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

LAND APPEAL NO.117 OF 2020
(Originating from Kibaha District Land & Housing Tribunal in Land Application No. 97 of 2014)

PAULINA MACKENZIE KAPALASULA (Administartix of Estate of the late Mackenzie J. Kapalasula).....**1ST APPELLANT**
JANE KAPALASULA MPANGALA (Administatix of the Estate of the late Mackenzie J. Kapalasula).....**2ND APPELLANT**

VERSUS

EMMANUEL S KAYOMBO.....**1ST RESPONDENT**
KADELE ALLY SUNGULWA (Administartor of the Estate of the late Ally K. Sungulwa)...**2ND RESPONDENT**

Date of Last Order: 10.02.2021
Date of Ruling: 09.04.2021

JUDGMENT

V.L. MAKANI, J

This appeal has originated from Kibaha District Land and Housing Tribunal (the **Tribunal**) in Land Application No.97 of 2014 where the 1st Respondent herein was declared the lawful owner of the land located at Mwendapole Area in Kibaha (the **suit land**). Being dissatisfied with that decision, the appellants herein have preferred this appeal on the grounds reproduced hereinbelow as follows:

1. *That, the trial chairperson erred in law and in fact by taking sale agreement of the second respondent as*

genuine contract of which was witnessed by non-existing village government.

2. *That, the trial chairperson erred in law and in fact by considering the sale agreement of second respondent which was in fact witnessed by different village government from that the land is located.*

3. *That, the trial chairperson erred in law and fact for disqualifying the sale agreement on the ground that it was not witnessed by the local government.*

4. *That, the trial chairperson erred in law and fact by taking first respondent sale agreement which was forged by the respondent.*

5. *That, the trial chairperson erred in law and fact for failure to take appellants evidence which was based on origin of which the appellants came to possess the land.*

6. *That, the trial chairperson erred in law and in fact for failure to determine that the second respondent was security guard of appellants properties hence he was taking care of appellants land on behalf of the appellant who was living in town the whole time.*

The appellants prayed for the court to allow the appeal with costs and the judgment and decree of the Tribunal be quashed.

With leave of the court, the appeal proceeded by way of written submissions. Mr. Obed Kasambala, Advocate drew and filed submissions on behalf of the appellants. Advocate Richard Kinawari drew submission on behalf of the 1st respondent while the 2nd respondent personally drew and filed his own submissions.

Submitting for the appeal, Mr. Kasamabala gave a brief history of the matter and added that the sale agreement which the 2nd respondent tendered at the Tribunal and which was witnessed by cell leaders of the village brings more doubt since the village government established under the Villages and Ujamaa Villages (Registration Designation and Administration) Act,1975, Act No.21 of 1975 in which section 11 (2) of the Act confers power to be body corporate. He insisted that before 1975 there was no village government therefore the Sale Agreement by the 2nd respondent lacks credibility and the Tribunal erred to consider it as strong evidence. Counsel further said that the Sale Agreement by the 2nd respondent does not disclose the names of cell leaders who witnessed the sale agreement instead only the names of the witnesses. He said that neither the cell leader nor the witnesses to the Sale Agreement was called to give their evidence at the Tribunal. He relied on the cases of **Haward Simon Mwansasu vs. Julieth Joseph and 150 others (HC-DSM** (unreported) and **Republic vs. Elias Michael@ Luhiye and Others Criminal Revision No.02 of 2018 (CAT-Tabora)** (unreported). He said that it was the duty of the Chairperson to satisfy

herself on the said Sale Agreement before admitting it as exhibit in court and also to consider all applicable laws.

On the second ground of appeal Mr. Kasambala said that the Chairperson gave judgment basing on the evidence adduced by the 2nd respondent. He said that at the first time the suit land was within Muharakani Village before it was divided to be Mwendapole Village. He said that the 2nd respondent's evidence does not mention on which year the two villages Muharakani and Mwendapole were one village before being divided. He said that the Sale Agreement of the 2nd respondent was witnessed by the village government different from which the land is situated. He cited the case of **Haward Simon** (supra). He further insisted that the 2nd respondent's Sale Agreement had no name nor signature of the ten-cell leader, only rubber stamp, that the 2nd respondent did not call any leaders who were present during the sale so as to testify at the Tribunal. Further he said there was no proof that in 1968 Muharakani village and Mwendapole village were one village. He said that all of that shows that the Sale Agreement was fraudulently procured and was entered by the authority which lacks territorial jurisdiction.

On the third ground he said that it was not mandatory for the Sale Agreement to be witnessed by the local village leaders but it is mandatory when the village government wants to allocate land to any person then the cell leader must be there. He said that the time in which the transaction was entered the land statutes were silent therefore it was improper for the Tribunal to disqualify the appellants Sale Agreement.

Submitting on the 4th ground, Mr. Kasambala said that the Sale Agreement tendered by the 2nd respondent was forged. On this he repeated his previous submission on the existence of village authority in 1968, names and signature of the cell leaders, and the controversy as to where the suit land is located. He insisted that the issue of forgery and fraud cannot be termed as criminal cases only. He said it can even fall in civil cases and the court should adjudicate them. He subscribed to the case of **Merina Chiteji Kassembe vs. Angel Basil Saprapasen & Eastern Wenslaus Mahori (HC-DSM)** (unreported).

On the 5th ground Mr. Kasambala stated that, the appellants' evidence was not taken by the Tribunal from her witnesses. He said that **PW2**

signed the Sale Agreement as a witness and that even **PW3** and **PW4** testified for the appellant, however he said that the said testimonies did not appear in the Tribunal's judgment. He relied on the case of **Omari Abdallah Kilua vs Rashidi Mtunguja, Civil Application No.178 of 2019 (CAT-Tanga)** (unreported).

On the 6th ground he said the 2nd respondent had no good title as the appellants' witnesses stated that the 2nd respondent was only taking care of the suit land before he trespassed on the same and therefore, he had no good title to pass to the 1st respondent. He prayed for the appeal to be allowed with costs.

In reply, Mr. Kinawari said that, the 1st respondent bought the suit land from the 2nd respondent who purchased the same from Ally Katanga in 1968. He said that it is on record that Ally Katanga inherited the same from his father as stated by DW2 who is the son of Ally Katanga. He insisted that the 1st respondent bonafide purchased the suit land from the person who had good title.

On the 2nd ground he said that, the appellants' 1st and 2nd grounds of appeal creates ambiguity as the appellants' counsel rely on mere

speculations. He said that, the records are clear that the 2nd respondent explained in length how the name of locality in which the suit land is located was changed from time to time as first it was called Mbwete, Muharakani and later divided to be Mwendapole village. He insisted that the sale agreement shows the name of locality in which the suit land is located. He said that the appellants' sale agreement does not show where the land is located nor the size of the land. He said that the sale agreement between the 2nd respondent and Ally Katanga was witnessed by a cell leader one Hemed Mtumwa, his name and signature is in the sale agreement (**Exhibit D2**). He added that the said sale agreement was executed 53 years ago and all of the witnesses has already died including the parties to the contract. He said that the only witness present is **DW1** the son of the seller Ally Katanga and the 2nd respondent himself who died after he had filed his defense at the tribunal. He said that all these facts were addressed by the 2nd respondent at the tribunal.

On the 3rd ground he said it was clearly stated by the Tribunal that since the land is unsurveyed it was difficult to purchase without involving local leaders and if the appellant could have involved the local leaders he could have been in a better position of knowing that

the suit land had already been sold since 1968. He insisted that the appellants' Sale Agreement does not show the size of the land nor location and therefore it was right for the tribunal to disregard it.

Submitting for the 4th ground that Sale Agreement by the respondent was forged, he said that the ground has no legs to stand. He said that the appellants were obliged to prove those facts at the tribunal and not rising it by way of appeal. He relied on section 110 (1) of the Evidence Act, Cap 6 RE 2019. He said that the appellant failed to prove forgery at the tribunal hence the judgment can not be in the appellants' favor. He relied on the case of **Ludovick Michael Massawe vs. Samson Herman**, Land Appeal No.103 of 2016 (HC-Mwanza). On the other hand, he said that if real there was allegations of forgery, the appellant should have reported the same to the law enforcing agency for further actions.

Regarding the 5th ground he said that there was no evidence on how Katanga Salumu Dahani got the suit land and sold it to the appellants. He said therefore that the Tribunals' Chairman considered the evidence by the appellants, but it lacks credibility.

On the 6th ground of appeal, he said that the 2nd respondent was never hired as security guard as the evidence on records reveals that Ally Kasunga was an employee of the defunct East African Railway Corporation. He said that the appellant had a duty to prove at the tribunal on how they hired Ally the 2nd respondent as he was employed by Tanzania Railway Corporation. He prayed for the appeal to be dismissed with costs.

On his side, the 2nd respondent said that the Mainland Tanzania has a long history of functioning local governments, starting with Local Government Authority in 1926. He said that it is not true as alleged by the appellants that there were no village governments before enactment of the village government Act. He said that there were village councils which acted as a village government and there were leaders including Hemed Mtutumwa who appeared in the Sale Agreement. He said that there were also rubber stamps and therefore the 2nd respondent's Sale Agreement is valid. He added that it was undisputed also that Ally Katanga owned the suit land and his son (**DW2**) testified to that effect.

On the 2nd ground the second respondent reiterated what he submitted on the 1st ground of appeal and added that the Sale Agreement by the 2nd respondent was not disputed at the Tribunal. He said that that the appellant contradicts himself by stating in the first ground that at that material time there were no village authorities and on the 2nd ground he said that the Sale Agreement was signed in the locality were the suit land is not situated. He insisted that time has passed, and a lot of changes has occurred including change of authorities therefore the appellants should not use the same to mislead the court.

On the 3rd ground he said that the appellants' Sale Agreement does not show the size and location of the suit land and that it was not signed by the local leaders. He insisted that the actual size of the suit land is 5 acres and not 4 acres as alleged by the appellants.

On the 4th ground he said that the appellants have not proved that the Sale Agreement was forged and therefore the Sale Agreement by the 2nd respondent is valid.

Submitting for the 5th ground, the 2nd respondent said that the evidence of **PW2** was considered but failed to persuade the court as it did not show size and location of the suit land. He added that even **PW3** failed to tell the Tribunal as to when exactly the 2nd respondent told her that the suit land is the property of the appellant.

On the 6th ground he said that the 2nd Respondent was an employee of the defunct East African Railway Corporation and thereafter Tanzania Railway corporation but the appellants several times referred to him as shamba boy. He said that the appellants failed to prove under what consideration he managed to hire an employee of the East African Railway Corporation to be his shamba boy or security guard. He prayed for this appeal to be dismissed with costs.

In rejoinder, Mr. Kasambala reiterated his main submission and added that the 1st respondent did not defend his case at the Tribunal and therefore this court should maintain the same status of ex-parte judgment against him.

In the course of preparing this judgment I came to realize that there was an ex-parte order against the 1st respondent at the Tribunal as

was also raised by Mr. Kasambala in his rejoinder. However, in this appeal he entered appearance by representation and his advocate argued the appeal by filing written submissions. I called upon the parties to address me on this. Mr. Kasambala for the appellant said the 1st respondent was added in the appeal because he lives in the suit land and so any decision would affect him. He cited the case of **TPB Bank PLC (Successor in Title of Tanzania Postal Bank) vs. Rehema Alatunyamadza & Others, Civil Appeal No. 155 of 2017 (CAT-DSM)** (unreported). He said the joining of the 1st respondent in the appeal was proper but the issue of the 1st respondent defending the appeal he left it to the court.

Mr. Kinawari, advocate for the 1st respondent submitted that the joinder of the 1st respondent is proper, and the filing of the written submissions is also proper because it is his right. He also subscribed to the case of **TPB Bank PLC** (supra). The 2nd respondent being a layman had nothing useful to assist the court.

Having gone through submissions by the parties, the main issue for determination is whether this appeal has merit. However, before tackling the substantive appeal I will discuss the procedural aspect

which the court raised suo mottu. It is on record that at the Tribunal the 1st respondent did not file any pleadings or enter appearance and so an order for the matter to proceed ex-parte was entered. It is also on record that the said order has not been set aside, and thus the ex-parte order against the 1st respondent is still valid and it gives a right to the 1st respondent that he is the lawful owner of the suit property. In this appeal the 1st respondent has been joined as a respondent. It is muy considered view that since he was joined as a respondent he has a right to appear and defend himself. The circumstances in **TPB Bank PLC** (supra) though different but can suffice in the present case. Indeed, in the cited case, there was an ex-parte order at the High Court, which was entered against, Viovena & Company Limited. But at the appeal level, grounds of appeal revolved around Viovena though she was not made a party therein. The Court of Appeal ordered the joining of Viovena in the said appeal. In the present case, the 1st respondent is a party in this appeal, and is said to currently be living in the suit property. In that respect, I will allow the joining of the 1st respondent in the appeal and will only consider the written submissions by the 1st respondent herein to the extent of the validity of the judgment of the Tribunal viz a vis this appeal.

The grounds of appeal herein are based on the weight of evidence and mainly on the validity of the 2nd respondent's Sale Agreement (**Exhibit D2**). Therefore, this Court shall address the validity of the 2nd respondent's Sale Agreement as against the appellants' Sale Agreement (**Exhibit P1**).

The Tribunal's records reveal that, through **Exhibit D2** the seller one Ally Katanga, on 13/02/1968 sold to the 2nd respondent a portion of land measuring 5 acres located at Kibaha Mbwete. The said Sale Agreement has been signed by both seller and buyer and their respective witnesses. It has been stamped and signed by the village authority. On the other hand, the appellants' Sale Agreement (**Exhibit P1**) witnesses the sale of the land by one Katanga Salum Dahani on 01/01/1986. As noted by the Chairman of the Tribunal, the said land has neither size nor location and has been signed by both parties with one witness. Appellants' Sale Agreement has not been witnessed by any local authority and it has not been stamped. The appellants claimed that **Exhibit D2** is a forged one, and therefore invalid but this issue was not raised at the Tribunal regarding the **Exhibit D2.** The said Sale Agreement was admitted in evidence without any objection from the appellants' advocate. At page 45 of

the Tribunal's typed written proceedings, **DW1** who is the administrator of estate of the 2nd respondent stated that:

> *"the 2nd respondent purchased the said land five acres which are subject of this dispute, it is at Mharakani village, Kibaha District from one Ally Katanga. It was on 13/02/1968, I have sale agreement I pray to tender it as pray (sic!) of my evidence"*

Advocate Mulugwa who was representing the appellant herein replied:

> *"No objection".*

The exhibit was admitted by the Tribunal as **DW2**. As stated, the appellants' Counsel did not dispute any content of the 2nd respondent's Sale Agreement. It is worth to note that, the appellants' enjoyed the services of learned Advocate, who unlike the layperson, is presumed to know well the procedural and substantive laws. It is at the stage of admitting the exhibits, learned Counsel was supposed to raise an objection if any. But he expressly stated that he had no objection. Now, at this stage of appeal, it is improper to raise objections or rather citing defects of the already admitted exhibits by the Tribunal. Any objection regarding genuineness of the said exhibit cannot therefore be entertained at this stage. The issue of forgery was supposed to be raised and proved at the Tribunal and not at this

appeal, as forgery was not among the issues that were determined by the Tribunal. Raising the issue of forgery at this stage of appeal would amount to new issues which procedurally is not proper as was stated in the case of **Hotel Travertine & 2 Others vs. NBC [2006] TLR 133.**

On the other hand, the appellants claimed to have purchased the suit land in 1986 and that the 2nd respondent has been his shamba boy since 1990. They said in 2013 the 2nd respondent sold the suit land to the 1st respondent and that he did not know if the 2nd respondent was working at the railway corporation. From the above, the 2nd respondent is alleged to have worked as a shamba boy or a guard for about 13 years. However, there is no evidence to justify that the appellants engaged the 2nd respondent to guard the suit land. It was of utmost importance for the appellants to prove that the 2nd respondent was engaged by them as a shamba boy. This is because the 2nd respondent denied being employed as shamba boy and submitted and supported the claim that he was employed by Tanzania Railway Corporation from 1972 to 1989 in Civil Engineering department. Although the appellants alleged to have engaged him in 1990 but still it raises a lot of doubts because the circumstances of

his engagement were not clear and not supported by any proof. Since the appellants failed to support the claims raised this court finds it unsafe to rely on mere words.

Even if the **Exhibit P1** did not have discrepancies, there is still the principle of priority to be considered. This principle of law states "*he who is the first in time has the strongest claim in law*". According to the record, it is true that there are two Sale Agreements, that is, **Exhibit P1** by the appellants which was signed on 1986 and **Exhibit D2** which was signed by the 2nd respondent's father in 1968. It is apparent therefore that the Sale Agreement **Exhibit D2** signed on 1968 has priority over **Exhibit P1** signed on 1986, and the latter Sale Agreement **(Exhibit P1)** can never stand to be lawful over **Exhibit D2.** In view thereof, **Exhibit D2** being evidence by the 2nd respondent bears much weight than the appellants' evidence. Therefore, I agree with the Tribunal that the 2nd respondent had a good title to the suit land by virtue of **Exhibit D2.**

At the Tribunal the appellant (then applicant) prayed for following reliefs:

1. *Declaration that he is the rightful owner of the suit land.*

2. *An order of immediate eviction of the respondents from the suit land.*

3. *Perpetual injunctive order as against the respondents restraining them from further interference to the enjoyment of the suit land by the applicant.*

4. *General damages of Tsh. 40,000,000/=.*

5. *Costs.*

6. *reliefs*

The Tribunal ordered the following:

a) *The application is dismissed.*

b) *The 1st respondent is the lawful owner of the suit land who purchased legally from the 2nd respondent.*

c) *The applicant is a trespasser and is ordered to vacate from the suit land immediately ad handle the same to the 1st respondent.*

d) *The applicant to pay the 2nd respondent's administrator of estate (DW1) costs of this application.*

Looking at the reliefs prayed it is apparent that when the Chairman declared the 1st respondent the lawful owner of the suit land he did so beyond the reliefs that were prayed for. The appellants at the Tribunal merely failed to prosecute their case and they were therefore not entitled to the prayers sought. The Chairman's final decision and

declaration that the 1st respondent was the lawful owner of the suit land was therefore misplaced. Basing on the foregoing, it is the finding of this court that the appellants failed to prove their case to the standards required and the balance leaned more in the favour of the evidence by the 2nd respondent. The other subsequent orders are extraneous and are thus quashed and set aside.

In the result, the appeal is dismissed with costs to the extent that the appellants (then applicants) failed to prosecute their case at the Tribunal. As said, the other orders by the Tribunal are thus quashed and set aside.

It is so ordered.

V.L. Makani

V.L. MAKANI
JUDGE
09/04/2021