

TANZANIA / JUDGMENT

20150429 TZHC Mbeya

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29 April 2015

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•; IN THE HIGH COURT OF TANZANIA ATMBEYA 1 LAND APPEAL NO.09 OF 2013 /

- (Originating from Land Case No. 113/201 Ofrom the District Land and Housing Tribunal of Mbeya) 'ATI SEMAIN MAKC)1VIBE APPEI4I4NT VERSUS ATI..IOD 1i/ IATI.A

JUDGMENT

Date of last Order: 1110312015 Date of Judgment: 2910412015 HON. A. F. NGWALA, J. This is a Land Case Appeal No.9 of 2013 in which the Appellant prays this court to reverse the decision and order of the District land and Housing Tribunal of Mbeya in Land Application No. 113 of 2010 which declared him a trespasser over a piece of Land about 3/4 acres situated at Mbewe Village in Mbozi District. It also ordered him to pay the respondent Tshs.4,000,000/= as compensation for the. harvested coffee in the year 1999, 2010 and 2011. 1 In The facts as depicted from the records of the trial Tribunal show that, the appellant on 19/09/2008 sold the disputed farm to the respondent, for Tshs.270,000/= being the purchase price. The sale agreement was executed before the village leaders; namely; the Village Chairman and the Village Executive Officer (VEO). The appellant's wife one Stain Wisman and his younger brother Saiko Makombe witnessed the sale agreement. When the respondent started cultivating the said farm, he was arrested and prosecuted by the appellant at Miowo Primary Court. Thereafter he was acquitted. The Appeal by the Appellant to Mbozi District Court against the said acquittal was unsuccessful. Thus Respondent District Land and Housing Tribunal of Mbeya which declared him a rightful owner over the disputed Land. That tribunal awarded him Tshs.4,000,000/= as compensation for the coffee harvested by the appellant in three years; 2009, 2010 and

2011. The Appellant is aggrieved by that decision. The appellant is unrepresented while the respondent is represented by Ms Zakiah learned Advocate. His Memorandum of Appeal contains five grounds as follows:-

1. That the Learned Hon. Chairman erred in the assessment of evidence on record as there was no sufficient evidence to support the tribunal decision. 2 11
2. That the learned Hon. Chairman did not consider material contradictions in the Respondent's case at the trial.

3. That the learned Hon. Chairman erred in his judgment especially on the claimed sale agreement since witnesses said to be present at the sale transaction were not called to testify.
4. That the learned Hon. Chairman erred in Law in his judgment for merely relying on the purported sale agreement that was produced at Mlowo Primary Court in Criminal Case No. 17512012 which was not genuine due to the fact that it had many discrepancies such as :- The Appellant's signature in the Sale Agreement is not his. The signature of the Appellant's wife is not, not hers due to the fact that she does know how to write and read. That she merely thumbs print whenever she is required to sign any documents, as seen in her ID Card. Copies of the purported sale agreement and ID card collectively marked Annexure "A".
5. That the learned Hon. Chairman misdirected himself when he believed and left to the stand the purported sale agreement from the respondent which was a mere photocopy of the original that shows to have been forged since the writing of all names and their signatures was done by one man who prepared the purported sale agreement. The Respondent has disputed all the grounds and the contents in the said grounds of appeal. 3 During the hearing of this appeal, the Appellant simply prayed the court to adopt his written grounds of appeal. He insisted that the decision of the District Land and Housing Tribunal was unfair. On behalf of the respondent Ms. Zakia learned Advocate, submitted that, there was enough evidence which supported the decision of the District Land and Housing Tribunal. The evidence of the three witnesses including that of the respondent proved that the disputed land belonged to the Respondent Waliod Matiah. She argued further that the evidence was not contradictory as all the three witnesses testified to the effect that the Respondent bought the disputed farm at a price of Tshs.270,000/= from Wiseman Makombe, the Appellant on 19/09/2008. Regarding the 3rd ground of appeal, the learned advocate, contended that the Appellant was just misleading the court, as Jail Mwaseka who testified as PW2 in the trial, witnessed the sale transaction, as the Village Executive Officer (VEO). On the fourth ground of appeal, the learned Counsel, submitted that, had the Appellant stated before the District Land and Housing Tribunal that, he and his wife did not know how to read and write, then words could be valid. As regards the Appellant's wife signature, the learned counsel averred that, using a thumb print as signature is just an option, but it does not necessarily mean that a person cannot write. On the last ground of Appeal, it was averred that, the Sale Agreement had been forged. She insisted that the Tribunal saw the original document but filed a photocopy. On the allegation that the sale agreement was signed by only one person, Ms. Zakia submitted that the contention is unfounded since the Appellant's signature resembles the one appearing in his reply to the Application. She concluded her submission by stating that, it is true, the Appellant sold the disputed farm to the Respondent and he is not supposed to disturb him. 3/4 In his rejoinder, the Appellant insisted that he never sold the acre farm to the Respondent. In my perusal of the trial Tribunal in an attempt to verify the correctness or otherwise of the decision of the trial tribunal. Two issues came to my attention, these are:- Whether or not there was a sale agreement executed between the appellant and the respondent, and If the answer is in the affirmative, whether, the

agreement was proved before the tribunal during the hearing. 61 On whether or not there was a sale agreement between the appellant and the respondent, the evidence produced at the trial by PW1, PW2 and PW3 is crystal clear on the point. At page 3 of the typed proceedings of the trial tribunal, PW1 who was the applicant now the respondent testified that, he and the appellant on 19/09/2008, concluded a sale agreement regarding a coffee farm before Mbewe Village leaders. The purchase price was Tshs. 270,000/= . When the applicant (PW1) was required to produce the original document of the agreement, he could not produce on the ground that the original contract of sale was produced before the Primary Court. Again PW2, Jail Mwaseka, testified at the trial Court that the appellant sold a coffee farm to the respondent through a Sale Agreement signed in his office as an acting Village Executive Officer. In fact the records entail that PW2 was actually the one who drafted the sale agreement. That is not enough; PW2 together with the parties to the contract of sale to the said farm counted the coffee trees which amounted to 1094. PW3, Nelson Mwashambwa, the then Village Chairman also witnessed the sale agreement at the village office and escorted the parties to the farm where he confirmed the coffee trees to be 1094. 11 On his part the respondent (now the appellant) did not have much to state. He simply requested the tribunal to adopt his written reply to the application. In the records, the appellant is recorded to have denied that he entered into a sale agreement with the defendant in respect to the coffee farm. It goes without saying that, the above evidence produced by the respondent at the trial is watertight, save for the production of the original sale agreement, which the respondent purported to have tendered it as evidence in Miowo Primary Court. It follows therefore that, there was a sale agreement. On the 1st ground it suffices to say that there was sufficient evidence to support the tribunal's decision. There is no material contradiction in the respondent's case at the trial; the case was sufficiently proved to the required standard of balance of probabilities. The third ground is devoid of merit. It is apparent from the records, that all the three witnesses who testified on the applicant's side were present when the sale agreement was executed. 7 In *Mohamed Said Matula versus Republic* (1995) T.L.R. 3 the Court. inter alia stated that:- "Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter". In the case at hand, I have found no inconsistencies and or contradictions in the testimonies to more this court address the same. This point was stated also in the case of *OMARI AHMED versus Republic* (1983) T.L.R. 52 (C.A) that the trial court's findings as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their Credibility. As I have already stated, there are no circumstances on the record regarding the credibility of witnesses and their evidence produced that call for reassessment. The evidence adduced at the trial by PW1 who is the respondent was well corroborated by that of PW2 and PW3. N. On the fourth ground of appeal in which the appellant alleges that the sale agreement was forged as the signatures appearing therein purported to be his and his wife are not theirs. The question on whether a particular document is forged or not is dealt with

by experts, usually handwriting experts. A mere assertion that a document is signed by someone else other than the one purported to have signed without a clear proof cannot itself vitiate its admission. There must be evidence for rejection of the same. When the sale agreement was tendered in the tribunal as exhibit, the appellant did not raise this argument. What is noted in the records of the tribunal is simply denial that, he never entered into an agreement with the respondent to sell him a coffee farm. It is worth emphasizing also, that the mere fact that the appellant's wife thumb pointed in her ID Card is not a conclusive proof that she cannot write. One may opt to thumbprint, though it could also mean, failure to know how to read and write. In the circumstances, this ground fails as well. I The fifth ground, to the effect that, the Hon. Chairman misdirected himself when he admitted a photocopy of the original sale agreement evidencing a sale transaction of the coffee farm as between the parties. The record shows that the said sale agreement which together with a copy of the appellant's wife ID Card was marked annexure "A". It is true that the Learned Chairman admitted a photocopy of the sale agreement. As such under Section 65 of the Evidence Act, Cap. 6 R.E. 2002 that is Secondary Evidence. The issue before the court now is whether the purported photocopy of the sale agreement as Secondary evidence was properly admitted? In EDWARD DICK MWAKAMELA versus Republic (1987) T.L.R. 122, this court held that for Secondary evidence to be admissible, it must satisfy the provisions of Section 67 of the Evidence Act, 1967 on the admissibility of Secondary Evidence. Section 67 (1) (c) of the Evidence Act, 1967 reads:- "67 - (1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases -

- (a) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;" 10 Three circumstances under the cited provision of the Evidence Act, 1967 warrant the court to prove a document by secondary evidence. One, the document must have been lost, two destroyed and three, that the person offering evidence of its contents out of his own negligence cannot produce it in reasonable time. The Hon. Chairman who determined the application at the first instance, did not state why he received secondary evidence (a photocopy of the original sale agreement) instead of the original in proving the contents of the document. It is however in the wording of the respondent as per proceedings of the tribunal at page 4 of the typed proceedings, when cross - examined by the appellant (the then respondent) answered that he produced the original document in the Primary Court. That being the case, in my considered opinion, the learned Hon. Chairman found not ideal to wait until the Respondent retrieves back the said Sale Agreement from the Primary Court so as to proceed with the proceedings without delay. Hence under Section 67 (1) (c) of the Evidence Act, it was not the Respondent's negligence that caused the tribunal to admit a copy of the original Sale Agreement. Therefore the answer to the issue is in the affirmative, that the copy of the sale agreement was properly admitted to prove the contents of the original document. 11 The Court of Appeal of Tanzania, seating at Arusha, in DEEMAY DAATI AND TWO TOHERS versus Republic [2005] T.L.R. 132 stated inter alia that it is common knowledge that where there is mis-direction and no-direction on the evidence or

the lower court has miss apprehended the substance, the nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact. Applying the principle laid down in the above cited case, I have seen no misdirection and no - direction that the tribunal misapprehended the substance, nature and quality of the evidence. In the event I am not prepared to disturb the trial Tribunal's findings. For the said reasons this appeal lacks merit. It is accordingly dismissed with costs. C •'- AFNGWALA -: JUDGE 29/04/2015 12 Date: 29/04/2015 I Coram: A. F. Ngwala, J. Appellant: Present For the Appellant: Un represented Respondent: Present For the Respondent: Ms. Zakiah. Court: Judgment is delivered in court in the presence of the parties and their respective Advocates. Court: Right of Appeal to Court of Appeal of Tanzania explained. ,/,. / i_ .. --- ----- 44kio. A.F.NGWALA !..!/' JUDGE 29/04/2015 \., 13

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