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**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

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**PC. CIVIL APPEAL NO. 17 OF 2003.**

**ABDALLAH MSALIKE ..... APPELLANT**

**VERSUS**

**HAWA KONDO ..... RESPONDENT**

*Date of last Order: 8/7/2009*

*Date of Judgment : 21/10/2009*

**JUDGMENT**

**Mlay, J.**

ABDALLAH MSALIKE was the Defendant in a civil case instituted by the Respondent by the Respondent HAWA KONDO in Kiberege Primary Court. Civil Case No. 30 of 2001.

The Respondent was unsuccessful in the Primary Court and successfully appealed to the District Court of Kilombero at Ifakara, in Civil Appeal No. 55 of 2002. Being aggrieved by the judgement and decree of the appellate District Court, ABDALLAH MZALIKE has now appealed to this court.

The petition of Appeal which is in Kiswahili language, contains eight grounds of appeal. However, upon scrutiny, the grounds of appeal are either repetitions or stating the same ground of appeal in different ways. It is not therefore necessary to set out, the specific grounds of appeal as they appear in the petition of appeal. In a nutshell, the Appellant's main ground of appeal, is that the appellate District Magistrate erred in law and fact to set aside the decision of the Primary Court, in the light of the evidence adduced by the Appellant in the Primary Court.

Both parties were unrepresented by counsel at the hearing of this appeal. The Appellant submitted that, in 1999 one ZAINABU MBAGULE went to his house which was near her Shamba. The appellant contended that ZAINABU MBAGULE told him that she wanted to sell part of her shamba to get money for treating her legs which were paining her. The Appellant allegedly advised ZAINABU MBAGULE to look for a buyer but she later went back to the Appellant and told him that she could not find a buyer. The Appellant then asked ZAINABU MBAGULE how much she was selling the land for and she replied that, she was selling  $\frac{3}{4}$  acres of land for Tshs.20,000/=(twenty thousand shillings). The Appellant contended that ZAINABU MBAGULE looked for the Kitongoji Leader and witnesses who were the Appellants neighbours and the Appellant gave her the money while the Chairman of the Kitongoji prepared the SALE AGREEMENT which was signed by the vendor, the buyer, the Chairman of Kitongoji and

three witnesses. The Appellant stated that he was then handed over the shamba and started developing it. He said, the events took place in 1994.

The Appellant went on to say that he was given only part of her shamba while the remaining part of her shamba was being cultivated by the Respondent and other children of ZAINABU. The Appellant contended that while he was planting permanent crops and building on the shamba which he purchased, the vendor who is now deceased, was present. He further contended that ZAINABU died in June 2001 and in August 2001 the Appellant was called to the Office of the Chairman of BWAWANI KITONGOJI before whom the Respondent and her younger sister had made a complaint claiming that the Appellant should return their shamba. The Appellant alleged that he told the Kitongoji Chairman that he had purchased the shamba in the presence of the Chairman of Msufini Kitongoji. He contended further that the Kitongoji Baraza decided that the Appellant was the rightful owner and the Respondent went to the Primary Court which also decided that the Appellant was the rightful owner. He contended further that the Respondent appealed to the District court which decided that the Respondent was the rightful owner. The Appellant submitted that the District Court was wrong because all the witnesses who witnessed the sale and the Chairman of Msufini Kitongoji gave evidence. He contended that the District Magistrate did not consider the permanent crops and the houses which the Appellant had built on the shamba.

The Respondent contended that what the Appellant has submitted is not true. She said it is not true that the Appellant went to the Kitongoji

Baraza with witnesses. She contended that the Appellant did not bring any witnesses or showed any document to the Kitongoji Baraza. The Respondent contended further that she went to the Baraza with 4 witnesses who gave evidence that the Appellant was given this shamba after requesting for it twice. She denied that the Shamba was sold to him. She further contended that she asked for the shamba from the Respondents younger sister ZAITUNI KONDO in 1995. The Respondent further contended that at the material time her mother (ZAINABU MBAGULE) had left the shamba to her children (including Respondent), to cultivate because she was too old. The Respondent told this court that her mother died in June 1999 and not in 1996. She further stated that it was when they went to the shamba to divide it among themselves that they found a house built of woad and mud and also another house of similar make which was under construction. The Respondent stated it was at this point that ZAITUNI told them that she had allowed the Appellant to cultivate the shamba only. The Respondent contended that this is when they started the process of taking the matter to the authorities. She further contended that the appellant started claiming that the Respondents mother had sold the land to him after learning that she had died. She argued that the Appellant has stated that the Respondents mother died in 2001 while in 2001 they were already in the Primary court. The Respondent said she did not agree with the Sale Agreement. She questioned the Appellants contention that the agreement was made before witnesses by asking who were the witnesses of the deceased on the sale of the shamba.

Respondent stated that the evidence they gave in the Primary Court was that, the Appellant was given the Shamba but he did not buy it. She contended that the Appellants asked to use the shamba as he was married to the Respondent's relative. She contended further that the brick house was built when the case was on appeal to the District Court but when the Primary Court visited the shamba, there was only one completed mud house and one incomplete house made of wood. She further contended that the permanent crops belonged to her mother and that the Appellant found them on the land. She contended further that the Appellant had already built 4 brick houses on the land while this appeal was pending. She prayed that this appeal be dismissed.

In a short reply, the Appellant submitted that the Chairman of the Kitongoji was brought by the deceased who sold the shamba and two of the witnesses to the sale were her neighbours at the shamba.

The facts leading to the present appeal, can be stated briefly. The Respondent HAWA KONDO sued the Appellant in Kiberere Primary Court to recover  $\frac{3}{4}$  of an acre of land which the Respondent claimed to have been given the piece of land by her mother in 1986 and the land is situated in Bwawani Kitongoji in Kiborege. The Respondent gave evidence and called three (3) witnesses to support her claim. The Appellant denied the Respondents claim and adduced evidence to show that he bought the land in dispute from the Respondents mother ZAINABU MBAGULE in 1994 and produced a Sale Agreement Exh. "A" which was witnessed by three witnesses including the Chairman of Msufini Kitongoji, one of whom also gave evidence for the Appellant. Having given consideration to the

evidence adduced by both parties, the Primary Court found that the Respondent had no right to claim the land in dispute and that it belonged to the Appellant. The decision of the Primary Court was based on the finding of fact that the Respondent's mother was the person who had title to the land in dispute and that the Kitongoji leader at the material time who gave evidence as SU 2 had proved that the Respondents mother had personally and voluantly sold the land. The Primary court also relied on the Sale Agreement dated 23/11/94 which was produced in evidence. The Primary Court gave judgement to the Appellant.

Being aggrieved by the decision of the Primary Court, the Respondent appealed to the District Court of Kilombero. In his judgment the appellate District Magistrate P.M Mabula stated:

*"In awarding the ¾ acre of Shamba to the respondent, the trial court believed that document exhibit "A" was signed by the late Zainabu.*

*Having examined the said document the following observations were noted.*

- That the document was written by the seller, Zainabu Mbagule.*
- That there was no witness on part of the seller mentioned in a document.*

*-That there is no rubber stamp, on such document as it alleged to have been signed by the street chairman.*

*In my view, those observation made the document "A" doubtful and that is why the appellant complained that trial court was wrong in relying on that document.*

*As the trial court acted on a document which is doubtful the decision of the trial court was wrongly arrived at".*

It is this decision which is now being challenged in the present appeal. The issue for determination in this appeal is therefore, whether the appellate District Magistrate was justified to find the Sale Agreement Exhibit "A" was "doubtful" based on the there "observations" stated in his judgement.

The first "*observation*" on which the District Magistrate found the Sale Agreement to be a "*doubtful*" document is, "*that the document was written by the seller, Zainabu Mbagula*". According to the evidence adduced by SU II KASSIMU SAID KWAGONA the Kitongoji. Chairman who gave evidence for if the Appellant during trial, the Sale Agreement Exh "A" was drawn up by him, and not by the seller of the land ZAINABU MBAGULE, as "observed" by the District Magistrate. At page 6 of the typed proceedings SU II stated in Kiswahili:-

*“Niliwataka wanipe karatasi niandike mauziano hayo. Nilipokea karatasi na kuwaandikia makubaliano ya mauzo yao. Muuzaji na mnunuzi wote waliweka sahihi zao. Nasi mashahidi tuliweka sahihi zetu ndipo cash Shs.20,000/= zilipwe kwa mama huyo tukawa tumemaliza kazi”.*

From the clear evidence of SU II Kasimu Said Kwagona which has been quoted in part above, the appellate District Magistrate had no basis to speculate that the Sale Agreement was “doubtful” on grounds that it could not have been written by the seller, ZAINABU MBAGULE or that it was not written by her.

The Appellant did not allege during trial that the said Sale Agreement was written or drawn up by the late Zainabu Mbagule and as it was in evidence that it was drawn up by Kassim Said Kwagona the Kitongoji Chairman who also signed it as a witness, the first “observation” of the District Magistrate which he relied upon to cast doubt on the Sale Agreement, is without any justification.

The second “*observation*” which cast doubt on the Sale Agreement is “*that there is no rubber stamp, on such document as it alleged to have been signed by the Street Chairman*”.

It is true that Exh. “A” does not bear any Stamp of the Kitongoji Chairman whom the District Magistrate has referred to as the “Street



Chairman". It appears there is no English word for "Kitongoji" and for certain, there are no "streets" in the villages. Be that as it may, Exh. A shows that SU II signed the Sale agreement as witness No. 3 and he identified himself in the document as " M/K/K Kitongoji Misufini" and signed the document. SU II also when giving evidence in court, stated that at the material time, he was the Chairman of Misufini Kitongoji. There was no evidence adduced by the Respondent to dispute that SU II was not the Chairman of Misufini Kitongoji at the time.

The District Magistrate did not cite any law which requires that such a document should be stamped with the Kitongoji Stamp in order to verify that it was signed by the Kitongoji Chairman. The Kitongoji Chairman is not a Notary Public and he did not sign the Sale Agreement as a Notary Public but as a witness. In the absence of a legal requirement to append the Kitongoji stamp to the Sale Agreement, the second "observation" which was relied upon to cast doubt on Exhibit "A" is also without any foundation.

The third and last "*observation*" raising doubt in the District Magistrates mind is "*that there was no witness on the part, of the seller mentioned in a document*".

The corollary to this observation, would seem to be that, only the witnesses of the buyer (Appellant) signed the Sale Agreement.

During trial, the only evidence adduced by the Respondent relating to the Sale Agreement, was given by the Respondent herself and it appears at page 2 of the typed proceedings in Kiswahili, as follows:

*"Hati aliyoitoa kwenye baraza hilo hatukuiamini"*

The English free translation is:

*“We do not trust the document which he produced in that Baraza”.*

The Respondent did not state why she did not trust the Sale Agreement. The Appellant upon being cross examined by the Respondent during trial, stated at page 5 of the typed proceedings, as follows:

*“Muuzaji mlikuwa namfhamu ndiye alikuwa akilima hapo. Jirani zake ndio niliwaita ushahidi..... Eneo alilouza lipo Misufini na Muuzaji aliishi Kitongoji cha Stendi. Kiongozi wa eneo lilipo ndiye alisimamia mauzo shamba hilo awali lilikuwa katika Kitongoji cha Msufini. Kwa sasa lipo Bwawani”.*

According to the evidence adduced by the Appellant as quoted above, the Sale was witnessed by the neighbours of the seller called by the Appellant and the sale was also witnessed by the leader of Msufini Kitongoji where the land is situated. According to the evidence of KASSIM SAID KUWAGONA, the Kitongoji Chairman as it appears at page 6 of the proceedings, the seller called on him in 1994 as the Chairman of Kitongoji to witness the sale. SU II stated that the Seller Mama Mbagule told him she had land which she wanted to sell and that the Appellant (SU) I was the

buyer. SU II said he asked them to bring witnesses for the sale and they brought two women. SUII stated in Kiswahili as follows:

*“Mama bint Mbagule alieleza kuwa kwake ana eneo analiiza na mnunuzi alikuwa SU I niliwataka walete mashahidi wa kuuziana kwao waliletwa wanawake wawili. Niliuliza mbona watoto wake hawakuja nao alieleza angekuwa na mtoto anayemsikiliza angekuja naye hata mimi naweza kusaini kama mtoto wake.....”.*

Upon being cross examined by the Respondent (SM I) SU II replied in part as follows:

*“..... Namwelewa mama huyo sababu aliolewa na binamu wa baba yangu Sitambui aliyemjengea nyinyi mlikuwa kwa mabwana zenu. Mimi nasema kweli alikuwa akiishi peke yake.....”*

*Mama huyo aliniambia hata mimi natosha kuwa shahidi. Mimi ni ndugu wa baba yako Omary Kondo.....”*

From the evidence on record as shown above, there is nothing to show that the witnesses who witnessed the sale and signed the Sale Agreement, were witnesses for the purchaser (Appellant). The evidence shows that the witnesses were called for both parties to witness the sale of

the land in dispute. There is no legal requirement for the sale to be witnessed by witnesses for each party and if there is, the District Magistrate did not refer to it.

Both witnesses to the Sale Agreement KATHERINE CHAFU (SU III) and MWANAISHA D/O KIPITITI (SU IV) stated that they were called to witness the sale. Neither witness testified that she was a witness for only one of the parties to the sale Agreement.


Since there is no legal requirement for each party to the Sale Agreement to have witnesses of their own and there is no evidence that those who witnessed the Sale were only witnesses for the Appellant, the “*observation*” of the District Magistrate “*That there is no witness for the seller mentioned in a document*”, has no basis as a ground for “doubting” the Sale Agreement Exhibit “A”.

As the decision of the appellate District Magistrate was solely based on doubting the Sale Agreement, Exhibit “A” on grounds of the three doubts discussed above, and the said three observations have been found by this court to be groundless, the District Magistrate was wrong to set aside the decision of the Primary Court on the basis of the groundless “*observations*”. For this reasons, this appeal is allowed. The decision reached by this court is sufficient to dispose of this appeal without the need to consider the specific grounds of appeal on merit.

The judgment and decree of the District Court of Kilombero at Ifakara in Civil Appeal No. 55/2002 are accordingly set aside and the judgment and decree of the Kiberege Primary Court in Civil Case No.30/2002, are hereby restored. The Appellant will have the costs of this Appeal.

  
J.I. Mlay,  
**JUDGE**

Dated this 21<sup>st</sup> day of October 2008 and delivered in the presence of both the Appellant and Respondent on this same 21<sup>st</sup> day of October 2008. The parties have the right to appeal to the Court of Appeal after giving notice of 14 days and obtaining from this Court on application leave and certificate of point of law to be considered by the Court of Appeal.

  
J. I. Mlay  
**JUDGE**

**21/10/2008.**