IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

LAND CASE APPEAL NO. 70 OF 2019

(Arising from the District Land and Housing Tribunal of Muleba in Application No. 102 of 2016)

DEUSDEL MWELINDE.....APPELLANT

VERSUS

(1) ALEX KYENZIGU.....1ST RESPONDENT

(2) JOSEPHB.KYENZIGU.....2ND RESPONDENT

JUDGMENT

17/09/2021 & 06/10 /2021

NGIGWANA, J.

There is before me an appeal from the judgment and decree of the District Land and Housing Tribunal for Muleba at Muleba "henceforth the trial tribunal" which dismissed the appellant's case for want of merit and finally declared the land in dispute to be the clan land of the late Kyenzigu Mwenda. Disheartened with that decision, the appellant has now sought in this court to challenge the same. There are four grounds challenging the findings of the trial tribunal as follows:-

1. *That, the District Land and Housing Tribunal grossly erred in law and facts to hold that the Appellant failed to establish that 1st Respondent trespassed on his land.*

2. *That, the Hon. Chairman grossly erred in law and facts to dismiss the application while the Appellant rightly proved his case on the required standard.*

3. *That, the trial Hon. Chairman erred in law and facts for departing from issues drawn and agreed by the parties hence occasioned injustice to the appellant.*

4. *That, in totality the chairman erred in law and facts for failure to hold in favour of the appellant and allow the application.*

Advocate Gisera Maruka represented the appellant at the hearing and started arguing the 3rd ground where she cemented that the trial court did not confine itself on the issues framed and agreed upon by parties at the trial. That instead he rushed to the new issue that the land in dispute was the clan land of the late Kyenzigu Mwenda which was not the issue before parties. That it is the trite law that judgments must be composed by reflecting on the raised issues on records where he directed us to fallow +the stance in the case of **Peter Ngomango versus Attorney General** Civil Appeal No.114 of 2011 pg. 8 CAT(Unreported). He added further that there was no evidence adduced to prove that the land was clan land. She referred this court to its earlier decision in **John Bilisingi vs Princhipius Mshemba** Misc. Land Case Appeal No. 37 of 2006 HCT at Bukoba (Unreported) which explained what the clan land entails.

When appellant's counsel reverted to the second ground, she had a complaint that the trial tribunal erred in finding out that the first respondent did not

trespass while the proceedings and judgment depicts the testimony of the appellant to have bought the land from the second respondent on 5/02/1983 and planted the tree thereat and in 2008 he discovered that the first respondent had trespassed and carried out farming activities therein. It was Ms. Gisera's conviction that the appellant proved his case with strong evidence to the required standard as there was a sale agreement of purchase of suit land by the appellant from the first respondent.

In the second ground, the appellant's counsel reiterated what was submitted in the first ground that the case was proved by the appellant in the scale of balance of probabilities and thus he discharged his duty he therefore faults the trial tribunal to have dismissed his case.

The fourth ground is the repetition of what was submitted in the first and second grounds as they all boil down the weight and standard proof of evidence.

The reply by the first respondent was of the effect of disputing all the grounds advanced by the appellant and clarified that the decision of the trial tribunal was very right. That his side had strong evidence compared to the appellant's evidence. That the land in dispute is the clan land and that no clan land can be disposed without a consent from clan members, he therefore prayed the appeal to be dismissed for want of merit.

Whereas the reply from the second respondent (the seller) was that the land was properly sold as it was his own property and not a clan land as erred by the trial tribunal.

Answering what was exposed in the reply by the respondents, Advocate Gisera Maruka still insisted that the land in dispute is not a clan land and also shook hands with the second respondent's reply who stated that he sold his own land to the appellant and not a clan land. She further rejoined that they did not concentrate to adduce evidence on whether the land was clan land or not as it was not among the issue raised at the trial.

I will determine grounds of appeal as they were argued by the appellant's counsel, starting with the third followed by the first ground save the second and fourth grounds will be lastly discussed together as I said before, they boil down the weight and standard proof of evidence.

Starting with the third issue, since this court is dealing with this appeal as the first appellate court, I will be guided by the decision of the Court of Appeal of Tanzania in **Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others**, Civil Appeal No. 53 of 2013, CAT at Dar es Salaam Unreported). In this case, it was held that the duty of the first appellate court is to review the record of evidence of the trial Court in order to determine whether the conclusion reached upon and, based on the evidence received, justifies a re evaluation in relation to the referred framed issues, to see whether they were properly determined.

It has been strongly insisted by the appellant's counsel that the issue of declaring that the land in dispute is the clan land was a new issue. I think it must not labour me much. I get no trouble to rule that there was no new issue raised by the trial tribunal in its finding. Concluding that the land in dispute did not belong to the appellant as it was illegally sold to the appellant from the

second respondent who failed to prove how he acquired the same land and rather that there was enough evidence to prove that the land was a clan land which had never been distributed as it was used by the late Kyenzingu Mwenda (the 1st and 2nd respondents' father) and after his demise it remained to be used by the respondent's mother who eventually died. The argument of the appellant's counsel that the trial tribunal entertained new issue, in my view, cannot arise and it is actually misplaced.

I say so because the finding of the trial court stems from the first issue raised and agreed by parties Vis: ***Whether the applicant is the lawful owner of the disputed land after purchasing it from the 2nd respondent?*** The trial tribunal in determining this issue rightly analyzed the entire evidences given by all witnesses in both sides and eventually arrived at its conclusion that the second respondent purported to have sold the land to the applicant while he failed to establish that he had a good title to pass to the appellant. The trial tribunal rightly went further to analyze the evidence which was testified by the second respondent which he alleged to have purchased the land before selling it to the appellant where he said he purchased it from one Valeria but the tribunal refuted that allegation as it was not supported by any exhibit of sale agreement and the said seller one Valeria was not called by the 2nd respondent to testify before the tribunal.Besides,the tribunal rightly reasoned that Said Sauda Suedi (DW6) was not a witness to any sale agreement. Hence the framed issue was answered in negative.

Moreover, the testimony from the first respondent that the land in dispute was a clan land and not the 2nd respondent property was supported by the three

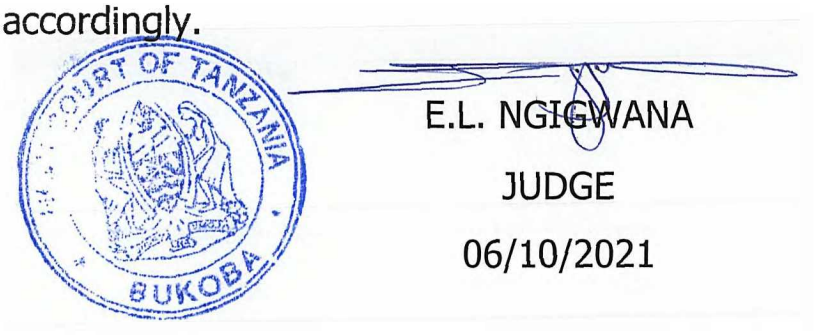
witnesses whom the trial tribunal found to be credible and trustworthy as they are relatives from the same clan of the 2nd respondent.Finally,the trial tribunal answering the firs issue in negative was ultimately satisfied that the land was a clan land and any sale of it from the second respondent to the appellant was subject to consent from clan members. Since in the first issue it was incumbent to determine the ownership of the second respondent before determining the ownership of the appellant, whether he had a title before he could sell to the appellant, is where the sub issue of clan land emerged from the main issue. On this issue, therefore there is no way this court can faulty the finding of the trial court instead of concurring with the trial tribunal's finding on this ground. There was no new issue raised by the trial tribunal rather the framed issue was answered in negative after the appellant had failed to prove his ownership having purchased land from the person who had no legal title hence the maxim ***Nemo dat quod non habet.*** Also See **Farah Mohamed vs Fatuma Abdallah** (Supra) as rightly referred by the trial tribunal. The issue of clan land was therefore a sub issue which resulted from the main issue. The referred case of **Peter Ngomango** (supra) is therefore distinguishable in our case. This ground of appeal bounces.

The rest of the grounds are rendered superfluous. There is no way the first respondent could have been held trespassing in the appellant's land after this court has concurred with the trial court that the appellant is not the owner of the suit land. Similarly, the first and fourth grounds are rendered obsolete as the first respondent could not have been held as a trespasser in the clan land upon which is also a member of the same clan save if the one who took action

on him could have been a member from the said clan but not the appellant who has no interest. I find no any sentiment of merit in all grounds. Therefore, it implies the entire appeal has no merit.

Finally, the appeal is dismissed in its entirety with costs.

Order accordingly.

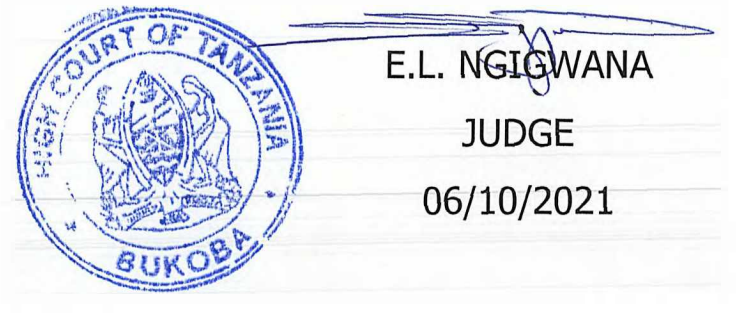


E.L. NGIGWANA

JUDGE

06/10/2021

Judgment delivered this 6th day of October, 2021 in the presence of the appellant in person, both respondents in person, Mr. E M. Kamaleki, Judges' Law Assistant and Gosbert Rugaika B/C. Right of appeal explained.



E.L. NGIGWANA

JUDGE

06/10/2021