IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL No. 134 OF 2021

(Appeal from the decision of the District Land and Housing Tribunal for Kibaha in Land Application No. 12 of 2017)

FIDELIS NJAU.....1ST APPELLANT

MARIETHA NJAU.....2ND APPELLANT

VERSUS

HERMAN HAULE.....RESPONDENT

JUDGMENT

11/08/2022 & 21/09/2022

Masoud. J.

The appeal before hand emanates from the decision of the Kibaha District Land and Housing Tribunal (The trial Tribunal) in Land Application No. 12 of 2017. In that case, the respondent sued the appellants (herein) claiming to be the rightful owner of the Land in dispute.

Having heard the parties, the trial tribunal decided in favor of the respondent herein who was the applicant. Being aggrieved by the decision of the trial tribunal, the appellants decided to appeal before this court on the following four grounds;

1. *That the trial chairman did grossly error in law and facts for refusing to admit the sale agreement dated 31/12/2005 between the 1st appellant and Stevin Chiwalo over the suit land (land in dispute) well attached to the written statement of defense thus reaching an erroneous decision.*
2. *That the trial chairman did err in law and fact for disregarding the evidence and testimonies of the defense witness who witnessed the sale transaction over the suit on 31/12/2005as between the 1st Appellant and Stevin Chiwalo, thus reaching a wrong decision.*
3. *That the trial chairman erred in law and facts for failure to recognize and appreciate that the 1st appellant bought the suit land in 2005 from Stevin Chiwalo well prior the respondent's alleged purchase of 2007 thus reaching a wrong decision.*
4. *That the trial chairman did err in law and in facts for declaring the respondent as the lawful owner of the suit land while in fact 2007 when the respondent alleged to have purchased the suit land from Stevin Chiwalo had no title over the suit land to pass to the respondent as he had already sold the suit land to the 1st appellant.*

Based on the above grounds, the appellants asked the court to admit the sale agreement dated 31/12/2005 attached to the written statement of defense filed before the trial Tribunal, and proceed to allow the appeal.

The appeal was argued by way of filing written submissions. Both parties were represented. While the appellants were represented by Mr. Leonard T. Manyama, Advocate, the respondent was represented by Mr. Ambroce Nkwera. Submitting in support of the appeal, Mr. Manyama combined the 1st and 2nd grounds and argued them together. He likewise combined the 3rd and 4th grounds and argued them together.

Submitting on the 1st and 2nd grounds, Mr. Manyama said that before the trial Tribunal the 1st appellant herein testified that he is the lawful owner of the suit land. He said that he purchased the suit land from one, Stevin Chiwalo. He tendered the sale agreement he concluded with Mr Chiwalo on the 31/12/2005. Unfortunately, the sale agreement was, he argued, not recorded in the proceedings. He added that the 1st appellant's evidence was supported by DW2, DW3 and DW4 testimonies.

As regard to the 3rd and 4th grounds, Mr. Manyama was of the view that when Mr. Stevin Chiwalo was selling the disputed land to the respondent herein, in 2007, he had no title to pass. Thus, the said

transaction is void ab initial, and unenforceable, due to the fact that the 1st respondent was the first person to purchase the suit land from Stevin Chiwalo in 2005. Thus, the said respondent purchased the same almost two years after.

It was Mr. Nkwera's argument when replying on the 1st and 2nd grounds that, it is trite law that an exhibit must be admitted in court for it to form part of the records. It has in that respect to be first cleared for admission, before being admitted and read out aloud. He submitted that the sale agreement annexed in written statement of defense (WSD) without being tendered in evidence will remain to be a mere annexure, and the court is barred to act on it as elaborated by the trial Chairman.

To support his argument, Mr Nkwera referred to the case of **Robinson Mwanjisi and three others vs Republic [2003] TLR 218** where the court held that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

On the 3rd and 4th grounds, Mr. Nkwera submitted in reply that, what the respondent herein claimed before the trial Tribunal was the land

measuring one acre. However, the written statement of defense, and what was testified by the appellants herein (respondents in the trial tribunal) and their witnesses (i.e DW1, DW2, DW3 and DW4) concerned the land measuring two acres. The same is, it was submitted, distinct from what the respondent herein was claiming. It is common place that both parties to a suit cannot tie. Rather, one whose evidence is heavier than the other is the one who must win the case.

Thus, the evidence adduced by the respondent who was the applicant in the trial tribunal was heavier than that of the appellants herein who were the respondents in the trial tribunal. It is in that respect that the trial Chairman decided the matter in the favour of the respondent herein. To support his argument, Mr Nkwera, learned Advocate, cited the case of **Eliza M. Tibesigwa vs Hilalion Mukulusi Malisel (PC) Civil Appeal No.40 of 2020[2021] HC at Bukoba**.

Having gone through the parties' submissions, the main issue for determination is whether the appeal at hand has merit in view of the grounds raised by the appellants and argued by the counsel.

The record of the trial Tribunal shows that the sale agreement was not tendered as an exhibit. It is apparent at page 75 of the handwritten proceedings that when he was being cross examined by the counsel for

respondent herein (applicant in the trial tribunal), DW1 (1st appellant herein) conceded to the fact he did not tender his sale agreement in evidence. Accordingly, I am in agreement with Mr. Nkwera that a document which is not admitted in evidence cannot be treated as forming part of the record.

Therefore, the trial Chairman was right in disregarding the said sale agreement. I am in this finding fortified by the case of **Mhubiri Rogega Mongáteko vs Mak Medics LTD, Civil Appeal No. 106 of 2019, CAT at Dar es Salaam**. Henceforth, the 1st and the 2nd grounds are bound to fail for lack of merit.

Coming to the 3rd and the 4th grounds, the record of appeal reveals that, both parties claimed to have purchased the disputed land from one Steven Chiwalo (PW2). Unfortunately, the vendor denied to have sold the disputed land to the appellants herein. Of significance, PW2 testified that he sold the disputed land to the respondent herein as expressed in the exhibit P1. He testified further that he sold another piece of land to PW3 who is the neighbor to the suit land.

I am in agreement with the trial Tribunal's findings that the facts that the main witness (PW2) denied to have sold the disputed land to the appellants, the appellants failed to tender the sale agreement before the

trial Tribunal to prove that they actually purchased the disputed land from Steven Chiwalo, and the fact the appellants failed to call neighbors to the suit land to prove their possession over the suit land, renders the appellants claim and testimonies to lack legs to stand on. Thus, these two grounds lack merits too.

In the upshot, the appeal is without merit. I see no reasons of faulting the judgment and decree of the trial Tribunal. Thus, this appeal is accordingly dismissed with costs.

It is so ordered.

Dated at Dar es salaam this 21st day of September, 2022.

B.S. Masoud
Judge