

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA MISC. LAND APPEAL NO. 19351 OF 2024 (Originated from Trial
Tribunal of Kyela Application No. 18 of 2023) DERICK
MWANGUPILI..... APPELLANT VERSUS BARUSHA M.
MASANJA..... RESPONDENT

JUDGMENT

Date: 4 November 2024 & 16 January 2025 SINDA, J.: The respondent in this appeal at the District Land and Housing Tribunal of Kyela (the Trial Tribunal) filed Land Application No. 18 of 2023, claiming to be the lawfully owner of one acre located at Ndwanga hamlet “B”, in Ndwanga village, at Katumbasongwe Ward, Kyela district within Mbeya Region (the Disputed Land) which he bought from Richard Mwaibata. The appellant claimed that the Disputed Land does not belong to the respondent. At the end of hearing the Trial Tribunal found that the Disputed Land belonged to the respondent. 1 Aggrieved with the decision, the appellant filed a memorandum of appeal with five grounds of appeal as follows:

1. That the trial Chairman erred both in law and facts when ordered that the appellant legally bought disputed land in absence of approval from the clan beneficiary.
2. That the trial court erred in law and fact when delivered its judgement in favour of the respondent while the case was not proved in balance of probability.
3. That the trial chairman erred in both law and facts when delivering its judgement basing on exhibit P.1 which has no evidential value.
4. That the trial Chairman misdirected herself when holding that forgery should be proved only on criminal case and not otherwise
5. That the trial Chairman erred in law when denied the appellant’s right to recall his witness for further examination chief contrary to the law. During hearing of the appeal, the appellant was represented by advocate Ezekiel Mwampaka while respondent was represented by advocate Joseph Mwainyakule. The appeal was argued by way of written submission. 2 The appellant submitted the first, second and third ground of appeal together on whether the respondent managed to prove his case to the standard required in civil

cases. He stated that it is a principle of law that generally, in civil cases, the burden of proof lies on a party who alleges anything in his favour. As provided under section 110 of the Evidence Act, Cap 6, R.E 2022 (the TEA). It is common knowledge that in civil proceedings, a party with a legal burden also bears the evidential burden. The balance of proof is on the balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on the particular facts to be proved. He added that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of weakness of the opposite party's case. he referred the case of Paulina Samson Ndawavya Vs Teresia Thomasi Madaha, Civil Appeal No. 45 of 2017 CAT Mwanza) He stated that in the instance appeal, the respondent was the one who set the law in motion thus burden of proof lies on him. The respondent affirmed that he bought the Disputed Land from one Richard Mwaibata on 17 May 2007. He produced a sale agreement to that effect. However, 3 that sale agreement has several discrepancies. There was no stamp from the local leader nor signature of the said leader. These brought doubts on the authenticity of the sale document. The respondent avers that the sale agreement was witnessed by the son of the vendor one Dancho Mwangupili. The sale agreement had only the name of Dancho without any surname or his signature. These can be witnessed on the sale agreement which was produced during hearing by SM1 and admitted as exhibit P1. On the said exhibit there is no vendor signature except his name neither the Hamlet chairman signature but his name. He added that it was necessary for the respondent to call Adam Mwamasangula, the hamlet chairman by then, as a material witness to prove his case. He argued that it is on record that the sale agreement was witnessed by three independent persons Dancho, Keneth Mwakyalaba and Adam Mwamasangula during the execution of the contract. But, at the hearing of the suit, the applicant paraded only one witness who was himself. He referred to the case of Hemed Said vs Mohamed Mbili [1984] TLR 113 to support his case. He submitted that the respondent failure to call those material witnesses to testify, was because the respondent knew that the sale agreement 4 was cooked. That is why there is no signature and stamp on the sale agreement. He further argued that the Trial Tribunal was of the opinion that the respondent managed to prove his case as required in civil case. However, he stated that the respondent in the Trial Tribunal failed to respond on how he got the Disputed Land when he was cross examined by the appellant counsel. He referred to page 32 of the typed proceeding of the Trial Tribunal (the Proceedings). He further contended that the question is, whether Richard Mwaibata, the vendor had capacity to transfer the Disputed Land without first obtaining a letter of administration of the estate. He added that the vendor was on someone's land as a caretaker for other heirs. Being a caretaker implies that the person is given temporarily occupation to use the land but does not have the right to dispose or transfer ownership. He referred to the case of Jane Kimaro vs Vicky Adili, Civil Appeal No. 212 of 2026 to support his argument. He further maintained that in the case of Lujuna Shubi Balonzi vs The Registered Trustees of Chama Cha Mapinduzi 1996 TLR 203 the only person with capacity to deal with the deceased estate is only the administrator of the estate who was duly appointed by a competent 5 court. He added that the respondent admitted that Richard Mwaibata was not

the administrator of the estate, therefore, had no locus standi to dispose the Disputed Land. On the last ground on whether the right to recall a witness must be accompanied by a cogent reason. He argued that the appellant counsel at the Trial Tribunal prayed before the honourable Chairman under section 147(4) of the TEA to permit the appellant to recall SU1 who had already testified for further examination in chief. The court declined to grant the prayer. He argued that the act of the trial Chairman to declined the prayer was against the the law. He submitted that recalling a witness does not prejudice either party since each party has right to cross- examination or re-examination. He prayed the court to allow the appeal. In reply, the respondent submitted that the respondent persuaded the Trial Tribunal that he was the owner of the Disputed Land. On the point that the sale agreement has no authenticity is immaterial because the document was admitted as annexure "P1" without any objection for want of authenticity. He added that the appellant is precluded at this appellate stage to question the issue of authenticity and this court can not decide on the matter which was not decided at the Trial Tribunal. He referred to section 64 (1) (b) of the Land Act, Cap 113, R.E 2019. 6 On the assertion that Adam Mwamasangula the hamlet leader, was to be called as a material witness. He argued that the fact he pleaded at the Trial Tribunal was proved by himself as PW1. There were no any pleaded material facts which required the testimony of the hamlet leader. He further submitted that Richard Mwaibata was not supposed to obtain letter of administration of the estate because he was the owner of the Disputed Land. He referred the paragraph 6 (a) (i) of the Land Application. On the last ground the respondent maintained that the Trial Tribunal was right to reject prayer of recalling a witness without any apparent reason by the counsel of appellant because the right under section 147 (4) of TEA is not automatic. That, it requires leave of the court upon sufficient reason to move the court to do so and the same was not complied. In rejoinder, the appellant reiterated his submission in chief. I have considered court records, grounds of appeal and submission filed by the parties. I find the appeal can be disposed under one issue of whether this case at the Trial Tribunal was proved to the required standard. Section 110 (1) of the TEA states that: 7 "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." Also, in the case of Paulina Samson Ndawavya versus Theresia Thomas Madaha, CAT at Mwanza, the Court of Appeal stated that apart from stressing the standard of proof in civil proceedings being proof on the balance of probabilities, it also stressed that; "It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of the weaknesses of the opposite parts case" Now, discussing the above issue on whether this case at the Trial Tribunal was proved to the required standard. This court being the first appellate court will re evaluate the evidence on record. The respondent during hearing testified that he purchased the Disputed Land from Richard Mwaibata in 2017. He further stated that they made their sale agreement before a hamlet chair called Adam Mwamasangula. The agreement was witnessed by Keneth Mwakalyaba on the respondent side and Dancho Richard on part of the seller (Richard Mwaibata). He tendered the sale agreement which was admitted as exhibit P1. I have gone through exhibit P1 and find that as correctly argued by

the 8 appellant exhibit P1 was not stamped by the seal/stamp of the hamlet leader. This brings doubt on whether it was true that the agreement was made before the hamlet chair as stated by the respondent. Based on that defect, I find that the exhibit P1 is invalid and I expunge it from the court records. It is also a position of law that failure to call material witness who is within reach without sufficient reason being shown, the court may draw an inference adverse to the prosecution. This position was clearly alluded by the Court of Appeal in the case of Azizi Abdalah vs. R,

[1991] T.L.R 71. In this matter the respondent stated that the sale agreement was made before a hamlet chair Adam Mwamasangula and was witnessed by Dancho Richard and Keneth Mwakyalaba. But both were not called by the respondent to prove that fact during hearing before the Trial Tribunal. Reasons were not given before the Trial Tribunal as to why they were not called to testify. The said Dancho Richard testified on the appellant side. But, he testified on something else contrary to what was said by the respondent. It is my considered opinion that these witnesses are material witnesses and failure for the respondent to call them to testify 9 on his side draw an inference that if they would have been called to testify, they would testify contrary to what was stated by the respondent. Based on the above analysis, I find that the case was not proved by the respondent to the required standard as required by the law. Therefore, the judgment of the Trial Tribunal and the orders are set aside. The appeal is allowed with costs. Right to appeal is explained. DATED at MBEYA on this 16 Day of January 2025. A. A. SINDA JUDGE 10

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