

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF SHINYANGA
AT SHINYANGA
LAND APPEAL NO. 76 OF 2022

[From District Land & Housing Tribunal for Shinyanga, Application No.30 of 2021]

MUSSA CLEMENT SALANGO-----APPELLANT

VERSUS

ATHANAS MANDALU NTENWA-----RESPONDENT

JUDGEMENT

Oct. 24th & Nov. 10th, 2023

Morris, J

The appellant above, being dissatisfied with the judgement of the District Land and Housing Tribunal of Shinyanga (*DLHT/trial tribunal*) in Application No. 30 of 2021 preferred this appeal. Four grounds thereof are fronted. He alleges that the trial tribunal erred by not: **one**, finding the sale agreements to be forged; **two**, finding that when the agreements were forged, he was hospitalized at Bugando Medical Centre; **three**, paying regard to the opinion of assessors; **four**; considering the judicial notice issued by the Uchuga Primary Court.

The parties' dispute is over a house located at Mhunze Area, Kishapu District of Shinyanga Region (*the suit house*). Originally, the suit house

was owned by the respondent. He sold it to the appellant for consideration of Tshs 35,000,000/=. However, parties join issues as to whether the same house was resold back to the respondent. Whereas the appellant denies to re-sell the same to the respondent, the respondent contends that he repossessed the same after giving 24 cows to the appellant.

In the contention also, is the allegation that each livestock was estimated at Tshs. 400,000/= yielding the equivalence of Tshs 9,600,000/= in total. It is claimed further that the appellant was unsatisfied with such herd-consideration. So, he reported the matter to the Prevention and Combating of Corruption Bureau (*PCCB*) thereby causing the respondent to add Tshs. 3,000,000/= on top. On the basis of evidence given at trial, DLHT judged in favour of the respondent. Hence, this appeal is to impugn such decision.

The Court ordered this appeal to be disposed by way of written submissions. The filing schedule was complied with accordingly. The appellant was represented by Advocate Ndimi Thomas Ilanga. The respondent, however, had Advocate Emmanuel Sululu to represent him. In the course of submitting, the counsel for the appellant abandoned the



4th ground of appeal. The gist of the respective parties' submissions is considered by the Court while determining the spared grounds of appeal.

Regarding the 1st ground of appeal, it was the submissions of Mr. Ilanga that, the sale agreements which were made on 17/08/2020, indicate that the sale price was Tshs. 12,600,000/= . And that Tshs. 9,600,000/= only was paid leaving Tshs. 3,000,000/= which balance was paid on 22/10/2020. He argued that the same was witnessed by Abdallah Romole, Cosmas Jack and Mhunze Hamlet leaders on 22/10/2020. To him, such state of affairs manifests clearly that the purported agreement/contract was fabricated.

Moreover, the counsel submitted that the second agreement indicates that the sale price was 24 cows valued at Tshs. 9,600,000/= which was paid in full. But, while in the first agreement boundaries were indicated starting from East, in the second contract borders were indicated starting from North. Further, whereas the first agreement was witnessed by eight people (Paul Mathas, Atanas Masele and other 6 witnesses); the second one was witnessed by three (3) people. His conclusion hereof was that the two agreements were ambiguous.



In reply, it was submitted that the suit house was resold by the appellant to the respondent at the exchange of 24 cows-consideration. The agreement was deduced into writing. The said cows were estimated at Tshs. 400,000/= each, Tshs. 9,600,000/= in total. Further, when the appellant went to complain to PCCB offices at Kishapu District that the purchase price was low, the respondent allegedly paid Tshs. 3,000,000/= on 22/10/2020. In his contention, the total price paid was Tshs. 12,600,000/=.

To the respondent, because the appellant alleges fraud, he should have proved it on a higher scale than balance of probabilities. I was referred to the cases of ***Ratilal Gordhanbhai Patel v Lalji Makanji*** (1957) E.A 314; ***Omary Yusuph vs Rahma Ahmed Abdulkadir*** (1987) TLR 169; and section 110 of ***the Tanzania Evidence Act***, Cap 6 R.E. 2022 to the effect that whoever alleges must prove.

I have dispassionately considered the submissions of parties in this regard. This being the first appeal, it is justified to take these proceedings in a form of re-assessment of evidence. I so hold because the appeal is primarily hinged on parties' evidence at the trial Tribunal. In law, the first appellate court retains the mandate to re-appraise, re-assess and re-



analyze the evidence on the record for it to arrive at its founded conclusions. Reference is made to the cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; and ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019 (both unreported).

Further, being civil case, facts need be proved on a balance of probabilities. This position is well stated in the case of ***Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)***, Civil Appeal No. 118 of 2014 (unreported). In addition, it is a cardinal principle of law that, in civil litigation, whoever alleges must prove his/her allegations. See, for instance, ***Obed Mtei v Rakia Omari*** [1989] TLR 111; and ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported). Nonetheless, when elements of crimes are alleged in a civil trial, the onus of proving such elements is heightened against the alleging party. I will revert to this aspect later in this judgement.

I have read the evidence on record thoroughly. At page 12 of the proceedings, the appellant denied the contract dated 17/08/2020 on allegations that he was hospitalized at Bugando at that time. He also



disputed being paid Tshs. 12,600,000/=. Further, he stated that there was a court injunction from the Primary Court against sale of the suit house. He is recorded further testifying that he got the respondent's claims of owning the subject house from his tenant, one Aloyce Masanja. That is why he reported the matter at PCCB, though that strategy did not help him.

However, the respondent testified that he purchased the suit house from the appellant on 17/8/2020. He paid by giving the seller 24 herds of cattle: 20 cows and Tshs. 1,600,000/= the equivalent of 4 cows (exhibit U2). The respondent alleged further that the appellant gave his wife Tshs. 1,000,000/= upon being paid by the former. It is also on record that before the said disposition, the appellant recorded his willingness thereof in writing together with his spouse (exhibit U1). In addition, the respondent stated that on 20/10/2022 he was summoned by PCCB from where he learnt (in presence of Chogolo Reuben) that the appellant wanted to rescind the contract. Consequently, the respondent demanded his cows back to no heed. However, it as well alleged that the appellant demanded to be paid more money (in addition to previous consideration).



According to the respondent, in view of the foregoing demand by the appellant, on 22/10/2020, he paid the latter the addition consideration of Tshs. 3,000,000/=. Henceforth, the amount in the previous contract was accordingly recast to read Tshs. 12,600,000/= which alterations were witnessed by Cosmas Jack and Hamis Seleman (exhibit SU3). The appellant also declared in writing ("*Tamko kwa Umma*") that he sold the said house to the respondent (exhibit U4). Indeed, the evidence of the respondent (DW1), was corroborated by Messrs. Cosmas Jack (DW2); Majire Mageme (DW3); Reuben Michael Chogolo (DW4) and Hamis Seleman Mussa (DW4).

In particular, DW4 - PCCB officer, testified that he was phone-called by the police Officer Commanding District (OCD) who requested him to assist the appellant. When the appellant arrived, he alleged that he had been coned his house; and that he was paid too lowly. So, he was demanding to be paid additional money. It was revealed further that he sold the suit house in order to cater for expenses involved in his contesting for Kishapu constituency parliamentary seat in 2020 general elections.

According to DW4, the appellant complained that he was given cows as consideration but the livestock fetched far below Tshs. 400,000/=

each. On such allegations, DW4 summoned the respondent who, after charged discussions, he agreed to pay the appellant the additional Tshs. 3m/= instead of Tshs. 6m/= demanded by the latter. He added that, on 22/10/2020, parties went back to his offices with a newly signed contract. In addition, DW4 testified that the appellant declared that the suit house was sold to the respondent ("*Tamko kwa Umma*"); and tendered the complaint letter dated 20/10/2020 with appendices (exhibit U5).

I have also examined the exhibits tendered at trial. The sale agreement dated 17/8/2020 (exhibit M6/U2) was for consideration of 24 cows worth Tshs. 9,600,000. It was witnessed by 8 witnesses: Paul Mathias, Atanas Masele, Rebeca Sandu (appellant's wife), Majire Mageme (DW3), Ester Elias, Sala Atanas, Lidia Atanas and George Peter. Further, Cosmas Jack (DW2) witnessed it as the Hamlet chairman.

Another critical document was the Sale Agreement dated 17/08/2020 (Exhibit U3). Consideration therein was Tshs. 12,600,000/-. It also signified that Tshs. 9,600,000/- was paid on such date and the balance (Tshs. 3,000,000/=) was to be paid on 22/10/2020. This contract was witnessed by Cosmas Jack and Abdala Romole. Also, Khamis Selemani - Mhunze Hamlet chairman witnessed the contract on

22/10/2023. Overleaf, the subject contract had parties' endorsement that payment of Tshs. 3,000,000/= was effected. Parties signed it on 22/10/2020. Furthermore, the complaint letter dated 20/10/2020 addressed to PCCB-Kishapu was tendered by DW4 (Exhibit U5). Before tendering the same, DLHT recorded at page 59 of its proceedings that;

"Nyaraka hizo ni hizi hapa malalamiko, makubaliano ya 22/10/2022 na tamko rasmi kwa Umma, na hii ni nyaraka alileta yeye kuwa aligombea ubunge na yupo namba 34, na nyaraka alizokuwa anauza ng'ombe kwa kila Mnada kwani hakuuza kwa mara moja kwa (sic) kule alikokuwa anahifadhi ng'ombe Waliandikishana na yule bwana. Naomba nizikabizi (sic)."

The appellant's counsel objected the said documents to be admitted. The trial Chairman adjourned the matter for the appellant and his counsel to discuss if the said documents was not supplied to DW4 by the appellant. At page 61 the counsel for the appellant was recorded as;

"Arnod: baada ya kuongea na mteja wangu amesema barua hizi ni zake ni malalamiko kwenda TAKUKURU na yeye aliwasilisha hizo nyaraka. Baraza linaweza pokea na kuona kama ni kweli lilivyowasilishwa na ndivyo lipo katika maelezo ya shauri. Mteja wangu kwa kuwa amekubali zipokelewe na kufanyiwa kazi na Baraza lako."



For easy of comprehension, I will pick some vital information from exhibit U5 (complaint latter to PCCB). It tells:

"2. Antanas (sic) Mtendwa (sic) Mandalu huyo huyo ameinunua nyumba yangu, kwa ng'ombe idadi 24 wenye thamani ya kila ng'ombe sh 400,000/- sawa na sh 9,600,000/= kwa ujumla wao.

3. Nimejaribu kuwauza ng'ombe hawa hakuna aliyeweza kununuliwa sh. 400,000/=... ng'ombe mmoja alichukuliwa na M/kiti Cosmas Jackson wakiwa na ndugu Paulo Mathias kwa kivuli cha udalali.

4. Kwa mchanganuo huu nyumba yangu imenunuliwa sh 7,300,000/= kwa ujajaujanja (sic) na utapelitapeli (sic).

5. Pamoja na Barua hii nimeambatanisha photocopy (vivuli) vya nyaraka zifuatazo...Mkataba mpya, baada ya mimi kuuza nyumba kwa Antanas Mtendwa Mandalu. Barua ya mgao wa fedha sh 1,000,000/- na ng'ombe mbili, alizogawiwa Bi Rebeca Sandu, mzazi mwenzangu. Mgao ambao alipewa na mwenyekiti kutoka kwenye mauzo ya nyumba yangu bila ridhaa yangu.

By exhibit U5 and its annexures, the appellant admitted that he entered into a sale contract with the respondent on 18/7/2020. The said exhibit further corroborates the evidence of the respondent that he was given the said cows and Tshs. 1,600,000/= out of which he gave Rebeca Tshs. 1,000,000/= and 2 cows as her share (to signify spousal consent).

After such complaints by the appellant, DW4 facilitated parties' negotiations which culminated into execution of another contract on 22/10/2020 thereby altering terms of the previous contract (of 17/8/2020). Indeed, the second contract was signed on 22/10/2020. All matters in context, the date at the beginning of the page (17/8/2020); and details that Tshs. 9,600,000/= was paid leaving Tshs. 3,000,000/= balance; was, to me, making the foundation for payment of the outstanding Tshs. 3,000,000/= in connection with the previous contract. Further, on the same date, the appellant gave his declaration (Exhibit U4) to signify his consented disposition of the suit house. Essentially, this document was not contested by the appellant on the basis of forgery.

As correctly submitted for the respondent, the allegations by the appellant that the two contracts were forged for want of his signature; are criminal accusations. Hence, such allegations must be proved, not on balance of probabilities, but more. It is the law that fraud/forgery in civil case needs to be specifically pleaded and proved on higher degree of probability. See the cases of ***Gabriel Mathias Michael and Another v Halima Feruzi and 2 Others***, Civil Appeal No. 28 of 2020; ***City Coffee Ltd v The Registered Trustee of Iloilo Coffee Group***, Civil Appeal No.



94 of 2018; ***Dominicus Zimanimoto Makukula (administrator of the estates of the late Dommy Dominicus Makukula) v Dominica Dominicus Makukula and 3 others***, Civil Appeal No. 359 of 2020 (all unreported). The 1st ground of appeal is, therefore, overruled.

Regarding the second ground of appeal, it was submitted that when the sale agreements were forged the appellant was sick and hospitalized at Bugando Medical Centre. That is, according to medical appointment Card No. 87690; the appellant was admitted at Bugando Medical Centre. Further, he stated that NHIF forms No. 2276908, 28772811 and 30387365 proved his being hospitalized on 17/8/2020 and 22/10/2020.

In reply, it was submitted by the respondent that the allegations of hospitalization are not true. To the respondent, during such time, the appellant was contesting for parliamentary membership which is contrary to exhibit M3 which indicate that the appellant was hospitalized from 5/6/2019 to 11/6/2019. The respondent reiterated that the suit house was sold by the appellant and his wife, one Rebeca Sandu, consented thereto.

I have read the evidence on record. At page 12 of the proceedings, the appellant testified that he was hospitalized at Bugando in 2019. He also tendered his photos (exhibit M2); Appointment Card and discharge



summary (exhibit M3 collectively) (page 13 of the proceedings). Further, at page 16, he testified that he attended his clinic at the same hospital on 17/8/2020 and 22/10/2022. I am loath to accept such the appellant's contentions regarding his absence. I have several reasons. **One**, the photos (exhibit M2) do not show when they were taken. They also have no corresponding evidence to prove how they were generated.

Two, the discharge summary (exhibit M3) tells that he was admitted on 5/6/2019 and discharged on 11/6/2019. These dates have no bearing of dates on issue. **Three**, the appointment card No. 87690 (exhibit M3 collectively) only mentions 17/8/2020 and 22/10/2020 to be dates of the appointment. They are not sufficient to prove that the appellant attended at the hospital without further proof thereof. **Four**, the alleged NHIF forms have merely been mentioned in the submissions. They were not part of pleadings or evidence before the DLHT. Therefore, the appellant has failed to prove that at the time the sale contracts were made he was hospitalized.

Five, it was proved by DW4 that the appellant, at the alleged time, was contesting for Kishapu parliamentary seat per the contesters list (exhibit U6). I am inclined to find that the same represents the true state



of events because the appellant used it to prove his motive of selling the suit house. **Six**, by exhibit U5, the appellant admitted entering into contract with the respondent to sale the suit house. Therefore, he was present for execution of the same. The 2nd ground of appeal is equally feeble. I disallow it too.

Regarding the last ground of appeal, it was submitted for the appellant that the opinion of assessors was disregarded. To him, both assessors opined for the application to be allowed with costs. Moreover, it was submitted that the opinion of assessors is rendered under section 24 of ***the Land Disputes Courts Act***, Cap 216 R.E 2019. And that the trial Chairman did not give strong reasons for departing from that set of opinion. To the appellant, the reasons stated at page 10 of the judgement are weak. Reference was also made to ***Eliumba Elizel v John Jaja***, Civil Appeal No. 30 of 2020 (unreported) to the effect that the opinion of assessors should be recorded and when departed from, the Chairman must record his reasons.

In reply, it was submitted by the respondent that the Chairman gave reasons at page 10 of the judgment for departing form the opinion of assessors. Having considered the rivalry arguments of both sides, I think

it is necessary to quote the applicable law hereof. The opinion of assessors at the DLHT is governed by section 24 of **Cap 216 (supra)**. The provision reads, thus;

*"24. In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment **give reasons for differing with such opinion** [bolding rendered for emphasis]."*

Parties herein unanimously note that the set of assessors' opinion was discussed and reasons for departure were given at page 10 of the DLHT judgement. However, for the appellant such reasons were weak. I do not comprehend the basis of the appellant's contention hereof. The cited law above only requires reasons to be stated by the Chairperson for differing with assessors' opinion. It does not require such Chair to state strong reasons. Therefore, it suffices the law if reasons are stated, stout or otherwise. It calls for no overemphasis, here, that what constitute strong reasons is not only subjective but also untenable. Hence, the 3rd ground of appeal is also devoid of merit. It is accordingly disallowed.

In the upshot, all grounds of appeal lack merit. I will, thus, not interfere with the judgement of the trial DLHT. Consequently, the appeal



stands dismissed. The respondent shall have his costs herein. It is so ordered and right of appeal is fully explained to the parties.



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C.K.K. Morris

Judge

November 10th, 2023

Judgement is delivered this 10th day of November 2023 in the presence of Messrs. Mussa Clement Salago and Athanas Mandalu Ntenwa; the appellant and respondent respectively.

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C.K.K. Morris

Judge

November 10th, 2023

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