IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT MOROGORO

LAND APPEAL NO. 140 OF 2021

(Originating from the District Land and Housing Tribunal for Morogoro, at Morogoro Before M. Khasim, Chairperson)

YUDA WENSTESLAUS NDANU ..... APPELLANT

VERSUS

FRANK P. KIBONA ..... 1ST RESPONDENT

MOROGORO MUNICIPAL COUNCIL ..... 2ND RESPONDENT

JUDGMENT

Last Order – 30/11/2021
Judgment – 06/12/2021

CHABA, J.

The appellant, Yuda Wensteslaus Ndanu (1st respondent at trial) has lodged the instant appeal challenging the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro in Land Application No. 112 of 2009. The trial Tribunal's record shows that the District Land and Housing Tribunal (the trial Tribunal) made decision in favour of the applicant (now the 1st respondent) by declaring that:

(i) The applicant one Frank P. Kibona is a lawful owner of the suit land located at Plot No. 280, Block "A" Tungi within Morogoro Municipality.

(ii) That, any sale entered by the 1st respondent and his vendor was null and void,

(iii) Any building erected by the 1st respondent (appellant) in the applicant's land (1st respondent) which is Plot No. 280, Block "A" Tungi, be demolished, and

(iv) Costs to follow the event.

Aggrieved by the decision of the trial Tribunal the appellant through the services of learned advocate Mr. Jackson Liwewa, on 19th day of July, 2021 filed the instant appeal by presenting a memorandum of appeal comprising of the following grounds:

1. That, trial Tribunal erred in law and fact when entered a decision in favour of the 1st respondent contrary to the evidence adduced.
2. That, the trial chairperson erred in law and fact when entered judgment in favour of the 1st respondent without considering the weight of evidence adduced by the allocating authority (2nd respondent).
3. That, the trial Chairperson erred in law when introducing a new issue which was never pleaded nor proved.

Both the 1st and 2nd respondents resisted the appeal by filing a separate reply to the memorandum of appeal. This paved way for the matter to proceed for hearing. The parties agreed to argue this appeal by way of written submissions and indeed they complied with the scheduling orders given by the court.

In her written submission, Ms. Esther Elias Shoo submitted that grounds No. 1 and 2 are basically centred on the weight of evidence and duty to prove. It is on record that, the dispute arose from a land located on Plot No. 280, Block "A" Tungi in Morogoro region whereby both the appellant (1st respondent at trial) and the 1st respondent at this appeal (applicant at trial) each claimed to be the owner of the suit land and further

asserted to have been issued with ownership documents from the 2nd respondent which is an authority responsible for allocation of land.

She went on submitting that under section 110 (1) of The Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act) provides that:

> "Section 110 (1) - Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

She underlined that the legal requirement under section 66 of the Evidence Act requires that documents must be proved by primary evidence. The learned counsel argued that documents admitted for identification are not evidence and cannot form the basis of the judgment, as stated by the courts in a number of cases such as **Abdallah Abass Najim v. Amini Ahmed Ali,** Civil Appeal No. 13 of 2005; HC Zanzibar at Vuga, **Ushirika wa Wakulima Wadogo Wadogo wa Kilimo cha Mpunga Dakawa Limited v. Bhakilana Augustine Mafwere t/a Balina Animal Care,** Civil Appeal No. 133 of 2011; HCT Dsm and **Nitak Limited v. Onesmo Claud Njuka,** Civil Appeal No. 239 of 2018 HC Dsm (All unreported).

She contended that looking at pages 2 and 7 of the trial Tribunal's judgment, divulges that the 1st respondent proved his case by tendering a copy of a letter of offer which was only admitted for identification and the trial Tribunal made her finding relying on this document stating that the 1st respondent proved his case on the strength of the said document. She argued that the trial Tribunal erred in law when it analysed evidence by placing reliance on a document which was not produced in evidence.

She went on submitting that the appellant gave sufficient evidence when he explained well how he came into possession of a disputed land and further tendered all the original documents including the letter of offer which was admitted and marked as exhibit D2. His evidence got support from the 2nd respondent who testified that the records of the authorized land office from 2009 (to-date) recognize the appellant to be the owner of the land in dispute. She said, the judgment of the trial tribunal at page 7 clearly shows that DW3 proved that after the sale of land the ownership was transferred to the current owner, herein the appellant.

