IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 105 OF 2016

(Arising from the District Land and Housing Tribunal of Shinyanga at Shinyanga, Original land case No. 134 of 2015)

MATALUMA GIMU..... APPELLANT

Versus

1. NYAMATE KALUMBETE
2. DOTTO MWANDU }.....**RESPONDENTS**
3. TANO SHIJA

Date of last order: 09/11/2018
Date of Judgment: 24/01/2019

JUDGMENT

KIBELLA, J.

The appellant, MATALUMA GIMU unsuccessfully sued NYAMATE KALUMBETE, DOTTO MWANDU and TANO SHIJA, hereby referred to as the 1st, 2nd, and 3rd Respondents for a claim of piece of land parcel which was surveyed and located at Masunula village, Usule Ward which valued by estimation at Tshs. 6,000,000/= (six million). It was vide Land Application No. 134 of 2015 before the District Land and Housing Tribunal of Shinyanga at Shinyanga.

At the end of the trial the trial tribunal was satisfied that the applicant now appellant failed to prove his case to the required standard that is to the balance of probabilities, hence judgment was entered in his disfavor as his claim was dismissed whereby each party ordered to bear his/her own costs.

Dissatisfied with the above decision by the trial tribunal, the appellant has preferred this appeal before this court.

Briefly the evidence by the prosecution side was led by Mataluma Gimu, PW1 who testified that, the dispute arose on 13/11/2011, when the 1st Respondent summoned people intending to divide PW1's land which he inherited from his father. The 1st Respondent is PW1's aunt, i.e a sister of PW1's late father.

That it was one Maige Kibeshi who divided the suit land. PW1 instituted a land case before Usule Primary Court where he lost. He appealed to the District court of Shinyanga at Shinyanga where was asked to first appoint an administrator of the estate of their late father. PW1 obliged and instituted such an application before Usule Primary court.

However, later, the 1st Respondent instituted a claim of the disputed land before Usule Ward Tribunal where PW1 won the case. The claimant/1st Respondent appealed to the District Land and Housing Tribunal for Shinyanga at Shinyanga. Her appeal was dismissed as she was not an administratrix of her deceased father who was PW1's grandfather. She did not do so, then PW1 instituted that land case before the trial tribunal. That year the Respondents used force to enter in the suit land when he reported the incident at Tinde police station. The Respondents were arrested and sent at police station where it was decided that the dispute should be heard first.

The land indispute is the property of his father. He got the same suit land upon clearing bush and another was given to him by Mwanangwa, while

other lands were allocated to him as his inheritance from his father (PW1's) grandfather.

Answering question to one of the assessors, PW1 replied inter alia that:-

> *"my father was allocated 5 acres as his inheritance. The Land cleared by him comprises of 15 acres by estimation and land given to him by Mwanangwa (chief) comprised 4 acres. It was my father who was using the suit land before his death."*

The above evidence by PW1 was supported by PW3, who testified to be the mother of the appellant and the sister in law of the 1st Respondent. She stated that the suit land was acquired by herself and her late husband by cleaning. However, after the death of her late husband, the Respondents trespassed her land and divided it alleging that the same was the property of their late father (the grandfather of PW1). However, that division effected without following the number of owners.

In her sworn defence, Nyamate Kalumbete, testified as DW1 and stated that, the land in dispute is the property of her late father. Upon the death of her father, in 2011, they decided to divide the suit land. The 2nd Respondent built on the allocated land to him. Later, they were arrested by policemen as alleged to have trespassed the suit land which was not true. From DW1's understanding, the land in dispute was not the property of the applicant's late father but the same is the property of their late father. And that, villagers and all relative were present at the division of the suit land.

That the applicant/appellant sought to be given land from DW1 but she resisted. That each child was given two acres. Later the applicant/appellant alleged that the land allocated to the Respondents was his land which was not true. On cross-examination by the Applicant/appellant, DW1 replied inter alia that,

> *"The lands indispute were placed under the applicant's late father as the 1st Respondent (DW1) with her fellows were married and thus were not living in the same village."*

The above evidence by DW1 was almost supported by the evidence by DW2 Doto Mwandu, Paulo Mwinamila, DW3, Shimbo Maganga, DW4 and Sheka Masimuda, DW5, whereby at the end, the trial tribunal was satisfied that the applicant did not prove his case to the balance of probabilities, hence dismissed the applicant's application as entered judgment in favour of the Respondents where each party was ordered to bear his/her costs.

The appellant in his petition of appeal has advanced four (4) grounds of appeal as hereunder:-

1. That Hon. Chairman erred in law and in fact in entering judgment in favour of the 1st Respondent on contradictory evidence adduced before him.
2. That Hon. Chairman erred in law and in fact by declaring the 1st Respondent as the owner of the disputed land without considering that the appellant obtained the same through inheritance and clearing the virgin land done by his late father.

3. That Hon. Chairman erred in law and fact by declaring the 1st respondent the owner of disputed land since she is not administratrix of the land indispute.
4. That Hon. Chairman erred in law by declaring the 1st respondent the owner of the disputed land without considering that the appellant used the land in dispute since he was born.

When the petition of appeal was served to the Respondents, the 1st and 2nd Respondents filed a reply as here under:-

1. That the contents in paragraph 1 of the petition are denied and the Appellant is called upon to strict proof of the same. The respondents further aver that the trial chairman was proper to enter judgment in favour of the respondent upon finding that their testimony on ownership of the suit land overwhelmed that of the appellant.
2. That the contents in paragraph 2 of the petition of appeal are denied and the appellant is put to strict proof thereof with regard to his allegation.
3. That the appellant's contents in paragraph 3 are denied, hence the appellant is put to strict proof thereof. The respondents aver that the disputed land is the property of the 1st Respondent's late father and consequently the same was properly divided among the heirs the appellant's father inclusive.
4. The contents in paragraph 4 are vehemently disputed and denied. The appellant is hereby called upon to strict proof of the allegation therein.

At the hearing of the appeal both parties appeared each in person but in the absence 3rd Respondent one Tano Shija who did not even file his reply to the petition of appeal. The appellant had nothing to add to what is contained in his grounds of appeal, however prayed for the same to be considered reaching a just decision.

The same was to the 1st and 2nd Respondents who each stated that had nothing to add to his/her grounds of reply to the appellant's petition of appeal and prayed for the same to be put into consideration.

Having carefully gone through the pleadings by the parties on the record, the evidence, the grounds of appeal and reply thereto as well as the submission in support and rival thereto, the issue for determination of this appeal is whether the appellant's appeal has merits.

To startwith answering the above issue, it is better to remind myself that, this is a civil case whereby a party who alleges must prove his allegation to the required standard i.e the balance of probabilities or preponderance of probability as clearly put under s. 3 (2) (b) of the Evidence Act, (Cap 6 RE 2002) which states that:-

> *"3 (2) A fact is said to be proved when –*
>
> *(b) in civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability."*

Having so observed, now going through the application by the appellant before the trial tribunal, his claim was to the following effect:-

"3 Location and Address of the suit Premises/Land.

(i) A surveyed piece of Land located in Masunula Usule Ward at Masunula village.

4.Estimate value of the suit property Tshs. 6,000,000/=." [Emphasis supplied]

In his affirmed testimony, the applicant, PW1, in totality never dared to mention or establish that the land parcel in dispute was surveyed. Not that only the same, its size measurement was not mentioned as well as the value itself which was mentioned in his application to be estimated value of Tshs 6,000,000/=. However, it was when PW1 was answering questions from one of the assessors when replied inter alia that:-

> *"my father was allocated 5 acres as his inheritance. The land cleared by him comprises of 15 acres by estimation and the land given to him by Mwanangwa (chief) comprised 4 acres...."*

The appellant PW1 as well admitted that the 1st Respondent is her aunt as a sister of his late father. And that the 1st Respondent's father was his grandfather.

From the evidence on the trial tribunal's records, the above quoted portion was not supported by either PW2 and or PW3, the mother of the applicant/appellant before this court.

The 1st Respondent in his defence as DW1, clearly testified that the suit land was the property of her late father which comprised 16 acres which

thereafter was divided to lawful heirs who were eight children of the their late father who was the grandfather of the appellant.

That after the death of their father, DW1 stated that, as herself with her fellows were married and did not live at Masunula village, the suit land was left in the hands of the appellant's father up to when met his death. This portion of evidence by DW1 was never challenged by the applicant on cross-examination. This implied that, what DW1 had testified was admitted by (PW1).

From the above, since there was variance between what was in the applicant's pleadings to what he testified before the trial tribunal, his claim was left unproved to the required standard i.e to the preponderance of probability. Generally, I find that the case before the trial tribunal was decided upon the credibility of witnesses which is best judged by the trial court and not the appellate court which goes through the transcript of what transpired before the trial court. It is trite law that, the appellate court under the circumstances is not allowed to interfere with the decision which was reached upon the credibility of witnesses.

Having so stated, I find that the appellant's case before the trial tribunal was not equally proved to the standard required in law i.e to the preponderance probability or to the balance of probabilities.

For that therefore, I answer that issue in determination of this appeal in negative that the appellant's appeal is devoid of merits. The decision reached by the trial tribunal is hereby upheld, and the appellant's appeal is dismissed whereby each party shall bear its own costs.

Order accordingly.

R. M. Kibella
JUDGE
24/01/2019

Order: Judgment delivered in chambers this 24th day of January, 2019 in the presence of both parties each present in person.

R/A fully explained.

R. M. Kibella
JUDGE
24/1/2019