 Others versus United Engeneering Works Ltd and Another (1988), TLR 203 CAT,** he submits.

On the 2nd and 4th grounds, it was argued that, Blandina Tiliani was a minor, hence, had no capacity to contract, thus, incompetent to dispose the suit land to the 1st respondent (section 10 of the law of Contract Act (supra). Above all, the said vendor was not even called to testify for the 1st respondent and this entitled the trial tribunal to draw a negative inference against the 1st respondent, but it chose not to do so.

Mr. Nassoro continued to argue on the 5th ground that, the learned trial chairperson admitted the evidence of PW2 while rejecting that of DW2 for a reason that it was hearsay evidence. To him, that was a misconception of facts and law as DW2 gave direct evidence on what he saw and did. He insisted that, DW2 did not give evidence on what he was told by someone else.

As for the 6th ground, the appellant's counsel maintained that, it was wrong for the trial learned chairperson to reject exhibit D2 for being stamped with CCM rubber stamp. Mr. Nassoro argued that, at the time of sale, the ten cell leader was called as a witness, that is what brought the existence of the said stamp on the agreement. He argued that, such existence does make the agreement void as the parties are at liberty to choose who should witness their agreements.

On the 7th ground, Mr. Nassoro maintained that, under section 112 of the Evidence Act, cap 6 R.E 2019, the 1st respondent was duty bound to prove ownership of the suit land. In doing so, the 1st respondent was required to prove that the vendor had a good tittle at the time of sale before passing the same to her. Also the 1st respondent was supposed to prove capacity of the vendor to contract, but she did not, therefore it was wrong to decide in her favour. He therefore prayed for the grant of the appeal.

In reply to the 1st ground, Mr. Mrindoko for the 1st respondent maintained that, since exhibit P1 was admitted unopposed, then the appellant is precluded from raising that fact at this stage, otherwise the same is an afterthought after he waived his right during the trial as stated in **Makubi**

Dogan versus Ngodogo Maganga, Civil Appeal No. 78 of 2019 (unreported).

On the 2nd ground of appeal, it was submitted that, the same is a new fact brought at the submission stage of this appeal. Mr. Mrindoko insisted that, the capacity to contract by the vendor, Bandita Taliani was not in issue at the trial tribunal. Also Mr. Mrindoko responding to the 4th ground, he submitted that, the weight of evidence is not based on the number of witnesses whom the party calls on her side, rather it is in the quality of the said evidence. Since the 1st respondent proved that she is the owner of the suit land, it is immaterial whether she called Bandita or not to testify on her behalf.

On the 4th ground, Mr. Mrindoko maintained that, it was correct to give much weight on the evidence of PW2 because she is living in the area where the suit land is located since 1982 and she was there as a ten cell leader and a witness when the said land was sold by Bandita Taliani to the 1st respondent. He cited the case of **Omari Ahmed versus R (1982) TLR 52** for the position that the trial Courts findings as to the credibility of witnesses is usually binding on appeal court unless there are circumstances on appeal court on the record which call for a re-assessment of their credibility. He went on to argue that, the facts that DW2 was a village secretary of Buyuni are new facts being introduced at this appeal, so as the fact that Mgeule was just an area within Buyuni village by then. These ought to be disregarded along with the fact that Chasimba had never been an Ujamaa Village and it is not existing in the register of Ujamaa villages. All are new facts being introduced in the submissions of the appellant's counsel. He contended that,

to allow them will be as good as admitting fresh evidence as stated in the case of **Mwajuma Mbegu versus Kitwana Amani, (2004) TLR 2004,** and the case of **Idha Salum versus Khalifa Khamis Said (2004), TLR 423, and Shilalo Masanje Versus Lobulu Ngeteya (2001) TLR 372,** he submits.

On the 6th ground, Mr. Mrindoko argued that, the trail Chairman was correct to disregard Exhibit D2 because it was improperly procured. As per the evidence of PW2, the Ten-cell leader of the area where the disputed land is located at the time of the purported sale was PW2 and the said sale was supposed to be witnessed by the ten cell leader of that area, failure of it made it void and ineffective as stated in the case of **Methusele Paul Nyangaswa versus Christopher Mbote Nyirabu (1985) TLR 103.**

Lastly on the 7th ground, it was submitted that, it is evident that the 1st respondent did prove her case on balance of probabilities, hence, discharged her legal burden accordingly as far as the ownership of the suit land was concerned at the trial tribunal. He therefore, urged for dismissal of the suit with costs.

In his rejoinder, Mr. Nssoro reiterated his submissions in chief and added that, they do not object the admissibility of exhibit P1, rather its evidential value in the dispute at hand, as the same contradicts section 29 of the Law of Contract Act, Cap 345 R.E 2019. He insisted that, failure to call Bandita Talian by the 1st respondent during the trial of her case entitled the trial tribunal to draw a negative inference against her and that would have benefited the appellant as that person was a crucial witness.

After considering the rival submissions of the learned counsels representing the parties in this appeal and also examining the records of the trial tribunal before me, I now turn to the determination of merit or otherwise of the appeal by examining the strength of each ground in challenging trial court's decision. It is pertinent to be noted at this juncture that, this being the first appeal, I am vested with the powers to re-evaluate the entire evidence on records and scrutinise the same before giving my decision on the instant appeal **(see Leopold Mutembei versus Principal Assistant Registrar of Tittles, Ministry of Lands, Housing and Urban Development and Another, Civil Appeal No. 57 of 2017, CAT, (unreported))**

The appellant's counsel has stressed much on the applicability of section 29 of the Contract Act, Cap 345 R.E 2019 in the 1st ground. That, as the agreement of sale did not describe the suit land in terms of size, boundaries and location, it fell under the provision above by being rendered void. That, for that reason it is not known whether the said sale involved the suit land or not. The respondent attacked the argument by submitting that as exhibit P1 was admitted unopposed, then the appellant is precluded from raising that fact at this appeal stage. In the onset, my considered opinion is that, the argument by the respondent counsel in this regard is not correct as it has been counteracted by the applicant's counsel in rejoinder submission that, not objecting admissibility of a document (exhibit P1) is not a bar in challenging its evidential value. Thus, the appellant is not bared from bringing this point in appeal as insinuated by Mr. Mrindoko.

The question that remains to be answered is whether the sale agreement was void in terms of section 29 referred to above. In my view, it was not. My reason for that view is that, as the sale was of a seemingly well-known piece of land and the 1st respondent instantly took occupation as per testimonies of PW1 and PW2 for a long time, there is no uncertainty in the description of the property that could work in favour of the appellant. The first respondent proved that the land in question was the one she bought and her testimony was well supported by that of PW2, as neighbour and area leader. As standard of proof in civil cases is on balance of probability, still the appellant was required to prove his ownership, instead of depending on trivial legal technicality to tilt balance scale on his side. After all, section 29 above only applies on contracts which courts or parties cannot ascertain their meaning, when no one is capable of knowing what exactly the parties intended to do in the said agreement. Simply put, the terms of the agreement are uncertain and cannot be executed by either all or one of the parties. The said provision states:-

> *"An agreement, the meaning of which is not certain, or capable of being made certain, is void".*

Looking at exhibit P1, I did not find any confusion in ascertaining its meaning. It appears from the face of it that, two persons are contracting to exchange land (farm) by the vendor for money from the vendee. Therefore, section 29 cannot apply to invalidate the said agreement. The first ground is therefore dismissed for lack of merits.

The gist of the first limb of the second ground is that, Blandina Taliani was a minor, hence, had no capacity to contract, thus, incompetent to dispose the suit land to the 1st respondent in terms of section 10 of the law of Contract Act (supra). Counter argument by Mr. Mrindoko in reply submission answers this this ground very well. As he well-argued, not only that this issue was not controversy at trial, but also the sale by the alleged minor was well conducted in presence his grandfather who is alleged to be the original owner who gave it to minor, the vendor in question. As the complaint is not from Blandina Talian, the alleged Minor, and not that she is the one who re-sold the same to the appellant, the validity of the contract between the alleged minor and the first respondent does not in any way work in appellant's favour. This ground is also of no substance. It is dismissed.

The remaining grounds mainly faulted the trial tribunal for its decision to grant ownership of the suit land to the 1st respondent while she did not manage to prove her case as required in law. According to the appellant, had the evidence been properly evaluated, the decision of the trial tribunal could have been in his favour. On the second ground, the appellant's counsel has faulted the trial tribunal for failing to note the contradiction in the testimony of PW1 and PW2. The 5th ground is that the trial tribunal chose to believe the PW2 and leaving the testimony of DW2. To start with the second limb of the 2nd ground, I find this too to be unfounded, both witnesses, (PW1 and PW2) have narrated well how the land came into the ownership of the 1st respondent from Bandita Taliani, PW2 being the neighbour and witness on the transaction has stated according to his knowledge how Bandita acquired the land before disposing it to the 1st respondent. Therefore, there is no contraction on the evidence of the two witnesses above as claimed by

the appellant. PW2 was present on the transaction, she knows the suit land by being a neighbour, and was involved as the area leader in the said transaction, meaning thereby, she had 1st hand information over the ownership of the suit land. In my considered opinion she is a very credible and reliable witness in this dispute capable of corroborating the testimony of PW1 as she was involved in a series of events regarding the sale of that particular land under dispute.

The above discussion also goes to answer the 5th ground, where the appellant complains that it was wrong to believe PW2 (ten cell leader) and leave DW2 who was a village secretary of Buyuni Village. The reason is simple as explained above, PW2 has more advantages of being the trustworthy witness as neighbour and knowing well the suit land and its history of changing hands from Banditas' grandfather to Bandita and later from Bandita to the 1st respondent. It is therefore safe to believe PW2 than DW2 who according to the records is the appellant himself, Lameck Magasi Mwita and not the so called Village Secretary of Buyuni. Thesegrounds are also dismissed for lack of merits.

On the 4th ground, I agree with the appellant, that it is and has been the rule that, in land disputes, a seller is a necessary party and ought to be joined **(see of Juma B. Kadala versus Laurent Mnkande, (1983), T.L.R).** However, this is not true for all the circumstances. The circumstances of this case are distinguishable Juma kadala's case, owing to the time which the 1st respondent has been in occupation of the said land without any disturbance. It is on record that that the 1st respondent had been on the land for 10 years from the date when she purchased the land on 14/3/2004 to the date when

the suit was lodged at the trial tribunal, 16/5/2014). It is unreasonable and really absurd to expect someone who have stayed on a piece of land for several years undisturbed, and after those years someone appears on it, claiming to have purchased part of that land from someone else other than the one who sold the whole land to the him, to join his seller in a trespass suit like this one. It is quite in order to sue alleged trespasser alone, who has the duty to prove how he found himself on the land in question. In my opinion, the appellant needed to find the 2nd respondent who sold the suit land to him and disappeared just a year after the sale. That could be easier than looking for the person who had sold the land for more than 10 years before the respondent came into the said land. The 4th ground therefore also lacks merit and it is dismissed.

On discrediting exhibit D2 as stated on the 6th ground which will be discussed together with ground 7. It is true as per records that the alleged CCM leader signed and stamped the sale agreement as a witness not as approving officer as observed by a trial court. That means, it was a wrong observation. What was communicated by the trial tribunal was that, in practice we use local government authorities to authenticate the sale, not party leaders, believing that it was done by a party leader in that particular noticing party stamp. No matter my observation above faulting trial court's observation on this aspect, but the trial court's decision was not entirely based on that observation. It therefore remains that, such observation does not change the fact that, the 1st respondent's evidence with regard to the ownership of the suit land was heavier than that of the appellant as shown in previous re-examination of evidence. Since the two parties in the case cannot tie, then it was correct for the trial tribunal to declare the 1st respondent as the lawful owner of the suit

land based on heaviness of her evidence **(Hemed Said v. Mohamed Mbilu (1984), TLR 113}.** The 6th and 7th grounds of appeal are as well dismissed.

Eventually, the judgment and decree of the trial Land and Housing Tribunal for Ilala District is here by upheld and appeal dismissed. No order as to costs.

M. P. OPIYO,
JUDGE
16/12/2020