IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CIVIL APPEAL NO. 97 OF 2018

KHALIFE MOHAMED (As Surviving Administrator of the Estate of the late **SAID KHALIFE**)..... **APPELLANT**

VERSUS

AZIZ KHALIFE.....**1ST RESPONDENT**
SEIF KHALIFE .....**2ND RESPONDENT**

(Appeal from the Judgment and Decree of the High Court of Tanzania at Tanga)

(Khamis, J)

dated the 9th day of August, 2017
in
Land Case No. 12 of 2015

JUDGMENT OF THE COURT

10th & 28th February, 2020.

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, at Tanga (Khamis, J.) dated 9th August, 2017 in Land Case No. 12 of 2015. In that case, the respondents sued Khalife Mohamed (their biological father) and one Maliki Said (their nephew), as joint administrators of the estate of the late Said Khalife, (the elder son of Khalife Mohamed), for including their land an eighty-acre farm located at

Choba area, Boza Village, Pangani District, Tanga Region (suit land) into the list of properties of the deceased.

It is noteworthy that, Maliki Said is not a party to this appeal, as it was reported that he passed away on 19th March, 2018 prior to the filing of the memorandum of the appeal. This is in accordance with the death certificate submitted before the Court during the hearing of this appeal. As such, the appeal proceeded only with Khalife Mohamed, the surviving administrator in terms of Section 45 of the Probate and Administration of Estates Act, Cap. 445 R.E. 2002.

The essential facts of the matter as obtained from the record of appeal indicate that, originally the suit land (an un-surveyed farm) belonged to the appellant, but on 24th April, 1994 he decided to sell it to his two sons (the first and second respondents) in equal sizes (approximately, forty 40 acres each). In 2007 the first respondent started a survey process for his farm and was permitted by Boza Village Council. Later, the respondents were surprised that the appellant and his co-administrator had included the suit land into the estate of the late Said Khalife claiming that it belonged to the deceased. The respondents directly and through other family members persuaded the administrators to

remove the suit land from the estate of the deceased to no avail, thus they decided to lodge a suit against the administrators praying to be declared the lawful owners of the suit land and perpetual injunction restraining the appellants and the family of the late Said Khalife from interfering with that land.

The appellant together with his co-administrator in their joint Written Statement of Defence disputed the allegations and alleged that the suit land belonged to the late Said Khalife. Khalife Mohamed further denied to have sold the suit land to the respondents and that all evidence which showed that he sold the suit land to the respondents was forged. The appellant raised a notice of preliminary objection against a claim by the first respondent that it was *res judicata* on the ground that an alleged sale of 40 acres of land to him by the appellant was heard and finally determined by the District Land and Housing Tribunal for Tanga in Application No. 47 of 2006 where the second respondent sued the appellant and Maliki Said (in their personal capacities) together with the Registered Trustees of Holy Ghost litigating under the same title. In a joint reply to the Written Statement of Defence the respondents challenged the issue of *res judicata* raised by the appellant that it was already decided by

the High Court (Teemba, J) in Land Case No. 9 of 2009 and cannot be raised again. In that regard, the objection raised was withdrawn by the appellants on 3rd November, 2015 and the matter went into a full trial where the respondents marshalled a total of eight (8) witnesses together with seven (7) documentary evidence and the appellants summoned four (4) witnesses and tendered five (5) documentary evidence.

At the closure of the appellants' case the trial Judge invited parties to address the court on the need to summon a handwriting expert in terms of Order VI Rule 14 of the Civil Procedure Code Act, Cap. 33 R.E 2002 to examine the authenticity of the disputed sale agreements. Upon parties submissions, the court summoned ASP Chrisantus John Kitandala from the Forensic Bureau who testified as a court witness (CW1) and tendered Forensic Bureau Examination Report, as exhibit C1.

After full consideration of evidence adduced before it, the High Court decided the suit in the favour of the respondents. Aggrieved, the appellant decided to lodge this appeal on the following four (4) grounds, that:-

(1) *The learned trial Judge erred in law in relying heavily on a ruling given in Land Case No. 9 of 2009 of the High Court of Tanzania at Tanga in deciding the issue of res judicata whereas*

the said ruling was neither part of the proceedings nor were the parties or their advocates invited to address the court on the same;

(2) *That, without prejudice to the first ground, the trial Judge erred in law and in fact in holding that the court had become functus official on the issue of res judicata, that the court had in the ruling in Land Case No. 9 of 2009 exhausted the issue of res judicata and held further that the claim by the second respondent was not res judicata;*

(3) *That, the learned trial Judge erred in fact in holding that Khalife Mohamed Ally sold the suit land to the respondents whereas there was no sufficient evidence to establish such sale; and*

(4) *In the alternative, but without prejudice to the third ground, even if the learned trial Judge was right in holding that Khalife Mohamed Ally sold the suit land to the respondents the said trial Judge erred in law and in fact in holding that the said sale was lawful.*

When the appeal was placed before us for hearing, both parties were represented. Mr. Alfred J. Akaro, learned counsel, entered appearance for the appellant, whereas Dr. Masumbuko R. M. Lamwai, also learned counsel, represented the respondents. The said learned counsel had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

Submitting in support of the appeal, Mr. Akaro argued the first ground of appeal by faulting the learned trial Judge for determining the issue of *res judicata* by relying heavily on the ruling of the same court in Land Case No. 9 of 2009 and ruled out that the court is *functus officio* while the said ruling was not part of the pleadings and parties were not invited to address the court on that issue. He specifically referred the Court to pages 298, 306 and 308 of the record of appeal where the trial Judge quoted extensively paragraphs from the said ruling and concluded that the said issue was conclusively determined by the court. It was the strong feeling of Mr. Akaro that it was wrong for the trial Judge to consider the said ruling without according parties right to be heard on the same. To buttress his submission, Mr. Akaro cited **Raza Somji v. Amina Salum** [1993] TLR 208 as authority and urged us to apply it in this matter as he said the circumstances in that case are similar to the ones at hand.

Upon being probed by the Court on the existence of the ruling in Land Case No. 9 of 2009 and whether it was wrong for the trial Judge to take judicial notice of the same and use it in his judgment, Mr. Akaro conceded that, the said ruling exists and it was not wrong for the trial

Judge to take judicial notice of the same, though he insisted that parties were not invited to address the court on the same.

Amplifying on the second ground of appeal, Mr. Akaro argued that, it was not proper for the trial Judge to conclude that the court was *functus officio* on the issue of *res judicata* while the Judge in the said ruling though ruled out that parties were different, but at page 310 observed that, the issue on whether the subject matter was the same in Land Case No. 9 of 2009 and in Land Application No. 47 of 2006 is the question of evidence. In the light of that omission, Mr. Akaro invited us to find out that, parties were not invited to address the court on that issue and the ruling in Land Case No. 9 of 2009 neither exhausted the issue of *res judicata* nor made the High Court *functus officio* to handle the issue of *res judicata.* To buttress his position he cited the authority in **Peniel Lota v. Gabriel Tanaki and Others** [2003] TLR 312.

On the third ground of appeal, Mr. Akaro vehemently argued that, it was wrong for the trial Judge to conclude that the appellant in his personal capacity sold the land to the respondents basing on the expert opinion, while the appellant himself denied to have owned and sold the suit land to the respondents. It was the strong view of Mr. Akaro that, the trial Judge misapprehended the substance, the nature and quality of the evidence, as

according to him the appellant's case was much heavier than that of the respondents. He specifically referred us to the testimonies of Ezekiel Lukengelo (DW3) the neighbour to the suit land and Hamad Tanzania Wasaa (DW4) who was the Boza Village Executive Officer in 2001 and argued that, the ownership of the suit land by the late Said Khalife was well known and acknowledged by the said witnesses and other members in Boza Village. He added that, both the Boza Village Land Council and Village General Meeting approved the application for survey of the suit land processed by the late Said Khalife prior to his demise. He thus challenged the sale of the suit land to the respondents that it was done unprocedurally as it was not approved by the Boza Village Council. To support his position he cited **Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] TLR 103, where it was held that "*The sale of land to the appellant was void and ineffectual as it took place without the approval of the Village Land Council.*" He thus urged us to apply the said authority in this appeal and find out that the sale of the suit land to the respondents is void and ineffectual as the Boza Village Land Council was not involved.

In addressing the alternative ground of appeal, Mr. Akaro urged the Court to find out that, even if the appellant sold the suit land to the respondents, such sale was unlawful, as he never owned the suit land and

did not have a better title to pass to the respondents. Finally, Mr. Akaro invited us, being the first appellate Court, to re-evaluate the evidence on record, reverse the decision of the trial court and allow the appeal with costs.

In response, Dr. Lamwai resisted the appeal. He submitted that there was no substance in any of the grounds of appeal. Disputing what was submitted by Mr. Akaro on the first and second grounds of appeal Dr. Lamwai argued that, the issue of *res judicata* was not a new issue. He said, initially that issue was introduced by the appellant in his Written Statement of Defence as a point of preliminary objection, which met resistance from the respondents who also raised a preliminary objection to the effect that, the issue of *res judicata* was already decided by the same court in Land Case No. 9 of 2009. To justify his point he referred us to pages 26, 30, 36, 88 and 98 of the record of appeal and argued that, despite the fact that the appellant withdrew the said objection, but still the issue of *res judicata* was among the issues framed by the trial Judge to be determined during the trial. He as such, disputed the claim by Mr. Akaro that parties were not invited to address the court on that issue by referring us to pages 289 -292 of the record of appeal, where in his final written submissions, Mr. Akaro submitted on that issue, though avoided to mention the ruling in Land Case

No. 9 of 2009. Dr. Lamwai argued that, on the basis of the doctrine of *stare decisis* courts are bound by their own decisions and it was proper for the court to look at its own record and ruled out that it was *functus officio*. To that extent Dr. Lamwai distinguished **Raza Somji** (supra) the authority cited by Mr. Akaro by stating that, facts in that case are different from the case at hand, hence the same cannot be applied herein. Dr. Lamwai further referred us to page 310 of the record of appeal and argued that, in determining that issue the trial Judge did not only use the ruling in Land Case No. 9 of 2009, but also Application No. 47 of 2006 and observed that parties and cause of action in those two cases were different, the reasons which were sufficient to overrule a plea of *res-judicata* and allow parties to adduce evidence which was done in Land Case No. 12 of 2015.

As for the third and fourth grounds, though Dr. Lamwai conceded that this Court has powers to reappraise the evidence on record and arrive at its own conclusion, he argued that, such powers can only be invoked if there is a misdirection or non-direction of the evidence by the trial court. Dr. Lamwai further cautioned the Court to take into account that, testimonies and documentary evidence submitted by the appellant before the trial court were discredited as the trial court based much on the credibility and demeanor of the witnesses. To buttress his position he cited **Williamson**

Diamonds Ltd and Another v. Brown [1970] 1 EA 1 and **Shah v. Aguto** [1970] 1 EA 263. He further added that, before the trial court the appellant accused the respondents of having committed fraud, but failed to prove that allegation to the required standard. He contended further that the documents submitted by the appellant to prove the ownership of the suit land by the late Said Khalife were discredited by the trial Judge and found to be forged documents. In conclusion, Dr. Lamwai prayed the Court to dismiss the entire appeal with costs.

In a brief rejoinder, Mr. Akaro reiterated what he submitted in chief and prayed us to re-evaluate the evidence adduced before the trial court and allow the appeal with costs.

On our part, having examined the record of appeal and considered the submissions made by the counsel for the parties, the main issue to be considered by the Court is whether the appeal by the appellant is founded.

The appellant's argument in respect of the first and second grounds of appeal is essentially that the trial Judge determined the issue of *res judicata* by relying heavily on the ruling of the same court in Land Case No. 9 of 2009 without according right to the parties to address the court on that issue and concluded that the court was *functus officio.* To verify this

claim we have scrutinized the record of appeal and specifically pages 26, 30, 36, 88, 98 289 to 292 referred to us by Dr. Lamwai and we find no scintilla of merit in this complaint. It is on record that the appellant himself is the one who introduced the issue of *res judicata* before the trial court vide a preliminary objection. The said objection was challenged by the respondents, while citing the ruling in Land Case No. 9 of 2009, the fact which forced the appellant to withdraw his objection. It is also on record, as eloquently argued by Dr. Lamwai that, the issue of *res judicata* was one of the issues framed by the court where parties were invited to address the court on the same. For ease of reference we take the liberty of reproducing the framed issues found at page 98 of the record and let them speak for themselves:-

1. *Whether the second defendant sold the suit land to the plaintiffs;*
2. *Whether the 2nd plaintiff's claim against the 2nd defendant is res judicata;*
3. *Whether annexures P6 (a) and P6 (b) to the plaint are not genuine;*
4. *To whom does the suit land belong and*
5. *To what reliefs are the parties entitled.*

Having noted the above framed issues, we have further perused the final submissions made by the parties before the trial court and indeed, the

appellant had submitted on that issue from pages 289 to 292 of his final submissions. It is therefore our finding that, parties were accorded right to address the court on that issue. It is our further view that, if the appellant opted not to exhaust that issue and even refer to the ruling in Land Case No. 9 of 2009 which he was aware of, he cannot be allowed at this level, to fault the trial Judge who took judicial notice of the existence of the said ruling and applied it extensively to determine a framed issue. We are equally in agreement with Dr. Lamwai that, since courts are bound by their own decisions, it was proper for the trial Judge to take judicial notice of its own ruling and ruled out that the court was *functus officio* on that issue. As such, we find the authority cited by Mr. Akaro of **Raza Somji** (supra) to be distinguishable from this appeal. As in that case, the issue complained of was a new issue raised *suo motu* by the court, which is not the case here. We therefore dismiss the complaint by Mr. Akaro and we find no merit in the first and second grounds appeal.

As regards the third ground, we wish to first acknowledge the principle cited by Mr. Akaro that, this being the first appellate court enjoys great liberty in re-evaluating the evidence adduced by the parties and the law. We have however noted the caution raised by Dr. Lamwai, who argued that, the Court is required to be cautious in invoking that principle,

as the decision of the trial court based mainly on the credibility and demeanor of the witnesses which is the monopoly of the trial court. We thus appreciate the authorities cited by Dr. Lamwai of **Williamson Diamonds Ltd and Another** (supra) and **Shah** (supra). In Shah (supra) the Court cited the judgment of Sir Kenneth O' Connor in **Peters v. Sunday Post** [1958] E.A 424 at 429 where it was stated that:-

> *"**It is a strong thing for an appellate court to differ from the finding, on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witnesses.** An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. **But this is a jurisdiction which should be exercised with caution;** it is not enough that the appellate court might itself come to different conclusion..."*

The Court went on and stated that:-

> *"An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, **though it should always bear in mind that it has neither seen nor heard the***

witnesses and should make due allowance in this respect. *In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally."* [Emphasis added].

As per the above authority, there is no doubt that the assessment of credibility of witnesses in so far as demeanour is concerned is the monopoly of the trial court. However, as the first appellate Court we can as well look into the consistency of witnesses in their testimonies and make our own findings.

In the matter at hand, having closely followed and examined the testimonies of Aziz Khalife (PW1), Seif Khalife (PW2) and Kisimbo Aza Abraham, the Primary Court Magistrate who assisted parties to prepare the sale agreements and witnessed the same (PW3) together with the two sale agreements (exhibits P2 and P4). The testimony of PW4 in some material aspects tallies with the evidence of PW1, PW2, and PW3. Specifically, PW4 testified on how PW1, PW2, PW3 and Mohamed Khalife (DW2) went to his office and signed the two sale agreements in front of him. He further

testified that Mohamed Rished (PW3), the son in law of Mohamed Khalife signed as a witness. In the circumstances, we have come to the same conclusion reached by the trial court that PW1, PW2, PW3 and PW4 were credible and reliable witnesses.

We are mindful of the fact that, DW2 had since disputed his signature in the two sale agreements, the act which forced the trial court to summon CW1 the handwriting expert who examined the authenticity of the sale agreements and tendered Forensic Bureau Examination Report (exhibit C1). We have thus meticulously gone through the substance of testimony of CW1 and exhibit C1. We did not see the logic behind discrediting this witness. To our minds, CW1 gave very credible evidence.

We have as well evaluated the testimony of Omary Jackson Msigwa (PW7) the former Chairperson of Boza Village from 2005 – 2015 and the minutes of the Village Council (exhibit P7) together with the testimony of Rajab Juma Kapteni (PW5), the former Member of the Boza Village Council. The estimonies of PW5 and PW7 tally with that of Amina Salim (PW8), the former Boza Village Executive Officer from 2006 to 2013.

We have also took note and examined the correspondences between the Land Department of Pangani and DW2 in his capacity as the

owner of the suit land (exhibits P5 and P6) in 1990 which also established that DW2 was once the lawful owner of the suit land. To that extent, we have come to the same conclusion reached by the trial court that evidence adduced by the respondents' witnesses is credible and reliable.

On the other side, we have as well evaluated the testimonies of Maliki Said (DW1) who claimed that the suit land belonged to his late father and tendered exhibit D1 a letter from Pangani District Commissioner dated 6th September, 1986 at page 169 of the record to prove the ownership of his late father on the suit land. With respect, exhibit D1 cannot be used to prove ownership over the land, as it was only a reminder letter to the late Said Khalife as the owner of the tractor to have his tractor ready for agricultural purposes in the village. It is also on record that the name of the addressee in that exhibit is questionable, as it was altered. This fact was confirmed by DW1 himself during cross examination by Mr. Mramba at page 177 when he testified that:-

> *I agree that this letter was rubbed and a name of the addressee was changed to be written S. Khalife Mohamed. Another correction using a white correction fluid was made in the blanks where types of the tractors were to*

be filled. I am not the one who made the corrections... I do not know who made alterations in the letter (exhibit D1)..."

It is also on record that, Hamad Tanzania Wasaa (DW4) who was the former Boza Village Executive Officer in 2001 testified that he did not know how the late Said Khalife acquired the suit land. It is equally on record that in 2006 when the Late Said Khalife applied for permit to survey the suit land, his application was not approved for failure to prove his ownership over the suit land. (See the testimonies of PW7 and PW8). As such, the trial Judge found DW1, DW2, DW3 and DW4 to be unreliable witnesses and exhibits D1 and D4 were categorized as forged documents. In the circumstances, we are in agreement with the trial Judge that the appellant did not prove his ownership over the suit land. We even wonder that, if at all it is true that the respondents forged the signature of DW2, their father in 1991, why then DW2 decided to stay mute for all that time without taking any action or even report the matter to the police? OR, if the land belonged to the late Said Khalife since 1986 why then he never complained anywhere, on the trespass over his land for all such time, till his death? It is equally important to note that, exhibit D5 Minutes of Boza Village Council dated 2006 was disowned by PW7 and PW8 that they were forged.

We are also aware that, in his submission on the third ground, Mr. Akaro, among others challenged the respondents' ownership for signing the sale agreements before the Magistrate instead of seeking an approval from the Boza Village Council. Though, it is true that the sale agreements were signed before the Magistrate, but as per the testimonies of PW1 and PW2 found at pages 110 and 137 of the record of appeal, respectively after signing of the said sale agreements (exhibits P2 and P4) the disposition of the suit land to the respondents was submitted to the Boza Village Council for consideration and approval. This evidence tallies with the testimonies of PW5, PW7 and PW8 the former leaders and members of Boza Village Council who recognized the respondents as the lawful owners of the suit land. As such, we find the authority cited by Mr. Akaro, **Methuselah Paul Nyagwaswa** (supra) to be distinguishable from the facts of this case. In that case the approval of the Village Council was not sought at all, while in the case at hand the situation is different.

In the event, we are satisfied that the trial Judge properly analyzed the evidence availed before him and reached to an appropriate conclusion hence there is no justification to interfere with his decision.

In view of the aforesaid, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs.

DATED at **TANGA** this 19th 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 presence of Mr. Alfred Josaphat Akaro, learned counsel for the Appellant and in absence of Dr. Masumbuko Lamwai, learned counsel dully served for the Respondents is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL