IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J. A., ORIYO, J. A. And MMILLA, J. A.)

CIVIL APPEAL NO. 118 OF 2014

ANTHONY M. MASANGA ..... APPELLANT

VERSUS

1. PENINA (MAMA MGESI)
2. LUCIA (MAMA ANNA) ..... RESPONDENTS

(Appeal from the decision of the High Court of Tanzania, at Mwanza)

(Nyangarika, J.)

Dated the 18th day of November, 2010
in
Land Appeal No. 24 of 2009

JUDGMENT OF THE COURT

13th & 18th March, 2015

MMILLA, J. A.:

The appellant, Anthony Mzungu Masanga is contesting the judgment and decree of the first appellate High Court at Mwanza after it reversed the decision of the District Land and Housing Tribunal for Mwanza in Civil Application No. 131 of 2006 before which he had emerged the winner, as against John Geji & 10 others, of whom the present respondents were

amongst. The centre of controversy before that tribunal was a parcel of land situated at Nyambiti area in Nyakato ward in the City of Mwanza. The present appellant's complaint before that tribunal was that, the respondents trespassed on his land and built houses thereat.

In his brief evidence before the trial tribunal, the appellant had testified that he became the owner of the land in dispute following the conclusion of a sale agreement on 16.4.2005 between him and one Helena Mtaitina, the wife of the late Christopher Mtaitina. Apart from the appellant, two other witnesses had testified before that tribunal in support of his case; PW3 Helen Mtaitina who as aforesaid was the seller of the said land, and PW2 Juvenary Rwebugisa who said was a witness to the said sale transaction.

On the other hand, the respondents were recorded by the tribunal to have generally disputed the appellant's allegations that they invaded his land. All of them told that tribunal that, they were in occupation of their respective pieces of land prior to the period the appellant allegedly bought the same from PW3. To be particular, the first respondent Penina (Mama Mgesi), also known as Penina Kitira said she and her husband, the late Peter Kiabaroti, cleared a bush and occupied her piece of land in issue with effect from 1989, while the second respondent Lucia (Mama Anna), also known as Lucia Maiko

and her deceased husband one Malimi, cleared a bush and occupied her respective piece of land with effect from 1999.

The trial tribunal also heard and relied on the evidence of Misana Bihemo whom it labeled as court's witness. It regarded him as an ex pert witness in his capacity as a planning officer with Mwanza City Council. The witness had testified that there were two types of maps in their office namely; TP drawings and maps showing upgraded squatter areas. He purported to show a map in relation to Nyakato area - proposed squatter incorporation Block 'H', Map No. DRG 14/165/781/28 & 33 approved in 2004 by their office and subsequently approved by the Ministry of Land in 2006.He said that the land in dispute was reflected in that map, and that by 2004 there was no any structures on that land.

Three issues were framed at the trial as follows:-

1. Who is the legal owner of the disputed land?
2. Whether or not the respondents trespassed into the disputed land.
3. To what reliefs are the parties entitled?

In its judgment, the trial tribunal found that the appellant had proved his claim that he was the lawful owner of the land in dispute, save for the

pieces of land held by one Mzee Adam and Hoja who were the10th and 11th respondents respectively, and declared the rest respondents as trespassers. As aforesaid, that decision was reversed by the first appellate court, hence the present appeal.

Before us, all the parties were in attendance and each of them appeared in person. Both sides filed written submissions which they adopted. They all said they had nothing useful to add.

The appellant's memorandum of appeal raised four grounds as follows:-

1. That the first appellate court erred in law and misdirected itself in not reading and understanding the nature of the land in dispute.
2. That the first appellate court erred in law and in fact in ignoring the evidence that the appellant bought the disputed land from PW3.
3. That the first appellate judge erred in law and in fact when it allowed the appeal while there was no evidence showing that the respondents had been in occupation of the disputed land before the appellant bought it from PW3.

4. That the first appellate court erred in law in faulting the evidence contained in the sale agreement plus exhibits on the basis that they had no stamp duty.

In his written submission filed on 29.12.2014, the appellant stated that the first appellate court ought to have considered the evidence contained in the sale agreement dated 16.4.2005. He stressed that sale agreement showed that the appellant was a legal owner of the land in dispute, further that the first appellate court erred in faulting the exhibits tendered and admitted by the trial tribunal only because they were lacking a stamp duty and/or unprocedurelly admitted. He maintained that there was no basis for the first appellate court to fault the decision of the trial tribunal given the fact that the trial tribunal had an opportunity to see the land in dispute when it visited the ***locus in quo***. Relying on the case of **Ally Abdallah Rajab v. Saada Abdallah Rajab** [1994] T.L.R. 132, the appellant contended that the trial tribunal properly assessed the credibility of the witnesses, therefore that the first appellate court erred in faulting the former's decision. After all, he retorted, it was not known to the Ward authority that the respondents had been in occupation of the land in dispute before the applicant bought it. He therefore urged the Court to allow his appeal.

On the other hand, the respondents submitted in their joint written submission that the first appellate court considered in great details the evidence by all parties in the case including the documentary evidence. They stressed that that court correctly held that the appellant's parcel of land which he bought from PW3 was different from the respondents' respective pieces of land. They submitted further that the first appellate court correctly held that the trial tribunal did not strictly observe the procedure in recording the proceedings. In the final analysis, they pressed the Court to dismiss this appeal because the appellant's grounds are void of reasons.

We have carefully gone through the proceedings and judgments of the trial tribunal and that of first appellate court as well as the rival submissions of the parties. We propose to begin with the fourth ground of appeal which alleges that the first appellate court erred in law in faulting the evidence contained in the sale agreement plus other exhibits on the basis that they had no stamp duty, among other reasons.

The first appellate court expunged Exhibit P1 from the record for a couple of reasons.

In the first place, upon examining the record of proceedings of the Tribunal, the first appellate judge noticed that exhibit P1 which was one of the pieces of evidence on which the trial tribunal anchored its judgment, was completely missing. What was on record was merely uncertified copies of the said document.

The first appellate judge noticed similarly that admission of the exhibits which included the purported sale agreement was strongly objected to by the respondents. However, the tribunal overruled them without assigning reasons.

More disturbing as the first appellate judge put it, the admission of the said exhibits was in a blanket form. To amplify the point, the record is clear that when the appellant was testifying, he prayed to tender several documents which included the sale agreement dated 16.4.2005, the certificate of marriage of the seller, written sale agreement signed before Ishengoma Advocate and receipts ERV No. 25321652. The prayer was objected to by the respondents and their colleagues for the reason that the sale agreement dated 16.4.2005 was not genuine. At the end of it all, those documents were collectively admitted as exhibit P1; hence the unavoidable conclusion that it was against the known procedure. If we may borrow the term used by the first appellate judge; it was an "omnibus procedure."

Further, we agree with the first appellate judge that no stamp duty was paid by the appellant in respect of the alleged sale transaction in accordance with section 45 (a) (i) read together with section 5 and the Schedule, all of the Stamp Duty Act Cap. 189 of the Revised Edition, 2002. He correctly found that such omission rendered the sale agreement inadmissible as evidence in court as was expressed in the case of, among others, **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] T.L.R. 211 (CA)

After carefully synchronizing the above situation, we share the view of the learned judge on first appeal that, for justice sake, those documents ought to have been dealt with one after the other instead of dealing with them collectively. It appears therefore that the respondents were not afforded the right to be heard (***audi alteram partem)*** on that aspect. In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an "adequate opportunity" to be heard so as to achieve the quest for a fair trial. See the case of **The Judge i/c High Court Arusha & Another v. N.I.N. Munuo Ng'uni** [2006] T.L.R. 44

In the present matter, we are of the opinion that the respondents were not given an "adequate opportunity" to be heard in respect of Exh.P.1. Therefore, while taking note that these tribunals are given a wide decree of latitude to

regulate their own procedure in conducting trials, we nonetheless think that where the adopted procedure compromises justice, a measure such as that taken by the first appellate court to expunge that evidence constituted in exhibit P1 from the record may be justified and we uphold it. In the circumstances, this ground lacks merit and we dismiss it.

Next for consideration are grounds one, two and three which we find it convenient to discuss them together. Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002 which state inter alia:-

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

See also the case of **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002, CAT (unreported).

It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. In ***Re B*** *[2008] UKHL 35*, Lord Hoffman in defining the term balance of probabilities stated that:-

> *"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

To quote again from Lord Hoffman, this time in a judicial review case in **Secretary of State for the Home Department v Rehman**[2001] UKHL 47, he stated that:-

> *"It would need more cogent evidence to satisfy [a judge] that the creature seen walking in Regent's Park was more likely than not to have*

been a lioness than to be satisfied to the same standard of probability that it was an Alsatian."

Now, in the present matter, the issue before us is whether the appellant had, in the required standard, discharged his duty of proving that the land belonged to him and not to anybody else. The High Court judge was of the opinion that the appellant failed to discharge that duty. We hasten to agree with him for the reasons we are about to assign.

The appellant's evidence before the trial tribunal was that he bought the land in dispute on 16.4.2005 from PW3, Helena Mtaitina. His evidence was supported by that of PW3 who stated that she sold that land to the appellant. She said that she inherited that land from her late husband who bought it in between 1999-2000. She never mentioned the name of the person who sold that land to her late husband. She further stated that the sixth respondent in the trial tribunal was one of the persons who witnessed the sale. However, the latter denied that fact in his defence. In fact, his defence was that he cleared the bush and built his house and the land in dispute was not owned by anybody.

On the other hand, the first respondent's evidence was that her husband started occupying the disputed land in 1989. She said that her

husband died in 2001 and in 2003 she started living on the said land after she completed construction of the house which her late husband had left behind.

The second respondent's evidence was that she started owning the disputed land in 1999. She said that her husband cleared the bush and built a house whereby they lived together for about five years before he passed away. She maintained that she has ever since been living on that land. In our view, the first appellate judge correctly found that the respondents' evidence in that regard was not given adequate consideration, and that even, there was no cogent evidence on record to dwarf it.

As the record shows, the trial tribunal also relied on the evidence adduced the witness it referred to as "the Court's witness" one Misana Bihemo who was a planning officer working with Mwanza City Council. Once again, upon a close look at the evidence of that witness, we agree with the learned judge on first appeal that it is hard to accept him as a person with any special knowledge in the field of survey because he was not a surveyor.

That apart however, his evidence was not properly relied upon by the trial tribunal for reasons expressed by the first appellate judge on page 9 of his typed judgment where he said that:-

"As the land was unsurveyed, it is therefore clear that the neighbours were not involved during the purported sale of the disputed land and also during the survey. The original map purportedly drawn after survey was not tendered in court as exhibit and no reasons were given why a copy of it was only pinned in Tribunal record file without even being marked as an Exhibit and asking all the parties if they had anything to say in objection before a copy of it was admitted in court...In the case of ***Obed Mtei v. Rakia Omari [1989] T:L.R. 111 at page 113 (CA)*** *it was held, interalia, that before any survey is made,* ***it is the duty of the Land Officer to make sure that all third parties interests are cleared and if it is a farm, the Land Officer must see to it that the owners agree on the boundaries.*** *"*[Emphasis provided].

We sincerely subscribe to the judge's finding.

In the circumstances, we think that the appellant ought to have proved that at the time of buying the land in dispute on 16.4.2005, the respondents were not in possession and/or in occupation of that land. Unfortunately, the available evidence does not lead us to believe so, which is the reason why we agree with the finding of the first appellate judge that the trial tribunal was

not justified in its conclusion that the appellant had proved his case against the respondents that they were trespassers.

For reasons we have given, we find no merit in grounds one, two and three as well. In consequence, we dismiss the appeal in its entirety with costs on the appellant.

DATED at **MWANZA** this 17th day of March, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL