IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 52 OF 2019

EPAPHRA GIBSON KESSY .... APPELLANT

VERSUS

SUDI ATHUMANI SUDI

JUMA DAUDI .... RESPONDENTS

GODFREY ERNEST ALILA

(Appeal from the decision of the District Land and Housing Tribunal for Temeke District at Temeke)

Dated the 27th day of February, 2019

in

Land Application No.256 of 2017

JUDGMENT

Date of Last Order: 16/07/2021 &
Date of Ruling: 13/08/2021

S.M. KALUNDE, J.:

The appellant, **Epaphra Gibson Kessy** was the applicant in **Land Application No. 265 of 2017 ("the application")** at the District Land and Housing Tribunal for Temeke District at Temeke **("the Tribunal")**. He instituted the application against the respondents S**udi Athumani Sudi, Juma Daudi** and **Godfrey Ernest Alila** (the 1st – 3rd respondents respectively).

The dispute originated from a piece of land situated at Butiama Street, Mtoni Kijichi within Temeke Municipality **("the suit land")**. The appellant claimed that by an agreement dated 23rd September, 2005 he bought from the 1st respondent a piece of land measuring 19 steps at the beginning, middle and the end. The suit land was purchased at an agreed purchase price of Tshs. 500,000.00 which was duly paid at the conclusion of the transaction.

Later, in 2015 the appellant noticed that people had invaded onto her land and were putting construction materials. The alleged intruders were allegedly instructed by the 2nd respondent. On noticing the trespassers, the appellant filed case No 182 of 2015 at the Kijichi Ward Tribunal. He lost the case and appealed to the Tribunal. The tribunal quashed the proceedings of the Kijichi Ward Tribunal for contravening the provisions of **the Ward Tribunal Act, Cap. 206 R.E. 2002**.

After the quashing of the proceeding and setting aside of the Judgment of the **Tribunal in Case No 182 of 2015**, the appellant filed Land Application No 256 of 2017. At the tribunal the appellant contended that the 2nd and 3rd respondent had trespassed into a piece of land lawfully owned by him having purchased it from the 1st respondent.

To be specific, the appellant herein (applicant at the tribunal) prayed for judgment and decree against the respondents (respondents the tribunal) as hereunder: -

(1) A declaration that the applicant is the rightful and lawful owner of the land in dispute;

(2) A declaration that the respondents are trespassers;

(3) A permanent injunction directing and ordering the respondents, their workmen, agents or any other persons claiming authority from the respondents to refrain from interfering with the peaceful enjoyment of the applicants premises;

(4) An order directing the respondents to pay the applicant Tshs 5,000,000/= being specific damages for loss of money for delay of using the landed property and development of the suit premises as itemized under paragraph (xii) of the application;

(5) Payment of Tshs. 15,000,000/= as general damages for trespass and cause insecure and not peaceful enjoyment of the suit premises for a long time;

(6) Costs of the proceedings be provided for; and

(7) Any other relief (s) the Honorable Tribunal shall deem proper.

The 1st respondent filed a written statement of defence denying the appellant's claims. His argument was that he was a lawful owner of the suit land before selling a portion of it to the appellant and the other portions to the 2nd and 3rd respondents. He admitted having sold a piece of land to the appellant but said he sold an area equivalent to 19 steps in

length by 19 steps is width. He thus claimed to have a valid title to pass to the 2nd and 3rd respondents. In the end he prayed the application be dismissed with costs.

On his part, the 2nd respondent filed his defence in which he claimed to have lawfully bought a portion of the suit land from the 1st respondent on 27th June 2015. He maintained that the 1st respondent had a good title to transfer to him. He prayed that the application be dismissed with costs.

The 3rd respondent filed his defence alleging that he was the lawful owner of a portion of the suit land having lawfully bought it from the 1st respondent. He claimed that his portion measured 3 foot in width and 35 foot in length. It was also pleaded that the appellant did not have any good title sufficient to sustain the grant of any of the reliefs sought. He claimed that the appellant allegations were baseless and unjustifiable and prayed for dismissal of the suit with costs.

On completion of filing of pleading the trial tribunal flamed two issues for determination: -

1. **Whether the applicant is the lawful owner of the suit land; and**
2. **To what Reliefs are the parties entitled to.**

Together with his oral testimony, the appellant **(PW1)** paraded two more witnesses, **Gasper Ngube (PW2)** and **James Paul Mrema (PW3).**

In his testimony in chief the appellant (PW.1), recounted that he purchased the suit land from the 1st respondent since 23rd September, 2005. He started that prior to selling the suit land the 1st respondent had sold him an area equivalent to ¾ acres. He went on to say that sometimes in 2015 the 1st respondent approached him and requested for Tshs. 500,000 as his son was sick. It was agreed that in return the 1st respondent was to offer him the suit land. An agreement was drafted and executed by the parties to witness the transactions. The sale agreement was admitted in evidence as Exhibit P.1. Later in 2015 when he went to fence the area, he was stopped by the ten-cell leader who claimed the area belonged to the 2nd & 3rd respondents.

In cross examination the appellant said the 1st respondent was like his father because he was the one who sold him the first ¾ acres. He admitted having drafted the sale agreement but denied that he drafted it in his favour. When cross-examined about the size he said that the area measured 19 peace at the beginning, middle and at the end. He also said after the transaction, marks were fixed at the instructions of the 1st respondent.

In his testimony in chief, **PW2** testified that, he was the one who drafted the sale agreement (Exh. P.1). He stated that the agreement was handwritten as the 1st respondent was in hurry to attend his sick son. In cross examination he said he was employed by the appellant as an Accountant and Auditor. He said he did not sign the agreement because he was the one who prepared it to be signed by parties. When cross-examined about the size he stated that the area measured 19 paces in the first, middle and end. He stated that there was no length as the length was pegged from the former land of the applicant.

On his part **PW3** sworn testimony was that he witnessed the execution of the sale agreement (Exh.P.1) between the appellant and the 1st respondent. He said that the 1st respondent sold the suit land to the appellant because his son was sick. When asked why his signature was on a photocopy and not original document. He said feared the original might be erased. In further Cross-examination he said he did not know the size of the suit land.

All the respondents testified in defence of their cases. In addition to their testimony one more witness was called the 1st, 2nd and 3rd respondents testified as DW.1, DW.2 and DW.4 respectively.

DW.1 confirmed that he sold a piece of land to the appellant. However, he said that the area sold to the appellant measured 19 paces is length and 19 paces in width. He said there was no written agreement to witness the transaction because he trusted the appellant as his son. He denied having signed as sale agreement. However, he said he signed the same at the appellant's house. In cross-examination he said he sold a piece of land to the appellant because his son was sick. He insisted that there was sale agreement drafted for the purchase of the land. He also said he know how to read and write. He admitted he signed a document but said the document he signed looked like a drawing, hence he did not know his contents. In re-examination he said the sale of land to the appellant was witnessed by the appellant's clerk. He said there was no agreement even when he sold the appellant the earlier half an acre.

DW2 argued that he purchased a portion of the suit land from the 1st respondent on 01st May, 2015. According to him the area measured 50 by 32 paces in width and length respectively. The sale agreement executed between DW.2 and DW.1 was tendered and admitted as Exhibit D.2. When cross examination he admitted Exh. D.2 did not show the other pieces of land which bordered his land. He denied having trespassed into the appellant's land. He also said he asked the ten-cell leader before purchasing his portion of the suit land.

When re-examined, he said Exh. D.2 was prepared by the 1st respondent. He said it was the ten-cell leader who confirmed ownership of the suit land.

When **DW3** took to the stand, he informed the tribunal that he was a ten-cell leader of Shina Namba 41, an area where the suit land is situated. He said the 1st respondent sold the suit land to the 2nd and 3rd respondent. In describing the area, he said that the sold portion was bordered by the respondent to the east, applicant to the West and South, and the 3rd respondent to the North. When cross examined, he admitted having seen Exh. P.1. He also stated that Exh. D1 did not show the neighbors to the land and the date when it was executed. He also said he did not remember when the transaction was concluded. When re-examined by the respondent's council he said Exh. P.1 was provided to him to show that the appellant had purchased a piece of land measuring 10 by paces. He also said the lack of dated on Exh. On d.1 did not invalidate the contract.

The 3rd respondent, testified as **DW4**. In his testimony he said he bought his portion of land from the 1st respondent on 27th June, 2015. He said that during the transaction the **"Mjumbe wa shina"** was present as well as other witness. In describing his area, he said the area measured 30 meters to the West and North and that it was 8.5 meters to the East

where he is adjacent to the 1st respondent and 20 meters to the South where it is adjacent to the appellants plot. The sole agreement between 1st respondent and 3rd respondent was admitted as Exh. D.2. He said that before buying the 1st respondent told him there was a dispute over the suit land up to the High Court where he non. He said during the transaction the 1st respondent showed him the appellants plot and pass way between the appellants land and his land.

In cross-examination he admitted that Exh. D.2 did specify the subject matter of the contract. He said the **Serikali ya Mtaa** confirmed that the 1st respondent owned the disputed land. He also claimed to have been shown documents witnessing that that the appellant lost a case over the property. He said he was not shown the marks of the appellants land but said he marked his own area. When re-examined he said that he got information on the suit land from the 1st respondent. He denied that he had trespassed into the appellant's land.

Having heard the testimonies of witnesses and evaluated the evidence tendered during the trial, the learned chairman of the tribunal reasoned that the appellant and 1st respondent were not certain of the size of land transacted through Exh. P.1. Having visited the *locus in quo*, the chairman was satisfied that, the area sold to the 2nd and 3rd respondents was not paid

of the land sold to the appellant. The tribunal concluded that the applicant's claims lacked merits. The application was dismissed.

The appellant was dissatisfied with the decision of the tribunal hence this appeal which is essence predicated on eight grounds as follows: -

(1) *That Honourable chairman erred in law and in fact when he held that the Appellant was not certain on the size of the land when he purchased the disputed land.*

(2) *That Honourable Chairman erred in law and in fact when he held that both Applicant and 1st Respondent entered into sale contract of the disputed land with different terms and mind. And also the Chairman erred in law and in fact when he held that sale agreements (Exhibit P1, D1 and D2) are with no value as they were not stamped with Stamp Duty.*

(3) *That Hon, chairman erred in law and in fact when he held that the version of the 1st Respondent seems to the more reliable than that of the appellant while the 1st Respondent used oral evidence without any documentary evidence.*

(4) *That Hon. Chairman erred in law and in fact when he stated that the disputed and is still intact and has never been trespassed by the three Respondents.*

(5) *That, Hon chairman erred in law and in fact when he stated that in accordance with sketch map the appellant's land is located at points ABCD which is measuring 10 by 10 footsteps and that the land at point CDEF*

does not form part of the land purchased by the appellant.

(6) *That Hon chairman erred in law and in fact when he failed to evaluate the Appellants evidence and relied on unreliable evidence of the Respondents for the reasons best known to himself.*

(7) *That Hon. Chairman erred in law and in fact when he did not mention and excluded the 2nd Respondent in the judgment.*

(8) *That Hon. Chairman erred in law and in fact when he refused the inspection of middle beacon and the last beacon fixed on the disputed land for reasons best known to himself.*

Hearing of the appeal was conducted through written submission. The appellant retained the legal service of **Mr. Samson Russumo** learned advocate in drafting and filing his written submissions. The respondents engaged learned counsel **Ibrahim Shineni** in drafting and filing their submission. All submission were dully filed in accordance with the schedule hence this decision. For convenience, I will not reproduce all the content of submissions. Suffice to note that the submissions have been duly considered.

Having gone through the records and submissions from both parties. I am of a settle view that, the trust of this appeal is whether or not there was sufficient evidence or record to warrant the trial tribunals finding that there was no meeting of annual between the appellant and firs Respondent

in relation to the size of land being sold. This being a first appeal, the appellant is entitled to have this court's own consideration and view of the evidence as a whole and its draw its own conclusion thereon. (See **Dinkerrai Remkrishnani Pandya vs. R** (1957) E.A 336).

In the case of **Peters v Sunday Post Limited** (1958) EA 424 **Sir Kenneth O'Connor, P.** of the then Court of Appeal for Eastern Africa after considering **Watt v Thomas** (1947) AC 484 stated as follows at page 429: -

> *"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellant court itself have come to a different conclusion".*

In his submissions Mr. Rusumo attacked the Chairman's conclusions on various fronts. However, as observed earlier, the core arguments revolve around the learned Chairman's conclusion that the appellant and the 1st respondent were not at one on the size of the area being sold. In responding the

fist isues, as to who is the rightful owner of the suit land the learned Chairman stated as follows: -

> *"Assessors who sat during the hearing have given their written opinions and they have unanimous opinions that the applicant did not understand the terms of the contract when he entered into the agreement with the 1st respondent because, by claiming that he purchased the piece of land measuring 19 footsteps at the beginning (mwanzo), 19 footsteps middle (katikati) and 19 footsteps at the end (mwisho) shows that the applicant do not know the length of the land he purchased. So the application has to be dismissed."*

The reasons advanced by the learned Chairman in answering the first issue in favor of the respondent was that, there was no way the 1st respondent would sale the piece of land by only measuring the width, without indicating the length. Specifically, the learned Chairman stated that: -

> *"I entirely agree with the unanimous opinions of assessors that the applicant was not certain on the size of the land which he purchased because in no way one can the sale the land by measuring only the width of the land. In any contract the certainty of the terms on the subject matter and the contract as whole are very important."*

The learned Chairman, then concluded that: -

"According to the testimonies of both, the applicant and the 1st respondent, the applicant and 1st respondent, were not in the certainty over the land of which size is applicant going to purchase and as a result both entered into the contract with different terms in mind; of which in practice, the version of the 1st respondent seems to be more reliable because it shows exactly the dimensions of the plot/piece of land which the 1st respondent sold; which is 19 by 19 footsteps."

By practice, here, the learned Chairperson, seemed to refer a system where land is described by stating the dimensions of the length and width. The above findings were, apparently, made on the basis of oral testimonies of the parties and findings made during the site visit. The learned Chairman had initially expunged, from the record, the sale agreements Exhibits P.1, D.1 and D.2.

Having, briefly, observed what transpired in the decision of the learned Chairman, I will now proceed to consider the merits of otherwise of the grounds of appeal. I propose to, firstly, address the complaint related to the handling of Exhibits P.1, D.1 and D.2, thereafter I will consider whether the remaining evidence was sufficient for the conclusions arrived at by the learned Chairman.

The complaint in the second ground of appeal is that the learned Chairman erred in concluding that Exhibits P.1, D.1 and D.2 had no evidential value as they were not stamped as required by **the Stamp Duty Act, Cap. 189 R.E. 2019**. Section 5 of **the Stamp Duty Act** (supra) provides a condition that every instrument specified in the Schedule to the Act executed in Tanzania Mainland or outside Tanzania Mainland, relates to any property in Tanzania Mainland or to any matter or thing to be performed or done in Mainland Tanzania, shall be chargeable with duty of the amount specified or calculated in the manner specified in that Schedule in relation to such instrument. In accordance with the schedule, agreements for sale or transfer of land are included as one the documents requiring to paid with stamp duty.

Further to that the Act, under section 47 (1), instructs that a document not stamped should not be admitted in evidence. The section reads:

> *"47.-(1)* ***No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon****, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped:"* [Emphasis mine]

To amplify the importance of section 47(1) of **the Stamp Duty Act** (supra), in **Zakaria Barie Bura vs Theresia John Muberu** [1995] TLR 211 the Court of Appeal did not mince words as shown hereunder: -

> *"The second reason why the appellant could not have obtained the title to the suit premises, even if the sale agreement had not been tainted with illegality, is the fact that neither document containing the agreement bears any indication of payment of stamp duty according to the Stamp Duty Act. By law, such omission renders the sale agreement inadmissible as evidence in court."* [Emphasis is added]

The same position was also held in the case of **Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd** (Civil Appeal No. 69 of 2014) [2019] TZCA where it was stated that:

> *"...that section instructs that no instrument chargeable with duty shall be admitted in evidence unless such instrument is duly stamped, except under conditions stipulated in clauses (a) to (e) thereof..."*

On the strength of the provisions of section 47 of **the Stamp Duty Act** (supra) and the above authorities I am satisfied that the learned Chairman properly excluded Exhibits P.1, D.1 and D.2. This complaint lacks merit.

Having expunged, Exhibits P.1, D.1 and D.2, the next question is whether the remaining evidence was sufficient to decide the case in favour of the respondents. I will do so by examining the substance of the 1st, 2nd, 3rd, 4th, 5th and 6th grounds together as they are closely related. Reading through the above-mentioned grounds, one would appreciate that, the main complaint is that the learned Chairman failed to properly evaluate the evidence before it hence erroneously arriving at to a conclusion that parties were not in agreement on the size of the land being transacted during the sale.

However, before I investigate the merit of the complaint, I think it is important to note that, parties agree that the 1st respondent had initially sold the piece of land to the appellant. There is also consensus that, after the initial sale, the 1st respondent sold another piece of land adjacent to the earlier sold land. DW1 admits having sold a piece of land to PW1, the appellant, at the cost of Tshs. 500,000 when his son was sick. Connected to that PW1, the appellant, also contended to have bought a piece of land from the 1st respondent. However, parties are at logger head on the size of land transacted in the subsequent sale.

In the circumstances, and as clearly stipulated in our laws particularly section 110 and 111 of **the Evidence Act, Cap. 20 R.E. 2019**. The plaintiff was duty bound to prove the

allegations. The burden placed on him was that of the balance of probabilities.

In his testimony, the appellant (PW1), maintained that he bought a piece of land measuring 19 paces in the beginning, middle and end. The 1st respondent argument is that parties agreed to sale a piece of land measuring 19 by 19 paces. The next question would be whose story is credible in the circumstances. While I agree that, it is indeed true that, parties did not categorically state the length of the area being sold. But that argument would only hold water if there was no understanding of the length of the area being sold. In accordance PW2, there was consensus that the 19 paces in the beginning, middle and end were to be calculated from the area initially sold to the appellant by the 1st respondent. That testimony is also substantiated by the tribunal's findings when it visited the site. In accordance with the notes taken by the tribunal during the site visit, it was concluded that points A – B; C – D; and E – F represented the 19 paces in the beginning, middle and end (the beginning being A – B; the middle being C – D; and the end being point E – F) the finding of the tribunal was that the two points measured 19 paces. As my be gleaned from the above explanation, the appellant seem to have calculated length of the plot being sold from point B through D to F. Admittedly, points A – C; C – E; and D – F were not measured.

Surprisingly, the notes taken by the tribunal during cite visit also confirms that the area identified by points A, B, C and D, measures 19 by 19 paces. This area is the one that the 1st respondent agrees to have sold to the appellant. It was the 1st respondent's argument that the area identified as C, D, E, and F was not sold to the appellant, that is why he proceeded to sale it to the 2nd and 3rd respondents.

After closely examining the records, I think this is a classic case of a failure of understanding or meeting of minds between the parties as to the subject matter of the contract. It is trite law that for contract to subsist there must exist a mutual agreement among all parties to a contract. Once there is no meeting of mind between the parties chances of future disputes are higher as each part would interpret the terms of the contract in their own ways.

The position of our law is very clear that in the absence of meeting of minds, a contract so formed is ***void ab initio***. Section 20 of **the Law of Contract Act, Cap. 345 R.E. 2019** provides that:

> ***"20.-(1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.***
>
> *(2) An erroneous opinion as to the value of the thing which forms the subject matter of*

the agreement is not to be deemed a mistake as to a matter of fact." [Emphasis mine]

In the case of **I.T.C LTD. VS. GEORGE JOSEPH FERNANDES & ANR. 1989 AIR 839**, the Supreme Court of India Considered the interpretation of section 20 of **the Indian Contract Act, 1872**, which is ***pari materia*** to section 20 of **the Law of Contract Act** (supra). The Court stated:

> *"Section 20 of the Indian Contract Act, 1872 provides that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The explanation to the section says that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.* ***Where the parties make a mutual mistake, misunderstanding each other and are at cross purposes, there is no real correspondence of offer and acceptance and the parties are not really consensus ad idem. There is thus no agreement at all; and the contract is also void.*** *A common mistake is there where both parties are mistaken about the same vital fact although both parties are ad idem, e.g. the subject-matter of the contract has already perished."* [Emphasis mine]

In the case of **BRIJ MOHAN & ORS. VS. SUGRA BEGUM & ORS. 1990 SCR (3) 413**, the India Supreme Court considered the importance of meeting of minds is a vital ingredient to establish the existence of a valid contract between the parties. The plaintiff had sued for specific performance of an oral contract. Having observed that there is no requirement of the law that an agreement or contract of sale of immovable property should only be in writing. The Court made the following observation

> *"However, in a case where the plaintiffs come forward to seek a decree for specific performance of the contract of sale of immovable property on the basis of an oral agreement alone, a heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for the sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and the circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for the sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently, would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement."*

Mindful of the above position of the law, I will revert back to the facts of the present case. As narrated above, the appellant maintains that he bought a piece of land measuring 19 paces in the beginning, middle and the end. Equally, the 1st respondent insists is that, parties agreed to sale a piece of land measuring 19 by 19 paces. Besides the appellants alleged witnesses, that is PW2 and PW3, there was no other evidence to substantiate the plaintiff's claims. For some reasons, the plaintiff erected to conclude the said arrangement without the involvement of the relevant local authorities as independent witnesses. As a result, I am satisfied that he failed to discharge his duty under sections 110 and 111 of **the Evidence Act** (supra).

In light of the above facts, it can be safely concluded that the there was no proper communication of offer and acceptance between the appellant and 1st respondent as regards to the remaining portion of the suit land. That said and done, I find the 1st, 2nd, 3rd, 4th, 5th and 6th wanting in merits. On the same note, I do not think there is any substance in the 7th and 8th grounds either.

As for the way forward, I think this is a different case altogether, as stated in **BRIJ MOHAN & ORS. VS. SUGRA BEGUM & ORS.** (Supra), whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and the circumstances of each

individual case. Circumstances, in the present case clearly points that, parties were at one on the initial area measuring 19 by 19 paces. The appellant paid Tshs. 500, 000.00 which were received and acknowledge by the 1st respondent. There cannot be said that parties did not transact with respect to that area. However, the agreement on the second part of the suit property is ***void ab intio*** for lack of **consensus ad idem**. The 1st respondent was therefore at liberty to deal with that portion in the manner he deems fit including disposing it to third parties, as he did to the 2nd and 3rd respondents.

For the reasons cited above, this appeal is wanting in merits. It is, consequently, dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this **13th** day of **AUGUST, 2021**.

S.M. KALUNDE

JUDGE