IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CIVIL APPEAL NO. 237 OF 2017

BARELIA KARANGIRANGI.....APPELLANT
VERSUS
ASTERIA NYALWAMBWA.....RESPONDENT

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

(Mruma, J.)

Dated the 7th day of January, 2014
in
Land Appeal No 16 of 2010

JUDGMENT OF THE COURT

28th March & 3rd April, 2019.

MBAROUK, J.A.:

This is an appeal arising from the judgment and decree of the High Court of Tanzania at Mwanza in Land Appeal No. 16 of 2010 dated the 7th day of January, 2014. The matter emanated from the Ward Tribunal of Muriti in Ukerewe District in Shauri Namba 40 of 2007. The dispute was on the ownership of the piece of land situated at Itira Village in Muriti Ward in Ukerewe District. The Ward Tribunal held in favour of the Appellant herein but declared one

Changala, who was not a party to the proceedings, to be the owner of the suit land. The Respondent herein appealed to the District Land and Housing Tribunal in Land Appeal No. 211 of 2007, where the District Land and Housing Tribunal overturned the Ward Tribunal decision and the respondent herein was declared the lawful owner. Aggrieved, the appellant herein appealed to the High Court. The High Court also found for the respondent and dismissed the appeal with costs to the respondent. Still dissatisfied, the appellant has filed the present appeal.

In this appeal, the appellant has filed a memorandum of appeal containing three grounds as follows:-

1. *The High Court erred in law to dismiss the appellant appeal and the record does not show anywhere that the Respondent was appointed as an administrator of her deceased father before sued the appellant in court of law.*

2. *The High Court erred in law to dismiss the appellant appeal while the record shows that, the Respondent was a mere invitee to the land in dispute.*
3. *The High Court erred in law to dismiss the appellant's appeal, while the record shows that the Respondent instituted her claim after it was time barred of twelve years from 1957 to 2007.*

At the hearing of the appeal both parties appeared in person, unrepresented. Apart from asking the Court to do justice to her on the ground that she was claiming for her right since the land in dispute belonged to her husband, the appellant had nothing to add but adopted her written submissions. In her written submissions, she stated that, the respondent used the land in dispute as an invitee only by way of cultivation. Further that, the second appellate Court Judge was not correct by nullifying the Ward Tribunal's decision after the time limit in claiming land had lapsed from

when the appellant inherited the land and stayed there without disturbance for more than twelve years.

On her part, the respondent briefly submitted that, the father in law of the appellant who also was her grandfather gave the disputed piece of land to her father. She added that, to date, she possesses that piece of land but the appellant wants to take it over.

The appellant in rejoinder, had nothing useful to add but prayed for the appeal to be allowed and the disputed piece of land of her father-in-law, to be inherited by her children.

As earlier on observed, the real issue for determination and decision is who between the parties to the dispute, is a real owner of the disputed piece of land.

We have carefully gone through the record, the evidence shows that, initially the respondent (who was the applicant) at the Ward Tribunal, in addition to herself called

two witnesses, one Busanya Katamba (PW2) who was 71 years of age testified that, he was living with his father one Maloa whose farm shared a border with that of Mganga in about 1957. It seems Mganga was the father in law of the appellant and a grandfather of the respondent. PW2 testified that, Mganga was tired of living alone and invited Nyalwambwa, then Mganga gave the ownership of the disputed piece of land to Nyalwambwa on which Nyalwambwa lived. Nyalwambwa is the father of the respondent. At page 3 of the record of appeal PW2 testified before the Ward Tribunal and said:-

> *"Alikuja nae nyumbani kwetu... Mganga akasema nitakuja ili nimuonyeshe eneo hili liwe lake."*

Another witness of the applicant/respondent one Bwire Mwangwa (PW3), testified that, in 1957 his father Mganga after he was tired of living alone, had invited Nyalwambwa so that they could live together. He gave him the plot on

which Nyalwambwa constructed a house and he lived there without any dispute. In 1959 PW3, left the place and went to live with his mother. In 1985 when he returned to Itira and found Nyalwambwa still occupying and using the land.

In her evidence, the appellant (who was the respondent at the Ward Tribunal), stated that, the land in dispute belonged to her father in law one Mganga and when her father-in-law died, the land was divided into three plots, one plot was bequeathed to Mwanga's child, another one to Mata's child and the other one, to Karangirangi, her husband. Another witness on her side was one John Kizari (DW3), who testified that, the respondent was her sister in law, as she was married to his brother. DW3 testified that, when his father died in 1991, the clan appointed him (DW3) to divide those farms among his three fathers. They then divided them into three plots. That, Nyalwambwa's children merely stayed there waiting for the place to live and were given the plot to cultivate. That they were asking for the

land to cultivate and the one who was giving them was his son. Hence, after his son died, they then started to go and ask the land to farm from his late son's sister.

The Ward Tribunal had an opportunity to visit the *locus in quo* on 04/06/2007. During the visit, it accompanied the Ward Chairman and some elders living in the neighbourhood of the place in dispute. The Ward Tribunal having interviewed those elders in relation to the ownership of the land in dispute, one Mzee Biseko Mabwai and Mzee Nyangaso stated that, the disputed plot of land initially belonged to one Mganga but Mganga gave the land to Nyalwambwa to live therein since 1957.

At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove. The rule finds a backing from sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002 which among other things state:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

See also the cases of **Attorney General and two Others versus Eligi Edward Massawe and Others,** Civil Appeal No. 86 of 2002; **Ikizu Secondary School versus Sarawe Village Council,** Civil Appeal No. 163 of 2016 and **Godfrey Sayi versus Anna Siame Mary Mndolwa,** Civil Appeal No. 114 of 2012 (all unreported).

It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In

addressing a similar scenario on who bears the evidential burden in civil cases, the Court in **Anthony M. Masanga versus Penina (Mama Ngesi) and another,** Civil Appeal No. 118 of 2014 (unreported), cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities states 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 in 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 to and the fact is treated as having happened."

From the evidence on record, there is no doubt at all that the respondent's evidence adduced at the Ward Tribunal was heavier than that of the appellant (who was the respondent). The respondent (who was the applicant) at the Ward Tribunal, alleged that the land in dispute belonged to her as she inherited it from her father, who was the owner of the disputed piece of land. The burden of proof then lied on her side. The question is whether she successfully discharged her duty?

We have observed that, the respondent's own evidence at the Ward Tribunal supported by that of Busanya Katamba (PW2) and that of Bwire Mwangwa (PW3) also that

of The Ward Tribunal officers who had an opportunity to visit the *locus in quo* on 04/06/2007, sufficiently proved that the land in dispute belonged to her as she inherited it from her father who acquired and owned it from one Mganga (her grandfather). The respondent then, had on the balance of probabilities, succeeded to discharge her duty.

In the circumstance therefore, we agree with the finding of the second appellate judge that from the evidence on record it was proved that the land in dispute was given to the respondent's father not as an invitee but to occupy and use it for good.

Another issue of consideration is the appellant's contention that the suit was time barred by the time it was instituted. The record reveals that, the respondent's father was given the disputed plot in 1957. It is not indicated in the record that there was any dispute in relation to the ownership of that piece of land until 2007 when the dispute arose. The right of action is deemed to accrue on the date of

the dispossession of the land in question. Item 22 of Part I of the Law of Limitation Act, Cap. 89 R.E. 2002 prescribes the twelve years limitation period within which to institute actions to claim back the land. Section 9 (2) of the same Act, prescribes when the right of action accrues in land disputes. The relevant section 9(2) states:-

> *"9 (2)- Where the person who institutes a suit to recover land, or some person through whom he claims has been in possession of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."*

See: **Maigu E. M. Magenda versus Arbogast Maugo Magenda**, Civil Appeal No. 218 of 2017 (unreported).

As stated earlier, it is trite law that he who alleges must prove. In the circumstances, we think that the appellant ought to have proved with certainty that at the time when the respondent instituted the suit at the Ward Tribunal, twelve years from the date the dispute arose had already elapsed. Unfortunately, the available evidence does not lead us to believe so.

The right of action in this present case, accrued when the respondent claimed to have found the appellant and her children cultivating the suit land which according to the record, it was in 2007. The respondent had then immediately instituted the suit in the Ward Tribunal. The suit was hence instituted within the prescribed time of twelve years. In the premises, we find that the appellant's contention that the suit was time barred has no merit.

For the reasons we have given, we find no merit in all grounds. In consequence, we dismiss the appeal in its

entirety. As this is a case involving family members, we order each party to bear its own costs. We so order.

DATED at **MWANZA** this 1st day of April, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL