

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 359 OF 2020

DOMINICUS ZIMANIMOTO MAKUKULA

ADMINISTRATOR of the estate of the late

DOMMY DOMINICUS MAKUKULA.....APPELLANT

VERSUS

DOMINICA DOMINICUS MAKUKULA.....1ST RESPONDENT

SONGEA MUNICIPAL COUNCIL.....2ND RESPONDENT

COMMISSIONER FOR LANDS, MINISTRY OF LANDS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania

at Songea)

(Arufani, J.)

dated the 21st day of May, 2020

in

Land Case No. 2 of 2017

.....

JUDGMENT OF THE COURT

24th & 31st March, 2022

KITUSI, J.A.:

The subject matter in Land Case No. 2 of 2017 before the High Court, at Songea and before us on appeal, is a landed property registered as Plot No. 17 Block E in Songea town. There was no dispute at the trial, nor here, that the original owner of that property was one Dominicus Zimanimoto Makukula. We shall be referring to him as the original owner, to try to avoid confusion that may result from the tricky nomenclature of the parties involved in this case.

This original owner died on 24/5/1982, an old man. He was survived by his wife who subsequently also died in 1995, and children known as; Dommy Dominicus Zimanimoto Makukula, Dominica Dominicus Zimanimoto Makukula and Veronica Dominicus Zimanimoto Makukula. The appellant Dominicus Zimanimoto Makukula is a son of Dommy Dominicus Zimanimoto Makukula and grandson of the original owner. We shall henceforth refer to this grandson as the appellant.

The appellant's father died in 2013 following which the appellant was granted letters of administration of his estate. In 2017 the appellant instituted the said Land Case No. 2 of 2017 before the High Court of Tanzania, at Songea, on the basis of information he allegedly stumbled onto as administrator of the estate of his late father. In his amended plaint, the appellant pleaded the following facts as forming the basis of his claim: -

8. *That the said late DOMINICUS Z. MAKUKULA gave, donated and handed over the said demised premises as a gift to the late DOMMY DOMINICUS MAKUKULA. Annexure "B" is attached hereto and leave is craved to refer to it as part of this plaint.*
9. *That, consequential thereto, the Certificate of Title No. 28979, for 99 years, with effect from 1st July, 1982, was issued in the favour of the late DOMMY DOMINICUS*

MAKUKULA. Annexure "C" collectively is attached hereto and leave is craved to refer to it as part of this plaint.

- 11. That, despite the existence of the above-named Certificate of Title No. 28979, there is a certificate of Title No. 13084-MBYL in respect of Plot No. 17 Block "E", which has been fraudulently issued/processed by the first and second defendants, jointly and severally, in total violation of the laid down rules and principles, in favour of the first defendant. Annexure "E" collectively are attached hereto and leave is craved to refer to it as part of this plaint.*
- 12. That, further, the defendants have, jointly and severally, and in various times broadly and in the day light, committed a serious and unpardonable fraud by issuing a letter of offer and Certificate of Title No. 13084-MBYL over the existing title on Plot No. 17. Block "E" Songea Town. Annexure "F" collectively are attached hereto and leave is craved to refer to it as part of this plaint.*

The alleged donation was done through a signed hand-written note. The authenticity and validity of this note is quite decisive. Part of the first respondent's amended written statement of defence reads: -

"8. The first defendant states that the chit of paper annexed to the amended plaint and marked "A" is a forgery and at any rate no disposition of a registered land in Tanzania can be lawfully effected in such a manner and then

be presented to the land office after the death of its author”.

As for the second respondent, paragraph 5 of its written statement of defence reads: -

“5. That the contents of paragraph 9 of the Plaintiff’s plaint are strongly denied and disputed. Further the 2nd defendant states that according to the second defendant’s perusal in the annexed documents, it revealed that there is no any document of Certificate of Occupancy issued in favour of Dommy Dominicus Makukula annexed to the plaint”

The High Court (Arufani, J.) appreciating the appellant’s duty to prove his case, and upon evaluation of the evidence before it, came to the conclusion that he had not discharged that duty. It dismissed the suit with costs. This appeal challenges that decision on three grounds, namely: -

- (1) The Honourable High Court judge erred in law and fact by failing to consider and compare evidence of parties and reached a wrongful decision.*
- (2) The Honourable High Court judge erred in law and fact by making findings on strange issues which were not raised and not supported by pleadings.*
- (3) The Honourable High Court judge erred in law and facts by making decision basing on his own sentiments and feelings.*

The above grounds, in our view, call upon us to examine the evidence which the learned judge is faulted for not properly considering. Each side called four witnesses to tell its side of the story.

The appellant testifying as PW1 stated that after the death of his father, and after obtaining letters of administration of his estate, there was a meeting of his family to identify properties of the deceased. One of the properties turned out to be the house on plot No. 17 Block "E" at Songea Township and there was a title deed in his name, to prove that. He followed up with the office of the second respondent, only to learn that a certificate of title, different from the one his family had in possession, had been issued to somebody else in respect of the same plot of land.

Bertha Nyoni (PW3) the surviving widow of Dommy Dominicus Zimanimoto Makukula and mother of the appellant, traced ownership of the property by her late husband to 1982. She testified that her husband told her that his father, the original owner, had given the house to him and he showed her the certificate of title. According to PW1, this disposition was done by a handwritten letter signed by the original owner on 3/5/1982, tendered in court as Exhibit PW3. The full text of exhibit PW3 reads: -

3-5-1982,

*Dominicus Z. Makukula,
S.L.P Box 47,
c/o R. C Mission,
Songea Mjini.*

***The Halmashauri ya Mji,**
Ruvuma, Songea,*

Salam Sana.

*Mintarafu ya barua hii ni umilikaji huyu mtoto wangu **Domy bin Dominicus Z. Makukula** kiwanja yaani nyumba yenye (Block Plot Namba 17). Mimi sasa ni Mzee haniwezi kuitunza hii nyumba. Ndio maana namhusia mwanangu **Domy Dominicus Z. Makukulu** amiliki nyumba hii Plot Na. 17 Block E. Songea Mjini.*

Wasalam wako Mtiifu.

Dominicus Z. Makukula

PW3 testified further that she lived with her parents -in -law in the suit premises for sometime before moving to another house at Mfaranyaki area within Songea Township. She also conceded to the fact that at one time she saw the construction of a new house on the suit area, but she did not share that information with her husband. Acting on exhibit P3, which was received in the second respondent's office on 30/6/1982, one Abdallah Salum Limbua (PW4), a land officer, wrote to the Treasury a letter Kumb. Na. STC. 1077/26/ASL dated 1/7/1982, exhibit P. 12 notifying that office to change ownership of that house into the name of Dommy Dominicus Z. Makukula. He then wrote a letter of offer to Dommy Dominicus Z. Makukula. Next, he wrote to the Director of Land Development Services, a letter with Ref. No. STC 1077/30/ASL

(exhibit P.13) for that office to prepare a certificate of occupancy for Plot No. 17 Block "E" in the name of Dommy Dominicus Z. Makukula of P.O. Box 10 Songea. As requested by PW4, the certificate of occupancy was issued, although it was issued in the name of Dominicus Makukula, and PW4 explained why this was so. He stated that the whole name of "*Dommy Dominicus Z. Makukula*" would not fit on the space for inserting the owner's name on the certificate. He went on to testify that that certificate was signed on 22/4/1983 by Dommy Dominicus Z. Makukula before a land officer, A. P. Mbena, in Dar es Salaam. PW4 stated that up until 1995 when he retired, nobody ever raised any complaint on the transfer of that property.

Armed with these facts as well as a copy of Exhibit P3 and the certificate of occupancy (Exhibit P4), PW1 took up the matter. He visited the property and saw construction in progress by workmen hired by the first respondent, so he wrote to the second respondent demanding explanation. The second respondent wrote to PW1 a letter (exhibit P5) informing him that vide a letter of offer number STC/11239/SRIC, a certificate of occupancy No. 13084 MBYL had been issued to the first respondent.

PW1 also came to learn that the first respondent had obtained letters of administration of the estate of the original owner vide Probate

and Administration Cause No. 67 of 2003 at the District Court of Songea. This, he said, was after an interlude of overseas studies during which the follow up of the matter had to be suspended. As the appellant was back from studies, he also visited the suit property again where construction of a storey building was now complete and the house had been rented out to employees of Star Times.

Following this, PW1 engaged the Director of the second respondent who convened a meeting of land officers to deliberate on the matter. After the discussion, the Director instructed the land office to write to PW1 intimating what had transpired in the course of the meeting. The letter was dated 10/2/2017 (exhibit P7), and it reads: -

"HALMASHAURI YA MANISPAA SONGEA

[Barua zote ziandikwe kwa Mkurugenzi wa Manispaa]

MKOA WA RUVUMA:

*SIMU OFISINI Na. 2602970
Fax: 025 2602474*

*UKUMBI WA MANISPAA,
S.L.P. 14,
SONGEA*

Email: - songea.municipal@gmail.com

Unapojibu tafadhali taja:

Kumb. No. STC/11239/65/ H.G.N.

10/02/2017

*DOMINICUS ZIMANIMOTO,
THEODOR HEUSS-PLATZ 5,
14052 BERLIN,
GERMAN.*

YAH: KIWANJA 17 KITALU "E" CENTRAL AREA

Kichwa cha habari chahusika.

Ofisi ya Mkurugenzi wa Manispaa ya Songea inakiri kupokea barua zako mbalimbali pamoja na vikao kadhaa vilivyofanyika katika Ofisi ya Mkurugenzi.

*Kiwanja hicho kilikuwa kinamilikiwa na **Ndg. Dominikus Makukula** kwa Hati Miliki yenye Title Na. 28979. Ofisi ya Mkurugenzi inakiri kuwa mgogoro huo umetokana na mgongano wa miliki baada ya kupokea nyaraka zisizokuwa sahihi kutoka mahakamani na kuandaa hati ya pili kwa mmiliki mwingine kinyume na utaratibu za miliki. Hivyo basi, Ofisi inaendeiea kutafuta suiuhu ya mgogoro huo mara suiuhu itakapopatikana na utapewa taarifa kwa barua.*

Tunakutakia kazi njema.

Fortunatus Marandu
*kny: **MKURUGENZI WA MANISPAA***
SONGEA"

In arguing the appeal before us, the appellant placed a lot of reliance on this letter, suggesting that if it had been properly considered by the learned High Court judge, it would have tipped the scales of justice in his favour. We shall refer to the full arguments later.

PW1, Arthur John Makukula (PW2) and PW3 also testified that the late Dommy Dominikus Zimanimoto Makukula also went by the name of Dominicus Makukula so that the name in exhibit P4 showing the holder of that certificate of occupancy to be Dominikus Makukula was in fact referring to Dommy Dominicus Zimanimoto Makukula. They tendered his driving licence (Exhibit P.9) and his voters Registration card (Exhibit P.10) to substantiate that portion of their story.

The first respondent's story was that when her father, the original owner died on 24/5/1982 she was living in Holland where her husband was working as Tanzania's ambassador and that due to her absence, no application for grant of letters of administration was processed. DW1 said she managed to come back home on 3/3/1990.

She testified that at the time of his death, her father, the original owner had two houses, one of them being on the suit premises. The other one was at Mfaranyaki area within Songea township which fell in his ownership upon death of his sister who was the owner. She also stated that while no one was administering the Mfaranyaki house, her mother and her sister known as Veronica were living in the house on the suit premises.

When DW1 returned from Holland she went to live in the Mfaranyaki house with her brother, the appellant's father. Their mother and Veronica continued to live in the house on the suit premises, until later when DW1 had finished construction of her house at Majengo area and moved the two in the new house. She testified that all along, Veronica was the one paying land rent of the suit premises.

DW1's mother's stay at the new house constructed by DW1 was brief. According to DW1 her mother wanted to go back to her late husband's house because, under Ngoni traditions, it was unbecoming for

her to stay in DW1's house. So, the mother asked DW1 to renovate the dilapidated house left by the original owner, for her to live in.

After mobilizing building material, DW1 asked for permit from the second respondent to carry out the renovation, but the latter informed her that according to the hitherto town plan, she could not renovate the existing house, but had to erect a storey building. On receiving this information, DW1 convened a meeting of her siblings, that is Veronica and Dommy or Dominicus who agreed that DW1 should take Plot No. 17 Block "E" and erect a building as per town plan. It was also agreed that Dommy would retain the house at Mfaranyaki.

DW1 said she formalized the family agreement by processing letters of administration of her father's estate and tendered the court ruling as exhibit D1, after which she proceeded to construct a storey building. She testified that on 25/2/2009 she obtained a certificate of occupancy (exhibit D2), so on the basis of that document she claims to be the lawful registered owner of the suit property.

DW1 disputed the allegation that she obtained exhibit D2 fraudulently, but suspected that the certificate issued to the appellant's father was a result of a forged process. The reason for doubting the process according to DW1, was that it did not occur to her possible that her late father would have transferred the suit property to the

appellant's father without notifying his wife (DW1's mother) and his daughter Veronica, who were living in that very house. She further said that only the person who presented the purported letter (exhibit P3) to the second appellant may tell the author of that letter.

In qualifying her story, DW1 stated that she constructed the storey building for eight years, during which she never faced any dispute from her relatives. Extensively she referred to the life of the appellant's father who used to live in Dar es Salaam and sometimes in Songea. She conceded during cross examination, that the certificate of occupancy was given to her when she had already finished the construction of the house.

One Elly Christopher Lyamuya (DW4) a land officer testified to the effect that he processed exhibit D2 on the basis of the ruling in Probate Cause No. 67 of 2003, exhibit D1. DW4 sought to distinguish between the certificate that was issued to the appellant's father (exhibit P4) and that which was issued to the first respondent (exhibit D2), but in the end that distinction will prove unnecessary.

DW4 also sought to discredit the process adopted in acquiring exhibit P4. He testified that exhibit P3 was presented to the office of the second respondent when the owner of the property had already died, without there being letters of administration of his estate. Further,

the application was for a certificate of occupancy in favour of Dommy Dominicus Makukula, but it was issued to Dominicus Makukula. In addition, DW4 testified that the process in obtaining exhibit P4 violated sections 36 and 37 and 174 of the Land Act No. 4 of 1999. Responding to cross-examinations, DW4 admitted that reference to Block "E" or "C" of Plot 17 was a mere typing error as the Plot in question is the same, which made the earlier attempt at distinguishing them uncalled for, as we said.

Doroth John Makukula (DW3), a niece to DW1 demonstrated that she was familiar with the background of the dispute as her late father was the elder brother of DW1. According to DW3, the appellant had been instigating his father to demand from DW1 payment of TZS. 50,000,000/= as his share from the storey house, but she said she heard his uncle expressing his surprise and disagreement as he wondered how he would claim such payment when he had not contributed even a single bag of cement in constructing that house. When cross examined, she conceded that she was not aware of any family meeting that appointed DW1 administratrix of the estate of her father. She however held on to the position that DW1 as the only surviving child of the original owner, was the remaining lawful owner.

The trial had been proceeded by formulation of six issues but we think the first three are crucial for the determination of the matter: -

1. Whether the original owner of the demised premises the late Dominicus Z. Makukula donated and handed over the demised premises to the late Dommy Dominicus Makukula.
2. Whether the certificate of Title No. 28979 for 99 years was lawfully issued in favour of the late Dommy Dominikus Makukula from 1st July, 1982.
3. Whether the Certificate of Title No. 13084 MBYL in respect of Plot No. 17 Block "E" Songea Township was fraudulently proceeded and issued in favour of the first defendant by the defendants.

Before determining these issues, the learned judge referred to sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E. 2002] and the cases of **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2014 and; **Anthony M. Masanga v. Penina (Mama Mgesi) and Another**, Civil Appeal 118 of 2014 (both unreported), on the duty of the one who alleges, to prove the allegations.

In his evaluation of the evidence adduced by the appellant, the learned judge had doubts with the validity of the letter, exhibit P3. We had promised to refer to the letter in full at an appropriate time. The

learned judge wondered why the letter was written on 3/5/1982 by a person who died on 25/5/1982 but the said letter was not delivered to the second respondent until on 30/6/1982. He posed a question why was delivery of the letter delayed.

Secondly, the learned judge was curious that the alleged transfer of the property to the appellant's father was not witnessed by anyone; not even the original owner's wife and his daughter Veronica who were, at that time, living in the same house.

In addition, the learned judge took note of the evidence of DW1 that when her mother requested that the house be renovated for her to move in, and when DW1 informed the appellant's father about that request, he responded that he was not going to do anything in relation to that house as his concern was with the Mfaranyaki house. The learned judge questioned why, at that moment, didn't the appellant's father inform DW1 that he was the owner of the house?

The Court considered the evidence of DW1 and concluded that it was materially supported by DW3 on the conduct of the appellant's father in relation to the house. The learned judge answered the first issue in the negative.

Addressing the second issue, the learned judge concluded that even assuming that vide exhibit P3, the original owner donated the land

to the appellant's father, the process of transferring ownership to him still left a lot to be desired. The learned judge did not see any justification for the certificate of occupancy being in the name of Dominicus Makukula while exhibit P3 and the letters written by PW4 (exhibits P12 and P13) all intended title to be in the name of Dommy Dominicus Z. Makukula.

He also noted that according to the appellant, his father was also using the name of Dominicus Makukula, but still wondered why transfer was made into the latter name which was also the appellant's. It rejected PW4's testimony which attempted to justify the preference of Dominicus Makukula to Dommy Dominicus Z. Makukula on the ground of insufficiency of space. He took that view because, he said, PW4 could not testify to justify that fact, as he is not the one who prepared exhibit P4. Lastly the learned judge believed the testimony of DW4 which showed that there is no Plot No. 17 Block "E" High Density Songea appearing on exhibit P4, issued to the appellant's father, rather there is Plot No. 17 Block "E" Central Area Songea Township issued to the first respondent. For those reasons, the learned judge answered the second issue in the negative too.

Turning to the third issue, whether the certificate of occupancy held by the first respondent was issued to her fraudulently, the judge

referred to the settled principle on the duty of the one who alleges fraud or commission of a crime in civil proceedings, to establish such allegation on a degree higher than that required in ordinary civil cases. He cited the cases of **Ratialal Gordhambai Patel v. Lalje Makanji** [1957] and; **Omari Yusufu v. Rahma Ahmed Abdulkadir** [1987] TLR 169.

After evaluating the evidence on how DW4 processed a certificate of occupancy (exhibit D2) after obtaining from DW1, letters of administration of the original owner's estate granted to her by the District Court of Songea in Probate and Administration Cause No. 67 of 2003, the learned judge was satisfied that fraud had not been proved. That was so even though it was satisfied that, a family meeting properly so called, to nominate the first respondent as administratrix of the original owner's estate, was not convened.

After answering in the negative the first three issues, which we firmly believe were the trump issues, the learned judge dismissed the suit with costs. That decision is the subject of this appeal.

Before us, the appellant who prosecuted the appeal in person had lodged written submissions ahead of the date of hearing. We shall refer to his submissions generally because it was not easy to segregate them according to the grounds of appeal. Both in his written and oral

submissions, the appellant faulted the trial judge for selectively subjecting exhibit P3 and P4 to close scrutiny and coming to a conclusion, without considering and subjecting to equal scrutiny other pieces of evidence specifically exhibit P7. As we had earlier intimated, the appellant's view is that if the learned judge had considered exhibit P7 properly, he would have appreciated that the second respondent was guilty of issuing a certificate of occupancy to the first respondent based on false information, and when there was an existing certificate of title that had been issued to his father earlier.

He submitted that while the learned judge made his findings on the basis of the evidence of DW4 that he followed the procedure in issuing exhibit D2 to the first respondent, he did not consider the import of exhibit P7 which contradicted DW4. He also criticized DW4 for issuing exhibit D2 in respect of Plot No. 17 Block "E" while the ruling of the District Court in Probate and Administration Cause No. 67 of 2003 referred to Plot No. 17 Block "C". He submitted that DW4 had no authority to correct the errors made by the District Magistrate. He accused the learned judge of making findings based on matters that were of his own making. He listed six new issues, which we shall later refer to.

The respondents appeared before us by counsel. The first respondent was represented by Mr. Edson Mbogoro, learned advocate, while the 2nd, 3rd and 4th respondents were represented by Mr. Hangi Chang'a learned Principal State Attorney who was being assisted by Mr. Stanley Mahenge and Ms. Ansila Makyao, both learned State Attorneys. There were written submissions for the first and second respondents, which the learned counsel adopted to form part of their addresses to us.

Submitting on the first ground of appeal, Mr. Mbogoro took the view that the first issue was decisive as the rest of the issues would fall in place depending on that issue. The learned counsel associated himself with the reasoning of the learned trial judge and submitted that in resolving the first issue, exhibit P3 was central but exhibit P7 was not relevant. He pointed out that the validity of all procedures subsequent to presentation of exhibit P3 was dependant on the finding of the court on that exhibit. He submitted that the judge could not be faulted.

On the second ground of appeal alleging that the decision was influenced by the judge's discussion of issues not earlier framed and canvassed, Mr. Mbogoro submitted that what the appellant listed down from (a) to (f) in his written submissions are not issues but factors which the Court considered in resolving the first issue.

As for the third ground, Mr. Mbogoro submitted that the error of the description of the Plot whether "C" or "E", was not such a big deal. In respect of exhibit P7 which the appellant relies upon in faulting the judge, Mr. Mbogoro submitted that it does not specify the incorrect documents that the second respondent received from the court, but also that the letter cannot validate exhibit P3. After adopting the written submissions for the 2nd, 3rd and 4th respondents, Mr. Chang'a aligned himself fully with the submissions made by Mr. Mbogoro.

That was about all from the submissions by the parties. At our prompting the parties were no longer at issue that notwithstanding the errors in describing the property in dispute, in actual fact, it is one and the same and there stands a storey building constructed by the first respondent. They also agreed that the two titles to that property co-exist because the High Court dismissed the appellant's suit without making any order as to the certificate of occupancy in his possession (Exhibit P4).

When we put to the appellant and Mr. Mbogoro the question; what would be the justice of this case, the appellant stated that the first respondent should remove her storey building and give vacant possession of the suit property. Mr. Mbogoro's response was that should

the decision of the High Court be upheld; the property still belongs to the original owner.

We consider the allegation on ground two, that the learned judge's determination of the suit was done by considering issues that had not been raised and canvassed, to be a sore question to be resolved first. What the appellant referred to as new issues are those listed down in his written submissions as follows: -

- a. Why the letter was not taken to the second defendant who was the addressee of the letter immediately after being written.*
- b. It took 3 weeks from when it was written up to when the author of the letter died without being taken to the addressee.*
- c. It took 2 months to reach the office of the addressee, the 2nd defendant.*
- d. These delays make the Court to entertain doubts if the letter was really written by the author.*
- e. That the wife of the author and sister of the donee was not involved in the transaction.*
- f. That the wife of the donee was not involved in the transactions.*

The immediate question is whether these are issues.

As rightly submitted by Mr. Mbogoro the so-called new issues were in fact discrepancies in the evidence presented by the appellant. Issues as defined under Order XIV of the Civil Procedure Code, Cap 33, cited in

the case of **Ally Rashid & 534 Others v. Permanent Secretary, Ministry of Industry and Trade**, Civil Appeal No. 71 of 2018 (unreported) are: -

"Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other".

What the appellant has listed down in the written submissions do not qualify as issues going by the cited definition. However, even if they were issues, not every time the court considers issues not earlier framed will the decision arising therefrom be vitiated. The court has powers to consider issues even if not earlier raised, if the same were canvassed and evidence led by the parties. See our decisions in **Salhina Mfaume and 7 Others v. Tanzania Breweries Co. Ltd**, Civil Appeal No. III of 2017 and; **Bahari Oilfield Services FP2 Ltd v. Peter Wilson**, Civil Appeal No. 157 of 2020 (both unreported). The latter cited **Stella Temu v. Tanzania Revenue Authority** [2005] T.L.R 178 among others.

In this respect, evidence was led by the appellant to show that exhibit P3 was a valid document written by the original owner. The first respondent pleaded in paragraph 8 of the Amended Written Statement of Defence and adduced evidence to suggest that exhibit P3 was a doubtful document. DW1 stated that it was forget because the original

owner could not have written it without involving his wife and daughter Veronica. Thus, ground two has no merits and we dismiss it.

Back to the first ground of appeal, we agree with Mr. Mbogoro that exhibit P3 formed the central point of discussion. The appellant faults the learned judge for subjecting exhibit P3 to rigorous scrutiny and taking a casual approach in evaluating other pieces of evidence. We understood the appellant as suggesting that if exhibit P7 had been properly evaluated it showed that the first respondent's certificate was acquired through dubious means.

We see no fault in the learned judge scrutinizing exhibit P3 because that is the essence of whatever followed later. Besides, it is the appellant who had to prove his case by presenting credible evidence instead of asserting right through the weakness of the defence. In an almost similar scenario, in **Agatha Mshote v. Edson Emmanuel and 10 others**, Civil Appeal No. 121 of 2019 (unreported), we stated: -

"On this, we have considered that the success of the appellant's case did not depend on the credibility of the respondents and instead, the burden of proof never shifts to the adverse party until the party on whom the onus lies, discharges the burden. It does not cease on account of the weakness of the case of the adverse party."

We held similar views in **Paulina Samson Ndawaya v. Theresia Thomas Madaha** Civil Appeal No. 45 of 2017 and; **Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials v. Kinondoni Municipal Council**, Civil Appeal No. 125 of 2016 (both unreported).

It was therefore incumbent upon the learned judge to put the appellant's evidence especially exhibit P3 to a serious interrogation. As we are sitting on first appeal, we not only agree with the learned judge's evaluation of the evidence, but we have also found ourselves disturbed by the conduct of PW3 and the appellant's father.

The conduct of the appellant's father towards the suit property was not consistent with the assertion that the said property had been donated to him by the original owner, and also that he had become the new registered owner. For instance, he never paid statutory levies for the property nor visited the place for 8 years during which the storey house was under construction. His wife's conduct was also wanting. She said she saw the construction of the storey building going on, but she never told her husband about it. All this do not add up, in our view.

The tone of the appellant's submission is that proper evaluation of other evidence would sanitize the shortcomings shown in his case. With respect, exhibit P7 for instance, only tells how the second respondent

acted on wrong information to issue exhibit D2. As that letter came much later it does not validate exhibit P4, and its evidential value is limited and of no assistance in proving the validity of exhibit P3. We have already rationalised the judge's reference to exhibit P3, so the absence of similar reference to exhibit P7 is neither here nor there. Consequently, there is no merit in the first ground of appeal. We dismiss it.

In the third ground of appeal, the learned judge is accused of being driven by sentiments. With respect, that is a wild shot. In view of the analysis of the evidence before him, which we have agreed with, we are unable to see sentiments in the learned judge. If we take the inaction on the part of PW3 and appellant's father, for instance, it makes the first respondent's testimony more probable than the appellant's. Even the appellant could not offer an explanation to that strange lack of interest in what was supposed to be his property. This ground of appeal has no merit, liable to dismissal.

We have pondered over the question whether we should make findings in relation to exhibit D2, the certificate that was issued to the first respondent. The learned trial judge limited his decision to making a finding whether fraud had been proved in obtaining that certificate or not. We agree with him that proof of fraud calls for standards higher

than those required in normal civil cases. See **Twazihirwa Abraham Mgema v. James Christian Basil (as Administrator of the Estate of the late Christian Basil Kiria)**, Civil Appeal No. 229 of 2018 (unreported). What we gather from the evidence as a whole, and here considering exhibit P7 also, exhibit D2 is equally not free from doubts despite the fact that fraud was not proved.

There are at least two aspects that bring the validity of exhibit D2 to question. **One**, there is undisputed evidence that the said certificate was issued when there was another existing certificate of title (exhibit P4) issued earlier to the appellant's father by the same office of the second respondent. We cannot read in section 29 of the Land Act, Cap 113 R.E 2002, which vests powers to the Commissioner for Lands to issue certificates of occupancy, the possibility of issuing a certificate of occupancy over a piece of land in respect of which there is an existing certificate of occupancy. **Two**, the fact that the first respondent was administratrix of the estate of the original owner did not, *ipso facto*, make her the owner of the estate, including the house, and this taints exhibit D2. As the issue of the administration of that estate is not before us, we shall stop at that.

Finally, it is our duty to conclude that having found the transfer of the suit property from the original owner to the appellant's father to

have been invalid, the learned judge ought to have declared the certificate issued to Dominicus Makukula (exhibit P4) also invalid. Since that was not done, we step into the shoes of the High Court and declare so. We also proceed to declare exhibit D2 invalid for the two reasons we have shown above. As a result, the suit property reverts to the original owner, and anyone claiming interest in that property may pursue it in accordance with applicable procedures.

In conclusion, this appeal is devoid of merit. It is dismissed with costs.

DATED at IRINGA this 31st day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 31st day of March, 2022 in the presence of Ms. Theresia Charles who appear for appellant and in presence of Ms. Ansila Makyao, learned Principal State Attorney for 2nd, 3rd and 4th who also hold brief for Mr. Edson Mbogoro for 1st respondent is hereby certified the true copy original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL