

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND APPEAL NO. 15 OF 2022

(Arising from Application No. 24 of 2020 from the decision of the District Land and Housing Tribunal for Tanga at Tanga)

H Aidari Mwinyi.....APPELLANT

-VERSUS-

Seif Mhina Mzee..... RESPONDENT

JUDGMENT


Date of last order:11/07/2022

Judgment date:24/10/2022

AGATHO, J:

In this appeal, the Appellant is aggrieved with the decision of the District Land and Housing Tribunal for Tanga at Tanga in Application No. 24 of 2020. He therefore filed a Petition of Appeal based on the following grounds;

1. That the trial Tribunal Chairman grossly erred in law and in fact by regarding oral evidence which is contrary to documentary exchange agreement of the suit land between the Appellant and the Respondent.
2. That the trial Tribunal Chairman grossly misdirected himself by holding that the exchange agreement is valid while the same was in the contrary since the Appellant had nothing in the said



exchange which negatively affected valid meaning of lawful consideration.

3. That the trial Tribunal Chairman grossly misdirected himself by holding that the exchange agreement was lawful and valid without considering that there was no lawful object to be exchanged in accordance with terms of sale agreement.
4. That the trial Tribunal Chairman grossly misdirected himself by holding that the issue raised during the hearing cannot be considered that the same is not pleaded that it was raised during the hearing.
5. That the trial Tribunal Chairman grossly erred in law and in fact by the principle of *caveat emptor* even where the subject of agreement was uncertain and void in law.
6. That the trial Tribunal Chairman grossly erred in law and in fact by failure to discover the finding that there was misrepresentation since the Respondent identified himself as the one to be compensated in respect of the same and the Appellant had nothing to be entitled.

Before determining the appeal, I am guided by the decision in the case of **Bakwata Mugango v. Mafuru Kiraka [2012] T.L.R 114 at page**

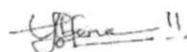


115 where it was held that the legal duty of the first appellate court is to re-evaluate the evidence on record on which the decision of the trial court or tribunal has been founded and make its own finding based on the facts presented before it.

From the above case it is therefore relevant to analyse the background of the matter. Now, according to the records of the trial Tribunal the background of the matter is that on the 26th day of February 2020, the Appellant and the Respondent entered into an exchange agreement where he had to provide a three-acre farm to the Respondent and the Respondent to provide him a seven-room house in exchange. The agreement was entered at the Village Office.

It was the Appellant's testimony that to a dismay upon handling process of the house in dispute he found the same to be a mud house roofed with coconut tree branches commonly known as *makuti*. He declined to be handled with the house. The Appellant filed an application at the District Land and Housing Tribunal for Tanga at Tanga claiming for the following reliefs;

- (a) *A declaratory decree invalidating exchange agreement.*
- (b) *A declaratory decree that the exchange agreement of the suit land is unlawfully and be declared as null and void.*

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- (c) *An order for perpetual injunction permanently restraining the Respondents and or their agents from the suit land.*
- (d) *Payment of general damages for causing embarrassments, disturbances and inconveniences to the Applicant and other beneficiaries of the deceased's estate.*
- (e) *Costs of the Application be provided.*
- (f) *Any other relief the Tribunal may deem fit and just to grant.*

The Appellant tendered two exhibits namely the document concerning handling of the house and the picture of the farm and the house as exhibits A1 and A2 respectively.

The Respondent, RW1 on his part denied the claims. He disputed the claims that the Appellant did not know the house. He testified that prior to the agreement he affixed a flier to the house indicating that the house is on sale. That it was the Appellant who followed him and requested for the exchange and that the Appellant was shown the house before effecting the exchange agreement and he disclosed that the house is subject to the TANROAD programme. The Respondent as well tendered a document concerning handling of the house. The same was admitted as exhibit R1.

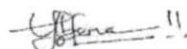
John J. J. J.

RW2, one Mohamed Baraka the Village Executive Officer witnessed the agreement. He testified that parties visited the house prior to the exchange agreement and the house is on TANROAD programme. RW3, Shabani Abdallah Hickman, a village old man also witnessed the exchange agreement, his testimony was the same as that of RW2.

The Tribunal having heard both parties however found the Appellant to have failed to prove the claims contained in the Application. The Application was therefore dismissed. This triggered the Appellant to appeal before this honourable court. Hence the Appeal.

On the 11th day of July, 2022 the Court ordered the matter to be determined by way of written submissions. The Appellant was represented by Mr. Christopher Wantora whereas the Respondent was represented by Mr. Obediodom Chanjarika, Advocates.

Starting with the first ground of appeal, the counsel for the Appellant submitted that a house of seven rooms which was subject to the exchange agreement did not exist since there was oral evidence which stated that there were two houses connected to each other which was contrary to the documentary evidence exhibit A1. He stated that in law, contents of the document cannot be superseded by the oral account. He referred the case of **Martin Fredrick vs Ilemela Municipal Council**

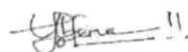
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and Another, Civil Appeal No. 197 of 2019 and Section 101 of the Evidence Act, [Cap 6 R.E 2019].

The counsel for the Respondent refuted that there was contravention of the provision of Section 101 of the Evidence Act. He submitted that the testimony established that the house had four rooms at the front and three rooms at the back and they are all in one plot.

Regarding the second ground of appeal, The Appellant inquired about the issue of validity of the contract. He submitted that the Appellant had nothing in the said exchange because the house was on the TANROAD programme. He referred the case of **Sardudin Sharif vs Tarlochian Singh [1961] EA 72** where it was held that the contract entered on subject matter with non-compliance with the provision of the law is illegal. The counsel added that consideration which is a house was contrary to the law, Section 48(e) of the Road Act, it was also contrary to the public road policy and hence there was no price (consideration) as such and that rendered the agreement uncertain and void. He referred the case of **Alfi East Africa Ltd vs Themis Industries & Distributors Agency Ltd [1984] TLR 256**.

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The Respondent on his part stated that the house exists as it existed before the programme and it was the Appellant who asked the Respondent for the exchange.

On the third ground of appeal, the Appellant states that there was no lawful object to be exchanged as per the terms of the contractual agreement. He referred to Section 10 of the Law of Contract Act [Cap 345 R.E 2002]. The counsel for the Respondent maintained that the exchange agreement was valid.

Regarding the fourth ground of appeal, the appellant states that the Tribunal Chairman erred in considering that the issue raised was not pleaded. This is in respect of page 10 of the judgment where the Chairman stated that the Appellant did not state in the pleading that after they entered the exchange agreement, he discovered that the land in dispute is within the road reserve. Besides, the Appellant states that the issue was pleaded since it was contained in the exchange agreement annexed to the Application.

Regarding the fifth ground of appeal, the Appellant states that the trial Tribunal Chairman erred in law and in fact by the principle of *caveat emptor* since the same cannot apply where there is no lawful object to be transferred between the parties to the agreement.

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It is an established principle under the law of contract that parties are bound by the terms of the agreement they entered freely. This is according to the case of **Simon Kichele Chacha v Avelina M. Kilawe Civil Appeal No. 160 of 2018 CAT at Mwanza**. But since the agreement in its nature is void, that there was no lawful object then even the terms forming part of the contract becomes void hence not enforceable under the law.

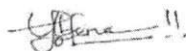
On the sixth ground of appeal the appellant states that the trial Tribunal Chairman erred in law and in fact by failure to discover the fact that there was misrepresentation since the Respondent is the one who is entitled to be compensated in respect of the house and the Appellant has nothing to be entitled.

I have considered submissions from both sides. In determining this appeal, I prefer to begin with the second and the third ground of appeal. They both concern with the issue of validity of the contract. According to Section 10 of the Law of Contract Act [Cap 345 R.E 2002] all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

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From the above provision of the law, it follows that the relevant issues are whether there was lawful object and lawful consideration. I have read the exhibit A1. Indeed, the Respondent knew that the house in dispute is under the TANROAD program. There was no lawful object to be transferred and the consideration as a consequence was unlawful. The contract is manifestly void and unenforceable in law. According to Section 24 of the Law of Contract Act [Cap 345 R.E 2002] an agreement is regarded to be void if considerations and objects are unlawful in part. Also, according to Section 2(g) an agreement not enforceable by law is said to be void.

Coming to the fifth ground of appeal, I concur with the counsel for the Appellant that the principle of *caveat emptor* cannot operate since the contract was void and with respect to the sixth ground of appeal, the Respondent misrepresented the Appellant since according to exhibit A1 (a photocopy) the Appellant is the one who is supposed to benefit from the compensation while in R1 it is the Respondent who is supposed to benefit and the witness RW2 testified that it is the Respondent who is supposed to benefit from the same. That is contradicting. It seems that there was no actual transfer of the property (the house).

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Regarding the fourth ground of appeal, it is correct that parties are bound by their pleadings. This is according to the case of **Makori Wasaga vs Joshua Mwaikambo & Another [1987] TLR 88** where it was held that;

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."

I have read the application, it is clear that the Applicant/ Appellant did not disclose that after the contractual agreement he found the house to be under the TANROAD programme, however he annexed copies of the exchange agreement dated the 26th of February, 2020 marked as "A-1" and the other dated 27th February, 2020 dated 27th February, 2020 marked as "A-2." The documents clearly stipulate that the house is under the TANROAD programme. In my view the documents formed part of the Application/ the pleading. They do not deserve to be regarded as not pleaded.

Regarding the first ground of appeal, it is correct that there is contradiction, the exhibits A1 and R1 indicates that there is one house and while RW1 testified that the house had two sies, RW2 testified that

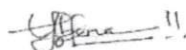


there were two houses in a single plot and that the front house was a mud house whereas the second one was a block house.

I concur with the counsel for the Appellant that there was a contradiction and the trial Tribunal Chairperson ought to rely on the written contract. Though even though the written contract is relied upon, the contract is void, the subject house was subject to the TANROADS. According to Section 29 of the Law of Contract Act, if an agreement is uncertain, it becomes void.

Having considered submissions from both sides and evidence on record, it is my view that the exchange agreement was invalid, it is thus declared to be void. The judgment and decree of the District Land and Housing Tribunal for Tanga at Tanga are hereby quashed. The Court further orders the Appellant to hand over the house to the Respondent and the Respondent to hand back the suit land to the Appellant. The Respondent and or their agents are thus permanently restrained from the suit land, and so is the Appellant restrained from interfering with house in dispute.

According to Section 65 of the Law of Contract Act [Cap 345 R.E 2002], when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such

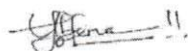
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agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Regarding the payment of general damages for causing embarrassments, disturbances, and inconveniences to the Appellant and other beneficiaries of the deceased's estate, this is not granted for lack of proof. There is no justification on that. According to Section 110 (1) of the Evidence Act [Cap 6 R.E 2019], whoever desires any court to give judgement as to any legal right or liability dependent upon the existence of facts which he asserts must prove that those facts exist. See also the case of **Berelia Karangirangi vs Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 (CAT) unreported.**

According to the cases of **Anthony Ngoo and Another vs Kitinda Kimaro, Civil Appeal No. 5 of 2014 (unreported)** it was held *inter alia* that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. Similarly, no costs are awarded against the Respondent since both parties were aware that the house was subject to TANROAD programme. It is so ordered.

DATED at TANGA this 24th Day of October 2022.



U. J. Agatho !!

U. J. AGATHO

JUDGE

24/10/2022

Court: Judgment to be delivered today this 24th day of October 2022 by the Hon. Beda Nyaki, Deputy Registrar, in the presence of the parties.



U. J. Agatho !!

U. J. AGATHO

JUDGE

24/10/2022

U. J. Agatho !!

Date: 24/10/2022

Coram: Hon. B. R. Nyaki, DR

Appellant: Absent

Respondent: Present in person

C/C: Zayumba

Court: Judgment delivered this 24th day of October, 2022 in the presence Respondent but in absence of the Appellant.

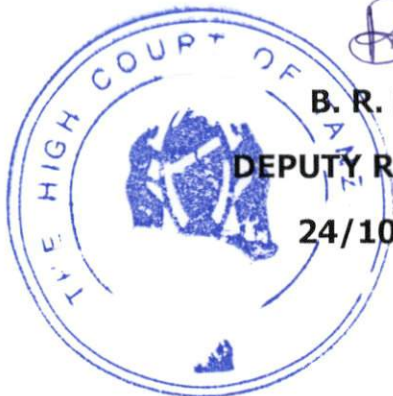


B. R. Nyaki

DEPUTY REGISTRAR

24/10/2022

Court: Right of Appeal explained fully upon filing notice of appeal.



B. R. Nyaki

DEPUTY REGISTRAR

24/10/2022