IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT MWANZA

LAND APPEAL NO. 22 OF 2008

(From the Decision of the District Land and Housing Tribunal of Tarime at Tarime in Application No. 28 of 2008)

MWITENTYA RYOBA ..... APPELLANT

VERSUS

MAMBA CHACHA KEMBAKI ..... RESPONDENT

JUDGMENT

MWAMBEGELE, J.:

This is an appeal from the decision of the District Land and Housing Tribunal of Tarime (hereinafter the Tribunal) in which Mwitentya Ryoba Mwita; the Appellant was sued by Mamba Chacha Kembaki; the Respondent for trespass into the disputed parcel of land. The Tribunal decided in favour of the Respondent and consequently allowed the Respondent's application. Dissatisfied, the Appellant has appealed to this court filing six grounds of appeal challenging the decision of the Tribunal.

Both Respondents are no more. One Magibo Mamba was appointed administrator of the estates of the Respondent. The letters of administration have been filed in this court file. When this matter came up for hearing before me on 19.10.2012, only the Appellant appeared. There was no proof of service to the said Magibo Mamba; administrator of the estates of both deceased Respondents. I adjourned the matter. On 29.10.2012 when this appeal came up for hearing, Magibo Mamba; the administrator, again, did not enter appearance. It was said he refused service. Indeed there was proof that he had refused service. The Court Process Server had sworn an affidavit to that effect. In the premises, I granted the Appellant's prayer to argue the appeal *ex parte*.

In arguing the appeal, the Appellant prayed to rely on what he stated in the grounds of the appeal he had filed to instigate this appeal. He just added that the second witness Ryoba Mamba, had never appeared in court and actually he had never testified. He also submitted that the Tribunal ought to have visited the disputed land so as to reach a fair decision.

Having gone through the record of this appeal as available in the court file, I satisfied that the Tribunal was correct to allow the Respondent's application. The ground upon which the Tribunal allowed the Respondents' case is the fact that

both the Appellant and Respondents were allocated land by the Village Land Allocation Committee. The Respondent, after long customary occupation, was allocated the disputed land in 1993 while the Appellant was allocated the same in 2001. The Tribunal therefore held that the allocation of the disputed land to the Appellant had no legal effect.

I have perused the record in its entirety and with utmost great care. The Testimony of the Respondent at the trial is very clear that he "gave" the Appellant the disputed land to cultivate in 1994 and that he (the Appellant) invited one Nyahiri Ryoba; his relative to the disputed land but that the he (Respondent) objected. That it was at that point in time when the Appellant started the process to be allocated the disputed plot. According to him, at that moment, the Appellant had not been allocated he disputed land. That, at one point, he was forced to sign a document in favour of the Appellant as he was put under custody. I note here that the Respondent is trying to raise a plea *of non est factum* (it is not his deed) which, I think, is not applicable in the circumstances of this case. In the premises, I will not make a finding on this plea.

The Respondent contended further that the allocation of the disputed land to the Appellant was not lawful. And from the testimony of Ryoba Mamba; who

testified as PW3, it appears the land was allocated to the Appellant after the Village Government realised that the Respondents used to grow *cannabis sativa* in the disputed land.

On the other hand the appellant claimed to have been allocated the land in 1994 while the Respondent was allocated in 1993. He claimed that the Respondent was allocated only 25 acres but that he forged the document to read 250 acres. As bad luck would have it, Lucas Nkaina PW2 who participated in allocating the land to the Respondent did not testify as to the acreage allocated to the Respondent. But as it is the Appellant who has averred, the evidential principle that goes: he who alleges must prove [see Section 110 (1) of the evidence Act, Cap 6 – R.E.2002], the burden is upon him to prove what he has alleged. He did not. Worse more, the allegation of forgery by the Appellant against the Respondent requires proof above the normal standard of proof in civil cases as it was held in ***Ratilal Gordhanbhai Patel Vs Lalji Makanji*** [1957] 1 EA 314 at page 316:

> "*Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required*".

In the present case, the Appellant has just asserted without any evidential proof whatsoever, let alone proof on the normal preponderance of probabilities as required in normal civil cases neither beyond the ordinary as it is in allegations of fraud in civil cases. In the premises, I will not accept this averment.

As to who between the Appellant and Respondent was allocated the disputed land first, the evidence at the trial was loud and clear. The Appellant, as per his testimony, was allocated the disputed land on 14.03.1994 while the Respondent, as per PW2, was allocated the same on 05.03.1993. In view of this, I find and hold that the Respondent has a better title than the Appellant. I am satisfied that the Tribunal was correct to reach the verdict it arrived at. In the final analysis, I endorse the decision of the Tribunal and dismiss the appeal. As the Respondents, through the administrator of their estates, did not defend this appeal, I make no order as to costs.

DATED at MWANZA this 5th day of November, 2012.

J. C. M. MWAMBEGELE

JUDGE