IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LILA, J. A., SEHEL, J.A And KAIRO, J.A.)

CIVIL APPEAL NO. 121 OF 2020

FLORIAN M. MANYAMA .....1st APPELLANT
RICHARD J. TOBA.....2nd APPELLANT

VERSUS

MAXIMILLIAN THOMAS.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Mwanza)

(Ebrahim, J.)

dated the 5th day of January, 2018

in

Land Appeal No. 96 of 2016

.....

JUDGMENT OF THE COURT

29th Nov. & 22nd Dec. 2022.

SEHEL, J.A.:

This is a second appeal. It emanates from the District Land and Housing Tribunal for Mara at Musoma (the DLHT) where the respondent sued the appellants claiming for ownership of a house situated at Plot No. 408 Block "AA", Buhare area in Musoma Municipality (the disputed property). Judgment was entered for the appellants. The respondent was aggrieved by the decision of the DLHT and he successfully appealed to the High Court of Tanzania at Mwanza (the first appellate court). Aggrieved by that decision, the appellants have now appealed to this Court.

Briefly, the evidence that was led in the trial court by the respondent who sued the appellants was such that, in 1989, the then Musoma Town Council allocated to him the disputed property and made some development by constructing a house therein. In 1992, he acquired a Certificate of Title with number 7243 but it was lost in the hands of OLAM. As a result, he sought a new Certificate of Title which was re-issued in 2013. That, in 2000, he relocated to Shinyanga and left the disputed property under the care of the 2nd appellant. In 2006, he heard that the 2nd appellant sold the house to the 1st appellant. He made several attempts to amicably settle the dispute but in vain. Therefore, in 2015, he lodged the application before the DLHT seeking for;

a) *Declaratory order that the respondent was the lawful owner of the disputed property.*
b) *Declaratory order that the sale between the 1st and 2nd appellants be declared null and void abinitio.*
c) *Eviction order against the 1st appellant and his agents form the disputed property.*
d) *Costs of the application.*
e) *Other order may the DLHT deem fit to grant.*

The appellants' defence was that the 2nd appellant bought the disputed property from the respondent in 2001 and then sold it to the 1st appellant. On account of a copy of the sale agreement tendered by the 2nd appellant, the DLHT found that the respondent failed to prove his claim that he left the disputed property under the custodian of the 2nd appellant. It further found that the respondent sold the same to the 2nd appellant. Accordingly, it dismissed the respondent's application with costs. As stated earlier, the High Court overturned the decision of the DLHT upon being satisfied that the respondent had strong proof of ownership of the disputed property through an original Certificate of Title tendered before the DLHT as exhibit P1. It thus disregarded the copies of the sale agreement and Certificate of Title tendered by the 2nd appellant on account that the 2nd appellant was required to prove the ownership by tendering original documents as required by section 66 of the Law of Evidence Act, Cap. 6 R.E. 2022 (the Evidence Act). As indicated earlier, the appellants preferred the present appeal.

The memorandum of appeal has the following two grounds:

1) *That, the learned Judge of the High Court erred in law when she omitted to hold that there was a valid sale agreement in respect of the disputed*

property between the 2nd appellant and the respondent.

2) *That, the learned Judge of the High Court erred in law when she omitted to hold that the respondent cannot rightly claim ownership of the disputed property after having sold, given up and abandoned the same to the 2nd appellant more than 14 years ago.*

Pursuant to Rule 106 (1) of the Tanzania Court of Appel Rules, 2009 as amended (the Rules), the appellants also filed written submissions and therein they added one more ground that:

> *"The learned Judge of the High Court erred in law when she omitted to hold that the trial DLHT had no jurisdiction to determine the dispute which relates to the land registered under the Land Registration Act, Cap. 334 R.E. 2019."*

The respondent also filed reply submission in terms of Rule 106 (7) of the Rules.

At the hearing of the appeal, the appellants and the respondent appeared in person, unrepresented.

When given a chance to address the Court, both appellants did not have anything much to argue apart from adopting the grounds of appeal

and the written submissions which they had earlier on filed and beseeched the Court to allow the appeal. The respondent also took the same course that he adopted the written submissions he filed to this Court and urged the Court to dismiss the appeal.

Basically, the submissions of the appellants on the additional ground was that in terms of section 37 (e) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (the LDCA), the jurisdiction of the application was vested with the High Court. The respondent strongly disputed that position by arguing that the ground is misplaced because section 33 (2) (a) and (b) of the LDCA is patently clear on the pecuniary jurisdiction of the DLHT.

We have scrutinized the record of appeal and noted that the application filed by the respondent before the DLHT estimated the value of the disputed property at TZS. 9,500,000.00. This is gathered from paragraph 4 of the application found at page 5 of the record of appeal. As rightly submitted by the respondent, the pecuniary jurisdiction of the DLHT is stipulated under section 33 (2) (a) and (b) of the LDCA whereby the DLHT is conferred with the jurisdiction to hear and determine proceedings for recovery of possession of immovable property whose value does not exceed three hundred million shillings and in other proceedings where the subject matter capable of being estimated, the value of such subject

matter does not exceed two hundred million shillings. Given that in the present appeal, the estimated value of the immovable property was below two hundred million, the DLHT had jurisdiction to hear and determine the suit and not the High Court. We therefore find that this additional ground is without merit.

For the 1st ground of appeal that there was a valid sale agreement, the appellants contended that there was enough oral and documentary evidence to the effect that the respondent sold the disputed property to the 2nd appellant whereas the respondent only made a short statement that he relocated his residence to Shinyanga and left the disputed property under the care of the 2nd appellant without bringing any further proof.

As for the 2nd ground of appeal that the application was filed out of time, the appellants submitted that from the evidence on record, the respondent moved from his residence to Shinyanga in 2000 and the disputed property was sold on 14th January, 2002. They further submitted that counting from 14th January, 2002 to the date the application was filed on 10th February, 2015, more than fourteen (14) years have lapsed without taking any action. It was the submission of the appellants that the respondent's application was an afterthought and thus urged the Court to allow the appeal.

On the part of the respondent, he replied together the two grounds of appeal, as he contended, they boil down to the issue as whether there was a valid sale agreement. He submitted that there was no valid sale agreement because there was no original title deed issued to the 2nd appellant. That, the 2nd respondent failed to produce any evidence to prove that there was a transfer of ownership as no forms for transfer of ownership was ever tendered in evidence. That, the sale agreement was never witnessed by the commissioner for oaths. For these reasons, the respondent urged the Court to dismiss the appeal with costs.

Having gone through the record, the grounds of appeal and the parties' written submissions, we note that the appellants do not dispute that the respondent was the original owner of the disputed property that was lawfully allocated to him by the then Musoma Town Council in 1986 followed with the issuance of the Certificate of Title number 7243 and thereafter erected a house in it. We further note that the appellants conceded that the respondent once lived in the said disputed property and then moved his residence to Shinyanga leaving it in the hands of the 2nd appellant. That apart, the appellants' argument was that the 2nd appellant persistently and established by both oral and documentary evidence that he bought the disputed property from the respondent before the latter

selling it to the 1st appellant. As rightly put by the respondent, the central issue concerning the two grounds of appeal is whether there was a valid sale agreement between the respondent and the 2nd appellant. We say so, because the time limitation in the 2nd ground of appeal depends on the sale agreement as per the written submissions filed by the appellants.

At this juncture, we wish to point out that the DLHT found that the respondent failed to prove his claim of leaving the disputed property in the hands of the 2nd appellant. For that reason, it dismissed the application and relied upon two pieces of evidence to find that the 2nd appellant purchased the disputed property. It relied upon the oral evidence of the 2nd appellant and a copy of the sale agreement, exhibit D1. The first appellate court rightly rejected these two pieces of evidence.

The sale agreement being documentary evidence, generally, ought to be proved by primary evidence as per section 66 of the Evidence Act read together with section 51 (1) of the LDCA. Of course, a copy of the document may be admitted as secondary evidence in terms of section 67 of the Evidence Act. Nonetheless, given the circumstance of the present appeal where the respondent denied to have sold the property to the 2nd appellant, the probative value of exhibit D1 is questionable. Hence more cogent evidence was needed to establish that indeed the respondent and

the 2nd appellant concluded a sale of the disputed property as per exhibit D1. This could have been established by bringing witnesses to the said sale agreement.

The general and well-known rule is that proof in civil cases is at the preponderance of probabilities. In the case of **Godfrey Sayi v. Anna Siame as legal representative of the late Mary Mndolwe**, Civil Appeal No. 114 of 2012 (unreported), we stated that:

> *"It is commonly knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and standard in each case is on a balance of probability."*

In that respect, the burden was upon the 2nd appellant to prove on the preponderance of probability that in 2001, he bought the disputed property from the respondent. We are therefore, of the decided view that failure by the 2nd appellant to call as witnesses those who allegedly witnessed the sale, and particularly the leaders of the area where the disputed property is situated without sufficient reasons, raises doubts on the truthfulness of the prevalence of allegedly sale and genuineness of the said sale agreement.

Besides, there is no explanation given by the 2nd appellant as why he failed to call the wife and the magistrate who witnessed the sale agreement. The failure to call these material witnesses weakened the appellant's case. We are further fortified with our stance because at page 55 of the record of appeal, the 2nd appellant, DW2 testified thus:

> *"...concerning the applicant [the present respondent], I heard an announcement of sell and I was told the location of the house so I went to see it. So, the person who acted between brought the applicant to me, we met and we went to see the house. I followed procedures to see the local leaders. There was a ten-cell leader I came to know as Bwire. We entered a house and inspected it so I purchased it. we agreed with the applicant to go to Mwanza to a bank I kept my money. So, I paid and we prepared a sale agreement. He gave me a copy of his title deed."*

Going by the above evidence, the 2nd appellant articulates that he paid the respondent after visiting the bank where he kept his money. We wonder why he failed to tender the bank slip proving that either he paid him through bank or withdrew the money to pay the respondent. We therefore entirely concur with the first appellate court that the appellants'

evidence was mere assertion short of proof. Accordingly, we find the 1st and 2nd grounds of appeal have no merit.

At the end, we hereby find that the appeal has no merit. We therefore dismiss it with costs.

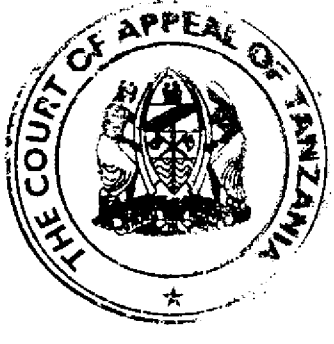
DATED at **DAR ES SALAAM** this 20th day of December, 2022.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of December, 2022 in the presence of the appellants and respondent appeared in person via video link from Mwanza ICJ, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL