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

LAND APPEAL NO. 01 OF 2019

Arising from Temeke District Land and Housing Tribunal in Land Application No. 96 of 2016)

MUSA BARAKA.....APPELLANT

VERSUS

MARWA MWITA .....1ST RESPONDENT
MATHIA NDOMBA.....2ND RESPONDENT
VERONICA NDOMBA.....3RD RESPONDENT

Date of Last Order: 21.12.2020
Date of Ruling 27.01.2021

JUDGEMENT

V.L. MAKANI, J

This is an appeal by MUSA BARAKA. He is appealing against the decision of Temeke District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 96 of 2016 (Hon. A.R. Kirumbi, Chairman).

With leave of the court the appeal was argued by way of written submissions. The submissions on behalf of the appellant were drawn and filed by the Mr. Kurubone Pasensa Dickson, Advocate while the 2nd and 3rd respondents drew and filed their own submissions. The appeal proceeded ex-parte against the 1st respondent as he refused to enter appearance personally or by an advocate.

According to the application at the Tribunal, the appellant (then applicant) was claiming ownership of land located at Vijibweni, Kigamboni, Dar es Salaam (the **suit property**) whose value was estimated to be TZS 7,000,000/=. The appellant claimed that the 2nd and 3rd respondents sold him the said suit property. The appellant further said after purchasing the suit property he erected a house which was demolished by the 1st respondent who also claimed that the suit property was sold to him by the 2nd and 3rd respondents. The dispute between the parties was referred to Vijibweni Ward Tribunal, then to the District Court and the High Court where the proceedings below were declared a nullity as per Civil Revision No. 66 of 2011. The 1st respondent started to build a house on the suit property but when the appellant tried to prevent him, he said that the suit property belonged to him.

The appellant had seven grounds of appeal as were reflected in the Memorandum of Appeal and the Supplementary Memorandum of Appeal as reproduced hereinbelow as follows:

1. *That the Hon trial Chairman grossly erred in law and in fact when he refused to agree with the views of the honourable gentlemen assessors who had attended the case from the beginning to the end and observed*

no suspicious demeanour on the part of the respondents' number 2 and 3.

2. *That the trial chairman erred in law and in fact when he believd the evidence of DW2 Cosmas Mwita Maricha and Mohamed Ally Nyenza as witnesses to the sale transaction between the 1st respondent and the 2nd and 3rd respondents when the 1st respondent himself states in his evidence that the witness to the sale agreement was Veronica Ndomba only whom he has refrained from calling without giving any reason thereof.*

3. *That the honourable chairman erred in law and in fact when he refrained purposely from evaluating the evidence as a whole and relied on the demeanour of DW2 and 3 which they exhibited during the trial, when in fact these were not witnesses to the sale as stated by the 1st respondent himself.*

4. *That the trial chairman erred in law and in fact when he did not consider the fact that the 2nd and 3rd respondents do not know how to read and write which fact would have refuted the evidence of DW2 & 3 who claim to have witnesses the transaction between 1st respondent and the 2nd and 3rd respondents which include signing of a sale document.*

5. *That the trial chairman erred in law and in fact when he rejected the sale agreement between the appellant and 2nd and 3rd respondents because of lack of stamp duty without giving him a chance to pay for it ad valorian.*

6. *The 1st respondent was not true telling witness as for no reason at all decided not to call two other witnesses to the sale.*

The above grounds of appeal can be reduced into two grounds that: (a) The Tribunal Chairman failed to properly evaluate the evidence by the parties, and; (b) the Chairman failed to consider the assessors' opinion and observe Regulation 19(2) of the District Land and Housing Tribunal Regulations GN. 174 of 2002.

In arguing the second third, fourth, fifth, sixth grounds of appeal, which grounds were based on the evaluation of the evidence by the Tribunal, Mr. Kurubone stated that the Chairman relied the 1st respondent's evidence; that there was sale of the suit property between him and the 2nd and 3rd respondents, witnessed by Veronica Ndomba. However, the said Veronica Ndomba was not even called as a witness and the Sale Agreement itself was not tendered as an exhibit. He further argued that the Chairman relied on hearsay evidence and further pointed out that the Chairman erred by relying on the demeanour of the DW2 and DW3 (Cosmas Mwita Maricha and Mohamed Ally Nyenza). He said, the 2nd and 3rd respondents did not know how to read and write and so they could not have signed the Sale Agreement which was attached as an annexure to the Written Statement of Defence by the 1st respondent but was not tendered as an exhibit.

Mr. Kurubone observed that the Chairman ought to have given the appellant a chance to pay for stamp duty of the Sale Agreement (**Exhibit P1**) instead of disqualifying it. As for the assessors, he said the Chairman failed to consider their opinion while they fully participated from the commencement of the proceedings to the end. On the other hand, he said the Chairman failed to observe Regulation 19(2) of GN 174/2002 because there is nothing on record that the assessors need to give their written opinion and it was not read out to the parties. To support this argument Mr. Kurubone relied on the case of **Edna Adam Kibona vs. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017 (CAT-Mbeya)** (unreported) and prayed the appeal to be allowed and the appellant be declared the lawful owner of the suit property. He prayed for costs to follow event (sic!).

In their joint written submissions, the 2nd and 3rd respondents concurred with the appellant that they did not know how to read and write so they could not have signed any sale agreement as alleged by the 1st respondent. They further stated that the Chairman failed to consider their evidence that the appellant is the rightful owner of the suit property and erred when he declared the 1st respondent as

rightful owner and bonafide purchaser. They said the act of the Chairman rejecting the Exhibit P1 was unfair. They prayed for the appeal to be allowed and the court to declare the 1st respondent a trespasser as there is no proof that he acquired good title from the 2nd and 3rd respondents.

As I have said hereinabove, the 1st defendant did not find it necessary to enter appearance though he was duly served so the matter proceeded ex-parte against him.

I have gone through the submissions by the appellant, the 2nd and 3rd respondents. I have also gone through the judgment and record of the Tribunal. The main issue is whether this appeal has merit.

I will start with the ground on the evaluation of evidence. Indeed, I am inclined to agree with Mr. Kurubone that the evaluation of evidence by the Chairman is questionable. There is on record the evidence of the 2nd respondent who categorically stated that he and his wife the 3rd respondent sold the suit property to the appellant and he did not know the 1st respondent. This was duly confirmed by the 3rd respondent who in addition stated that the purchase price of the

suit property was TZS 1,400,000/= and was paid by the appellant. The evidence by the 2nd and 3rd respondents was consistent and was not shaken in cross-examination in whatever way and the evidential value of their evidence is high as they are sellers of the suit property and this has not been controverted in any way. And to sum it all, the 2nd and 3rd respondents have continued in this appeal to tell the court the same story that they sold the suit property to the appellant and not the 1st respondent. Unfortunately, the 1st respondent has refused to enter appearance to protect his rights which refusal creates adverse inference on his part that his claims at the Tribunal were not genuine and indeed the appellant is the lawful owner of the suit property.

With the evidence by the 2nd and 3rd respondents the 1st respondent's case at the Tribunal becomes weak. The 1st respondent claimed that the 2nd and 3rd respondents signed a Sale Agreement. However, the said Agreement, which in my view, was a vital document was not tendered as an exhibit on evidence. But it remained as an annexure to the Written Statement of Defence. And according to Order XIII Rules 7(1) and (2) of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**), documents admitted in evidence are the only documents that

can be treated as forming part of the record. In the case of **Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited, Civil Appeal No. 107 of 2004 (CAT-DSM)** (unreported) the Court of Appeal among other things held:

> *"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record of suit."*

In the absence of this Sale Agreement which was stated in the defence but not tendered creates doubt as to its authenticity and rather to the transaction that was claimed by the 1st respondent.

The Chairman admitted that the Sale Agreement between the 1st respondent and the 2nd and 3rd respondents was not tendered and admitted in evidence, but he relied on the demeanour of DW2 and DW3. It is in my considered view that, relying on the demeanour of these witnesses alone without any corroborating evidence was not proper. And in any case, the observation of the demeanour of the witnesses was not recorded in the proceedings to show that, certainly, the Chairman noted the demeanour of the witnesses and that the said demeanour was an important piece of evidence to be considered in

the evaluation of evidence. In this regard, the Chairman erred when he solely relied on the demeanour of DW2 and DW3. Subsequently, while the 2nd and 3rd respondents consistently denied having sold the suit property to the 1st respondent, the evidence by DW2 and DW3 strongly referred to the Sale Agreement between the 1st respondent and the 2nd and 3rd respondents which Agreement as said was not tendered as an exhibit hence not on record and thus cannot be relied upon.

In the case of **Hemed Said vs. Hemed Mbilu [1984] TLR 113** it was held:

> *"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

The above cited case implies that courts should be moved to decide by the weight of evidence adduced by the parties after a thorough evaluation of such evidence in its totality. As I have stated hereinabove, the evidence by the appellant (the applicant at the Tribunal) was far stronger and heavier than that of the 1st respondent; and if the Chairman had criticaliy given the said evidence a detailed evaluation

and analysis then the decision would have been in the favour of the appellant herein.

This ground alone suffices to dispose the appeal and I would not venture to address the other grounds.

In that regard, I find merit in the appeal and it is hereby allowed. The decision of the Tribunal is hereby quashed and set aside and the appellant herein is declared the lawful owner of the suit property. The appellant will also have his costs. It is so ordered.

V.L. MAKANI
JUDGE
27/01/2021