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

LAND APPEAL NO. 196 OF 2019
(Arising from Ilala District Land and Housing Tribunal in Application No. 90 of 2010)

ADRIANO CHANJA.....APPELLANT

VERSUS

RENATHA TIGIYA.....1ST RESPONDENT
HAMU KOTEKI MWAKASOLA.....2ND RESPONDENT

Date of Last Order: 28.09.2022
Date of Judgment: 24.10.2022

JUDGMENT

V.L. MAKANI, J.

This is an appeal by ADRIANO CHANJA. He is appealing against the decision of Ilala District Land and Housing Tribunal at Ilala Boma (the **Tribunal**) in Land Application No. 90 of 2010 (Hon. Mgulambwa, Chairperson).

This matter was in this court for some time because records from the Tribunal could not be availed. On 02/08/2021 the Chairman of the Tribunal informed this court of the unavailability of the record and on 04/10/2021, the Chairperson, Mwendwa Mgulambwa, swore an affidavit that the record (file) of the Tribunal could not be traced. The court consulted the parties, who informed the court that they have

copies of the proceedings and the decision of the Tribunal that may assist in compilation of a duplicate file. This exercise was done and after satisfaction by the court and parties, it was agreed that the appeal may proceed on the basis of the duplicate file of the Tribunal created by and consented by the parties and the court and the parties were each availed with a set of the duplicate file.

At the Tribunal the decision was in favour of the 2nd respondent who was declared the lawful owner of the suit land which is located at Kisukuru in Segerea Ward, Ilala District, Dar es Salaam (the **suit land**). The appellant being dissatisfied with the decision of the Tribunal, has filed this appeal based on the following grounds of appeal:

1. *That the Honourable Chairperson of the District Land and Housing Tribunal erred in law and fact in not considering the evidence that Renatha Tigiya sold the land/property in issue to Hamu Koteki Mwakasola as her own property.*

2. *That the Chairman erred in law in not considering the evidence that Renatha Tigiya had no interest to pass over to Hamu Koteki Mwakasola.*

3. *The trial Chairman erred in law and fact in validating the transfer of the land in issue from Renatha Tigiya to Hamu Koteki Mwakasola while the said Hamu Koteki Mwakasola engaged a surveyor and registered the land in issue while he had already received*

information about the devoid/defect of the title of Renatha Tigiya vide a Demand Notice and a stop order from the local government authority.

4. *That the learned Chairman erred in law and fact in analysing the evidence on record and did not consider the fact that there is no evidence showing that the applicant issued a Power of Attorney to the 1st respondent to sell the said land.*

5. *The Trial Chairman erred in fact and law in declaring the 2nd respondent the lawful owner of the land in issue despite the illegality of the sale between him and the 1st respondent.*

6. *That the trial Chairman erred in law and failed all together to analyse the evidence on record and arrived at a wrong holding of granting ownership to the second respondent while the evidence for the respondent (Applicant at the lower Tribunal) was very contradictory.*

The appellant prayed for the appellant to be declared the lawful owner of the suit land and he be given vacant possession of the same. He prayed further for this court to quash and set aside the decision of M. Mgulambwa, Chairperson of the Tribunal with costs.

With leave of the court the appeal was argued by way of written submissions. Mr. Barnaba Luguwa filed submissions on behalf of the appellant. After a long history of the matter Mr. Luguwa argued the first and fourth grounds of appeal together. He said it is not in dispute that according to the evidence the appellant was not aware of the

transaction of sale of the suit land between the 1st respondent to the 2nd respondent until he came back to Dar es Salaam from Lindi.

Mr. Luguwa said the appellant had left the suit land to the 1st respondent for care taking but she sold it to the 2nd respondent without his consent. He further said, the issue that the suit land belonged to the 1st respondent and the 2nd respondent was not aware cannot be true from the evidence of the 2nd respondent himself and DW3 the Ten Cell leader. He said the fact is also clear from the **Annexures D1** and **D3** and further that the 1st respondent claimed that the appellant declined sale or refused the purchase price while she stated that the appellant's son came and approved the sale. He said the appellant expressly refused to sell the suit land and there was no evidence of approval by the appellant's son of the said sale. He said it is alleged that the true owner of the suit land was not known to the buyer until the demand notice was issued by his lawyer but he asked the question when did the said owner approve the contract? He prayed for these grounds to be allowed.

Mr. Luguwa argued the second, third, fourth and sixth grounds together. He said when the appellant was transferred to Lindi he left

the suit land under the care of the 1st respondent and allowed her to do gardening. He said the 1st respondent was therefore given licence to plant vegetables and other seasonal crops. He said the rule of law is that no one can confer a better title than what he has (*Nemo Dat Quod Habet*). So, the purchaser had a duty to check the title before the purchase. He relied on the book of **Megarry's Manual of the Law of Real Property, 6th Edition, Stevenson & Sons Limited, London, 1982.** He said the appellant is the only person who can convey title over the suit land as he has better title. He said the conduct of the appellant and the 1st respondent gave room to the 1st respondent to act in the detriment of the third party. He said this is due to the fact that the owner of the property did not allow her to sell and the seller concealed this fact from the owner of the property. He said if notified the owner would have halted the process as he was not interested in selling the suit land.

Mr. Luguwa invited the court to declare the 1st respondent a rogue who posed as if the suit land is hers and fraudulently sold it to the 2nd respondent. He said it was not proper for the Tribunal to punish the appellant to compensate the 2nd respondent while fully knowing that the appellant was equally defrauded by the 1st respondent. He said

the person who is supposed to suffer the consequences is the 1st respondent and he has a duty to pay compensation.

As for the fifth ground Mr. Luguwa said the appellant reported the matter to the local government and a demand notice was also served but despite this the 2nd respondent went ahead to process the Letter of Offer in respect of the suit land. He said the Tribunal ought to have considered the commitment of each party to the Sale Agreement and clause K to the Sale Agreement between the 1st and 2nd respondents was not considered. The said clause was to the effect that if there is any fraud by a party in the agreement then the aggrieved party ought to be compensated. Mr. Luguwa was of the view that the 1st respondent was supposed to compensate the 2nd respondent. He thus prayed for the appeal to be allowed and the appellant be declared the lawful owner of the suit land and the 2nd respondent to give vacant possession.

In submissions in reply, Mr. Moses Ambwindile, Advocate for the 2nd respondent stated that it should be noted that the 2nd respondent purchased the suit land without knowledge that the appellant was the owner because such facts were not disclosed to him throughout the

transaction until 30/12/2009 when he received the demand notice from the appellant to demolish the unfinished house and handover the suit plot to the appellant within 14 days. He said for 3 years the appellant was aware of the transaction and saw the developments on the suit land but remained silent until in 2009 when he came with the demand notice.

As for the first and fifth grounds of appeal, Mr. Ambwindile said they are misplaced because firstly the 2nd respondent believed the suit land belonged to the 1st respondent and that was before third parties/witnesses including a Ten Cell leader who also testified at the Tribunal. He said the 2nd respondent in his testimony said that at the time of the transaction the 1st respondent did not inform him that the land belonged to the appellant and Mr. Ambwindile continued to submit further that the 1st respondent went on further to testify that the 1st respondent testified that she was told by the appellant to sell the suit plot on his behalf and it was not the first time to do so, but the appellant refused to receive the balance amount and that is where the problem started. He said the 1st respondent was not cross examined on this point and failure to do so is tantamount to admission of the fact. He relied on the case of **Tom Morio vs. Athumani**

Hassan (suing as the aDaministrator of the Estate of the late Hassan Mohamed Siara & 2 Others, Civil Appeal No. 179 of 2019 (CAT-Arusha) (unreported). He thus concluded that the appellant admitted that the he trusted and allowed the 1st respondent to sell the suit land on his behalf. He said impliedly the 1st respondent sold the suit land as an agent.

Secondly, Mr. Ambwindile observed that when the appellant was left the suit land to the 1st respondent, he did not inform anybody including the local leaders and that is the reason it was easy for everyone to believe that the suit land belonged to the 1st respondent. Based on this he prayed the court to disregard the grounds that the Chairperson did not consider the evidence by the 1st respondent, because the Chairperson considered the evidence that is why she came up with the findings that the 2nd respondent was a bonafide purchaser and I pray that the court hold as such on the basis that the 2nd respondent had no notie in any manner about the fact that the 1st respondent was not the owner of the suit land. Mr. Ambwindile said the argument that the Tribunal did not consider and analyse that the 1st respondent did not have power of attorney is weak because the issue was not raised. He said the issue of the agent and principal was

well stated in the Written Statements of Defence of the 1st and 2nd respondents but there was no reply by the appellant and this issue was also not raised in the course of the trial. He said once an agreement for agency has been made either expressly or by conduct there is no need of power of attorney.

As for the second, third, fourth and sixth grounds, Mr. Ambwindile said submissions by Counsel by the appellant do not change that the 2nd respondent is a bonafide purchaser for value. He said according to **DW1** and **DW2** the appellant was aware with what was going on the suit land since 2006 but waited without taking action until when he saw the suit land was well developed and occupied. As for clause K and J in the Sale Agreement between the 1st and 2nd respondents, Mr. Ambwindile argued that the said clauses were options and not compulsory and all in all the same could have been acted upon if the defect would have been communicated to the respondent shortly after concluding the transaction. He said since the defects came to the knowledge of the 2nd respondent after 3 years and after development of the suit land then the said clauses have been overtaken by events. He prayed for the court to see that the 2nd respondent is a bonafide purchaser who deserve protection by all

means and uphold the judgment by the Tribunal and dismiss this appeal with costs.

In rejoinder, Mr. Luguwa reiterated what he stated in the main submissions. He further emphasized that, the sale transaction came to the knowledge of the appellant when he came back from Lindi on 14/11/2009 and in 30/12/2009 he served the 2nd respondent with a demand notice. He said the delay in knowledge of who was the purchaser was caused by the 1st respondent who was not willing to give the name of the purchaser. He said the issue that the appellant was aware of the sale transaction but remained silent is not supported by evidence. He distinguished the case of the **Tom Mario** (supra) that in the cited case the bonafide purchaser had no notice actual or imputed; but in the present case the respondents stated that the were informed of the coming into the land of the appellant soon after the execution of the Sale Agreement in 2006. As for agency, Mr. Luguwa said if there was any agency then it ought to be official and since there was concealment of the transaction there was no issue of payment of balance as the appellant was not aware of the transaction. He said there was no agency expressly or by conduct. He prayed for the appeal to be allowed.

Having heard the parties, the main issue for consideration is whether this appeal has merit. I will consider the grounds of appeal generally as they all revolve around the analysis of the evidence by the Tribunal.

It is not disputed that the suit land initially belonged to the appellant. It is also not in dispute that the 1st respondent sold the said suit land to the 2nd respondent. It is also not in dispute that the 1st respondent had sold other plots of land on behalf of the appellant without a problem hence she acted as his agent. It is also not disputed that the 2nd respondent was not aware that the suit property belonged to the appellant. The only problem with the suit land is that it is alleged to have been sold to the 2nd respondent without the consent of the appellant.

I have gone through the proceedings, the 1st respondent's claim and her evidence was not very controverted on cross-examination that she sold the said suit land on behalf of the appellant but she did not give the appellant the whole amount of TZS 1,800,000/= but she instead gave him TZS 1,500,000/= which the appellant was not ready to accept. In her evidence the 1st respondent was even willing to pay

back the sale amount. The appellant in his evidence admits that indeed he allowed the 1st respondent to sell his other plots on his but there was no consent from him in respect of the suit land. With the evidence on record, it is apparent there was an agent/principal relationship between the appellant and the 1st respondent because it is not disputed that the 1st respondent initially sold two plots of land on behalf of the appellant. The controversy is that it is not clear whether the 1st respondent was allowed to sell the last plot which is subject of this appeal. The consent from the appellant as regards the sale is vague because there was a mention of the appellant's son Mandi where it is allegedly claimed he gave a go ahead to the 1st respondent to proceed as he did to the other plots, but unfortunately, he was not called as a witness. Even Mr. Luguwa agreed that the conduct of the appellant and the 1st respondent gave room for the 1st respondent to act in the detriment of the third party. But this controversy though, does not remove the fact that the 1st respondent was an agent, and the appellant was the principal.

Mr. Luguwa stresses that since there was no consent from the appellant title did not pass to the 1st respondent for her to sell to the 2nd respondent. As I have said hereinabove, the consent is shrouded

with ambiguity. However, the 1st respondent declared that she never informed the 2nd respondent that the suit land belonged to the appellant, but she represented herself as the owner of the suit land which was not the case. This shows that there was misrepresentation on the part of the 1st respondent because it is clear from the evidence of the 2nd respondent that he did not know and he did not have to believe otherwise that the suit land did not belong to the 1st respondent as he was even cleared by the local leaders, and the Ten Cell leader (**DW2**) testified in the affirmative that the suit land belonged to the 1st respondent.

Now, with this picture who is the lawful owner of the suit land? The Chairperson decided that the 2nd respondent was the lawful owner as a the bonafide purchaser of the suit land. The concept of a bonafide purchaser was clearly elaborated in the case of **Suzana S. Waryoba vs. Shija Dalawa, Civil Appeal No. 44 of 2017 (CAT-Mwanza)** (unreported), where the Court of Appeal agreed with the definition of a bonafide purchaser that was quoted by the High Court from Black's Law Dictionary which stated:

> *A purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell and*

without any suspicious circumstances to put him on inquiry."

The Court of Appeal further agreed with the High Court on the definition of bonafide purchaser by Oxford Scholarship Online as follows:

> *A bonafide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property. "*

In making it clearer as to who is a bonafide purchaser, the Court of Appeal cited the case of **Stanley Kalama Masiki vs. Chihiyo Kuisia vs. Nderingo Ngomuo [1981] TLR 143**, at page 144 (holding viii) where it was held that a bonafide purchaser for value was entitled to a declaration that he was the lawful owner of the suit plot.

In the present case, as said above, the 2nd respondent was not aware that the land was not the 1st respondent's property. And he was comfortable because the local leaders also confirmed to him that the owner of the suit land was the 1st respondent. **DW2** who is a Ten Cell

leader testified that the suit land belonged to the 1st respondent and further the testimony by the 1st respondent also reflected that the 2nd respondent was not aware that the suit land was not the property of the 1st respondent as she did not want to tell the 2nd respondent anything as he had paid all the purchase price. It is therefore clear, that the 2nd respondent was not aware of the existence of the appellant as such he was an innocent purchaser, and he purchased the said suit land in good faith believing it to be the property of the 1st respondent. I therefore I agree with the Chairperson that the 2nd respondent is a bonafide purchaser of value and I hold as such.

Now what is the remedy available for a bonafide purchaser? In the case of **Stanley Kalama Masiki** (supra) the Court held:

> *"where an innocent purchaser for value has gone into occupation and effected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims."*

In this case the evidence is clear that the 2nd respondent has constructed a house and conducted a survey and has been developing the suit land from 2006. The 2nd respondent has even processed a Letter of Offer (**Exhibit D4**). In terms of the case of **Stanley Kalama Masiki** (supra), I hesitate to disturb the 2nd respondent

because as a bonafide purchaser the claims by the appellant against him cannot stand and they are hereby dismissed.

On the other hand, bonafide purchasers are protected by the law by virtue of section 135 of the Land Act. The protection accrues upon registration and the transfer of the property in question to the bonafide purchaser. The 2nd respondent has duly testified that he has been registered as the owner of the suit property by virtue of the Letter of Offer (**Exhibit D4**) (see the case **Moshi Electrical Light Co. Limited & 2 Others vs. Equity Bank & Others, Land Case No. 55 of 2015 (HC- Mwanza Registry)** (unreported). As reasoned by the Chairperson, the 2nd respondent, is under the law, the rightful owner of the suit property.

The Chairperson gave an alternative relief that the appellant and the 1st respondent may contribute equally and compensate the 2nd respondent to the exhaustive improvements made therein so that he can vacate the suit land. The Chairperson also ordered for the 1st respondent to pay back the purchase amount to the appellant. But in my considered view, after declaring the 2nd respondent as the lawful owner by virtue of being a bonafide purchaser then the alternative

orders are uncalled for because they were not among the prayers by the appellant in his application at the Tribunal. If the appellant and 1st respondent would wish to contribute and compensate the 2nd respondent for the exhaustive improvements incurred, then that would be private arrangement between the parties and in my view would not require an order of the court because as already decided the 2nd respondent is the owner of the suit land and there was no alternative prayer for these reliefs.

In view of the above, this appeal is hereby dismissed with costs. The decision of the Tribunal is upheld to the extent that the 2nd respondent is the lawful owner of the suit land.

It is so ordered.

THE HIGH COURT OF TANZANIA
LAND DIVISION

V.L. MAKANI
JUDGE
24/10/2022