IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 28 OF 2022

(Arising from The District Land and Housing Tribunal (DLHT) for Muleba in Application No. 71/2018)

SAPHINA ALLY MRISHO----------APPELLANT

VERSUS

HASSAN HUSSEIN.....RESPONDENT

JUDGMENT

26/09/2022 & 04/10/2022

Isaya, J.:

This is the first appeal upon which the appellant herein is challenging the decision of the District Land and Housing Tribunal (DLHT) which decided in favour of the respondent by dismissing the application for want of merit. To appreciate the context in which this appeal was brought, I find it apposite to recapitulate the historical factual background on this matter albeit in brief.

The appellant sued the respondent herein for encroaching the suit land which the respondent on the other hand, alleged to have bought from Ally Mrisho Karume, the father of the appellant.

The appellant alleged that the suit land was bequeathed by the grandfather to his grandchildren including the respondent herself. She therefore prayed the said land to be declared the property which is part of the estate the late Karume Mrisho Athumani subject to distribution to the rightful heirs.

In defence, the respondent claimed to have bought the suit land in 1996 from Ally Mrisho the only son of the late Karume Mrisho Athumani. That the sale agreement was witnessed by several witnesses including the wife of Ally Mrisho (the seller) and the respondent alleges to have been in occupation of the said land without interruption for more than 22 years.

At the end the trial tribunal dismissed the application and declared the respondent as a rightful owner who legally bought it from Ally Mrisho Athumani, the son of the late Karume Athumani Mrisho.

Aggrieved by the trial tribunal's decision, the appellant advanced five grounds of appeal thus:

1. *That the trial tribunal erred in law when it discredited the late Karume Mrisho Athuman from being lawful owner of the suit land.*
2. *That the trial tribunal erred in law to find out that the respondent lawfully purchased the Suitland while the alleged vendor never owned the same.*
3. *That the trial tribunal erred in law to rely and use the evidence founded from exhibit P1 which was improperly admitted.*
4. *That the trial tribunal erred in law to use the evidence of exhibit P1 which had no description of factual size of the purchased land.*
5. *That the trial tribunal erred in law when it reasoned that the duty to prove ownership of land is primarily on the complainant alone.*

When the appeal was called on for hearing, the appellant enjoyed the legal services of Mr. Samwel Angelo whereas the 1st Respondent was represented by Mr. Dastan Mutagahywa. The matter was heard exparte against the 2nd respondent after his presence had proved futile.

At the outset Mr. Angelo dropped the 3rd and 4th grounds of appeal and argued the 1st ,2nd and 3rd grounds. On the 3rd ground, he submitted that exhibit R1, the sale agreement was not legally tendered and admitted. That three steps are vital before admitting the exhibit (1) Clearing, (2) Admitting and (3) Reading out. To bolster his stance, he referred me the Court of Appeal case of **Robinson Mwanjisi and 3 others vs R** (2003) TLR, 218. He proceeded that unread exhibits ought to be expunged from the record. He referred the case of **Bernard Thobias Joseph and Another vs R**, CAT DSM. As the said exhibit is the only that proves ownership of the suit land, after expunging it, there is no material evidence to prove ownership of the land by the 1st respondent.

As regards to the 2nd ground of appeal, Mr. Samwel contends that the sale agreement was not endorsed by either clan head or clan members. He invited this court to visit on pages 14,45 and 47 and 65 of the trial tribunal proceedings as it was testified by witnesses that the suit land belonged to the clan. To bolster his stance, he cited the case of **Paul Alfred vs Gervas Maricianus** (1981) TLR 30 which held that if the land belongs to the clan, a clan head must approve the sale agreement. Equally too the case of **Leonance Mtarindwa vs Mariadina Edward** (1986) TLR where It was held that in the absence of a clan heard a clan member may approve the sale agreement. It was Mr. Angelo's submission that in all evidences brought by the respondent, no clan member came to testify that he either endorsed the sale agreement or that the clan head allowed the sale. That RW1 admitted that there was no clan member above 18 years who witnessed the sale.

Moreover, Mr. Samwel contended that the witnesses RW3, RW4 and RW5 were not trustworthy as their evidences contradicted each other. That

RW3 said he was present when sale was conducted but admitted to have not signed the same. The learned counsel viewed him as a concocted witness. He also faulted RW4's evidence who is the wife of the seller who said that was not present but the agreement was taken to her home to sign whereas RW5 said RW4 was present and witnessed the sale agreement but RW4 herself said she was not present.

Along with that, the learned counsel for the appellant submitted that the contradiction extended to the issue of who planted the tree where each witness claimed to have planted the trees himself that at least the respondent could have said he grew the trees with the help of other people. However, He cemented that the evidence of the appellant was clear that she planted and grew 875 trees in number and the trees are 23 years old on the land of 6 acres hence he was certain and accurate.

Mr. Samwel added that the sale agreement cannot be said to be complete as the documents were not placed to the village authority for blessings.

He supported his submission with the cases of **Bakari Mhando Swanga vs Mzee Mohamed Bakari Shelukindo** and 3 others, Civil Appeal No.389 of 2019, CAT at Tanga (Unreported) and **Elias Ichwekeleza vs Rev.Willison Kyakajumba**, Land Case Appeal No.26 of 2018, HCT at Bukoba. According to Mr. Angelo, as there was no any local or village leader who witnessed the sale agreement, then the respondent did not prove the case to the required standard.

Submitting on the 1st ground, Mr. Angelo stated that it is not in dispute that that the suit land was owned by the late Karume Athumani Mrisho, however, there is no evidence to show that Karume Athumani Mrisho bequeathed that land to Ally Mrisho. The appellant's counsel finally prayed

this court to allow the appeal by declaring that the suit land belongs to Karume Athuman Mrisho and hence forms part of his estate.

In reply, Advocate Mtagahiywa, submitting on the first ground, per section 112 of Cap 6 R.E 2019 the appellant was duty bound to prove that the suitland was bequeathed to the grandchildren by Karume Athumani Mrisho. The Appellant contended to have inherited the suitland by the will left by her grandfather but failed to bring and tender the said will to counter. Therefore, she failed to prove inheritance of the suit land, hence, the primary heir was Ally Mrisho and he legally sold the suitland to the 1st respondent. That the sale agreement was witnessed by RW4, the wife of the Ally Mrisho.

Furthermore, he contended that the exhibit R1 which was admitted without objection, it admission cannot be challenged at the appellate stage. He backed up his stance by the court of appeal case of **Makubi Dogani vs Mgodongo Maganga**, Civil Appeal No.78 of 2019, CAT at Shinyanga at page 15.

Reverting on the second ground which touches on the complaint that the sale agreement did not get approval from clan members, Advocate Mtagahywa was straight that clan members must follow procedure to redeem land in three months and that if they did not follow such procedure, they could not redeem it today. He cited the case of **Fulgence Seif vs Raphael Rwabwea** (1978) LRT 46.

Mr. Mutagahywa further stressed that the respondent has been cultivating the said land since 1996 without interruptions today any challenge of the sell agreement cannot stand. Moreso, he dismissed the argument raised by the appellant's counsel that the sale agreement was not endorsed by

the village authority after many years since the respondent bought and used the Suitland. That the case of Bakari Mhando (supra) which required endorsement by village authority is distinguishable as it gave such as just an opinion and the facts in that case the land which was sold was once owned by the Village Authority that is why the court opined that under that circumstance it was proper for the village council to bless the transfer.

Responding on the last third ground which challenges the sale agreement which was not read over, it was Mr. Mutagaihwa's argument that the requirement of reading out exhibits applies to criminal cases but in civil cases, the parties have the documents before the hearing date, therefore, no need to read the contents. He finally prayed the appeal to be dismissed with costs and the decision of the trial court to be upheld.

In his rejoinder submission Mr. Samwel reiterated that the requirement to read out exhibits applies to both in Criminal and Civil cases and failure to read the contents leads the exhibit to be expunged. That the cited case of **Makubi Dongani** (Supra) which held that un objected exhibit cannot be challenged at the appellate stage is distinguishable that the same cannot be challenged if it passed through the required steps.

Mr. Samwel re-emphasized that the requirement of getting blessings from village authority is of vital even if what was given by the court in the cited case was an opinion. That an opinion from Court of Appeal is the directive which ought to be followed and it acts retrospectively regardless the law which mandates the village council came in force since 1999 after the sale in this case at hand was conducted.

With regard to the issue of redeeming the clan land raised in the submission in reply, Mr. Samwel cemented that the issue of redemption cannot come into play as the clan land has never been legally sold.

In this case it is undisputed that Ally Mrisho sold the suitland to the 1st respondent. The main dispute is whether the sale was legal.

In the 1st and 2nd grounds, the appellant seeks to establish that the sold suit land belongs to the late Karume Mrisho Athuman hence it should be declared to form part of the estate of the late Karume Mrisho Athuman.

Similarly, what the appellant seeks to establish in the 2nd ground is that the suit land being owned by the late Karume Mrisho Athuman it was therefore unlawfully sold to the respondent as the vender who is the appellant's father did not own the same.

The appellant's counsel in his submission raised the issue of the suit land being a clan land to challenge that the sale procedure was not followed. This takes me to determine whether the suit land was a clan land or not and if it was, whether failure to follow the procedure to sell a clan land can vitiate the contract of sale of land?

In **Jibu Sakilu v. Petro Miumbi** [1993] TLR 25 this court tried to expound the meaning of a clan land and the consequences if the clan land is sold without the consent of clan members as here under quoted:

> *"This matter concerns the meaning of clan land and as to when it can be redeemed. Clan land means lands which have been inherited successfully without interruption from the great grandfathers or from a grandfather by members of the same clan. The key words are without interruption. If a*

member of the clan sells or in any other way disposes of clan land without the consent of the members of the clan, then the members of that clan can redeem it within 12 years - see the Customary Law (Limitation of Proceedings) Rules GN No 311/1964. If it is not redeemed within 12 years, then it is lost and it is no longer clan land. The said land becomes the property of the purchaser."

Shutting the discourse on what is the exact time limit to redeem the clan land sold to the non-clan member between three months favoured by paragraphs 560, 561 and 568 of the Customary Law of the Haya Tribe printed in Hans & Hartnoil in 1945 (the Book) and precedent of this court in **Leonance Mutalindwa v. Maliadina Edward** [1986] TLR 20 and 12 years favoured under the Customary Law (Limitation of Proceedings) Rules GN No 311/1964, this court through my brother Mtulya, J in **Makiu Kajwangya and Another vs]Deogratias Kassinda** Land Case Appeal No. 28 of 2019 HCT at Bukoba had this to say:

Having noted all this and following analysis of this court, I hold that the time limit to redeem haya tribe clan land is twelve (12) years as per cited Rules and precedents of this court. Clan members therefore can redeem clan lands even after expiry of the three (3) months' time after the sale of clan lands to strangers. In any case, ***this will align with the principle of adverse possession enacted in Paragraph 22 of Part 1 of the First Schedule to the Law of Limitation Act which had received precedents both in this court and Court of Appeal.***

It is not disputed that Athumani Mrisho was the only son of the late Karume Athumani Mrisho, the appellant's grandfather. It is again not in dispute that Athumani Mrisho is the father of the appellant. It is trite that the appellant's father being a son of the late appellant's grandfather was the heir of the first degree under The Customary Law (Declaration) (No.4) Order of 1963 GN No. 219 of 1967 who automatically inherited the Suitland after his father had died interstate. Rule 25 and 34 The Customary Law (Declaration) (No.4) Order of 1963 (supra) on ranks of inheritance speak for themselves as quoted herein below:

> *25) Kwa kawaida, cheo cha kwanza ni cha mtoto wa kiume wa kwanza, cheo cha pili ni cha watoto wa kiume wengine, na cheo cha tatu ni cha watoto wa kike*
>
> *(34) Wajukuu watarithi cheo cha baba au mama yao katika urithi wa babu ikiwa baba au mama yao amekufa kabla ya babu.*

I thus, concur with the findings of the trial tribunal that in the absence of the will left by the appellant's late grandfather the appellant cannot claim ownership. The reason is not farfetched. Grandchildren under customary law cannot inherit the estate of their grandfather if their fathers or mothers are still alive save if they were inherited through a **will** left by their grandfather. Under section 110 of Evidence Act as rightly relied by the respondent's counsel the appellant was bound to prove by tendering the **will** which granted inheritance to her or to her co-grandchildren to rebut customarily ownership of the Suitland to her father.

Having derived much help from the above earlier quoted authorities, it is now certain from the definition propounded above that suit land was a

clan land and as already hinted it was inherited to Athumani Mrisho, the appellant's father who under **The Customary Law (Declaration) (No.4) Order of 1963 GN No. 219 of 1967** was an heir of the first degree after the late Karume Athumani Mrisho had died interstate. It is therefore trite that under customary law if the clan land is sold without following the procedure the only remedy is to redeem it from the bonafide purchaser. Therefore, failure to follow the customary procedure in disposing a clan land cannot vitiate the contract. Therefore, the late Athumani Mrisho, the appellant's father having sold the clan land which he owned through succession to the respondent, without any approval from clan head or clan members, the only remedy was for any member in the clan to file an application for redeeming the same within 12 years (See **Makiu Kajwangya and Another vs Deogratias Kassinda**(supra) and not an application seeking ownership or to invalidate the sale.

It is apparent that the respondent as bonafide purchaser have stayed in the suit land for about 22 clear years without interruption, therefore, the said land becomes the property of the purchaser.

Furthermore, there is no any piece of evidence suggesting that the appellant's father when died in 2008, left any dispute over ownership of the Suitland between him and the respondent.

In the event, having ruled that the suit land was inherited by the appellant's father, and having determined that the suit land was a clan land which was sold to the respondent and no any member attempted to redeem it within prescribed time it therefore seized to be a clan land and is now the property of the purchaser who is the respondent herein.

I finally rule that this appeal is devoid of merit. It is hereby dismissed. Given the fact that parties are related, I give no orders as to costs.

It is so ordered.

DATED at **BUKOBA** this 4th day of October, 2022.

G. N. Isaya
JUDGE
04/10/2022

Court: The Judgement delivered in chamber this 4th day of October, 2022 in the presence of the counsel for the Respondent, Mr. Dastan Mutagahywa, and the Appellant present in person, Audax Vedasto, Judge's Law Assistant and Ms. Grace Mutoka, B/C.

G. N. Isaya
JUDGE
04/10/2022