

TANZANIA / JUDGMENT

Idrisa

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA LAND APPEAL NO. 66 OF 2023 (Arising from the District Land and Housing Tribunal for
Karagwe at Kayanga in Application No. 20 of 2020) IDRISA
MWINORI..... APPELLANT VERSUS DR BYERA
SHWEKERELA..... 1st RESPONDENT GRESMO
ISHUZA..... 2nd RESPONDENT

JUDGMENT

28th October & 4th November 2024 KIWONDE, J. Before the District Land and Housing Tribunal for Karagwe at Kayanga, the first respondent, Dr. Byera Leopord Shwekerela, filed Land Application No. 23 of 2020 claiming for his land which was sold by Mr. Gresmo Ishuza without his consent. Upon conclusion of the trial, the trial tribunal declared him the lawful owner of the land in dispute and the appellant, Idrisa Mwinori was ordered to vacate from the suit land. i Being aggrieved by the said decision, the appellant, Idrisa Mwinori, preferred the present appeal raising six (6) grounds of appeal namely:

- 1) That the trial chairman erred in law by making decision by using a legal issue which was not framed by the trial tribunal on the first day of hearing.
- 2) That the trial chairman erred in law and fact by failure to know that the admitted exhibit A1 was not elaborating the location of exchanged landed property between the respondents as to whether it was same Plot No. 110 Block C.
- 3) That the trial chairman erred in law and facts by making decision relying on the exhibit A1 which lacked the necessary witnesses, contrary to the law.
- 4) That the trial chairman erred in law and fact to rule that the suit property was the property of the 1st respondent while the 1st respondent had failed to prove whether the 2nd respondent was the lawful owner of the suit property.
- 5) That the trail chairman erred in law and fact by failing to rule that the ownership of the registered land can only be proved by the title deed. 2

- 6) That the trial chairman decided against the weight of evidence. The appellant prayed this court to allow the appeal with cost, quash and set aside the decision of the trial tribunal. The respondents filed a reply to the memorandum of appeal opposing the appeal and the matter became ripe for hearing. During hearing of this appeal, the appellant was represented by Mr. Peter Matete, learned counsel, while the respondents hired the legal services from Mr. Mathias Rweyemamu learned counsel. When invited to submit in support of the appeal, Mr. Peter Matete, abandoned the first ground of appeal and submitted on the rest five. In supporting the second and third grounds of appeal, the learned counsel submitted that exhibit A1, which is the handing over letter of the suit property does not state where the suit land is located. He submitted that it was alleged that the land in dispute is located at Nkwenda but the said land was not described as to the boundaries so as to ascertain if it is the same plot in dispute. The learned counsel submitted that the plot given to the 1st respondent is at Karo hamlet while Nkwenda Station is another hamlet. He argued that the 3rd plot at Nkwenda Station was sold to Sosthenes Karoli. According to him that means the 2nd respondent did not give the said plot to the 1st respondent. He further submitted that the land given to the 1st respondent by the 2nd respondent is bordering each other. Whereas, the 2nd respondent testified that the plot owned by Dr. Byera is not bordering his land. The learned counsel submitted that exhibit A1 proves that the land in dispute does not belong to the first respondent. Besides that, the counsel submitted that the trial tribunal had to visit locus in quo so as to ascertain the boundaries. He prayed this court to find out that the exhibits admitted and relied upon are not enough to determine the dispute and this court declare that the suit land is the property of the appellant. As to the fourth, fifth and sixth grounds of appeal, the learned counsel submitted that the trial tribunal erred by holding that the disputed land belongs to the 1st respondent while it was not proved. He insisted that the appellant proved that the land belongs to him by calling Salvatory and Maganga who proved that the appellant bought the said land in dispute. The counsel further said that the evidence adduced by the 1st respondent did not prove the case to the standard required, that is, at the balance of 4 probabilities. He therefore, prayed this appeal to be allowed, the trial tribunal decision be quashed and the appellant be declared as the rightful owner of the suit land. In reply to the submissions in-chief, Mr. Mathias Rweyemamu, learned counsel, opposed the appeal. He submitted that the 2nd respondent was not a trustworthy witness and that is why he was joined in this matter. Concerning exhibit, A1, he argued that it was written by the 2nd respondent and it shows that the land in dispute is located at Nkwenda Station and it was admitted without objection. The counsel for the respondents said further that the records indicate that the 2nd respondent asked to return the said plot to the owner who is the 1st respondent, so, the 2nd respondent spoke the truth and he is estopped under section 123 of the Evidence Act, Cap 6 to act otherwise. He said this appeal be dismissed for lack of merit. As to the proof of the case, the counsel said in civil matters, the same is at the preponderance of probabilities, but the appellant failed to prove ownership of the land in dispute. He submitted that the appellant said he bought the said land from Salvatory and Rutamanya, but he did not tender any document to prove the same. 5 Also, the counsel submitted that the appellant prayed to tender the sale agreement from Salvatory but it was

rejected because it was a photocopy. Moreover, the counsel submitted that when the land in dispute is a register land, then the procedure of transfer must be followed as per section 64 of the Land Act, Cap 113 and therefore, one cannot rely on oral evidence. To support this point, he cited the case of Maria Amandus Kavishe Versus Noran Waziri Mzeru (Administrator of the estate of the late Silvanus Mzeru) and another, Civil Appeal No.365 of 2019 Court of Appeal of Tanzania. In addition to that, the learned counsel argued that the 1st respondent asked for general damages, which he prayed to be consequential order because the trial chairman did not assess them. He cited the case of Aidan George Nyonge Versus Magesa Machenja and 3 others, Civil Appeal No.292 of 2017, Court of Appeal of Tanzania. Finally, he prayed this appeal be dismissed with cost for want of merits. In rejoinder submissions, Mr. Peter Matete, on the issue of general damages, said there is no cross-appeal on this matter and he was of the view that if the counsel saw anything of such nature, he had to file cross- appeal. 6 On the issue of registered land, he submitted that it is a cardinal principle that he who alleges must prove, and the burden of proof was on the 1st respondent and not the appellant. He submitted that the argument that the appellant did not prove ownership is shifting the burden of proof. He argued that the cited case of Maria Amandus (supra) favours the appellant and that it is the 1st respondent who was required to describe the size of the suit land he claimed. Regarding the sale agreement which proves ownership, the learned counsel submitted that this was not objected by Mr. Alli Chamani, learned counsel but the trial chairman rejected it. He further submitted that the appellant brought before the tribunal, witnesses such as Salvatory and Burhani Mussa Maganga who proved ownership of the land in dispute to be of the appellant. In response to the argument that the 2nd respondent wanted to return the land to the 1st respondent, the learned counsel submitted that those are just mere words because he did not speak under oath. However, he agreed that those words are in court record but they were just mere words. Also, he said that parties are bound by their pleadings only. The learned counsel said the 1st respondent was duty bound to prove his claims and the trial tribunal had to visit the locus in quo. 7 Having gone through the trial tribunal records and the submissions from both parties, the issue for determination is whether this appeal is meritorious. In the appeal at hand, the dispute between the parties is on the ownership of the suit land. Thus, the trial tribunal and this appellate court have to scrutinize and decide as to who is the lawful owner of the land in dispute. It is a cherished principle of law that the burden of proof lies on the person who alleges existence or not, of a fact to persuade the court to decide in his favour. Also, in civil proceedings, the standard of proof is at the balance of probabilities. The court has to base its decision on the proper evidence which is credible and heavier than the other on a particular fact to be proved. This position has been elaborated in a number of decisions like Anthony Masanga Versus Penina Mama Ngesi and Another, Civil Appeal No. 118 of 2014, and Hamza Byarushengo Versus Fulgencia Manyanga and 4 others, Civil Appeal No. 33 of 2017 (all unreported) In this appeal, it is clear from oral and documentary evidence available that the land in dispute was owned by the 1st respondent, Dr. Byera Shwekerela and that the 2nd respondent one Gresmo Ishuza sold the land 8 in dispute to Selestine Karoli without the consent of owner. That is not enough, the 2nd respondent agreed that he sold the said land

accidentally without the consent of the owner and he promised to compensate him by giving another piece of land as per exhibit A, part of it reads and I quote: "Mimi Gresimo Ishuza nimembadHishia kiwanja changu kilichopo hapa Nkwenda Station dhumuni ni kwa sababu ya kiwanja nilichokuwa nimemuuzia Sositenesi Karo/i hakikuwa changd' From this, it follows that the sub-issue here is whether the 2nd respondent had a good title to pass. In law, no person can pass title which he does not have. This position of the law was stated in the case of Farah Mohamed vs Fatma Abdallah [1992] TLR 205. Therefore, since the 2nd respondent had no good title to pass, then the said sale of the land in dispute to Sositenesi was illegal. Besides that, in law, the buyer is required to inquire of the land he wants to purchase to acquaint himself if there is any encumbrance on the said interest in land under the principle of buyer beware. The suit land is registered one. Thus, oral evidence cannot override documentary one. It was incumbent on the appellant to conduct legal search before to ascertain on the proper and actual status of the land before the purchase 9 instead of relying on what he was merely told by Mr. Salvatory Rutamanya and Butian Maganga Ishuza. Regarding the issue of land description, it is on record that the said land was describe in the pleadings as Plot No. 110, Block C, located at Nkwenda Station and during trial, the 1st respondent (the then applicant) stated that his land is located at Nkwenda Station, within Nkwenda village at Nkwenda harmlet in Kyerwa District. Apart from that, during hearing of the application, the 1st respondent managed to describe the land in dispute by stating the same details. He specified the size to be 36 to 30 paces and that it is bordering with NAFCO farm in the north, KKT farm in south and the main road which is going to Kakerere to Kaisho in the west and Kigaga farm in east. From this evidence, it is obvious that the suit land was properly described. The counsel for the appellant argued that it was necessary for the trial tribunal to visit the locus in quo on reason that the location of the suit land was not certain. He said the evidence showed that it was in Karo hamlet different from Nkwenda Station. At this juncture I should state that visiting the locus in quo is discretional. The trial tribunal can do so if the interest of justice so requires. In Sikuzani Saidi Magambo and another Versus Mohamed Roble, Civil Appeal No. 197 of 2018, the io Court of Appeal of Tanzania stated inter alia that there is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo as the same is done in the discretion of the court or tribunal particularly, where it is found necessary to verify the evidence adduced at the trial. In this case, the suit land is surveyed with specific particulars of the owner, location and boundaries. So, there was no need of visiting the locus in quo. To that end, the 2nd and 3rd grounds of appeal find no merits. From the foregoing observation, I find and hold that the 1st respondent managed to prove his ownership over the land in dispute and the trial tribunal was justified to declare the 1st respondent, DR. Byera Shwekerela as the rightful owner of the land in dispute. For that matter, the 4th, 5th, and 6th grounds of appeal are devoid of merits. Finally, the counsel for the respondents asked this court to assess and grant general damages which were sought before the trial tribunal but not awarded. The records indicate that when the tribunal chairman dealt with the reliefs available to the parties, he was reluctant to award general damages on reason that it was wise and enough to declare the 2nd respondent (then applicant) rightful owner of the suit land together with all

improvements made on it. So, I concur with the counsel for the li appellant that if the decision offended the respondents on this particular aspect, they had to make a cross-appeal. Short of that, this court cannot determine the same. Also, at the trial, the appellant said when he bought the suit land, he made some improvements on the land, such as, building the house which is unfinished. It is at the roofing level; that he put some gravels, stones and /?7/Z7(not known if planted or cut treesJ. This evidence was not cross- examined or disputed. In my view, the trial tribunal chairman was wrong to declare the first respondent is the owner of the suit land and together with any improvements made by the appellant. The interest of justice demands that the purchaser is entitled to the improvements he made on the suit land which turned to be not validly acquired. He has to be allowed to remove them or for immovable property, it can be valued and the owner pay for its value if he wishes, otherwise, the appellant has to demolish the structure. The owner is entitled to his land only. Consequently, the entire appeal lacks merit and it is hereby dismissed with cost. 12 The decision of the trial tribunal remains undisturbed save for the improvements made by the appellant which the appellant is entitled to. Dated at Bukoba this 4th day of November 2024. F.H. KI WON DE JUDGE

04. 11.2024 Court: Judgment is delivered in chamber in the presence of the appellant in person, Mr. Mathias Rweyemamu learned counsel for the first respondent and Grace Mutoka (RMA) but in the absence of the second respondent this 4th day of November 2024 and the right of further appeal is explained. pr. JUDGE

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