IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 279 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 11 of 2020)

GASTON HUDSON ..... APPLICANT

VERSUS

PATROKILI SHIRIMA.....1ST RESPONDENT

CHRISTOPHER KIMARO .....2ND RESPONDENT

MASOKOTA S. MKWENYA.....3RD RESPONDENT

JUDGEMENT

Date of last order: 20/11/2023

Date of Judgement: 24/11/2023

MWAIPOPO, J.

This appeal emanates from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.11 of 2020, which was delivered on 31st May 2023, by Hon. S.H Wambili, Chairman.

The brief history of the suit is that the 1st Respondent in this Appeal, Patrokili Shirima, filed Miscellaneous Application Number 11/2020 against Gaston Hudson, Christopher Kimaro and Masokota Mkwenya who were the first, second and third respondents therein. The gist of the application was that the Applicant claimed to be the lawful owner of the unsurveyed plot measuring 2 acres located at Goba Mpakani Mtaa wa Kulangwa Kata ya Goba, with an estimated value of TZS 50,000,000 only. That sometimes in 2005, the applicant bought the disputed land from one Christopher Kimario, who was granted power of attorney by her Sister Adela Kavishe to sale the said land, after having purchased the same from the third respondent, Masokota Mkwenya. It is stated on record that, the third Respondent sold the land,

to the sister of the second respondent, following failure by the first Respondent to pay half of the remaining balance of the purchase price, i.e. TZS 200,000 on the 28th January 1997 as agreed, after having purchased the same for TZS 400,000 on 28th December 1996. That the Applicant, after purchasing the said plot of land in 2005, lived peacefully in the disputed property whereby he managed to erect a house on an area of half an acre which he lived with his family and left about one and half acres undeveloped. That sometimes towards the end of 2019, without any colour of right or justification, the 1st Respondent unlawfully trespassed to the remaining 1 ½ acres, which is part of the land that the applicant bought from the second respondent herein and proceeded to erect a fence therein and planted some cassava, oranges and bananas and also intended to construct a house. Aggrieved with the actions of the 1st Respondent, the Applicant filed an application number 11/2020 before the DLHT, praying for the following reliefs;

i. Declaration that the Applicant is the lawful owner of the suit property;
ii. Removal of all plants and structures planted/erected by the 1st Respondent
iii. The first Respondent be permanently restrained from trespassing the suit land
iv. Payment of general damages by the respondents jointly and severally
v. Costs of this Application
vi. Any other Relief (s) as the Honourable Tribunal deems fit and proper to grant

Following the hearing of the Application, the DLHT delivered its judgement in favour of the Applicant, Patrokili Shirima, by declaring him the lawful owner of the disputed property. The 1st respondent Gaston Hudson was declared the trespasser and ordered by the Tribunal to pay the applicant costs of the suit.

Being dissatisfied with the decision of the DLHT, the First Respondent filed Land Appeal case no 279/2023 before this Court armed with 10 grounds of appeal as follows;

1. That the District land and Housing Tribunal erred in law and fact for failure to consider and accord weight to evidence of appellant as well as his testimony
2. The trial District Land and Housing Tribunal erred both in law and facts for failure to observe the mandatory requirements of the law.

3. That the District land and Housing Tribunal erred in law and fact for failure to observe that the sale agreement between the 2nd respondent and 1st respondent was defective/title was illegal (sic) passed.
4. The trial Chairperson erred in law and fact by holding that the appellant did breach sale agreement while neither case nor order from any court or tribunal ever instituted by the 3rd respondent to justify the same.
5. That, the trial Chairperson erred in law and fact by holding that the appellant had never used the disputed land while the pleadings and his evidence clearly shows and elaborate that he has been used(sic) the land for agriculture.
6. That, the trial chairperson erred both in law and fact by holding that for 14 years the 1st respondent peacefully enjoyed the interest on disputed land and forgetting that in his own judgment at page 12 the appellant clearly stated that the dispute over the disputed land started on 2007 and the same was never challenged during cross examination.
7. That the trial Chairperson erred in law and fact holding that 3rd respondent disposed off the disputed land to the sister of the 2nd respondent while neither consideration nor evidence presented.
8. That, the Chairperson erred both in law and fact in holding that the 3rd respondent stayed in the disputed land since 2005 to 2019 while all these facts are never pleaded in in either the 1st Respondent nor 3rd respondent defence.
9. That, the Trial District Land and Housing Tribunal erred both in law and fact for deciding the matter in favour of the 1st and 2nd respondent without considering that the complaint was not proved at a required standard.
10. That, the trial tribunal erred both in law and fact for ordering costs against the appellant alone and diverted from the pleadings within which costs was sought against all respondents and there are no reasons assigned thereof.

At the commencement of the hearing on 23/10/2023 the appellant was represented by the learned Advocate Martin Frank, the 1st respondent enjoyed the services of the learned Advocate Reginald Shirima and the 2nd and 3rd Respondents appeared in person and fended for themselves. The appeal was heard orally.

Arguing in support of the application Mr. Martin Frank, counsel for the appellant consolidated ground No.1, 3 and 5 together. He submitted that he would argue the appeal by using pleadings filed in court. He began by quoting the judgment of the Tribunal dated 31st May 2023, at page 3 where it states that;

> *"Mdaiwa wa kwanza ameleta hati yake ya utetezi ambapo amejitetea kuwa amenunua eneo lake kutoka kwa Masokota S. Mkwenya mdaiwa wa tatu mnamo 28/12/1996 malipo yalikamilika tarehe 20/10/97 kwa bei ya Tz 400,000 kwa eneo la ekari mbili lililopo Goba Kulangwa Kata ya Goba mpakani. Mjibu maombi ametoa mikataba yake ya mauziano ya tarehe 28/12/1996 na ule wa tarehe 20/10/1997 wa kumalizia kulipa pesa".*

The counsel further submitted that, contrary to what the Court recorded above, the appellant, who was the first Respondent in the Tribunal, never tendered only two documents but tendered 3 of them and the third one was marked D3 collectively. The said document was titled "Uthibitisho wa Makubaliano ya Mauzo ya Shamba eneo la Goba Mpakani Mtaa wa Kulangwa Kata ya Goba". He asserted that; exhibit D3 is not cited in any page of the judgment of the Court. The second document which was admitted collectively is titled "Halmashauri ya Manispaa ya Ubungo kutatua mgogoro wa eneo baina ya ndugu Gaston Hudson Nyande na ndugu Patrokili Shirima na Masokota Mkwenya walalamikiwa leo 15/12/2019, katika eneo lenye mgogoro".

He further submitted that this very important document was also not cited by the DLHT, while it visited the area of the suit property, this document is in the record of the Tribunal and he referred the Court to the Resolutions of the said meeting as follows;

> *"Shamba lote hekari mbili limerejeshwa kwa mlalamikaji ndugu Gaston Hudson Nyange kuanzia leo tarehe 15/12/2019 na ndiye mmiliki halali wa shamba lote la hekari mbili".*

He amplified further that, the document was signed and stamped by the relevant authority. The document was signed by Dandas Kijo an Executive Officer at Kilangwa Street and Muslima Mnendwa who was also an executive officer, at Goba Ward. The

document shows the attendance of the people in the said Meeting including the appellant and 1st respondent. Despite these documents being tendered in court, they were not cited before the Tribunal during the consideration and determination of the case. Likewise, the tribunal never considered the Agreement between the 1st and 2nd Respondent had weakness in law and was done illegally. The said Agreement was admitted as exhibit P1, titled as follows;

Hati ya kuuziana vitu serikali ya mtaa, shamba, nyumba, kiwanja baiskeli, radio n.k.

The document further reads;

Mimi Christopher Kimario nimemuuzia shamba hekari mbili ndugu Patrokili Shirima kwa bei ya shilingi 1,000,000.

Based on the contents of the said Agreement, the appellant questioned whether the second respondent had a right to the title to enable him to sale the land directly. He contended that; the 2nd Respondent claimed to sale the land under the power of attorney but there was no any reference in the said agreement to show that the second respondent sold the land based on the Power of Attorney. He in fact sold the land as his own land. To substantiate his arguments, he referred the court to the case of **Farah Mohamed vs Fatma Abdalla** (1992) TLR page 205. Where the court stated that;

"He who doesn't have a good title to land cannot pass to another".

That based on exhibit PI which was used by the DLHT to show that Kimario had capacity to sell, he argued that there is nowhere in the agreement which shows that the 2nd Respondent had capacity to contract, he concluded that he sold something which he did not have. He cited the case of **Pascal Maganga versus Kitimba Ngarika, Civil Appeal no. 40/2017 reported at Tanzlii.**

With regard, to non-consideration of his evidence by the Tribunal, the Counsel proceeded to argue that; based on the evidence adduced by the appellant, supported by pleadings he stated that he was using the disputed area for agricultural purposes without any interference but in the judgment of DLHT it was stated that the chairman was satisfied that the appellant never used the area before. It was his contention that, the Chairman never considered the document and evidence

tendered by the appellant that is why he ended up by giving the judgment against the appellant.

As regards, the 2nd ground, he submitted that; the Chairman erred in law and fact for failure to observe the requirements of the law. The Counsel for the appellant began by referring the court to the provisions of regulation 12(1)(2)(3) (a) and (b) of the Land Dispute Court (The District Land and Housing Tribunal) Regulation, GN No.174 of 2003 which state that;

1) The chairman shall at the commencement of the hearing read and explain the contents of the application to the respondent.
2) The respondent shall after understand the details under sub regulation (1) be required either to admit the claim or party of the claim or deny.
3) The Tribunal shall;
   (a) Where the respondent has admitted the claim, record his words and proceed to make orders as it think fit.
   (b) Where the respondent doesn't admit the claim or part of the claim, lead the parties with their advocate, if any to frame the issues.

It is the argument of the counsel for the appellant that this requirement is mandatory but was not observed by the Tribunal Chairman who proceeded only to record the issues instead of reading facts to the parties as per the requirements of Regulation 12 of GN. 174. The counsel argued further that in the WSD, the 2nd and 3rd respondent admitted the claim and the 1st respondent objected. The tribunal ought to have recorded the admission of the 2nd and 3rd respondent based on Regulation 12(3). It is on record that hearing date was fixed on the 28th October 2023, however it was until 8th December 2021 when the matter was fixed for hearing and all parties including the assessors were present in the Tribunal when the applicant and 1st respondent adduced their evidence.

With regard to ground no. 6, the appellant faulted the tribunal chairperson in law and fact for holding that for 14th years the 1st respondent peacefully enjoyed the disputed land and forgetting that in his own judgment the appellant clearly stated that the dispute started in 2007 and the same was never disputed in cross examination. The

counsel for the appellant submitted that the period of 14 years had not lapsed because the pleadings show that the cause of action arose in 2019. Similarly; this allegation was not backed up by any evidence.

Arguing in support of ground no. 8, the appellant contended that the trial chairperson erred in both law and fact by holding that the 3rd respondent stayed in the disputed land since 2005 to 2019 while these facts were not pleaded. The counsel argued that parties are bound by their pleadings and the position is stated in CAT case in **Martin Fredric Rajabu v Ilemela Municipal Council and Another** Civil Appeal No 197 of 2019 at page 15, stated that;

> *"It is a cardinal principle of law that upon prudence parties are bound by their pleadings and thus no party is allowed to present the case contrary to the pleadings".*

He added that; there is no any evidence adduced to show that the 3rd Respondent lived on the disputed property from 2005 to 2019 and since the pleadings guide the parties, there is no any justification adduced by the tribunal on how they arrived at such findings.

As for ground No.9 of appeal, the counsel for the Appellant stated that; the District Land and Housing Tribunal erred both in law and fact for deciding the matter in favour of the 2nd and 3rd respondent without considering that the complaint was not proved at a required standard. The dispute was based on trespass to land done by the appellant to the 1st respondent. However, there is no any evidence to show how the appellant invaded the area of the 1st respondent, also there is no evidence showing how change of ownership went to 1st respondent.

With regard to ground no. 4, the counsel for the Appellant proceeded to argue that; the trial tribunal erred in law and fact by holding that appellant did breach the sale agreement while neither case nor order from any court or tribunal ever instituted by the 3rd respondent to justify the same. The counsel wondered how could the tribunal find that the 3rd respondent had not been paid his sale price since 1996 to 2023 while there is evidence admitted in court to prove that the money had been paid. He referred the court to exhibit D1 and D2. He amplified that, the chairperson

misdirected himself in holding that the agreement between the appellant and the 3rd respondent is null and void on the essence of time while the money had already been paid as stated by the appellant in his defence.

Regarding ground no. 7, the appellant submitted that; the chairperson misdirected himself in his decision at page 10 para 4, by stating that the 3rd respondent sold the plot to the sister of the 2nd respondent in 2003 while there was no any legal contract for sale brought in court or any consideration in his evidence/pleadings while it is known that any agreement without consideration is void (see section 25(1) of the Law of Contract). Further, the law is settled that he who alleges must prove but the 2nd respondent failed to prove that her sister bought the land from Masokota.

As regards the 10th ground of appeal, the counsel for the appellant submitted that; the trial District Land and Housing Tribunal erred both in law and fact for ordering costs against the appellant alone and diverted from the pleadings within which costs were sought against all the respondents without assigning any reason. The counsel cited the case of **Yusuph Mpini & 2 others v Juma Mkunga and Others** Civil Appeal No.1 of 2017 HCT DSM which cited with approval the case of **Joe Filed Tanzania Limited V Maliasili Resources ltd and Others**, Misc. Commercial Case No.323/2015, HC Commercial Division, DSM (reported in commercial Digest) where it was stated that;

> ***"It is a trite law that the loosing party should bear the cost of the matter to compensate the successful party for expenses incurred for having to vindicate the rights".***

He contended that in the case at hand the appellant was a looser, and the tribunal ordered that he should pay cost to the applicant, however it never adduced any reason.

Submitting in rebuttal, Mr. Shirima counsel for the 1st respondent began by objecting grounds of appeal no. 1,3 and 5 as argued by the counsel for the appellant. The counsel for the respondent began by submitting on the issue of non-citation of the exhibits tendered by the appellant before the Tribunal. He asserted that; the

appellant tendered 3 documents but exhibit D3 tendered by Local Government (Serikali ya Mtaa) has no any legal force. The Counsel contended that; if the resolutions stated that the plot should be returned to the appellant, then what was the rationale of the resolutions, if the appellant stated that he was already using area for agriculture. Similarly, the counsel for the appellant also referred to the ward tribunal resolutions which required the 3rd respondent to be taken to jail for breaching terms of the contract. He questioned as to why it has taken so long to arrest the 3rd Respondent, if he indeed breached the law. He further challenged Exhibit D3, which is a document from the Local Government Office (Serikali ya Mtaa), for being signed by two leaders (Executive officers only) leaving out parties to the case (the appellant and first respondent herein). The counsel contended that it took 12 years (since 2007) for the appellant to lodge a complaint to the Local Government Authority something, which he found to be odd. He stressed that until 2007 the 1st Respondent had already started construction activities. The Appellant came in, in 2019 and fenced the area and started planting some orange trees.

Reacting to ground no 2, the counsel for the respondent disputed the arguments put forth by the counsel for the appellant on the compliance of Regulation 12 of GN no. 174 by firmly stating that there was no necessity for the Chairperson to read the particulars of the application since parties had already exchanged pleadings. Further the appellant did not state how this led to miscarriage of justice. Similarly, the 2nd and 3rd respondents were required to proceed with the case since they were just necessary parties.

With regard to ground No.6, he contended that the tribunal was correct to state that the 1st respondent used the land for 14 years without interference. The reason being that when the appellant went back to the suit land in 2007, he found the 1st Respondent had already started building the house. Therefore, if one counts from 2005 when the 1st Respondent bought the land to 2019 when the appellant went to complain at the Local Government, it was indeed 14 years.

Regarding ground No.8, the counsel for the 1st Respondent submitted that the one who stayed in the disputed land since 2005 was the 1st respondent and that the 3rd respondent continued to stay in the area up to the year 2003, until when he got

another buyer and sold the land to her. The counsel for the 1st Respondent objected to the submissions; he submitted that the one who stayed in the disputed land since 2005 to 2019 was the 1st respondent and that the 3rd respondent continued to stay in the area up to the year 2003, until when he got another buyer and sold the land to her.

I agree with the submissions by the counsel for the 1st respondent that; the one who stayed in the disputed land since 2005 to 2019 was the 1st respondent and that the 3rd respondent continued to stay in the area up to the year 2003, until when he got another buyer and sold the land to her. Further, the 3rd Respondent also stated before the Tribunal that he stayed in the land for 7 years, i.e. 1996 to 2003 when he sold the land to the sister of the 2nd Respondent. Moreover, the Tribunal in its Judgement it never stated what the appellant submitted as his 8th ground of appeal. The Tribunal stated on page 10 of the Judgment last para that;

> ***"Aidha, nimeridhika mdaiwa wa tatu baada ya kuliuza eneo hilo kwa mdaiwa wa kwanza mwaka 1996 hakuondoka eneo hilo na ameishi had mwaka 2003 alipoliuza kwa Adela Kavishe. Ushahidi wa mdaiwa wa tatu kuendelea kuishi kwenye eneo hilo baada ya kuliuza kwa mdaiwa wa kwanza umeungwa mkono na mdaiwa wa kwanza mwenyewe wakati anahojiwa maswali na wakili msomi Bernad Shirima."***

As for ground no.9, the counsel firmly submitted that there was no dispute as to the issue of chain of ownership as the 3rd respondent sold the land to the sister of the 2nd respondent after the appellant had bought the land in 1996 and failed to pay the remaining balance of TZS 200,000 in the beginning of 1997 as per the agreement between them. He contended that the Appellant tendered exhibit D1 and D2 to prove that he finished paying the remaining balance through one Bavo Fransis who was sent by the 3rd Respondent at different times to collect 50,000/= and 150,000/= respectively out of the remaining TZS 200,000/= however the 3rd respondent in his testimony refused to have received the said balance. Further the said person by the name of Bavo was never brought before the tribunal to testify as a witness and no

power of attorney was tendered in court to prove that he was assigned by the 3rd respondent to collect the money on his behalf. The Counsel amplified further that, the 3rd respondent waited for the appellant to fulfil his obligations for 7 years and the law is clear that if a party to contract does not pay part of the balance, then it will amount to a breach of contract. He cited the case of **Philip Sila v Rose Ngiama Makundi case No 28 of 2022, Pg 11** and **Sirinapita Mtiniko Administratix of the estate of the late Abdalla Hamis Mbuni Pg 15 case no. 12/2018, last paragraph,** to fortify his argument. He added further that, the issue of breach does not require any court order as the contract can be avoided without going to court. He referred the court to the case of **Joseph Mmbwiliza v Kubwa Mohamed,** page 15 para 3; **Mirambo Mabula Versus Yohana Marco Sangasu and others, Civil No. 71/2020** and **Hashim Omary Likungwa Vs Mohamed and Another, Pg 12 para 2 line 6**

It was his submission that; the evidence of the trial tribunal reveals that the appellant never paid the remaining balance, exhibit D1 and D2 were not proved to the satisfaction of the Court and PW4 who witnessed the transaction when giving his testimony refused to have witnessed the remaining balance being paid.

Submitting on ground 7; the counsel for the 1st Respondent stated that the 3rd respondent testified before the tribunal that he sold the land to the sister of the 2nd respondent, as the appellant never finished the remaining balance. Further, the said transaction between the sister of the 2nd respondent and the 3rd respondent was also witnessed by PW4, who also testified before the Tribunal.

Reacting to the 10th ground, which deals with the issue of costs, the counsel for the 1st Respondent attributed the cause of the dispute to the appellant and stated that; that was the reason as to why the tribunal ordered him to pay costs. He alluded that the appellant found the 1st respondent constructing a house but he kept quite until 2019 when he went to the Ward Tribunal to obtain resolutions which were to the effect that the land be returned to him and that is when he trespassed into the 1st Respondent's land, fenced it and started planting some trees and fruits.

Arguing against the appeal, the second respondent, Christopher Kimario; began his submissions by objecting to all the grounds of appeal for lacking merit. He submitted that; based on ground 1-10, it is not true that DLHT made errors in its decision rather the decision was delivered in accordance with the law and evidence that was tendered before the Tribunal. He proceeded to state that; the sale agreement was legal (he referred the court to page 5 of the tribunal judgment) where it shows that the 3rd Respondent was not paid full amount of the purchase price by the appellant and that based on the omission by the appellant he had to sale the land to the 2nd Respondent's sister known as Adela Kavishe and he in turn sold the land to the 1st Respondent by way of power of Attorney granted to him by his sister. He further contended that, the appellant failed to justify before the Tribunal that he paid the whole contract price and he could not summon the people he claimed to have paid the remaining balance. He amplified further that the appellant never lived on the suit land thus he cannot claim to the owner of the suit land.

With regard to the issue of costs, he submitted that the tribunal was correct to order costs against the appellant, as he was the cause of the dispute. He trespassed on the land of the 1st respondent.

Masokota Mkwenya the 3rd respondent objected to all grounds of appeal from ground 1 to 10 and submitted that he sold the land to the appellant for Tshs. 400,000/= but he paid TZS 200,000/= only and committed to pay the remaining balance of TZS 200,000 on 28/01/1997 but he never did. However, the appellant never came back until 2003, the 3rd Respondent decided to go to "Mjumbe" who supervised the sale transaction who advised him to sell it following the breach by the Appellant. In 2019 the appellant came to claim his land and said that he had paid the remaining balance in two instalments of 50,000/= and 150,000/= respectively which 3rd Respondent objected to have received it. The appellant failed to discharge his burden before the Tribunal.

In his rejoinder submissions; the counsel for the Appellant Mr. Martin Frank reiterated his submissions in chief, I shall not repeat the said contents.

Having gone through the relatively lengthy submissions of the parties, the records of the Trial Tribunal, the crucial question before this court is whether this appeal has merit and in principle whether the appellant is the lawful owner of the disputed land subject of Land application no. 11/2020 decided at the DLHT.

In determining this appeal, I am guided by the principle that this court being the first appellate court can review and re-evaluate evidence of the trial Court and reach its own conclusions, taking into account that it did not have the opportunity to hear and see the witnesses testify (**See the case of Leonard Dominic Rubuye t/a versus Yara Tanzania Ltd, Civil Appeal No. 219 of 2018, Siza Patrice Vs Republic, Criminal Appeal No. 19 of 2010.** Similarly, the onus of proving the existence of any fact lies on the party asserting its existence and in civil case, the burden of proof is on balance of probabilities. (See section 110 and 111 of the Evidence Act CAP 6 RE 2019.

Having set out the principles above, I proceed to determine ground 1, 3, 5 and 9 conjointly as they all touch on the evaluation of evidence tendered before the Tribunal in respect of Land Application no. 11/2020.

In his submissions, the counsel for the appellant, Mr. Martin Frank contended that the tribunal failed to consider and accord weight to evidence tendered by the appellant as well as his testimony, that the tribunal failed to observe that the sale agreement between the 2nd and 1st Respondent was illegal and for ruling that the appellant never used the disputed land while he used the same for agriculture. The Respondents on their part have contended that the Tribunal was correct in reaching its decision contrary to what ground 1,3 and 5 of the Appeal state.

The hearing before the Tribunal was guided by the following three issues;

i. Whether the disputed land belongs to the Applicant by purchasing it from the 2nd Respondent who bought the same from the 3rd Respondent or whether the disputed land is a property of the 1st Respondent by purchasing it from the 3rd Respondent. (as quoted from the Judgement it reads; Eneo la mgogoro ni la mdai kwa kununua kutoka kwa mdaiwa wa pili ambaye alinunua kutoka kwa

mdaiwa wa tatu au ni mali ya mdaiwa wa kwanza kwa kununua kutoka kwa mdaiwa wa tatu)

ii. Based on the response to issue no. (i) above, whether the 1st Respondent has trespassed to land or not (Kutegemea na hoja ya kwanza, je mdaiwa wa kwanza amevamia au hajavamia eneo la mgogoro)

iii. What reliefs were the parties entitled to (Nafuu zipi wadaawa wanstahili kupatiwa na Baraza).

