IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPEAL NO. 47 OF 2010

(C/F Land Appeal No. 7 of 2010, in the District Land and Housing Tribunal for Karatu at Karatu, Original, Land Case No. 36 of 2009 before the Qurus Ward Tribunal)

FAUSTINE MCHUNO.....APPELLANT

VERSUS

MELKIORI HUBERT ASSEY.....RESPONDENT

JUDGMENT

14/09/2021 & 12/11/2021

GWAE, J

The appellant, Faustine Mchuno Moshi is challenging the judgment and its decree of the District Land and Housing Tribunal for Karatu at Karatu (DLHT) dated 6th day of March 2010 reversing the decision of the trial Ward Tribunal (trial tribunal) by declaring the respondent as the lawful owner of the disputed farm measuring about 33 x 169 paces located at Bashay village in Qurus Ward within Karatu District in Arusha Region.

The center of the controversy before the trial tribunal was that the appellant filed a suit against the respondent claiming that, the respondent had

trespassed into his land measuring two acres. Brief evidence of the appellant is that the appellant had once entered into an agreement with one Philipo John Mkinga of building a house, and in return, after completion of the said construction the said Philipo John Mkinga was to give the appellant a land measuring two acres as consideration. This evidence was supported by the testimony of the said Philipo John Mkinga who testified as PW1, in his testimony he stated that at first, he entered into a construction agreement with the respondent on the terms that, the respondent was to build for him a house and in return he would be given a land measuring one acre. PW1 went further to state that unfortunately the respondent could not finish the project as agreed and therefore the appellant was engaged to proceed with the construction while the respondent would be refunded the costs, he had incurred in the said construction.

According to PW1, the appellant completed the construction as agreed, consequently, the appellant was given a land measuring two acres worthy Tshs. 1,000,000/= as consideration for the work done. A contract for sale between the appellant and PW1 was tendered together with an agreement between the respondent and PW1. Other witnesses who testified on his behalf were Moshi Gidos and Kristina Philipo who supported the testimony of PW1.

On the other hand, the respondent refuted the appellant's claim stating that he was the first one to buy the land on the 26th September 2005 before the alleged purchase of the suit land by the appellant. His testimony was supported by two witnesses Hhawu Manoyi a Ten Cell leader and Paulo Goranga who witnessed the exchange agreement of a land measuring one acre and a house.

In its judgment the trial tribunal was satisfied that the appellant had proved his case on the balance of probability that he is the owner of the land in dispute on the reasons that, the respondent did not perform the terms of the agreement to warrant him to own the suit land as he failed to complete the construction whilst the appellant was able to complete the construction as mutually agreed between him and PW1. Therefore, the appellant is entitled to be the owner of the disputed land.

In the first appeal before the DLHT, the learned Chairperson reversed the decision of the trial tribunal on the basis of the two agreements entered by both the appellant and the respondent. As it was established that the first agreement between the said Philipo John Mkinga and the respondent was entered in the year 2005 while the second one that was entered in favour of the appellant was concluded in the year 2007. Basing on the principle that

"You Cannot Give What You do not Have" the Honourable Chairman finally concluded that, at the time the said Philipo John Mkinga was selling or exchanging the suit land to the appellant he had no good title to pass over to any person other than the respondent as the same had already been passed to the respondent.

Aggrieved, the appellant has appealed to this Court with two grounds of appeal namely; **firstly**, that, the DLHT erred in law and fact in declaring the respondent lawful owner of the suit land and the respondent contract of sale still exists and that the appellant's contract is void ab-inition and **secondly,** that, the DLHT erred in law and fact for its failure to properly evaluate the evidence adduced before the trial tribunal.

The appellant's appeal was however initially heard exparte on the context that, the respondent refused service for the reason best known by himself and its exparte judgment was delivered by the court (**Sambo, J)** on the 28th August 2011.

After delivery of exparte judgment, the appellant when was about to enforce the decree entered in his favour, the respondent countered it by filing an application for extension of time within which to file an application to set

aside exparte judgment and its decree out of time. This court (Mzuna, J) decided in favour of the respondent on the 21st August 2020 vide Misc. Land Application No. 103 of 2018 and when an application for setting aside ex-parte judgment (Misc. Land Application No. 70 of 2020) was placed before me. I then granted the same and fixed a date for hearing of this appeal interparties. The record of this court exercising its appellate jurisdiction was found nowhere as a result I ordered a duplicate file be opened and parties to reconstruct the necessary proceeding especially grounds of appeal.

When this appeal was called on for hearing interparties before me, the appellant was represented by the learned counsel, **Miss. Elizabeth Alais** whereas **Mr. Oscar Mushi** (adv) represented the respondent. The parties' advocates opted to argue this appeal by way of written submissions and leave of doing so was accordingly granted.

The appellant through his counsel maintained that he is the lawful owner of the suit land since he was able to complete the construction of the house of the seller of the suit land, Philipo John Mkinga as opposed to the respondent who did not accomplish his contractual obligation. On this basis, the appellant's advocate argued that the appellant's contract of sale is valid and

the contract that the respondent had with the said Philipo John Mkinga came to an end when he failed to complete the construction as agreed.

Mr. Mushi, on the other hand, supported the judgment of the DLHT on grounds that, the contract between the respondent and Philipo John Mkinga is still valid and there has not been any proof to the effect that, the respondent failed to complete the construction adding that, it his considered opinion that the appellant's contention that he performed the remaining parts of respondent's obligation is a misconception and an afterthought. He further maintained that as title had already passed to the respondent then the sale between Philipo John Mkinga to the appellant was invalid as the said Philipo had no good title to pass to the appellant therefore the sale agreement that was concluded in the year 2005 between the respondent and one Philipo John Mkinga still exists and is binding between the parties.

After a careful consideration of the entire record and the submissions of the parties' counsel, this court is therefore bound to resolve two grounds of appeal aforementioned in a condensed manner, forming one ground, that, the DLHT erred in law and fact for its failure to properly evaluate evidence adduced before the trial tribunal and thereby reaching at erroneous decision

that, the respondent is lawful owner and the contract between him and previous owner of the suit land was still binding and valid.

It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges an existence of a certain fact in issue to be decided in his favour and that, the standard of proof is on balance of probabilities. I am fortified by the provisions of sections 110 and 111 of the Law of Evidence Act (Cap 6 Revised Edition, 2019] which among other things provide:

> "S.110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
>
> S.111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

Similarly, it is common knowledge that in civil cases, a party has a legal burden also bears the evidential burden of proof. In addressing on who bears the evidential burden in civil cases, the Court of Appeal of Tanzania in the case of **Anthony M. Masanga vs Penina (Mama Ngesi) and another,** Civil Appeal No. 118 of 2014 (unreported), cited with approval of the case **In**

Re B [2008J 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."

In the matter under scrutiny, since it is the appellant who alleged that, the land in dispute belongs to him, the burden of proof was on the appellant to prove that he is a rightful owner of the suit land after he had legally and procedurally purchased it from the said Philipo John Mkinga (vendor).

This court has observed that, the root of this dispute stems from a desire by the PW1, Philipo John Mkinga to have a residential house built on condition that, after completion of the construction of the same he would exchange the same with a parcel of land now in dispute. PW1 who in this

case was the important key witness to substantiate as to whom he entered into a contract with and who between the appellant and the respondent he gave the land in dispute though his evidence is subject its credibility and absence of fraud.

In his testimony, the said Philipo John MKinga who was summoned by the appellant gave his evidence to the effect that, it is undisputed fact that he entered into a first agreement with the respondent for the construction of the house. Likewise, he does not refute that, the respondent did part of the agreement and thus he is entitled to reimbursement of his construction costs that he incurred, that is to say the respondent is entitled to reimbursement to the extent of the work done by him as the said Mkinga, after obtaining consent from the respondent, looked for another person now appellant to complete building the house whose initial constructions were carried out by the respondent.

On the other hand, the respondent maintains that he built the house of the said Philipo as per their agreement and that he legally bought the land in dispute measuring one acre and that the contract dated 26th September 2005 with Philipo John Mkinga is valid.

Together with these pieces of evidence, the court has also observed as correctly testified by the parties before the ward tribunal and rightly argued by the parties' advocates that, there were (2) two agreements, the first one dated 26th September 2005 being between the said Philipo John Mkinga and respondent and another agreement dated 17th between the said Philipo Mkinga and the appellant. The 1st agreement is to the effect that, the respondent was to build a house on condition that he was to be given a farm measuring approximately one (1) acre by the said Philipo John Mkinga meanwhile the respondent should be into use and possession of the said suit farm while undergoing construction of the house. The title of this agreement and contents of the parties' agreement was in Swahili version and is reproduced herein under for clarity;

> "Hati ya Mkataba wa kujenga nyumba ya vyumba viwili na sebule kwa makubaliano ya kupewa eka moja huko aya Hale Bashay kati ya Philipo John na Malkiori Hurbert Assey tarehe 26/9/2005."
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> "Mimi Philipo John na familia yangu Samson philipo pamoja na shahidi yangu Donya Elibariki kwa...yetu bila kushauriwa na kulazimishwa na mtu yoyote yule **tumeamua kumpa ndugu melkiori hurbeti assey eneo la ekari moja (1) ziwe za kwake kipindi**

atakapo kuwa anafanya kazi hiyo ya kunijengea nisingependa mtu yeyote kuleta usumbufu katika eneo langu kwani ni mali yangu (ndama moja wa kienyeji)....."(emphasis is mine)".

Equally, the agreement between the appellant and Mkinga was also to the effect that; the said Mkinga and his family had decided to sell their parcel of land measuring about length 200 paces and width 33 paces located at the aforementioned places to the appellant. The contract is also to the effect that the suit land is lawful property of the said Mkinga and his family and its free from any encumbrances. And that, in the any event of any encountered encumbrances afterwards, the seller and his family would be held liable for refund of the purchase price, damage for breach of the contract and any other costs as might be claimed by the purchaser. For the sake of precision, parts of the sale agreement dated 17th April 2007 is reproduced as herein;

"Wauzaji tunatamka wazi kuwa eneo hilo ni letu na halina mgogoro wowote wala deni wala reheni yoyote ile. Na tunathibitisha kwamba kama kuna lolote kati ya tuliyotaja litatokea tutakuwa tayari kurudisha fedha tuliyopokea, gharama yoyote ya kuvunja mkataba itakayotajwa na mnunuzi Pamoja na gharama yoyote ya kuvunja mkataba.. na pia hatua kali za kisheria zichukuliwe dhidi yetu".

As admitted by the seller, Mkinga that, he entered into an agreement with the respondent but the respondent did not fully discharge his contractual obligations. If the seller of the suit land was of the view that the respondent partially performed his obligation and that he (respondent) told him (vendor) that he could look for another person who would accomplish the building and the seller had to refund the respondent's costs that he incurred during his discharge of the contractual obligations, in my considered view, that would have been included in the 2nd agreement as opposed to what the vendor stated in the 2nd agreement that the suit land had no incumbrances. In my increasing view the validity of the 2nd agreement is doubtful on the following grounds;

i. That, the 1st agreement between the previous owner of the suit land and the respondent was still valid as there is no tangible evidence to the effect that, it was terminated or rescinded by the parties. Hence, the 2nd agreement would not be effectual in the eye of the law
ii. The 2nd agreement did not disclose substantial facts if at all the vendor was honest in executing the 2nd agreement, including whether the appellant was to complete the construction initially commenced by the respondent and whether the suit land had encumbrances making it to be considered to have fraudulently

been executed. The testimonies of the former owner of the suit land (PW1) as well as that PW2, Moshi Gidos are not consistent with the documentary evidence, 2nd agreement) as there is no mentioning of completion of parts of works which were to be performed by the respondent

iii. It is evident that, the former owner/vendor did not sue the respondent for damages arising from the alleged breach of the 1st agreement by the respondent if it were true as per his allegations that, the respondent failed to perform his contractual obligation thereby making the contract between the two to come to an end

iv. The 2nd contract between the previous owner, purporting vendor of the disputed land and the appellant was for monetary consideration (Tshs.1,000,000/=) and not for completion of the construction of the said house as wrongly and undoubtfully depicted in the testimony of the said Philipo (PW1) and PW2.

According to the above observations, I unhesitatingly find that, the testimony and credibility of the evidence adduced by PW1, Philipo is doubtful or not worth for consideration as there is falsehood on the material facts as explained herein above. I would like to subscribe my holding to the judicial decision of the Court of Appeal at Nairobi in the case of **Widow of Haji Gullamhussein** (1957)1 EA where courts are encouraged to discard a piece

of evidence of a witness whose reliability is questionable on record when exercising its appellate jurisdiction and it was inter alia held;

> "Where the trial judge fails to appreciate or attach importance to a deliberate falsehood on a material point told by a witness whose evidence is accepted, an appellate court may place its own valuation upon the evidence of that witness".

See also the decision in the case of **Anthony M. Masanga vs Penina (Mama Ngesi) and another** (supra).

Presently, it is plainly clear that, the respondent had performed his duty notwithstanding that he might have not fully completed the construction as agreed yet the previous owner had no colour of right to re-sell to another person unless with express or implied consent by the respondent or the agreement is rescinded by the parties taking into account that, the said previous owner and his family had already given it to him (respondent) and he allowed him on the material date (26th September 2005) to uninterruptedly use and take possession while going on with the building of the house. I am alive of the principle that "he who has no legal title to the land cannot pass good title over the same to another person as was rightly stressed in the case of **Farah Mohamed vs Fatuma Abdallah** (1992) TLR 205. I would also

like to be guided by the persuasive authority in **Vidyadharv. Manikrao** & **Another** (1999) 3 SCC 573 when the Supreme Court of India interpreted section 54 of the Transfer of Property Act, 1882 and it held;

> "That the words "price paid or promised or part paid and part promised" indicates that actual payment of the whole of the price at the time of the execution of the Sale Deed is not a sine qua non for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in praesenti, or in future. The intention is to be gathered from the recitals of the sale deed, the conduct of the parties...."

In our instant dispute, the previous owner, in my view, could not therefore have a legal title to subsequently transfer the suit land to the appellant considering the fact that he had initially transferred the title to the

respondent who had either already completed the agreed construction as costs or price in exchange with the suit land or who had partly performed his contractual obligation. Provided that, the parties had intended to transfer the ownership of the disputed land, Thus, the previous owner could not have any legal title, free from encumbrances even if the respondent had not completed the agreed building of the house except that he had a cause of action for damages or for specific performance in case the respondent really breached terms of their agreement.

In view of the aforesaid, I find demerit in this appeal. Consequently, this appeal is dismissed with costs. The appellant is at liberty to institute a legal proceeding against the previous owner of the suit land as their contract is voidable on the ground that, there was fraud / mis-presentation that the suit had no encumbrances on the part of the vendor. Since parties are not to blame, I shall not order costs of this appeal and the tribunals bellows.

It is so ordered.

M. R. GWAE
JUDGE
12/11/2021