

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 389 OF 2019

BAKARI MHANDO SWANGA APPELLANT

VERSUS

**1. MZEE MOHAMEDI BAKARI SHELUKINDO
2. CHAIRMAN OF KASIGA VILLAGE COUNCIL
3. MARIAMU RAJABU
4. HAMISI RAJABU** } **RESPONDENTS**

**(Appeal from the Judgment of the High Court of Tanzania at Tanga
(Aboud, J)**

Dated 14th day of December, 2016

in

(Land Case No. 4 of 2013)

JUDGMENT OF THE COURT

17th & 28th February, 2020

MZIRAY, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania at Tanga in Civil Case No. 04 of 2013 whereby the High Court (Aboud, J.) on 14/12/2016 entered judgment in favour of the four respondents.

The brief facts of the case as gathered from the parties pleadings at the trial court are that, the appellant alleged to have purchased the suit land measuring roughly 3½ acres from one Khatibu Rashid Shembilu and constructed a lime factory therein. He further alleges that sometimes in

October, 2012 the first respondent started to make developments in the suit land claiming that he was allocated the said parcel of land by the second respondent (the Chairman of Kasiga Village Council) way back in the year 2007. The appellant claims also that in the same year i.e. 2012, the third and fourth respondents entered in the suit land and claimed ownership thereof. Suit land refers to the land in occupation of the first, third and fourth respondents.

On the above brief background, the appellant instituted a suit in the High Court against the respondents claiming ownership of the suit land. On the other hand, the respondents disputed the claim and at the same time the first, third and fourth respondents raised a Notice of Preliminary Objection on three points of law questioning the pecuniary jurisdiction of the trial court to entertain the dispute, absence of cause of action against the third and fourth respondents and lastly they argued that the suit is res-judicata in respect of the third and fourth respondents. On 30/3/2016 the High Court (Msuya, J.) overruled the preliminary objection and directed the main suit to proceed on merit.

Upon hearing the suit, the trial court dismissed the claim for lack of merit. Being dissatisfied, the appellant lodged a notice of appeal to express his intention to appeal to the Court and later lodged a

memorandum of appeal armed with three grounds of complaint as follows:

- " 1. That, the judge erred in law and in fact when she ignored and or disregarded the concrete evidence of the appellant that the 3rd and 4th respondents herein lacks a locus standi whereas has failed to tender to the court the certificate of administration as Administrators of the estates of the late Rajabu Hiza Mbewe.*
- 2. That the judge erred in law and fact when she upheld that the appellant is a trespasser, without evaluating fundamental proof evidence of how the appellant acquired the suit land, and thus violates the law of documentary and witnesses' evidence.*
- 3. That the judge grossly misdirected herself when she upheld that the Kasiga Village Land Council has no power in law to allocate land to Mzee Mohamed Bakari Shelukindo without village General Meeting Committee's minutes failed to tender such evidence during trial, hence failed to evaluate the virginity ownership of the suit land."*

On the date of hearing the appeal, all parties involved except the first respondent were present, unrepresented. One Omari Mohamed Shelukindo appeared on behalf of the first respondent on the strength of a power of attorney conferred by the donor (Mzee Mohamedi Bakari Shelukindo) to him as shown at page 67 of the record of appeal. The appellant abandoned the first ground of appeal.

Submitting in support of the second ground of appeal, the appellant started by giving a brief background of the suit land. He said that, the original owner is one Rajabu Shemshi Kusaga who was allocated the suit land in the notorious "*Operation Vijiji*" (villagization). Then, in the late 1990 Kusaga sold it to Khatibu Shembilu who occupied the suit land until 2010 when he transferred it by sale to the appellant. He said the village authority was not involved in the sale transaction because at the material time the Village Executive Officer was on leave. He therefore opted to execute the sale deed before a Primary Court Magistrate. He submitted that in the trial court his evidence was corroborated by the testimonies of PW2, PW3 and PW4 who according to him confirmed that he acquired the suit land through sale. When grilled why he did not call the witnesses who appears in the deed of sale as witnesses, he was quick to say that they all had genuine problems during that time. He said that on the other side the third and fourth respondents failed to prove that they were the

lawful owners of the suit land. He submitted that they gave contradictory evidence and they could not establish whether they came into possession through inheritance from their late father Rajabu Mbwewe or through allocation by the village council. He said that such contradictions should be resolved in favour of the appellant and as a whole, the second ground of appeal be allowed.

In the third ground of appeal the appellant questions the procedure used by the village council to allocate the suit land to the first respondent. He submitted that in so long as there was no approval of the Village General Assembly, then the allocation made to him was tainted with illegalities. To fortify his argument, he cited the provisions of section 8 of the Village Land Act, Cap. 114 R.E. 2002. He submitted that, the Kasiga village council is the source of this dispute because it allocated the first respondent the suit land, which did not fall under its authority. He therefore prayed for this Court to intervene and find the appellant the lawful owner of the suit land.

Finally, based on the two grounds of appeal and on the strength of the submissions made, the appellant prayed that the trial court's judgment be quashed and set aside by allowing this appeal with costs.

In reply, the first respondent was brief. He contended that from the evidence adduced, the appellant is a trespasser as correctly found by the

trial court and he prayed for this appeal to be dismissed with costs. On the part of the second respondent he submitted that it was proper for the trial Judge to declare the appellant a trespasser on account of the fact that the village council was supposed to approve the sale agreement before being acted upon. He challenged the alleged sale agreement to be a fake document because Shembilu who sold the land to him was not the lawful owner. He recognized the third and fourth respondents to be the lawful owners of the suit land. He joined hands with the first respondent that the appeal deserves to be dismissed with costs.

On the part of the third respondent she maintained that the suit land belongs to her on account of the fact that she was given the same by his late father out of love and affection. Like the first and second respondents, she submitted that the appellant is a trespasser to the suit land because he never purchased any land from Shembilu as alleged. According to her, this is the reason why the two witnesses who signed in the purported sale agreement refused to testify before the trial court after they had discovered that they were cheated by the appellant. Her brother, the fourth respondent, fully supported her version and like the other respondents, he prayed for the appeal to be dismissed with costs.

We find that the only issue for our determination is who is the lawful owner of the suit land. This in our view is a question of evidence. In our

discussion we are going to approach the two grounds of appeal generally. We find that the appellant crucially and heavily relies on the sale agreement to prove his case. The respondents' side have highly disputed this document to be genuine. They are supported by the finding of the trial judge as reflected at page 103 of the record of appeal when she stated;

". . . none of the children of the late Omari Shembilu was called to prove that the suit land belongs to their father or Khatibu Shembilu. Further the sale agreement was witnessed by Hussein Nzira, Paul Bakari Chikira before the Primary Court Magistrate but none of these witnesses were called to testify."

The trial Judge made the above remarks after she had adjourned the case and accorded the appellant chance to bring these witnesses but for reasons best known to himself, he failed to bring the witnesses. In his submission before us the appellant alleged that the witnesses in the sale agreement did not testify as they had emergencies which hindered their attendance in court. With respect, we fail to believe him and we support the finding of the trial judge.

It is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the Tanzania Evidence

Act, Cap 6, R.E. 2002. It was therefore the duty of the appellant to prove the ownership of the suit land on a balance of probabilities. In **Paulina Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported), this Court stated that;

"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council as correctly submitted by the second respondent, which in our view is in compliance with section 142 (1) of the Local Government (District Authorities) Act – Cap. 287 R.E. 2002 which provides;

"A village council is the organ in which is vested all executive power in respect of all the affairs and business of a village."

Under normal circumstances, it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings. However, the appellant did not comply with this requirement.

The second complaint in the third ground of appeal is directed to the first respondent alone. The complaint is that the first respondent trespassed in the appellant's land. Infact, he questions the procedure used to grant the first respondent the land in dispute. With respect, as correctly found by the trial Judge, the duty of the appellant was to prove the legality of his ownership. All in all, we find that the grant of the land to the first respondent was valid and on this point we are supported by the evidence of DW2 (the village chairman), which has proved that the first respondent was in occupation since 2008 while the appellant purported to have purchased the suit land in 2010, when the first respondent was already in occupation. The observation we make here is that there was no due diligence on the part of the appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the village council before embarking on the transaction. Had he done so, obviously, he would not have purchased the suit land from Shembilu who was not the lawful owner.

In his submission he argued that the third and fourth respondents failed to prove before the trial court that they were lawful owners of the suit land and at the same time gave contradictory evidence. With respect, we did not see any contradiction in their testimonies. On the contrary, their evidence was consistent and they established that they inherited the

suit land from their late father Rajabu Mbwewe and at the material time it was the third respondent who was in physical occupation.

Having discussed to that extent, we are satisfied that this appeal raises no points of substance. We accordingly dismiss it with costs.

DATED at **TANGA** this 25th day of February, 2020.


R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the absence of the appellant, and in the presence of 1st and 3rd respondent in person, Mr. Bakari Hassan Mwiga appeared for the 2nd respondent and in the absence of 4th respondent dully served is hereby certified as a true copy of the original.




H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL