IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 57 OF 2018

MELCHIADES JOHN MWENDA ..... APPELLANT

VERSUS

1. **GIZELLE MBAGA (Administratrix of the Estate of JOHN JAPHET MBAGA - deceased)**
2. **PHILEMON NDYANA**
3. **JOSHUA E. MWAITUKA t/a FASTER AUCTIONEERS & DEBT COLLECTORS**

..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania, at Dar es Salaam)

(Muruke, J.)

dated the 28th day of November, 2017
in
Land Case No. 10 of 2012

.....

JUDGMENT OF THE COURT

14th July & 13th November, 2020

MWAMBEGELE, J.A.:

This appeal arises from a dispute over a parcel of land christened as Plot No. 23 & 24 Block C, situate at Kunduchi Mtongani area, Mbezi within the City of Dar es Salaam between the appellant, Melchiades John Mwenda on the one hand, and Gizelle Mbaga (administratrix of the estate of the late John Japhet Mbaga), the first respondent and Philemon Ndyana, the

second respondent, on the other. The appellant unsuccessfully sued the first respondent in the High Court in which he claimed for, *inter alia*, a declaration that he was the lawful owner of Plot No. 23 & 24 Block C, Kunduchi Mtongani area, Mbezi within the City of Dar es Salaam (we shall henceforth refer to it as the disputed land). Dissatisfied, he has come to this Court on first and last appeal.

To appreciate the appeal before us, we find it apt to narrate the material background facts of the dispute between the parties, albeit briefly, as can be gleaned from the pleadings and the entire record of appeal. They go thus: John Japhet Mbaga, now deceased, owned the disputed land. Sometime in 2006 and 2007, he sold the disputed land to the appellant. The appellant pleaded and testified that he was given all the relevant documents including an original Certificate of Title but that this document was subsequently found missing in his office at Kariakoo where he had kept it. Following the alleged loss of the original Certificate of Title, the appellant reported to the Police and obtained a loss report. He used the loss report to obtain a duplicate Certificate of Title and managed to

change registration of the disputed land from John Japhet Mbaga to his name.

In 2009, John Japhet Mbaga purportedly sold the disputed land to the second respondent. The second respondent was given the original Certificate of Title of the same land. When the second respondent was in the process of transferring the Certificate of Title into his name, he realized that the disputed land was registered in the name of the appellant. His further search revealed that the Certificate of Title in possession of the appellant was a duplicate one. Thinking that there was fraud in the transaction by the appellant, he reported the matter to the police where John Japhet Mbaga and the appellant were jointly charged with conspiracy and forgery. While John Japhet Mbaga was also charged with obtaining money by false pretences, the appellant was also charged with a separate count of giving false information to the public officer. The District Court (Hon. J. Kinyage - RM) acquitted them of all the charges, save for the count facing the appellant alone; giving false information to the public officer. He was convicted of the offence and sentenced to serve three months in community service. That was on 07.11.2011.

On 30.01.2012, the appellant instituted the suit the subject of this appeal. At some point after the suit was instituted, the second respondent managed to move the Registrar of Titles to change the registration of the disputed land in his name on the strength of the verdict of the criminal case.

The High Court (Muruke, J.) found that the second respondent was a lawful owner of the disputed land and declared him as such. That suit proceeded *ex parte* as against the first and third respondents having defaulted appearance. In this appeal, the appellant seeks to assail the decision of the High Court on the following grounds of grievance:

1. That, granted the finding on the first issue in the affirmative that the suit plot was variably sold to the appellant and the second respondent, the Trial Judge failed to direct her mind as to who between the appellant and the second respondent was the first buyer of the disputed land;

2. That the trial Judge abdicated her judicial duty for not evaluating the legality of the rectification by the Registrar of Titles of the Certificate of Title under the name of the appellant

basing on the findings of Criminal Case No. 200 of 2010 which never determined the issue of the ownership of the suit plot;

3. That to the prejudice of the appellant, the trial Judge failed to evaluate and make any finding on the evidence tendered in court especially the evidence of PW1, PW2 and PW3 who witnessed the sale between the appellant and the first respondent and the process of handing over the suit house by the first respondent;

4. That the trial Judge erred for reckoning the sale agreement between the first and second respondents without any admitted exhibit in court showing the existence of the alleged sale transaction;

5. That the trial Judge misdirected herself when she relied on the judgment of the District Court in Criminal Case No. 200 of 2010 which had convicted the appellant for giving false information to a police officer, in total disregard that the District Court did not determine the question of the ownership of the disputed plot; and

6. That the trial Judge erred in law by misapplying the maxim buyer beware against the appellant in view of the evidence by PW1 that the appellant did actually conduct official search and discovered the property to be registered in the name of Dyness Dimere and initiated transfer of ownership from Dyness Dimere to the first respondent who ultimately transferred the same to the Appellant.

When the appeal was placed before us for hearing on 14.07.2020, like in the High Court, the first respondent did not enter appearance. The first respondent defaulted appearance despite being duly served with the notice of the hearing through substituted service by publication in two issues of Mwananchi Newspaper; of 29.06.2020 and 30.06.2020. Messrs. Sylvester Eusebi Shayo and Cornelius Kariwa, learned advocates, joined forces to represent the appellant. As for the respondents, while the second enjoyed the services of Mr. Amini Mshana, also learned advocate, the third; a legal person, appeared through Mr. Hamis Ismail; her principal officer.

The learned advocates for the appellant and second respondent had earlier on filed written submissions for and against the appeal, as the case

may be, which they urged the Court to adopt as part of their oral arguments. The learned advocates simply elucidated their respective written submissions.

In the written submissions in support of the appeal, arguing in respect of the first ground, the appellant, through Mr. Kariwa, submitted that he bought the disputed land on 19.11.2007 from John Japhet Mbaga; the first respondent and this is exhibited by the Sale Agreement (Exh. P1) while, on the other hand, the second respondent argued that he bought the disputed land but no document was produced to prove that sale. The appellant relied on **the National Housing Corporation and Another v. Turubali Gulamali Abdurasul (Executor of the Estate of Gulamali Abdurasul Satchu)**, Civil Appeal No. 64 of 1999 (unreported) to argue that such allegations must have been reinforced by documentary evidence.

Mr. Kariwa submitted further that an official from the Registrar of Titles testified that the appellant was the first to lawfully occupy the disputed land but the trial judge failed to direct her mind as to who was the first buyer.

Mr. Kariwa argued the second and fifth grounds of appeal conjointly. These grounds assail the High Court for blessing the action of the Registrar of Titles to change ownership of the disputed land on the strength of the judgment in Criminal Case No. 200 of 2010 which did not prove ownership of the disputed plot. He submitted that while the suit the subject of this appeal which was instituted with a view to determining ownership of the disputed land was still pending in court, the second respondent managed to move the Registrar of Titles to change the Certificate of Title to his name. That course of action, he argued, was contrary to the provisions of section 99 (1) of the Land Registration Act, Cap. 334 of the Revised Edition, 2002 (the Land Registration Act) in that the appellant was not found guilty of buying the property fraudulently in the criminal case. He argued further that it was incumbent upon the second respondent to refer the matter to the High Court in terms of sections 99 (1) (a) and 99 (1) (d) of the Land Registration Act.

Regarding the third ground of appeal, the appellant submitted that the trial Judge erred in relying her findings on predominantly the judgment of the District Court in Criminal Case No. 200 of 2010 (Exh. D2) and the

testimony of Apolo Elias Laizer (DW3) and, in so doing, she failed to consider the testimonies of Paschal Gasper Chuwa (PW1), Melchiades John Mwenda (PW2) and Flora Itembe Mbasa (PW3). He added that PW1 witnessed a smooth transaction of the disputed land from Dyness Dimere Kitunga to John Japhet Mbaga and later from the said John Japhet Mbaga to the appellant which evidence was supported by No. D. 8707 D/Sgt Deus (DW2) and Appolo Elias Laizer (DW3). DW3 witnessed physical possession of the disputed land by the appellant and that the said John Japhet Mbaga once introduced the appellant to her that he had sold the disputed land to him before he moved in.

The fourth ground is a complaint that the trial Judge was wrong to reckon the sale between the first and second respondents without any admitted exhibit in court showing the existence of the sale transaction, if any, as evidence to prove the same. The appellant relied on **Mwajuma Mbegu v. Kitwana Amani**, Civil Appeal No. 12 of 2001 and **Malmo Montage Konsult AB Tanzania Branch v. Margaret Gama**, Civil Appeal No. 86 of 2001 (both unreported) to buttress the point that the second respondent ought to have produced documentary evidence to

prove the sale. These requirements were not met by the second respondent, he submitted. He added that the appellant proved these two ingredients through the Sale Agreement (Exh. P1), the Valuation Report (Exh. P2) and the Certificate of Title (Exh. P3). The appellant thus argued that the purported transfer of right of occupancy from the first respondent to the second respondent was not supported by any valid documentary evidence hence nonexistent.

The sixth ground seeks to challenge the trial Judge for misapplying the maxim "buyer beware" against the appellant in view of the evidence by PW1 that the appellant did actually conduct official search and discovered the property to be registered in the name of Dyness Dimere Kitunga and initiated transfer of ownership from the said Dyness Dimere Kitunga to John Japhet Mbaga who ultimately transferred the same to the appellant. The appellant argued further that PW3 testified as appearing at p. 285 of the record that she told the second respondent that the disputed land belonged to the appellant and was shown land rent receipts to that effect.

In conclusion, Mr. Kariwa submitted that the trial court rightly concluded at p. 460 that the second respondent had no counterclaim but

yet proceeded to award him with what he abstained from counterclaiming and paying him costs. He prayed for the appeal to be allowed with costs.

For the second respondent, Mr. Mshana kickstarted by submitting in the reply submissions that the appellant colluded with John Japhet Mbaga to swindle the second respondent by fraudulently concocting and backdating sale agreements. Mr. Mshana heavily relied on the criminal case to submit that the appellant was convicted of presenting a false document to a public servant and fraudulently obtained a duplicate Certificate of Title and that the second respondent was a lawful owner of the disputed land in that he was in possession of the original Certificate of Title over the disputed land.

Arguing against the first ground of appeal, Mr. Mshana submitted that the question as to who between the appellant and the second respondent was the first buyer does not arise where the appellant backdated the sale agreement and produced fake documents to obtain registration while the second respondent had the original Certificate of Title in his name and the registration thereof obtained legally. In the circumstances, he submitted, the case cited; the **National Housing**

Corporation case, is not applicable here. He thus beseeched us to dismiss the first ground of appeal.

In respect of the second and fifth grounds of appeal to which the respondent conjointly made a response, as they were so argued conjointly, Mr. Mshana submitted that the Registrar was quite in the right path to rectify the register basing on the criminal case pursuant to section 99 (1) (d) of the Land Registration Act, when he is satisfied that any memorial in the land register, has been obtained by fraud. The learned counsel also relied on section 99 (1) (f) of the Land Registration Act which authorizes the Registrar to rectify the register "in any other case, where, by reason of any error or omission in the land register, or by reason of any memorial made under a mistake, or for other sufficient cause it may be deemed just to rectify the land register". The learned counsel added that any complaint against the Registrar of Titles, as a quasi-judicial body ought to have been challenged under sections 101 and 102 of the Land Registration Act. He thus implored us to dismiss the second and fifth grounds.

As regards the third ground of appeal which is on the evaluation of evidence, Mr. Mshana submitted that on the evidence by the appellant at

the trial, only a blind court or a kangaroo court could find for him. He repeated that the appellant's case was scanty and weightless and that he procured the transfer by fraud while the second respondent had the original Certificate of Title. He prayed that this ground be dismissed as well.

Responding to the fourth ground of appeal, Mr. Mshana submitted that the decision of the High Court cannot be faulted merely because no sale agreement was tendered in evidence. Mr. Mshana distinguished the **Malmo Montage Konsult AB Tanzania Branch** case because in that case there was no question of fraud like in the present where the appellant presented false documents while the second respondent had an original title. He added that the decision cannot help us as it was decided based on the repealed law.

Mr. Mshana concluded that the trial Judge heard all the available evidence, weighed it and was rightly convinced that the appellant's case was weak. He thus implored us to dismiss the appeal with costs.

Mr. Hamis Ismail, the principal officer of the third responded had nothing useful to say on the appeal. He just summitted that the third

respondent, being a court broker, was waiting for the verdict of the appeal on which to act.

In a short rejoinder, Mr. Shayo submitted that as per sections 44 and 45 of the Evidence Act, Cap. 6 of the Revised Edition, 2019 (the Evidence Act); a judgment in a criminal case is not proof of the alleged fraud committed by the appellant.

We wish to start our determination by observing some preliminary matters. First, that Mr. Mshana for the second respondent had initially filed a notice of preliminary objection on the appeal. However, when the appeal was called on for hearing, he prayed to withdraw it to pave way for determination of the appeal on its merits. The prayer for withdrawal was not objected by the advocates for the appellant and, consequently, the Court marked the preliminary objection withdrawn.

Secondly, we wish to remind the parties that this is a first appeal. We are mindful that in terms of rule 36 (1) (a) of the Tanzania Court of Appeal Rules, we, as a first appellate court, have a duty to reappraise the evidence adduced at the hearing of the suit and come up with our own conclusion if there is a dire need to do so – see also: **Future Century**

Limited v. TANESCO, Civil Appeal No. 5 of 2009, **Damson Ndaweka v. Ally Said Mtera**, Civil Appeal No. 5 of 1999 – [2003] TZCA 12 at www.tanzlii.org, **Abdallah Athuman @ Dulla v. Republic**, Criminal Appeal No. 434 of 2018 - [2019] TZCA 496 at www.tanzlii.org and **Vuyo Jack v. Republic**, Criminal Appeal No. 334 of 2016 - [2018] TZCA 322 at www.tanzlii.org (all unreported), to mention but a few. In **Future Century Limited** (supra) for instance, we went an extra mile to explain that even though most of the cases that enunciated the principle are criminal in nature, the principle applies to both civil and criminal cases.

Thirdly, we have learnt from the reply submissions by the learned advocate for the second respondent that some of the matters have been stated as if they have been proved by evidence. For instance, Mr. Mshana has stated more than once in the reply submissions that the appellant and John Japhet Mwenda colluded with a view to swindle the second respondent. He has also stated that the appellant and John Japhet Mwenda backdated the sale agreement with the same view of executing their illegal purpose. We wish to state at the outset that there is no such evidence as collusion to swindle or backdating of documents in the

proceedings and judgment of the trial court. These have just surfaced in the reply submissions. In the course of our determination of this appeal, therefore, we shall ignore such averments.

We will confront the grounds of appeal in the manner the counsel for both parties did; that is, considering the second and fifth grounds together and determining the rest separately.

The first ground of appeal, as already alluded to above, challenges the trial court for not directing its mind to the issue who between the appellant and the first respondent was the first buyer of the disputed land. We have well considered the rival arguments by the learned counsel for the parties. While on the one hand the advocates for the appellant have submitted that their client was the first buyer, Mr. Mshana for the respondent is of the view that the issue does not arise as the appellant presented to the Registrar of Titles forged documents and this, he argues, has been proved by a criminal court while his client is in possession of the original Certificate of Title. Mr. Mshana has used this argument throughout his reply submissions as his trump card. This ground, in our view, will not

be sufficiently considered without reappraising the evidence adduced at the trial, a task we now embark upon.

It all started with the plaint in which the appellant pleaded how he bought the disputed land from John Japhet Mbaga vide a sale agreement (Exh. P1) executed on 19.11.2007 and all the documents relating to the disputed land given to him. The appellant pleaded at para 9 of the plaint that the original copy of the Certificate of Title mysteriously disappeared from his office at Kariakoo where he had kept it when one of his employees left employment. That evidence dominated the testimony of the appellant (PW2) as well as that of PW1; an advocate who witnessed the sale and transfer of the disputed land from John Japhet Mbaga to the appellant. The gist of the testimony of PW1 and PW2 was that the said John Japhet Mbaga had mortgaged the disputed land to a bank for a loan which he failed to service. John Japhet Mbaga got assistance from one Dyness Dimere Kitunga; a family member who helped him repay the bank the outstanding amount of Tshs. 15,000,000/= and the disputed land was transferred into her name. The sale of the disputed land to the appellant by John Japhet Mbaga had two essential phases. The first one comprised

an agreement supposedly executed by them on 13.07.2006 during which the said John Japhet Mbaga was paid by the appellant Tshs. 22,500,000/= as the first instalment. That sum was to be used to pay Dyness Dimere Kitunga and to effect transfer of title from the said Dyness Dimere Kitunga to John Japhet Mbaga and after payment of the second and final instalment, the title would be transferred from John Japhet Mbaga to the appellant.

All went well. That is, Dyness Dimere Kitunga was paid and the Certificate of Title was transferred to John Japhet Mbaga. After the second and final instalment of Tshs. 12,500,000/= was paid through a Sale Agreement executed on 19.11.2007 (Exh. P1), the Certificate of Title was handed to the appellant. It was agreed that John Japhet Mbaga would cooperate to make sure that the title was transferred to the appellant. They visited the Kinondoni Municipal Council several times for that purpose but they could not complete the transaction, for the endeavours were temporarily suspended because of the appellant being bereaved of his mother. When the appellant returned from attending the said bereavement, he realized that the Certificate of Title was missing in his

office at Kariakoo. At some point, he thought he left it with the Kinondoni Municipal Council Officers but the enquiry there proved futile. That made the appellant resort to the police to seek and obtain a loss report which was presented to Kinondoni Municipal Council where he obtained a certified copy of the Certificate of Title (Exh. P3). Finally, upon presentation of the Transfer Deed and Sale Agreement which were tendered in evidence as Exh. P1 collectively as well as the Valuation Report (Exh. P2), the disputed land was registered in his name.

The gist of the second respondent's evidence who testified as DW4 at the trial is that he bought the disputed land in 2009 and took the original Certificate of Title and all necessary documents to the Land Registry where the disputed land was registered in his name. That Certificate of Title was tendered in evidence as Exh. D1. He also tendered a judgment of the District Court of Ilala in Criminal Case No. 200 of 2010 which was admitted in evidence as Exh. D2. The second respondent fielded Zubeda Juma Kichawele (DW1), a land officer in Kinondoni Municipal Council, No. D. 8707 D/Sergeant Deus (DW2) who was in charge of investigations in respect of the criminal case which culminated into Exh. D2 and Appolo

Elias Laizer (DW3) who was Assistant Registrar of Titles in the ministry responsible for land matters. DW3 testified, *inter alia*, that he registered a caveat on 04.03.2010 lodged by the second respondent in respect of the disputed land after the latter brought relevant documents including a Sale Agreement between John Japhet Mbaga and the second respondent dated 23.06.2009. DW3 also testified that the appellant was issued with a notice to rectify the register after the second respondent presented to the Registrar of Titles Exh. D2 attached with; **one**, the Transfer Deed - Land Form No. 35, **two**, Sale Agreement between John Japhet Mbaga and the second respondent, three, Certificate of Approval - Land Form No. 33 and, **four**, the original Certificate of Title. The register was ultimately rectified from the appellant's name to the second respondent's despite the former's explanation that he bought the disputed land first and that the original Certificate of Title had disappeared before the transfer transaction was completed and that there was a suit the subject of this appeal which would determine its ownership. The register was rectified on 27.03.2009 in terms of section 99 (d) and (f) of the Land Registration Act.

We have subjected the evidence adduced at the trial in respect of both the appellant and second respondent to the scrutiny it deserves. Having so done, we are of the considered view that the Registrar of Titles acted prematurely in invoking the provisions of section 99 (d) and (f) of the Land Registration Act. That course of action, we think, would have been appropriate if ownership of the disputed land was finally determined by a civil court. We shall deal with the question whether the criminal court determined the question of ownership in some considerable details when determining the second and fifth grounds.

Answering the question who bought the disputed land first, we think, was rightly entertained by the trial court. We do not agree with Mr. Mshana that the question does not arise because the criminal court said there was fraud. The criminal court, we are afraid, did not say there was fraud. It said the appellant presented false information to a public officer. That in our view is far from saying there was fraud in the transaction. After all, in terms of section 44 of the Evidence Act, that judgment is not conclusive proof of that which it states.

Flowing from the above, we are satisfied that when the appellant and John Japhet Mbaga executed the Sale Agreement (Exh. P3) between them on 19.11.2007 title passed from the latter to the former. What was remaining was to effect transfer from John Japhet Mbaga, in whose name the disputed land was registered, to the appellant. Thus in 2009 when the said John Japhet Mbaga purported to sell the disputed land to the second respondent, he had no good title to pass to him. We are of the view that the fact that the second respondent is in possession of the original Certificate of Title which allegedly disappeared from the office of the appellant, is not *ipso facto* proof that he is the lawful owner of the disputed land. We are asking ourselves, what was the status of the original Certificate of Title after the certified Certificate of Title was issued. We think the original one became invalid and could not be used in any transaction thereafter. We say so because two documents cannot legally co-exist in respect of the same plot. We find solace on this standpoint in the provisions of section 38 of the Land Registration Act which provides for lost certificates. The provisions of subsection (1) of section 38 read:

> *"Where it is proved to the satisfaction of the Registrar that a certificate of title has been lost or*

destroyed or that there is other sufficient cause therefore, he may, after taking such indemnities as he may consider necessary, and giving, at the expense of the applicant, such public notice in the Gazette and in such local or other newspapers and in such other manner as shall appear to him sufficient in each case, issue a new certificate of title."

And subsection (2) thereof provides:

"A new certificate of title issued under the provisions of subsection (1) shall be deemed to replace for all purposes the certificate of title previously issued, and any person discovering the certificate previously issued shall surrender it to the Registrar for cancellation by him."

In view of the provisions of section 38 reproduced above, we think, when the Registrar of Titles issued a certified Certificate of Title the old original Certificate of Title was no longer valid and, in terms of subsection (2) of the Land Registration Act reproduced above, the second respondent ought to have produced it before the Registrar of Titles for cancellation.

Given the above, we think, the trial High Court fell into error when it declared the second respondent the lawful owner of the disputed land. We say so because; first, in addition to the reasoning in the foregoing paragraph, the evidence did not prove so on a balance of probabilities and, secondly, the second respondent did not plead ownership by way of counterclaim. It is elementary law which is settled in our jurisdiction that the court will grant only a relief which has been prayed for – see: **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161 and **Hotel Travertine Limited & 2 Others v. National Bank of Commerce Limited** [2006] T.L.R. 133

In the case at hand, the second respondent, in his written statement of defence appearing at pp. 97 – 99 of the record, did not raise any counter claim nor did he plead ownership of the disputed land. Admittedly, the first prayer in the written statement of defence was for a "declaration that the second defendant is the rightful and lawful owner of the disputed property designated as plot No. 23 & 24 Block "C" with Title No. 50041 Kunduchi Mtongani vide sale agreement date 23rd June 2009" and that the "sale agreement between the plaintiff and the first defendant dated 19th

November 2007 be declared null and void". However, we think these prayers, being raised in the written statement of defence, and not in the counter claim, were misconceived. If the second respondent thought he had any claim against the appellant, in terms of Order VIII of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002, he should have raised a counter claim in which he would "set out all the material facts on which he relied in support thereof with the same particularity as he would as a plaintiff in an independent suit" - see **Mulla: the Code of Civil Procedure**. Clinging on the appellant's prayer as he did instead of just stating in defence that the appellant's prayers be refused, was inappropriate and the trial court erred in granting such a relief.

in view of the above, we think, the trial court, having found that John Japhet Mbaga sold the disputed land to both the appellant and second respondent, it should have found that the appellant was the first buyer and that John Japhet Mbaga (the seller) had no good title to pass to the second respondent. We find merit in the first ground of appeal and allow it.

The second and fifth grounds of appeal seek to challenge the trial Judge for not evaluating the legality of the Registrar of Titles rectifying the

register under the name of the appellant basing on the findings of the District Court of Ilala in Criminal Case No. 200 of 2010 which never determined the issue of the ownership of the disputed land. This is clear in the judgment of the District Court of Ilala in its judgment; at pp. 421 – 422 it came quite in the open that it did not determine as to who was the owner of the disputed land when it stated:

> *"The fact that the transfer was made earlier than that sought by another applicant does not per se entitle the former a right nor deprive his right if he can prove it before a court of law that will decide on how such transaction came to pass and the Land Ministry will act upon such decision on whose title deed be cancelled ...."*

We have also stated in the course of determining the first ground of appeal above that the criminal court in Criminal Case No. 200 of 2010 did not determine ownership of the disputed land. If anything, what was proved beyond reasonable doubt by the criminal court is that the appellant presented false information to the public officer contrary to section 122 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). We discern from the particulars of the offence as appearing in the

judgment of the criminal court at p. 409 of the record of appeal that, on 23.09.2009, he reported to one WP 2191 Cpl. Fatuma that he lost the original Certificate of Title in respect of Plot No. 23 and 24 Block C, Kunduchi Mtongani, Kinondoni District in Dar es Salaam Region and that consequent upon that, he was given a police loss report. Proof of this criminal charge, in our view, does not invariably mean that the appellant did not legally buy the disputed land. In our view, the transaction of sale was complete when the appellant and John Japhet Mbaga executed the Sale Agreement (Exh. P1) on 19.11.2006. The transactions that followed thereafter were meant to effect transfer of title from the said John Japhet Mbaga to the appellant. We have already stated earlier that John Japhet Mbaga had nothing to pass to the second respondent after the transaction between him and the appellant. The Latin maxim *nemo dat quod non habet*; that is, one can only give what they have or one can only transfer what they own, binds John Japhet Mbaga and the second respondent here. After he sold the disputed land to the appellant, John Japhet could not sell the same land to the second respondent. One cannot eat his cake and still have it.

In view of the above, we are increasingly of the well-considered view that the Registrar of Titles, in rectifying the Register relying on the criminal case, acted prematurely. The second and fifth grounds of appeal are therefore meritorious. We allow them.

The third ground of appeal assails the High Court that it prejudiced the appellant for not considering the evidence of PW1, PW2 and PW3 who witnessed the sale between the appellant and John Japhet Mbaga. We have stated above how PW1, an advocate, played a pivotal role in handling the transaction between the appellant and John Japhet Mbaga. He witnessed when the first instalment was paid to the said John Japhet Mbaga by the appellant so that he could repay Dyness Dimere Kitunga and transfer the disputed land to the said John Japhet Mbaga which was then in the name of Dyness Dimere Kitunga. That was done and the same was later transferred to the appellant after the second and final instalment was paid.

The testimony of the appellant (PW2) dovetailed with that of PW1. Only that PW2 added the aspect of the original Certificate of Title being lost; that when he returned from attending a bereavement, he realized that

the Certificate of Title was missing from his office in Kariakoo. As the efforts to trace it were barren of fruit, he reported the matter to the police where he obtained a police loss report which he presented to Kinondoni Municipal Council and obtained a certified copy of the Certificate of Title (Exh. P3).

PW3, a ten-cell leader of the area where the disputed land is located, told the trial court that he knew John Japhet Mbaga as the owner of the disputed land. She testified that in 2006, John Japhet Mbaga introduced the appellant as the owner of the disputed land after he sold it to him. She added that the appellant relocated to the disputed land and started to live there. She also testified that sometime in 2009, the second respondent, a retired army officer who lived at Salasala, went to inspect the disputed land and said he had bought it. The witness testified that she told the second respondent that the house belonged to the appellant and showed him the land rent receipts which they used to pay in his name.

We agree with the appellant that the trial Judge did not pay much attention to the testimony of these three witnesses, presumably because she was carried away by the criminal court judgment. The first issue

framed at the trial was whether John Japhet Mbaga sold the disputed land to the appellant or the second respondent. This issue was discussed from p. 438 to p. 444 of the record. In its seven-page discussion, the trial court concentrated on the testimony of the defence to determine the issue. There was very little reference to the evidence of the appellant. The only mention was at p. 440 when the court said PW1 and PW2 proved to it that there was a sale agreement between John Japhet Mbaga and the second respondent. No other reference at all was made to the testimony of the appellant's witnesses. That was, in our view, an error on the part of the trial High Court. These three witnesses of the appellant were entitled to credence at the outset and their evidence needed scrutiny. This is more so because, as alluded to above, proof in the criminal case that the appellant presented false information to the public officer, did not prove that the appellant did not buy the disputed land from John Japhet Mbaga. We, therefore, are increasingly of the view that the trial court erred in discussing the defence evidence independent of the plaintiff's evidence.

The above said, we find merit in the third ground of appeal and allow it as well.

The fourth ground of appeal faults the trial High Court that it erred for reckoning the sale agreement between the first and second respondents without any admitted exhibit in court showing the existence of the sale transaction, if any. We think the appellant sufficiently proved that he bought the disputed land from John Japhet Mbaga and produced the relevant Transfer Deed and the Sale Agreement (Exh. P1). We must underline at this juncture that by the term "sale of the disputed land" here we simply mean sale of the interest in land, for, as long as land is not owned by the individual but by the state, what sale here implies is sale of interest in land – see: **Manual on Land Law and Conveyancing in Tanzania**, by Dr. R. W. Tenga and Mr. Sist J. Mramba, 2008 (at p. 214). On the contrary, the second respondent simply brought the original Certificate of Title (Exh. D1) and the judgment in Criminal Case No. 200 of 2010 (Exh. D2). For the avoidance of doubt, we are satisfied that the appellant gave a plausible explanation on how the original Certificate of Title mysteriously disappeared and his resort to the police where he sought and obtained a loss report which he used to get a Certified Certificate of Title. On a preponderance of probabilities, we think, in the circumstances where the second respondent did not tender any Transfer Deed and Sale

Agreement between him and John Japhet Mbaga, the appellant proved ownership of the disputed land. He was, in our view, equally genuine in the transaction which led into the disputed land being registered in his name.

We have already discussed above that the fact that the second respondent is in possession of the original Certificate of Title is not *ipso facto* proof that he is the lawful owner of the disputed land. We think, the trial High Court fell into error when it declared the second respondent a lawful owner of the disputed land. We say so because; first, the evidence did not prove so on a balance of probabilities that he bought the same from John Japhet Mbaga. Second, no documentary evidence was produced in court to authenticate the allegation by the second respondent, though DW3 testified that there was one; it was executed on 23.06.2009 (see p. 310 of the record).

The above said, we allow the fourth ground of appeal as well.

The final ground of appeal assails the trial Judge that she erred in law by misapplying the maxim *caveat emptor*; buyer beware, against the appellant in view of the evidence by PW1 that the latter conducted an official search and found out that the property to be registered in the name

of Dyness Dimere Kitunga and initiated transfer of ownership from Dyness Dimere Kitunga to the first respondent who ultimately transferred the same to the appellant. We agree that the appellant did whatever was available within the realm of due diligence to make sure he was safe in the transaction. In the circumstances, we think it was unfair to point an accusing finger at the appellant that he did not take reasonable care in the transaction while he bought the disputed land in 2006 prior to the subsequent sale to the second respondent in 2009. The doctrine applies retrospectively, not prospectively. If anything, the maxim was more applicable to the second respondent than to the appellant. This ground of appeal is meritorious as well.

Before we pen off, we wish to state by way of postscript that Mr. Mshana, in his written submissions, was not courteous in responding to the appellant's written submissions and, in some instances, in addressing the court. For instance, Mr. Mshana has stated in his submissions: "the Appellant colluded with the 1st Respondent to swindle the 2nd respondent by fraudulently concocting and backdating sale agreements ...." at p. 2 of the written submissions, "then hatched a plan which was to report to the police of having lost original title deed" at p. 2, "thereafter got consent

issued clandestinely by this man Magesa" at p. 2, "the appellant kept quiet because at the lowest of the bottommost best part of his Chagga heart of hearts, knowing the truth, he was convinced of the futility of his efforts" at p. 4, "the criminal conviction and sentence make the whole story of sale and purchase a big lie" at p. 5, "it is only a blind court if ever there were or a kangaroo court which, upon the evidence of the appellant could find for him" at p. 6 and "only a blind person could be carried away by this childish explanation" at p. 7, to mention but a few. These expressions were not courteous and, in our considered view, not expected of an advocate; an officer of the Court. We are certain that the expressions could have been expressed in a milder and courteous manner and yet deliver the same message, had Mr. Mshana taken a grip of himself and remembered his duty of courteously addressing his colleagues and the court at large.

We are constrained to remind Mr. Mshana of the noble duty we addressed in **The East African Development Bank v. Blueline Enterprises Tanzania Limited**, Civil Application No. 47 of 2010 (unreported). We were insistent in the **The East African Development Bank** that submissions by counsel must be courteous to the Court and fellow counsel as well.

The above said and done, we find merit in this appeal and allow it. In consequence whereof, we quash the judgment of the High Court and set aside the decree entered in favour of the second respondent. The appellant shall have his costs.

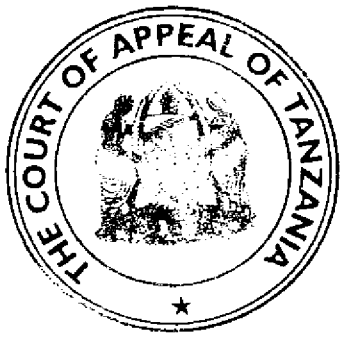
DATED at **DAR ES SALAAM** this 9th day of November, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 13th day of November, 2020 in the presence of Mr. Michael Kariwa, assisted by Mr. Pascal Gasper Chuwa counsels for the Appellant in absence of Mr. Gizelle Mbaga, 1st respondent and Mr. Philemon Ndyana, 2nd respondent present in person and in absence of Mr. Joshua E. Mwaituka, 3rd respondent dully served is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL