**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**(LAND DIVISION)**

**AT DAR- ES- SALAAM**

**LAND APPEAL NO.234 OF 2019**

*(Originating from Judgment and Decree of the District Land and Housing Tribunal for Morogoro in Land Application number 131 of 2013 delivered on 24TH October 2019)*

**ABDALLAH HUSSEIN MAGARI.....APPEALLANT**

**VERSUS**

**MARCEL RICHARD CHAMI.....1ST RESPONDENT**

**SALUM MUSTAPHA KUNAMBI.....2ND RESPONDENT**

***EX PARTE* JUDGMENT**

**OPIYO J.**

This appeal follows the Judgement and orders of the District Land and Housing Tribunal for Morogoro as trial tribunal delivered on 24th October 2019, in favour of the 1st respondent, Marcel Richard Chami. The said judgement declared the appellant, Mr. Abdallah Hussein Magari as a trespasser while giving ownership of the suit land to the 1st respondent. The grounds upon which the appeal lies are as follows: -

1. The trial tribunal erred in law for delivering a judgement which is very bad in law for giving right to the appellants nephew who had no right to make forgery with intent to rob the appellant of his piece of land.

2. The trial tribunal's chairperson erred in law and fact in ignoring the evidence of the appellant while favoring that of the respondent especially the evidence of Karoli Joseph Paul (AW2) who produced a forged document before it.

3. The trial chairperson erred in law and facts by misdirecting himself and ruled in favour of the appellant.

4. The trial chairperson erred in law and facts by directing his mind towards agreeing with the opinion of tribunal assessors.

5. The trial chairperson erred in law and facts by misdirecting himself and ruled in favour of the appellant relying on a fabricated document.

6. The trial chairperson erred in law and facts by failing to properly evaluate the evidence presented by the parties before the tribunal.

7. The trial chairperson erred in law and facts by misdirecting himself and ruled in favour of the 1st respondent.

8. The trial chairperson erred in law and facts when failed to consider the fact that the same dispute was once solved by the Ward Executive Office and the decision at the Ward Executive officer was in favour of the appellant.

9. The trial chairperson erred in law and facts when decided in favour of the 1st and 2nd respondent without regarding the balance of probability rule.

The factual background of the dispute briefly is that, the 1st respondent purchased the suit land measuring 20 to 36 paces from the 2nd respondent in 2012. The facts further show that, the plot in dispute is said to have been sold to different persons at different times prior to the event when

the same was sold to the 1st respondent. The appellant on the other hand claims ownership of the suit land. He insisted that the said land was sold to him in 1997 and left the same under the care of his nephew, the 2nd respondent, Salum Mustapha Kunambi. It is on the basis of this background; the dispute reached the trial tribunal which was decided in the favour of the 1st respondent, hence the appeal at hand. Both the appellant and the respondents were not represented. The 1st respondent failed to appear, irrespective of the fact that, he was dully served and even called by phone in court in presence of both applicant and 1st respondent when the matter was scheduled for BRN in Morogoro, sometimes in November 2020. Consequently, on 27th November 2020, the court ordered to proceed *ex parte* against him. The hearing was by way of written submissions. The appellant filed his submission as scheduled, but the second respondent did not file written submission, although he appeared in court in a number of occasions. This is tantamount to failure to defend the appeal on part of the 2nd respondent as well. Therefore, the matter also proceeded *ex parte* against him.

Submitting on the 1st ground, the appellant stated that, the trial tribunal erred in its approach to evaluate and analyze evidence and failed to consider that the appellant is the lawful owner of the suit land having bought the same in 1997 from one F.K. Msike and the 2nd respondent stood as a witness.

On the 2nd, 3rd, 4th and 5th, grounds, it was submitted together that the trial tribunal failed to evaluate the evidence and decided the case in favour of the 1st respondent unjustifiably. That, he had documents which were recognized by the respondents, but they were not considered by the trial court. Also, that there was testimony of the mason, RW2 to the effect

that, it is the appellant who constructed the structure in the disputed land, not the second respondent as alleged by the 1st respondent, but even such evidence was not considered at all by the trial tribunal. He argued that, this is a mistake that can attract interference by this court as held in the case **of Materu Leison and J Foya versus R. Sospeter (1988) T.L.R 102** where it was held that, the appellate court may in rare circumstances interfere with trial court findings of fact, including when it is in omission to consider material facts.

On the 6th, 7th, 8th, and 9th grounds, it was also submitted together that, it is settled that a person who assert the existence of certain facts had a duty to prove the existence of such facts as given under section 110 of the Evidence Act, Cap 6 R.E 2019. That the respondents failed to discharge this duty, but decision was in their favour.

I went through the submissions of the appellant and the records at hand. I will consolidate all nine grounds of appeal and discuss them together for the reason that they are all based on the failure on part of the trial tribunal to analyze and evaluate the evidence of parties presented before it during trial of the matter.

It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour (**Godfrey Sayi versus Anna Siame, Civil Appeal No. 114 of 2014, Court of Appeal of Tanzania).** Based on the evidence on record, the appellant has contended at the trial tribunal that, he bought the suit land in 1997 from Mr. Msike, measuring 70 by 20 paces, through his nephew, Salum Mustapha Kunambi, the second respondent at the trial tribunal as well as in this appeal, who stood as a witness in that sell. The 1st respondent

claimed to have purchased the said land from Mr. Salum Mustapha Kunambi, second respondent in 2012. The 1st respondent's sale agreement shows that, he bought the suit land in 2012 from the 2nd respondent at a price of 4,000,000/- measuring 36 by 20 paces with a semi-finished building. The 1st respondent alleged that; he was the 4th person to purchase the disputed property after it passed through the hands of three different people. That, on 7/3/1997 it was purchased by one Mzee Matekenya, who sold to Msike on 11/3/1997. Msike sold to Kunambi on the same year and Kunambi sold to him in 2012. The sale agreements in those stages were admitted as Exhibit A1, A2, and A3 respectively. The trial court in total reliance on the three sale agreements decided in favour of the 1st respondent.

The above finding, in my view was not backed with strong evidence. The 2nd respondent who was a vendor to the 1st respondent, as per the records did not appear to defend the claims against him. He also neither appeared as a witness to prove his title. Looking at the three above exhibits, there is a difference in size of the land 2nd respondent allegedly purchased from Msike and what he sold to the 1st respondent. In the 2nd respondent's purchase agreement, the piece of land involve was 20 by 70 paces while what he sold to 1st respondent is 20 to 36 paces, almost half of what he had allegedly purchased. That alone brings doubt as to whether it was the same land which was involved in the two transactions. If so, one wonders as to what befell the other half, whether only part thereof was sold and there is a part remaining. As the case was heard and decided *ex parte* against second respondent, so is this appeal, those substantial questions remained un answered.

The decision of the trial tribunal totally made reliance on the production of exhibits A1, A2, and A3 to decide in favour of the 1st respondent. It is unfortunate that, there are a lot of discrepancies in those documentary evidences tendered by 1st respondent that leave his entire evidence shaken and unreliable. Both exhibits A2 and A3 have been signed by the chairman of the Madeco B Street one Karoli Joseph Paulo. Exhibit A2 was signed on 11/3/1997 between Kaloli Fidelis Msike and 2nd Respondent and A3 on 30/12/2012 between 1st Respondent and 2nd Respondent. Derived from such records, it means Karoli Joseph Paulo, who testified as AW2 was a chairman of Modeco B street from 1997 to 2012 (almost 16 years apart). However, this is contrary to what the same person Karoli Joseph Paulo testified in favour of the 1st respondent as AW2. He stated in his oral testimony that, he became the chairman of Modeco B Street from 2009 to 2014, so he was not a chairman in 1997 when he purportedly signed exhibit A2. He tried to foolhardy that contradiction when cross examined by stating that, at the time exhibit A2 was executed (in 1997), he was a street secretary, but he had the chairman's seal at his disposal for authenticating documents. The issue remains that he purportedly signed in the capacity he did not have, making this document a day light forgery in my view. It is not indicated that, he was signing on behalf of the Chairman, but he acted as a chairman himself.

Not only that, this same person, AW2, also seems not to know when the agreement he witnessed in exhibit A3 took place. He stated that the contract took place in 2013 instead of 2012. At some point in cross examination he has been recorded to have said that, he did not know the date when Kunambi purchased the Land from Msike although he knows Kunambi from 1984 when he came to the area. He also shown ignorance of when Kunambi (second respondent constructed the semi-finished

building he testified was constructed by second respondent. Worse still, he kept changing his leadership positions story leading to uncertainties. He stated in examination in chief that he was an acting councilor from 1994 – 1999, but in Cross Examination he stated that from 1994 – 1997 he was an acting street chairman. This makes his testimony far from being reliable in respect of his involvement in execution of Exhibit A2 (contract between 2nd respondent and one Msike in 1997).

Further discrepancies were noted in respect of the three exhibits. Another is the difference in signatures of one Kharidi Kasinde who allegedly was involved in contract of 7/3/1997 between Matekenya and Msike (exhibit A1) and that of 11/3/1997 between Msike and Kunambi (exhibit A2). The same person had different signatures in just a span of 3 days. More or so, the signature of Msike, the alleged vendor in exhibit A2 differs with that in exhibit A1 when he was a purchaser of the same property in a span of three days as well. Another vivid discrepancy is also seen in the signature of one Godfrey Paulo who allegedly witnessed the sale in 1997 in exhibit A2 during sale to Kunambi and in 2012 (after almost 16th years) during sale from Kunambi to the first respondent (exhibit A3). All those whose signatures differs substantially in those documents were not called to testify to clear the difference after possibly proving their participation in those different transactions. Their testimonies were necessary, especially after, the evidence of the one who claimed to be there, AW2, has been shown to be unreliable as per the above analysis. The situation is even worsened by the fact that, the 2nd defendant who could have solved the issue refused to turn up court to defend the suit at both stages.

The above discrepancies are so material that they go to the root of the matter on the authenticity of the exhibit A2 (contract between Msike and

Kunambi). Therefore, in my considered view, ownership of 2nd respondent remained unproved to be able to validly transfer the same to the 1st respondent. In such circumstances, based on the balance of probability rule, it is obvious that the applicant at the trial tribunal who is the 1st respondent in this appeal did not prove his case as he claim to derive his title from unproved title of the second respondent.

It is also noted that, the trial tribunal solely kept reliance in the evidence of the 1st respondent as it totally turned a blind eye to both oral and documentary evidence of the appellant. It is on record that, there were three documents tendered by the appellant proving his involvement with the disputed property. Exhibit ID1 shows that he was involved in a boundary dispute with Matekenya over a disputed property in 2001 which was amicably resolved by street leadership. Existence of this resolution was not disputed by the other side, to the extent that they did not even cross examine RW1 on it. RW1 also testified on settlement by the Ward Executive Officer after the respondents complained there against the appellant over the property subject of this appeal. Again, this fact was also not opposed by the respondents. In fact, it attracted support from adverse party when AW2, the then street chairman, agreed to had been aware of the same in cross examination. AW2 admitted knowledge of the matter being referred to WEO in 2013 (exhibit R2) although he denied his personal partaking. It is a settled principle of law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said (**Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another,** Civil Appeal No. 85 of 2005 (unreported).

The conclusion derived from above finding (not challenging those exhibits) is authenticating both (exhibit ID1 and R2). In exhibit R2, 2nd respondent admitted to have once participated as a witness in purchase of a piece of land by appellant, but could not show its difference from the one under dispute. In the same document the key witness one K.F. Msike (the alleged vendor to both appellant and second respondent) was recorded to have testified that, he had sold the land to the appellant and not the first respondent who participated as appellant's witness in the sale. In the same exhibit, there are words of Ashura Matekenye, who testified in favour of the appellant. Reference has also been made to what came to be admitted as exhibit R1, 'land rent receipt in the name of the appellant of 31/3/1997' which shows the appellants association with the disputed property in its original number *3391/CH more than 10 years before dubius and unexplained change to plot no 1212/CH which was purportedly sold to the 1st respondent in 2012 .* the following quotation from exhibit R2 summarize it all;

> *"Mnamo tarehe 31/11/203 tukiwa na pande zote za wadai na mdaiwa na viongozi wa kata alifika shahidi muhimu ndugu K.F. msike.*
>
> *Kwa pamoja kaati ya mdaiwa, mdai(1) na (2)na uongozi wa kata kuelekea moja kwa moja eneo la kiwanja ambapo shahidi huyo (KF Msikealidai kuwa eneo hilo alimuuzia ndugu Abdalah H. Magari na ndugu Salum Mustapha(mdai 1) yeye alikuwa shahidi wa Abdalah H. Magari na kwa kuwa yeye ndiye alikuwa na karatasi za manunuzi anaweza kuzalisha nyingine na kwa kuwa yeye yuko hai atasema ukweli kuwa kiwanja hicho ni ni cha Abdalah H. Magari na salum*

*Mustapha alikuwa ni shahidi tu wa mauziano si mmiliki wa kiwanja hicho kama anavyodai.*

*Pia tulipata maelezo ya mtoto wa marehemu A. Matekenya aitwaye Ashura Matekenya ambaye alieleza kuwa eneo hilo ni la Abdalah H. Magari na tayari maelezo hayo alishayatoa polisi, kwani wakati baba yake anatoa eneo hilo alikuepo na pia alionyesha mipaka ambayo ipo hadi leo na tayari mdaiwa alishaanza kujenga boma siku nyingi na eneo hilo halikuwa na mzozo wowote hadi hapo iliojitokeza kwa wadai (1) na (2) kuingia na kubomoa hilo boma...*

*pia baraza la serikali ya mtaa wa Modeco B la tarehe 31/7/2001 lilithibitisha kuwa kiwanja hicho ni cha mdaiwa plot no 3391/CH. Pia hati ya kulipia ardhi ya 12/3/1997 ilithibitisha bila kuacha shaka kuwa kiwanja hicho ni cha mdaiwa; kwani kwa namba ya sasa 1212/CH ni mpya na inaonekana imeingizwa mwezi wa 11 2012kwa jina la mdai (1)*
*Aidha mdai(1) ameshindwa kuonyesha kiwanja ambacho yeye binafsi alisimama kama shahidi namba wa mdaiwa, hivyo kuthibitisha kuwa alitumia njia zisizo halali kutaka kujimilikisha mali."*

All these facts were not given a glance by the trial court, leading to unjustified decision in favour of the 1st respondent. In essence, in the case at hand, the burden of proof was on the 1st respondent as the applicant. He was supposed to prove that, on balance of probabilities his case is true, that he is the real owner of the suit land. This means that, his evidence was to be good enough to satisfy the trial tribunal that, he bought the land from the 2nd respondent, Salum Mustapha Kunambi.

Furthermore, the 1st respondent had a duty to satisfy the tribunal that Mr. Mustapha had a good tittle over the suit land at the time of sale to him. With the discrepancies noted above, the title of his vendor was far from being proved. Therefore, it was not enough in my opinion to just rely on the sale agreement to decide against the appellant and in favour of the 1st respondent while the appellant had the reliable documentary too worth consideration.

In view of what I have outlined above, I find and hold that, the 1st respondent failed to prove his case at the trial tribunal, therefore it was wrong to decide in his favour. This appeal is therefore meritorious and it is hereby wholly allowed. The judgment and decree of the District Land and Housing Tribunal for Morogoro District are hereby quashed and set aside. The appellant is declared the lawful owner of the disputed land. Costs to follow the event.

**M. P. OPIYO,**

**JUDGE**

**15/3/2021**