It was Ms. Shoo's contention that the 1st respondent (the applicant at trial) did not prove his case to the required standard. Nevertheless, the trial tribunal ruled that the appellant had to take stock of the principle *buyer be aware* before entering into the contract of sale while forgetting that the appellant made follow up to the allocating authority and got assurance on ownership and later on after satisfying itself, the land authority transferred the ownership to him.

As to the third ground, Ms. Shoo submitted that the trial tribunal introduced a new issue of impersonation as indicated at page 7 of the typed judgment. According to her, this had never been an issue before the tribunal and that it was neither addressed nor proved by either party. Also, no machinery responsible for forensic investigation was engaged to investigate any document purported to be a scam. He referred this court to the case of **Jamal Ahmed v. CRDB Bank Ltd (2016)** TLS LR 106 where the Court of Appeal had the following to state:

"Once while composing his decision, the trial judge raised the new issue, parties to the case had to be accorded the rights to be heard on that new issue. Since both parties were not accorded the opportunity to address the court on the new issue that emerged, they denied the right to be heard (audi alteram partem) thereby rules of natural justice contravened."

To conclude, the learned counsel for the appellant emphasized that basing on the above submissions coupled with the support of precedents and laws, this appeal should be allowed with costs. She so prayed.

The 1st respondent was represented by Mr. Chrispinus R. Nyenyembe, learned advocate. In his submission he vehemently opposed the appeal arguing that the same is misconceived and devoid of any legal merit. He underlined that the record is clear that the 1st respondent tendered Original Letter of Offer which not only identified his name, but also identified him as the true owner of the land in dispute since 1998 and it was supported by the Original Land Rents Exchequer Receipts of the year 1998 – 2003, 2005 – 2007 and 2008 as exhibit to prove his case. He highlighted that the letter of offer was only used for identification when the 1st respondent Frank Phillemon Kibona notified the tribunal that he had never sold his land to any person. The counsel maintained that looking at the records and proceedings of the trial tribunal there is nowhere it has been established that the 1st respondent tendered a "copy" of letter of offer to prove his case.

Arguing in respect of the 1st and 2nd grounds of appeal, which relates to the weight of evidence and duty to prove the case, Mr. Nyenyembe submitted that the record reveals that AW1 testified among other things that he acquired the suit land in March, 1998 and the fact was

corroborated by DW3 one Gilbert Charles Msemwa, acknowledged at page 5 of the typed judgement.

Mr. Nyenyembe went on submitting that the appellant shifted the burden of conducting due diligence to the authorised land office of Morogoro Municipal Council contrary to the guiding principle of Constructive Notice. He contended that the appellant also failed to bring the vendor before the trial tribunal as a key witness to prove vendor's good title in the disputed land. He submitted that at page 4 of the judgment it was acknowledged that DW2 testified that the vendor of the suit land went to him identifying himself as Frank Kibona the owner of the suit land living in Dar es Salaam. The learned advocate drew attention of this court to page 8 of the judgment, that when the vendor was required by the land office to produce his identity card(s), he brought "Kitambulisho cha Mkazi No. 2303" and the same showed that Frank P. Kibona was a farmer, resident of Kola area within Kilakala Ward and not Dar es Salaam. He further told (DW2) that his house at Dar es Salaam was burnt and due to that his ownership documents got lost.

The learned advocate went on to state that apart from that information the 2nd respondent failed and indeed did not bother to deeply inquire into the relevant reports like the Police Report Book (RB) and Fire Investigation Report to verify and satisfy themselves as to the truth of the facts. He accentuated that the record at page 8 shows that DW2 testified that the vendor was ordered to bring an introductory letter from Kichangani though he did not see the said letter. At page 6 of the judgment DW3 testified that the vendor had no any original document so he was ordered to file police loss report. The learned advocate stressed that with all these pieces of evidence no record shows that the

loss report was tendered and admitted in the trial tribunal. He said, even if the said loss report could have been admitted, that could not solely be the evidence to believe that the house was burnt because among other things there was a Disclaimer Clause in Swahili language reading; *"Muhimu: Ieleweke kuwa hati hii sio Ushahidi kuwa taarifa iliyotolewa imekubaliwa na Jeshi la Polisi kuwa ni ya kweli."*

He added that, the evidence adduced by the appellant's witnesses is full of doubts and contradictions, worsened by failure to bring the vendor before the trial tribunal. He submitted that there was lack of due diligence on the side of the buyer before deciding to buy a land in dispute and clear negligence on the side of the 2nd respondent (land authority) by failure to make thorough inquiry on the person who appeared before it introducing himself to be the owner of the suit land without any document concerning that land. This fact was evidenced by DW3 who asserted at page 7 that when the vendor for DW1 introduced himself to the 2nd respondent's office, he had no any document in that respect. He underlined that, the view on the weight of evidence was well discussed in the case of **Hemedi Saidi v. Mohamed Mbilu,** [1984] TLR, where the Court had the following to say: -

> "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. In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence.

In another case of **Issa Ahmad v. Mussa Abdul Mohamed,** Misc. Land Appeal No. 72 of 2010 (HC) (Unreported), the Court held:

"In civil action the question of ownership is not established by mere plain words, but clear and cogent evidence will resistibly and specifically point to the source of acquisition and occupation of the property under contest".

On this point, the learned advocate contended that it is a matter of principle in the common law jurisdiction that the quality of evidence is the one which determine good decision and not quantity of witnesses. Again, in the case of **Farah Mohamed v. Fatma Abdallah,** [1992] TLR. 208 the Court had the following to say:

"He who does not have legal title to land cannot pass good title over the same to another."

He further submitted that the assessment of evidence and the decision of the trial tribunal cannot be interfered by this court because it is apparent on the record of the trial tribunal that there is no any serious mis-direction, non-direction, mis-apprehension or miscarriage of justice to warrant this court interfere as it was held in the case of **Michael Y. Simkoko v. Elia Robson Myalla,** PC Civil Appeal No. 31 of 2019 HC (T) - Mbeya District Registry (Unreported).

He accentuated that since the land acquisition by the appellant from the non-existent vendor was *null and void ab initio,* the courts of law cannot be used to legalize illegal transactions. He referred this court to the famous Common Law Principle which says; *"He who comes to equity must come with a clean hand".* He stressed that since the appellant does not have a clean hand, then this principle of law is against him.

Arguing in respect of the 3rd ground of appeal, Mr. Nyenyembe contended that since all issues were framed, recorded and consented by

all parties to the suit before the trial Chairperson, then the law governing civil matters was complied with. Under Order XX, Rule 4 of the Civil Procedure Code [Cap. 33 R.E. 2019] the law articulates that, a judgment must contain concise statement of the case, the points for determination, the decision thereon and the reason for such decision, of which the Chairperson adhered to. In addition, Order XX, Rule 5 of the Code further provides that in suits in which issues have been framed, the court must state its findings or decision, with reasons thereof, on each separate issue, unless the findings on any one or more of the issues is sufficient for the decision of the suit. The trial tribunal's records show that the Chairman did not breach any rule of procedure and the judgment was prepared and delivered in compliance with both the CPC and Section 51 (2) of the Land Dispute Courts Act [Cap. 216 R.E. 2019]. It was Mr. Nyenyembe's contention that the new issue purported by the appellant to be introduced by the trial Chairperson, was a mere word which does not go to the root of the matter.

On the strength of his submission, Mr. Nyenyembe prayed and pleases this court to decide this appeal in favour of his client, herein the 1st respondent and issue the following orders:

1. The dismissal of the appeal in its entirely with costs,
2. A declaration that the 1st respondent is the rightful owner of the land in dispute.
3. Any other relief(s) this Honourable Court deem just and equitable to grant.

Replying to the 1st ground of appeal, Mr. Alson Kireri who entered appearance for the 2nd respondent, contended that the 1st respondent did manage to establish and prove his case on the required standard of

proof as stipulated by the law under Sections 3 (2) (b) and 110 (1) and (2) of the Evidence Act [Cap. 6 R.E. 2019]. She further cited the case of **Kalyango Construction and Building Contractors Limited v. China Chongquing International Construction Corporation (CICO),** Civil Appeal No. 29 of 2012 where the court held inter-alia that:

> "The appellant was the one who sued the respondent. Regardless of whether the matter proceeded exparte or not, he has the duty of proving the case against the respondent on the standards required."

From the above principle of law, the 2nd respondent underlined that such a duty was well observed by the 1st respondent. Mr. Alson Kireri underscored that indeed the 2nd respondent is supporting the 1st respondent. Arguing in respect of the 2nd ground of appeal, he contended that the evidence adduced by the allocating authority (2nd respondent) was well considered in the judgment, that is why the decision descended on the 1st respondent's favour. As to the 3rd ground of appeal, he averred that the Chairman did not introduce any new issue rather she was just referring to the testimonies given by the 1st respondent that he had never sold his land to any person especially the appellant. Indeed, she referred to the testimonies of the 1st and 2nd respondents to determine who is the real or rightful owner of the plot in dispute. He further submitted that the 1st respondent showed the trial tribunal his identity from the custom agency to prove his identification of which such a piece of evidence is featured in the judgment of the trial tribunal. In rejoinder, the learned appellant's counsel reiterated what she submitted in written submission in chief.

Having considered the rival arguments from the learned counsel for both sides, the trial tribunal's judgment and proceedings as well as the grounds of appeal advanced by the appellant, I find it apt to start with the third grounds of appeal and later on, I will deal with the first and second grounds of appeal. The third ground raises an issue of procedural irregularity. It deserves to be determined first because it may render other grounds of appeal redundant.

The appellant complained that the trial tribunal Chairperson erred in law when introduced a new issue of impersonation which was neither pleaded nor proved. Further, the parties were not afforded with the rights to be heard.

At the outset, I am inclined to agree with the learned advocate for appellant that it is a rule of law that the court has no liberty to raise new issue(s) without availing the parties with an opportunity to address on the raised issue(s). Also, I have in mind that the law requires the court to frame issues and the same must be reflected in the judgment as points for determination. This issue has been addressed by the Court of Appeal of Tanzania in a number of cases including **Jamal Ahmed** (supra) and **Mussa Chande Jape v. Moza Mohammed Salim,** Civil Appeal No. 141 of 2018, CAT (ZNZ) (2019), to mention a few. For instance, in **Mussa Chande Jape's case** (Supra), the High Court of Zanzibar raised an issue of non - joinder of necessary parties *suo motu* without affording parties with the rights to address the court on the said issue. The Court of Appeal of Tanzania borrowing words from Mulla's **The Code of Civil Procedure, Vol. II 15th Edition** in the case of **Scan-Tan Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012 and **Tanganyika Cheap Store**

Ltd and 2 Others v. National Bureau De Change Ltd, Civil Appeal No. 93 of 2003, CAT, Dsm (both unreported), the Court held:

> "If the court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue."

This requirement was also reiterated in the case of **Peoples' Bank of Zanzibar v. Suleman Hajj Suleman** [2000] TLR. 347. However, after a close scrutiny of the trial tribunal's judgment and the proceedings thereof, I failed to see an iota of symptoms of the flaw as avowed by the learned counsel for the appellant. The record at page 2 of the typed judgment reveals the issues that were framed by the tribunal. The record reads:

> "From the foregoing issues for determination are as follows:
> (i) Who is the lawful owner of the suit land?
> (ii) What reliefs are the parties entitled to."

The proceedings dated 10/10/2016 show that the tribunal framed issues in the presence of the parties who conceded too. But the appellant complained that the tribunal Chairperson raised new issue and parties were not afforded with the right to be heard. It is apparent from the record that the words **conned** and **impersonation** were used. To arrive to a fair and just decision, I wish to pick relevant phrases from the trial tribunal's judgment where the above two words were used. At page 7, third paragraph it is written:

> "GIZBETH CHARLES MSEMWA (DW3) proved before the trial tribunal that after the sale of the land, the names were transferred to the current owner, but the letter of offer and all other land documents by

that time had no pictures. This means any person had access to **pretend** or **impersonate** to be someone and tamper with any land".

He continued to analyse the evidence at page 8 to this effect:

> "By the first respondent avoiding bringing his vendor on the date scheduled for hearing reveals that there is something hidden, but all in all, in relying to the above analysis made, **I strongly believe that the first respondent was conned by a person who had no legal right to dispose the suit land,** the buyer of the suit land had to beware, caveat emptor...". [Emphasis supplied].

Passing through the wording used by the Chairperson in his judgment, I think in my view that, it is next to impossible for a reasonable person to think and believe that by so stating, he drew a new issue. In my opinion, the tribunal's Chairperson was right to use such words as means of expressing and explaining the circumstance in which the 1st respondent met, perhaps with a conman who cheated him using confidence tricks.

I have keenly examined these phrases from different angles of thinking but garnered nothing suggesting that a new issue was framed. I say so because the word **issue** as defined by the Black's Law Dictionary, 8th Edition at page 849 is interpreted as ***a point in dispute between two or more parties.*** The explanation thereof goes like this:

> "... an issue is a single, certain and material point arising out of the allegations and contentions of the parties: it is matter affirmed on one side and denied on the other".

Our Civil law which governs civil matters is also close to the above given description. Order XIV, Rule 1(1) of the Civil Procedure Code [Cap.33 R.E. 2019] provides a definite description of the word **issue** in the following words:

> **Order XIV, Rule 1 (1)** - Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.
>
> **(2)** Material propositions are those propositions of law or fact which plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
>
> **(3)** Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
>
> **(4)** ... N/A
>
> **(5)** ... N/A
>
> **(6)** ... N/A

From the above, the word *issue* can simply be termed as "points for determination". The provisions of law further provide for a proper procedure on how an issue can be framed. Hence, extracting from the afore-mentioned interpretation, it cannot be said that in the circumstance of this case, the trial tribunal's Chairperson framed a new issue by just mentioning that the appellant was conned, and unknown person impersonated himself as a vendor.

My evaluation and assessment of the evidence adduced at the trial tribunal and scrutiny of the records, revealed that the words **'conned'** and **'impersonate'** in the judgment, were properly used or applied by

the trial tribunal as hinted above. The two words do not qualify the test of being termed as issues. With all due respect to the learned counsel for the appellant, I think in my opinion that she perceived the tribunal Chairperson's lexeme in a caricature picture. That being the position, I am satisfied that the third ground of appeal lacks merits.

Reverting to the 1st and 2nd grounds of appeal, it is the appellant's contention that the trial tribunal erred in law and fact when decided in favour of the 1st respondent contrary to the evidence adduced and without considering the weight of evidence adduced by the allocating authority, herein the 2nd respondent. Indeed, both two grounds are essentially based on the complaint that the trial tribunal failed to evaluate the evidence properly, henceforth the issue here is mainly centred on the question of the weight of evidence and duty to prove the same. Of course, this court being the first appellate court in this matter, is entitled to re-examine the evidence adduced before the trial tribunal and if necessary, come up with its own conclusion. See **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 (both Unreported).

From the proceedings, both the appellant and the 1st respondent are claiming to be rightful owners of the suit land. The land allocation authority successively issued them with certificates of title over the same. Fascinatingly, the appellant contends to have purchased the suit land from the person who introduced himself by the names of the first respondent, while the 1st respondent (the real Frank P. Kibona) stated that he was allocated the same by the Land Office. Thus, the vital

question which needs consideration, determination and decision thereon is this; *who is the rightful owner of the suit land in light of the evidence adduced at trial tribunal?* For me to be able to intelligibly address the above question, at this point, I think it is apt to recapitulate the substance of the material evidence briefly.

The evidence adduced by the 1st respondent (the applicant at trial) is briefly that he acquired the land in dispute, Plot No. 280 Block "A" Tungi area, Morogoro Municipality on the 25th March, 1998 through allocation by the Authority. He produced some exchequer receipts proving that he had been paying the relevant fees since 1998 to 2015. His testimony was supported by DW3 one Gizbert Charles Msemwa an authorized land officer from Morogoro Municipal Council who without hesitation stated that the legal owner of the land in dispute was at first **Frank P. Kibona** herein the 1st respondent who remained the lawful owner up to 24th April, 2009 when ownership was changed from **Frank P. Kibona** to **Yuda Wenstelaus Ndanu** herein the appellant. The ownership was changed when **Frank P. Kibona** sold the suit land to **Yuda Wenstelaus Ndanu.** Indeed, he testified in common with the submissions advanced by the learned counsel for the 1st respondent.

On the other hand, the appellant (1st respondent at trial) had testified that he was sued by the 1st respondent (the applicant at trial) on complaints that he acquired the suit land in dispute unlawfully. But according to him, he purchased the suit land lawfully from a person who introduced to him as the lawful owner of the land in dispute and thereafter was issued with the legal documents by the relevant Authority. His testimony was supported by the street chairman one Gerald Wilson Kessy (DW2).

Upon considering the evidence of both sides and upon placing reliance on the evidence adduced by the 1st respondent (AW1) and Land officer (DW3), the trial Chairman declared the 1st respondent (the applicant) as the rightful owner.

From the grasp of the foregoing, the evidence adduced before the trial tribunal, the impugned decision of the trial tribunal and a clear understanding of the dispute, I think, in my view that I am now in a position to tackle the raised questions as to who is the rightful owner between the appellant and the 1st respondent. In my opinion, the following points are of paramount importance to determine and demonstrate the legal owner of the land in disputes:

One, under the principle of law by the maxim ***nemo dat quod non habet,*** meaning that; ***"no one gives what they do not have",*** which is vital and relevant in the circumstance of this case, a person who does not have a legal title to land cannot pass good title over the same to another. See **Pascal Maganga v. Kitinga Mbarika,** Civil Appeal No. 240/2017 and **Ombeni Kimaro v. Mishili t/a Catholic Charismatic Renewal,** Civil Appeal No. 33/2017 (Both unreported).

Two, the 1st respondent had proved before the trial tribunal on how he acquired the disputed land from 25th March, 1998 by acquiring granted right of occupancy and continued to pay the relevant fees vide the exchequer receipts shown before trial tribunal in 2015. I have also taken time to keenly read the evidence by DW3 one Gizbert Charles Msemwa, a Land Officer who testified for defence at the trial. In essence, his evidence was in support of the 1st respondent. From his evidence I gathered the following:

1) The 1st respondent (was)is the rightful owner of Land in Plot No. 280 Block "A" Itungi from 25th March, 1998;

2) On 24/04/2009 a sale was conducted by one person called Frank P. Kibona, who however, was and till to-date, not the 1st respondent in this case and therefore could have been a conman as it was termed by the trial tribunal;

3) The said Frank P. Kibona who presented himself as the owner of the suit land and vendor, had no valid documents to prove ownership of the suit land. Instead, as the records at the trial tribunal speak, he was given a copy of a letter of offer from the Land office for him to secure a loss report from the Police Force, in turn to qualify his access into the title, and

4) The said vendor had no reliable identity card, but a letter styled as KITAMBULISHO CHA MKAZI NO. 2303 purportedly secured from Kichangani Ward, Kihonda area within Morogoro Municipality while he claimed to be a resident of Dar es Salaam Region.

Three, as indicated above, DW2 assisted to link DW1 (herein the appellant) with the purported vendor who pretended to be Frank P. Kibona, whom the buyer (appellant) did not know. Unfortunately, the said vendor was not called as a witness to prove that he sold the land in dispute to the appellant. The root of title from which the appellant would claim any right over the suit land was the person who introduced himself as Frank P. Kibona unknown to the trial tribunal, but to the appellant himself. I believe, this new version of Frank P. Kibona was a very important witness to the trial. This is because, he would prove his ownership and the subsequent sale to the appellant. But the appellant opted not to parade such a vital witness.

It should be noted here that, principally, in civil cases the burden of proof lies on the party who alleges anything in his favour. (see: **Antony M. Masanga v. Penina (Mama Mgesi) and another** Civil Appeal No. 118 of 2014, CAT (unreported). Again, it is a trite principle of law that if a party fails to call a material witness on his side, the court is entitled to draw an adverse inference against him/her. This court and the Supreme Court of our land voiced this principle of law in a number of cases including the cases of **Hemedi Saidi v. Mohamedi Mbilu (supra), Ecobank Tanzania Ltd v. Future Trading Company Ltd,** Civil Appeal No. 82 of 2019, CAT (Dsm) and **George Ngando v. Bakhita Salumu Ally,** Land Appeal No.7 of 2019, HCT (Iringa). In **Hemedi Saidi's** case the Court held specifically on failure to call important witness when stated 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".*

As far as this appeal is concerned, I subscribe to the above observations. This principle of law can be narrowed in our case here to the effect that when a party to a land dispute claims to have derived the right from purchase, where circumstance serves, such person must call the vendor as a witness to support his claim in trial. That witness would assist the court to make a fair and just decision on the relevant issue(s). But since the appellant failed to call the purported vendor that presented himself as Frank P. Kibona, henceforth, the trial tribunal was entitled to draw an adverse inference against the appellant.

On the other limb, the appellant grumbled that the trial tribunal based its decision on secondary evidence, that is to say; the photocopy of a letter of offer from the 1st respondent (AW1) tendered for identification. The law as it is positioned by now, secondary evidence must be proved by primary evidence. I accept that the letter of offer was a photocopy admitted for identification. I also admit the argument by appellant's counsel that a document admitted for identification is unfit for reliance in the court's judgment. The rationale is obvious, rules of evidence will be deflated. The distinction between primary and secondary evidence provided for under the Law of evidence will be rendered futile and evidence otherwise inadmissible would enter into justice by the rear entrance and impurify the sacred nature of justice. Legal authorities cited by the appellant suffices to pin the position.

However, looking at page 2, 7 – 10 of the judgment, it is evident that the said letter (ED1) was admitted for identification along with the original copies of receipts for years 2003, 2007 and 2008 (collectively P1). But from the analysis made by the tribunal, there were material enough to reach the decision. Even without ED1, in my own analysis of the evidence available before the tribunal, I found the following:

(i) The 1st respondent (the applicant at trial) was the rightful owner of the suit land since 25th March, 1998 up to 2015 when the purported sale was subsequently made. AW1 and DW3 proved this fact and no strong evidence from the defence was given to disprove it.

(ii) The purported vendor who pretended to be the applicant had no good title over the suit land. All witnesses testified to that effect, except the appellant though he failed to disprove the fact.

(iii) The appellant purchased the suit land from a suspicious and tricky transaction whose vendor had neither personal identity cards nor ownership documents. Circumstances under which the purported vendor secured the copy of letter of offer as above explained establishes that indeed, he had ill will to achieve his plan so devised.

(iv) Before the trial tribunal, the applicant and DW3 proved that the applicant (herein the 1st respondent) was the rightful owner of the suit land while the appellant (1st respondent at trial) had nothing concrete to establish ownership over the disputed land.

On that basis I hold that the trial tribunal did not ground her decision on ED1 as alleged. Another contention by the appellant is that the trial tribunal did not consider the evidence adduced by the Land officer (DW3). However, the record as divulged herein above, is clear on how the same was considered by the trial tribunal before reaching at its decision. I find the appellant's argument on this point implausible as well, thus hard to subscribe to.

Basing on what I have expounded above in reliance to the evidence adduced before the trial tribunal, it is my finding that the analysis and evaluation of evidence made by the Chairman was proper. By my scrutiny, the evidence adduced by the 1st respondent's side was heavier compared to the one given by the appellant. In the same wavelength I am satisfied that the 1st respondent sufficiently proved his case to the required standard as per sections 3 and 110 (1) and (2) of the Evidence Act [Cap. 6 R.E. 2019]. The trial tribunal was correct to have decided in favour of the 1st respondent. For that reason, grounds number one and two are generally devoid of merits and are hereby dismissed.

That said and done, and on the basis of what is explicated above, I find no genuine reason to fault the findings and decision of the trial tribunal. The judgment and Orders thereof are hereby upheld. Since the instant appeal is devoid of merits, it is entirely dismissed with costs.

It is so ordered.

DATED at MOROGORO this 06th day of December, 2021.

M. J. CHABA

JUDGE

06/12/2021

This Judgment is delivered at my hand and the Seal of the Court at Morogoro this 06th day of December, 2021 in Chambers in the presence of Prof. Binamungu, learned counsel for the Appellant, but in absence of the Respondents.

M. J. CHABA

JUDGE

06/12/2021

Rights of Appeal to the parties fully explained.

M. J. CHABA

JUDGE

06/12/2021