

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM**

(CORAM: MUGASHA, J.A., KEREFU, J.A And MAIGE, J.A.)

CIVIL APPEAL NO. 121 OF 2019

AGATHA MSHOTEAPPELLANT

VERSUS

- 1. EDSON EMMANUEL**
- 2. SAIDI PACHANJA**
- 3. MAULID ABDALLAH**
- 4. PETER YOHANA**
- 5. PAULO KATORI @ MUGABO**
- 6. MWANYENI NDILU @ KAMCHAPE**
- 7. HOSEA HOSEA**
- 8. AUGUSTINO EXAVEL DAMIAN@ ASKOFU**
- 9. JOHN MOHAMED@ ZAKAYO**
- 10. RASHID MANJURA**
- 11. GERALD SEGESERA**

.....RESPONDENTS

**(Appeal from the decision of the High Court of Tanzania,
(Land Division) at Dar-es-salaam)**

(Ebrahim, J.)

dated the 23rd November, 2018

in

Land Case No. 286 of 2015

JUDGMENT OF THE COURT

6th & 20th July, 2021

MUGASHA, J.A.:

This is a first appeal whereby the appellant is challenging the decision of the of the High Court of Tanzania (Land Division) sitting at Dar-es-Salaam which dismissed her suit in Land Case No. 286 of 2015. In the said case, the appellant instituted a suit against the respondents claiming

to be declared a lawful owner of unsurveyed land measuring approximately 9 acres situated at Changwela hamlet, Mapinga Village, within Bagamoyo District in the Coast Region (herein after referred as disputed land or disputed premises). She contended to have purchased the said land between 2002 and 2004 from Mapinga Village Council and other people, developed it having constructed a two bedroomed house, drilled a bore hole, installed a barbed wire fence and planted variety of trees and crops. In the year 2015, she asserted to have embarked on survey processes in respect of the land in dispute and that the move was endorsed by Mapinga Village Council and Bagamoyo District Council. However, in the course of following up the survey in early August 2015, she gathered that about 30 people had trespassed into the land in question, divided it among themselves, destroyed vegetation and erected several structures. Though she attempted to report the incident at the Police and the Village Authorities, no assistance was forthcoming and this prevented her from processing a certificate of title in order to formalize ownership which made her to commence a suit against the respondents. The reliefs sought by the appellant were: **One;** a declaration that she is the lawful owner of nine acres of the land in dispute; **two;** the demolition of all temporary and

permanent structures erected by the defendants/respondents **Three**; eviction of the defendants/respondents from the suit premises; **Four**; payment of general damages at the tune of TZS. 300,000,000.00, interest thereon and cost of the suit. It is against the said backdrop, the appellants commenced the suit which is a subject of the present appeal.

On the part of the respondents, they all opposed the appellant's claims through a joint written statement of defence wherein it was averred that Exavel Damian, the 8th respondent owned the disputed premises which he purchased on 6/5/1998 at a price of TZS. 900,000.00 from one Mzee Juma, and allocated part of it to his son and other respondents. The respondents also denied the appellant's claims that she has been in occupation of the disputed land.

At the trial, the controlling issues were: **One**; whether the plaintiff is the lawful owner of the suit premises; **two**; whether the defendants trespassed into the suit premises and **three**, to what reliefs are the parties entitled to. Five witnesses including the appellant testified for the appellant's case whereas the defence had four witnesses including the 8th respondent. The evidence at the trial was to the effect that: the appellant

initially purchased fifty (50) acres from Mapinga Village Council and paid half of the purchase price at a tune of TZS. 2,500,000.00. However, having gathered that she was given a different plot which was not along the sea, she was refunded a sum of TZS. 2,300,000.00 by the Village Council and was promised to be allocated two acres for the remaining balance of TZS. 200,000.00. On these transactions, she tendered in the evidence, the sale agreement (Exhibit P1) and the refund letter by members of Mapinga Village Council. However, the appellant recounted that, the compensation of the two acres on the remaining balance was not documented. Later, the appellant purchased land from one Issa Muhibu and on this, she tendered in the evidence exhibit P3.

Subsequently, in 2015, her relatives bought for her a total of 4 acres. This was flanked by Amina Mahadi Mwinchumu (PW2) and Robinson Amos Mwayumba (PW3) who recounted to have purchased land at Changwela hamlet on behalf of the appellant who was abroad and had sent them money for the said purpose. On this, PW2 testified to have purchased two acres from Mr. Damian Mapunda and Amina Mohadi Mwindwa whereas PW3 recounted to have purchased two acres from Kambi Athumani as reflected in exhibits P6 and P7 which were tendered at the trial as

documentary evidence in respect of the disposition of a total of four acres. When cross-examined on the contents of sale agreements (exhibits P6 and P7) which do not reflect if the land was purchased on behalf of the appellant, PW2 and PW3 urged the trial court to believe their oral account that the purchase of land was on behalf of the appellant. As for Issa Muhibu (PW4), he was told the trial court to have sold his own land which was allocated to him by the Village Council as he was its member as reflected in exhibit P3. Upon being asked as to why the sale agreement was not signed by another seller, PW4 replied that, the other seller one Hussein Omari was sick and since it was a Sunday and the appellant was in a hurry, he signed as a seller and witnessed as a Chairman.

Another witness for the appellant was Mr. Hassan Simba Yahya who recalled that, the appellant is his neighbour and that she owned a farm at Mapinga, Changwahela where she had planted crops and built a permanent house. During cross-examination, apart from PW4 asserting that the appellant had purchased land from the Village Government, he denied to have been involved in the sale process but only heard that the appellant had purchased the land in question.

The respondents disputed the claims of the appellant. The 8th respondent contended to have purchased land on 6/5/98 from Mzee Nuhu at a sum of TZS. 900,000.00 in a transaction conducted at the village offices and witnessed and signed by the respective village authorities including Mzee Nuhu, Abdallah Ngandala and Said Simba Ngunga. He also recounted to have built two houses and cultivated the area which was before a forest. He then stated to have remained with three acres after allocating three acres to Asha Manjula, DW3 his sister, 2 acres to his nephew one Edson Emmanuel Buberwa, DW4 who constructed a house. When cross-examined, he conceded not to have signed the written statement of defence. DW2 confirmed about the purchase of the land by the 8th respondent in 1998 and that witnesses were himself, Abdalla Ngandali, Damian and Mzee Nuhu and that the purchase price of the respective land was effected at the village offices. He as well, testified that though Mapinga had several hamlets, the disputed was in Changwahela hamlet. Both DW3 and DW4 recounted to have been allocated land by the 8th respondent.

Having scrutinized the evidence and considered the provisions of sections 29 of the Law of Contract Act [CAP 345 RE.2002] and section 110

(1) and (2) of the Evidence Act [CAP 6 RE.2002], the learned trial Judge held against the appellant and dismissed the suit having concluded at page 34 of the record as follows:

"The Plaintiff in this case seeks to be declared by this court as the lawful owner of the disputed land. My understanding of the provisions of the law are that it is not enough to merely claim a legal right and allege the existence of facts or circumstances without proof. That being the case therefore, the primary duty of the plaintiff was to prove her ownership, of which according to what she asserted in her plaint, she has miserably failed as her documentary evidence [does] not support her case. Failure to prove by the defendants does not make her the lawful owner. After all remedy for failure by plaintiff to prove her claim, is to dismiss the suit.

It is for that reason that the plaintiff failed to prove that she is the lawful owner of the disputed land and I accordingly [answer] the first issue in the negative.

Since the plaintiff failed to prove her ownership, the second issue has no bearing at this stage."

Also, having found that the appellants were trespassers, the learned trial Judge concluded that, they were not entitled to be notified on the intended eviction and demolition by the 1st respondent as that would offend the provisions of section 75(1) of the Town Planning Act Cap 355 and amount to condoning the wrongs of the appellants who cannot be heard to complain about the unlawful demolition by the 1st respondent”.

Undaunted, the appellant has preferred an appeal to the Court. In the Memorandum of Appeal, she has raised two grounds of complaint as follows:

1. That, the learned trial judge erred in law and fact by failure to [analyse] evidences thereof [to] declare the appellant to be the lawful owner of the disputed land measuring nine (9) acres situated at Changwahela, Mapinga village, Bagamoyo District in Coast Region.
2. That, the learned trial judge erred in law and fact by failure to find out that the respondents did not file and sign the

purported joint written statement of defence filed on 20th April, 2016 as the same was signed by the Advocate.

At the hearing, the appellant's counsel with leave of the Court sought to argue four additional grounds contained in the supplementary memorandum filed on 17/6/2021 as follows:

1. That, the honourable High Court Judge grossly erred both in law and fact for failure to determine all issues framed and agreed upon by the parties at the commencement of the trial.
2. That, the honourable High Court Judge grossly erred both in law for holding that there was no village meeting approving the sale of land to the appellant while there was tendered documentary evidence of the minutes of the Village meeting.
3. That, the honourable High Court Judge grossly erred both in law for failure to fully determine the rights of the parties with regard to ownership of the land.
4. That, the honourable High Court Judge grossly erred both in law for failure to take into account the inconsistency of the oral evidence of the respondents that they acquired land through purchase from

Mzee Nuhu while in their written statement of defence they [contended] to [purchase] the said land from Mzee Juma.

At the hearing, the appellant was represented by Mr. Bwire Benson Kuboja, learned counsel whereas the respondents had the services of Mr. Samwel Shadrack Ntabaliba, learned counsel. Following a brief dialogue with the Court on the clarity of what constitute the grounds of complaint and the respective arguments, the appellant's counsel opted to argue only, the 1st ground in the Supplementary Memorandum and abandoned the rest resulting to a total of four grounds of appeal together with those in the Memorandum of Appeal.

The appellant's complaint in the first ground in the supplementary memorandum is faulting the trial Judge that she did not determine one of the issues framed at the commencement of the trial. On this, it was submitted that the learned trial Judge did not determine the issue as to whether or not the defendants trespassed into the suit premises which was against the prescribed dictates of the law. On being probed by the Court, as to whether the complaint raised had any bearing since the learned trial Judge's holding was to the effect that appellant failed to prove ownership,

the appellant's counsel maintained that, the law requires all issues framed to be determined. To support his propositions, he cited to us the case of **SHEIKH AHMED SAID VS THE REGISTERED TRUSTEES OF MANYEMA MASJID** [2005] T.L.R 61 where the Court, among other things, held:

"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."

That apart, the appellant's counsel did not propose the way forward in respect of the alleged shortfall.

We now turn to the grounds of complaint in the Memorandum of Appeal. In the first ground, the appellant faulted the learned trial Judge to have failed to analyse the entire evidence adduced at the trial so as to declare the appellant as the lawful owner of the disputed land. Clarifying on this ground, the appellant's counsel submitted that, the trial learned Judge did not consider the evidence that the appellant: **One**, was given two acres as compensation by Mapinga Village Council at a sum of TZS. 200,000.00 which was the balance on refund of appellant's money on the

purchase of 50 acres which did not materialize. **Two**, she had purchased three acres from one Issa Muhibu; **three**, PW2 and PW3 had purchased a total of four acres on her behalf from Kambi Athumani and Damian Mapunda. **Four**, while the 8th respondent in the written statement of defence claimed to have purchased the land from Mzee Juma, in his oral account he stated to have purchased it from Mzee Nuhu.

Pertaining to the second ground of appeal in the Memorandum of Appeal, the complaint was on the written statement of defence which was signed by the advocate instead of the respondents themselves and that this contravened the provisions of Order VI rule 14 of the Civil Procedure Code [CAP 33 RE. 2002] (the CPC). The appellant's counsel argued this to be a fatal and incurable omission which resulted into a mistrial and as such, he urged the Court to nullify the impugned judgment and the trial proceedings subsequent to the filing of the written statement of defence. On the way forward, the appellant's counsel asked the Court to remit the case file to the High Court with a direction that the appellant prove her case *ex-parte* in view of the absence of a written statement of defence signed by the respondents. He cited to us the case of **GEORGIA CELESTINE MTIKILA VS REGISTERED TRUSTEES OF DAR-ES-**

**SALAM NURSERY SCHOOL AND INTERNATIONAL SCHOOL OF
TANGANYIKA [1998] T.L. R 515.**

With the said submission, the appellant's counsel urged the Court to allow the appeal with costs.

On the other hand, the appeal was opposed by the respondents who through their advocate urged the Court to dismiss the appeal because it is misconceived. The respondent's counsel challenged the 1st ground in the Supplementary Memorandum of Appeal arguing that, the learned trial Judge addressed all the framed issues having concluded that since the appellant had failed to prove ownership of the disputed land, the remaining issue of trespass had no bearing.

In response to the complaint contained in the 2nd ground of appeal on the written statement of defence which was signed by the advocate instead of the respondents, Mr. Ntabaliba submitted that, the written statement of defence was signed by the advocate who was dully authorized to do so as indicated in the verification clause which is in accordance with the dictates of the law. He thus argued that, the concession by the 8th respondent on not having signed the pleading should

not be taken as having disowned the pleadings as suggested by the appellant's counsel. He thus distinguished the case of **GEORGIA MTIKILA** (supra) arguing the same not applicable here because in that case, one of the defendants had not signed the pleading and instead the advocate had signed on its behalf which was improper.

In relation to the first ground of appeal, the same was similarly challenged on ground that the appellant did not parade evidence to prove that she is the owner of the disputed land. On this, it was argued that though the appellant in paragraphs 5 to 8 of the plaint claimed to have acquired the disputed land from Mapinga Village Council and various other people, she did not parade evidence to the same effect because: **One**, no documentary evidence was paraded by the appellant in respect of the two acres which she alleged to have been compensated by the Mapinga Village Council; **two**, the oral account by PW2 and PW3 that they had purchased a total of four (4) acres on behalf of the appellant is not compatible with documentary account (Exhibits P5 and P6) to the effect that PW2 and PW3 had purchased the land in question in their own capacities and not on behalf of the appellant. That apart, the sale agreements were not signed by the village chairman and bear different dates that is, 18/1/2004 and

2/11/2003. **Three**, Exhibit P3 shows that the land was sold on behalf of Mapinga Village Council which is contrary to the law because the Village Council is not mandated under section 8 of the Village Land Act to sell land and instead, to allocate it. **Four**, the minutes of the Village Council endorsing the purported survey did not justify or establish that the appellant is the owner of the disputed land. Besides, it was further argued that the alleged disposition was not consented to by the Village Assembly. On this submission, it was the respondents' counsel argument that on account of appellant's failure to prove ownership, the learned trial Judge was justified to dismiss the suit. Finally, the respondent's counsel urged the Court to dismiss the appeal with costs.

The appellant's counsel rejoined by asserting that the minutes of the Village Council endorsing the survey proved that the appellant owned the disputed land and that the oral account of PW2 and PW3 established that they had purchased a total of four acres on behalf of the appellant. On being probed by the Court he conceded that, it is the sale agreement which constitute conclusive proof in the sale of land and not otherwise. He reiterated his earlier prayer that the appeal be allowed with costs.

Having examined the rival submissions of the parties in the light of the grounds of appeal, the issue for determination is whether the appellant did prove to be the lawful owner of the disputed land. To determine this appeal, we shall initially dispose of the first ground in the Memorandum of appeal on the propriety or otherwise of the written statement of defence which has a bearing on the validity of the case which is a subject of the present appeal. Then the two first grounds in the memoranda on the complaint of ownership and failure to determine one of the framed issues which have a bearing on each other will be determined together.

The appellant faulted the learned trial judge in entertaining the matter based on the written statement of defence which was signed solely by their advocate. The learned counsel for either parties locked horns on the propriety of the respective written statement of defence. The signing of pleadings is regulated by Order VI rule 14 of the CPC which stipulates as follows:

"Every pleading shall be signed by the party and his advocate (if any); provided that, where a party pleading is by reason of absence or for other good cause, unable to sign the pleading, it may be signed

by any person duly authorized by him to sign the same or to sue or defend on his behalf.”

In the present matter, it is glaring at page 16 of the record that the respondents’ counsel signed the joint written statement of defence on account of being dully authorized by the respondents as verified therein and as such, the law was not at all contravened. Probably, with respect, the appellant’s counsel eye missed the proviso to the cited order or else he would not have raised such complaint. In this regard, the case of **GEORGIA MTIKILA** (supra) which was cited by the appellant’s counsel is distinguishable because in that case, which had more than one defendant, one of them had signed and the advocate proceeded to sign on behalf of the other defendant. Thus, the 2nd ground in the Memorandum of Appeal is not merited and we hereby dismiss it.

Pertaining to the 1st ground of appeal in the memorandum of appeal, the appellant faulted the learned trial judge for not having properly analysed the evidence so as to find that she was the lawful owner of the land in dispute. Prior to determining this ground of appeal, we shall address the appellant’s counsel submission which was to the effect that, the learned trial Judge should not have concluded judgment in favour of

the respondents on because the 8th respondent's account whose credibility was discredited during examination at the trial was at variance with averments in the written statement of defence as to how he acquired the land in dispute. As earlier pointed out the respondent's counsel took a different view and not surprisingly so that the respondents' failure to prove their case does not make the appellant the lawful owner. We agree with the course taken by the respondent's counsel. On this, we have considered that, the success of the appellant's case did not depend on the credibility of the respondents and instead, the burden of proof never shifts to the adverse party until the party on who the onus lies, discharges the burden. It does not cease on account of the weakness of the case of the adverse party. This was emphasised in the case of **PAULINA SAMSON NDAWAVYA VS THERESIA THOMAS MADAHA**, Civil Appeal No. 45 of 2017 (unreported), where the Court said:

".... In our view, since the burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant. It is thus our firm view that the appellant's criticism against the learned trial Judge is, with respect,

without any justification and so, ground one is held to be devoid of merit...”

Back to the substantive ground, it was the appellant’s counsel contention that the trial court failed to evaluate the evidence as a result of which she came to a wrong conclusion. In terms of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009, being the first appellate court in this matter, we shall re-consider and re-evaluate the trial evidence and if warranted, draw our own conclusions on the facts, subject to there being no evidence to support a particular conclusion; or if it is established that the trial Judge failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. See – **PETERS VS SUNDAY POST LIMITED** [1958] E.A 424 and **STANSLAUS RUGABA KASUSURA AND ANOTHER VS PHARES KABUYE** [1982] TLR 338.

We are aware that it is trite law that he who alleges has a burden of proof in terms of section 110 of the Evidence Act [CAP 6 RE 2002] (the Evidence Act). Thus, in civil cases, the standard of proof is on balance of probabilities which is to the effect that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. We shall accordingly be guided and in determining the present appeal.

In disposing of the issue of ownership surrounding the ground of appeal, our scrutiny of the appellant's cause of action and the gist of her complaint can be discerned from their pleadings in the plaint as stated in paragraphs 5 to 8 as follows:

Paragraph 5

"On 18th June, 2002 the plaintiff purchased fifty (50) acres of land from the Mapinga Village Council/ government for a consideration of TZS. 5,000,000/= of which TZS. 2,500,000/= was paid as down payment. However, in August 2002 the Mapinga Village Council requested the Plaintiff to surrender the land back to the Village Council because it was wrongly identified on the condition that the purchase money of the same would be given alternative parcel of land which offer was accepted by the Plaintiff".

Paragraph 6

"In August and September 2002 the Plaintiff's down payment was refunded to the tune of TZS. 2,300,00/= and the Plaintiff was given two acres of land to cover the remaining TZS. 200,000/=. The

documents evidencing refund are herewith attached and collectively marked as 'B'.

Paragraph 7

"On 18th January, 2004 the Plaintiff purchased two acres of land from KAMBI ATHUMANI Through Robinson Amos Mwaijumba as Plaintiff's representative, and two other acres from DAMIAN MAPUNDA through Amina Mwinchumu as Plaintiff's representative. The relevant sale agreements are herewith attached and collectively marked 'C'.

Paragraph 8

"On 10th October, 2004 the Plaintiff bought three other acres from the Village Council of Mapinga which was represented by ISSA HUSSEIN OMARI and, ISSA MUHIBU and KAMBI ATHUMANI the consideration of the same was TZS. 360,000/= and the relevant sale agreement is annexed hereto and marked 'D' ".

In a nutshell, in the pleadings, the appellant alleged to have acquired the disputed land in terms of the aforesaid averments. It is settled law that parties are bound by their own pleadings and that a party shall not be

allowed to depart from his pleadings to change its case from what was originally pleaded. This entails a party parading the evidence to prove or support what he has pleaded bearing in mind, as earlier stated that, he who alleges has a burden of proof as stipulated in section 110 of the Evidence Act [CAP 6 RE.2002]. The question to be addressed is if the appellant did prove to be the lawful owner of the disputed land at the required standard.

Besides, her oral account, the appellant as well, tendered documentary exhibits in a bid to establish how she had purchased the disputed land. Since she alleged to have purchased the land in pieces from the village council and other people, in order to be precise, we shall consider transaction subjecting it to the availed oral and documentary account adduced at the trial. We begin with the two acres which the appellant claimed were allocated to her as compensation in lieu of the balance of TZS. 200,000.00 from the refund of TZS. 2,300,000.00 she had earlier paid to purchase fifty acres which did not materialize. This is contained in exhibit P2 which reads as follows:

*"YAH: MAKABIDHIANO YA MAREJESHO YA FEDHA
YA SHAMBA LA WAJUMBE WA SERIKALI YA KIJJI
CHA MAPINGA*

*Rejea somo la hapo juu. Ndugu Juma Nassoro
Mw/kiti wa kijiji anamkabidhi B. Agatha Mshote
marejesho ya fedha za shamba TSHS, 1,000,000/=
(milioni moja tu) **Bado anadai Tshs. 200,000/=**
(laki mbili) ambazo zitalipwa baadae. Malipo
haya ni kati ya malipo haiisi milioni mbili na laki tano
tu, ambazo bi Agata alitoa malipo ya awali
amepokea Tshs. 1,300,000/-= jumla amepokea
Tshs. 2,300,000/= (milioni mbili na laki tatu tu).
Malipo haya yamefanyika mbele ya mashahidi
wafuatao:*

- 1. SEIFU BAKARI (sgd)*
- 2. MANENO MTUNGUTU (sgd)*
- 3. ROBINSON AMOSI (sgd)*
- 4. MLIPAJI....JUMA NASSORO (sgd)*
- 5. MLIPWAJI.....AGATHA MSHOTE (sgd)"*

Contrary to what the appellant pleaded in paragraph 6 of the plaint and her testimony at the trial, the bolded expression shows that the remaining balance was to be paid to her later and it had nothing to do with compensation or allocation of two acres of land. This is cemented by the

appellant's own account at pages 69 and 70 of the record of appeal as she testified at the trial as follows:

"...I brought the document to show that I was refunded Tshs. 200,000/=. I was not given any document as how that I was availed 2 acres on Tshs. 200,000/=".

In the light of the oral and documentary account, the appellant fell short of proving to be the owner of the alleged two acres purported to be compensation from Mapinga Village Council in lieu of her remaining balance of TZS. 200,000.00.

In relation to a total of four acres which the appellant claimed to have purchased through PW2 and PW3, she pleaded and testified that the two had purchased a total of four acres of land on her behalf, the documentary account reflects otherwise. We say so because exhibits P5 and P6 which are sale agreements in respect of the purchase of the said land, neither PW2 nor PW3 had purchased the land in question on behalf of the appellant. This is reflected at pages 122 and 124 of the record of appeal. That apart, when cross examined, besides conceding that none of

the said documents bore her name, the appellant told the trial court what is reflected at page 70 of the record of appeal as follows:

"I do not have any document to show that exhibit P2 for refund there are documents to show that my relatives bought the land for Agatha Mshote".

