IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISC. LAND APPEAL No 49 OF 2020

(Arising from Land Appeal No 176 of 2019 of the District Land and Housing Tribunal for Musoma at Musoma, original Land Application No. 27/2019 Issenyi Ward Tribunal)

ULAMU WISAKA .....APPELLANT

Versus

BWAHERI MASAUNA..... RESPONDENT

RULING

30th June & 16th July, 2020

Kahyoza, J.

Ulamu Wisaka sued **Bwaheri Masauna** in the ward tribunal claiming for vacant possession of the disputed land. **Ulamu Wisaka** contended that **Bwaheri Masauna** encroached into her land (the disputed land), which her father in law, Gesura Mwatagu gave her. **Bwaheri Masauna** deposed that he was allocated the disputed land by the village land committee. **Ulamu Wisaka,** the appellant, emerged unsuccessfully before the ward tribunal and appealed to the District Land and Housing Tribunal of Musoma (the tribunal). Ulamu Wisaka also lost the appeal.

Dissatisfied, **Ulamu Wisaka** has appealed to this Court raising four grounds of complaint. The grounds of appeal are-

1) That, the appellate tribunal erred in law and fact for failure to consider the fact the appellant had been staying in the disputed land since 1995;

2) That, the ~~trial~~ appellate tribunal erred in law and fact for failure to consider the weight of evidence adduced by the appellant and her witness;
3) That, the ~~trial~~ appellate tribunal erred in law and fact for disposing and dismissing the appellant's appeal without considering and reasons for the grounds of appeal;
4) That, the appellate tribunal erred in law and fact for failure to take into consideration that the respondent was allocated by the village council only two acres but invaded and illegally acquired 16 acres being the appellant's land.

This is a second appeal. The appellant was represented by Mr. Waikama, learned advocate and the respondent fended for himself. Given the grounds of appeal there is only one issue that is whether the disputed land belonges to the appellant.

Is the disputed land the appellant's property?

The appellant's evidence was that her father in law gave a parcel of land to her children. Later, when the dispute arose between her and her husband, family members met and distributed her husband's landed property between her and her husband. The appellant's husband had two wives the appellant and another woman. She testified that she occupied the disputed land for agriculture from 1995 until when the respondent invaded it in 2014. The appellant summoned her two sons as her only witnesses and tendered the minutes of the clan or family meeting on the 4th Jan, 2015 which distributed her husband's landed property between the appellant and her husband.

On the other hand, the respondent's evidence was that he

acquired the disputed land in 2012 when the village land committee allocated it to him. He summoned only one witness Dw2 Juma Mosi Nyachacha. Dw2 Juma Mosi Nyachacha deposed that the village land committee allocated the disputed land to the respondent. He added on that very day, the village land committee also allocated other parcels of land to him (Dw2 Juma Mosi Nyachacha), Kasongone Paul and Magesa. He concluded that the respondent's land borders his land.

I noted that the tribunal visited the *locus in quo* (disputed land) in the presence of the parties. unfortunately, the ward tribunal did not take any notes or invite neighbours to give evidence. It did not draw sketch plan nor ask the respondent to identify his parcel of land, only the appellant showed her land. The purpose of visiting the *locus in quo* was not achieved. The ward tribunal visited the disputed area for the purpose other than to dissolve the dispute. The ward tribunal's visit to a *locus in quo* was a waste of time and other resources in the absence of the record of proceedings. I am fortified in my stance by the Court of Appeal in **Nizar M. H. Vs. Gulamali Fazal Janmohamed** (supra), where it explained the procedure to be followed when visiting the locus in quo. It stated -

> *"When a visit to a **locus in quo** is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their*

advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

It is trite law that the first appeal is in the form of re-hearing. The first appellate court or tribunal is required to re-appraise; re-assess and re-analyze the evidence on the record before it and arrive at its conclusions on the matter and give reasons either way. [*See* ***Siza Ptrice V. R*** *Cr. Appeal No 19/2010 (CAT unreported)*]. The first appellate tribunal did not discharge that duty. It did not re-evaluate the whole evidence on record. For that reason, despite this being a second appeal, I will have to go beyond the mandate of a second appellate court and reconsider the evidence on record.

It has been shown above that the appellant deposed that she started using the land in dispute in 1995 until the time the respondent invaded the land. Her evidence was supported by her own sons, one aged 25 years and another one 19 years. There were also minutes of the meeting that distributed the landed property between her and her husband. The minutes depicted that the village government chairman attended the clan or family meeting and witnessed the distribution of the landed property between the appellant and her husband.

It is a trite law that he who alleges must prove. In the **Registered Trustees of Holy Spirity Sisters Tanzania V January Kamili Shayo and 136 Others (CAT)** Civil Appeal No. 193 /2016 the

Court of Appeal stated that-

> *"It is trite law that he who alleges must prove. This Principle backing sections 110((2) of the Law of Evidence Act, Cap 6 R.E. 2002 which among other things state:*
> *110(2). When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".*

In the instant case, the appellant had a duty to prove that the she was using the land from 1995 up to the time the respondent invaded it. I was convinced by the dissenting opinion of one the members of the ward tribunal. The member opinioned that he knew the parcel of land in dispute and that it is the property of the appellant. He contended that he was the appellant's neighbour. I am alive of the fact the opinion of a member of tribunal is not part of the evidence.

I noted that all other member of the ward tribunal opined that the disputed land belonged to the respondent because the village land committee allocated it to him.

I had an opportunity to look at the opinion of the assessors of the **DLHT**. The dissenting assessor opined in favour of the appellant, thus-

> "(1) *Hakuna uthibitisho wa maandishi kuonesha kuwa mjibu maombi alipewa eneo lenye mgogoro na serikali ya kijiji cha Nyamisingisi mwaka 2012.*
>
> (2) *Hakuna barua ya kwenda kwa serikali ya kijiji cha Nyamisingisi kuomba eneo lenye mgogoro.*
>
> (3) *Hakuna uthibitisho kuwa mnano tarehe 18.11.2012 kamati ya ardhi ya kijiji ilimkabidhi eneo lenye mgogoro. Huyo ni mvamizi."*

The chairman of the tribunal and one of the assessors decided in favour of the respondent contending that there was ample evidence to show that the village council allocated the disputed land to him. The chairman stated-

> *"As to the rest of the grounds of appeal, there is enough evidence on record that the respondent, Bwahewi Masauna, was allocated the suit land by the Nyamisingisi village council on the 18.11.2012 that the appellant has her own parcel of land, but she has illegally jumped over into the land of the respondent."*

Regrettably, the chairman did not discuss the respondent's evidence. As pointed out by one of the assessors, I did not find evidence to prove that the respondent established that the village council allocated the disputed land. The evidence on record shows that it was the village land committee and not the village council which allocated land to the respondent. The respondent did not produce any document issued by the village land committee or the village council to prove that the disputed land was allocated to him.

The respondent did not explain the procedure, which the village committee adopted before it allocated land him. The law is very clear, it is the village council which manages the village land with mandate to allocate land subject approval of the village assembly. Section 8 of the **Village Land Act** [Cap. 114 R.E. 2019] that-

> *8.- (1) The **village council** shall, subject to the provisions of this Act, be responsible for **the management of all village land**.*
> *(2)...(4)...*

customary right of occupancy without a prior approval of the village assembly.

(6) A Village Council shall–

(a) at every ordinary meeting of the Village Assembly, report to and take account of the views of the Village Assembly on the management and administration of the Village land; and

Given the above cited law, it is the village council, which has mandate to allocate the village land not the village land committee. In the case at hand, the respondent deposed that he was allocated the disputed land by the village land committee. He deposed-

"Na mimi kutuma maombi kwenye serikali ya kijiji cha Nyamisingisi ndipo kamati ya ardhi ikanikabidhi hiyo tarehe 18/11/2012."

The respondent's witness gave the evidence that –

"Mnamo tarehe 18/11/2012 nilipewa ardhi na Kamati ya ardhi kijiji cha Nyamisingisi. Siku hiyo tulipewa watu (4) mojawapo ni mimi na Bwaheri Masauna (the respondent) mwingine alikuwa Kasogone Paul, na Magesa."

The ward tribunal also found that the respondent proved that he was given the disputed land by the village land committee. It started that-

"sababu ya mdaiwa kushinda kesi hiyo ni kama ifuatavyo-

(1) Baraza la Kata sheria Issenye lilimpatia ushihindi mdaiwa hii ni baada ya kupitia maelezo yake na maelezo ya shahidi wake no.(1). Pia kielelezo cha kumiriki ardhi hiyo cha mwaka 2012 alichopewa na Kamati ya ardhi kupitia serikali ya kijiji hiyo. "

It is axiomatic from the record that the respondent was allocated

land by the village land committee. The village land committee had no mandate under the law to allocate land. Section 8(4) of Cap. 114 states that the village council may establish a committee to advice and make recommendations. The advisory committee has no right to allocate land. It states that-

> *(4) A village council may establish* ***a committee to advise and make recommendations*** *to it on the exercise of any of the functions of the management of village land but, notwithstanding the provisions of section 110 of the Local Government (District Authorities) Act *(19)* ***such committee shall have no power to take any decisions concerning the management of village land.***

I am of the firm view that it was wrong for the village land committee to allocate land to the respondent. I also find not proved on the balance of probability that the village land committee allocated land to the respondent for lack of exhibit. The ward tribunal stated that there was exhibit to show that the village land committee allocated land to the respondent. I did not see such exhibit in the tribunal's record. The only document tendered by the respondent was the valuation report, which do not prove ownership. The evaluation report does not prove that the village land committee allocated the disputed land to the respondent.

Eventually I find on the balance of probability that the undisputed the disputed land belongs to the appellant. I did not find any evidence to establish that respondent acquired the disputed land legally. For that reason, I set aside the decision of the District Land and Housing Tribunal and that of the ward tribunal. I allow the appeal and declare

the disputed land is a property of the appellant. The appellant is awarded costs of this appeal.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
16/7/2020

Court: Judgment delivered in the absence of the parties with leave of absence. Copies to be supplied to them via Nata primary court. B/C Catherine Tenga present.

J. R. Kahyoza,
Judge
16/7/2020

Court: A party aggrieved may appeal to the Court of Appeal by lodging a notice of appeal within 30 days and by applying to this Court for a certificate under s. 47(2) of the **Land Disputes Courts Act**, Cap. 216 [R.E. 2019].

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza,
Judge
16/7/2020