In proving the 3 issues above, both the 1st Respondent herein and the Appellant testified before the court and also paraded witnesses to prove their case.

The 1st Respondent herein Patrokili Shirima, who was the applicant aptly narrated before the Tribunal that he bought the land measuring 2 acres from the 2nd Respondent one Christopher Kimario after paying full purchase price as per their Agreement. He stated that the 2nd Respondent bought the land from the 3rd Respondent Masokota Mkwenya. That following the sale transaction he stayed peacefully and undisturbed in the disputed property and built a house in an area of ½ an acre where he is living with the family and left an area of 1 and ½ acres undeveloped. However, in the year 2019, the appellant invaded his land, fenced it and started planting trees, cassava, oranges and other types of plants in an undeveloped area of 1 1/2 acres, and had also intended to build a house, claiming that he was the lawful owner of the suit property. The Applicant claimed to have purchased the land from the 2nd Respondent who bought it from the 3rd Respondent. The Applicant tendered Sale Agreement between him and the second Respondent, dated 19th February 2005, which was admitted by the Tribunal and marked exhibit P1. (See proceedings and page 3 and 4 of the Judgement)

His evidence was supported by the testimony of the 2nd Respondent Christopher Kimario who testified before the Tribunal that he sold the area of land to the 1st Respondent herein vide power of Attorney granted to him by his sister Adela Kavishe, who bought the land from the 3rd Respondent. Therefore, he contended that the said property belongs to the 1st Respondent. The 2nd Respondent thus tendered a copy of the power of Attorney dated 27th June 2004, which was admitted as exhibit D4 by the Tribunal. (See proceedings and page 4 of the Judgement)

The evidence of the 1st Respondent was also further supported by the testimony of the 3rd Respondent, who testified before the Tribunal that on the 28th of December 1996, he sold the area of land measuring 2 acres to the 1st Respondent for consideration of Tshs.400,000/=, whereby the 1st Respondent paid TZS 200,000/= only and committed to pay the remaining balance on 28/1/1997, however before the said payment was made, he disappeared and never fulfilled his obligations. (See Sale Agreement dated 28th December 1996, which was tendered and admitted as Exhibit D5 in the Tribunal). That despite the sale transaction, the 3rd respondent continued to live in the suit property until 2003 when he visited the Office of the Local Government to inquire as to whether or not he should proceed to sell the land to another interested buyer, based on the fact that the appellant had failed to discharge his payment obligations. The Local Government Office advised him to wait for further 3 months before selling the land to another person. He complied with the instructions and following the expiry of the said period; he sold the land to one Adela Kavishe, the sister of the 2nd Respondent. Then the second respondent through power of attorney granted to him by his sister Adela Kavishe, sold the land to the 1st Respondent in the year 2005. He thus stated that the appellant had never lived or stayed in the suit property until in 2019 when he trespassed into the land. (See proceedings and page 5 of the Judgement, 2nd Paragraph)

In disputing the claims before the Tribunal, the Appellant herein as the first respondent therein defended himself by stating that he bought the land from the 3rd Respondent, Masokota Mkwenya on 28th December 1996 and completed payment of the contract price on 20th October 1997, i.e. 400,000 for the 2 and ½ acres of land, located at Goba Kulangwa Mpakani and Madale, thus the 1st respondent was not the owner of the land since he was the first to purchase it in 1996. He also tendered two Sale Agreements, the first one dated 28th December 1996 which was also admitted as exhibit D1 and the second one evidencing payment of the remaining balance admitted as exhibit D2.(See page 3 para 3 and page 4 para 1 of the Tribunal's Judgement)

Therefore, based on the testimony of the parties, there was no dispute before the Tribunal that both the appellant herein and the 1st respondent herein purchased the

same piece of land at different periods from different people. That the appellant claimed to have bought the land in 1996 from the 3rd Respondent and the 1st Respondent claimed to have purchased it in 2005 from the 2nd Respondent, whose sister bought it from the 3rd Respondent. The one-million-dollar question which was to be resolved at the tribunal was whether who, between the two buyers was the lawful owner of the land in dispute.

From the evidence narrated above and the arguments submitted by the parties during hearing of the appeal, it is evident that the first respondent herein is the lawful owner of the suit property for the following reasons;

One; I have satisfied myself from the records, testimony and evidence of the Respondents and or parties herein that; the appellant purchased the piece of land on 28/12/1996 from the 3rd Respondent for TZS 400,000 but failed to pay the remaining balance of TZS 200,000 to the 3rd Respondent. This is evidenced by the testimony of the 3rd Respondent who was the lawful owner of the property. He stated before the Tribunal that he sold the land to the appellant for TZS 400,000 however the appellant paid only TZS 200,000 and promised to pay the remaining balance of TZS 200,000 on the 28th January 1997 but he never fulfilled his promise to pay the balance on the said date. See page 8 para 2,3,4, page 9 para1,2 and 3).
Page 8 para 4 of the Judgement states that;

> ***"Tano, nimeridhika kuwa mdaiwa wa kwanza hajalipa pesa iliyobakia Tshs. 200,000/= kwa mdaiwa wa tatu tarehe waliyokubaliana yaani kabla ya tarehe 28/1/1997. Kielelezo D2 kinaeleza kuwa mdaiwa wa kwanza amemlipa mdaiwa wa tatu Tshs. 150,000/= tarehe 20/10/1997 ambapo mdaiwa wa tatu amekana kupokea malipo hayo.***

It is my firm position that by failing to pay the money on the agreed date the appellant breached the terms of the contract as argued by the counsel for the 1st Respondent.

Two, the Appellant in his testimony, stated before the Tribunal that he paid the remaining money on 20th October 1997 and produced before the Court Exhibit D2

showing that he gave the money to Ngalola and Abdalla Mongo to deliver the money, i.e. TZS 50,0000 and 150,0000 to the third respondent. However, the third Respondent denied to have received the money from the Appellant or the people he mentioned before the Tribunal. Further, the appellant failed to discharge the burden of proof by summoning the said people to testify before the court and be cross-examined by the 3rd Respondent. Therefore, the appellant failed to discharge the burden of proof before the tribunal that he indeed paid the remaining balance of TZS 200,000. Thus, he never met the standard stipulated under section 110 and 111 of the Evidence Act CAP 6 RE 2019. See page 9 of the Judgement para 3 where the Tribunal stated;

> *"Watu hao waliodaiwa na mdaiwa wa kwanza kuwa walitumwa na mdaiwa wa tatu kwenda kwa mdaiwa wa kwanza kupokea fedha za mlipo kwa nyakati tofauti hawakuitwa kutoa ushahidi barazani kuthibitisha kupokea fedha hizo kwa niaba ya au wakiwa wametumwa na mdaiwa wa tatu kama alivyoeleza mdaiwa wa kwanza. Aidha, wakati mdaiwa wa kwanza anahojiwa na mdaiwa wa tatu alikiri kuwa hakulipa deni husika la Tshs 200,000/= tarehe waliyokubaliana kama ifuatavyo;*
>
> *sikufanya malipo ya pesa iliyobakia tarehe 28/1/1997 kwakuwa haukuonekana"*

By failing to call this key witness to testify in his favour, the Tribunal cannot be faulted because the law is settled that; failure to call key witness can lead the court to draw an inference against the person who called the witness that the witness so called, can testify against such a person who called him in court. See **Hemedi Said v Mohamedi Mbilu** [1984] TLR 113.

Based on the foregoing, I consequently agree with the cases cited by the Counsel for the 1st Respondent that by failing to pay the remaining balance, the contract between him and the third respondent became voidable and the 3rd respondent had an option of selling the land to any other interested buyer after he had waited for a period of 7 years. Hence the title did not pass from the 3rd Respondent to the to appellant, therefore the 3rd respondent was right to sell it to the 2nd respondent's

sister. **See the case of Hashim Omari Likungwa Vs Mohamed Mtondo and Shaha Said Namwambe, Land Appeal case No. 16/2018, HCT Mtwara,(Unreported) where Dyansobera J stated;**

The 1st Appellant had two options to exercise. One to enforce the contract by way of suing for recovery of the outstanding balance of TZS 7,240,000/= or two, abandoning it altogether. The 1st Respondent opted for the latter. He cannot be blamed for exercising his legal right. As correctly found by the Chairman, 1st Respondent was justified in selling his suit land to the 2nd Respondent after the Appellant failed to perform his contractual obligation".

I thus hold that ground number 1 of appeal has no merit in this regard since the tribunal considered evidence of the appellant.

Three, DW4 Abdalla Mohamed Ajali , testified to have witnessed the sale of the land between the 3rd Respondent and the appellant for TZS 400,000, whereby he paid only TZS 200,000 and that the appellant promised to pay the remaining amount of TZS 200,000 after a month but never fulfilled his promise to pay. His evidence was never controverted in the Judgement (See page 13 of the Judgement)

Four, I have perused the records and noted that, the 3rd Respondent sold the land to one Adela Kavishe, who was the sister of the 2nd Respondent. That when the 2nd Respondent sold the land to the 1st Respondent, he sold it under the power of attorney granted to the 2nd Respondent. The arguments by the Counsel for the Appellant that that the Sale agreement between the 2nd Respondent and the 1st Respondent indicated that the 2nd Respondent was selling his own land, do not hold water, since there was ample evidence that the said power of attorney was granted to him to sale the land and nothing else. The same document was admitted by the Tribunal as exhibit D4 as it appears in the proceedings. The appellant is thus estopped to challenge at this stage the sale between the 2nd and 1st Respondents. I hold that the sale was not illegal as contended underground 3 of appeal.

Five, with regard to ground no. 5 of appeal, the appellant contended that the tribunal erred in law in stating that the appellant never used the suit property for 14 years while he used it for agriculture. He further maintained that the dispute accrued in 2019 and not 2005. The counsel for the 1st Respondent objected to the submissions and stated that the 1st Respondent stayed in the disputed land since 2005 up to 2019 when the dispute ensued, which makes it to 14 years.

I have perused the records and noted in the submissions of the parties, that; the first appellant never resided or stayed in the suit property for 14 years, based on the following reasons; one, the 3rd respondent in his testimony and submissions before this court stated that; when he sold the land to the appellant in 1996 he never left the premises, he continued residing in the suit land until 2003 when he sold the land to the 2nd Respondent's sister one Adela Kavishe and afterwards till 2005.(See pg 10 and 11) of the Judgement. Further, after wards the 2nd Respondent hired a caretaker (PW3) who testified in court that he continued to reside in the suit land until 2005 when the land was sold to the 1st Respondent and afterwards he continued to stay and working for the 1st Respondent till 2019.(See page 11 last para of the Judgement) Then the 1st Respondent immediately began to do some improvements on the land including constructing a house, which he is using with the family. That when the appellant visited the suit land in 2007, he found the 1st respondent had already built a house. See Page 12 of the Judgement, where appellant states as follows;

> *".....nilinunua eneo hilo kwa silingi 400,000. Nilinunua 28/12/1996.* ***Ilikuwa mwaka kati ya 2005-2007 wakati natembelea eneo langu*** *nilimkuta Shirima anajenga kwenye eneo langu.*
>
> *Mgogoro kati yangu na mdai ulianza 2007* ***nilipofika*** ***shambani nilimkuta anajenga msingi, kulikuwa na mifugo,ngombe na alikuwa amejenga nyumba ndogo tayari...ni 2007, mdai nilimkuta anajenga eneo hilo".***

I have also satisfied myself that the appellant then went back to the land in dispute in 2019 and started fencing the area and planting trees. That is when the dispute erupted. Further the counsel for the 1st Respondent has also argued in his

submissions about exhibit D3 tendered by the appellant before the Tribunal, which bore resolutions aimed at giving ownership of the land to the appellant. However, the said resolutions were to the effect that the land should be returned to the appellant herein as the lawful owner. The counsel questioned if the appellant was the owner of the land or residing in the land then why was there a resolution aiming at returning the land to him if he indeed already had it. I agree with his submission in this regard.

Therefore, based on the evidence and submissions above, I am inclined to hold that ground number 5 of appeal as advanced by the appellant has no basis.

The counsel for the appellant contended in his submissions that exhibit D3 was not considered in the Judgement of the Tribunal. The Counsel for the 1st Respondent objected to the submissions. I have perused the document, which was tendered twice as exhibit 3 noted that it was titled;

"KUTATUA MGOGORO WA ENEO KATI YA GASTON, PATROLINK NA MASOKOTA) and the 2nd exhibit D3 titled (UTHIBITISHO WA MAKUBALIANO YA MAUZO YA SHAMBA ENEO LA GOBA) the same emanates from the resolution which is not enforceable under the law hence the same cannot be enforceable because by looking at it, it is vague as there are no signatures of the parties and its title is vague generally. The document was signed by two ward executive officers and it had some minutes attached to it with the attendance of the both the appellant and the 1st Respondent. However, the 3rd Respondent who is key never attended in the meeting. It is my firm position that whether the document was referred by the tribunal in its Judgement or not is immaterial since the issue before the court was on ownership and the Appellant proved on the balance of probabilities that the Appellant is not the owner of the suit property. The Document did not constitute the final decision of the Tribunal or Court of law. Further, the presence or absence of the document could not or cannot vitiate the position reached by the Tribunal based on the evidence submitted by the parties. The presence or absence of the document cannot negate the fact that the appellant failed to discharge his obligation of paying the remaining 200,000 shillings, something that automatically triggered the right of 3rd Respondent, Masokota Mkwenya to sale the plot of land to another interested

buyer. In the case of **Leonard Dominic Rubuye t/q Agrochemical supplies Vs. Yara TZ Ltd Civil Appeal No. 219/2018 CAT, the** Court stated that;

Documents although tendered in court, if no sufficient explanation is availed to its purpose are of no assistance to the court. The duty lies on the party relying on them to demonstrate their significance

I have demonstrated above that, the appellant in this case never discharged his burden of proof as per section 110 and 111 of the Evidence Act, CAP6 RE 2019. Therefore, D3 had no any significance to the Tribunal.

Reverting to the 2nd ground of appeal, the appellant contended that, the trial District Land and Housing Tribunal erred both in law and facts for failure to observe mandatory requirements of the law stipulated under Regulation 12(1) (2)(3)(a) and (b) which require the chairman at the commencement of the hearing to read and explain the contents of the application to the parties. He contended that looking at the pleadings especially the written statement of defence, 1st Respondent who was the appellant therein objected to the application while the 2nd and 3rd Respondent admitted the claims. The Counsel for the Appellant contended that the tribunal ought to have recorded the admission of the 2nd and 3rd respondent based on Regulation 12(3). On his part the counsel for the respondent objected to the submissions contending that it never occasioned any miscarriage of justice.

In determining this issue, I have perused the contents of the Regulation 12 and note that they read as follows;

12.(1) The chairman shall at the commencement of the hearing read and explain the contents of the application to the respondent.

(2) The Respondent shall, after understanding the details of the application under sub regulation (1) be required to admit the claim or part of the claim or deny

(3) The Tribunal shall;

(a) Where the Respondent has admitted the claim, record his words and proceed to make order as it thinks fit

(b) Where the respondent does not admit the claim or part of the claim, lead the parties with their advocates, if any to frame issues.

I have gone through the record of hearing of Application no. 11 of 2020 and noted that both parties were afforded an opportunity of knowing the case each one was advancing before the Tribunal. In the first place Parties exchanged pleadings (Application and Written statement of Defence) where they had an opportunity of admitting and disputing the claims. When the hearing commenced parties framed issues and proceeded to give their evidence based on the pleadings they prepared and issues framed by the Tribunal. Whether the 2nd and 3rd Respondent admitted the claims in their pleadings has got nothing to do with the recording of the tribunal, since that was their position and the position they took throughout the case. The recording by the Tribunal was not going to change their position in the case. The appellant, who was the first Respondent, opted to object to the application and that is how he proceeded to adduce his evidence and was recorded throughout the proceedings. Further, the appellant lamented in his rejoinder that failure to comply with such a procedure led to the appellant to lose the case and be ordered to pay cost. I state that, the Appellant lost his case for failure to prove his case on the balance of probabilities while he was also fully represented by an Advocate before the Tribunal, who was observing closely all the procedures.

I thus agree with the submissions by the counsel for the 1st Respondent in this regard and the 2nd and 3rd Respondent who generally objected to this ground as well. Consequently, I am inclined to hold that there was no any miscarriage of justice occasioned to the parties to vitiate the proceedings of the trial Tribunal.

I now turn to ground no. 6, which is to the effect that; the trial chairperson erred both in law and fact by holding that for 14 years, the 1st respondent peacefully enjoyed the interest on disputed land and forgetting that in his own judgment at page 12 the appellant clearly stated that the dispute over the disputed land started in 2007 and the same was never challenged on cross examination. On his part, the Counsel for the appellant objected to the submissions for not being true since as per the record of the Judgement, the Tribunal stated that Appellant went back to the

area in 2007 and found that the 1st Respondent had already done some improvements on the land.

It is my firm position that, there is no dispute that the land was sold to the 1st Respondent in 2005 after the appellant had failed to discharge his obligation and the dispute between the Appellant and the 1st Respondent ensued in 2019. This is evidenced by the facts narrated in the Application to the Tribunal and the submissions by the counsel for the Appellant that his client went to the ward tribunal to complain about the alleged invasion of his land in 2019. There is a difference between the 1st Respondent using the land since 2005 and the appellant declaring a dispute in 2019 after keeping quiet for 14 years. Further, there is no any other evidence to show what the appellant was doing in between 2007 and 2019 after discovering that his area had been allegedly invaded by the first Respondent. The Appellant failed to prove this before the Tribunal. This fact makes this court to believe that the dispute arose in 2019.

I thus agree with the counsel for the 1st Respondent and the submissions by the 2nd and 3rd Respondent that the decision of the Trial Tribunal is correct in this regard and I cannot fault it.

With regard to ground 8, the counsel for the appellant contended that the trial Chairperson erred in both law and fact by holding that the 3rd Respondent stayed in in the disputed land since 2005 to 2019 while all these facts were never pleaded in either the 1st Respondent nor 3rd Respondent's defence. He cited the case of **Martin Fredrick Rajab (Supra)** to drive point home that parties are bound by their pleadings.

With regard to ground no. 4, the counsel for appellant Ms Hawa Tursia contended that the trial Chairperson erred in law and fact by holding that the appellant did breach the sale the agreement while there was neither a case nor order from any court or tribunal ever instituted by the 3rd respondent to justify the same. Further she alluded that time was not of essence in the said Agreement and that the agreement never had a provision to nullify the same in case of breach. She cited Hulsbury Law

of England para 931 pg 635. She also distinguished the case of **Milambo Mabula versus Yohana Michael Sangasu and others, Civil Appeal no 71/2020 CAT DSM** for being irrelevant in the instant case. On his part the counsel for the Respondent Reginald Shirima contended that it was not necessary to have a court order whenever the contract is breached, the other side can avoid the contract, no need of issuing notice or going to court. He cited the case of **Mirambo Mabula (Supra), Joseph Mbwiliza (supra) and the case of Hashim Omary Likungwa (supra).** The 2nd and 3rd Respondents on their part objected to this ground of appeal no. 4.

Having followed closely the arguments between the counsel for the appellant, 1st the counsel for the 1st Respondent, the 2nd and 3rd I rightly agree with the submissions of all of the respondents in this appeal and the holding of the trial Chairperson that the appellant breached the contractual obligation to pay hence there was no need of the case or order from any court. The 3rd Respondent had the right to sale his property to someone else after waiting for 7 years. Indeed, time was essence in the said sale Agreement. See **Joseph F Mbwiliza v Kobwa Mohamed Lyeselo Msukuma (Legal respresentyative of the estate of the late Rashid Mohamed Lyeselo) and 2 Others,** Civil Appeal No.227 of 2019CAT At Tabora and at page 15 and Milambo Mabula(supra). Further, the appellant was required to pay the remaining TZS 200,000 on or before 28 January 1997 of which he never fulfilled. He tendered documents in the Tribunal to show that he paid the money but could not parade the witnesses or the people he alleged to have paid the money on behalf of the 3rd Respondent. Finally, the 3rd Respondent denied to have received the money and PW4 who witnessed the sale.

On ground No 7, the Appellant contended that the trial Chairperson erred in law and fact in holding that 3rd respondent disposed of the disputed land to the sister of the 2nd respondent while neither consideration nor evidence was presented. The counsel for the 1st Respondent objected to the ground of appeal by stating, the 3rd Respondent testified before the court that he sold the land to the sister of the 2nd Respondent after the appellant had failed to discharge his obligation of paying the remaining. The evidence is also supported by that of PW4 who witnessed the sale. As

per the records, it is also supported by submissions and evidence of the 3rd Respondent himself who affirmed these submissions leave alone the 2nd Respondent, whose sister was the beneficiary or owner of the land.

Therefore, based on the foregoing extract of the submissions of the Respondents, I find this ground to be baseless. The records are clear that the 3rd respondent sold the land to the sister of the 2nd respondent and there is no dispute on this issue. Furthermore, if I may add up, the contention had nothing to do with the alleged ownership of land by the Appellant in the instant case. The main issue before the Tribunal was whether the appellant discharged his burden of paying the remaining money of TZS 200,000 in order to prove his ownership to the land and nothing else. Whether the Appellant sold the land to the 2nd Respondent or someone else is a question that should not detain us for long.

Lastly, on the 10th ground, the counsel for the appellant submitted that, the trial tribunal erred both in law and in fact for ordering costs against the appellant alone and diverted from the pleadings within which costs were sought against all respondents and that there are no reasons assigned thereto by the Tribunal.

The counsel for the appellant objected to this ground vehemently contending that the cause of the dispute was the appellant's trespass to the Applicant that's why the Tribunal ordered him to pay costs to him. He alluded further that the 2nd and 3rd Respondent were ordered to join the case by the Tribunal as necessary parties. The 2nd Respondent disputed the issue of costs based on the same reasons advanced by the counsel for the 1st Respondent and the 3rd Respondent objected generally to all the grounds of appeal including the issue of cost. Further in their testimony before the Tribunal, the 2nd and 3rd Respondents requested the tribunal to allow the application filed by the Applicant (1st Respondent therein) with costs and dismiss the claims advanced by the appellant herein who was the 1st Respondent in the Tribunal and prayed for him to be permanently restrained by the Tribunal from disturbing the Applicant (1st Respondent herein).See page 5 para 3 and 6 para 1 of the Judgement.

I fully agree with the submissions by the Respondents on the issue of costs and I cannot fault the trial Tribunal in this regard. The award by the Tribunal was based on the costs of litigation after declaring the Appellant herein the trespasser. (See page 26 of the Judgement, last paragraph.). I am guided by the fact that the Tribunal has discretion to award costs based on the circumstances of the case. In the Application before the Tribunal, the Applicants and the Respondents requested for costs against the Appellant and gave evidence that he was the trespasser. Further, it could have been awkward for the Tribunal to grant costs against the 2nd and 3rd Respondents who were joined by the order of the court as necessary parties.

In the end result and for the foregoing reason, I find that this appeal is devoid of merit and is hereby dismissed with costs.

It is so ordered.

The right of appeal explained.

S. D. MWAIPOPO
JUDGE
24/11/2023

The Judgement delivered this 24th day of November,2023 in the presence of the Gaston Hudson Nyange, the Appelant, Learned counsel Hemed Nassoro holding brief for Advocate Reginald Shirima for the 1st Respondent, Christopher Edward Kimario, the 2nd Respondent and Masokota Mkwenya, the 3rd Respondent, is hereby certified as a true copy of the original.

S. D. MWAIPOPO
JUDGE
24/11/2023