Since the disposition was reduced into writing it could not be overridden by an oral account. This is as per the dictates of section 100 (1) of the Evidence Act which stipulates as follows:

"(1) 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."

We thus agree with the respondent's counsel that since the sale agreements expressly show that, PW2 and PW3 had purchased land in their own capacities and not on behalf of the appellant, the oral account by

PW1, PW2 and PW3 is not compatible with the contents of the documented sale agreements which cannot be superseded by the oral account. The resultant effect is that the appellant also failed to prove ownership of the stated four acres.

Next is land measuring three acres which the appellant claimed to have purchased from Mapinga Village Council. She relied upon exhibit P3 which is found at page 114 of the record of appeal and it reflects that the respective land was sold to the appellant by ISSA and HUSSEIN OMARI on behalf of the Village Government. However, Hussein Omari did not sign the document and neither was it signed by the Chairman of the Village Council. Instead, it was signed by the alleged seller ISSA MUHIBU as the Executive Chair of the hamlet. It was the appellant's account that though the land was sold on behalf of the Village Government, she was not aware that they had a right and authority to sell the land considering that she was not shown any document in that regard. However, in his oral account, Issa Muhibu who testified as PW4 apart from testifying that the land he had sold to the appellant was allocated to him by the Village Council, on cross-examination, he said what appears at page 80 of the record of appeal as follows:

"..... I sold my own land and not village land. I was allocated the land from Halmashauri ya Kijiji. I do not have the document here that I was allocated by Village Council. Each member was allocated 2 acres. I sold the land together with my fellow. Hussein Omari. Each sold 1 ½ acre."

When shown exhibit P3 his response was as reflected at page 80 as follows:

"I sold on my own behalf after being allocated by Village Government. Village Government had already allocated to us.... It is not village farm.... It is ours but we sold on behalf of the village."

What taxed our mind is that how could PW4 who claimed to be the owner of the land, sell it on behalf of the Village Council. Besides, if at all the land was sold on behalf of the Village Government which is doubtful, what made the Village Chairman not to sign the sale agreement? Moreover, and surprisingly so, PW4 who happened to be one of the sellers played a double role having signed the sale agreement as the chairman of the hamlet. This leaves a lot to be desired. In a nutshell, from what is evident on the record, it would appear, the appellant was not aware as to who was the seller and it is very probable that she was conned. Again, the

appellant fell short of proving that she owned the three acres of land in question.

In view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of probabilities and it cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case, if any, cannot salvage the plight of the unproven appellant's case. In our considered view, we agree with the manner in which the trial Judge addressed the second issue as to whether the respondents' had trespassed into the land in disputed. We are fortified in that account because since the burden of proof was on the appellant and not the respondents, and in the event she did not discharge the onus, the credibility of the respondents' account was irrelevant. Thus the appellant's counsel criticism on the learned trial judge's failure to consider the second issue framed is with respect, uncalled for and therefore, the case of **SHEIKH AHMED SAID VS THE REGISTERED TRUSTEES OF MANYEMA MOSQUE** (supra) cited to us by the appellant's counsel is not applicable in the present case.

Therefore, the first two grounds in the Memoranda of Appeal fail and are hereby dismissed.

Finally having scrutinized and re-evaluated the oral and documentary evidence adduced at the trial, we agree with the learned trial Judge that the appellant did not prove to be the lawful owner of the disputed land and the appeal is not merited. All said and done, we hereby dismiss the appeal in its entirety with costs.

DATED at DAR-ES-SALAAM this 16th day of July, 2021.

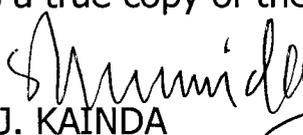
S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 20th day of July, 2021 in the presence of Mr. Bwire Benson Kuboja, learned counsel for the appellant, who also is holding brief for Mr. Samwel Shadrack, learned counsel for the respondents, is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL