

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

**(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)**

**CIVIL APPEAL NO. 49 OF 2019**

<b>1. MENARD THEOBARD BIJUKA</b>	}	..... <b>APPELLANTS</b>
<b>2. EDWIN SHUZO BIJUKA</b>		
<b>3. LUDOVICK PAULO</b>		

**VERSUS**

**DIDAS J. TUMAINI ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Bukoba)**

**(Mwangesi, J.)**

**Dated the 23<sup>rd</sup> day of April, 2015**

**In**

**Land Appeal No. 25 of 2011**

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**JUDGMENT OF THE COURT**

9<sup>th</sup> & 17<sup>th</sup> August, 2021

**KENTE, J.A.:**

The appellants namely Menard Theobard Bijuka, Edwin Shuzo Bijuka and Ludovick Paulo hereinafter referred to as the first, second and third appellants respectively, have appealed against the judgment and decree of the High Court of Tanzania (at Bukoba) presided over by Mwangesi, J. (as he then was) in Land Appeal No. 25 of 2011. In short, it was decided, in the said judgment that the present respondent one Didas J. Tumaini was the lawful owner of the whole of a piece of land located at Kitunga area Ruanda

Village in Muleba District having bought the same from the late Lucia Tinabo. Notably, the impugned decision of the High Court Judge was simultaneously overturning the decision of the Bukoba District Land and Housing Tribunal which was in favour of the appellants and upholding the decision of the Ibuga Ward Tribunal which had ruled in the respondent's favour. Mr. Lameck J. Erasto, learned advocate, resisted the appeal on behalf of the respondent and sought to support the decision of the High Court.

In order to bring the dispute between the parties herein into a proper perspective, we think it is apposite at this early stage, to preface our judgment with a brief statement of the factual background and the undisputed events leading to the present appeal.

According to the evidence on record, it is common ground that the late Lucia Tinabo was the owner of a piece of land (shamba) located at Kitunga area Ruanda Village in Muleba District. Apparently by reason of old age and being in need of the necessaries of life, on 11<sup>th</sup> August 2001 she sold a portion of that land to the respondent. Notably, Lucia's ultimate aim was to sell the whole shamba to the respondent but to start with, she bisected it and sold him half of it at an agreed price of Tshs.325,000/=. It was agreed that the remaining part would be sold to him sometimes thereafter at

another Tshs.325,000/= hence the full price of shs.650,000/=. Apparently, following this arrangement between the late Lucia Tinabo and the respondent, there was no permanent boundary demarcation between the two pieces of land as the respondent was expected to buy the remaining portion in the near future. However, just as it happened, the respondent never bought the said portion and, as a result in 2007 the late Lucia Tinabo had to seek the intervention of the Ibuga Ward Tribunal to have the two pieces of land permanently demarcated.

Having heard the parties, and satisfied itself that they were ready for amicable settlement, the Ward Tribunal in its decision dated 18<sup>th</sup> October 2007 directed for the permanent demarcation marks (Ebilamula in Haya language) to be installed on 22<sup>nd</sup> October, 2007 at 4.00 p.m. A copy of the said judgment of the Ward Tribunal was admitted in evidence during the trial culminating in the present appeal as Exhibit "B". We shall revert to this exhibit later. Meanwhile, let us continue to put to bare the factual background of this old-time dispute.

Apparently, after installation of the demarcation marks, the respondent reneged on his promise to buy the remaining portion of the land which was still the property of the late Lucia Tinabo. It is sometimes after this point

that the appellants seem to have joined battle against the respondent. The second appellant Edwin Shuzo Bijuka claims to have bought the disputed piece of land from Lucia Tinabo. For purposes of exactitude, a sale agreement between the late Lucia Tinabo and the second appellant (Exh. A) is said to have been executed on 10<sup>th</sup> January, 2008. As nature took its course, the elderly Lucia Tinabo passed away and she was buried on 17<sup>th</sup> January, 2009. After burial, as a norm, her clan-members invited anyone who owed anything to the deceased or had any claim against her. The respondent then stood up and informed the deceased's clan-members that he owed her Tshs.325,000/= for the remaining portion of the un sold land. According to the respondent, he went ahead and paid the said sum of money to the deceased's clan-members but when he sought to take possession and effectively occupy the said piece of land, the appellants resisted claiming that the same had already been sold by the deceased to the second appellant. Briefly it is against this background that deeply aggrieved by the appellants' action, the respondent successfully lodged a complaint in the Ibuga Ward Tribunal seeking to be declared the lawful owner of what he called a "*shamba*" valued at shs.650,000/= which he said he had bought from the late Lucia Tinabo on 11<sup>th</sup> August, 2001.

After hearing the parties the Ward Tribunal gave judgment in favour of the respondent with costs. It found that the respondent was the legal owner of the disputed piece of land and that the sale agreement between the late Lucia Tinabo and the second appellant herein was nothing but a forged document and further that, the purported sale agreement to the second appellant was invalid. From that judgment, the appellants successfully appealed to the Bukoba District Land and Housing Tribunal (DLHT) which, having analysed the evidence adduced before the Ward Tribunal, it came to the conclusion that the evidence as adduced had proved, on a balance of probabilities, that the late Lucia Tinabo had sold only one part of her piece of land to the respondent and that the remaining portion was sold to the second appellant. In effect the learned chairman of the DLHT found that, if the respondent had bought the whole of the piece of land from the late Lucia Tinabo on 11<sup>th</sup> August, 2001 as claimed, then the two would not have been involved in a boundary dispute in 2007 as to call for the intervention of the Ward Tribunal.

The respondent was deeply dissatisfied with the decision of the DLHT. He accordingly appealed to the High Court of Tanzania (sitting at Bukoba) which, as stated earlier, overturned the decision of the DLHT and restored

the decision of the Ward Tribunal which had decided in the respondent's favour. The undaunted appellants have now appealed to this Court. Their main ground of complaint as certified by the High Court (Arufani, J.) is that in his evaluation of the evidence, the learned High Court Judge, Mwangesi, J. (as he then was), had failed or neglected to take into account the contents of the judgment of the Ward Tribunal (exhibit "B") in respect of a boundary dispute between the late Lucia Tinabo and the respondent and that, as a result, the learned Judge ended up misguiding himself and erroneously concluding that the late Lucia Tinabo had sold the entire piece of land to the respondent.

At the hearing of this appeal, the appellants were represented by Mr. Josephat Rweyemamu, learned advocate while Mr. Lameck Erasto also learned advocate, represented the respondent. In his submission before us, Mr. Rweyemamu faulted the decision of the High Court observing in the main that, the learned Judge of the High Court had not considered exhibit "B" in his judgment an omission which occasioned injustice to his clients. He submitted that had the learned Judge of the second appellate court considered the said exhibit, he would have arrived at a different decision and most probably in the appellants' favour. This is so because, according to Mr.

Rweyemamu, if the High Court Judge had considered exhibit "B" and put it in a proper perspective, he would have found that the late Lucia Tinabo had sold just a piece of her shamba to the respondent and remained with the one which she eventually sold to the second appellant. Mr. Rweyemamu therefore implored us to have regard to exhibit "B" and find in consequence that indeed, the respondent had purchased just a portion of the late Lucia Tinabo's piece of land and that the remaining portion was eventually sold to the second appellant.

For his part, Mr. Erasto resisted the appeal on both the two grounds. He said that in essence, there was no point of law worthy of consideration by this Court as the learned High Court Judge had canvassed all the exhibits tendered before the trial Ward Tribunal. With regard to exhibit "B" which is said to have been consigned into oblivion by the High Court Judge, Mr. Erasto was of the view that, the same was considered along with other documentary exhibits and that it was found to have no convincing value in as far as the appellants' case is concerned. He therefore urged us to hold that this appeal has no merit and consequently dismiss it with costs.

For our part, having considered the uncontested evidence which was adduced before the trial Ward Tribunal together with the decision of the High

Court, we think the most important question in this appeal is as clear as certified to us by Arufani, J. That is whether the learned High Court Judge, in his impugned decision had really considered exhibit "B". Germane to the above-posed question is, if he had considered the said exhibit as it was passionately maintained by Mr. Erasto on behalf of the respondent, could he have reached to the decision forming the subject of this appeal? After carefully going through the judgment of the High Court, we think there is merit in Mr. Rweyemamu's criticism. To start with, it was not in dispute that, at first, the late Lucia Tinabo had sold only a portion of her piece of land to the respondent. We are saying so notwithstanding the disquieting oddity in the sale agreement (exh. "A") between Lucia Tinabo and the respondent. Notably, while it seems to be common ground between the parties herein that the late Lucia Tinabo had initially intended to sell in two equal portions the whole of her land to the respondent and that to this end, on 11<sup>th</sup> August 2001 she sold him the first portion at an agreed price of Tshs.325,000/=, exhibit "A" shows that on that day, the respondent had purchased the whole piece of land owned by the late Lucia Tinabo at Tshs.650,000/=. It is unfortunate that this glaring anomaly which appears to have a direct bearing on the present dispute had escaped the attention of both Mr. Rweyemamu



and the learned High Court Judge. The respondent should have been told, point blank that, if he had bought the whole of the piece of land owned by the late Lucia Tinabo at Tshs.650,000/= as exhibit "A" purports to show, then there would not have been a boundary dispute between him and the late Lucia Tinabo which was resolved amicably by the Ibuga Ward Tribunal in 2007. For, why would the deceased lay hands and raise complaints on a piece of land which she had already sold to the respondent way back on 11<sup>th</sup> August 2001? And that is where exhibit "B" which we entirely agree with Mr. Rweyemamu that it was not considered by the learned High Court Judge, becomes very much relevant. Put in other words, if it is agreed as it should, that the respondent had purchased only a portion of land owned by the late Lucia Tinabo and that the deceased had retained the remaining portion up to the year 2007 when she was involved in a boundary dispute with the respondent, then the respondent cannot be heard today to say that he had purchased the whole piece of land owned by the deceased including the portion which is now in dispute.

Notably, in his relentless efforts to demonstrate that indeed he had purchased the disputed piece of land from the deceased, the respondent told the trial Ward Tribunal that, following the death of Lucia Tinabo, he paid the

purchase price (Tshs.325,000/=) to her clan-members. With due respect, as correctly submitted by Mr. Rweyemamu in his brief but insightful arguments, we find the transaction between the respondent and the clan-members of the deceased, if any, to have been invalid and therefore of no legal effect. It must be noted at once that until then, there was no administrator of the deceased's estate who could have transacted on her behalf. In such a situation, the *nemo dat quod non habet* rule comes into play and if it is anything to go by, it follows in our judgment that the respondent could not have purchased a piece of land from someone who had no legal mandate to deal with it. To say the least, the respondent in this case was a victim of unscrupulous clan-members who could not wait for the appointment of the administrator of the deceased's estate so as to have her property legally distributed to the rightful heirs or otherwise disposed of.

For these reasons, we entirely agree with Mr. Rweyemamu counsel for the appellants that indeed the learned Judge of the High Court did not consider exh. "B" and accord it a proper evidential weight. We are convinced that, given the nature of the present dispute and the evidence on record, had the learned Judge considered the said exhibit and put it in a proper evidential perspective, he would have found that after selling the first portion

to the respondent the late Lucia Tinabo had retained the disputed piece of land which she eventually sold to the second appellant. It must be obvious therefore that, the decision of the learned Judge of the High Court was against the evidence on the record.

We accordingly allow this appeal with costs.

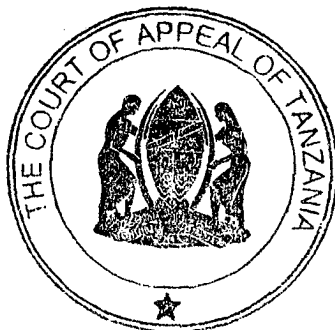
**DATED at BUKOBA** this 16<sup>th</sup> day of August, 2021.

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 17<sup>th</sup> day of August, 2021 in the presence of Mr. Josephat Rweyemamu, learned counsel for the Appellants and Mr. Lameck Erasto, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**