IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE APPEAL NO. 14 OF 2023

(Arising from Application No. 26/2021 at Muleba District Land and Housing Tribunal)

SEBASTIAN SELESTINE KALOKOLA..... APPELLANT

VERSUS

SOSTENES EVALISTER..... RESPONDENT

JUDGMENT

2nd and 25th August, 2023

BANZI, J.:

The appellant has preferred this appeal against the judgment of the District Land and Housing Tribunal for Muleba (the trial tribunal) where, he instituted a land suit against the respondent claiming that, the respondent encroached his land located at Bumpande-Ikondo ward which he got as a gift from his late father, Selestine Kalokola who claimed to purchase it from Maria Mwelinde in 1976. The appellant also claimed that, before his demise in 1992, his late father distributed his properties and since the appellant was an infant of less than one year, his share was placed under care of his mother until attaining the age of majority. His mother continued to take care of that land until 2009 when she died. After the death of his mother, in 2012 the respondent encroached the disputed land claiming to have been given orally

by his father in 1982 in the presence of clan members and he has been using it since then. After a full trial, the trial tribunal decided in favour of the respondent on the reason that, the appellant failed to prove the case because he failed to summon the vendor, Maria Mwelinde while she is still alive and the sale agreement was not genuine for want of signatures of witnesses. Aggrieved with that decision, the appellant has filed the present appeal comprising six grounds thus:

1. *That the Hon. Chairman of the trial Tribunal erred in law and in fact to determine the application no. 21 of 2021 in the respondent favour, without taking into consideration the fact that the respondent had failed to prove his alleged better title of the disputed land to the required standard of strict proof and balance of probabilities.*
2. *That the Hon. Chairman went astray in law and in fact to deal and determine the dispute concerning a sensitive landed property owned under deemed right of occupancy in term of the Customary law which needs aid of Assessors, without taking into account the opinion of Tribunal Assessors.*
3. *In holding that the Appellant had failed to prove his claim of ownership of the disputed land, the learned Chairman not only misinterpreted the provisions of the law of evidence, but also failed to make a proper evaluation of the evidence adduced by the Appellant and his witnesses*

which clearly shows that the disputed land belongs to him.

4. *That the learned trial Chairman misdirected himself to dismiss the application with costs on the ground of want of merit, without taking note that the Appellant's failure to tender a sale agreement that meets the legal requirement by itself is not a reason for the Respondent to achieve a better title to the disputed land.*
5. *That the suit was dealt with and decided in favour of the Respondent without taking trouble to receive evidence from the seller of the disputed land to Appellant.*
6. *That the Hon. Chairman applied a wrong approach in deciding the rights of the parties on the basis of mere stories given by the Respondent side who failed to disprove the claim of trespass into the disputed land against him.*

At the hearing, the parties appeared in person unrepresented and prayed to argue the appeal by way of written submissions. In his submission, the appellant decided to argue the first, third, fourth and sixth grounds jointly contending that, they touch similar issues and the second and fifth grounds were argued separately.

Submitting on the first, third, fourth and sixth grounds, the appellant contended that, the Chairman failed to make proper evaluation of evidence of the parties. Also, he misinterpreted the provisions of section 3 (2) (b) of

the Evidence Act [Cap. 6 R.E. 2019] ("the Evidence Act") when he made a finding that, the sale agreement did not meet legal requirement in proving ownership. He added that, the Chairman did not take into consideration the evidence adduced by him and his witness which was sufficient to prove that, the appellant is the legal owner of the disputed land. According to him, failure to sign the sale agreement was a minor omission which did not suffice to declare the respondent as the owner of the disputed land without taking into consideration that, the parties to that agreement were laypersons. He supported his submission with the cases of **Robert Kulwa Maganga and Others v. Mwalimu Hassan Mwalim and Another** [2021] TZCH 3487 TanzLII and **Philipo Joseph Lukonde v. Faraji Ally Saidi** [2020] TZCA 1779 TanzLII.

On the other hand, he contended that, the respondent did not prove ownership of the land to the required standard to be declared as the lawful owner of the disputed land. He failed to prove how he acquired the said land because he neither tendered documentary evidence nor he called material witnesses, the clan members like Spensioza Evalister, Theonestina Everlister and Melida Evarister who were alleged to have witnessed the allocation of the disputed land to the respondent by his father one Evalister Yona. Instead, he called other witnesses who were not conversant with the facts

of the case and did not participate in the transaction. He contended that, DW3 and DW4 were not truthful witnesses because they had interest to save.

In respect of the second ground, he submitted that, the case was determined without aid of assessors contrary to sections 23 (1) (2) and 24 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] ("the Act") and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 ("the Regulations") because their opinion was not taken into account and there was no justification of ignoring them. Also, he alleged that, the assessors were not fully involved as well as their opinion was not read over to parties. He supported his submission with the case of **Cleophace Kaiza v. Potence Mugumila** [2022] TZCA 760 TanzLII and **Peter Makuri v. Michael Magwega** [2022] TZCA 54 TanzLII. Concerning the fifth ground, he contended that, the Chairman erred to decide the matter without receiving the evidence of the seller of the disputed land, Maria Mwelinde. Besides, she was a necessary party but the trial tribunal failed to join her. Instead, he was blamed for failure to call that seller who is still alive. He finalised his submission, by urging this Court to re-evaluate the evidence of parties and declare him as the lawful owner of the disputed land. He also

prayed for the judgment of the trial tribunal to be quashed and appeal be allowed with costs.

In his brief reply, the respondent contended that, the grounds raised by the appellant have no merit because the evidence of both parties was properly evaluated by the Chairman and the documentary evidence (Exhibit P1) was evaluated and found to be vague for lack of signatures of witnesses and the location of the purchased land. He cited the case of **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113 and submitted that, the appellant failed to call material witness and hence, the trial tribunal was entitled to draw adverse inference that, if the witness was called, she would have given evidence contrary to the appellant's interest. Besides, the court had no duty to call witnesses as it was the duty of the appellant. On the issue of assessors, he contended that, according to section 24 of the Act, the Chairman is required to take into account the opinion of assessors but he is not bound by it save that, he must give reason for the departure. In that regard, he prayed to be declared the lawful owner of the disputed land and the appeal be dismissed with costs.

In rejoinder, the appellant insisted that, the Chairman failed to make proper evaluation of evidence adduced by both parties. He added that, the evidence adduced by the appellant was heavier than that of the respondent.

Having carefully considered the submissions of both sides in the light of evidence on record, the main issue for determination is whether the appeal has merit.

It is settled law that, a person with heavier evidence is the one who should win the case as it was stated in the case of **Hemedi Saidi v. Mohamedi Mbilu** (*supra*) that:

> *"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

Taking into consideration the appellant's submission, he complained that the trial tribunal failed to properly evaluate the evidence adduced by parties. However, this Court being the first appellate Court, has a duty to re-evaluate the evidence of the trial tribunal, and where possible, come out with its own findings. See the case of **Domina Kagaruki v. Farida F. Mbarak and Others** [2017] TZCA 160 TanzLII.

According to the testimony of the appellant, he claimed to be given the disputed land by his father in 1992 when he was still very young. It was also his testimony that, his father acquired it by way of purchase from Maria Mwelinde in 1976. To substantiate his evidence on how his father acquired the disputed land, he tendered sale agreement which was admitted as

Exhibit P1. Furthermore, his testimony reveals that, since, 1992 his mother was using that land until she was murdered in 2009. According to his testimony, there was a time when the respondent assaulted his mother while she was in the course of using the disputed land. Following such assault, the respondent was imprisoned for one year and it was in 2012 when, the respondent invaded disputed land. The respondent did not ask the appellant any question concerning how the appellant's father acquired the disputed land. For ease of reference, I find prudent to reproduce the whole part of cross-examination of the appellant made by the respondent as hereunder:

> *"Aliyefunguliwa kesi ya kumuua mama ni mdogo wako sio wewe. Hivyo ni kweli kwamba haukushirikikiana na mdogo wako katika kumuua mama.*
> *Hujawahi kuthibitishwa na Mahakama kuwa ulichoma nyumba ya Baba. Hujawahi kukamatwa kwa kuvamia shamba la mgogoro.*
> *Tunazaliwa watu wanane katika familia, sasa hivi tupo saba.*
>
> *Saini: J.K. Banturaki*
> *Mwenyekiti*
> *28/02/2022"*

It is apparent from the extract above that, the respondent did not cross-examine the appellant on his evidence concerning how his father had acquired the disputed land. Likewise, he did not cross-examine him on his

evidence concerning his mother's use of disputed land from 1992 until her death in 2009. Equally, he did not cross-examine him on his evidence concerning the respondent to be imprisoned for one year following his act of assaulting the appellant's mother in the course of using the disputed land. Thus, the respondent's failure to cross-examine the appellant on these vital aspects amounted to acceptance of the truthfulness of the appellant's account as it was stated in the cases of **Shadrack Balinago v. Fikiri Mohamed @ Hamza and Others** [2018] TZCA 215 TanzLII, **Bomu Mohamed v. Hamisi Amiri** [2020] 2 TLR 144 and **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** [2019] TZCA 453 TanzLII.

Apart from his oral testimony, the appellant produced Exhibit P1, a document which exhibited the transaction between the appellant's father and the vendor Maria Mwelinde on 29/12/1976. The learned Chairman disregarded Exhibit P1 because it had defects such as lack of signatures and location of the disputed land. According to the learned Chairman, these defects make the said agreement to be invalid in the eyes of law. However, looking closely at Exhibit P1, it is apparent that, the same is a homemade agreement drawn by layman which exhibited the transaction occurred on 29/12/1976 between Maria Mwelinde and the appellant's father. It did not use any legal language for the learned Chairman to subject it legal

technicalities. On the other hand, it expressed the intention of the vendor Maria Mwelinde to sell her land to the purchaser, Selestine Kalokola who is the appellant's father for a consideration of Tshs.3,900/=. In the case of **Philipo Joseph Lukonde v. Faraji Ally Saidi** (*supra*), the Court of Appeal was inspired by the decision of the Court of Appeal of Kenya, in **Michira v. Gesima Power Mills Ltd** [2004] eKLR where it was stated that:

> *"...That fact does not give room to this Court to tamper with the agreement. As Apoloo, J.A. said in SHAH V. SHAH [1988] KLR 289 at page 292 paragraph 35, in respect of an agreement drawn by laymen:*
>
> *One must bear in mind that this agreement was drawn up by laymen. They did not use any legal language and the court can only interpret the sense of their agreement and not interpolate it with any technical legal concept.....*
>
> *If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties."*

Applying the position of the law above in our case, Exhibit P1 clearly expressed the intention of parties in their transaction made on 29/12/1976. Besides, it described the person who borders the disputed land *i.e.,* Magumbo, Paulo, Polotazi and Malia. The same persons were also mentioned

by DW4 when she was responding to the questions from assessor G. Machumu about persons who bordered disputed land as indicated at page 29 of the proceedings. In that regard, even if the appellant did not call the vendor Maria Mwelinde to testify but that in itself did not justify the learned Chairman to draw adverse inference on the appellant considering the fact that, it is on the testimony of the appellant that, Maria Mwelinde is too old. Nonetheless, Exhibit P1 did not require oral testimony of vendor to prove ownership because, it speaks for itself and as stated under section 61 of the Evidence Act, oral evidence cannot prove the contents of documents. Therefore, it is the considered view of this Court that, through his testimony and Exhibit P1, the appellant proved on the required standard how his father acquired the disputed land which is the same land that the appellant acquired by way of gift from his father.

On the other hand, the respondent claimed to be given the disputed land orally by his father in 1982 in the presence of members of the clan including Spensioza Evalista (DW4). However, unlike the appellant, he did not testify on how his father acquired the disputed land in the first place before he gave it to him. Likewise, neither DW2, DW3 nor DW4 testified on how the respondent's father acquired the suit land either by purchase, allocation or inheritance. Thus, it is the finding of this Court that, the

evidence of the appellant was heavier than the evidence of the respondent. With this finding, I don't see the need to delve into the issue of involvement of assessors because, the proceedings clearly show that, the assessors were properly involved from the beginning to the end. Also, their opinion was read to the parties as it indicated in the proceedings.

That being said, I find the appeal with merit and I hereby allow it with costs by quashing and setting aside the judgment and the decree of the trial tribunal dated 31/01/2023. Consequently, the appellant is hereby declared as the lawful owner of the disputed land. It is accordingly ordered.

I. K. BANZI
JUDGE
25/08/2023

Delivered this 25th day of August, 2023 in the presence of the appellant and the respondent both in person. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
25/08/2023