IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

LAND APPEAL NO. 26 OF 2021

(C/f the District Land and Housing Tribunal- Mbulu District at Manyara Region in Land Application No. 61 of 2018)

CHARLES GWARU.....APPELLANT

VERSUS

FAUSTIN FOBESH.....1ST RESPONDENT

EMANU NAMSON .....2ND RESPONDENT

SAFARI NYORA .....3RD RESPONDENT

JUDGMENT

14/12/2021 & 31/03/2022

GWAE, J

The appellant, Charles Gwaru instituted a land case in the District Land and Housing tribunal of Mbulu at Mbulu (trial tribunal) claiming that the respondents to have trespassed onto his parcel of land measuring about 5 acres out of 18 ½ acres that he was duly given by his uncle (his father's young brother) one Eliya Bosta in the year 2009 as gift due to the fact that he took care during his sickness.

It was the version by the 1st and 2nd respondent that they purchased their respective parcels of suit land from one Samwel Safari Genda who was given by the late Eliya Bosta for taking care of him during his illness and that, the said sales by Genda is evidenced by sale agreements

followed by the issuance of customary rights of occupancy by Mbulu District Land Officer.

The appellant lost his case before the trial tribunal as the trial tribunal chairperson together with the assessors were of the view that the appellant had failed to prove to the required standard. Aggrieved by the decision of the trial tribunal, the appellant has brought this appeal armed with a total of four grounds of appeal, to wit;

1. That, the trial tribunal erred in law and fact by blaming the appellant that he failed to produce agreement of allocation by the late Eliya Bosta whereas the agreement was tendered and received by the tribunal
2. That, the trial tribunal erred in law and fact by relying its decision on agreement of allocation of land issued in 2007 by the deceased regardless that the said agreement was revoked by the deceased before his demise by issuing another allocation agreement of 2009
3. That, the trial tribunal erred in law and fact by deciding the dispute in favour of the respondents regardless that a time when malafide sold to the respondents in 2013, the suit land was in occupancy of the appellant
4. That, the trial tribunal erred in law and fact by deciding in favour of the respondent regardless the heavier and stronger evidence adduced by the appellant proving that the suit land belonged to him.

The parties, laypersons and who were not represented in this appeal sought and obtained leave to dispose of the appeal by way of written submission. The parties complied with the court's order in relation to the filing schedule of their written submission that I shall consider their while determining the appellant's grounds of appeal (1st, 3rd and 4th) as the appellant abandoned ground two of appeal.

In the 1st ground and 4th ground which read, **that the trial tribunal erred in law and fact by blaming the appellant that he failed to produce agreement of allocation by the late Eliya Bosta whereas the agreement was tendered and received by the tribunal** and

That, the trial tribunal erred in law and fact by deciding in favour of the respondent regardless the heavier and stronger evidence adduced by the appellant proving that the suit land belonged to him.

According to the appellant's written submission, there was annexture of the allocation agreement dated 10th July 2009 and that the learned chairperson ought to have considered the said annexture as per Regulation 3 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations.

On the other hand, the respondents strongly argued that they bought the suit land from Samwel Safari who was given by the late Eliya Bosta. They added that their evidence was stronger than that of the

appellant. They thus urged the court to make a reference to the case of **Said vs. Mohamed Mbilu** (1984) TLR 113 and section 100 (1) of Tanzania Evidence Act, Cap 6 Revised Edition, 2019.

In his rejoinder, the appellant reiterated his submission in chief nevertheless he cited the case of **John Magendo vs. N. E. Govan** (1973) TLR 6o where it was held that it is the duty of the magistrate or judge conducting a case and determining it, on its merit, doing justice to each party according to the law.

Examining the trial tribunal's records, it is clear that, during hearing of the case, the appellant who appeared as AWI did not tender the alleged agreement of allocation by the late Eliya of 2009 as he vividly informed the tribunal that he had a copy, for that reason he sought leave to bring an original one. Nevertheless, upon my careful perusal, I have not seen the original agreement dated 10th day of July 2009 except the appended copy in the appellant's application and that at paragraph 6 (ii) it is indicative to that effect as rightly submitted by the appellant.

It is general principle that, annextures are part of the parties' pleadings though not evidence but a notice to other party in a proceeding that an original or copy of the same is going to be tendered during hearing and be used in evidence. I am not unaware of the requirement of the law to produce original document or secondary ones (see section 63 of

Evidence Act, Cap 6, Revised Edition, 2019). However, attachments or annextures in a plaint are not document to be relied by a trial court or appellate court. This position was judicially stressed in **Godbless J. Lema vs. Mussa Mussa Hamis Mkhanga and two others**, Civil Appeal No. 47 of 2012, where Court of Appeal of Tanzania with approval of case of **Sabry Hafidhi Khalfn vs. Zanzibar Teleco. LTD (ZANTEL),** Civil Appeal No. 47 of 2009 (unreported) it was held:

> "But in our case, there is no evidence on the record to indicate that the respondents were registered voters. The record contains annextures. It is trite law that annextures are not evidence for the court of law to act and rely upon".

In our case, the appellant though sought leave to tender the original document but the record is silent and in fact he has not tendered the original or give any explanation as why he was unable to tender the same after his testimony had been recorded.

I am of the view that, payment of fees in respect of an application or plaint and annextures thereof do not on their own form part of the documentary evidence till the same are tendered and received by the court. Hence, the appellant's assertion that he paid for the application and its annexture, that alone would not justify the trial tribunal to act and rely upon it.

Assuming that the trial court was entitled to look and act upon the said annexture (copy of the said agreement dated 10th July 2009, yet in my view, the same is not reliable since the late Eliya Bosta did state the dispute land plus other acres as well as plot were never given to any other person whilst the agreement dated 12th July 2007 is to the effect that the said deceased gave three persons pieces of land, appellant was given a plot and 11 acres, John Daniel was Given 2 ¾ acres and Samwel Safari Genda was given 5 acres. Further to that it must be known that the title as to ownership of five acres passed from the late Eliya to Samwel after the transactions of giving and accepting by the parties were completed and documented since 12th July 2007 (See the foreign jurisprudence in **Vidyadharv. Manikrao** & **Another** (1999) 3 SCC 573

If the former gifts given by the late Eliya to the three (3) persons, appellant inclusive as per his assertion the agreement dated 10th July 2009 would have stated to that effect instead of stating that, the deceased parcels of land including the disputed suit was never given to any person ("Kwamba mtoaji anamhakikishia mpewaji kuwa shamba halijawahi kuuzwa wala kupewa mtu mwingine yeyote") as opposed to his own ground of appeal. Due to that defect, even if the agreement dated 10th July 2009 was to be considered yet the same could not form basis of the decision since it contains false information. If the former gift was revoked

by the deceased person, that fact ought to have been in the said agreement indicated This ground of appeal is therefore bound to fail, it is dismissed.

> As to the 3rd ground of appeal, **that, the trial tribunal erred in law and fact by deciding the dispute in favour of the respondents regardless that a time when malafide sold to the respondents in 2013, the suit land was in occupancy of the appellant.**

Arguing the 3rd ground, the appellant stated that the respondents failed to summon necessary party, the alleged seller one Samwel Safari Genda and that it was wrong for the trial tribunal to decide in favour of the respondents since their sale agreements were null and void for the sales were conducted in 2013 while the appellant was in occupation of the suit land.

The respondents jointly stated that, there was tangible evidence establishing that they purchased their parcels of land from the said Samwel Genda who passed away since 2016.

Considering the fact that, the trial tribunal was duly informed of the demise of the said Samwel (See typed proceedings at page 14, there was no dispute when Safari Samwel was alive....."), the appellant's assertion that the respondents failed to summon the said Samwel Safari Genda, the seller is unfounded. More so, the testimonies by the 1st and

2nd respondent are cogently credible through both oral and documentary evidence.

Moreover, the appellant's complaints that the sales were null and void on the basis that the sales between the 1st and 2nd respondent and the said Samwel Safari was not tendered is baseless since the same are appended to the customary rights of occupancy of both respondents (See RE1, RE2 and RE3). I like to subscribe my finding to a foreign judicial jurisprudence in **Miller vs. Monister of Pensions** (1937) ALL ER 372 at page 374 where it was stated;

> "If evidence evenly balanced, that the tribunal is unable to come to a determination conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the case against him reaches decree of cogency as is required to discharge the burden in a civil case".

In our instant case, the appellant did not meet the required standard in proving his case, it follows therefore, the trial tribunal was justified to decide in favour of the 1st and 2nd respondent even if the agreement appended in the application would have been relied by the court as the first appellate court capable of re-analyzing the evidence so recorded by

the trial tribunal yet the same is not worth for consideration for the reason explained herein.

Consequently, the appellant's appeal is entirely dismissed for want of merit. The decision of the trial tribunal and its ancillary orders are hereby upheld. The appellant shall bear the costs of this appeal.

It is so ordered.

M. R. Gwae
Judge
31/03/2022

Court: Right of Appeal and its requisite steps fully explained

M. R. Gwae
Judge
31/03/2022