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

LAND APPEAL 132 OF 2020

1. SEIF SALEHE MWANANGUKU
2. HADIJA SALEHE MWANANGUKU .... APPELLANTS

VERSUS

AMINA SEIF MWANANGUKU .... RESPONDENT

(Appeal form the decision of the District Housing and Land Tribunal for Morogoro District at Morogoro (Hon. M. Kassim, CM.))

dated the 13th day of August, 2020

in

Land Appeal No. 30 of 2020

JUDGMENT

Date of Last Order: 15/11/2021 &
Date of Judgement: 03/12/2021

S.M. KALUNDE, J.:

In this appeal the appellants, SEIF SALEHE MWANANGUKU and HADIJA SALEHE MWANANGUKU are aggrieved by the decision of the District Housing and Land Tribunal for Morogoro District at Morogoro ("the appellate tribunal") in **Land Appeal No. 30 of 2020**. The proceedings, judgment, and decree from this appeal arises from Mvomero Ward Tribunal ("the trial tribunal") in **Case No. 03 of**

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218. Before the trial tribunal the respondent had sued the appellants seeking to be declared a lawful owner of a piece of land measuring one (1) acres located at Dibamba Village, Mvomero District, Morogoro Region. ("suit property").

The basis of the respondents suit before the trial tribunal was an allegation that the appellants had invaded and cleared the suit property which she had legally bought from Salima Abdallah Gobwa. The said Salima Abdallah Gobwa inherited the property upon the demise of her son Vincent Gobwa. On their part the appellants contended that the suit property was part of the property of Salehe Seif Mwananguku, their father, who passed away in 1994.

After considering the rival positions, the trial tribunal view was that the respondent was the lawful owner of the suit property. In arriving at its decision, the trial tribunal was satisfied that prior to his demise the late Salehe Seif Mwananguku sold the suit property to Vincent Gobwa. In addition to that, the trial tribunal was convinced that available evidence was sufficient that the respondent had legally bought the suit property from Salima Abdallah Gobwa who inherited the same upon the demise of her son, Vincent Gobwa.

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Aggrieved by the decision of the trial tribunal, the appellants logged an appeal with the appellate tribunal. In their petition of appeal the appellants preferred four grounds of appeal namely: **one**, that the trial ward tribunal erred in in holding that the Respondent was the lawful owner of the disputed land without any reasonable justifiable grounds; **two**, that the trial ward tribunal erred in validating the non-existing sale agreement alleged to be entered in favour of the Respondent; **three**, that the trial ward tribunal erred in appreciating the poor and weak evidence tendered by the respondent and her witnesses; and **four**, that the trial ward tribunal erred in deciding the matter against the weight of evidence tendered.

Upon review of the available evidence and consideration of the submissions on the grounds of appeal the learned Chairman of the appellate tribunal was of the firm view that the trial tribunal correctly entered judgment in favour of the respondent. In arriving at the above conclusion, the trial tribunal was persuaded by the opinion of the two wise assessors who sat with him and opined in favour of the respondent. In his conclusion, the learned Chairman made a finding

that the respondent's evidence was weightier than that of the appellants. In the end, the learned Chairman found that, before the trial tribunal, the respondent proved her case on the balance of probabilities. The tribunal made the following orders:

> ***"(i) The ward tribunal decision is hereby upheld as per Section 35(1)(a) of the Land Disputes Courts Act No.2/ 2002.***
>
> ***(ii) The respondent is declared to be the lawful owner of the suit land comprising one (1) acre located at Mvomero Ward.***
>
> ***(iii) Appellants are permanently restrained from entering/ interfering with the disputed land in any manner whatsoever.***
>
> ***(iv) Costs to follow the event."***

The appellants were not happy with the decision of appellate tribunal, they have brought a second appeal and sets four (4) grounds of appeal, namely:

> *(1). That, the District Land and Housing Tribunal erred in holding that the Respondent was the*

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lawful owner of the disputed land without any reasonable justifiable grounds.

(2). *That, the District Land and Housing Tribunal erred in validating the non-existing sale agreement alleged to be entered in favour of the Respondent.*

(3). *That, the District Land and Housing Tribunal erred in appreciating the poor and weak evidence tendered by the respondent and her witnesses; and*

(4). *That, the District Land and Housing Tribunal erred in joining hands with an unfair decision delivered by the Ward Tribunal.*

Hearing of the appeal was conducted through written submissions. Unrepresented both parties filed their respective submissions in accordance with the schedule ordered by the Court and hence the present judgment.

In support of the first ground of appeal the appellants faulted the decision of trial and appellate tribunals for proceeding with the determination of the matter without joining the seller as a necessary party. To support their argument, they cited the case of **Juma**

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Kadala vs. Laurent Mnkande (1983) T.L.R. 103 where it was held inter alia that in any suit for recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant.

The appellants were brief in the second ground, the contended that, before the trial tribunal, neither the respondent nor her witnesses tendered a sale agreement signed by the respondent and the seller to demonstrate whether there was really an actual sale. Connected with that was the third ground where the appellants attacked the appellate tribunal decision for failing to properly evaluate the available evidence and arrive at an improper conclusion having relied on fabricated testimony. The appellants cited section 110 of **the Evidence Act, Cap. 6 R.E. 2019** for a contention that the respondent failed to prove her case before the trial tribunal. In the fourth ground, the appellants complained that the decision of the appellate tribunal was unjust and favored the respondent ignoring the appellants' evidence. Relying on what they considered to be **"interest of justice"** the appellants prayed that the appeal be allowed.

Submitting in reply, the respondent argued the first and second grounds jointly. Relying on section 110 of **the Evidence Act** (supra) she contended that, the appellate tribunal was satisfied that she was able to prove her case on the required standard of proof. To further bolster her argument, she cited the Court of Appeal decision in the case of **Bakari Mhando Swanga vs Mzee Mohamed Shelukindo & Others** (Civil Appeal No.389 of 2019) [2020] TZCA 28; (28 February 2020 TANZLII) where the Court (**Mziray J.A**) held that:

> *"It is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the Tanzania Evidence Act, Cap 6, R.E. 2002. It was therefore the duty of the appellant to prove the ownership of the suit land on a balance of probabilities.*

On the substance of evidence, the respondent contended that there was sufficient evidence that the suit property of Seif Mwananguku and upon his demise it was inherited by Salehe Seif Mwananguku. The respondent added that, through her testimony and that of Halima Seif Mwananguku, Salima Abdallah Gobwa and Omari Simoni Yona it was established that the late Salehe Seif Mwananguku, sold the said suit property before his demise in 1994

and that throughout the period the property has been in undisputed ownership of Vincent Gobwa and later Salima Abdallah Gobwa, before being sold to her in the year 2007. Relying on the consistency of testimony from the respondent witnesses the respondent argued that title to the property had passed to another person before the passing of the appellant's father. To support the view, she relied on the cases of **Africa Mwambogo vs. Republic** (1984) T.L.R. 240 and **Rashidi Shabani vs. Republic**, Criminal Appeal No. 310 of 2015 (Unreported) cited in **Pascal Sele vs Republic** (Crim Appeal No.23 of 2018) [2019] TZCA 18; (28 February 2019 TANZLII) where the Court of Appeal held *inter alia* that:

> *"In other words, in evaluating the testimony of a witness the Court may take into consideration all the circumstances of the case, such as whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts, the witness's interest in the trial and the witness's emotional and mental state"*

Relying on the above set of facts and authorities the respondent condensed that the decisions of the trial tribunal and that

of the appellate tribunal were proper as they both were based on the overwhelming testimony of the respondent.

On the question whether the decisions of the two lower tribunals were correct for failure to join the seller as a necessary party, the respondent argued that the point could not be argued at the present appeal as it was canvassed or decided upon by the first appellate tribunal.

Responding on the question of the sale agreement, the respondent argued that she was not cross-examined on why she did not tender the said document. Her view was that failure to cross examine on an important matter entailed acceptance of the matter. To indorse the position, she cited the case of **Khalidi Mlyuka vs Republic** (Criminal Appeal No.442 of 2019) [2021] TZCA 539; (29 September 2021 TANZLII).

In relation to a complaint that the appellate tribunal erred in joining hands with an unfair decision delivered by the trial tribunal, the respondent argued that the appellate tribunal arrived at a proper conclusion. In addition to that, the respondent submitted that, being a second appellate court, this Court cannot fault the concurrent

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findings of facts of the two lower tribunals unless there was a misapprehension of evidence or miscarriage of justice. Relying on the case of **Daniel Kivati Monyalu vs Republic** (Criminal Appeal No.224 of 2019) [2021] TZCA 561; (07 September 2021 TANZLII). The respondent concluded with an observation that in absence of proof of misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the tribunals below, this Court should desist from interference with the concurrent findings of fact of the wo Courts below. In totality the respondent was of the view that the appeal lacked merit and ought to be dismissed.

In rejoining the appellants were brief, they contended that, before the ward tribunal the respondent failed to establish existence of a sale agreement between their father, Salehe Seif Mwananguku and Vincent Gobwa; and the agreement between Salima Abdallah Gobwa and the respondent. Based on that argument, the appellants contended that the respondent failed to prove she was the lawful owner of the suit property. In bolstering the point, the appellant cited section 119 of Cap. 6 R.E. 2019.

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On the question whether the Court can interfere with the concurrent decisions of the two lower tribunals, the appellants contended that the decision of the lower tribunals were based on incorrect premises and failed to consider the fact that the appellant had failed to prove her case hence arriving at a wrong decision. Based on the above premise, the appellants implored that this Court could interfere with the concurrent findings of the two lower tribunals. They supported their argument by citing the case of **Ali Abdallah Rajan vs. Saada Abdallah Rajab and Others** (1994) T.L.R 132. In conclusion the appellant prayed that the appeal be granted in the interest of justice.

On my part, having carefully considered the grounds of complaint, the submissions made by both parties and examined the record before me, I wish to reiterate the settled principle of law which state that, in the second appellate court cannot entertain a new issue that was not canvassed or decided upon by the two lower courts/tribunals. This position was well stated in **Abdul Athuman v. Republic**, [2004] TLR 151; **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004; **Sadick Marwa Kisase v. Republic**,

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Criminal Appeal No. 83 of 2012; and **Yusuph Masalu @Jiduvi v. Republic**, Criminal Appeal No. 163 of 2017 (all unreported).

Mindful of the above position I will not entertain the first ground of appeal, in which the appellants faulted the decision of trial and appellate tribunals for proceeding with the determination of the matter without joining the seller as a necessary party, for lack of jurisdiction. I will therefore consider the second, third and fourth grounds.

I propose to approach the second, third and fourth grounds generally. I adopt that approach based on the consideration that the cumulative effect of the respective grounds is the determination of the prime question which is, as between the parties, who is the lawful owner of the suit property. I will approach this question while mindful of the established rule that a second appellate court would rarely interferes with the concurrent findings of facts by the two courts below. The established exception is that this Court may interfere with such finding if it is evident that the two courts below mis-apprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there

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have been misdirections or non-directions on the evidence. See **Felix s/o Kichele & Another v. Republic**, Criminal Appeal No 159 of 2005, CAT (unreported).

In the instant case, it is apparent from the records that the appellants have heavily challenged existence of a sale agreement between their late father, Salehe Seif Mwananguku and Vincent Gobwa. The basis of their claim is that the respondent failed to tender the said agreement and the two court below erred in relying on mere testimonies of respondents' witnesses. Having gone through the records, I am satisfied that this question is purely a question of evidence. Apparently, the two lower tribunals were of concurrent finding that the evidence from the respondent outweighed that of the appellants and they were satisfied that the late Salehe Seif Mwananguku sold the suit property to Vincent Gobwa before his demise.

In deliberating whether the respondent has proved the case on the balance of probability the first appellate tribunal assessed the relevant evidence from the respondents' witnesses. The first witness was **Fatuma Said Matupa** she recounted that the late Salehe Seif

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Mwananguku sold his property without informing her. Part of her testimony read as follows:

> *"Baba wa wadaiwa baada ya kupata urithi wake wa shamba aliamua kuuza shamba hilo bila hata mimi kunieleza nikiwa mi mdogo wa mama yake mzazi."*

In cross examination she said that she knew the farm had been sold upon being taken over by the new owners, who informed her that they bought the farm from Salehe Seif Mwananguku.

Fatuma Said Matupa's testimony was supported by **Halima Seif Mwananguku**, the sister to Salehe Seif Mwananguku and aunt to the appellants. She alluded upon the demise of their father in 1969, Salehe Seif Mwananguku inherited the suit property and later sold the same. On proof of sale agreement, the witness said that during that period transactions were conducted on trust and no need of a written agreement. **Salima Abdallah Gobwa** testified that the farm was sold to her son Vincent Gobwa who developed the property for over 30 years until the year 2007 when she decided to sale the property to the respondent. On his part **Omari Simon Yona**

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testified to have facilitated the transaction between Salehe Seif Mwananguku and Vincent Gobwa.

The defence case was built on the testimony of the appellants and two more witnesses, that is Mwajuma Ali and Ali Sahela. The first appellant, **Seif Salehe Mwananguku**, his testimony in chief was that the suit property was part of the properties listed as the estate of the late Salehe Seif Mwananguku which was read out in 1994 during the funeral. However, this fact was denied by **Mwajuma Al**i, the appellants mother. Her response during cross examination was as follows:

> **Swali: Je siku ya kumaliza msiba wa mumewako hili shamba lilitajwa?**
>
> **Jibu: Hapana ila walisema baba zao wapo.**

Literary translated, the question was whether the property was listed as part of the deceased estate. She respondent that the farm was not on the list of the assets of the deceased. The witness added that they divorced in 1993 and the records show that her husband passed away in 1994. However, in her testimony she did not provide any evidence to suggest that during the pendency of their marriage

the property had at any stage been owned or developed by her husband. The second appellant did not provide any substantive testimony besides confirming that she agreed with the first appellants' testimony.

The last defence witness was, **Ali Sahela**, he contended that upon the demise of Salehe, he was appointed the father of the family. However, he did not file an application to be appointed as the administrator of the estate of Salehe Seif Mwananguku. As a result, no list of the assets of the deceased was prepared or distributed among the heirs.

Relying on the above testimony the appellate tribunal was satisfied that the appellants had failed to tilt the balance of probabilities in their favour. Conversely, the appellate tribunal was content that the respondent's case was more credible and heavier than that of the appellants. The two tribunals below were stratified with the consistent story narrated by the respondents witnesses that the property having been acquired by Salehe Seif Mwananguku, was subsequently sold to Vincent Gobwa and later inherited by her mother, Salima Abdallah Gobwa. The later sold it to the respondent.

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The consistency in the respondents witnesses or any witness had something to do with their credibility.

As was stated in **Rashidi Shabani vs. Republic** (supra) in evaluating the testimony of a witness, the Court may take into consideration several circumstances including whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts, the witness's interest in the trial and the witness's emotional and mental state. The trial tribunal had the benefit of hearing, observing witnesses as well as gauging their credibility and found it apposite to believe the respondent's case. Similarly, the appellate tribunal, which had the benefit of sitting with two assessors both of whom concurred with the trial tribunal, made a concurrent finding of facts as to the testimony leading up to the present case.

On my part, having gone through the grounds, records, submissions and analyzed the evidence as pointed out above, I have found nothing to fault the finding of the first appellate tribunal with respect to the evidence of the respondent witnesses. I am convinced that there is no misapprehension of evidence or overlooking in

considering available evidence or drawing wrong conclusions from the facts, or any misdirection or non-directions on the evidence. given the circumstances of this case, the respondent sufficiently established her ownership over the suit property. That said, the second, third and fourth grounds must collectively fail.

In the result, I dismiss the appeal in its entirety. The respondent shall have costs.

It is so ordered.

DATED at **MOROGORO** this **03rd** day of **DECEMBER, 2021**.

S.M. KALUNDE

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