IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 126 OF 2021

(Originating from the judgment of the District Land and Housing Tribunal for Temeke in Application No. 337 of 2019 delivered by Hon. P.I Chinyele on 28/9/2021)

MWANAHAMISI NGOZI ..... 1ST APPELLANT

HASSAN RAMADHAN ALLY ..... 2ND APPELLANT

(Both being Administrators of the estate of the late

MAULID RAMADHANI ALLY)

VERSUS

LUKAS PETER KASALA..... RESPONDENT

JUDGMENT

20/4/2022 & 29/4/2022

A. MSAFIRI, J

The brief background of this appeal is that the now respondent Lukas Peter Kasala, instituted an application No. 337 of 2019 before the District Land and Housing Tribunal for Temeke District at Temeke (herein as the District Tribunal) against the now appellants in their capacity as administrators of the estate of the late Maulid Ramadhani Ally.

In the said application, the respondent was claiming that, he entered into a sale agreement with the late Maulid Ramadhani Ally where he agreed to sell him his piece of land (suit land or land in dispute) for a consideration of TZS 3,000,000/- only. It was agreed that the purchase price will be paid into two instalments i.e. TZS 2,000,000/- at the time of

signing the agreement and the remaining TZS 1,000,000 to be paid within one month which was to be on or before 24/03/2014.

The respondent claimed that, the late Maulid Ramadhani Ally failed to honour the promise of paying the agreed remaining purchase price of TZS 1,000,000/-. That, after the death of Maulid Ramadhan Ally, the appellants (then respondents) as administrators of the deceased estate, processed for the distribution of the deceased estate and included the land in dispute as part of the deceased estate. He averred that, it was wrong to include the land in dispute as part of the deceased estate because the deceased breached the sale contract and hence he was not the owner of the said land.

After the hearing, the District Tribunal decided in favour of the respondent and declared him the lawful owner of the land in dispute. Aggrieved, the appellants has lodged this appeal advancing a total of eight grounds of appeal, which I need not reproduce them herein. They pray for the judgment and decree that; the judgment of the District Tribunal be quashed and dismissed, the declaration that the late Maulid Ramadhani ally is the lawful owner of the disputed farm, damages to the tune of TZS 50,000,000/- to be paid to the 2nd appellant, costs and any other reliefs.

The hearing of the appeal was by way of written submissions whereby the appellants were represented by Samson Rusumo, learned advocate while the respondent had the service of Mr. Mulamuzi Byabusha, learned advocate. I have read the written submissions by parties in support of the appeal and against it. I have considered them in determination of

this appeal. I have also gone through the District Tribunal records. The major issue is whether the appeal is tenable.

Determining this issue, I have gone through the eight grounds of appeal and I believe they are interrelated. I say so because, grounds of appeal No. 2 and 3 are on the issue of unreliable and contradictory evidence which was purportedly adduced by the applicant and his witnesses before the District Tribunal. Grounds of appeal No. 4, and 5 are on the contents of the purported sale agreement between the respondent and the late Maulid Ramadhani. The contents of grounds No. 6, 7 and 8 are on the issue of ownership of the disputed Plot and particularly who is the lawful owner of the same. It is only ground No.1 which can stand separately.

Beginning with determination of grounds of appeal No. 2 and 3, the appellant stated that, the trial Chairperson erred when she admitted unreliable oral evidence of PW1 and PW2 without evaluating the weight of the evidence. Also, that, the trial Chairperson erred when she relied on contradictory evidence of PW2.

In his submission, Mr. Rusumo stated that, PW2 said that the disputed farm is of size of 3 acres while PW1 said that the size was 3 $^{1}/_{4}$ acres and added that the evidence of PW1 and PW2 were mere unreliable oral evidence. Mr. Byabusha responded that PW1 was the rightful owner of the suit land so he had correct information on the specification of the plot in dispute.

In have gone through the evidence of both PW1 and PW2 adduced during the hearing at the trial Tribunal.

About the size of the land in dispute, I am not convinced that it is of utmost importance and it goes to the root of the case. What is in dispute here is who is the lawful owner of the land in dispute between the respondent and the late Maulid Ally. The size of the land in dispute has never been contested between the parties.

It is true that during the trial, PW1 Lucas Peter Kasala (now the respondent) said that the size of the piece of land in dispute was 3 and $^1/_4$ acres, while PW2 James Emmanel Ngasa said the size was about 3 acres. PW2 was a Street Chairman who witnesses the sale agreement. He said that he never went to see the land in dispute as the sale was done at the Street Government Office. So he never saw nor knew the land in dispute. The size he named was an approximation not the exactly size.

However, PW1 knew the land in dispute so he was certain that the size was 3 and $^1/_4$ acres. This corroborated the evidence of DW1 who also said the land in dispute was sized at 3 and $^1/_4$ acres. As the size of the land was not in dispute, I will disregard this ground No. 2 of the appeal.

On the issue of the trial Chairperson relying on unreliable oral evidence of PW1 and PW2, as said earlier, PW1 stated that he sold a piece of land to the late Maulid Ally at a purchase price of TZS 3,000,000/- . That Maulid paid only TZS. 2,000,000/- and he did not pay the remaining balance of TZS 1,000,000/- so he breached the sale contract. That, as per their agreement, Maulid was supposed to pay the remaining balance

within one month. PW1 told the District Tribunal that he has neither original copy of the sale contract nor the photocopy as Maulid Ally went with the only copy available and he never photocopied it.
The evidence of PW1 was similar to the one of PW2 who as said earlier, was the Street Chairman who witnessed the sale.

I agree that the evidence of PW1 and PW2 was verbal one and there was no supporting document. This is because, PW1 admitted that, he has no document to prove his claims. He said that there was only one copy of the sale contract which the late Maulid Ally took. Did the trial Chairperson err when he relied on mere oral evidence of PW1 and PW2? Before answering this important question first I will have to determine grounds of appeal No. 4 and 5.

These grounds of appeal shows that there was a contract (a written one) between the late Maulid Ally and the respondent. In those grounds, the appellants are claiming that, the trial Chairperson contradicted herself by talking about the contract while there is no clause in the same which stated about payment of debt within one month.

During the trial, as observed, the applicant admitted that there was a written contract which was entered between the two parties. However, he had no copy of that contract. This was supported by the evidence of PW2, the witness to the contract.

When he was filing their defence, the 2nd appellant (then the respondent) as DW1 attached a photocopy of contract of sale. He stated that he was told by the late Maulid that he had bought a piece of

land from the now respondent. That Maulid told him that he still owed the respondent TZS 1,000,000/-. That, he and other relatives of the late Maulid attempted to pay the respondent that amount of TZS 1,000,000/- but he refused.

When he was being examined by the counsel for the applicant about the photocopy of the sale contract attached in their Written Statement of Defence, DW1 replied that, he don't know anything about the attached document.

When composing and delivering the judgment, at page 16 of the said impugned judgment, it is obvious that the trial Chairperson based his findings on the said contract of sale. He stated as follows;

> ***"Hivyo basi kwa muktadha huo ingawa hakuna kipengele chochote kwenye Mkataba wa mauziano kuhusu ahadi ya kukamilisha deni hilo ndani ya mwezi mmoja, pande zote mbili zimeridhia uwepo wa deni hilo ....."***

The trial Chairperson went on to find that;

> ***"Hivyo basi kwa kuwa Mkataba ulifanyika na pande zote mbili walikuwa na jukumu la kutekeleza Mkataba huo, basi kushindwa kwa Maulid Ramadhan Ally kulipa kiasi hicho kwa muda waliokubaliana kwa maneno kumepelekea kuvunjika kwa Mkataba huo".***

According to the analysis and findings of the trial Chairperson, there were two agreements, the written one and oral one. This is derived from the Chairperson's own words that there is a sale contract which has no clause which shows that the payment made was TZS 2,000,000/- and there was a promise to pay the remaining balance of TZS 1,000,000/-. Rather, according to the Chairperson, that promise was made orally and it was binding on both parties.

Failure to perform that oral promise, it amounted to breach of contract on part of the late Maulid Ally, so the ownership of Land in dispute had not shifted from the respondent to Maulid Ally. On that findings, the trial Chairperson declared the respondent the lawful owner of the land in dispute.

As the trial Chairperson on his findings relied on the photocopy of the sale contract which was attached as annexure in the Written Statement of Defence of the respondents, I had to look at the same to satisfy myself on the contents of the said sale contract. It shows that Lukas Peter Kasala sold a piece of his land to Maulid Ramadhani Ally, for a price of TZS 3,000,000/-. The document read/stated that, the sale has been witnessed and confirmed by the Government Street leaders and it is legal. **The document showed that, the sale proves that Maulid Ramadhani Ally is the lawful owner.**

So, by the contents of the written Contract of Sale, the lawful owner of the land in dispute is/was late Maulid Ramadhan Ally.

As said earlier, the findings of the trial Chairperson envisaged that there was oral contract along side the written contract. However, it is my view that, in the circumstance that there is a written contract, the oral contract which vary with the contents of the written one cannot be accepted or admitted. Since the parties to the contract did not comprise their oral agreement into their written contract, then the court cannot rely upon oral agreement as the same vary with the contents of the written contract. The trial Chairperson said that the late Maulid Ally breached the contract, however, the written Contract declared the late Maulid Ally the lawful owner of the land in dispute having bought it at the price of TZS 3,000,000/-.

In the case of Dr. A. Nkini & Associated Ltd vs. National Housing Corporation, Civil Appeal No. 72 of 2015 which was determined in 2021, the Court of Appeal was of the view that, if the terms of an agreement are written, then oral evidence suggesting variation of such terms may not be acceptable. This position is also laid down under the provisions of section 100 (1) of the Evidence Act, Cap 6 R.E. 2019.

Going back to grounds of appeal No. 4 and 5, I agree that the trial Chairperson erred both in law and fact when he relied on the contract of sale which has no terms that the payment was to be done in instalment. There was no any terms or clause which showed that the late Maulid Ally paid only TZS 2,000,000 out of TZS 3,000,000/- and promised to pay the remaining balance in one month.

Then, this also answer in affirmative the question whether the trial Chairperson erred when he relied on mere oral evidence. In the presence of a written contract, the trial Chairperson would have considered and base his findings and decision on the said document.

The oral evidence was a mere words of PW1 and PW2, in absence of the person who was a party to the contract who is a deceased. But, the written agreement was stronger evidence and the same was not disputed by the respondent. Hence, on the above analysis, I find the grounds of appeal No. 3, 4, and 5 to have merit and I allow them.

The grounds of appeal No. 6, 7 and 8, raised the issue of whether the trial Tribunal was right to declare the respondent the lawful owner of the land in dispute and that it could not be included in the list of the properties of the late Maulid Ally.

In his submission, counsel for the appellants argued that, the land in dispute belonged to the late Maulid Ally and that, just because Maulid Ally failed to pay the balance of TZS. 1,000,000/- does not give ownership of the said land to the appellant. He said that, the respondent should claim compensation for breach of contract and not the ownership of land.

In response, counsel for the respondent argued back that the respondent has a right to claim back the land in dispute since the title did not pass successfully to the deceased as he breached the contract.

This need not take much of my time since I have already analyzed the available evidence pertaining to the purported contract of sale between Alle.

the respondent and the late Maulid Ally. Basing on that analysis and the contents of the purported contract of sale, it is my finding that the title passed successfully to the deceased. The deceased was the owner of the land in dispute which he bought from the respondent and used it for about two years until his death. The contents of that contract of sale by itself gave ownership of the land to the deceased. Therefore, it was just and proper to include the disputed land in the list of assets or properties of the deceased. Basing on that, I also allow the 7th and 8th grounds of appeal. I will not further discuss the contents of the 1st ground of appeal as the issues raised therein has already been determined while I was deliberating on other grounds of appeal.

Before going further, I would like to address a serious point of law which have been raised by the counsel for the appellant pertaining the jurisdiction of the District Tribunal which heard and determined this matter at trial level.

The counsel is alleging that, the Hon. Chairperson had no jurisdiction to entertain this matter as it is a pure contractual case/commercial case. That the jurisdiction of the District Tribunal vests in the land disputes only.

In this, with respect, I don't agree with the counsel of the appellants' views. This is simply because the matter before the District Tribunal was land matter. The applicant was seeking among other things, to be declared a lawful owner of a piece of land in dispute. He claimed there was a breach of contract because there was a sale agreement between the two parties. The existence of a contract of sale of the land does not

make a matter a commercial dispute. Therefore, I agree with the submissions by the counsel for the respondent that, the dispute was under the jurisdiction of the District Tribunal as per Section 33 of the Land Disputes Courts Act Cap 216 R.E 2019.

Having said that, for the reasons given in my determination on the grounds of appeal, I differ with the findings and the decision of the Hon. trial Chairperson in Land Application No. 337 of 2019 by which the judgment was delivered on 28th September, 2021.

Therefore, I hereby quash and set aside the decision, judgment and decree of the District Tribunal herein above stated. I also declare that the late Maulid Ramadhani Ally is the lawful owner of the land in dispute. The costs of this case to be borne by the respondent.

Appeal is allowed.

It is so ordered.

Date at Dar es Salaam this 29th April, 2022.

A. MSAFIRI

JUDGE