IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISC. LAND CASE APPEAL NO. 25 OF 2015

ERNEST F. MLELWA (The administrator of the estate of the late BEATUS MLELWA ---------- APPELLANT

VERSUS

1. MAVANGA VILLAGE COUNCIL
2. VODACOM TANZANIA ----------RESPONDENTS

JUDGEMENT

28th July, 2016 & 13th December, 2016

KIHWELO, J.

This is an appeal taken by the Appellant Ernest F. Mlelwa, the administrator of the estate of the late Beatus Mlelwa. The appellant appeared in person while the first respondent was under the services of Juvenalis Ngowi, learned counsel from East Africa Law Chambers and the second respondent was represented by Mr. Erick Nyato, learned counsel.

The background to the instant appeal is briefly that the appellant was unsuccessful party in the Application he lodged at the District Land and Housing Tribunal of Njombe in Land Application No. 12 of 2010 before Hon. G. Kairuki. The Appellant had instituted an Application at the District Land and Housing Tribunal against the Respondents on the allegation that the 2nd respondent had erected a communication/ transmission tower in the appellant's suit land without his consent. It was alleged further that the said tower was built in August 2008 and that he approached the 2nd respondent while the construction was in progress and he was informed that the 2nd respondent was given permission by the 1st respondent to erect the transmission tower. The appellant claimed that the suit land belonged to him as he was allocated by the 1st respondent way back in 1974 during operation sogeza and that the 2nd respondent had no power or authority to lease the suit land to the 2nd respondent. The tribunal dismissed the application on account that the application had no legal basis. Aggrieved by the decision of the tribunal the appellant filed the instant appeal.

The Appellant filed six grounds of appeal to challenge the decision of the Tribunal. The six grounds of appeal are:-

1. *The District Tribunal erred in law and facts to hold that five persons including the appellant owned the suit land before 1988 without considering that the appellant had never owned the suit land jointly.*

2. *The judgment of the District Tribunal is contradicting and bad in law.*

3. *The District Tribunal erred in law to insist that the appellant had voluntarily given his suit land to the village government while not.*

4. *The whole judgment of the District Tribunal is bad in law and fact as it (sic) based on the contradicting evidence adduced by the respondents' witnesses.*
5. *The District Tribunal erred in law and facts to conduct the locus in quo in ignorance of the law and precedents.*

6. *The District Tribunal erred in law and facts to deliver judgment in favour of the respondent without considering the ample evidence adduced by the appellant side.*

By consent of the parties the appeal was disposed of through written submissions that were dully filed as directed by the court.

While arguing in support of the appeal, the appellant submitted that the trial tribunal erred when it held that five persons including the appellant owned the suit land. He further argued that the trial tribunal erred when it held that the appellant voluntarily gave the suit land to the 1st respondent.

The appellant went on to argue that the judgment of the trial tribunal was premised on contradictory evidence of the respondents' witnesses and he cited in particular the testimony of DW1. He strenuously submitted that the trial tribunal erred in visiting the *locus in quo*. To buttress further his argument he referred this court to the case of **Nizar M.H.Lada V**

Gulamali Fazal Mohamed [1980] TLR 29 in which at page 30 the Court stated that;

> *"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator."*

He finally prayed that the Court should allow the appeal with costs.

In reply to the submission by the appellant the counsel for the first respondents Mr. Erick Nyato, learned counsel submitted briefly that the appellant is one of the people who voluntarily surrendered the suit land to the 2nd respondent and that in no way was the evidence adduced by the respondents' witnesses contradictory. Finally he argued that the trial tribunal correctly conducted the *locus in quo*.

In reply to the submission by the appellant the counsel for the 2nd respondent Mr. Juvenalis Ngowi, learned counsel submitted in great detail that it was the duty of the appellant to prove the allegations but he did

not. Mr. Ngowi went further to cite the provisions of section 110(1) as well as section 3(2)(b) of the Evidence Act, Cap 6 RE 2002 and valiantly argued that the appellant miserably failed to prove that he is entitled to the suit land which he voluntarily surrendered to the 2nd respondent in 1988. He further argued that there was no contradictions at all in the trial tribunal's judgment and that there was no fault in the tribunal's visiting the *locus in quo.*

After thorough analysis of the evidence on record and having carefully considered the rival submissions made by both counsel the central issue to be determined is whether the instant appeal is meritorious.

It is important to stress that it is not disputed that the present appeal is essentially based upon facts presented and evaluated by the District Land and Housing Tribunal. The law is very clear and settled that where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion. This position has been adopted by the court in

numerous occasions and one such occasion is in the case of **Ali Abdallah Rajab V Saada Abdallah Rajab & Others** (1994) TLR 132.

The rationale behind this legal position is that the trial court or tribunal was better placed to assess the demeanour and credibility of witnesses who came before it and testified during the trial of the dispute or case hence arrived at the conclusion it reached.

In the present appeal the question is, is there any indication that the trial Tribunal failed to take some material point or circumstance into account to warrant this court find that the Tribunal came to an erroneous conclusion? To answer this question I will briefly point out some key elements of the Tribunal's records to drive the point home.

According to the records of the District Land and Housing Tribunal more in particular the testimonies of PW1, PW2, PW3, PW4, DW1 and DW5 it is not in dispute that the appellant was in ownership over the suit land. DW1 for instance who was by then the Village Chairman of the area where

the suit land is located testified in no uncertain terms that they asked the appellant and four others to surrender their land to father Gerald Sanga so that he could construct a water project and admittedly DW1 testified that no compensation was made to the appellant and his co-owners at all. This was equally testified by DW2, DW3 and DW4 who testified in more similar terms that they reached an agreement to surrender their land to the 2nd respondent for construction of water project.

It was DW2's testimony that the suit land was a property of one Sebastian Mlelwa and part of that piece of land belonged to the applicant and that the same piece of land was taken by the 2nd respondent as there was demand to establish a water project in that piece of land which was seen to be suitable. If that account of DW2's testimony is correct then what was the rationale for the 2nd respondent to request the said land from the appellant and four others? It goes without saying that the testimony of DW2 is contradictory and reveals that the appellant had interest in the suit land.

There is yet another piece of evidence which conspicuously indicates contradictions of the respondents' witnesses. This is the evidence of PW2 (Batromei Mpalala) who testified that the agreement for surrender of the suit land by the appellant and his co-owners was done in 1977 but at the same time DW1 testified that the agreement was made in 1988 which is a total contradiction which the trial tribunal did not resolve in its judgment.

I totally disagree with the submission by the counsel for the Respondents that the Appellant has failed to establish his ownership or rather prove the case. In the contrary the respondents have miserably failed to prove that the appellant voluntarily surrendered his suit premise to the 1st respondent as no any contract or even minute of the 1st respondent were tendered and produced in court which raises a million dollar questions. In my considered opinion and given the mounting contradictions, it would have been logical and appropriate for the 1st respondent to produce before the tribunal the agreement or the minutes of the surrender.

On the strength of the testimonies of PW2, PW3, PW4, DW1 and DW5 I am of the strong opinion that the testimony of the appellant is heavier than that of the respondents and as clearly stated in the case of **Hemed Said V Mohamed Mbilu** [1984] TLR 113 *"the person whose evidence is heavier than that of the other one must win."* It is the humble submission of this honourable court that the Appellant did establish title.

Consequently, this appeal is hereby allowed by quashing the decision of the trial tribunal with costs.

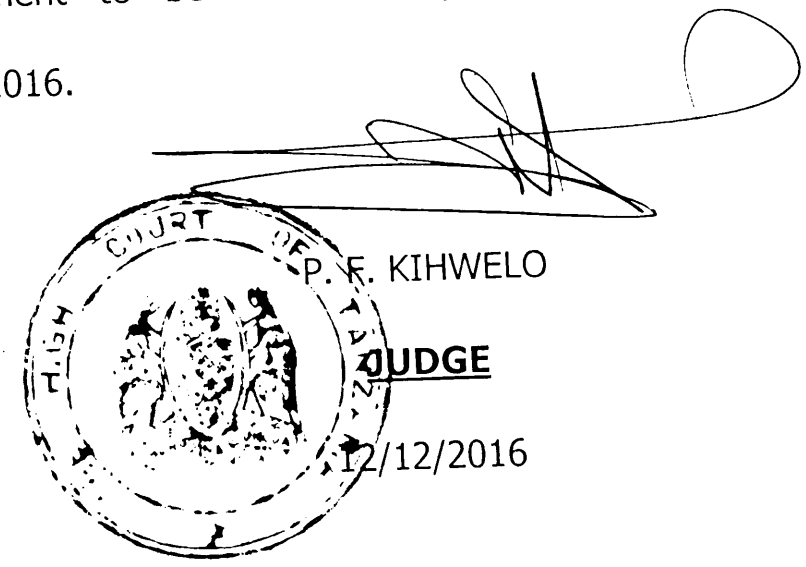
It is so ordered.

P. F. KIHWELO

JUDGE

12/12/2016

Judgement to be delivered by the Deputy Registrar on 13th December, 2016.



P. F. KIHWELO

JUDGE

12/12/2016