IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 04 /2020

(From the District land and Housing Tribunal of Songea at Ruvuma)

BARAKA JOSEPH NDAKIDEMI ..... APPELLANT

VERSUS

THE REGISTERED BOARD OF TRUSTEES OF NAMANDITI COMMUNITY DEVELOPMENT ASSOCIATION(NACODA)..... RESPONDENT

JUDGMENT

Date of Last Order: 15/10/2020
Date of Ruling: 24/11/2020

BEFORE: S.C. MOSHI, J.:

In the District Land and Housing Tribunal of Songea at Songea the respondent successfully sued the appellant over ownership of the land in dispute measuring two acres, it is located at Namanditi area, along Songea to Mbinga main road. Aggrieved by the decision the appellant has filed this appeal on the following grounds, to wit:-

1. *That the trial tribunal erred in law and fact to make a finding that, the suit land was a property of the founder of the respondent herein, hence declaration that the respondent herein as the lawful owner of the suit land while there was a clear evidence that the purchase money was paid to the seller by the appellant and there was no any evidence that the payment of the purchase money was made in the founder's behalf.*
2. *That, the trial tribunal erred in law when it decided not to rely on Exhibit D1 for the treasons which did not go to the root of the case leaving the strength of the Exhibit as required by the law regarding evidence on proving a fact where there is a written document.*
3. *That, the trial Tribunal erred in law and fact to disturb the sale done by the appellant without giving strong reasons taking into consideration that the third party was already in occupation and had done some substantial development on the suit land.*
4. *That, the trial Tribunal erred in law and facts to decide in favour of the respondent herein contrary to the law and facts to decide in favour*

of the respondent herein contrary to the law and evidence which is in record.

The appeal was disposed off by way of written submissions. The appellant was represented by Mr. Vicent Kassale, advocate whereas the respondent was represented by Mr. Eliseus Ndunguru, advocate.

Submitting on the first ground Mr. Kassale said that the trial Tribunal grossly erred in law and fact when it declared the respondent herein as the lawful owner while there is clear evidence in records that, the appellant handed the purchase money to the seller who had testified as PW2, PW2 admitted that he received the purchase money from the appellant. Also PW3 testified that he witnessed the handing over of the purchase money; this is nothing but evidence of purchase of the suit land. The respondent said that the appellant handed the purchase money on behalf of the owner, one Ntimbanjayo. Unfortunately, there is no proof to the effect that the purchase money which was handed over by the appellant to the seller PW2 was given by the alleged buyer one Ntimbanjayo for the purpose. Having no such proof, it was therefore wrong to conclude that the purchase of the suit land was between the seller and Ntimbanjayo through the appellant.

On the second ground, he said that it was not correct for the trial tribunal not relying on exhibit D1 which was a contract of disposition of the suit land between the appellant and the seller (PW2). It is clear that the trial tribunal wrongly refused to consider the said exhibit on two grounds first that PW2, the seller refused to have signed the contract of sale, second that the appellant did not bring the key witnesses who had witnessed the execution of the said contract. He said that the two reasons assigned by the trial tribunal are basically contrary to the requirement of section 100(1) and 101 of the Evidence Act, Cap. 6 R.E 2019 which prohibits admission of oral evidence where there is a written contract.

He argued that the seller PW2 had refused to have signed the said contract, this alone could not have invalidated the contract in the absence of any proof. It was the respondent herein who had a duty to prove that the alleged signature in the contract is not his signature, this was not done in this case.

On the third ground he said that it was an error in law when the trial court nullified the sale while it was clear through the evidence in records that, the third party who had purchased the suit land from the appellant

was already in occupation and has done some substantial developments on the suit land. He made reference to the case of **Suzanna S. Warioba Vs Shija Dalawa,** Civil Appeal No. 44 of 2017, Court of Appeal at Mwanza and **Stanley Kalama Masiki Vs Chihiyo Kuisia Nderingo Ngumuo** (1981) TLR 143, Where it was held that: -

> *"Where an innocent purchaser for value has gone into occupation and affected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims".*

He said that, taking into consideration the circumstances of this case in which the seller, the appellant had a contract of sale from the original owner that is Pw2, there is no way a third party cannot be called a *bonafide purchase* for value who is an innocent purchaser. On the fourth ground he reiterated what is submitted in the 1st, 2nd and 3rd grounds of appeal.

In reply, the respondent's advocate stated that the appellant grossly erred to believe the fact that because he handed the purchase money to the seller that by itself made him lawful owner of the land in question.

Proof of ownership of land require evidence on how he acquired the same but the fact that he is the one who was entrusted by Mzee Ntimbanjayo to hand money to the seller does not confer land ownership to him. PW2 insisted that he sold the suit land in favour of Mzee Ntimbanjayo and not the appellant and the money received from the appellant was from the founder of the respondent in favour of Mzee Ntimbanjayo. Mzee Ntimbanjayo made oral agreement with the seller one mzee Lupanga who is PW2 in the view of making written agreement in future days because by that time Mzee Ntimbanjayo was sick and he expected to travel to Dar es salaam for treatment and he promised the seller that he would direct the appellant DW1 Baraka Joseph Ndakidemi to hand the money to PW2 who was a headmaster of the respondent herein who is in-law of Mzee Ntimbanjayo as he married his daughter one Malaika. That is why Mzee Ntimbanjayo had confidence to promise the seller PW2 that someone will come to effect payment on behalf of the respondent. That, if the appellant insists that he purchased the land in dispute from PW2 then the proper remedy is to address his claim to PW2 not to the respondent as he did. The respondent herein is not proper party to be sued for such claim because

even the seller PW2 adduced his evidence that he disposed his land to Mzee Ntimbanjayo.

He further submitted that based on the court records and judgement of trial tribunal there is no doubt that the respondent had discharged his burden of proof on required standard that he is the lawfully owner of the land in dispute. He cited the case of **Hemed Said Vs Mohamed Mbilu,** (1984) TLR 773, where it was held thus:-

> *"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".*

On the second ground he said that, looking on the facts of this case the genuineness and the authenticity of exhibit D1 is questionable because even the seller in his testimony denied to have signed the said sale agreement with the appellant. Furthermore the appellant allege that the sale agreement exhibit D1 was signed by the street leader of Namanditi in the year 2012 being about five years after execution of the purported sale agreement. This fact was supported by Dw2 one Otmala Laurent Tole who testified that while the said sale agreement was executed he was not there

but he witnessed it later which is about 5 years later as he was absent during the sale.

Mr. Ndunguru said that since the appellant wanted the trial tribunal to believe his story that it is PW2 who signed the said contract, then as per section 112 of the Evidence Act Cap. 6 R.E 2019 the burden was upon him to prove and the burden could be said to have discharged by calling those material witnesses like Bashiru and S. Hamisi who witnessed the execution of the said contract but the appellant herein failed to call those witnesses while they can be easily found, so on that circumstance the trial tribunal was correct to draw an adverse inference.

He said all circumstances in this case create a lot of doubt on genuiness of the said sale agreement to includes but not limited to, for want of due execution, fraud and as per section 101 of the Evidence Act Cap. 6 R.E 2019. The law allows in this circumstance to invite the oral evidence even though there is documentary evidence.

On the third ground he said that no any development were done by the appellant or the purported *bonafide purchaser*, even if it was so, the position of the law is that for a third party to be considered as *bonafide purchaser* there must be evidence, firstly that he was acting in good faith,

secondly he must be honest in his intentions and thirdly he is not aware of the real title over the property even after a reasonable inquiry carried. Where there was absence of reasonable care and ordinary prudence on the part of transferee to ascertain the power of transferee or for the purposes of making a valid transfer, the transferee will not be protected under the law. He cited the case of **John Bosco Mahongoli Vs Imelda Zakaria Nkwira and 2 Others,** Land Appeal No. 101 of 2016, High Court of Tanzania at Dar es salaam at page 5-8 (Unreported).

He said that the issue of bonafide purchaser cannot be raised at this stage of appeal. It was supposed to be proved on the trial Tribunal by that third party who claims to be an innocent buyer but there's nowhere in the records of the trial tribunal that the said third party appeared before the court. It is improper and procedural for the appellant to raise that issue on behalf of the third party who did not state anything at the trial tribunal. He also said that the cited case does not fit with the facts of this case, it is distinguishable.

On the fourth ground of appeal he said that it is too general and contradictory and has nothing to do with this appeal.

The issue to be determined is whether the appeal has merits.

It is a trite law that the burden of proof lies on the person alleging existence of certain facts see section 110 and 111 of the Tanzania Evidence Act, 1967 Cap 6 R.E 2019. In the case of **Godfrey Sayi and Anna Siame as Legal Representative of the Late Mary Mndolwa,** Civil Appeal No. 114 of 2014 (Unreported), the Court of Appeal stated thus:-

> *"It is a cherished principle of law that, generally in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act Cap. 6 R.E 2002 which among other things states:-*
>
> *110. Whoever desire any court to give judgement as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.*

This being a civil suit the standard is on balance of probabilities which simply means that the court will accept evidence which is more credible and probable. See the case of **Wolfgango Dourado vs Toto Da Costa,** Civil Appeal No. 102 of 2002 CAT (Unreported).

Starting with the first issue which covers grounds number one and two, Section 10 the Law of Contract Act, Cap. 345 recognizes oral and written forms of contract, that, a contract may be oral or written. Under normal order of business Contract start by negotiation and upon completion of negotiation the parties reduce the terms of their negotiation in written forms thus a formal contract. When the dispute arises between the parties as to the term or content of the contract and one party is seeking to dispute the terms therein, recourse has to be sought under section 100 of the Law of Evidence Act Cap. 6 which provides thus:-

> *"When the terms of a contract or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract,*

grant or other disposition of property, or such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herin before contained".

Therefore in the instant appeal, Exhibit D1 would be sufficient to prove the disposition of suit land between the appellant and PW2. The law however under section 101 provides a room for flexibility in exceptional cases, it reads thus

"when the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to section 100, no evidence of oral agreement or statement shall be admitted as between the parties to any such instrument or their representative in interest, for the purpose of contracting, varying, adding to, or subtracting from its term".

Provided that

(a) any fact may be proved which would invalidate any document, or which would entitle any

person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law".

I subscribe to what was held by the trial Tribunal that the purchase money was handed to the appellant by the late Ntimbanjayo to the appellant to pay PW2 who was the seller of the suit land. The evidence adduced by the respondent and his witnesses has more weight compared to that of the appellant. PW1, PW2 and PW3 testimonies corroborated each others, furthermore the exhibit D1 which the appellant relies on has some defects which were pointed by the tribunal, these defects raise some doubts. That they have different dates that is 15/10/2007, 15/10/2012, 10/11/2012, 6/8/2015. Explanations given by the appellant in respect of having different dates is that there was a dispute in respect of the suit land, however he did not say what the dispute was all about, who were parties to the dispute and how the same was resolved and why now it has three different dates. Also Otmara L. Tolle a member of Namanditi Harmlet (mjumbe wa Serikali ya Mtaa) signed the same in two different date that is as 10/11/2012 and 6/8/2015, no explanation was given why Otmara L.

Tolle signed on two different dates. To top it all, the appellant didn't call the people who witnessed the disposition of the suit land. It was expected that the appellant would have called witnesses who were present when the contract was reduced into writing following PW's denial that he didn't sign the purported contact. All in all, the authenticity of the written agreement is questionable in view of the alterations.

I am alive of the fact that calling of witnesses is the purview of the parties and the law does not dictate the number and or type of witnesses to be called, but it is imperative that fundamental witnesses be called to assist the court in dispensation of justice. In the case of **Hemedi Said Mbilu** (1984) TLR 113, it was held that;

> *"where for undisclosed reasons, a party fails to call a material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.*

The circumstance of this case dictates that S. Hamis and Bashiru were fundamental witnesses but for reasons best known to the appellant, were not called to corroborate the appellant testimony and assist the trial

Tribunal in determining whether PW2 disposed the suit land in favour of either the appellant or respondent. It is my settled view that failure to call the above people the Tribunal was entitled to draw an inference adverse to the appellant's case. Therefore exhibit D1 cannot be relied upon.

Apart from exhibit D1 there is no other evidence to prove that the appellant was a legal owner of a suit land, therefore, he had no good title to pass to a third party, Moses Nyirenda. As it was held in the case of **Farah Mohamed Vs Fatuma Abdallah** (1992) TLR 205 thus:-

> *"he who has no legal title to the land cannot pass good title over the same to another".*

That said, the appellant had no good title to pass to a third party. This answers also ground three of appeal which relates to the right of a third party one Moses Nyirenda who the appellant said had done some substantial development. Furthermore the cited case of **Suzana S. Waryoba Vs Shija Dalawa,** Civil Appeal No. 44 of 2017 Court of Appeal at Mwanza (Unreported), is distinguishable to the present case, as in that case Shija Jawala was a party to that case i.e the respondent and proved to have bought the land from Mathew Waryoba on 11.06.2008 at Tshs

160,000/=. The following year he made some substantial developments the value reaching Tshs. 1,500,000/= which Suzana on special agreement with Shija Jalwala agreed to refund but the same was not implemented until 2011 when Shija Jawala had developed the land, its value appreciated the tune of Tshs. 4,500,000/=. The Court of Appeal held that it was not in the interest of justice to disturb him. The same position was reached in the case of **Stanley Kalama Masiki Vs Chikiyo Kuisa W/O Nderingo Ngomuo**, (1981) TLR 143.

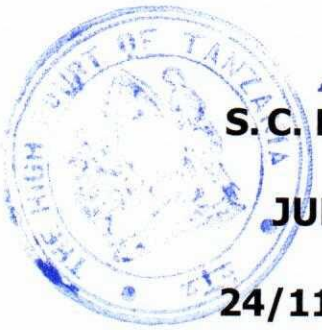
In the case at hand. The situation is different, the bonafide purchaser at Trial Tribunal was the second respondent, while the appellant was the first respondent, he didn't appear hence the case proceeded exparte against him. Therefore there is no evidence that he truly bought the suit land from the appellant and that he has done substantial development towards the suit land. Hence **Suzana S. Waryoba** case (supra) is distinguishable.

That said, I find that the appeal lacks merits. In the event it is dismissed in its entirety.

Costs of the appeal to be paid by the appellant.

Orders.

Right of Appeal Explained.



S. C. MOSHI

JUDGE

24/11/2020