IN THE HIGH COURT OF TANZANIA

AT MWANZA

(LAND DIVISION)

MISC. LAND APPEAL NO. 49 OF 2008

(Appeal from the Judgment of the District Land and Housing Tribunal for Mara at Musoma in Land Appeal No. 107/2007)

DAUDI MWITA.....APPELANT

VERSUS

OKOMBO GUYI.....RESPONDENT

JUDGEMENT

LATIFA MANSOOR, J.

The Appellant was represented by Byabusha Advocate while the Respondent was represented by Magwaiga Advocate. The Appellant filed five grounds of appeal.

On the first ground of appeal, the Counsel for the Appellant had submitted that the Chairman of the District Land and Housing Tribunal being the first appellate court failed to evaluate evidence and erred in relying on the opinion of the assessors. To support his case he cited the case of Hassan Mzee Mfaume vs. Republic (1981) TLR page 167 at page 168, where the judge had said that:

> "it is stressed once again that a judge on first appeal should re-appraise the evidence because the appeal before him is, in effect, a re-hearing of

the case and that in the course of doing so he should set out or indicate the grounds for his decision.

> Given that the first appellate court failed to re-evaluate evidence and to consider material issues involved therein, the question now arising should this court do? .....

At page 169 of the judgment, the Court of Appeal said:

> "It is apparent that acting on this provision (S.3 (2) of the Appellate Jurisdiction Act, 1979), this Court may properly exercise the powers of the High Court to re-evaluate evidence in the instant case."

The Counsel for the Appellant urges that this Court should re-evaluate evidence instead of remitting the matter back to the 1st Appellate Tribunal since the First Appellate Court failed to do so.

On the 2nd ground of appeal, the Counsel for the Appellant submitted that the Chairman of the District Land and Housing Tribunal erred when visiting the locus in quo and asking the neighbors of the boundaries while these neighbors were not called before the Tribunal as witnesses thereby denying the chance to the Appellant to cross examine them.

On 3rd ground of appeal, the Counsel for the Appellant submitted that the 1st Appellate Tribunal erred in doubting the credibility of the key witness for the Appellant case one Nyangubo Mwita Matindu "Nyangubo" who testified as PW5. He said that the testimony of this witness should have been corroborated by the testimony of PW2 one Warioba Masawe, and the Appellate Tribunal would have found that PW5 was a credible witness.

On ground No 4, the Counsel for the Appellant submitted that the 1st Appellate Tribunal erred in relying heavily to Exhibit B, a letter by the Village Council confirming that the disputed land belongs to the Respondent. He said that this document was faulty as it was issued after the dispute had already started. He submitted further that this document cannot be used to confer the Respondent the customary right of occupancy. To support this argument he referred to the case of the Bishop Bukoba Diocese vs. Rev. George Rugarabamu, High Court Civil Appeal No. 6 of 1989 (unreported), where the judge held that a document is inadmissible when it is written when the proceedings are pending or anticipated, the Counsel for the Appellant said that this document is inadmissible as it was issued by the mediators when adjudicating over the dispute of this same land, this document was not issued in the ordinary course of business.

On ground No 5 the Counsel for the Appellant submitted that the First Appellate Tribunal erred in failing to appreciate the fact that the Appellant occupied the land for more than 10 years.

Magwaiga Advocate for the Respondent countered the first ground of appeal and submitted that the Chairman of the 1st Appellate Tribunal properly evaluated evidence and reached in its own conclusion, and it was not against the law for the Chairman of the Appellate Tribunal to appreciate and consider the opinion of the assessors.

On ground No. 2 the Counsel for the Respondent submitted that it is not true that the Chairman of the Appellate Tribunal

turned himself into a witness and it was not wrong for the Chairman to ask the neighbors of their knowledge of the boundaries.

The Counsel for the Respondent had submitted that it is not the duty of the 2nd Appellate Court to assess the credibility of a witness; this duty is of a trial court that have seen and assessed the demeanor of the witness. He said that Nyangubo (PW5) testimony was shaky and contradictory because he had failed to show the exact area he had sold to the Appellant.

On ground No. 4, the Counsel for the Respondent submitted that it is on record and in evidence that the Respondent is in occupation and use of the disputed land since 1980. In 2003 he stopped using the land as he wanted to leave it unused in order to have it fertilized. In 2004 the Appellant trespassed into the land. He said the Respondent has been in occupation and use of the disputed land for 27 years. He said Exhibit B was issued by the Village Land Committee as a certificate after being satisfied that the land belongs to the Respondent. The Counsel for the Respondent submitted further that the allegation that the Appellant has been in occupation of the land for 10 years is unsubstantiated, and the Appellant failed to give any documentary proof to certify that the Village Council allocated him this piece of land.

On ground No. 5, the Counsel for the Respondent submitted that the evidence given by the Respondent was heavier than that of the Appellant, and when the Ward Tribunal visited the locus in quo found that the land belongs to the Respondent and that the

Appellant showed the land different from the land which is in dispute.

On first ground of appeal I would say that in the holding of the case of Hassan Mzee Mfaume vs. Republic cited by the Counsel for the Appellant that the Second Appellate Court has a duty to re-evaluate evidence if the first Appellate Court had failed to do so, I would say that an appeal lay as of right to the High Court where the first Appellate Court confirmed, varied or reversed the decision of the Trial Court and, in hearing such an appeal, the High Court had the powers to re-evaluate evidence and assume the powers of the 1st Appellate Court. On a second appeal, the High Court is not required to re-evaluate the evidence in the same manner as the first Appellate Court; this depends on the circumstances of each case. The second appellate Court would re-evaluate evidence only when it is necessary as doing so would create unnecessary uncertainty. It is sufficient to decide whether the first Appellate Court on approaching its task had applied the relevant principles properly. In the exercise of its powers of re-evaluation of evidence, the first Appellate Court was not bound to follow the trial Courts's findings of fact if it appeared that either he had clearly failed on some point to take account of particular circumstances or if the impression based on the demeanor of a witness was inconsistent with the evidence in the case generally;. In this instance, there had been no good reasons for the High Court to interfere with the first Appellate court's findings of fact as it had not committed any errors in the evaluation of the evidence as a whole. The Chairman of the first

Appellate Tribunal gave his reasons for accepting the evidence of the Respondent's witnesses and rejecting that of the Appellants' witnesses and his reasoning in doing so could not be faulted.

On the second ground of appeal, there was no error committed by the Chairman of the First Appellate Tribunal in asking the neighbors, when visiting the locus in quo, of their knowledge of the boundaries of the disputed land, after all as submitted by the Counsel for the Respondent that the witnesses had already given their testimony over the issue of boundaries and the Appellant had a chance of cross examining the witnesses.

On ground No. 3, I agree with the submission by the Counsel for the Respondent that the demeanor and credibility of a witness and the weight of evidence is best judged by the court before which the evidence is given and not by the court which merely reads the transcript of the evidence. The decision of the Chairman of the first appellate Tribunal in doubting the credibility of PW5 could not be faulted.

On ground no. 4 , regarding the document given by the Village Council (Halmashauri ya Kijiji) after mediation of the dispute, I agree with the submission of the Counsel for the Respondent that this document is admissible in evidence and that the decision of the Chairman of the first Appellate Tribunal was not based on this document at all. However Under section 34(1) (b) and (d) of the Evidence Act, evidence given by a witness in a judicial proceeding was admissible in subsequent judicial proceedings for the purposes of proving the fact which it states if, inter alia, the proceeding was

between the same parties or their representatives and the adverse party in the first proceeding had the right and opportunity to cross examine. Admission of this evidence did not cause any miscarriage of justice.

On ground No. 5 I also agree with the submissions by the Counsel for the Respondent that the first Appellate Tribunal did not err in the evaluation of evidence and deciding that the evidence given by the Respondent was heavier compared to that given by the Appellant. It is in record that the Respondent was in occupation and use of this land for over 27 years, and the Appellant failed to identify the land he purchased from one Nyangubo. The key witness for the Appelant's case was found to be unreliable as he failed to show the land he sold to the Appellant. The Appellant failed to prove the 10 years tenure he had occupied and used the land.

Accordingly, for the foregoing reasons, I dismiss all five grounds of appeal with costs.

Appeal dismissed.

Latifa Mansoor
JUDGE
29 OCTOBER 2012