

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 27577 OF 2024 (Arising from the judgment and decree of the District Land and Housing Tribunal for Kinondoni in Application No. 387 of 2016 Dated 17th day of October 2024) BETWEEN WINSTONE KESSY..... APPELLANT VERSUS JITIHADJI JUMA SHOMVI..... 1ST RESPONDENT JUMANNE JUMA..... 2nd RESPONDENT KASIUS CHARLES GODIAN..... 3rd RESPONDENT

JUDGMENT

17/03/2025 & 24/03/2025 N.E MAN DI A, J The appellant Winstone Kessy, filed the present appeal against the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the Tribunal) in Land Application No. 387 of 2016 delivered on 17.10.2024. The brief background of this appeal as obtained from the record is that: the 1st respondent who was the applicant, sued the appellant, the 2nd and 3rd respondents for trespass to his land via Land Application No.387 of 2016 in the Tribunal. The Tribunal determined the Application and on 17.10.2024 delivered its decision in favour of the 1st respondent. The appellant was aggrieved by the decision hence, appealed to this court on the following grounds: 1

1. That, the trial land tribunal erred both in law and fact holding that the 1st Respondent herein is the lawful owner of the land in dispute while he failed to prove his case as per the law requirements
2. That, the trial land tribunal erred both in law and fact to arrive at its impugned decision basing on the contradicting Respondent's tendered evidences
3. That, the learned trial Chairman erred both in law and fact arriving at his impugned decision without considering the watertight evidences tendered by the Appellant A. That, the trial land tribunal erred both in law and fact by relying only on the minor and curable defects of the first Sale Agreement without considering other corroborative tendered evidences in arriving at its impugned decision After being served with the notice of hearing of the appeal on 13.11.2024, the 3rd respondent filed a memorandum of cross appeal under Order XXXIX Rule 22(1) and (2) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) on the following grounds:

1. That, the trial land tribunal erred in law and in fact to entertain the matter without the necessary parties.
2. That, the trial land tribunal erred both in law and fact by declaring the 1st Respondent herein as the lawful owner of the land in dispute while she failed to prove her ownership.
3. That, the trial land tribunal erred both in law and fact arriving at the impugned decision without considering the watertight evidences tendered by the 3rd Respondent.
4. That, the trial land tribunal erred both in law and fact by disregarding the Sale Agreement tendered by the 2nd Respondent without considering other corroborative testimony and evidences in arriving at its impugned decision. The appeal and cross appeal were heard by way of written submissions. The appellant and the 2nd respondent appeared in person and unrepresented 2 whereas the 1st and 3rd respondents enjoyed the legal services of Mr. Maros Gabriel, learned advocate and Mr. Franco Mahena, learned advocate respectively. In support of the 1st ground of appeal, Mr. Kessy submitted that the finding by the Tribunal that the 1st respondent had established ownership of the disputed land contradicts section 110(1) of the Evidence Act [Cap.6 R.E.2022]. He cited the case of PAULINA SAMSON NDAWAVYA VS. THERESIA THOMAS MADAHA, Civil Appeal No.45 of 2017, to bolster his argument. He was of the view that the 1st respondent and his two witnesses failed to prove how he was given the land in dispute by his late father, JUMA SHOMVI. That no documentary evidence was tendered to prove how JUMA SHOMVI had acquired the land in 1974 as claimed by the 1st respondent. That the factual gap renders the 1st respondent's claim of inheritance legally untenable. He cited the case of FARAH MOHAMED VS. FATUMA ABDALLAH [1992] TLR 205, to bolster his argument. He submitted further that the 1st respondent failed to prove his age at the time he was given the land in order to verify his capacity to hold such property. That the testimony of SMI, SM2 and SM3 suggest that the 1st respondent was given the land when he was 1-year-old hence, he was a minor with no capacity to own land independently. He cited the case of AGAPITI FIDELIS MASIKA AND ANOTHER VS. OLIVER FIDELIS MASIKA & ANOTHER, Civil Appeal No.466 of 2022, to bolster the argument. 3 That without evidence of a trust, guardianship or family arrangement through customary or statutory means, the alleged transfer to a 4-year-old child lacks legal grounding. That record does not show the age of SMI, SM2 and SM3 hence, their credibility to testify on the acquisition of the land in dispute in 1974 and distribution of 1984 require scrutiny. That in the absence local authorities or other community leaders to testify on JUMA SHOMVI's ownership in 1974 weakens the 1st respondent's case. He cited the case of AZIZI ABDALLAH VS. REPUBLIC (1991) TLR 71. That the 1st respondent failed to prove his case on the standard required under civil case hence, it was wrong for the Tribunal to declare him the lawful owner of the disputed land. He prayed for the court to find that the 1st ground of appeal has merit. On the 2nd ground of appeal, Mr. Kessy contended that the impugned decision relied heavily on the 1st respondent's testimonies despite the inconsistencies of the evidence. That the evidence tendered by SMI, SM2 and SM3 were contradictory on the size of the land and how it was distributed to the 1st

respondent creating an impression of cooked evidence. That, the contradiction touched the root of the matter hence, denied him the right to be declared as the lawful owner of the land. He cited the case of DICKSON ELIA NSHAPWATA VS. REPUBLIC, Criminal Appeal No. 92 of 2007, to support his argument. He prayed that the 2nd ground of appeal has merit. On the 3rd ground of appeal, Mr. Kessy submitted that he bought the land from the lawful owner one CHRISTOPHER A. BWANA by executing a sale 4 agreement on 14.02.2009 which was admitted as Exhibit D3. That if the claim by the 1st respondent is true how comes he did not notice the sale transactions, development and survey of the land. He was of the view that the 2nd respondent had a good title to pass to the 3rd respondent and to one CHRISTOPHER A. BWANA who sold the land in dispute to him. He cited the case AHMED HUSSEIN ASGAR VS. MUJAHEED GULAMHAFIZ MUCADAM & ANOTHER, Civil Appeal No.4854 of 2024 to bolster his argument. On the 4th ground of appeal, Mr. Kessy submitted that despite the fact that Exhibit D3 had some anomalies, it was corroborated by the testimonies of SU1, SU2, SU3 and SU4. He cited the case of REGINAM VS. PATEL [1965] EA 575 to substantiate that corroborative evidence enhances the credibility of a party's claims. He prayed for the court to find that this ground has merit. Finally, he prayed for the appeal to be allowed in its entirety, the impugned judgment and decree be quashed and set aside and be declared the lawful owner of the disputed land and costs of the appeal. In reply to the 1st ground of appeal, Mr. Maros submitted that oral agreement is admissible and can be enforced by courts as long as it has been witnessed by third parties. He cited the case of LEONARD DOMINIC RUBUYE t/a RUBUYE AGROCHEMICAL SUPPLIES VS. YARA TANZANIA LTD, Civil Appeal No. 219 of 2018. That testimony of SMI, SM2 and SM3 reveal that they were given the land in dispute in 1984 in the presence of ISMAIL MUSA HASSAN. That they invited their grandmother one MAUA SULTANI to live with her in the disputed land after the demise of their father in 1988. That at no time their ownership had transferred to either MAUA SULTANI or CHRISTOPHER A. MBWANA who is not known to them. That SM2 and SM3 still enjoy their ownership of their land at the area to date. He cited the case of MAGOIGA N YANKO RON GO MRIRI VS. CHACHA MOROSO SAIRE, Civil Appeal No. 464 of 2020 to substantiate the argument that an invitee cannot own land to which he was invited to the exclusion of his host. He also referred to the case of LAURENT MWANG'OMBE VS. TATU HAJI MWAMBISHILE, Civil Appeal 358 of 2019 and FURAH MOHAMED VS. ABDALLAH (1992) TLR 208 to support the argument that he who does not have good titled to land cannot pass title over the same to another. That there is no explanation as to where, when and how CHRISTOPHER A. MBWANA acquired the land in dispute. He cited the case of HEMEDI SAID VS. MOHAMED MBILU (1984) TLR 113. That Exhibit D3 cannot be a conclusive evidence that Mr. Kessy is the lawful owner of the land in dispute. That the argument that 1st respondent was a minor in 1984 does not legalize CHRISTOPHER A. BWANA to sale the 1st respondent's land to the appellant. That in 1984 when SM2 and SM3 were given the land they were 20 and 18 years respectively. That the allegation on prior ownership of the land in dispute was not an issue in the Tribunal however, the land was a no man's land and JUMA SOMVI cleared the forest in early 1970's and lived there until 6 1984 when he distributed it to his children. That SM2 and SM3 were all key witnesses because they were present when the 1st respondent was

given the land. That what matters is the weight of evidence given and not the number of witnesses. He cited section 143 of the Evidence Act (supra). He contended that even the 2nd respondent did not bring CHRISTOPHER A. BWANA or any other witness who was present when his sale was concluded. He prayed for the 1st ground of appeal be dismissed with costs as it has no merit. On the 2nd ground of appeal, Mr. Maros replied that since the land was un-surveyed and all parties referred to it, ownership cannot be invalidated by the mere difference in the measurements. He cited the case of GABRIEL MATHIAS MICHAEL & ANOTHER VS. HALIMA FERUZI & 2 OTHERS, Civil Appeal No. 28 of 2020 to bolster the argument that the difference in measurement does not invalidate a transaction of un surveyed land. On whether the land was inherited or given, he replied that those who witnessed have testified that the ownership transferred from SHOMVI JUMA to SMI, SM2 and SM3 respectively. He cited the case FATUMA SAID MAHANYU VS. THE REPUBLIC, Criminal Appeal No. 323 of 2019 and MUSTAFA RAMADHANI KIHIOYO V. THE REPUBLIC [2006] TLR 323 to support his argument. On the credibility of witness, he replied that the position is settled that every witness is entitled to credence unless there is a sound reasons suggesting to the contrary. He cited the case of CHRISTIAN UGBECHI VS. THE REPUBLIC, Criminal Appeal No. 274 of 2019 and GOODLUCK KYANDO V. REPUBLIC 7

[2006] TLR 369 to support his argument. He argued that this ground has no merit hence, be dismissed. On the 3rd ground of appeal, Mr. Maros replied that Exhibit D3 does not sufficiently identify the land in dispute which hindered the Tribunal from concluding that the appellant is the owner of it. That there is doubt whether Exhibit D3 was made in respect of the land in dispute or a different land. That no evidence was tendered by appellant to support the ownership of CHRISTOPHER A. MBWANA and in the absence of such evidence, the Tribunal could not rely on Exhibit D-3. That the 2nd respondent had no good title to pass to the 3rd respondent. That Exhibit DI was acquired in July 2022 when the matter was pending in the Tribunal. That Exhibit DI is not a conclusive proof of ownership as the 3rd respondent obtained the land from the 2nd respondent who had no good title to pass. That the 3rd ground has no merit. On the 4th ground of appeal, Mr. Maros replied that Exhibit D3 had anomalies which are fatal to affect the ownership of the land in dispute. That the appellant failed to bring witness to corroborate his evidence and SM3 knows nothing about CHRISTOPHER A. MBWANA and the matter at hand. Record reveals that, neither SU1, SU3, SU4 were present when Exhibit D3 were executed and nor evidence were adduced by them to support the ownership by the appellant. He prayed that the appeal be dismissed with costs for lack of merit and the judgement of the Tribunal be left to stand. 8 In support of the 1st ground of cross appeal, Mr. Mahona submitted that it was improper for the trial Tribunal to proceed with the matter without involving the Commission for Lands and the Registrar of Titles who issued Exhibit DI. That after the 3rd respondent purchased the land in dispute from the 2nd respondent, he was later granted a certificate of title by the Commissioner for Lands and the Registrar of Titles registered him as the lawful owner. That in the circumstances, the Commissioner for Lands and the Registrar of Titles were the necessary parties. He cited the case of

LYDIA MWAMIKO AND ANOTHER VS. KINONDONI MUNICIPAL COUNCIL & 14 OTHERS, Land Case No. 126 of 2022 and MAIMUNA ALFAN SALEHE AND OTHERS VS. CHILWA LUBAWA KILIAKI; Land Case No. 235 of 2021, which cited with approval the case of ABDULLATIF MOHAMED HAMIS VS. MEHBOOB YUSUF OSMAN & ANOTHER, Civil Revision No. 6 of 2017 to bolster his argument. That, joining the Commission for Lands and the Registrar of Titles was necessary due to the nature of the reliefs sought by the 1st respondent in the Tribunal and for the effective execution of the decree because they are the implementing authorities. That it will be difficult to deregister the 3rd respondent and grant the 1st respondent if the order is not directed to them. On the 2nd ground of cross appeal, Mr. Mahona submitted that the 1st respondent failed to prove how he acquired the land in dispute. That no document of inheritance from SHOMVI JUMA was tendered in the Tribunal. 9 That the allegation that the 1st respondent land was held by his grandmother one MAUA SULTAN was not proved contrary to the dictate of section 110(1) and (2) and 111 of the Evidence Act(supra). On the 3rd ground of cross appeal, he submitted that the 3rd respondents' testimony and evidences were enough to prove his ownership to the suit land. That had the Tribunal considered Exhibit D-1 tendered by the 3rd respondent, it would have decided that, the one with a registered certificate of title has a better title than the one who does not. He cited section 2 of the Land Registration Act, [Cap. 334 R.E 2019] to support his argument. On the 4th ground of cross appeal, he contended that the Tribunal unreasonably disregarded Exhibit D-2 without considering other testimony which referred to the 2nd respondent's ownership of the land. That the testimonies of all witnesses including those of the 1st respondent referred to the land in dispute. That it was improper for the Tribunal to hold that Exhibit D-2 did not refer to the land in dispute. He prayed for the appeal to be allowed and the decision of the Tribunal be quashed and/or reversed. Opposing the cross appeal on the 1st ground, Mr. Maros submitted that it is not true that in every suit in which a party has a certificate of title, the Commissioner for Lands or Registrar of Titles must be joined unless such a party claims for violation of procedures for issuing a certificate or where a party is challenging the grant by those authorities or where ownership had passed through those authorities before or after passing to either party in a dispute or in the case of double allocations. He cited the case of SAULO MALIMA VS. PETRO KINGONI, Civil Appeal No. 154 of 2022 and the case of MWINYIHATIBU JUMAA HATIBU VS. RIDHIWANI JU MAA HATIBU, Civil Appeal No. 70 of 2020 to bolster his argument. That it is clear from the pleadings that no parties had claimed any relief against the Commissioner for Lands or Registrar of Titles. He was of the view that the case of LYDIA MWAMIKO AND ANOTHER(supra) is distinguishable and irrelevant in the instant matter. Also that the case of MAIMUNA ALFAN SALEHE AND OTHERS (supra) is only relevant in defining who is a necessary party. He disputed the argument by the 3rd respondent that if the 1st respondent has been declared a rightful owner of the disputed land, it will be difficult to execute the order for reason of non-joinder of necessary parties. He cited section 71 of Land Registration Act, (supra) and Order 1 Rule 9 of the CPC. He submitted further that Exhibit D-1 issued on 25.07.2022 was an afterthought as it was issued while this suit was ongoing before the

Tribunal since 2015. That the presumption that a certificate of title is a conclusive proof of ownership is rebuttable under section 33 of Land Registration Act (supra) upon adducing evidence of prior interest. That the 3rd respondent's ownership dates from 2009 when he purchased the land from the 2nd respondent and not in July, 2022 where he obtained the certificate of title whereas the 1st respondent ownership is traced from 1984 when he was given the land by his father. He cited the case of NICHOLAUS MWAIPYANA VS. li THE REGISTERED TRUSTEES OF LITTLE SISTERS OF JESUS TANZANIA, Civil Appeal No. 276 of 2020 to bolster his argument. On the 2nd ground of cross appeal, Mr. Maros contended that the 1st respondent was given the land in dispute by his father SHOMVI JUMA in 1984 in the presence of SM2 and SM 3 and one ISMAIL MUSA HASSAN. The 1st respondent testified that after the demise of his father they invited their grandmother one MAUA SULTANI to stay with them. That, the 2nd respondent claim of purchasing the land from MAUA SULTANI in 1994 was not supported by any evidence since MAUA SULTANI was only invitee, she could not have title to pass to the 2nd respondent. He referred to the case of MAGOIGA NYANKORONGO MRIRI (supra) to bolster his argument. That Exhibit D2 neither shows the location and boundaries of the disputed land nor how MAUA SULTANI owned it prior to the 1st respondent. He cited the case of FURAH MOHAMED VS. ABDALLAH (1992) TLR 208 and HEMEDI SAID v. MOHAMED MBILU (1984) TLR 113. He was of the view that the 1st respondent has sufficiently proved his case. On the 3rd ground of cross appeal, he disputed the argument that Exhibit D-1 was a conclusive evidence of ownership of the land in dispute because the principle cannot apply in circumstances where an ownership of a person with certificate of title is rooted from a person without a good title to pass to him. That a mere fact that one has certificate of title does not automatically validate his ownership if he obtained the land from a person without a good title to pass. On the 4th ground of cross appeal, Mr. Maros reiterated his earlier submission that MAUA SULTANI was an invitee of SMI, SM2 and SM3 after the demise of their father while the 2nd respondent was their family friend. He prayed that the appeal be dismissed with costs for lack of merit. In rejoinder to support the appeal and against the 1st respondent's cross submission, Mr. Kessy submitted on the 1st ground of appeal that the 1st respondent has conceded that the alleged disposition of the disputed land did not involve any writing, which is contrary to the law. He cited sections 64(1) (a), (b) and section 181 of the Land Act [Cap.113 R.E.2019]. That the 1st respondent has failed to prove how the land in dispute came into his possession and he has never resided nor installed anything on the said land or complained anywhere until 2016. He cited the case of FRED MWALYAGILE VS. PANCRAS PERUZI, Land Appeal No.63 of 2022 to bolster his argument. On the 2nd ground of appeal, the appellant re-joined that there were contradictory evidences in which the Tribunal could not have arrived at its impugned decision if proper scrutiny of evidences tendered by SMI, SM2 and SM3 was made. That the contradictions in evidence touched the root of the matter. He cited the case of BENEDICT JUMA VS. REPUBLIC, Criminal Appeal No.41 of 2023 and DICKSON ELIA NSHAPWATA VS. REPUBLIC, Criminal Appeal No. 92 of 2007 in buttressing the legal position that in evaluating discrepancies, contradictions or omission, the court has to decide whether the

discrepancies or contradictions are only minor or whether they go to the root of the matter. That the case of GABRIEL MATHIAS MICHAEL AND ANOTHER (supra) is distinguishable, irrelevant and inapplicable in the matter at hand. Also that the case of FATUMA SAID MAHANYU (supra) and MUSTAFA RAMADHANI KIHIO (supra) are irrelevant. He cited the case of AGATHA MSHOTE VS. EDSON EMMANUEL AND OTHERS, Civil Appeal No. 121 of 2019 to bolster the argument that parties are bound by their pleadings. On the 3rd and 4th grounds of appeal, he re-joined that the 1st respondent has unsuccessfully challenged Exhibit D3. He cited section 64(1) (a), (b) and (2) of the Land Act (supra) and the case ABUALY ALIBHAI AZIZ VS. BHATIA BROTHERS LTD, Civil Appeal No.1 of 199 to bolster his argument. He prayed for the court to find that these grounds of appeal have merit and hence, allow the appeal with costs, set aside the impugned judgment and decree of the Tribunal, and declare him as the lawful owner of the land in dispute. In rejoinder to the 1st ground of cross appeal, Mr. Mahona submitted that a mere fact that the Commissioner for Lands has allocated the 1st respondent land to the 3rd respondent and the Registrar of Titles has registered the same in the name of the said 3rd respondent and issued a certificate of title, is a clear cause of action against the Commissioner for Lands and the Registrar of Titles. He cited section 33(1) (b) and (c) of the Land Registration Act (supra) to bolster his argument. That in the absence of evidence of fraud, it would entail a conclusion that the 3rd respondent is an authentic holder of the property which he holds under a certificate of right of occupancy free from all estates and interests whatsoever. That the proper authority to justify that at the time the land was being granted to the 3rd respondent did not have any subsisting third-party interests is the land authorities hence, it was proper for the Commissioner for Lands and the Registrar of Titles to be joined as necessary parties. He cited the case Of TANZANIA RAILWAYS CORPORATION (TRC) VS. GPB (T) LIMITED Civil Appeal No. 218 of 2020. That section 71 of the Land Registrations Act, (supra) does not mean that, the Registrar of Titles should not be made party to the proceedings. Re-joining on the 2nd ground of cross appeal, Mr. Mahona submitted that according to the testimony of SM2 and SM3, the 1st respondent was given the land in dispute by his late father in their presence. That the testimony of SMI, SM2 and SM3 contradict with the amended application filed on 19.12.2017 as to how the 1st respondent acquired the disputed land. That, whether inherited or given, the same have not been proved by neither a deed of gift nor documents of inheritance. He prayed for the court to allow the appeal, quash and/or reverse the decision of the Tribunal. 15 After examining the record, the submission in support of the appeal and cross appeal and the rejoinder submission of the parties, the pertinent issue for my determination is whether the appeal and, or cross appeal has merit. Starting with the 1st ground of appeal that the trial Tribunal erred in both law and fact to hold that the 1st respondent was a lawful owner while he failed to prove the case. It is a trite law that in civil cases the burden of proof is on balance of probabilities. After going through the record, I have noted the claim by the 1st respondent that he was given the disputed land by his late father in 1984 in the presence of one ISMAIL MUSSA HASSAN, FATUMA SHOMVI JUMA (SM2 and MARIAM SHOMVI JUMA (SM3) and that he lived in the area and developed it by

planting seasonal and long term crops until in

2002. It is also on record that JUMA SHOMVI acquired the disputed land through personal establishment (Alibuni eneo) in 1974. That after the demise of SHOMVI JUMA in 1988, the land came into the care of the 1st respondent's grandmother one MAUA SULTANI until when he grew up and took ownership and possession of it. It is also on record that the disputed land was invaded by JUMMANNE JUMA (SU1), the 2nd respondent in 2013. SU1 testified that he purchased the disputed land from MAUA SULTANI on 25.10.1994 as per Exhibit D-2 and later he sold the land to SU2 (the appellant) and SU4 (the 3rd respondent). SU1 did not explain how MAUA SULTANI obtained the disputed land. I have also realized from the record that the appellant(SU2) claimed to have purchased the disputed land from one CHRISTOPHER A. MBWANA on 16 14.02.2009. The record is silence on how CHRISTOPHER A. MBWANA got the disputed land. The 3rd respondent testified that he bought the suit land from the 2nd respondent. After my careful examination of the record, I have noted a lot of contradictions on the evidence tendered by the appellant. One, Exhibit D-2 showed that the 2nd respondent purchased a one acre of land from one MAUA SULTANI and he sold it to the appellant and the 3rd respondent. Two, the appellant claimed that he purchased the disputed land from one CHRISTOPHER A. MBWANA, who appears as KRISTOFA MBWANA in Exhibit D-3, while the 2nd respondent testified that he sold the disputed land to the appellant and the 3rd respondent. The record does not show how MAUA SULTANI and KRISTOFA MBWANA (as per Exhibit D3) have acquired the disputed land. At the same time, Exhibit D-1 and Exhibit D-3 does not properly describe the disputed land in terms of size and location and no evidence were tendered to corroborate the correctness of the said Exhibits. On the other side, the 1st respondent's claim of ownership of the disputed land located at Kibururu Street - Goba, Kinondoni District, Dar es Salaam was corroborated by the testimonies of SM2 and SM3. From these contradictions, it is my settled observation that the appellant has failed to prove his ownership of the disputed land on the standard required by civil cases. On the allegation that 1st respondent was a minor in 1984 hence lacked the capacity to hold the land on his own, it is on record that after the demise of his father the disputed land was taken care by his late grandmother one 17 MAUA SULTAN until he became of the age. It is true as submitted by the appellant that, a minor has no capacity to own land on his own. However, it is my observation that even if the 1st respondent was a minor with no capacity to hold the disputed land on his own, it was not also proper for MAUA SULTANI, who was alleged to take care of the 1st respondent's land until he became of the age, to sale the disputed land to the 2nd respondent because MAUA SULTANI had no good title to pass to the 2nd respondent. I am hesitating to comment on the issue of how SHOMVI JUMA had acquired the disputed land for the reasons it was not contested in the Tribunal and that it will not change the fact that the one who sold it, MAUA SULTANI had not sufficiently established how she have acquired it than the allegation that she was an invitee and a care taker of the disputed land. From the foregoing observation, I am of the considered position that the Tribunal chairman was right to hold that the 1st respondent is the lawful owner of the suit land and he has proved

his case on balance of probabilities as required under civil case. On the contrary, the testimonies and evidences tendered by the appellant and the 3rd respondent are doubtful as to how MAUA SULTANI and CHRISTOPHER A. MBWANA (KRISTOFA MBWANA as per Exhibit D-3) have acquired the disputed land. It is unfortunate that KRISTOFA MBWANA was not brought to testify before the Tribunal to support the appellant case. It is therefore my settled position that Exhibit D-2 and Exhibit D-3, have no weight to support the testimonies of the appellant and the 3rd 18 respondent because despite the fact that they do not show how the vendors has acquired the land, they also do not describe the location, size, neighbours and boundaries of the disputed land. In the circumstance, I join hand with the trial chairman that Exhibit D-2 and Exhibit D-3 are uncertain and cannot be relied on as they may be referring to a different land. In the circumstance, i do not see merit on this ground. In respect to the 2nd ground of appeal that the Tribunal erred in law and fact to arrive at its impugned decision basing on contradicting evidences tendered by the respondents. After my examination of the record, I have noted the disparities as to the size of the disputed land in the testimony of SMI, SM2 and SM3. Despite the said disparities, I found that the disputed land was unsurveyed and both SMI, SM2 and SM3 referred to the same disputed land and that they were allocated it by their late father SHOMVI JUMA in 1984. I take pride in the holding of the Court of Appeal in the case of GABRIEL MATHIAS MICHAEL & ANOTHER (supra) that: . .the suit land had not been surveyed at the time of the purported transactions, hence the difference of measurements does not in our view invalidate the evidence of ownership. What is common is that the parties are referring to the one and same suit land. [Emphasize added] It is clear that the land was unsurveyed by the time it was alleged to be allocated to the 1st respondent hence, the contradiction as to its size cannot invalidate the testimony adduced by the 1st respondent, SM2 and SM3. On the credibility of witness, the position is settled that, every witness is entitled to 19 credence unless there is a sound reasons suggesting the contrary preposition and in the instant appeal, I do not see any sound reasons suggesting to the contrary. This ground has no merit. In respect to the 3rd ground of appeal, that the trial tribunal disregarded the substantial evidence adduced by the appellant. It was submitted by the 3rd respondent that the Tribunal had disregarded Exhibit D-3 which in his view CHRISTOPHER A. MBWANA was a lawful owner of the disputed land. As alluded to when responding to the 1st ground above, it is my considered view that Exhibit D-3 does contains anomalies that are fatal as the go to the root of the matter at hand. Hence, it was impossible for the Tribunal to conclude that the appellant was the lawful owner of the disputed land as Exhibit D-3 did not describe the land as required under the sale agreement of land. On the allegation that Exhibit D-1 tendered by the appellant was disregarded by the Tribunal, I have noted on the record that Exhibit D-1 was issued on 25.07. 2022 while the application was filed in the tribunal on 11.07.2016. It is my observation that Exhibit D-1 cannot said to be a conclusive proof of ownership as the land in disputed was obtained from persons (MAUA SULTANI and the 2nd respondent) who had no good tittle to pass to the appellant. I am surprised to see why the 3rd respondent who was aware of Land Application No. 387 of 2026 proceeded to process the certificate of title before the verdict of the Tribunal. Is it that the appellant

was very sure or not of his other evidences regarding his ownership to the disputed land is concerned? Or was 20 a way to pre-empt the 1st respondent's case? It is therefore my considered observation that the Tribunal was proper in not considering Exhibit D-3 and Exhibit D-1. Hence, I find that the 3rd ground of appeal has no merit. On the 4th ground of appeal, that the trial tribunal erred by focusing on curable defect in the sale agreement without considering the corroborative evidence. I have carefully examined the records of the Tribunal and realized that SU1, SU3, SU4 were not present when Exhibit D-3 was executed and no testimony and/or evidence were adduced by them to corroborate the claim by the appellant. It is my considered observation that the anomalies found in Exhibit D-3 are fatal and if it was to be considered it would have led to injustice to the 1st respondent. This ground in my view has no merit too. Coming to the cross appeal, I will join the 1st and 3rd grounds that the trial Tribunal erred in law and fact to entertain the matter without necessary parties and that it did not consider the watertight evidence tendered by the 3rd respondent. It was submitted that the Commissioner for Lands and Registrar of Titles ought to have been joined in the suit because the 3rd respondent had obtained a certificate of title for the disputed land. It is my considered view as submitted by Mr. Maros that not in every suit in which a party has a certificate of title the Commissioner for Lands or Registrar of Titles must be joined. I am bound by the holding in the case of ABDULLATIF MOHAMED HAMIS VS. MEHBOOB YUSUPH OTHMAN, Civil Revision No. 6 of 2017(unreported) that the determination as to who is a necessary party to a suit would vary from a case to a case depending upon the facts and circumstances of each particular case. It is on record that the 3rd respondent purchased the disputed land from the 2nd respondent in 2009 and the certificate of title which was admitted as Exhibit D-1 was issued on 25.07.2022 while the matter was pending in the Tribunal since 2016. No any reliefs claimed by the 1st respondent who was the applicant in the tribunal to warrant the joining of the Commissioner for Lands and Registrar of Titles as necessary parties because at the time he filed Land Application No. 387 of 2016 there was no party who was holding a certificate of title. It is clear on my side that the grant of the said certificate was done as move by the appellant to disown the 1st respondent of his right on the ground that the disputed land is owned under a certificate of title issued by the Commissioner for Lands and registered by Registrar of Titles. It is my view that doing so at this stage is to condone to the action by the 3rd respondent of seeking the certificate of title from the land authorities while the matter was still pending in the Tribunal hence, pre-empting the 1st respondent's case. I am aware that it is trite law that holder of a certificate of title is presumed to be the lawful owner of the land however, in the instant matter, and taking into consideration that Exhibit D-1 was sought and obtained while the matter was pending in the Tribunal, I am afraid to be enclaved by such a view. Hence, it is my view that at this stage these grounds has no merit 22 In response to the 2nd ground of cross appeal that the 1st respondent failed to prove his ownership on the disputed land. I have carefully examined the records, it is my considered view that the 1st respondent proved his ownership on the disputed land as required by the law. The records are clear that he was given the disputed land by his late father SHOMVI JUMA in 1984 in the presence of ISMAIL MUSA HASSAN,

FATUMA SHOMVI JUMA(SM2) and MARIAM SHOMVI JUMA(SM3). SM2 and SM3 were also given land beside the 1st respondent's land which they own to date. The 1st respondent testified that his land was taken care by his grandmother MAUA SULTANI until he became of age. The claim by the 2nd respondent that he purchased the disputed land from MAUA SULTANI is in my view unjustified because MAUA SULTANI was an invitee in the disputed land hence, she had no good title to pass to the 2nd respondent. In the circumstance, the transaction effected between the 3rd respondent and the 2nd respondent cannot stand as they were rooted from a nullity. This ground collapses as in my view it has no merit. On the 4th ground of cross appeal, on disregarding Exhibit D-2 between MAUA SULTANI and 2nd respondent, I hold the view that the Tribunal did not disregard Exhibit D-2 rather it found that MAUA SULTANI was just an invitee of SMI, SM2 and SM after the demise of their father, SHOMVI JUMA. MAUA SULTANI had nothing to pass to the 2nd respondent as she had no good title to pass. Also, Exhibit D-2 failed to describe the location, size, boundaries and 23 the neighbours on the disputed land hence, could not be relied upon by the Tribunal. This ground in my view had no merit. In the end, and without prejudice to my observation and analysis, i find both the appeal and cross appeal devoid of merits. I therefore, dismiss the appeal and cross appeal in their entirety with costs. Hence, I uphold the decision of the Tribunal in Land Application No. 387 of 2016. It is so ordered. N.E
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