IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LAND APPEAL No. 43 OF 2020

(Originating from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Application No. 247 of 2011)

MATHIAS LUTAMBI.....APPELLANT

VERSUS

SAMWEL MAKABUYA Administrator
of the Estate of the Late SHOMA BULAHYA .....1ST RESPONDENT

EMMANUEL KIBACHO .....2ND RESPONDENT

LEYA ENOS.....3RD RESPONDENT

ESTHER LUGIKO.....4TH RESPONDENT

ROSE CHACHA .....5TH RESPONDENT

GODFREY MWANGA.....6TH RESPONDENT

JEREMIAH CHARLES .....7TH RESPONDENT

JUDGMENT

17th & 30th August, 2021

TIGANGA, J

Before the District Land and Housing Tribunal for Mwanza sitting at Mwanza, in Land Application No. 247 of 2011, Mathias Lutambi, the

appellant herein, sued the respondents Samwel Makabuya (The Administrator of the Estate of the late Shoma Bulahya) and six others as listed above, for the following orders;

1. A declaratory order that the applicant is the lawful owner of the suit land.
2. A declaratory order that the respondents are trespassers on the sit land
3. A declaratory order that the sale transaction carried out between the 1st respondent and the 2nd 3rd 4th 5th 6th and 7th respondents was null and void
4. Permanent injunction restraining the respondents from harassing, evicting, threatening and or interfering the applicant from ownership, peaceful enjoyment and occupation of the disputed land.
5. Payment of Tshs. 100,000,000/=(One hundred Million) being general damages
6. Costs of the suit,
7. Any other relief (s) the trial tribunal deemed fit and just to grant.

After completion of the pleadings before that tribunal, three issues were framed, that is;

(i) Who as between the applicant and the late Shoma Bulahya is the lawful owner of the disputed land,

(ii) Whether the late Shoma Bulahya had a title to pass to the 2nd, 3rd, 4th, 5th, 6th, and 7th respondents.

(iii) What reliefs are the parties entitled to.

The trial tribunal found in respect of the first issue that, the appellant did not prove the case at the required standard and did not prove his title over land in dispute.

While regarding the second issue, the trial tribunal held that, the said Shoma Bulahya had a better title over the disputed land compared to the appellant, therefore she had better title to pass to the 2nd, 3rd, 4th,6th, and 7th respondents. Thus the sale of the disputed land to the 2nd, 3rd, 4th, 6th, and 7th respondents was legal and valid for the seller had better title to pass.

While the respondent was declared to be the lawful owner of their respective lands, the appellant was permanently restrained from disturbing the respondents from their quiet enjoyment of their lands. Generally, the

application was therefore found to have no merit and it was dismissed with an order that each party should bear its costs.

That decision aggrieved the appellant, he appealed to this court against the decision by filing seven grounds of appeal, as follows;

i. That, the trial tribunal erred in law and facts by failing to consider that the appellant owned the land since 1994 after purchasing it from one Luhanga Buyungu now deceased.
ii. That, the honourable trial chairperson erred in law and facts for failure to consider that it was only the appellant who could dispose the land.
iii. That, the trial tribunal erred in law and facts by failure to consider that, the appellant once had a dispute on the same disputed land with one Maria Peleka as a result of which he was re-affirmed as the lawful owner of the disputed land.
iv. That, trial tribunal erred in law and facts by granting judgment in favour of the respondents on the bases of weak evidence of the respondents while ignoring strong evidence of the appellant.
v. That, the trial tribunal erred in law and facts for failure to accord much weight on the appellant's evidence hence arriving to the

decision that is prejudicial to the appellant basing on incredible and contradictory evidence on part of the respondent.

vi. That, the trial Tribunal erred in law and facts for failure to declare the appellant as the lawful owner of the suit premises despite strong evidence of the appellant.

vii. That, the trial tribunal erred in law and facts for relying on weak and contradictory documentary evidence of the respondent that were improperly admitted.

In the joint reply to the petition of appeal, the respondents opposed the appeal and disputed all the facts averred in the grounds of appeal and asked this court to dismiss the appeal.

With leave of the court, the appeal was argued by way of written submissions. Submitting in support of the first ground of appeal the appellant submitted that the trial tribunal erred in law and facts by failing to consider that the appellant owned the land since 1994 after purchasing it from one Luhanga Buyungu now deceased. It failed to consider that even after tendering the sale agreement between him and the said Luhanga Buyungu which was tendered and admitted without being contested by the

respondents. In the circumstances therefore it was not correct for the trial court to find in the favour of the respondents.

Regarding the second ground of appeal, he insisted that the honourable trial chairperson erred in law and facts for failure to consider that it was only the appellant who could dispose the land under the principle of *Nemo dat quod not habet* and neither the exception applies in the favour of the respondents. He submitted further that, there is no document tendered to prove that the appellant had authorized the first respondent to sell the disputed land. In his opinion, considering the principle referred to above, no one would have passed the title to the respondents apart from the appellant himself

On the third ground of appeal that, the trial tribunal erred in law and facts by failure to consider that the appellant once had a dispute over the same disputed land with one Maria Peleka as a result of which he was re-affirmed as the lawful owner of the disputed land. He submitted that such assertion was strong and uncontroverted and thus it was not proper for the trial tribunal to dismiss the appellant's claims

Regarding the fourth ground of appeal that, the trial tribunal erred in law and fact by granting judgment in favour of the respondent on the bases of weak evidence of the respondents while ignoring strong evidence of the appellant. He submitted that the trial tribunal erred to disregard the valid and relevant documents capable of proving that he is the lawful owner of the land in dispute.

Regarding the fifth ground of appeal which raises the complaint that the trial tribunal erred in law and facts for failure to accord much weight to the appellant's evidence hence arriving to the decision that is prejudicial to the appellant basing on incredible and contradictory evidence on part of the respondents. Citing example of the said incredible and contradictory evidence, he submitted that, DW1 testified that the 1st respondent had also bought the same land from the same person who sold the land to the appellant but said so without tendering any documentary proof. Also that the 1st respondent sold the same land to the 2nd, 4th, and 6th, respondents while the 2nd respondent who testified as DW4 said, he bought the land from the 4th respondent. The other contradiction he cited was in the testimony of DW7 who was the 7th respondent that he did not prove that the 1st respondent gave the land to him nor was he able to establish the

circumstance in which he purported to be given the land that belonged to the appellant herein. The same goes to DW6 who is the 4th respondent herein who did not even have documents to prove that she purchased the disputed land. This being a civil case, the burden of proof was on both sides on each averment and allegations.

On the sixth ground of appeal which raises a complaint that, the trial tribunal erred in law and facts for failure to declare the appellant as the lawful owner of the suit premises despite strong evidence of the appellant, he submitted that the appellant proved by evidence that he was a lawful owner of the disputed land, the fact which was proved by the opinion of both assessors namely Cheneko at page 8 and 9 of the judgment and Lubasa at page 9 and 10 of the same judgment. Both opined that, in view of the strong and sufficient evidence by the appellant, the appellant was to be declared the lawful owner of the suit land.

Regarding the seventh ground of appeal which raises a complaint that, the trial tribunal erred in law and facts for relying on weak and contradictory documentary evidence of the respondents which were improperly admitted, he asked the court to pass through the record to see the admissibility of DE2 and DE3 which in his opinion were un procedurally

admitted. He in the end asked for the appeal to be allowed, and the decision of the District Land and Housing Tribunal to be quashed and set aside.

In his reply in respect of the 1st ground of appeal, the respondents submitted that, it is trite law that, primary evidence is the best evidence in any case. He submitted that the appellant did not prove the case at the balance of probability by tendering the documents and giving other evidence as required by law. Therefore the trial tribunal was correct to dismiss the application as found at page 6 to 18 of the judgment by basing on a number of decisions of the court of record. In buttress of the position, he cited the decision of this Court in the case of **Daniel Dagala Kanuda (As Administrator of the Estate of the late Mbalu Kushala Buluda) vs Mashaka Ibeho and Four Others,** Land Appeal No. 26 of 2015 - HC Tabora, Hon. Utamwa, J He submitted that the documentary evidence tendered by the appellant did not conform to the cited case therefore the trial tribunal was justified to hold that the matter was not proved at the required standard.

In respect of the second ground of appeal, he submitted that the trial tribunal was correct to hold that the 1st respondent was the one with better

title compared to the appellant. Therefore the said Shoma Bulahya passed the pieces of her land to the 2nd, 3rd, 4th, 5th, 6th, and 7th, respondents legally. He asked the court to find that the second ground of appeal has no merit and dismiss it forthwith.

In respect of the third ground of appeal, the allegation that the appellant had a case against Maria Peleka and he won the said case before the trial tribunal was not proved orally or by tendering any documentary evidence to prove the same. The evidence adduced by DW1 Samwel Makabuya was not disputed and/or questioned by the appellant and his Advocate. Therefore the 3rd ground of appeal is baseless and the same should be dismissed forthwith.

Regarding the fourth ground of appeal, he submitted that, it is a common principle that, he who alleges must prove but in the case before trial tribunal, the appellant failed to prove the case at the required standard as indicated at page 17 of the judgment. According to him the findings based on evidence and the fact that, the evidence by the appellant was very weak compared to that of the respondents, therefore the ground is also baseless and deserved to be dismissed.

Regarding the fifth ground of appeal it was submitted that, nowhere the evidence was contradictory as alleged, therefore the decision basing on the evidence was not prejudicial to the appellant.

Regarding the sixth ground of appeal he submitted that, as submitted in the fifth ground, the appellant did not establish the claim at the required standard, he could not be entitled to the victory. Further to that, he submitted that, under section 24 of the Land Disputes Courts Act, [Cap 216 R.E 2019] the opinions of assessors do not bind the chairperson of the tribunal. He therefore asked the ground to be dismissed.

Regarding the seventh ground of appeal, it was submitted that exhibits DE-2 and DE-3 were admitted properly because Shoma Bulahya in her life had good title to pass to the respondents that is why the appellant did not dare to claim during the life time of the said Shoma Bulahya. He had to wait to raise the dispute after her death in the year 2011. He submitted that, the 3rd respondent who testified as DW2, said he purchased the land in 2006, the 6th respondent who testified as DW3 said he purchased the land in 2008, the 2th respondent who testified as DW4 said he purchased the land in 2006, and all these purchased the land from

the owner Shoma Bulahya. On that base, he asked the entire appeal to be dismissed with costs.

Having summarized at length the records, and the grounds of appeal as well as arguments by the parties in support and in opposition of appeal, in my discussion, I will deal with the first and second grounds of appeal together, while the rest of the grounds will be dealt with one after the other in the manner adopted by the parties.

Before going to the merits of appeal, I find it pertinent to point out some important principles which will guide me in this judgment. **One**, is the principle of burden and standard of proof. It is trite law that the evidential burden lies upon the party who desires for the Court to give judgment in his favour. That is according to sections 110, 111, 112 and 115, read together with section 3(2)(b) of the Evidence Act [Cap. 6 R.E 2019]. This principle was a subject of discussion before the Court of Appeal of Tanzania in the case of **Godfrey Sayi vs. Anna Siame (as Legal Representative of the late Mary Mndolwa),** Civil Appeal No. 114 of 2012 (Unreported) explained:

"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."

In addressing a similar scenario on who bears the evidential burden in civil cases, the Court of Appeal in the case of **Anthony M. Masanga vs Penina (Mama Mgesi) and Another,** Civil Appeal No. 118 of 2014 (Unreported), cited with approval the case of **Re B [2008] UKHL** 35, where Lord Hoffman in defining the term balance of probabilities states that:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."

Starting with the first and second grounds of ground of appeal, it was thus upon the appellant to establish by evidence on the balance of probabilities

that the appellant owned the land in dispute since 1994 after purchasing it from one Luhanga Buyungu, who is now deceased and that the honourable trial chairperson erred in law and facts for failure to consider that it was only the appellant who could dispose the land.

In proof of that fact the appellant tendered PE1 the sale agreement between him and the said Luhanga Buyungu, which the trial tribunal after evaluation of the evidence in totality, discredited on the ground that, it did not stipulate clearly the location of the area, the size and boundaries of the said plot. According to the trial tribunal, that failure rendered the sale agreement to be ambiguous which made its enforceability questionable. In so holding, the trial tribunal relied on the authority in the case of **Daniel Dagala Kanuda (As Administrator of the Estate of the late Mbalu Kushala Buluda) vs Mashaka Ibeho and Four Others,** (supra) where my Senior brother, Hon. Utamwa, J when he was faced with similar situation held that; the legal requirement to specify the boundaries of land is not for cosmetic purpose, it intended to distinguish one place from the other, and in case of dispute over the land, it becomes easy to identify the actual land in dispute from the other piece of land especially for the un surveyed land. In satisfying myself on whether the finding by the tribunal

was justified, my careful perusal of the record has not managed locate exhibit PE1 as tendered and admitted, but basing on the content of the judgment, at page 11 and 12, it has been held that the said exhibits was short of that requirement, that finding however, has not been disputed in any of the grounds of appeal.

It has not been disputed in the arguments advanced by the appellant. According to Blacks Law Dictionary 4th Edition, 1968, terms an allegation not disputed is deemed not controverted, and silence of pleader is usually treated as an admission against him for purpose of the action. See. **Doughty v. Pallissard, 3 N.Y.S.2d 452, 453, 167 Misc. 55,** as quoted in that dictionary.

In this case though I have not had the benefit of seeing the exhibit PE1, the fact that the findings in the judgment regarding the same have not been disputed, I take the findings to be true that the said sale agreement PE1 did not specifically describe the area, in the manner that would have assisted the tribunal to identify it and therefore made it hard to know as to whether it is the same land where the area now identified as plot No. 001/306 is located.

In this case not only that exhibit PE1 did not precisely describe the area in dispute, but also the appellant did not give sufficient details in his evidence to show the boundaries, location and permanent features of the disputed land. Therefore though the purported sale agreement was tendered and admitted but it did not contain sufficient evidence to establish the ownership of the said disputed land. Since the appellant failed to establish that he bought the said plot he can not claim to have the right to dispose the land in question. Therefore the first and second grounds do hereby fail for lack merits and are disallowed.

Regarding the third ground of appeal which raises the complaints that the trial tribunal erred in law and facts by failure to consider that, the appellant once had a dispute on the same disputed land with one Maria Peleka as a result of which he was re-affirmed as the lawful owner of the disputed land. As correctly found by the hon. Chair person that allegation was under the principle in the above cited authorities on the principle of burden of proof, that he was supposed to prove the said allegations. However, the appellant did not tender any judgment of the court or tribunal which declared him as the lawful owner, neither did he mention the case number which declared him the owner, therefore there was no material upon which

the chairperson could base to find so. The ground also lacks merits and is disallowed.

The fourth, fifth, sixth, and seventh grounds of appeal were are also raising common complaints based on failure by the trial tribunal to accord weight on strong evidence of the appellant, while basing on the weak, incredible, contradictory and improperly admitted evidence by the respondents and failed to declare the appellant as the lawful owner of the suit premises despite strong evidence of the appellant.

It should be noted that in the case of **Hemed Said vs Mohamed Mbilu** [1984] T.L.R 113 HC, it was held 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 and that in measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence"*

In this case looking at the nature of the dispute, it can be concluded that the apparent dispute is between the appellant with Shoma Bulahya, the deceased whom the appellant alleged to have invited and entrusted to live on the plot, when the appellant was away for his business. He was

tactically supposed to have sued the 1st respondent as a person he entrusted with the property who according to him turned against and sold the said landed property. Looking at the weight of the evidence of both parties it goes without saying that the 2nd to 7th respondents testified by giving the detailed description of their plot, by size, location, and boundaries, as well as from whom did they derive their titles and tendered their purchase agreement carrying such description of their respective plots. While they did so, the appellant failed in his evidence to describe the location, boundaries and size of the area he claims to be his, and called no any other person who either witnessed the handing over of the land to the said Shoma Bulahya or a person who witnessed him purchasing. Now putting the two versions of evidence on the scale, it goes without saying that, that of the respondents was heavier than that of the appellant.

To prove that, he was supposed to give evidence to prove the handing over the land, and would have done so by calling the persons who were present when he bought the land, those who were present when he invited the late Shoma Bulahya, whom he did not call and gave no reasons for non calling the said witnesses. In the case of **Hemed Said vs Mohamed Mbilu** (supra) it was held inter alia that,

"where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."

Also see, **Samwel Dickson and Msafiri Atiende Abour Versus The Republic,** Criminal Appeal No. 322 Of 2014.

In this case there are no reasons given as to why the appellant did not call witnesses who witnessed the sale agreement, and gave no reasons for his non calling. That entitled the trial tribunal to draw adverse inference against the appellant that had he called the witness, that witness would have testified against the favour of the appellant. That said, I find the appeal to have no merit, it is dismissed with costs.

It is accordingly ordered

DATED at **MWANZA**, this 30th day of August 2021

THE HIGH COURT OF TANZANIA
MWANZA

J. C. Tiganga

Judge

30/08/2021