

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

LAND APPEAL NO.142 OF 2021

(Arising from Kibaha District Land and Housing Tribunal in Land Appeal No.132 of 2019; Originating from Fukayosi Ward Tribunal in Land Application No. 15 of 2019)

EVARIST C. KISAKA.....APPELLANT

VERSUS

REDEMTA MCHAWILE.....RESPONDENT

Date of Last Order: 23.05.2022

Date of Judgment: 30.05.2022

JUDGMENT

V.L. MAKANI, J

This is a second appeal. The genesis of this appeal can be traced from Fukayosi Ward Tribunal (**the Ward Tribunal**) when the respondent herein successfully sued the appellant for alleged trespass in two acres of land located at Mwavi kwa Mkorea, Bagamoyo (**the suit land**). The appellant, EVARIST C. KISAKA, being dissatisfied with the decision of the Ward Tribunal, appealed to Kibaha District Land and Housing Tribunal (**the District Tribunal**) but he lost again. He thus preferred this appeal with the following grounds as reproduced herein below:

1. *That the trial honourable Chairperson erred in law and fact for confirming the decision of the ward tribunal and ruling that respondent is the owner of the suit land while in the ward tribunal there was no any supportive documentary evidence to support ownership on the part of the respondent.*
2. *That the honourable chairperson erred in law and fact for failure to evaluate the evidence of the parties and their witnesses as presented during the hearing of the matter before the ward tribunal.*
3. *That the trial honourable chairperson erred in law and fact for accepting that, respondent acquired the disputed land by way of purchase while the given sale agreement showed the purchaser of the suit land was another person named Mchawile Adelgot and not the respondent.*
4. *That the trial honourable chairperson erred in law and fact for making its decision in favour of respondent while respondent failed to bring before trial tribunal the third part whose name appeared in the purported sale agreement to testify on her behalf.*

With leave of the court the appeal was argued by way of written submissions. The appellant personally drew and filed his own submissions while Mr. Victor Kessy, Advocate drew and filed submissions in reply on behalf of the respondent.

In his submission, the appellant stated brief facts of this appeal and prayed to argue only the third ground of appeal dropping the rest of the grounds. He said that the decision of the Ward Tribunal was greatly based on the Sale Agreement produced by the respondent

during the hearing. That the purported Sale Agreement does not bear the name of respondent as a purchaser or witness. He insisted that the respondent cannot claim ownership of the suit land on the ground of the Sale Agreement which does not bear her name. He said under the doctrine of privity of contract the respondent is not the legal owner of the suit land and she has no cause of action against appellant because she is not part to the Sale Agreement.

Further, the appellant said that there is nowhere in the records that reflects the relationship between the respondent and the so called **Mchawile Adelgot**. He said both the respondent and the Tribunal failed to call the said **Mchawile Adelgot** to testify, that it was important since he was named in the Sale Agreement as the purchaser. He said that failure to call him meant that if called, he would have testified against respondent. The appellant relied on section 110 (1) and section 119 of the Evidence Act, CAP 6 RE 2019 and prayed for this appeal to be allowed with costs.

In reply, Mr. Kessy submitted on all four grounds of appeal though the appellant in his main submission dropped the rest of the grounds of appeal and argued only the third ground of appeal. On that basis

therefore, I shall concentrate on the reply regarding the third ground of appeal only.

As the third ground Mr. Kessy said that respondent acquired the suit land by way of first purchase. He said the appellant clearly admitted to have purchased the suit land on 13/05/2017 from MZUWANDA SHABANI ZAIDI who actually was the seller of the same plot way back in 2009. That the cardinal principal of law is that he who acquire first has a good title and the same is in this case. He said that the respondent purchased the disputed property in 2009 while the appellant purchased the same in 2017. That the Sale Agreement was done by Halfani Ally Kugwile who was by then the Chairperson of Kitongoji "Mwavi B "which differs from the purported Sale Agreement which was witnessed by Shabani Mkumbi who was purpoted to be the Chairperson of Mwavi Bagamoyo. He said that if the second Sale Agreement of 2017 is from the very same seller, then the latter buyer cannot claim over the same property which had already been sold to the respondent herein almost eight years back. He prayed for the appeal to be dismissed with costs.

In rejoinder, the appellant said that the matter at hand involves only the appellant and respondent but not between the appellant and one **Mchemwile Adelgot**. He said that the proceedings at the Ward Tribunal and the pleadings filed in this court shows that the respondent was registered under the name of **Redemta Mchawile** and not **Mchawile Adelgot**. He said that the District Tribunal erred in confirming the decision of the Ward Tribunal which relied on the Sale Agreement which did not bear the name of the respondent. He said the purported Sale Agreement indicate that on 11/10/2009 Mr. MZUWANDA SHABANI ZAIDI sold the suit land to **Mchamwile Adelgot** and not **Redemta Mchamwile** as indicated in the last paragraph of page one of her submission where she properly quoted the wording of the Ward Tribunal starting that "*Mnamo tarehe 11/10/2009, Bwana Mzuwanda Shabani Shabani Zaidi alimuuzia shamba bwana Mchamwile Adelgot kwa mujibu wa hati iliyowasilishwa na mlalamikaji*". He called upon the court to examine whether the statement of the said witness mentioned the respondent as the purchaser or not, whether the said purchaser was a man or woman and if a man then the next thing is whether the respondent herein is a man or woman. He insisted that the decision of both the

Ward and the District Tribunal relied on the Sale Agreement which did not recognize the respondent as a purchaser.

I have gone through the submissions and the main issue to address is whether this appeal has merit. In so doing, I will mainly confine myself to the Sale Agreements tendered as evidence by the parties herein and relied upon by the Tribunals.

At the Ward Tribunal, the respondent (then applicant), presented a Sale Agreement on which she relied upon. The records reveals that the Sale Agreement was executed on 11/10/2009. The seller was one MZUWANDA SHABANI ZAIDI and the buyer was one **Mchawile Adelgot**. The size of the land sold as indicated in the Sale Agreement was 2 acres. The said Sale Agreement was witnessed by one Halfani Ally Kugwile, The Chairman of "Kitongoji cha Mwavi B ". The said witness is nowhere on the records of the Ward Tribunal as to have testified for the respondent herein.

On the other hand, on 13/05/2017 another Sale Agreement was executed by the same seller, MZUWANDA SHABANI ZAIDI. The size of the land sold is indicated in the said Sale Agreement to be 2 acres

(81-77 and 88 – 100) sold to Evarist C. Kisaka, who is the appellant herein. The same was witnessed by the Village Chairman of Mwavi who testified at the Ward Tribunal.

It is apparent from the records that the said MZUWANDA SHABANI ZAIDI sold land to the appellant and one **Mchawile Adelgot**. The appellant purchased the suit land in 2017 while **Mchawile Adelgot** purchased the land in 2009. The said **Mchawile Adelgot** was not the one who claimed trespass at the Ward Tribunal, but it was the respondent herein whose name is **Redemta Mchawile**. As correctly stated by the appellant, the two names **Redemta Mchawile** and **Mchawile Adelgot** represent two distinct persons and I would wish to add that the respondent herein did not endeavour to explain why the Sale Agreement bears the name of **Mchawile Adelgot** and not her name as the complainant of the trespass. Further there is no proof on record of the relationship between the respondent and the said **Mchawile Adelgot**, and how the said relationship has affected the passing on of title from the said **Mchawile Adelgot** to the respondent. The said **Mchawile Adelgot** was not in called in court to give evidence and clear the air as to how the Sale Agreement got in possession of the respondent and why she is claiming ownership

of the suit land. In the absence of such proof, the respondent's ownership of the suit land is in doubt because the two names **Mchawile Adelgot** and **Redempta Mchawile** depict two distinct persons in law. In the submissions of the respondent at the District Tribunal, the respondent said that there were variations in her name and that the ID provided by NIDA referred her as **Redempta Mchawile** and not **Mchawile Adelgot**. However, this assertion is not reflected anywhere in the submissions in this court. This raises more doubts as to the allegations regarding the different names, and a further presumption that even the said Sale Agreement was concocted. And where doubts are created in evidence, the same should be resolved in favour of the opposite party (see the case of **Jeremiah Shemweta vs. Republic [1988] TLR 228**).

The issue of difference of names in the Sale Agreement was also raised and explained in detail by the appellant at the District Tribunal. But either by oversight or design the District Tribunal decided not to address this ground. In any case, the name of the purchaser appearing on the Sale Agreement is not that of the respondent herein but of **Mchawile Adelgot** and in that respect the respondent herein could not have been the purchaser of the suit land.

Indeed, the Sale Agreement between MZUWANDA SHABANI ZAIDI and **Mchawile Adelgot** reflects that it was prior to that of MZUWANDA SHABANI ZAIDI and the appellant. But the said MZUWANDA SHABANI ZAIDI and **Mchawile Adelgot** were not in court to explain if the Sale Agreement was still valid and in existence. If at all the Sale Agreement were valid then the said **Mchawile Adelgot** would have been in court to claim his right.

Mr. Kessy in his submissions argued emphatically on the issue that the rights of **Mchawile Adelgot** still subsists because it has not been revoked. He cited the cases of **Severin Moshia vs. Hubert Kisanga, Land Case Appeal No. 19 of 2018 (HC-Moshi)** (unreported) and **Prof. Benard Kirei vs. Natalino Mwenda**. Unfortunately, the latter case was not annexed so I had no opportunity to peruse through. However, the case of **Severin Moshia** (supra) is distinguishable to the present case, as it is in respect of registered land and there was a Certificate of Title so there were no doubts as to who was claiming and who was allocated the suit land. But as established above, there are doubts as to who is the owner of the suit property and if at all the Sale Agreement between the said MZUWANDA SHABANI ZAIDI and **Mchawile Adelgot** is in existence.

In the absence of proof of the relationship between the appellant and the said **Mchawile Adelgot**, as explained hereinabove, the said Sale Agreement cannot be relied upon and the argument that the respondent is the owner of the suit land cannot therefore be entertained.

In the result, I proceed to allow this appeal with costs. The decision of the District Tribunal is hereby quashed and set aside, and the appellant is declared the lawful owner of the suit land.

It is so ordered.


V.L. MAKANI
JUDGE
30/05/2022

