

TANZANIA / JUDGMENT

20170915 TZHC Mwanza

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~ 1•', < - 'v'f- IN THE HIGH COURT OF TANZANIA G . ,d. , IN THE DISTRICT REGISTRY
ATMWANZA 0 MISC. LAND CASE APPEAL NO. 170 OF 2015 (Arising from Land Appeal No. 33 of
2015 of Geita District Land and Housing Tribunal and original from Jgulumuki Ward Tribunal
Case No. 5 of 2014) ANDREW SHILOTI -----APPELLANT VERSUS ALLON
KALIMBIA -----RESPONDENT .

JUDGEMENT

Ebrahim, J.: Allon Kalimbua had initially instituted a suit against the appellant at Igulumuki Ward Tribunal, Case No. 5 of 2014. The respondent claimed at the Ward Tribunal that the appellant had sold him the disputed land at the price of Tshs. 3,000,000/-. They qgreed the appellant shall hand him over the disputed land in Sept 2011. He testified at the trial Tribunal that they agreed to put the agreement into writing after the appellant has purchased another land at Nyawilimilwa and later the agreement was witnessed by 1 The appellant testified at the trial Tribunal that he secured a loan of Tshs. 3,000,000/- from the respondent, his brother in law for the purpose of buying a farm at Nyawilimilwa. They did put the agreemerit in writing and it was witnessed at the office of Nyamilimilwa - Geita. The appellant had put the disputed land as collateral. The dispute arose when the respondent started cultivating the disputed land. He testified further the respondent had once gone to claim that he purchased the disputed land at Baraza la Ardhi Ijinga. It was decided that the appellant had only borrowed money from the respondent · and he was ordered to refund Tshs. 3,000,000/- and the respondent wanted to be paid interest of Tshs. 800,000/-. Aggrieved, the appellant then filed a Civil Case No 29/2012 where it was ordered that he should refund the respondent Tshs. 3,000,000/- of which he did and the money is in Court. Both parties in this case called witnesses. The appellant called a total of additional three witnesses and the respondent two witnesses. Upon hearing the evidence of both parties and visiting locus in quo, the trial Tribunal decided in favour of the respondent on the basis that the wife of the respondent said that the money was for buying the land, the appellant responded a cross examination question that t h e ~ t cannot be used; and that collateral cannot be sold before refunding the money . . The appellant was aggrieved and preferred an appeal at the District Land and Housing Tribunal for Geita at Geita. The first appellate Tribunal dissenting with the opinion of one of the assessors upheld the decision of the trial Tribunal on the basis that the allegation by the appellant that he put the disputed land as collateral was skimpy. Aggrieved again, the appellant preferred the present appeal raising four grounds of appeal that:

1. That, the Geita District Land and Housing Tribunal chairman did not whole canvas the grounds of appeal were raised and argued by the appellants counsel- in his grounds of appeal at the Geita District Land and Housing Tribunal.
2. That the appellate tribunal chairman erred in law to hold that the appellant Andrew Shiloti really sold the suit land. while the evidence in record shows that he only mortgaged the suit land for consideration of Tshs. 3,000,000/= which he latter on repaid to the respondent.
3. By the statement that the minimum number of quorum of a sitting of the ward tribunal is four members and the maximum is eight the appellate chairman misdirected himself in law as to the minimum and maximum number of the quorum of the Ward tribunals.
4. That the appellate District tribunal did not bother to peruse the evidences of the appellant and ended in giving wrong decision. At the hearing of the appeal, the appellant who appeared in person unrepresented adopted his grounds of appeal and told the Court that the disputed land was put as collateral but the respondent refused to discharge it. He stated further that he has already returned respondent's money and that the loan was in writing. Advocate Katemi represented the respondent and supported the decision of the Ward Tribunal and DLHT. He contended that there was written sale agreement hence the 1st, 2nd and 4th grounds of baseless and should be dismissed. 4. Responding on the issue of quorum, he agreed with the decision of the DLHT that at all the sittings the Ward Tribunal listed the members who were not less than four and not more than eight. He urged the Court to dismiss the appeal on the basis that this Court cannot interfere with the concurrent findings of the two lower Tribunals. He cited the case of Marindo Marwa V. Charles Wambura & 6 others, (PC) Civil Appeal No. 44/2009. He prayed for the appeal to be dismissed. In brief rejoinder, the appellant urged the Court to go through the evidence on record and other witnesses to the said agreement. He reiterated his prayer. Upon perusal of the court records, the Court wanted parties to address the presence of the two different letters of 24.07.2011. The appellant objected the said sale agreement on the basis that the stamp on the document together with the witnesses on the same shows that are from Geita at Nyawilimilwa at Kasemi Hamlet whilst the disputed land is at Ijinga. He also raised a question as to how can a person who bought the land charge 10% interest; where does the interest come from sale? Adv. Katemi told the Court that in the interest of justice he has no issue to call those who signed the document. As for the authenticity the same can be referred to the relevant authority. Moreover on 21.04.2017, Mr. Katemi told the Court that he has managed to secure the judgement on Civil Case No. 29/2012 where the original agreements were tendered hence prayed for Court guidance in calling for the records of the Primary where the whole dispute began. The appellant also urged the Court to call for records in respect of the Civil Case No. 29/2012. The file from Primary Court in respect of Civil Case No. 29/2012 forms part and parcel of the record of the proceedings of this case. Indeed this is a second appeal and I subscribe to the holding of the cited case of Marindo Marwa (supra). As the general rule goes the second appellate court should not disturb the

concurrent findings of facts of the lower courts unless there has been a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or practice (CA - in the case of Salum Bugu V Mariam Kibwana, Civil ~ of 1992). Nevertheless, in so far as this appeal is concerned, I find that interference of this Court is pertinent for there is misapprehension of evidence as I will demonstrate in the course of my judgement. In determining this appeal, I shall begin with the ground of appeal on the composition of the members of the trial Tribunal. This ground need not detain me much. I have thoroughly gone through the proceedings of the trial Tribunal on record. At every sitting the quorum was met. Therefore I dismiss this ground of appeal. As for the remaining grounds of appeal the bone of contention is whether the disputed land was sold to the respondent or it was put as collateral for the loan advanced to the appellant. In addressing the above issue it is pertinent that I revisit the evidence on record. The respondent who was the applicant at the trial Tribunal claimed that the appellant had sold him the disputed land at the price of Tshs. 3,000,000/- and that their agreement was reduced into writing. He tendered a photocopy of the said sale agreement. He called additional two witnesses, Marietha Kazimili (SM2) his wife who b a s i c ~ L - . ~ 7 testimony that the money that they availed the appellant herein was for the purchase of his land and not a loan. Another witness Mapambano Shomali ~SM3) eviden_ced before the Tribunal that ~he disputed land is 12 acres and that the respondent after handing over the money to the appellant called the Village Authority and informed them that he has purchased the disputed land. He also testified that there was no house in the disputed land. The appellant on the other hand testified before the Tribunal that he secured a loan of Tshs. 3,000,000/- from the respondent who is his brother in law for the purpose of buying a farm at Nyawilimilwa. They did put the agreement in writing and it was witnessed at the office of Nyamilimilwa - Geita. The appellant had put the disputed land as collateral. Moreover, they did not put any terms pertaining to the interest or period of payment. The . . appellant submitted an original copy of the loan agreement. He called a total of 3 additional witnesses. SU2- Marco Sahani testified that parties had a written loan agreement which was entered before the Hamlet office. The land of the appellant was put as collateral and there is a house in the disputed land. He witnessed the said agreement and he confirmed to have a copy . of the said agreement which was entered on testified further that their agreement did not set interest nor loan period. V Amos Juma's testimony (SU3) was to the effect that the respondent had borrowed the appellant !shs. 3,000,000/- and the appellant had put his house and land as collateral. The last witness for the appellant was Simon Ngh'olo (SU4) who witnessed the agreement and told the trial Tribunal that the agreement for the loan was entered on Sunday, 24 th July 2011 at 1700hrs. He testified that they gave each party a copy of the said agreement and the house was put as collateral. In brief that was the evidenced adduced at the trial Tribunal. In evaluating the evidence, I would wish to begin with the evidence of Mapambano Shomali (SM3) witness for the respondent. I am aware that the credibility of a witness is a monopoly of a trial court and it is trial Tribunal for our case. However, the appellate court can determine the credibility of a witness by considering the testimony of the witness in relat!on with evidence of other witnesses. This principle was well illustrated in the case of Siza Patrice V R, Criminal Appeal No. 19 of 2010.

Mapambano Shomali (SM3) gave out testimony for the respondent that parties entered into an agreement to buy the disputed land. Nevertheless upon my perusal of the documents, I found that he was also among those who witnessed the loan agreement between the appellant and the respondent. Further when he was adducing his evidence, he said that the disputed land is 12 acres and there is no any house in the said land. Going by the evidence of all parties including the respondent himself, there are two houses in the disputed land. This shows that Mapambano Shomali was lying hence a question on his credibility as a witness. Consequently, I discard his evidence and accord no weight at all. Coming to other pieces of evidence, the respondent presented at the trial Tribunal a copy of the sale agreement that was entered between himself and the appellant. The said copy of agreement leaves a lot to be desired. First of all, there is vast evidence by the witnesses of the appellant who witnessed the loan agreement. According to those witnesses there was no any condition on neither interest nor loan period. Both Marco Sahani and Simon Gh'olo evidenced that parties were availed with the copy of the agreement. Again, looking at the sale agreement of the respondent; it can be easily observed even in its photocopy form that it is doctored and does not need an expert to observe that. That beside the point, the same agreement talk about the purchase of the land and then if it is cash interest 10% per month. This goes to my assertion that the respondent leaves a lot to be desired as rightly questioned by the appellant. Coming to the appellant, upon my perusal of the documents in records, I found an original loan agreement between the appellant and the respondent of 24.07.2011 witnessed at Nyawilimilwa, Kaseni hamlet where the appellant went to buy land, hence the loan from the respondent. Need not over emphasise here that in terms of the provisions of Section 100 of the Evidence Act, Cap 6, RE 2002 where evidence is reduced into writing, no other evidence shall be given to prove the terms of such matter except the document itself. Therefore the loan agreement speaks of itself. In furtherance agreements are executed in counter-parts, thus each counterpart is the original. That being the case therefore, the respondent cannot tender a photocopy to disapprove the original. The story would be different if the respondent also had the original but he had none. It follows therefore that, indeed the two lower Tribunals did not consider relevant pieces of evidence which were right in front of them. More importantly, the respondent has not disputed anywhere that he did not refund Tshs. 3,000,000/- by the appellant as ordered by the Primary Court in Civil Case No. 29/2012. From the background above, I find that there was misapprehension of evidence at the two lower Tribunals which resulted into arriving to a wrong decision. In the upshot, I find that the appeal has merits and accordingly allow it with costs. I further declare the appellant to be the rightful owner of the disputed land. The respondent should go to Primary Court to collect his Tshs. 3,000,000/- that has already been paid by the appellant. Ace R.A. Ebrahim Judge 15.09.2017 12

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