

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

LAND CASE APPEAL NO. 20 OF 2012

(From the decision of the District Land and Housing
Tribunal of Iringa District at Iringa in Land Case Appeal
No. 33 of 2010 and Original Ward Tribunal
of Itunundu Ward in Application No. 30 of 2009)

ABDALLAH MATIMBWA ----- APPELLANT

VERSUS

JOHN MASUNGA ----- RESPONDENT

19/11/2015 & 24/11/2015

JUDGMENT

KIHWELO, J.

The appellant herein filed an appeal before this court seeking to challenge the decision of the District Land and Housing Tribunal which allowed the appeal and quashed the decision of the Itunundu Ward Tribunal which awarded the appellant right over the suit land. Aggrieved by that decision he preferred an appeal whose Petition has three grounds namely;

- 1. That, the Chairman of the District Land and Housing Tribunal erred in law and fact by failure to consider strong evidence adduced by the Appellant in the Ward Tribunal.*
- 2. That, the Chairman of the District Land and Housing Tribunal erred in law and fact for decide (sic) that the village council re-allocated the suit land to the Appellant.*

The brief background to this matter which has chequered history and which was the basis of the District Land and Hosing Tribunal's decision is that the respondent way back in 1995 was allocated the suit by the village council. The respondent utilized the said land for four years when the Mkombozi canal went dry that is when he stopped and left somewhere else and when he came back in 2009 the respondent was surprised to find that the suit land was occupied by the appellant.

It is on record that the appellant was allocated the suit land in 2005 by the village council upon application for land allocation.

Upon realizing the respondent's claim over the suit land the appellant filed a claim before the Itunundu Ward Tribunal Application No. 30 of 2002 which upon full hearing of the parties and their respective witnesses the Ward Tribunal declared the appellant the rightful owner. Dissatisfied by the decision of the

Itunundu Ward Tribunal the respondent filed an appeal before the District Land and Housing Tribunal in Land Case Appeal No. 33 of 2010 which upon trial the District Land and Housing Tribunal upheld the appeal, quashed the decision of the Ward Tribunal and declared the respondent the lawful owner.

It is on the basis of that decision the appellant came before this Court challenging the decision of the District Land and Housing Tribunal.

Before this Court the appellant was initially represented by Mr. Mmbando, learned counsel and later Mr. Mhagama, learned counsel who however withdrew his instructions in the process as such the appellant argued the appeal in person. The respondent elected not to appear hence the appeal was heard *ex parte* pursuant to the order of this Court Honourable Shangali J. dated on 12th August, 2014.

The appellant being a layman did not have much to say except to request the Court to adopt the grounds of appeal as part of his submission.

I have anxiously and carefully considered the records of the two tribunals and the grounds of appeal and one thing stands out that both the appellant and the respondent alleges to have been allocated the suit land as such the main issue which cries for my determination is whether the present appeal is meritorious.

In an attempt to answer the above issue I have been guided by the principle stated in the case of **Hassan Mzee V Republic** [1981] TLR 167 in which the court religiously held that;

“Where the first appellate court fails to re-evaluate the evidence and to consider 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.”

From the evidence on record the appellant produced three witnesses including himself. These were PW2 Ndweti Bilali the Secretary of the Village Land Committee and PW3 Shedrack Mhumba a member of the Village Land Committee who both testified how the appellant was allocated the suit land way back in 2005 by the Village Land Committee which they were members. In my view their testimony was cogent and consistent.

On the other hand the respondent too produced three witnesses including himself. These were DW2 Zavery Mhumba who testified that way back in 1995 he went along with the respondent for the allocation of the suit premise while DW3 Martini Mponilogo testified to be a neighbor of the respondent who has a farm in neighborhood to the respondent. However, from the respondent's testimony and that of his witnesses there were conspicuous discernible contradictions which were apparent. Whereas the respondent claimed to have been allocated four acres, DW2 supported that assertion while DW3 testified that the respondent was allocated one acre. As if that was not enough the respondent's testimony had further contradictions. The respondent testified that he was allocated the suit land on 1995 cultivated for four years before leaving it for another four years owing to drought of the Mkombozi canal and came back in 2009 just to find that the appellant was in occupation of the suit land. But simple arithmetic reveals that the respondent's testimony do not add up as alleged because the four years from 1995 and another four years lands to 2003 and not 2009 as alleged hence the respondents testimony was nothing but a lie as the puzzle pieces did not add up when put together.

Needless to say the appellant's testimony and in particular his witnesses were members of the Village Land Committee while the respondent's witnesses were the alleged neighbours only and none of the members of the Village Land Committee did testify.

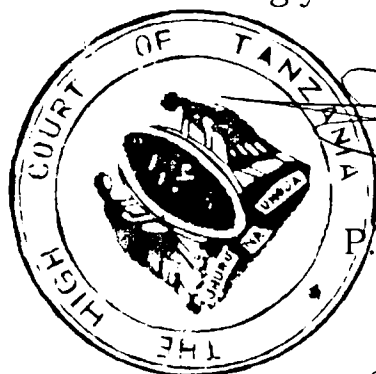
In my respectful opinion the evidence adduced by the appellant was a lot more stronger than that of the respondent in that the respondent was unable to prove that he was allocated the alleged suit land. His testimony along with that of his witnesses was nothing but a sham and with contradiction.

It is trite law that parties to a suit can not tie. In the case of **Hemed Said V Mohamed Mbilu** [1984] TLR 114 the court decisively held that;

“According to law both parties to a suit can not tie, but the person whose evidence is heavier than that of the other is the one who must win.”

In the light of the foregoing and for the reasons stated above I allow the appeal, quash the decision of the District Land and Housing Tribunal, set aside the order and uphold the decision of the Itunundu Ward Tribunal with costs.

Ordered accordingly.



P. F. KIHWELO
JUDGE

24/11/2015