IN THE HIGH COURT OF TANZANIA

LAND DIVISION

LAND APPEAL NO. 193 OF 2022

GLORIA PAUL KESSY.....APPELLANT

VERSUS

ANDREW OBUNDE.....1ST RESPONDENT

MAIMUNA S. MAGOTI.....2ND RESPONDENT

SARA ELIGHT EDEBE.....3RD RESPONDENT

J U D G M E N T

Date of last Order:14/08/2023
Date of Judgment:24/10/2023

K. D. MHINA, J.

This is the first appeal. It stems from the District Land and Housing Tribunal ("the DLHT") for Kibaha in Land Application No. 26 of 2016, whereby, Gloria Paul Kessy, the applicant who is now the appellant, claimed, inter alia for the declaration that she was a lawful owner of three acres of land located at Kwakibosho area in Mapinga Village within Bagamoyo District vide sale agreement dated 16 February 2012, a permanent injunction restraining the 1st, 2nd and 3rd respondents from interfering with ownership of premises and demolition of any structure constructed by the 1st and 3rd respondents in the suit premises.

The brief facts which led to the institution of Land Application No. 26 of 2016 before the DLHT are that on 16 February 2012, the appellant purchased five acres of land from Said Abasi Faraji through his representative Issa Muhibu for a price of TZS. 15,000,000. She also paid TZS. 1,500,000 as a 10% to Mapinga Village, and she was issued with a receipt No. 15311.

She requested from the Mapinga Village Council, the minutes of the council so that she could survey the land, and she was given the village council minutes on 24 August 2013.

The appellant alleged that later the 1st and 3rd respondents trespassed into a part of the land for about three acres claiming that they purchased the land from the 2nd respondent. Despite informing them that she was the owner of the land, they continued to occupy the land and construct the permanent structures.

Therefore, this background prompted the appellant to rush and seek redress at the DLHT for Kibaha.

On the respondents' side, they alleged that the 2nd respondent was the lawful owner of the disputed land after she was allocated six

acres of land by Mapinga Village Council on 12 May 2003. Later, she sold to the 3rd respondent, who became the lawful owner of the suit land.

After the full trial, the DLHT decided the matter in favour of the respondents for the reasons that the evidence indicated that the land was allocated to the 2nd respondent by Mapinga Village Council in the year 2003, there was no evidence that the land sold by Issa Muhibu to the appellant on behalf of Said Faraji was owned by Said Faraji and It was not proper for Issa Muhibu, at the same time to be a seller of the land to the appellant and a leader who witnessed/ approved the sale. It declared the sale agreement between the appellant and the 2nd respondent was null and void ab initio.

Undaunted, the appellant appealed to this court and preferred the following grounds to fault the decision of the DLHT;

i. *The Trial Tribunal erred in law and in facts in finding that the 2nd Respondent is the lawful owner of the suit property.*
ii. *The Tribunal erred in law and in facts in finding that the transfer of the suit property between the Appellant, by PW2 Issa Muhibu and Abasi Faraji, was unlawful and void*

ab initio.

iii. *The Tribunal erred in law and in facts in not finding that the disputed suit property measures three acres of land and not five acres.*

iv. *The Tribunal erred in law and in facts in not finding that the Respondents had manufactured evidence and documents after the start of the hearing of the Application and particularly after the closure of the Applicant's case*

v. *The Tribunal erred in law and in facts in not weighing the evidence adduced by both parties to the Application and deciding on the preponderances of probability.*

The appeal was argued by way of written submissions. The appellant was represented by Mr. Deogratius John Lyimo Kiritta learned advocate, while the respondents were represented by Mr. Shabani Mlembe, also a learned advocate.

In his lengthy submission to support the first ground of appeal, which I will summarize as hereunder, Mr. Kiritta faulted the DLHT decision for the reason that the evidence showed that the suit property was lawfully acquired by the appellant by way of purchase from PW2 (Issa Muhibu) on behalf of Said Abbas Faraji and was witnessed by the Kwa Kibosha Village authority. Therefore, if the 2nd respondent was

allocated the land in 2003, the Village authority could not have witnessed the transfer of the same property or part thereof to the appellant.

He further stated that during the trial, Issa Muhibu (PW2) testified that the Kibosha Village did not own any land in 2003 and, as such, did not distribute or grant land to any person, including the 2ndRespondent, Maimuna S. Magoti, in 2003 or any other time thereafter. Also, there was no evidence to show that Kwa Kibosha Village was the lawful owner of the suit property, which they could have granted to the 2nd Respondent. Even if assuming that the 2nd respondent was allocated land, but still the procedures of allocation of land by the Village Council were still not followed.

Mr. Kiritta attacked the respondents' evidence at the trial by submitting that the 2nd respondent failed to produce her application letter to the Village Council when she asked for allocation of the disputed land.

He further stated that DW3, DW5 and DW6 were former leaders of Kwa Kibosha Village; therefore, they were no longer leaders of Kwa Kibosha Village and had no access to the documents relating to the

suit property. Further, there was no explanation as to why the current leaders of Kwa Kibosha Village were not called to adduce evidence or to indicate that DW3, DW5 and DW6 had permission from the Kwa Kibosha Village to appear in Court and adduce evidence on matters attended during their time in office or not.

He concluded by submitting that in deciding the Application and finding that the suit property belonged to the 2nd respondent, the DLHT did not consider the basic issue as to whether the suit property was the Village land prior to its grant to the 2nd respondent in 2003.

He further stated that during the trial, Issa Muhibu (PW2) testified that the Kibosha Village did not own any land in 2003 and, as such, did not distribute or grant land to any person, including the 2ndRespondent, Maimuna S. Magoti, in 2003 or any other time thereafter. Also, there was no evidence to show that Kwa Kibosha Village was the lawful owner of the suit property, which they could have granted to the 2nd Respondent. Even if assuming that the 2nd respondent was allocated land, but still the procedures of allocation of land by the Village Council were still not followed.

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submitting that the 2nd respondent failed to produce her application letter to the Village Council when she asked for allocation of the disputed land.

He further stated that DW3, DW5 and DW6 were former leaders of Kwa Kibosha Village; therefore, they were no longer leaders of Kwa Kibosha Village and had no access to the documents relating to the suit property. Further, there was no explanation as to why the current leaders of Kwa Kibosha Village were not called to adduce evidence or to indicate that DW3, DW5 and DW6 had permission from the Kwa Kibosha Village to appear in Court and adduce evidence on matters attended during their time in office or not.

He concluded by submitting that in deciding the Application and finding that the suit property belonged to the 2nd respondent, the DLHT did not consider the basic issue as to whether the suit property was the Village land prior to its grant to the 2nd respondent in 2003.

He further submitted that Said Abbas Faraji or his two daughters, Halima Said Faraji and Mariam Said Faraji, had never complained against the PW2 power to sell the suit property to the appellant.

Faulting the second ground of appeal Mr. Kiritta submitted in addition to what he had submitted in the first ground, that according to the evidence appellant, one Abasi Faraji was the lawful owner of the suit property and had granted power of Attorney to PW2, Issa Muhibu to transfer the property to the Appellant.

Therefore, it was wrong for the DLHT to find that the transfer of the property to the appellant was unlawful.

As for the third ground of appeal, Mr. Kiritta submitted that according to Exhibit Pl, the Sale Agreement, the Appellant purchased approximately five acres of land from PW2.

However, the property the respondents trespassed on was three acres of land. The remaining two acres have not been trespassed on by the respondents, and they were not the subject of the proceedings at the DLHT.

He concluded by stating that this factual position was supported by paragraph 6 (a) (vii) of the Application filed by the Appellant in the DLHT and the evidence adduced by both parties.

Arguing the fourth ground of appeal, Mr. Kiritta submitted that he was aware of the provision of **Regulation 10 (1) (2) and (3) of**

the Land Disputes Courts (the District Land and Housing Tribunal) 2003 on the power of the DLHT to receive and or admit documents at any stage of the proceedings.

But, first, the DLHT has to ensure that the other party has been served with a copy of the document, and secondly, has regard to the authenticity of the document.

He explained that the DLHT did not regard the authenticity of the documents after the appellant's case had been heard and the evidence closed. He referred to the documents filed at the DLHT by the respondents on 30 October 2018, 13 February 2019 and 20 February 2019.

He further submitted that the manner in which the documents were obtained was not clear, and it was not possible to establish whether they were genuine, forged or manufactured to fit the convenience of the respondent's case as there was no evidence that they were lawfully obtained from the Kwa Kibosha Village office. Indeed, those who tendered them had long retired from leadership positions with the Kwa Kibosha Village.

In the last ground of appeal, Mr. Kirita submitted that the

appellant's evidence was stronger than that of the respondents in determining the ownership of the suit property.

He further submitted that the DLHT overly depended on the opinion of the assessors as indicated in the judgment in deciding the Application. The assessors did not direct themselves to the issues and had even mixed up the dates of the documents tendered.

Responding to the first ground of appeal, Mr. Mlembe submitted that the DLHT was correct to declare the 3rd respondent as the lawful owner of the suit land as per adduced evidence. Exhibit "D1", the acceptance letter tendered before the DLHT, proved that Kwa Kibosha Mapinga Village allocated 6 acres to 3rd respondent. The exhibit had never been disputed, meaning it was genuine. The testimonies of DW3, DW5 and DW6, former leaders of the Village, confirmed that the 2nd respondent was granted the suit land by Mapinga Village as per Exhibit D1 after following all procedures.

Further, the appellant had never disputed the above facts on the allocation of the suit land by Mapinga village to the 2nd respondent, who later on conveyed the same to the 3rd respondent, thereby creating a clear chain of ownership of the suit land from the Mapinga Village to the 2nd respondent and finally to the 3rd respondent.

He responded further that it was not true that PW2 was a Chairperson of the Kwa Kibosha Suburb Mapinga Village from 2000 and was still holding the same position because Kwa Kibosha is not a Village and PW2 was not the Chairman of the village but Juma Nassoro was the Chairman of the Mapinga Village and he was the one who supervised the whole process of allocating 6 acres of land to the 2nd respondent I as supported by Exhibit DI which is the acceptance letter dated 12th May 2003.

He stated that it was crystal clear that the suit land was legally allocated by the Village Authority to the 2nd respondent; hence, the sale agreement and transfer between the 2nd and 3rd respondents was lawful.

Therefore, such heavier evidence than the mere words of PW2 that the suit land belonged to Saidi Abais Faraji and that he was authorized to sell the same to the herein appellant. To support his submission, he cited **Hemedi Said vs. Mohamed Mbilu [1984] TLA 113,** where the court held that

> *"the party whose evidence is heavier than that of the other is the one who must win the case."*

He further stated that when PW2 was cross-examined, he stated that he sold the land after being given the authorizing letter to sell the land belonging to the children of Saidi Abasi Faraji. That means the said Saidi Abasi Faraji, who gave PW2 a mandate to dispose of the disputed land, could not provide such a mandate or power since he was not the owner.

In his further submission, he stated that the respondents called witnesses who were competent and familiar with the land allocated to the 2nd respondent in 2003, as some were the leaders. They were present at the village meeting when the application of the 2nd respondent was discussed.

He concluded by citing section 101 of the Evidence Act, Cap 6, which provides for the exclusion of oral evidence by documentary evidence. The section. The section reads;

> *"When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives".*

And argued that the respondent tendered Exhibit DI and proved the allocation of the suit land by Mapinga Village.

Regarding the second ground, he submitted that there was no documentary evidence to prove ownership or allocation of land to Saidi Abbas Faraji. That failure justified the DLHT findings that transferring the suit property between PW2 Issa Muhibu and Saidi Abasi Faraji was unlawful ab initio. He supported his submission by citing the decision of the Court of Appeal in **Yusufu Selemani Kimaro vs. Administrator General & 2 others**, Civil Appeal No. 266 of 2020 (unreported), where it held that;

> *"In civil cases, the onus of proof does not stand still rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win a case is saddled with the duty to ensure that the burden of proof remains within the yard of his anniversary".*

In the instant appeal, the appellant had a burden to prove the allegations that the suit land was hers. Failure to prove that Said Abasi Faraji had owned the suit land before selling it to her hinted to the DLHT that Saidi Abasi Faraji had no valid title to convey to the appellant.

He concluded by submitting that it is a principle in evidence under section 110 (1) and (2) of Cap 6 that he who alleges must prove the existence of such an allegation.

Regarding the 3rd ground of appeal, Mr. Mlembe submitted that the DLHT was correct to reach that decision due to the fact that the second respondent was the owner of 6 acres, of which 5 acres were invaded appellant.

He concluded by submitting that in her claim at the DLHT, the appellant stated that 3 out of 5 acres were invaded by the second respondent while the truth was that the appellant invaded 5 acres out of 6 acres which were allocated to the 2nd respondent by Mapinga village Authority. The focus of the DLHT was to ascertain ownership of the whole piece of land, which the Appellant failed to prove her ownership.

On the fourth ground of appeal, he submitted that the appellant's Counsel had ample time to scrutinize and object to the evidence presented before the DLHT if the same were unlawfully obtained or manufactured as alleged. The appellant could have objected to those documents during the defense hearing, but were tendered and

received by the Tribunal as exhibits with no objections.

Furthermore, the Chairman asked the appellant if there was any objection concerning the documents, but did not object.

Also, the Appellant was given a chance to cross-examine the respondents regarding the documents.

In the last ground of appeal Mr. Mlembe submitted that, the proof ownership by the evidence on record adduced by respondents was heavier than that that of the appellant; therefore, DLHT could not be faulted in declaring the 3rd respondent as the lawful owner of the suit land.

He narrated that proof of ownership cannot be proved by mere say without the existence of any evidence. He substantiated his submission by citing **Rupiana Tungu and 30 others vs. Abdul Buddy and another**, Civil Appeal No. 115 of 2004 (HC-DSM), where it was held that,

> *"Although the appellant did not make any submission on ground (b),I find there was no credible evidence adduced by the appellants to show that they had a lawful right to the land in dispute"*.

Mr. Kiritta did not file the rejoinder.

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I find that the first, second and fifth grounds of appeal all revolve around the issues of evaluation of evidence; therefore, the grounds are intertwined hence I will determine them together and evaluate the evidence on record versus the decision of the DLHT.

From above, it is a cardinal principle that he who alleges must prove the allegation, and the burden cannot shift to the adversary party. See **Hemedi Said (Supra)** and Section 110 (1) of the Evidence Act, Cap. 6 [R.E. 2019] which reads

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

Therefore, the one who was supposed to prove the ownership of the land in dispute was the appellant.

At the DLHT, the appellant's important witness was PW2, the seller of the land in dispute to the appellant. He testified that he was authorized by one Saidi Abbas Faraji to sell the suit land, and he

tendered exhibit P5 (the authorization letter). He stated that Saidi Abbas Faraji purchased land from Bakari Ayub and the late Mzee Suna. Then he sold the farm to the appellant for a consideration of TZS. 15,000,000. When cross-examined stated that the land was owned by the children of Saidi Abbas Faraji by the names of Halima Saidi Faraji and Mariam Saidi Faraji. He stated the children were minors.

According to the appellant, they executed the sale agreement (Exhibit P1. According to Exhibit P1, the sale agreement was entered on 16 February 2012 between the appellant as a buyer and his witness PW2 as a seller. Further, Exhibit P2 indicated that the one who supervised the sale as the Hamlet chairman of Kwa Kibosho was PW2, Issa Muhibu. He played both, as a seller and as the Harmel leader.

On the other hand, according to the 2nd respondent, she was allocated the land by the village council of Mapinga in 2003, and she tendered the allocation letter as Exhibit D1. According to that Exhibit, which was signed by Juma Nasoro as the Village Chairman, the 2nd respondent was allocated six acres of land located at the Kwa Kibosho area after the village council meeting resolution on 12 May 2003. After that, she was shown the boundaries of the land. Her evidence was

corroborated by DW3, former leader of Mapinga Village, who stated that the land was allocated to the 2nd respondent and that he was among the leaders who went to show the 2nd respondent the boundaries of the land. Also, the evidence of DW5 and DW6, both former leaders of Mapinga Village, testified that the land was allocated to the 2nd respondent.

In circumstances such as above, the principle of tracing is very important. That means in certain circumstances, the background and evidence of how a person acquired the land must be traced to check its lawfulness.

On this, as I alluded to earlier, PW2 stated that Saidi Abbas Faraji purchased land from Bakari Ayub and the late Mzee Suna. But he failed to tender the sale documents indicating that the sale from Bakari Ayub and the late Mzee Suna to Saidi Abbas Faraji. Further, since Saidi Abbas Faraji and Bakari Ayub did not testify on that issue, therefore the evidence of PW2 remains hearsay.

On the other hand, the evidence on record indicates that the 2nd respondent was allocated by the village council of Mapinga.

Further, the submissions from Mr, Kiritta that according to the evidence of PW2, Mapinga Village had no land to allocate in the year 2003, it is an afterthought because; **one**, despite mere words, there was no evidence to prove that fact and **two**; PW2 was not the Village Chairman as claimed by Mr. Kiritta in his submission. According to Exhibit P1, tendered by the appellant himself, indicated that PW2 was a Hamlet Chairman. Therefore, he was not in a position to give the status of the village affairs.

From the above discussion, the DLHT was proper, in finding that the 3rd respondent was a lawful owner of the disputed land because she purchased the same from the original owner (2nd respondent), who was allocated by the Village Council in 2003. On the other hand, the sale of the land by the PW2 on behalf of Saidi Abbas Jafari to the appellant was void ab initio because, at the time of sale, PW2 had no good title to pass.

Therefore, since the burden of proof normally lies to the one who alleges, in the instant appeal, on the balance of probabilities, the DLHT was right to hold that the appellant failed to prove her case.

Thus, the first, second and fifth grounds, regarding the evaluation of evidence, lack merits, and I dismiss both grounds.

Coming to the fourth ground, which should not detain me long, the entry point is Regulation 10 of the **Land Disputes Courts (the District Land and Housing Tribunal) 2003** which provides that;

> *10. (1) The Tribunal may at the first hearing, receive documents which were not annexed to the pleadings without necessarily following the practice and procedure under the Civil Procedure Code, 1966 or the Evidence Act, 1967, as regards documents.*
> *(2) Notwithstanding sub-regulation (1) the Tribunal may,* ***at any stage of proceedings before the conclusion of the hearing, allow any party to the proceeding to produce any material documents which were not annexed or produced earlier at the first hearing*** *[Emphasis provided]*

Mr. Kiritta complained about the documents filed at the DLHT by the respondents on 30 October 2018, 13 February 2019 and 20 February 2019, but unfortunately, he could not name the documents. But from the case file, I find the document attached to the lists of additional documents to be relied upon. The document filed on 13 February 2019 was the receipt the 1st respondent paid to Mapinga

Village on 17 July 2014, and the document filed on 30 October 2018 was the Meeting Minutes of Mapinga Village Council dated 12 May 2003. Both documents were served to the appellant.

At the trial, the Meeting Minutes of Mapinga Village was not tendered as an exhibit; therefore inconsequential. On the other hand, the receipt the 1st respondent paid to Mapinga Village on 17 July 2014 was admitted as Exhibit D3. At the time of admission, Mr. Kiritta did not object.

In fact, having gone through the whole defence case, Mr. Kiritta did not object to any exhibit on its tendering.

From above, I have the following, the law is clear that failure to object tendering of an exhibit amounts to admission of the document. And on this, there is a plethora of authorities of Court the Court of Appeal. In **Anna Moises Chissano vs. The Republic,** Criminal Appeal No. 273 of 2019(Tanzlii), it was held that;

> *"An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused".*

Therefore, the appellant cannot come to this court and lament that the documents were "manufactured" while her advocate did not object to its admission at the trial. Thus, this ground also fails.

The last ground also should not detain me long, and it is straightforward. According to the pleading (Application), the dispute was over three acres which the appellant claimed to be trespassed by the respondents in her land-sized five acres. But in its decision, the DLHT on six acres, as raised by the 2nd respondent, was allocated six acres of land. The Chairperson of the DLHT decided on what was alleged in the written statement of defence.

Having gone through the WSD, I found that, the respondent did not raise a counter-claim. Therefore, since there was no counter-claim, the DLHT was not correct to decide on six acres, while the matter to decide before it concerned the dispute of trespass of three acres of land as per the application.

From above, the DLTH was supposed to decide only on three acres which the appellant claimed to be trespassed by the respondents. The DLHT, by deciding on six acres, overlapped its mandate.

On the way forward, quash and set aside the holding of the DLHT

regarding the declaration of six acres and substituting it with three acres as per the application. Parties may pursue their rights on the remaining part of the land, which was not pleaded in the pleadings.

I shall end here since the remaining land mentioned in the evidence of the parties was not part of the reliefs claimed in the pleadings before the DLHT. Therefore, this ground succeeded to such an extent.

Flowing from above, in totality, the appeal lacks merits, and I dismiss it with costs save for the substitution in ground six of the appeal, which will not in any way change the outcome of the appeal.

It is so ordered.

K. D. MHINA
JUDGE
24/10/2023