

My Copy

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

LAND APPEAL NO.221 OF 2020

(Originating from Mkuranga District Land and Housing Tribunal in Land Application No.16 of 2015)

FULGENCY B. KITIGWA.....APPELLANT

VERSUS

**KIPARANG'ANDA HANDCRAFT GROUP alias
KIKUNDI CHA SANAA MTENYU.....1ST RESPONDENT
VENANCE MIHURU.....2ND RESPONDENT
BEATUS LIKAUNGA.....3RD RESPONDENT
EDWARD VINTANI MTANOLE.....4TH RESPONDENT
MWASABULI ALLY KILUNGI.....5TH RESPONDENT
OIL LINK (T) LTD.....6TH RESPONDENT
GERALD JOSEPH @ JOSEPH JOSEPH.....7TH RESPONDENT**

Date of Last Order: 30.09.2021
Date of Ruling: 08.11.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by FULGENCY B. KITWIGA. He is appealing against the decision of Mkuranga District Land and Housing Tribunal at Ilala (the **Tribunal**) in Land Application No. 16 of 2015 (Hon. R. L. Chenya, Chairman).

At the Tribunal the appellant herein was claiming against the respondents for, among other things, declaration that he is the lawful

owner of an area measuring 5 acres located at Mtenyu area in Kiziko Village (the **suit land**). The 6th respondent raised a counterclaim that he is the lawful owner of the suit land. The application was dismissed for lack of merit and the 6th respondent was declared the lawful owner of the suit land in terms of the counterclaim. Being dissatisfied with the decision, the appellant preferred this appeal with five grounds of appeal reproduced hereunder:

- 1. That, the trial tribunal erred in law and fact in deciding in favour of the 6th respondent without considering the strong and clear evidence adduced by the appellant and his key witnesses which was supported by the 7th 2nd and 3^d respondents to prove the fact that the appellant is the lawful owner of suit land and proved the case at the required standard.*
- 2. That, the trial tribunal erred in law and fact by deciding in favour of the 6th respondent without considering the fact the evidence of the 6th respondent, his witnesses and admitted documents were weak and contradictory.*
- 3. That, the trial chairman erred in law and fact by holding that it was not proved how the 7th respondent was authorized to sell the suit land while the 7th and 2nd respondents proved that they were the remaining members of first respondent, they passed a resolution hence as per the 1st respondents constitution it was right for them to sell the disputed land to the appellant and the 7th respondent to sign the said sale agreement.*
- 4. That, the trial tribunal erred in law and fact by deciding in favour of the 6th respondent on basis of members minutes/resolution tendered while the*

number of the present members in the purported title of the resolution and the number of members who signed differs and contradict each other.

5. That, the trial tribunal erred in law and fact by deciding in favour of the 6th respondents who failed to prove his counter claim on required standard by the law.

The appeal proceeded by way of written submissions. Ms. Costancia Wilson, Advocate drew and filed submissions on behalf of the appellant. Mr. Benedict Pius, Advocate drew and filed submissions on behalf of the 4th, 5th and 6th respondents; while Ms. Filister Rugazia, Advocate drew and filed submissions on behalf of 1st, 2nd, 3rd and 7th respondents.

In arguing the appeal, Ms. Wilson argued in consolidation, the first and third grounds of appeal and then the second, fourth and fifth grounds together.

Submitting in respect of the first and third grounds of appeal, Ms. Wilson said that during the trial it was clearly proved by the appellant, the 2nd, 3rd and 7th respondents that the suit land is owned by the appellant. She said the Tribunal failed to consider the evidence adduced by the appellant which proved that he is the lawful owner of

the suit land. She said further that, this court being the first appellate court should re-evaluate the evidence adduced at the Tribunal and come out with its own findings. That at the Tribunal the appellant tendered **Exhibits D4** and **D6** and stated how he came into ownership of the suit land through the evidence of the 1st, 2nd, 3rd, and 7th respondents. She went on saying that the appellant showed how the 7th respondent was authorized to sell the suit land and tendered the documents in support thereof. She argued that according to the constitution of the group, when a member does not participate in three consecutive meetings, his membership ceases and is disqualified from the decision making of the group. That the remaining 8 members led by the 7th respondent were automatically qualified to dispose of the suit land to the appellant.

Submitting for the second, fourth and fifth grounds of appeal, Ms. Wilson said that the appellant proved his case by tendering evidence showing how he became the lawful owner of the suit land. That the respondent failed to prove what was alleged in the counterclaim. Counsel relied on section 100 and 110 of the Evidence Act, CAP 6 RE 2019 and the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113** where the Court held that the party whose evidence is

heavier than the other is the one who must win the case. She said the appellant's evidence was heavier than that of the respondents and prayed for the appeal to be allowed.

Ms. Rugazia submitted on behalf of the 1st, 2nd, and 7th respondents. On the first and third grounds of appeal, Counsel said that the records of the Tribunal clearly show that the suit land is lawfully owned by the appellant. She said the evidence by the appellant carries weight than that of the 4th, 5th and 6th respondents. Counsel insisted that this court, being the first appellate Court, must re-evaluate the evidence presented at the Tribunal so as to reach its own conclusion.

On the second, fourth and fifth grounds of appeal, Ms. Rugazia said that the evidence by the appellant was heavier than that of the 6th respondent. She said the 4th and 5th respondents were no longer members of the 1st respondent since they were disqualified according to the group's Constitution and the documents produced by them had no legitimacy. Counsel relied on the case of **Hemed Said** (supra) and section 110 of the Evidence Act. She prayed for the appeal to be allowed.

In reply to the first and third grounds of appeal, Mr. Pius submitted that the appellant failed to prove ownership of the suit land. He said the appellant had stated that he was given ownership by the Village Council but on 29/11/2016 when he was ordered to tender the document of ownership he failed to do so as reflected at page 14 of the Tribunal's typed proceedings. He said the appellant's failure to tender ownership document waived his rights to prove the same. He said even the 2nd, 3rd and 7th respondents failed to adduce strong evidence as to the ownership of the suit land by the appellant. That **Exhibits D4** and **D6** were considered by the Tribunal to the extent that the 2nd and 7th respondents did not have capacity to dispose the suit land. He insisted that **Exhibits D4** and **D6** do not prove that the appellant was the owner of the suit land. He said the Sale Agreement (**Exhibit D4**) was signed by the 2nd and 7th respondents who did not have the authority and consent from other members to dispose the suit land. That the 7th respondent failed to establish where the 8 members got authority to expel the other members from the organisation. That the minutes were manufactured to necessitate disposing the suit land. Counsel insisted that the evidence of the 7th respondent was weak.

On the second, fourth and fifth grounds of appeal, Counsel said that the appellant complained that the evidence by the 6th respondent was weak and contradictory, but she did not point out how the evidence was contradictory. He said that the 6th respondent proved that she purchased the suit land from the 1st respondent and the same was proved through **Exhibit D7** which is the Sale Agreement as well as the minutes of the meeting which resolved the disposition of the suit land to the 6th respondent. That the 6th respondent proved her counterclaim which the trial Chairperson considered. Counsel insisted that, the trial Chairperson considered the capacity of 4th, 5th and 6th respondents to sell the suit land as members who convened a meeting and passed a resolution to dispose the suit land. Counsel prayed for the appeal to be dismissed with costs.

In rejoinder, Ms. Wilson reiterated her main submissions.

I have gone through the proceedings at the Tribunal and the submissions by the parties. This being a first appellate court, I am guided by the principle that this court has a duty to reconsider and evaluate the evidence on the record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified. See

the cases of **Audiface Kibala v. Adili Elipenda & others, Civil Appeal No. 107 of 2012, (CAT-Tabora)** and **Maramo Slaa Hofu & others v. Republic, Criminal Appeal No. 246 of 2011 (CAT-Arusha)** (both unreported).

It is not in dispute that the 1st respondent is a group registered under Baraza la Sanaa la Taifa (**BASATA**) under Certificate of Registration No. BST/262 dated 25/05/1995. Further, it is not disputed that the original owner of the suit land is the 1st respondent. The issue in controversy is who, between the appellant and the 6th respondent acquired a better title from the 1st respondent.

It is on record that, the appellant and 6th respondent presented Sale Agreements at the Tribunal to corroborate what was testified by the witnesses orally during the hearing. It is convenient therefore to determine the validity of the Sale Agreements. In **Exhibit D4** the 2nd and 3rd respondent appear as the sellers on behalf of the 1st respondent. The said Sale Agreement is dated 15/03/2002 and the same has not been witnessed by the Village Authority but only a rubber stamp of the 1st respondent which is not supported by a signature. **Exhibit D6** is Confirmation of Sale (*"Uthibitisho wa kuuza*

Eneo la Shamba) by the Village Authority. Like in **Exhibit D4**, the sellers in **Exhibit D6** are the 2nd and 3rd respondents in their personal capacity and the sale has been witnessed by Village Executive Officer of Kiziko Village. In what seems to be an afterthought, the words WAUZAJI UONGOZI WA KIKUNDI CHA SANAA MTENYU has been written in an informal place as the seller's name, at the left top side of the said **Exhibit D6**. Therefore, **Exhibit D6** reflects that the 2nd and 3rd respondents are the sellers and so is KIKUNDI CHA SANAA MTENYU.

On the other hand, **Exhibit D7** is the Sale Agreement presented by the 6th respondent. The seller is KIKUNDI CHA SANAA KAZI ZA MIKONO KIPARANG'ANDA (the 1st respondent) and the buyer is the 6th respondent. The said Sale Agreement has been witnessed by the hamlet Chairman and has been confirmed by the office of the Village Executive Officer.

Now, what is the difference between the Sale Agreement by the appellant and by the 6th respondent. In the appellant's Sale Agreement, the 2nd and 3rd respondents appear as sellers whereas in the 6th respondent's Sale Agreement the seller is the 1st respondent;

KIKUNDI CHA SANAA ZA MIKONO KIPARANG'ANDA. It should be noted that, the parties are not disputing that the original owner of the suit land is the 1st respondent, therefore, the seller must be the 1st respondent. Further, in **Exhibit D6** there appears on top of it the words WAUZAJI UONGOZI WA KIKUNDI CHA SANAA MTENYU as the sellers. However, according to the Constitution of the 1st respondent and the Certificate of Registration from BASATA (**Exhibit D1 and D2**) the 1st respondent is recognised by the name of KIKUNDI CHA SANAA ZA MIKONO KIPARANG'ANDA **and not** KIKUNDI CHA SANAA MTENYU as it appears on appellant's Sale Agreement. Therefore, the 2nd and 3rd respondents and WAUZAJI UONGOZI WA KIKUNDI CHA SANAA MTENYU cannot be the sellers because KIKUNDI CHA SANAA ZA MIKONO KIPARANG'ANDA, the original owner of the suit land, had the sole mandate to dispose of the suit land and not any other entity. KIKUNDI CHA SANAA MTENYU is a non-existing entity and thus could not be the seller as alleged by the appellant, 2nd, 3rd and 7th respondents.

There is an allegation that the 2nd and 3rd respondents as Chairman and Secretary of the 1st respondent had the mandate to sell the suit land. However, in the meeting (see the minutes **Exhibit D3**) which


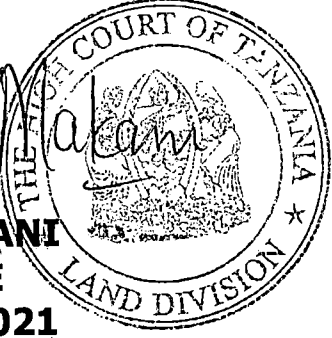
allegedly gave the mandate to the said 2nd and 3rd respondents had only 8 members in attendance. As pointed out by the Chairman of the Tribunal, the 2nd and 3rd respondents did not state why there were only 8 members as opposed to the 60 members of the group as reflected in the Constitution of the group (**Exhibit D1**); the number of the attendees was not even half of the members. Further the Minutes do not reflect that the other members had ceased to be members and only 8 members remained to enable them make decisions as per paragraph 5(1) of the Constitution. On the other hand, 35 members participated in the meeting that mandated the sale of the suit land to the 6th respondent (**Exhibit D8**). The decision of the sale to the 6th respondent was therefore by majority members. In that regard the sale between the 1st respondent and the 6th respondent is valid as it was supported by binding documents as explained hereinabove. Subsequently, I agree with the Chairman that the 1st respondent had title to pass to the 6th respondent in terms of the case of **Farah Mohamed vs. Fatuma Abdallah [1992] TLR 205** where it was stated:

"He who has no legal title to the land cannot pass good title over the same to another".

In this present case, it was only the 1st respondent who had good title over the suit land and so she had all the right to pass on the title to the 6th respondent. And vide **Exhibit D6** the 1st respondent lawfully sold the suit land to the 6th respondent hence the lawful owner of the suit land.

In that regard, I find no fault in the decision of the Tribunal. Subsequently, the appeal has no merit, and it is hereby dismissed with costs.

It is so ordered.



V.L. MAKANI
JUDGE
08/11/2021