IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 149 OF 2017

THE REGISTERED TRUSTEES OF JOY IN THE HARVEST.....APPELLANT

VERSUS

HAMZA K. SUNGURA..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (at Tabora)

(Masanche, J.)

dated the 6th day of February, 2002

in

(DC) Civil Appeal No. 41 of 1998

.....

JUDGMENT OF THE COURT

19th & 28th April, 2021

GALEBA, J.A.:

This is a second appeal arising from a decision of the High Court of Tanzania sitting at Tabora in Civil Appeal No. 41 of 1998. The first appeal had originated from the judgement and orders of the District Court of Kigoma in Civil Case No. 38 of 1996. In the latter case, whereas Hamza K. Sungura, the respondent, was declared a lawful owner of Plot No. 299/A Medium Density Kibirizi Area in Kigoma/Ujiji Township (the disputed property), the Registered Trustees of Joy in the Harvest, the appellant, was

adjudged, a trespasser to the land and was ordered to pay TZS 3,000,000.00 to the respondent for the trespass and costs of the suit. The appellant was aggrieved and preferred Civil Appeal No. 41 of 1998 to the High Court, but that appeal was dismissed with costs on 06.02.2002. Still aggrieved by the dismissal, the appellant has preferred the present appeal to this Court.

The brief facts material to this appeal, as can be gleaned from the record, is that on 31.07.1985, one Vrushank Desai (Mr. Desai), was allocated the disputed property by the Regional Land Development Officer for Kigoma Region (the land allocating authority) and was given a letter of offer to that effect. Although both parties were in agreement that Mr. Desai was the original owner of the disputed property, as to who succeeded him in ownership of it, parties' positions, were poles apart. According to the respondent, on 02.08.1989 Mr. Desai surrendered his title to the disputed property, back to the land allocating authority followed by payment of surrender fees on 09.08.1989. It was the respondent's account further that, following the surrender of the disputed property by Mr. Desai, on 12.08.1989, the allocating authority issued him with a letter of offer in respect of the disputed property, thereby allocating it to him. It was also his

contention that subsequent to the allocation, he erected thereon a foundation which the appellant demolished illegally. Thus far was summary of the respondent's case in the District Court.

The appellant's position was quite the opposite; his account of the case was that there was no lawful or effectual surrender of the disputed property by Mr. Desai to the allocating authority on 02.08.1989 and therefore there would be no lawful allocation of it to the respondent on 12.08.1989 as alleged. The appellant contended that, the alleged surrender and allocation of the land to the respondent in 1989 is a total scam and sheer forgery. According to the appellant, Mr. Desai maintained ownership to the disputed property uninterruptedly from its initial allocation to him on 31.07.1985 until on 05.07.1994 when he transferred it to the appellant. The appellant maintained further that, after the land was transferred to it by Mr. Desai, the allocating authority issued, in its favour, a letter of offer dated 15.05.1996, exhibit D8 contained at page 54 of the record of appeal, hence vesting title to the disputed property in the appellant.

As stated above, the appellant lost before both courts below, and has approached this Court with a total of four (4) grounds of appeal to challenge the judgment of the High Court. The grounds are;

*"1. **That** on account of the evidence on record, the learned judge misdirected himself in both law and fact for not allowing the appeal and hence holding that the disputed Plot No. 299/A, M.D. at Kibirizi road, Kigoma/Ujiji Municipality had been surrendered by its former occupier (VRUSHANK DESAI) and the reallocation of the same to the Respondent in 1989 by the Kigoma Regional Land Office was illegal.*

*2. **That** on the strength of the evidence on record, the learned judge further grossly misdirected himself both in law and fact for not declaring the appellant the legal owner of the suit plot since the former occupier of the same (VRUSHANK DESAI) had lawfully transferred the same to the appellant in 1994.*

*3. **That** in the circumstances of the case, the decision of the High Court in Civil Appeal No. 41 of 1998 was erroneous and not legally justifiable since the Honourable Judge did not thoroughly scrutinize the entire evidence on record together with the additional evidence of the said **VRUSHANK DESAI** (the former occupier of the suit plot) as it was contained in his affidavit that was filed in the said Court as per the said High Court's Order dated 22nd July 1999.*

*4. **That** on the strength of the evidence on record, the learned judge grossly misdirected himself both in law and*

fact for not holding that the appellant was not a trespasser on the suit plot and hence the trial Court's order against the appellant to pay a compensation of Tshs. 3,000,000/= to the Respondent for trespass was legally erroneous."

Scanning through the above grounds, it all boils down to one complaint; that the High Court did not reconsider, scrutinize and re-evaluate the evidence that was tendered before the trial court and that had it re-appraised the evidence, it would have set aside the decision of the District Court and declared the appellant the lawful owner of the disputed property. Noting that to be the position, we condensed the four (4) grounds into a single ground of appeal, namely;

"That the learned appellate judge, being the first appellate judge, erred in law and in fact for not considering and re-evaluating the evidence adduced before the trial court, in order to come up with the High Court's independent findings."

Before us, Mr. Method R. G. Kabuguzi learned advocate, appeared for the appellant, while Mr. Armando Swenya, also learned counsel appeared for the respondent.

Arguing the above ground of appeal, after adopting the written submission earlier lodged for the appellant, Mr. Kabuguzi, contended that

the first appellate judge did not re-evaluate the evidence of the trial court, which omission was, according to him, erroneous. For instance, he argued, that the evidence of PW2 Joseph Mahehela, was not at all taken into consideration by the High Court on appeal because the witness had stated that for the alleged surrender transaction to be valid, it was supposed to be made by Mr. Desai himself and not any person on his behalf. To support his position, Mr. Kabuguzi relied on this Court's decision in **Japan International Corporation Agency (JICA) v. Khaki Complex Limited**, Civil Appeal No. 107 of 2004 (unreported), where it was held that the first appellate court has a duty to re-evaluate the evidence of the trial court and come up with its own independent findings.

Mr. Kabuguzi implored us to hold that the High Court omitted to re-appraise the evidence adduced at the trial and as a way forward, he contended that although this is a second appellate Court, but it can step in the shoes of the High Court and re-evaluate the evidence of the trial court and come up with its own findings. He finally beseeched this Court to set aside the judgement of the High Court and allow the appeal with costs.

In reply to oral submission of Mr. Kabuguzi, Mr. Swenya adopted the respondent's written submission on record and added that the arguments of

counsel for the appellant were misleading because the High Court re-evaluated the whole evidence of the trial court, and like Mr. Kabuguzi, he relied on the case of **Japan International Corporation Agency** (supra), without pointing at a specific principle in that authority that would be applied in favour of his line of argument. The learned advocate, nonetheless, moved the Court to dismiss the appeal with costs.

In rejoinder, Mr. Kabuguzi insisted on his earlier arguments made during his submission in chief and prayed that this appeal be allowed with costs.

On our part, we are in agreement with both learned advocates that it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision. On this aspect, see this Court's decisions in **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009, **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and the Attorney General**, Civil Appeal No. 57 of 2017 and recently **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported). The issue before us is therefore, whether the High Court re-

evaluated the evidence adduced at the trial to enable it to come to an independent conclusion of its own.

A focused examination of the impugned judgment of the High Court reveals that, although the learned judge made reference to two letters that were relied on by the respondent, one dated 02.08.1989 and another dated 09.08.1989, the learned judge did not seek to know whether the letter of 02.08.1989 was written with consent or mandate of Mr. Desai. From that point the learned judge briefly touched on the submissions of counsel and to conclude the case, he stated finally as follows, at page 133 of the record of appeal;

> *"After my evaluation of the evidence available, I also do not see any fraud in the matter on the part of Mr. Hamza Sungura. It is evident that Mr. Desai had surrendered the plot back to the Government. The plot was then later given to Mr. Sungura. This explains why Mr. Desai found it a problem to come to court and face the direct questions I had posed when I directed the record to go back to the District Court for additional evidence. The judgment of the district Court is sound and I support it.*
> *The appeal is dismissed with costs.*
>
> *J.E.C. MASANCHE,*
> *JUDGE."*

To us, the above quotation is what the first appellate judge considered to be a re-evaluation of the evidence of the trial court. Mr. Swenya, too in his submission before us was of the same position. However, re-evaluation of evidence entails a critical review of the material evidence on record in order to test soundness of the trial court's findings. In **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another,** Civil Appeal No. 98 of 2008 (unreported) on the same subject, this Court held that;

> *"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (Peters v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R,1970 EA 1; Okeno v R, 1972 EA 32)".*

Underscoring further what re-appraising of evidence by an appellate court means, in **Joseph Ndyamukama (the administrator of the estate of the late Gratian Ndyamukama) v. NIC Bank Tanzania Ltd and Two Others**, Civil Appeal No. 239 of 2017 (unreported), this Court, adopting a definition of that term from **Cambridge Advanced Learners Dictionary** held that re-appraising of the evidence means;

"the act of examining and judging something or someone again, i.e. doing it again or in a different way."

That is to say, the obligation imposed on the first appellate court in handling an appeal is not a light duty, it is a painstaking exercise involving rigorously testing of the reliability of the findings of the court below. For instance, the complaint of the appellant before the High Court in the 3rd ground of appeal was that there was no proof before the trial court that Mr. Desai authorized the respondent to surrender his property back to the Government. In our view, on appeal, such a clear complaint necessitated a deserved scrutiny by the High Court and a clear communication of the outcome in the judgment. A general statement that the evidence was re-evaluated, without such re-evaluation being vivid and apparent on record, like what the High Court stated, is, with respect, evidence of an abrogation of the first appellate court's duty. We are therefore satisfied that the High Court did not review or re-appraise the evidence tendered in testing the soundness of the District Court's findings. Based on the above conclusion, the paraphrased ground of appeal is found to be meritorious.

Mr. Kabuguzi had earlier submitted that, in case we make a finding that the High Court abrogated its duty, as we have done; then this Court be pleased to step in the shoes of the High Court and re-evaluate the evidence and come up with its independent findings. Since Mr. Swenya did not express a contrary view, we agree with Mr. Kabuguzi on that proposition. In agreeing with the learned counsel, we are backed by this Court's decision in **Hassan Mzee Mfaume v. R** [1981] TLR 167, where it held, *inter alia*, that;

> *"Where the first appellate court fails to re-evaluate the evidence and to consider the material issues involved, on a subsequent appeal the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

We are as well, aware of the fact that this is not only a second appeal, but the appeal is seeking to fault findings of two concurrent decisions. Ordinarily, this Court would not readily disturb such findings, unless it can be demonstrated that the findings of the lower courts, are clearly unreasonable or are a result of a complete misapprehension of the substance of the evidence or that the findings are based on a violation of some principle of law culminating into a miscarriage of justice. This Court has persistently maintained that stance in numerous decisions including the **Director of**

Public Prosecutions v. Jafari Mfaume Kawawa [1981] TLR 149 and **Salum Mhando v. R** [1993] TLR 170. Other decisions on the same point are **Omari Mohamed China and Three Others v. R,** Criminal Appeal No. 230 of 2004 and **Wankuru Mwita v. R,** Criminal Appeal No 219 of 2012 (both unreported).

With the above position we then move to the evidence. In the district court a total of eight (8) witnesses testified; six (6) were called by the respondent and two (2) testified for the appellant. PW1, was Mr. Hamza Sungura himself, who had been employed by Mr. Desai as Sales Manager from 1964 to 1996 and also Chairman and Mayor of Kigoma Ujiji Town Council between 1988 and 1994. In brief, he stated that the land in dispute was previously owned by Mr. Desai, but on 02.08.1989 he surrendered it to the land allocating authority on behalf of Mr. Desai and he was allocated the same land 10 days later on 12.08.1989. He stated that he was paying land rent on it and he also obtained a building permit whereupon in 1992 he constructed a foundation worthy TZS 5,500,000.00. He found his foundation already demolished and he did not recognize the letter of offer issued in favour of the appellant. We must pose here and clarify one point, that is, receipts that were tendered to show that the respondent was paying land

rent in respect of the disputed property, cannot legally be considered conclusive documentary proof vesting title or conferring ownership of the disputed property to the respondent.

PW2 was Joseph Mahehela, a Land Development Officer employed by the land allocating authority. He tendered three files which were marked P6A, P6B and P6C. This witness testified that on 02.08.1989, the respondent tendered a letter to surrender Mr. Desai's plot, although the letter was signed by the respondent himself. He stated that on 09.08.1989 the land allocating authority wrote a letter to Mr. Desai for him to pay surrender fees. He stated further that on 05.09.1994, Mr. Desai transferred the plot to the appellant. As to who the lawful owner of the disputed property is, PW2 stated at pages 50 to 51 of the record of appeal, during cross examination that;

> *"The first letter to us is of the plaintiff. By then the owner of the plot was Mr. Desai. The letter was written by Mr. Sungura (the plaintiff), Mr. Desai was supposed to write the letter and not any other person. Mr. Sungura (plaintiff) had no plot and he has no plot at all. He had no right to surrender as he had none. No one can own a plot for and on behalf of another. ...There is an offer to the defendant*

dated 15.05.1996 dully signed by the officer concerned...In 1994 Mr. Desai had not surrendered the plot to our office...As Mr. Sungura (plaintiff) has no letter of offer upon a plot he has no right to the plot."

In our view, the evidence of this land officer is the most reliable because he was working with the land allocating authority at the time and he was called by the respondent. His evidence was that the alleged surrender by the respondent in 1989 was not effectual or valid on account of the surrender document being signed by a person who was not the lawful owner of the disputed property. According to him, it was Mr. Desai who was supposed to sign the document surrendering the disputed property.

PW3 was Paul Michael Kijumbe, an employee of Kigoma Town Council responsible for site and buildings inspection. In our view the evidence of this witness was not material in determining who is the real owner of the disputed property. PW4 was Challa Kiberiti, an employee of Tanzania Revenue Authority (the TRA) in Kigoma. He testified that they received TZS. 1/= as surrender fees and TZS. 120/= as stamp duty on the surrender document. Like PW3, this witness, could not by any standards know who the owner of the land was or if the surrender had any defects.

Juma Mrisho was PW5. He worked with Mr. Desai as Assistant Clerk; assisting him to sell goods and record keeping. The evidence of this witness is hearsay because he stated that he heard what he testified from a co-clerk. The last respondent's witness was Omari Juma, PW6. This was a mason who participated in the construction of the foundation that was demolished. Again, the evidence of this witness had nothing to do with the critical issue of ownership of the plot.

As for the defence, the first witness was DW1, Joel Kaulu, a town engineer with the Kigoma Ujiji Town Council. He did not deal with the disputed property. He had only interest in plot 300 but not the disputed property. The evidence of this witness was not of much relevance to this appeal.

The last witness was DW2, Johnson Kiishweko, who stated that Mr. Desai surrendered the plot to the appellant on 05.07.1994 by way of a declaration which was tendered as Exhibit D5. The appellant was later granted a letter of offer over the disputed property on 15.05.1996 by the land allocating authority. It was his position that the appellant was the lawful owner of the disputed property.

With the above evidence at our disposal, and in order to decide whether the respondent managed to prove the case at the required standard we had to revisit the trite principles in the law of evidence; the general concept of the burden and the standard of proof in civil litigations. The concept is "he who alleges must prove," and it means that the burden of proof lies on the person who positively asserts existence of certain facts. The concept is embodied in the provisions of section 110 (1) and (2) of the **Evidence Act [Cap 6 R.E. 2019]** which provides that: -

> *"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

Certainly, the position that he who alleges must prove is part of our jurisprudence as per this Court's decisions in **The Attorney General v. Eligi Edward Massawe,** Civil Appeal No. 86 of 2002 and **Ikizu Secondary School v. Sarawe Village Council,** Civil Appeal No. 163 of 2016 (both unreported) and the standard of proof, in civil cases is on the

balance of probabilities, see the decision in **Manager, NBC Tarime v. Enock M. Chacha** [1993] TLR 228.

After wholistically re-evaluating the evidence on record, we noted five (5) crucial factual indicators which will assist us in calibration, with a considerable degree of precision, whether the respondent discharged the burden of proof to the standard expected of him.

The five (5) evidential truths as extracted from the evidence as tendered are; **one,** the letter dated 02.08.1989 addressed to the land allocating authority surrendering Mr. Desai's plot was written, signed and presented to the land allocating authority by the respondent and not Mr. Desai, the registered owner of the disputed property. **Two,** there was no evidence at all, that the letter dated 02.08.1989, was written with mandate or authority of Mr. Desai.

Three, the respondent, did not call Mr. Desai as a witness to support his position that he was given mandate to surrender the disputed property to the Government by Mr. Desai. Having in mind the relevance of Mr. Desai's evidence, the High Court directed the taking of additional evidence from him. However, the trial court did not do so, instead it forwarded to the High

Court his affidavit which, the first appellate court, correctly disregarded. In his judgement however, the trial magistrate was of the view that the absence of Mr. Desai's evidence was detrimental to the appellant's case as it ought to have called him to substantiate the evidence of DW2. At page 106 of the record of appeal, the trial magistrate stated as follows;

> *"The evidence of DW2 relied on what Desai did in transferring the plot to the defendant. At this stage I am of the view that Desai was a necessary witness for the defence since he was the only one to challenge the plaintiff. Unfortunately for the defence, Desai was not available."*

The above statement implies the shifting of the burden of proof from the plaintiff to the Defendant, which is legally erroneous in the circumstances. The party who was legally bound to call Mr. Desai was the respondent in order to justify the validity of the surrender, not the appellant. Legally, if a plaintiff fails to prove his case to the required standard, the said case crumbles without having to call the defence to fight it. This position was clarified in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) at page 15 where this Court clearly stated that;

"It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his, and that the burden of proof is not diluted on account of the weaknesses of the opposite party's case."

In that case, this Court quoted with approval part of the text at page 1896 of **Sarkar's Law of Evidence, 18th Edition,** M.C. Sarkar, S. C. Sakar and P. C. Sarkar published by Nexis Lexis as below;

*"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...**until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden.** Until he arrives at such a conclusion, he cannot proceed on the basis of weaknesses of the other party..." (emphasis supplied).*

As per the above principle, the appellant did not have to defend itself in the District Court, as the case against it had not been effectively proved.

Four, there was no evidence on record that the respondent applied to the land allocating authority for grant of the disputed property to him.

Five, the letter of offer, exhibit P1 at page 33 of the supplementary record of appeal, allegedly granting the disputed property to the respondent, shows that his grant was effective 01.07.1989 whereas the surrender, according to his evidence, was presented on 12.08.1989. That means, although he purported to surrender Mr. Desai's plot in August 1989, he was granted the disputed property when it was still in the ownership of Mr. Desai.

In the event and for the foregoing reasons, we have no flicker of doubt in our mind that the respondent completely failed to prove his case on the balance of probabilities as was required of him and our interference with concurrent findings of the two courts below, is accordingly justified.

That said and done, this appeal is allowed. We reverse the decision of the High Court which upheld the judgement of the District Court.

Consequently, we hold that the Registered Trustees of Joy in the Harvest, the appellant, is the lawful owner of Plot No. 299/A Medium Density Kibirizi Area in Kigoma/Ujiji Township. Costs to be borne by the respondent.

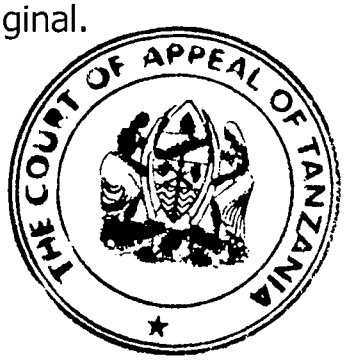
DATED at **TABORA**, this 27th day of April, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 28th day of April, 2021 in the presence of Mr. Amos Galise, learned Counsel for the Appellant and Mr. Kamaliza Kamoga Kayaga, learned Counsel who is holding brief for Mr. Armando Swenya Counsel for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL