

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND APPEAL NO. 14 OF 2021

(Arising from Land Appeal No. 33 of 2020 of District Land and Housing Tribunal for Lushoto at Lushoto originating from Land Case No.../2020 of the Lukozi Ward Tribunal)

BAKARI KIPANDE.....APPELLANT

-VERSUS-

JUMA RAMADHANI KIBINDO.....RESPONDENT

JUDGMENT

Date of last order: 02/06/2022

Date of judgment: 09/06/2022

AGATHO, J.:

Bakari Kipande as applicant complained before Lukozi Ward within Lushoto District that Juma Ramadhani Kibindo, the Respondent has trespassed into his farm and planted some trees therein in March 2020. The trial tribunal decided the matter in favour the Respondent. Aggrieved by the decision of the Ward Tribunal Bakari Kipande appealed to Lushoto District Land and Housing Tribunal where once again the decision was not his favour. He thus decided to appeal to this Court armed with six grounds of appeal as follows:

1. That the Appellate Tribunal failed to properly evaluate the evidence on record by faulting a deed of sale in favour of the Respondent who admitted it at the trial and also purported to return the purchase price featured in the sale agreement.
2. That the Appellate Tribunal to make a finding on the fact that logically the Appellant could not return to a third party a disputed land after a lapse of 16 years under a consideration of the same purchase price.
3. That the Appellate Tribunal wrongly confirmed the decision of the Trial Ward Tribunal while the Respondent is a trespasser with no interest over the disputed land.
4. That the Appellate Tribunal wrongly and negatively used the fact that there was a change of Applicant from the Appellant's wife to the Appellant himself at the Trial Tribunal thereby confirming Trial Tribunal decision.
5. That the Appellate Tribunal erred in law and in fact by granting the disputed land to the Respondent basing on contradictory evidence.

6. That the Appellate Tribunal was biased against the Appellant herein.

The Appellant prayed that the Court nullify the judgment, decree, and orders of the Appellate Court and Trial Ward Tribunal; the Appellant be awarded costs for this appeal and proceedings in the tribunals below; and other reliefs that this honourable Court may deem fit to grant.

Appellant was represented by Mr Henry Njowoka learned advocate and Respondent represented by Mr George Banoba learned Advocate. When this appeal scheduled for hearing parties agreed to dispose this appeal by way of written submissions and parties file their written submission as scheduled.

The first ground of appeal was that the Appellate Tribunal failed to properly evaluate the evidence on record by faulting a deed of sale in favour of the Respondent who admitted it at the Trial and also purported to return the purchase price featured in the sale agreement. Looking at the evidence on record, at the trial Tribunal the Appellant stated that he bought the disputed land from his father in law one Waziri Kibindo. The Appellant's spouse Telesia

Kibindo also known as Mwanauru Waziri also supported that testimony that his father indeed sold the land to her husband in 1988. The sale agreement is dated 12th February 1988 was tendered before the trial tribunal. The first ground of appeal carries several crucial points: the sale agreement, the return of purchase price, and the testimony that the Appellant admitted to have trespassed into the Respondent's land. I have noted the Appellant's counsel raised several question on page 2 of his written submissions linking them with the first ground of appeal. I have tried to peruse the record of proceedings in the lower tribunals I could not find such questions.

I should also say, while it is true that in disputes relating to sale of land agreements, the sanctity of contract requires the parties to that contract to be the ones to testify the correctness of the agreement see the case of **Simon Kichele Chacha V. Aveline M. Kiluwa, Civil Appeal No. 160 of 2018 of Court of Appeal of Tanzania at Mwanza at page 8 and 9.** However, the issue of validity of agreement is a legal matter the court cannot shut its eyes to legal defects that are visible on the agreement/contract itself. **If a contract is written, signatures are important component**

of the said contract. The same helps to support genuineness or authenticity of the contract. I will thus distinguish the case at hand with the decision of the High Court of Tanzania (Commercial Division) in the case of **Puma Energy Ltd V. Spe-Check Enterprises Ltd (Commercial Case No. 19 of 2011)** and the case of **Juma B. Kadala V. Laurent Mnkande [1983] TLR 103 (unreported)**. The Appellant is also confusing between heirs and the administrator of estate. The Respondent is not administrator of the estate of his late father. But he was given that land by his father. He cultivated it when his father died in 2001. If the Appellant wanted to sue the administrator of the estate of the late Ramadhani Kibindo he could have done so. Presence or absence of the administrator of the estate of the later Ramadhani Kibindo does not leave his property to become no man's land. The heirs will certainly come forward to protect it.

Respondent admitted that the contract was between the Appellant and his uncle while the plot belongs to his father. The uncle wrongly sold the land to the Appellant. And there is ample evidence (from the Respondent's witnesses, four of them who testified that the Appellant admitted having trespassed into the land of the

Respondent between 2004 and 2005). It is unsurprising that the Respondent paid the Appellant back his money (purchase price) because the property was wrongly sold to him. On 03/08/2005 the purchase price of TSH. 4,000/= was paid back to the village office. There were also exhibits from ward office dated 24/04/2005.

The Appellant's counsel submitted that it is illogical for the Appellant to receive TSH. 4000 after a lapse of 16 years from 1988 to 2004. What the learned counsel forgets is that a trespasser has gains no title no matter the length of his stay on the disputed land. The questions posed on page 2 of the Appellant's counsel's submission were not drawn by the tribunals. The first question is irrelevant as it does not matter. After all it is elementary principle of contract law that consideration need not be adequate but sufficient. As for the second question, the Appellant is faulting the returning of the purchase price documents, why was there no legal representatives of Waziri Kibindo, the seller. Why was his daughter wife of the Appellant not featured in the returning of purchase price transaction? I find this question lacking substance. If the buyer was there, why would there be a need for other people. Again, if the Appellant was faulting the said document, he could have raised that

at the lower tribunals. The Appellant's counsel forgets that the Appellant's spouse also claimed to be the owner of the said land while the sale agreement is in the name of her husband. Moreover, there are four Respondent's witnesses who testified that the Appellant confessed to have trespassed on to the Respondent's land. Were all these false witnesses? In **Goodluck Kyando v Republic [2006] T.L.R 367** the CAT held that every witness is entitled to credibility unless there is reason to disbelieve them. I find the Appellant's arguments to lack substance. The issue of locus standi I have answered it. The Respondent was given the land by his father. Again even if it was the administrator to be sued then it was the Appellant who wrongly sued the Respondent. In any case this is non-issue. The Respondent could not have left his deceased's father property encroached and taken by another person without lawful justification. The issues of locus standi is thus baseless.

The learned counsel for the Appellant is faulting the Village Executive Officer (VEO) signing of the agreement for the return of the land wrongly sold to the Appellant to the Respondent. The VEO did not usurp the power of Ward Tribunal. What he did was to witness the return of the purchase price to the Appellant. Had there

been a dispute on the same then the parties were not precluded from going to the Ward tribunal. The question of genuineness of the returning of purchase price of the land documents cannot be discussed at this level. The trial Tribunal found it to be genuine and the Appellant did not fault it at the trial. The question of genuineness of the sale could not have been dealt by VEO after all the Appellant returned the land to the Respondent. The document prepared by the VEO is corroborated by the testimonies of the four witnesses of the Respondent. Truly, the case is decided on substance of evidence and not number of witnesses. That is what is found in Section 143 of the Evidence Act [Cap 6 R.E. 2019].

It would have been wastage of Tribunal's precious time to call the VEO to come to testify while the trial tribunal has ruled that the return of purchase price document was genuine. Further, the land sale agreement was not witnessed by the VEO. If the Appellant wanted to call him as a witness. He was not precluded from doing so.

The question of Respondent's locus stand has been disposed. I will not repeat it here. There are four witnesses of the Respondent who

testified that the Appellant admitted to have trespassed into the Respondent's land. The Appellant side had himself and his spouse Telesia Waziri as witnesses. But the records show that they could not contradict or discredit the evidence of the four witnesses of the Respondent on the question admitting trespassing on the Respondent's land. Under Section 110 of TEA he who alleges must prove. The Appellant failed to prove his claim. The evidence of the Respondent was heavier than that of the Appellant. As it was held in **Hemedi Said v Mohamed Mbilu [1984] TLR 113** that person whose evidence is heavier than that of the other is the one who must win.

The Appellant posed a question "*mimi ninunue shamba langu kwa Waziri Kibindo halafu nikukabidhi wewe kwanini?*" the Respondent replies "*Hujanikabidhi mimi umemkabidhi baba.*" There was no further question. The Appellant's counsel has argued extensively on the Appellant's question that showed he was dismayed with the claim that he returned the land the Respondent. But unfortunately, he did not discredit the evidence given by the Respondent witnesses that he admitted having trespassed into the Respondent's land. Disputes before the Court of law are determined based on

evidence not mere assertions. I would conclude on the first ground of appeal that the Appellate tribunal properly analysed the evidence as it can be seen on pages 6-7 of the District Land and Housing Tribunal (DHLT) judgment, and pages 16 -17 of handwritten judgment of the trial Tribunal. The first ground of appeal therefore crumbles.

The second ground of appeal was that the Appellate Tribunal failed to make a finding on the fact that logically the Appellant could not return to a third party a disputed land after a lapse of 16 years under consideration of the same purchase price and also the third ground is that the Appellate Tribunal wrongly confirmed the decision of the Trial Ward Tribunal while the Respondent is a trespasser with no interest over the disputed land. These two grounds of appeal are interrelated with the first. But they will be disposed jointly here. I have held that the stay of the Appellant on the land for 16 years was not substantiated. And it was disputed by the Respondent. Moreover, the sale agreement was faulted by both trial tribunal and Appellate Tribunal (see pages 6-7 of the District Land and Housing Tribunal judgment and page 16 of Ward Tribunal Judgment). They faulted the sale agreement was not genuine

because it lacked the signature of the seller, buyer, and some witnesses. There are two thumb prints on the sale agreement. It is not clear whose thumb prints are these. I concur with the findings of the lower tribunals who faulted the genuineness of the sale agreement. Looking at the said sale agreement, it is true that the signatures are missing. The seller and buyer's signatures are conspicuously missing.

It would be unbecoming to conclude the second ground of appeal without saying something on the issue of adverse possession. The latter was not an issue raised by the Appellant. It was raised by the Respondent's counsel. I should state categorically that adverse possession is not automatic as it was held in **the Hon. Attorney General Vs. Mwahezi Mohamed (As administrator of the Estate of the Dolly Maria Eustance) and three others, Civil Appeal 391 of 2019, CAT at Tanga** (unreported). But is there any linkage to adverse possession in the case at hand. There would be there was not any because there was allegation that there was a sale agreement. Hence, there cannot be a claim for ownership of the land based on adverse possession. The case of **the Registered Trustees of Holy Spirit Sisters Tanzania v January Kamili**

Shayo and 136 Others Civil Appeal No. 193 of 2016 CAT at Arusha (unreported) at pages 24-27, and the English cases of **Moses v. Lovegrove [1952] 2 QB 533** and **Hughes v. Griffin [1969] 1 All ER 460** are informative on the issue at hand. It was held in these cases that:

*"[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following:- (a) That there had been absence of possession by the true owner through abandonment; (b) **that the adverse possessor had been in actual possession of the piece of land**; (c) that the adverse possessor had no color of right to be there other than his entry and occupation; (d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it; (e) that there was a sufficient animus to dispossess and an animus possidendi; (f) that the statutory period, in this case twelve 12 years, had elapsed.*

Since the Appellant never claimed ownership of disputed land by adverse possession, it is therefore irrelevant in the premises of the present case. The second and third grounds of appeal are therefore dismissed for lacking merits.

The fourth ground of appeal was that the Appellate Tribunal wrongly and negatively used the fact that there was a change of Applicant from the Appellant's wife to the Appellant himself at the Trial Tribunal thereby confirming the Trial Tribunal decision. I must say the Appellant's counsel is confusing issues and he is persuading the Court to determine matters basing on suspicion. The issue as to whether the property belongs to Bakari Kipande or Telesia Waziri Kibindo also known as Mwanauru Waziri was not before the Trial Tribunal nor at the District Land and Housing Tribunal. It is equally difficult to comprehend how the change of claimant from Telesia Waziri to Bakari Kipande led to miscarriage of justice to to Appellant. Actually, the wisdom of the Trial Tribunal helped dispute to be determined timely. Unless the Appellant counsel want this Court to assume that the spouse of Bakari Kipande should have been joined as the co-applicant at the Trial Tribunal. Since the sale agreement was in the name of Bakari Kipande the Trial Tribunal

justifiably removed Telesia Waziri and instead named Bakari Kipande as the applicant. This was rightfully accepted by the Appellate Tribunal. For that reason, I do not see how Section 60 of the Law of Marriage Act [Cap 29 R.E. 2019] on matrimonial property coming into play. The Appellant's counsel should be reminded that cases before the Court of law or Tribunal are not decided based on suspicion, rather they are decided based on evidence [see the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v R, [2006] TLR 395**].

Before signing off on the fourth ground of appeal, there was allegation that the Appellant raised new issues especially the third and fourth grounds of appeal. This was not the case as no new issue was raised on appeal that was not dealt with by the Appellate Tribunal. In **Hassan Bundala @ Swaga v The Republic, Criminal Appeal No. 386 of 215 CAT** held that:

"It is now settled that as a matter of general principle that this Court will only look into matters which came up in the lower court and were decided; not on matter which were not decided by neither the trial court nor

the High Court on appeal."

Besides the above observation, the fourth ground of appeal not meritorious. I decline from upholding it.

The fifth ground of appeal was that the Appellate Tribunal erred in law and in fact by granting the disputed land to the Respondent basing on contradictory evidence. On this ground the Appellant claims that there are contradictions on the evidence. And he pointed out the example of the same that Ramadhani Kibindo witnessed the transfer or sale of the land from Waziri Kibindo to the Appellant. And nowhere the late Ramadhani Kibindo opposed the said transaction. What the Appellant is not stating here is that the said sale agreement was faulted by both Trial Tribunal and Appellate Tribunal for lacking signatures of the seller and the buyer. Normally inconsistencies and contradictions have to be on the evidence/testimonies of one side. That is important because often the testimonies of rival parties will certainly be contradictory. It means the Appellants evidence will contradict the Respondent's evidence. Therefore, the sale agreement was tendered to contradict or counter the Respondent's evidence. It would have made a lot of


sense if the Respondent's witnesses were contradictory. But all his witnesses (Maliki S. Malika, Paulo Nyaki, William Bakari and Shaban Waziri) were consistent and credible. The Court of Appeal decision in **Mohamed Said Matula v R [1995] TLR 3** on inconsistencies and contradictions on witnesses' testimonies is unmatched with the present case. The fifth ground of appeal is without merits, I proceed to dismiss it.

The sixth and last ground of appeal is that the Appellate Tribunal was biased against the Appellant therein. This ground of appeal was also raised on the first appeal. When bias is pleaded as ground of appeal care must be taken. The record of proceedings at the Trial Tribunal and Appellate Tribunal do not indicate any grain of bias. The parties were given equal treatment. None was denied right to be heard. The Tribunal members were never had interest in the matter. The question of bias may as well be regarded as an afterthought. The Appellant had an opportunity to state his suspicion of Tribunal's bias by asking the chairperson and his members to retire from entertaining the matter. I am of the view that the ingredients of presence of bias as stated in **R v George Tumpes [1968] H.C.D. No. 416** and **Bhang Singh v Rex**

(1941) TLR 133 were not present in the case at hand. The claim that the Appellant is layman considering his level of education and intelligence cannot be a reason for alleging bias. I find no relevancy of the cases cited such as **Metropolitan Properties v Lannon [1969] 1 Q.B. 577** and **R v Albert Awour and 3 Others [1985] TLR 20**. I am of settled view that there was bias neither at the trial Tribunal nor at the Appellate Tribunal. I should warn the counsel of imputing bias while there was none. Being a judicial officer, an advocate should avoid insinuating issues that never occurred at the trial or appellate tribunals. Honesty is a beacon of our legal profession. Thus, the sixth ground of appeal is dismissed for being superfluous and untrue.

In lieu of the foregoing, I find this appeal lacking merits. I thus dismiss it with costs.

DATED at **TANGA** this 9th Day of June 2022.



U. J. AGATHO
JUDGE
09/06/2022

Date: 09/06/2022

Coram: Hon. Agatho, J

Appellant: Absent

Respondent: Absent

B/C: Zayumba

JA: Ms. Husna Mwiula

Court: Judgment delivered on this 9th day of June, 2022 in the absence of both the Appellant, and the Respondent.



**U. J. AGATHO
JUDGE**

09/06/2022

Court: Right of Appeal is available.



**U. J. AGATHO
JUDGE**

09/06/2022