IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO.26 OF 2021

(Arising from decision of the District Land and Housing Tribunal for Mwanza in Application No. 401 of 2019 dated 08/04/2020 by Murirya N. Chairman)

ALANUS MUBEZI.....1st APPELANT

MARIAM JUMANNE.....2nd APPELANT

VERSUS

ALEX RWAMBALI.....1st RESPONDENT

ESTHER FUNGAMEZA (As the Administratrix

of the Estate of the Late Mihayo M. Masunga **.....2nd RESPONDENT**

JUDGMENT

23th June & 2nd September, 2022

ITEMBA, J.

This appeal emanates from Land application no.401 of 2019 before District Land and Housing Tribunal (DHLT) for Mwanza in respect of Plot No.161 Block 'F' Nyamanoro area within Mwanza city, herein, the suit plot. The said application was filed by the 1st respondent against the 2nd respondent and both appellants.

I find it vital to start with a background which led to this appeal. It is alleged that; in the year 2009, Alex Rwambali, the 1st respondent sold

the suit plot to one Mihayo M. Masunga for a sum of TZS. 50,000,000/=. It was agreed that the said payment will be effected in two installments. Mihayo Masunga paid TZS 35,000,000 and obtained the certificate of tittle from the 1st respondent with a promise to pay the remaining TZS 15,000,000 and thereafter, transfer of title would have been realised.

Things went inadvertent as Mihayo Masunga got sick and had to travel outside Mwanza with his wife Ester Fungameza (the 2nd respondent herein) for long time treatment. Before he left, Mihayo Masunga gave the certificate of Tittle of the suit plot, (the certificate) and the sale agreement to his young brother Noriss Masunga, the husband of the 2nd appellant.

It is also in record that before Mihayo M. Masunga re-claimed the said certificate from his young brother Noriss Masunga, the said brother suddenly died on 23rd November 2016. He therefore died while in possession of the certificate. By then, Mihayo Masunga had renovated the suit plot and rented it out to some tenants. Upon Mihayo Masunga making inquiries as to the whereabouts of the certificate, the 2nd appellant informed him that it got lost together with other documents during the burial ceremonies of Noriss Masunga. The information didn't go well with Mihayo Masunga who decided to file a land application **No.**

748 of 2017 before DLHT for Mwanza, in which it was struck out for non-joinder of the necessary party. It appears that, Mihayo Masunga had reported that the certificate was lost and the Registrar of Tittles made a publication to that effect. Following the publication, the 1st appellant disclosed to the Registrar that he has the certificate. That the 2nd appellant had issued the certificate to his law Firm for its' safe custody. This made Alex Rwambali, the 1st respondent, to file Land Application **No. 401 of 2019** before the DLHT claiming the ownership of the suit land, against both appellants and Mr. Mihayo Masunga. On 16th December 2019, Mihayo Masunga died while the said application was still pending. His wife, Esther Fungameza, the 2nd respondent herein, stepped into his shoes. For clarity, before the DLHT, the 1st respondent had moved the tribunal to make the following orders:

1. A declaration that the applicant (1st respondent herein) is the lawful owner of the suit plot.
2. A declaration that the 2nd respondent had breach a sale agreement and;
3. An order compelling the appellants to hand over the Certificate of Tittle to the applicant.

After a full trial, it was ordered by the DLHT that the 2nd respondent is in breach of the sale agreement for not paying the remaining balance of the purchase price, and that unless the 2nd respondent's administrator of estate pays the purchase price balance, the 1st respondent will remain the owner of the disputed premise; the 2nd appellant to return the money received as rent from 2016 to the date of judgement and that since the certificate of tittle is nowhere to be seen, the Registrar of tittle to revoke the same and proceed to issue a new Tittle Deed.

The appellants were not amused by the said decision and filed this appeal. The memorandum of appeal has 10 grounds and I wish to reproduce the same as follows;

1. *The Court erred in law and fact for entertaining the matter to which a necessary part was never joined.*
2. *The Court erred in law and fact for entertaining the matter to which there was a misjoinder of parties thereto.*
3. *The Court erred in law and fact for entertaining the matter whereby the applicant had no cause of action against the 3rd respondent (The first appellant).*
4. *The Court erred in law for ordering the registrar to revoke the tittle subject to the said dispute.*

5. *The Court erred in law and in fact for a misconception and misinterpreting of its own proceedings and judgment in land application No. 748 of 2017.*
6. *The Court erred in law and in fact for failing to analyze the evidence properly.*
7. *The Court erred in law and in fact for relying on testimonies which are illegal before the law.*
8. *The Court erred in law and in fact for not calling reliable witnesses who could have assisted the Court in reaching a well-informed decision.*
9. *The Court erred in law and in fact for relying its decision on a testimony given by DW4.*
10. *The Court erred in law and fact for holding the case by the respondents was never proved on balance of probabilities.*

At the hearing, the 1st appellant, Alanus Mubezi, being a learned counsel, fended for himself and also argued for the 2nd appellant who was unrepresented.

Arguing the 1st ground, he averred that the documents relating to the disputed land reached the 2nd appellant through her late husband but administrator of the estate of the said husband was not given an opportunity to be heard.

He argued the 2nd and 3rd ground jointly and stated that he was not supposed to be joined as a party in this suit because the letter which

was referred by the 1st respondent before the DLHT was written by the law firm known as ARCUS Attorney and not him personally so the law firm is the one which was supposed to be sued.

In respect of the 5th ground, the appellant contends that there was another land case with registration No. 748 of 2017 which related to the same suit land and the 1st respondent appeared as a witness. He added the said application was struck out and it's findings were not considered in the impugned decision.

Regarding the 6th and 7th grounds of appeal, he contends that the 1st respondent submitted illegal documents and misled the court that the 'police loss report' and 'affidavit of loss of document' were false documents because the certificate was not lost as he handled it over to the 2nd respondent and even if it was lost the one to report and swear affidavit was not the 1st respondent but the one who lost the documents. He added that the testimony of the 1st respondent was tainted with lies in the trial proceedings and the court erred in relying on the sale agreement which was not brought before it.

On the 8th ground, he is of the view that the respondent ought to have called the state attorney one Ms. Dora as a witness but it did not.

Regarding the 9th ground, he avers that during the trial, there was no defence witness DW4 but rather Mr. Joseph Makoye who testified for the 1st respondent but was labelled as defence witness even though his testimony was tendered after both parties have closed their cases. That DW4's evidence was relied by the court as strong evidence.

He decided to drop the last ground and urged the court to quash the trial decision in respect of land application no. 401 of 2019.

In reply, the learned counsel for the 1st respondent Mr. Hezron contended that the 1st respondent was suing the 2nd respondent, 1st appellant, and the 2nd appellant. He explained that the cause of action was that the 2nd respondent was in breach of the contract of the sale agreement and that the 1st and 2nd appellants were in illegal possession of the certificate of title of the disputed land. He further stated that the 1st respondent had a duty to prove that he is the lawful owner of the disputed land and that he sold the property to the 2nd respondent and until now the 2nd respondent has not paid the remaining balance. He added that issues on how did the title deed move from the 2nd respondent to the appellants was not his duty to prove as he could not know that, and therefore there was no need to sue Noriss Masunga or his administrator of the estate.

Replying to the 2nd and 3rd grounds, he contends that the appellants ought to have objected at the earliest stage of the proceedings on the issue of misjoinder and non-joinder of parties, as provided for under Order 1 Rule 13 of the Civil Procedure Code R.E. 2019, but in the trial proceedings, the appellants raised the objection to that effect and abandoned the same before it was determined. Further, in connection to this ground he stated that in the WSD of the 2nd appellant, he did not raise any fact showing that he was dealing with the matter on behalf of the firm and not in a personal capacity, since parties are bound by their pleadings it is wrong for him to bring this issue to the attention of the court at this stage. He supported his contentions by the decision in the case of ***Paulina S. Ndawaya vs Theresia Thomas Madaha,*** Civil Application No. 45 of 2017 CAT (Unreported).

He added that even if the court finds it meritorious, he is of the view that the 1st appellant was properly sued he is the one who signed the letter. He added that under Order 29 Rule (1) and (2) of CPC (supra), lawyers can be sued either by their names or the names of their firms.

On the issue of cause of action, he avers that, records before the court showed that the documents are in the hands of the 1st appellant

thus, he was supposed to appear and tell the court as to how he came into possession. That both appellants have failed to explain how they possessed the said title therefore it was correct for the 1st respondent to sue them.

Concerning the 5th ground of appeal, he replied that the DLHT decision was justified as land dispute No. 748 of 2017 between Mihayo Masunga and the 2nd respondent, which was admitted as exhibit P.6, the court considered it and it was not determined on merits.

On the 6th and 7th grounds of appeal, he avers that the documents which were referred by the first appellant were admitted without any objection as exhibit P1 collectively. As to the issue of illegality, he said it was not raised before the tribunal thus there was no need for evidence to prove the legality of such documents and the duty to prove was on the one who asserts illegality. Since the appellants did not raise such issues during the trial, this court cannot deal with it at this stage.

On the arguments that the documents were not lost he avers that a copy of the title deed was admitted and marked as exhibit P.7 and the original certificate is not available, even the 1st appellant who claims to be in its possession, did not produce it before the court as exhibit. That appellants were ordered by the trial court to produce the same but they

didn't. Even after the judgment they were ordered to surrender the title deed but they haven't, he insists that the document is lost and not in the appellant's hands and the 1st respondent had to look for his title.

On the issue of production of the sale agreement, he explained that the 1st respondent alleged in his pleadings and the 2nd respondent admitted that he bought the land from the 1st respondent and they entered into sale agreement and he has not paid the remaining balance until now, that is the reason why the 1st respondent has refused to transfer the title to the 2nd respondent. He argued further that there is no dispute that the 1st respondent is the lawful owner of the disputed property but the issue is in the legality of the appellant's possession of the title deed as claimed.

Replying to the 8th ground, he is of the view that it was not necessary to call Dora as a witness because there was no dispute between the 1st and the 2nd respondent who were the seller and buyer.

Regarding the 9th ground he avers that the DLHT relied on evidence of the DW4 as he testified as a defence witness who was called by the 2nd respondent that's why the 2nd respondent who was unrepresented was not allowed to question him and the 1st respondent cross-examined him as reflected in page 62 of proceedings.

Lastly, he prayed the DLHT's decision to be sustained and appellants bear both costs of this court and the DLHT.

On her part, the 2nd respondent subscribed to what has been averred by the 1st respondent to be true as she was present throughout the transactions.

In his rejoinder, the appellants stated that the documents reached the 2nd appellant through Noriss Masunga, therefore, it was important for the administrator of his estate to be joined instead of the second respondent.

On the issue of bringing the objection at the earliest stage, he re-joins that this is the ground of appeal and not an objection. He maintains that the fact that they were abandoned does not mean that they cannot be raised as grounds for appeal. As to Order XXIX Rule (1) and (2) of CPC, the 1st respondent was supposed to include all partners of the firm.

Regarding the 5th ground, he criticises the trial Tribunal for not considering that what the 1st respondent alleged was not true. In application No. 748 of 2017, he stated that the 1st respondent sold the disputed plot, and later he stated that he was not paid the whole amount. He insists that if the trial Tribunal would have considered the

said judgment it would have known the intentions of the 1st respondent and contradiction to his testimony.

On the issue that the illegal documents which were not objected he stated that its admissibility does not make them lawful and if the court would consider the evidence, it would have noted that the documents were not lost but he gave them over to the 2nd respondent.

On the issue that there was no need to produce the contract he states that it was not true, what was in dispute is not only documents but the legality of ownership. The 1st respondent alleged to have sold the plot to the 2nd respondent while the 2nd appellant stated the buyer was her deceased husband. He retaliated the prayers that the findings of the trial tribunal in land application No. 401 of 2019 be quashed and the suit premises should be returned to the 2nd appellant as she was in possession before the filing of the instant dispute.

Having heard the submissions made by both parties, the court's duty at this stage of the proceedings, is to determine whether the appeal has merit.

I wish to tackle the grounds of appeal in the manner that they were argued by the parties. The appellant's claim in respect of the first ground is that it was vital for the administrator of estate to be joined as

a part in this case while the respondents hold the view that there was no such need. After going through the DLHT proceedings there is no dispute that the certificate of title with registration No. 21048 LR Mwanza in respect of Plot no.161 Block 'E' Nyamanoro is under the name of the 1st respondent. The evidence which was adduced before the tribunal shows that there was a sale agreement between the 1st respondent and the 2nd respondent which was not fully executed, this is according to the testimony of the 1st respondent himself, 2nd respondent, and DW4 one Joseph Makoye. The 2nd respondent while giving her testimony informed the trial Tribunal that Mihayo M. Masunga gave the sale agreement and the title deed Noriss Masunga as he was traveling for treatment, the said Noriss Masunga died before giving back the documents to his elder brother Mihayo M. Masunga, after his burial his elder brother unsuccessfully tried to acquire the documents from the 2nd appellant who is the widow of Noriss Masunga. DW4 who is the brother of both 2nd respondent Mihayo Masunga and Noriss Masunga testified as defence witness (DW4) on 24/02/2020. His evidence was to the effect that he witnessed the sale agreement of the suit plot and signing of contract between the 1st respondent and the 2nd respondent.

It is undisputed that, upon the publication made by the Registrar of Tittles that the certificate of tittle of the suit property is lost, the 1st appellant emerged with a letter dated 17th April 2019, stating that he has the certificate, and that it was the 2nd appellant who gave him to keep it in safe custody as the 2nd appellant has been intimidated by the 2nd respondent and his wife. The evidence also reveals that the 2nd appellant implies that she inherited the disputed land from her late husband but there is no evidence whatsoever that supports her allegations. It is trite law that one who alleges must prove and the burden of proof lies on the person who positively asserts the existence of certain facts. This position is embodied in the provisions of ***Section 110 (1) and (2) of The Law of Evidence Act*** **[Cap. 6 R.E 2019]** which provides thus;

(i) 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'

See also the case of **Anthony M. Masanga v Penina (Mamam Ngesi)** and another, Civil appeal no. 118 of 2014.

When I examine and weigh the evidence of the 1st respondent against that of the appellants before the trial Tribunal, I find myself more inclined to the obvious fact that the suit land belongs to the 1st respondent and he intended to sell it to the 2nd respondent. Further, based on DLHT records, it was the 1st appellant who informed the registrar of tittles through a letter (see **Exhibit P3**) that he is in possession of the certificate of Tittle after being handled the same by the 2nd appellant. Under those circumstances where the 2nd appellant is the one referred by the 1st appellant, why would the deceased Moris Masunga be involved in the said application? I see no valid reason for that. As rightly argued by the counsel for the respondent, the issue of ownership was between the 1st and the 2nd respondent based on the sale agreement. The 2nd appellant was just in possession of the certificate of tittle of the suit property. I should add, being in possession of a tittle does not necessarily make a person the owner of the relevant plot. Therefore, the 2nd appellant was joined so as to surrender the tittle if the need arises. I join hands with the counsel for the 1st respondent that there was no need for the administrator of the estate of Noriss Masunga to be joined as a party. Having said so the 1st ground fails.

The appellant's contention in respect of the 2nd and the 3rd grounds of appeal is to the effect that, the 1st appellant was not supposed to be joined as a party in this case as he acted on behalf of the law firm and not at individual capacity. This view is vehemently contested by the respondents as explained earlier. Looking at exhibit P2 it shows that the 1st respondent announced to the Government gazette on 10/03/2019 that he lost his title deed. The 1st appellant trading in the name of ARCUS attorney, informed the registrar of titles through exhibit P3 that he has the said title deed. The main complain here is that the appellant thinks it was the law firm named ARCUS Attorney which had to be sued and not himself at his personal capacity. Much as this argument is raised at an appellate stage, the 1st appellant explained before the DLHT that they were only two attorneys who are partners in ARCUS, firm himself and one Chiku Alunus Chande. It is trite law that partners are jointly and severally liable for the actions of the firm. Therefore, as one of the two partners, it was right for him to be sued

Further to that, **Order I rule 9 of the CPC** provides as follows:

'*A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the* ***court may in every suit deal with***

the matter in controversy so far as regards the right and interests of the parties actually before it'. *(Emphasis supplied)*

Inclining to the above provision, the question which the court need to answer is, was the appellant prejudiced by being sued by his name instead of the name of his firm? Referring to exhibit P.3, this is the letter is from the firm known as ARCUS attorneys but the author thereof is the 1st appellant, under these circumstances, the 1st appellant was the right person to represent the firm and hence the right person to be sued. Following provisions under Order XXIX Rule (1) and (2) of the CPC (supra) which was cited by the learned counsel for the first respondent, it was proper for the 1st respondent to sue the 2nd respondent, the 1st appellant, and the 2nd appellant. Based on these findings, the 2nd and 3rd grounds hold no weight, consequently, I dismiss them.

For unknown reasons, the appellant did not submit on the 4th ground of appeal. Either way, by it's nature it will be dealt with in the course of tackling the rest of the grounds. I will therefore not dwell on it.

In the 5th ground, the appellant wished the DLHT could have considered the evidence in the Land application no. 748/2017 which was struck out for being incompetent. Without wasting time, there was no

need whatsoever for the DLHT chair to refer to the said application as any matter before the court is usually struck out because it is incapable of being heard. Once struck out, the implication is that the said case never existed. That is why parties can refile the same application before the same court. See also **Yahya Khamis v Mahida Haji Idd and 2 others** Civil Appeal No. 225 of 2018, (CAT) Bukoba. Therefore, in reaching its findings, the DLHT could not have referred to a non-existing case. This ground is dismissed.

Regarding grounds 6th and 7th respectively, there are several complaints registered. The main complaint by the appellants is that the 1st respondent provided illegal documents namely police loss report and affidavit of loss of document and misled the tribunal that the certificate was lost while it was not. As rightly stated by the learned counsel for the respondent, all these documents were admitted before the DLHT without any objection, the appellant cannot raise the issue of illegality at the appellate stage as he had the opportunity before the DLHT but he opted not to utilise it. Further to that, based on records and as explained hereinabove, in the knowledge of the 1st respondent, the certificate was lost. It is undisputed that he was told so by the 2nd appellant, therefore he had a right and duty to report the said loss. Thus, there was no

document which was illegal before the DLHT. Besides, the 1st respondent would have gained nothing by making false report of a certificate which is in his own name.

On whether the 1st respondent knew the 2nd appellant before, if the 1st respondent met the 2nd appellant at the DLHT as claimed by the appellants that does not mean he knew her before at the time when he was selling the suit plot. The case before the DLHT was filed in 2017 while the sale was done back in 2009.

Regarding the non-consideration of electricity bills by the DLHT, as highlighted above, there was also evidence to the contrary that the 1st respondent has a certificate of tittle in his name. In dispute of ownership of land, obviously, a certificate of tittle will have more weight than electricity bills, it is not surprising why the DLHT did not accord weight to those bills but to the certificate.

As regards the evidence in its totality, as explained in ground one and two above, I find the court relied on the strong testimony adduced before it by the 1st respondent, the 2nd respondent and DW4 in arriving to it's conclusion. Therefore, this grounds also fail.

Coming to the 8th ground, I would agree with the respondents that it was not necessary to call the state attorney named Dora who attested

the sale agreement because there was no dispute between the seller and the buyer. Further the seller (1st respondent) made it clear that he sold his plot to the 2nd respondent and not otherwise. I find this ground hopeless and I dismiss it.

In regard to the 9th ground of appeal, I have revisited the DLHT proceedings at pages 60 through 64, I agree with the contentions by the respondent's counsel that Mr. Joseph Makoye (DW4) testified as defence witness (DW4) on 24/02/2020 before the case was closed. Thereafter, at page 64 of the proceedings the defence case was marked closed. Therefore, there was no irregularity in receiving the testimony of DW4. The last ground also fails.

It should be noted that, it is of judicial serious concern that the 1st appellant, who is an officer of the court, failed to comply with lawful orders issued by the DLHT on 21/2/2020 and on 24/2/2020. He did not surrender the certificate of title to the trial Tribunal even after he was ordered to do so. Before composing this judgment, parties were summoned to state why there was non-production of the certificate of the suit property before the DLHT for scrutiny. The 1st appellant explained that the court order had to be directed to the law firm and not to the appellant as a person. However, the 2nd appellant surrendered the

said certificate. It is a certificate of Tittle No. 21048, in respect of plot No. 161 Block "F" Nyamanoro, Mwanza and it features the name of the 1st respondent, ALEX RWAMBALI. It is an original of exhibit P7.

In the upshot, I find the appeal lacking in merit and I dismiss it in its entirely.

Given that the certificate of Tittle has been surrendered in court, I hereby set aside the order by the DLHT directed to the Registrar of Tittles to revoke and reissue the certificate in respect of the suit plot.

Upon payment of the purchase price balance to the 1st respondent as ordered by the DLHT, the certificate which is deposited in this court, will be surrendered to the 2nd respondent.

For clarity, other orders of the DLHT are hereby upheld.

Costs of this court and that of the trial Tribunal to be borne by the appellants.

It is so ordered.

DATED at **MWANZA** this 2nd day of September 2022.

L. J. ITEMBA

JUDGE

Judgement delivered under my hand and seal of the court in chambers in presence of the 2nd appellant and in the absence of the 1st appellant and both respondents.

L. J. ITEMBA

JUDGE

2/9/2022