IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND APPEAL NO. 35 OF 2023

(Originating from District Land and Housing Tribunal for Rukwa at Sumbawanga

in Application No. 12 of 2021)

SENTINALA SIKUMBILI MICHESE ..... APPELLANT

VERSUS

ENOCK JOHN ..... 1ST RESPONDENT
LEONARD MBALAZI ..... 2ND RESPONDENT
CHARITE LABANI SICHONE ..... 3RD RESPONDENT
JACKOB ISACK ..... 4TH RESPONDENT
FEDERIKO CREDO ..... 5TH RESPONDENT
JAMHULI SIKUMBILI MICHESE ..... 6TH RESPONDENT

JUDGMENT

MWENEMPAZI, J.

The appellant herein named is aggrieved by decision of the District Land and Housing Tribunal for Rukwa dated 14.07.2023 (Hon. J. Lwezaura, Chairperson). She has therefore filed a memorandum of appeal raising three grounds of appeal as follows: -

1. That the trial tribunal erroneously determined an application No. 12 of 2021 as a fresh case while the same was *res judicata* before the tribunal having being (sic) determined on merits by the Ward Tribunal of Miangalua by the judgment which was delivered on 17/11/2014 and its execution order by the District Land and Housing Tribunal on 15.09.2021.
2. That the trial tribunal erred in law for relying on exhibits, which had no any evidential value.
3. That the trial tribunal erred in law and fact for its failure to analyze properly the evidence adduced before it.

The appellant prays that this appeal be allowed with costs; the judgment and decree of the trial tribunal be quashed and set aside respectively and the appellant be declared the lawful owner of the land in dispute.

In this appeal, the appellant was being represented by Mathias Budodi, Advocate of Budodi Advocates Zonal Law Chambers and the respondents were unrepresented. Parties prayed to proceed by way of written submission whereby leave was granted by this court. Both sides complied to the

scheduling order which was issued subsequent to an order granting leave to proceed by way of written submission.

Mr. Mathias Budodi, learned advocate for the appellant commenced by praying to drop the second ground of appeal and submitted on the 1st and 3rd ground of appeal.

Before I embark on the summary of arguments by the parties, I think it will help to see a summary story of the dispute as presented by the parties. As I have gathered from the evidence adduced by parties, the appellant and the 6th respondent are sibling sharing a father. Nothing has been testified on the maternal originality. Their father the late Sikumbili Michese, owned a land which was handed over to the appellant a she was old enough to handle properties and the 6th respondent was still a minor. That was before demise of the late Sikumbili Michese in 1977.

The 6th respondent was given his share of farms left by their late father after attaining the age of majority. He sold all the farms and left for Chunya. In 2014 he came back; trespassed into the farms belonging to the appellant sold them. The moves by the 6th respondent prompted the appellant to seek redress. She filed land dispute in the Ward Tribunal of Miangalua where the

decision was made in her favour on the 17/11/2014. The same was executed by order of the District Land and Housing Tribunal dated on 15.09.2021 issued by Hon. J. Lwezaura, chairperson. According to the record, land case in the ward tribunal was registered as Shauri la Ardhi Na. 14/2014 and application for execution in the District land and Housing Tribunal was Application for Execution No. 76/2021.

The application whose judgment is being challenged in this appeal was filed on 14.06.2021 and registered as Land Application No. 12/2021 it was heard and concluded by the decision made on 14/07/2023 declaring the 1st – 5th respondents lawful owners of the dispute land. With this brief summary I will now proceed to deal with an appeal.

In the submission for the appeal, Mr. Mathias Budodi, Advocate elected to commence with the 3rd ground of appeal that the trial tribunal erred in law and fact for its failure to analyze properly the evidence adduced before it.

The counsel submitted that the trial tribunal fell into an error for failure to consider and appreciate that there was no proof of transfer of land from the 6th respondent to the other respondents by way of sale.

The counsel for the appellant has submitted that all the applicants the 1st, 2nd, 3rd, 4th and 5th applicants in their evidence testified that the respondents (appellant and 6th respondent) were restricting them from using the farm because they wanted to distribute the dispute land between themselves.

He submitted had the trial tribunal taken into account this evidence, it should have required the 1st, 2nd, 3rd, 4th and 5th respondent to prove to the balance of probabilities that indeed they acquired the dispute land by way of sale by producing contract of sale.

However, there is no sale agreement which was tendered by the 1st, 2nd, 3rd, 4th and 5th respondent to substantiate sale agreement and prove their allegations. He submitted further that, it is a trite law that when the terms of a disposition of property have been reduced to the form of a document or where any matter is required by the law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such disposition except the document itself. The counsel referred to section 100(1) of the Evidence Act, [Cap 6 R.E 2019], which provided as follow: -

> *"When the terms of a contract, grant, or 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 of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

The counsel has thus submitted that although the respondents (1st, 2nd, 3rd, 4th and 5th respondent) testified that they purchased the said land from the 6th respondent, they had the transaction reduced into writing but they did not produce/tender the sale agreement.

The counsel submitted that it is a trite law that a contract for the disposition of a right of occupancy is enforceable only if it is in writing. This is a position under section 64 of the Land Act, [Cap 113 R.E 2019] which provide that: -

"Section 64(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if

(a) The contract is in writing or there is a written memorandum of its terms:

(b) The contract or the written memorandum is signed by the party against whom the contract is ought to be enforced".

The counsel submitted that the provisions of section 100 of the Evidence Act require only documentary evidence and in the circumstances of this case where the respondents did not tender any sale agreement signifies their failure to prove their case on the required standard. The counsel cited the case of **Paulina Samson Ndawavya Vrs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) where the court in deciding whether the purchaser proved the case in the circumstances at page 11 of the decision, it observed that: -

"That means, the determination of the suit in the appellant's favour was conditional upon proving, one, existence of the contract/agreement for sale of the plot of land; two, fulfillment of her part of the bargain under the contract, and three, breach of the terms of the contractual

terms by the respondent entitling the appellant to relief sought".

The counsel also has submitted that it was an error for the trial tribunal to rely on the testimony of SM6 and SM7 for failure to consider that their testimony is not compatible with the requirement of section 100(1) of the Evidence Act and cannot prevail to the requirement of the provisions of law.

Submitting further on failure by the trial tribunal to analyze properly the evidence adduced before it, the counsel approached the same by looking at the angle of time limitation. It is the requirement of law that time limit to institute proceedings for the recovery of land is 12 years as per item 22 part of the schedule to the Law of Limitation Act, [Cap 89 R.E 2019] which must be read together with section 4 of the same law. He has submitted that even where the cause of action for trespass to land by the respondents can be accounted from 2014 to the date of his submission, the appellant would not be barred to institute the matter as 12 years to institute the case has not lapsed.

Also, that the analysis was not done properly; although the respondent testified that the village council as a land authority in the village approved

the disposition of the land in dispute the trial tribunal decided in favour of respondents without having any evidence to substantiate and prove the approval of the village council on the alleged disposition.

Thus, no documentary evidence was tendered nor any local leader from the village council was summoned to testify under oath on the existence of the said approval of disposition by sale.

It is the position in law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden. In the case of **Paulina Samson Ndawavya Vrs. Theresia Thomasi Madaha** (supra) it was held that:

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that burden of proof is not diluted on account of the weakness of the opposite party's case".*

The counsel for the appellant submitted that the 1st, 2nd, 3rd, 4th and 5th failed to discharge their burden as analyzed herein above, and prayed that this court finds the case was not proved by the respondents.

On the first ground of appeal, the appellant's counsel has taken off showing that the matter at hand was technically decided in the Ward Tribunal of Miangalua in Shauri la Ardhi Na. 14 of 17.11.2014 and the ruling allowing the execution of the decree was delivered on the 15th September 2021 in application for execution No. 76 of 2021. The matter was between the 6th respondent and the appellant herein whereas in the Ward Tribunal the matter was decided in favour of the appellant. In regard to the 1st, 2nd, 3rd, 4th and 5th respondent who alleged to have purchased the suit land from the 6th respondent the allegation which was not proved, they purchased the said land to the person who is not a lawful owner of the suit property. As said above, the said judgment of the Ward Tribunal, its decree was allowed to be executed by the District Land and Housing Tribunal in the Application for Execution No. 76 of 2021 whose decision/ruling was delivered on the 15.9.2021.

The application for execution No. 76 of 2021 before the trial tribunal emanating from the said Shauri la Ardhi No. 14 of 2014 was heard and granted at the time when the land application No. 12 of 2021 in the District Land and Housing Tribunal was coming for hearing, the trial tribunal was

supposed to take judicial notice on the decision of the Ward Tribunal and its execution order.

The counsel argued that the proceedings show that the appellant testified in the District Land and Housing Tribunal in Application No. 12/2021 as SU1. She testified that: -

> *"Eneo gombewa ni mali yangu. Niliwahi kushtakiwa na mjibu maombi wa 2 kwenye Baraza la Kata la Miangalua ambapo nilipewa haki...baadaye waleta maombi walianza kudai eneo gombewa kwa madai ya kuwa wameuziwa eneo hilo na mjibu maombi wa pili".*

The said piece of evidence was not cross examined by the respondents. In law they admitted to the fact that there is a judgment of the Ward Tribunal which was executed by the trial court. On the reason that they were not parties to the cases, which were in respect of the suit land, they had a remedy to make an application for revision to the District Land and Housing Tribunal to challenge the decision of the Ward Tribunal under section 36 of the Land Disputes Court Act, [Cap 216 R.E 2019].

The counsel submitted that it is a principle in law that facts admitted in evidence do not need any evidence to prove. In this matter the 1st, 2nd, 3rd, 4th and 5th respondent admitted that ownership of the land in dispute was determined by the ward tribunal by their failure to cross examine on the aspect.

The counsel has submitted that in law for a court to be able to take judicial notice of the judicial decision the party is required to produce that decision for the court to see and recognize the seal of the court under section 58(d) of the Law of Evidence Act, [Cap 6 R.E 2022]. However, in the circumstances of this matter the trial tribunal should have taken judicial notice on the issue of *res judicata* as the said application for execution and the land application which is subject to this appeal were scheduled for hearing on the same dates. Alternatively, if this court finds that the judgment was not tendered, then the appellant's counsel has suggested that this court may order the District Land and Housing Tribunal to take and certify additional evidence for the appellant to tender the judgment and ruling of the Ward Tribunal and the District Land and Housing Tribunal respectively. Otherwise, there will be two decisions in favour different parties; the act which will not end the dispute.

The counsel thus prayed for the appeal to be allowed with costs and quash the trial tribunal's decision and set aside its subsequent orders.

Upon finishing their submission the respondents took on their turn to submit and defend their position. they submitted that they will reply to the submission commencing with the submission on the 1st ground of appeal, that the trial tribunal erroneously determined the application No. 12 of 2021 as a fresh case while the same was *res judicata* before the tribunal having been determined on merits by the Ward Tribunal of Miangalua in the judgment which was delivered on 17/11/2014 and its execution order by the District Land and Housing Tribunal on 15/09/2021. They have submitted that the ground is an afterthought as the appellant never objected to the case in the trial by raising a preliminary objection. On a point of law on the other note, the argument is incompatible with the definition of *res judicata* as provided for in section 9 of the Civil Procedure Code, [Cap 33 R.E 2019]. Section 9 of the Civil Procedure Code, [Cap 33 R.E 2019] provides that: -

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same*

parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

The applicants in the trial tribunal (1st, 2nd, 3rd, 4th and 5th respondent) had never had any litigation with the respondents in the trial tribunal (herein is the appellant and the 6th respondent). The respondents have cited the case of **Peniel Lotta Vrs. Gabriel Tanaki, and Others, [2003] T.L.R 312** where the applicability of section 9 of the Civil Procedure Code was dismissed. It was held that: -

"The scheme of section 9, therefore, contemplate five conditions which, when co-existent, will bar subsequent suit. The conditions are:

(i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit

(ii) The former suit must have been between the same parties or privies claiming under them

(iii) The parties must have litigated under the same title in the farmer suit

(iv) The court which decided the former suit must have been competent to try subsequent suit, and

(v) The matter in issue must have been heard and finally decided in the former suit".

In the case at hand it has been argued that the matter did not fall under all conditions, hence the case was not *res judicata* in any how it was the first case for them to claim for the rights.

It has been submitted and argued that this case is not a fit one to identify with the doctrine of *res judicata*. No evidence has been tendered to show the respondents were parties to the case at the Ward Tribunal and the doctrine cannot stand. They object to the prayer to take judicial notice of the decision in the Ward Tribunal, that cannot apply in the situation at hand.

On the third ground of appeal the appellant faults the analysis of the evidence adduced which in her opinion it reached on a wrong decision. That

the trial tribunal failed to analyze properly the evidence adduced before it. The respondents have replied to the submission in chief that the trial tribunal chairperson did properly analyze the evidence adduced by the parties hence reached at a fair and just decision to the bonafide purchaser.

The respondents suggest that given the evidence, the appellant should go back at home and settle the matter with her relatives without disturbing the respondents who are bonafide purchasers.

The appellant claimed five acres and the 6th respondent states that there is only 50 acres and if the acres bought by the respondents are added up, you end up with 38 acres and the remaining twelve belong to relatives brothers and sisters. They can settle without bothering buyers.

According to the respondents' submission they adduced clear evidence on how they acquired their pieces of land. It is clear for the applicants as well as the respondents.

As to the submission of not tendering the sale agreement, the respondents have submitted that it doesn't matter because they never had a sale agreement with the appellant. However, respondents were able to call

witnesses who witnessed the agreement at the time they paid money and signed contract before the village leaders, the chairman and village executive officer who were involved and also visited the land.

The respondents have submitted that the authority cited is not relevant to the scenario in this case as the land is unsurveyed and so is the cited case.

As to the submission on failure to cross examine the appellant, they have submitted that no judgment was tendered hence there was no need to cross examine her. That happened to other witness. The 6th respondent also was not cross examined when he testified that he was given the land he sold by his father. The respondents pray this court to dismiss the appeal with costs.

In rejoinder the appellant's counsel has reiterated the contents of the submission in chief. The counsel has submitted that the submission made by respondents that to call the case at the trial tribunal as *res judicata* is an afterthought and that the appellant should have raised the point at the trial is misconceived and bad in law. It is certain the respondent's allegations on the ownership of the disputed land depends on the transfer of ownership from the 6th respondent who was a party to the "Shauri la Ardhi No. 14 of

2014" in Miangalua Ward Tribunal and he was not declared to be the lawful owner of the land in dispute.

The counsel submitted that they have an opinion that the Land Application No. 12 of 2021 in the trial tribunal was *res judicata* under the meaning of section 9 of the Civil Procedure Code, [Cap 33 R.E 2019]. This position can be substantiated by adducing evidence, hence one cannot raise a point of preliminary objection on a point of law as was held in **Mukisa Biscuit Manufacturing Co. Ltd Vrs. West End Distributors Ltd**.

The counsel insisted that given that the appellant testified on the existence of the dispute over the same land in the Ward Tribunal of Miangalua, the trial tribunal ought to have taken judicial notice on the issue of *res judicata.* The decision of the Ward Tribunal was also the subject to application for execution filed by the appellant in the same tribunal (trial tribunal) in respect of the same land. The application for execution was registered as application for Execution No. 76 of 2021 before trial tribunal which was emanating from the said Shauri la Ardhi No. 14 of 2014.

The counsel cited the case of **Jebra Kambole Vrs. Attorney General,** Civil Appeal No. 236 of 2019, Court of Appeal of Tanzania at Dar es Salaam

(unreported) for the argument that nothing bar parties to raise the issue of *res judicata* at the appellate stage. The court stated: -

> *"In the circumstances, even if the plea of res judicata was not raised at the trial, the right of the respondent to raise it on appeal was not waived as parties could be heard and the matter be determined".*

The counsel for the appellant submitted that the respondents acquired ownership by purchasing the dispute land from the 6th respondent who was a party at the Ward Tribunal and Land Application No. 12 of 2021 which is the subject of this appeal. The 6th respondent was not declared to be a lawful owner in the Ward Tribunal of Miangalua. Hence, the remedy taken by the respondents to file Land Application No. 12 of 2021 in the trial tribunal was bad in law as they alleged that there were not parties to the proceedings in the Ward Tribunal hence proper remedy for them was to file an application for revision and not to file a fresh suit in respect of the land which was already declared by the competent tribunal to be the property of the appellant. The counsel cited the case of **Jacqucline Ntuyabaliwe Mengi & 2 Others Vrs. Abdiel Reginald Mengi & Others,** Civil Application No.

332/01 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was held: -

> *"Mr. Vedasto maintained the position which we associate ourselves with as the correct position of the law, that the applicants were not parties to that matter and thus the only way to challenge the decision of the High Court is by way of revision".*

The appellant therefore prayed this court to find the respondents failed to prove their case to the balance of probabilities and allow the appeal or in alternative, invoke section 42 of Land Disputes Courts Act, [Cap 216 R.E 2019] to take and order the trial tribunal to take and certify additional evidence for the appellant to tender the judgment and ruling of the Ward Tribunal of Miangalua and District Land and Housing Tribunal for Rukwa respectively for litigation to come to an end.

That will do away with the possibility of having two decision declaring two different parties as owners of the dispute land which is likely to bring in chaos to the society.

On the third ground of appeal, its opposed by the respondents, it is not in dispute that the respondents entered into written contract (sale agreement) with the 6th respondent and the said sale agreement was not tendered by respondents at the trial tribunal. It is trite law that the person who allege bears the burden to prove on the required standard and the burden never shifts to the adverse party until the party on whom burden lies discharge it. This is the position of the law in section 110 and 100(1) of the Evidence Act, [Cap 6 R.E 2022] and section 64 of the Land Act, [Cap 113 R.E 2019] taking into account the facts in this case.

It is the duty of the respondents to prove the existence of the alleged sale agreement. Thus, the trial tribunal grossly fell into an error to rely on the testimony of SM6 and SM7 which does not comply with the requirement of law that require written contract to be proved by the document itself. The testimony of SM6 and SM7 cannot prevail to what the law dictates. The counsel submitted that they have opinion that the trial tribunal failed to properly analyze and evaluate the evidence on record and hence reached into the wrong decision. The appellant prayed that the appeal be allowed

with costs and quash the trial courts' decision and set aside subsequent orders.

I have as well read the record of the trial tribunal and all attachments in it. The file has a copy of the record of Shauri la Ardhi Na. 14 of 2014 in Miangalua Ward Tribunal and a copy of the file for Application for Execution No. 76 of 2021. It suffices to say, so far as the dispute land is concerned there are two valid standing decision of two competent tribunals, though at different levels, the Miangalua Ward Tribunal and the District Land and Housing Tribunal for Rukwa whose decision is being challenged in this appeal.

The decision of Mianguala Ward Tribunal held the appellant to be the lawful owner and the decision of the District Land and Housing Tribunal held that the respondents in this appeal as being lawful owners of the dispute land. The question is which decision is the right one. That should remain to stand. I think by necessary one must be quashed to clear the conflict.

No doubt, all the respondents save for the 6th respondent had as their claim and testimony that they purchased the dispute land from the 6th respondent; each respondent has the size of the land equivalent to the financial capacity

he had at the time of purchase. Enock John (1st respondent) bought 7 acres for Tshs. 380,000/= in 2014; Leonard Mbalazi (2nd respondent) on 14/09/2014 bought 14 acres for Tshs. 500,000/=; Charite Labani Sichone bought 6 acres for Tshs. 360,000/=; Jackob Isack bought 7 acres for Tshs. 370,000/= and Federico Credo bought 7 acres for Tshs. 450,000/=. The 1st – 5th respondent bought their respective pieces of land sometime in 2014.

This is a first appeal, the court has power reassess and or reevaluate the evidence and come up with its own findings however, with precautions as it had no opportunity to observe the witnesses when testifying. Being conscious of the position I have noted that the appellant testified that:

> *"Eneo gombaniwa ni mali yangu niliwahi kushitakiwa na mjibu maombi wa 2 kwenye baraza la kata ambapo nilipewa haki. Mjibu maombi wa 2 alikata rufaa dhidi ya maamuzi ya baraza la kata lakini hakuhudhuria".*

Indeed there is a case file in the record for Appeal No. 5 of 2015 and the parties are Jamhuri Michese Vs. Sentinela Michese. The record of the file shows on the 20th April, 2016 the appeal was dismissed for want of prosecution. It is my observation that, the records were available in the

District Land and Housing Tribunal. The trial tribunal was, in my opinion, duty bound to take judicial notice of the record and consider the same it its decision.

The respondents, according to the tracing I have just made, after observing that the appellant and the 6th respondent were contesting over the dispute land they circumvented the appellant and registered a fresh application at the District Land and Housing Tribunal. The result is a different decision contradicting that of the Ward Tribunal.

In the submission by the counsel for the appellant in support of the 1st ground of appeal he has argued that the case, Land Application No. 12 of 2021 was *res judicata* in that although the respondents were not parties to the Shauri la Ardhi Na. 14 of 2014 in the Miangalua Ward Tribunal, they were parties on account of having been acquired, as they claim, ownership by purchase from the 6th respondent. Since the respondents allege to have purchased from the 6th respondent, then they did not acquire ownership from the vendor (6th respondent), as he was not declared to be the owner. Or the final determination had already been made over the dispute land the

are claiming which was also the subject of trial in the ward tribunal in the Shauri la Ardhi Na. 14/2014.

In my view, although the wording in terms of parties show in the Ward Tribunal of Miangalua did not incorporate their names, still I find it will be valid, technically so to speak, to identify the 1st, 2nd, 3rd, 4th and 5th respondent with the 6th respondent who alleged to own the dispute land and sold it to them. Hence, the definition of *res judicata* under section 9 as quoted above will be compatible to the scenario in our case. I would argue that the 1st, 2nd, 3rd, 4th and 5th respondent were privies to the dispute by virtue of their connection to the land via purchase from the 6th respondent.

Alternatively, I would opine that given that the 1st, 2nd, 3rd, 4th and 5th are residents of the area the appellant and 6th respondent was residing; I believe they knew of the case and they would have applied to be parties to the application Shauri la Ardhi No. 14 of 2014 to defend and protect their interest instead of filing fresh suit at the District Land and Housing Tribunal.

The counsel for the appellant has suggested that although the respondents could not appeal by virtue of not being parties to the application, they ought to have filed revision. That would ultimately give them an opportunity to

challenge the decision of the Ward Tribunal of Miangalua and avoid presence of two contradicting decisions as it is the present situation.

In my view, the case Land Application No. 12 of 2021 was *res judicata* to Shauri la Ardhi Na. 14 of 2014. I would also add it was proper still to raise the point at an appeal drawing from the decision in **Jebra Kambole Vs. Attorney General** (supra).

On the third ground of appeal the appellant complained against proof of the case by the 1st, 2nd, 3rd, 4th and 5th respondent in the trial tribunal. That the respondent failed to prove their case to the balance of probabilities.

In the trial tribunal the respondents (1st – 5th) went to claim for a farm which in the form Na. 1 at item 3 it is recorded:

> *"3. Eneo na anwani ya ardhi: Kijiji cha Tunko Mkutabo, Momba, S.L.P 229 Sumbawanga 4. Kadirio la thamani ya mali inayobishaniwa milioni nne tu (4,000,000/=)".*

In the evidence tendered by the respondents, it is stated that they acquired the said farm by purchasing from 6th respondent. They alleged also that the

purchase went simultaneous with signing contracts of sale, which were witnessed by the village leadership and or authority.

It is however on record that the said contracts of sale were not tendered nor the leaders were summoned to testify an oath. Counsel for the appellant had the opinion that there being a document in which the terms of sale were reduced into writing, proof of the same will be achieved by tendering the said documents. He relied on the provisions of section 100(1) of the law of Evidence, [Cap 6 R.E 2019]: -

> *"When the terms of a contract, grant, or 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 of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.*

The counsel also submitted that the sale being pertaining to sale of interest in land, then it is enforceable if it will be in writing, citing the provisions of section 64 of the Land Act, [Cap 113]. The counsel also cited the case of **Paulina Samson Ndawavya Vrs. Theresia Thomas Madaha** (supra).

I have read the record, clearly the respondents relied on the word of month, oral evidence in a bid to prove their case. Given that they did not produce any documentary evidence to substantiate their allegation, that was a failure on their part to prove the case. It has also been submitted by the respondents that it didn't matter for then to tender a sale agreement because they never had a sale agreement with the appellant. I think that was a wrong choice by the respondent as it went to water down their case.

Section 110(1) of the Evidence Act, [Cap 6 R.E. 2019] provide that: -

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".*

That burden of proof fell on the respondents who were applicants in the case. They did not exercise their duty thus they have failed to prove their case against the appellant.

Under the circumstances, the complaint by the appellant on the third ground of appeal is a valid one and I allow it.

For the reasons stated herein above I allow the appeal, with costs. The judgment and decree of the trial court is quashed and set aside.

It is ordered accordingly.

Dated and signed at Sumbawanga this 07th day of March, 2024.

T. M. MWENEMPAZI
JUDGE

Judgment delivered in court in the presence of the appellant and the 4th respondent.

T. M. MWENEMPAZI
JUDGE
07/03/2024