IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 79 OF 2019

(Appeal from the judgment and decree of the District Land and Housing Tribunal for Chato at Chato in Land Application No. 40 of 2017, Dated 11th of November, 2019.)

THE KIRURUMA VILLAGE COUNCIL ..... APPELLANT

VERSUS

DOTTO PHILIPO MCHELEMCHELE ..... 1ST RESPONDENT

BONIPHACE MUSA NDEKEJA ..... 2ND RESPONDENT

DEUS KALIDUSHA ..... 3RD RESPONDENT

JUDGMENT

20th May, & 10th August, 2020

ISMAIL, J.

This is an appeal arising from the decision of the District Land and Housing Tribunal (DLHT) for Chato at Chato, in respect of Land Application No. 27 of 2017, which allowed claims for the respondents. The DLHT declared the respondents as lawful owners of the disputed land and issued a permanent injunction against the Appellant or its agent from entering into or interfering with the respondents' rights to the disputed land.

The dispute from which these proceedings stemmed relates to tracts of land located at Kiruruma Village in Biharamulo District. The appellant contends that the said land is part of the Game Reserve Area which falls outside the village land and that the respondents' occupation had been stopped by the District Commissioner who ordered their eviction. This contention was strongly opposed to by the respondents who contend that on 17th December, 2013, the disputed land had its land use changed from pastoral to agricultural land and that subsequent thereto, on 13th March, 2014, the village through the village council assembly allocated the said land to the respondents. The respondents contend that the said land was allocated to them after payment of necessary fees and impositions which were duly receipted by the village government. The appellant's account of facts is that the respondents invaded the reserve land. This alerted the village authority that took steps to avert a crisis by putting measures which would be conformed to by the respondents in order to regularize their occupation but the respondents took no heed. It is the respondents' adamancy which caused the appellant's resort to higher authorities that intervened and evicted the respondents, along with other families total of which were 17. This is what triggered the trial proceedings which were commenced by the

respondents and four others. After conclusion of the trial proceedings that saw the respondents marshal attendance of seven witnesses against two for the appellant, the DLHT found for the respondents.

The DLHT's decision has not gone well with the appellant and, as a result thereof, it has mounted a challenge, through this appeal. Three grounds of appeal have been raised as follows:

1. *That, the trial tribunal erred both in law and fact and misdirected itself by giving/granting the respondents the land in dispute while it solely belongs to the village authority and ways of acquiring land being explicitly open and clear.*
2. *That, the trial tribunal erred both in law and fact by misdirecting itself by admitting but not considering the exhibits; documents tendered by the appellant, which clearly show the procedures to follow to be a resident and owner of land in the respective village of which the respondents had to adhere to if they wished to be residents of the respective village.*
3. *That, the trial tribunal erred in law and facts and misdirected itself by admitting the exhibits tendered by the respondents as they refer to different things. The respondents paid application and village entrance fees, and development contributions only no any procedure and payment was made by the respondents for holding land in dispute they hold and furthermore no any exhibit was tendered by the respondents proving allocation of land in dispute to the respondents.*

When the matter came up for orders on 20th May, 2020, the counsel for the parties prayed to have the matter disposed of by way of written submissions. Submitting in support of the appeal the counsel for the appellant chose to argue the first two grounds together. The learned counsel argued that in terms of section 8 (4) of the Village Land Act, Cap. 114 R.E. 2019, the village land council is the sole organ responsible for management of land as a trustee of the village land for and on behalf of the villagers as its beneficiaries. This includes the power to allocate land, subject to prior approval by the village assembly. The applicant submitted that none of the testimonies tendered proved how and when the respondents were allocated the suit land. The appellant contended that the testimony which was tendered in the trial proceedings was merely receipts of the generous contributions that they paid. These were not payments in respect of the acquisition of land that is the subject of the instant appeal. The appellant held the view that allocation of the suit land would be evidenced by minutes of the village council and the village assembly or receipts from the village authority to acknowledge receipt of fees for allocation of land.

With respect to the third ground, the appellant's contention is that payment of various contributions, levies and impositions made to the

village authority by the respondents cannot be the basis for the claim of allocation and ownership of the suit land. It was the appellant's argument that the respondents' participation in development initiatives is never the evidence of allocation of land as contended by the respondents.

Addressing the Court on the appellant's preference of a memorandum of appeal instead of the petition of appeal, the appellant's counsel made reference to section 38 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 which provides that appeals be by way of petition. The learned counsel contended that since Cap. 216 allows application of the Civil Procedure Code, Cap. 33 R.E. 2019, then use of memorandum as provided for by Order XXXIX Rule 1 (1) is not inappropriate. After all '*memorandum*' and '*petition*' are mere words that serve the same purpose. To buttress her contention the learned counsel cited the decisions in ***Hussein Gulamabbas v. Monban Trading & Farming Company & 2 Others*** and ***Yakobo Magoiga Gichere v. Peninah Yusuph***, CAT-Civil Appeal No. 55 of 2017 (unreported) and urged the Court to apply the principle of overriding objective and address the anomaly.

With respect to the Court's jurisdiction to handle the matter that originates from a village within Bukoba's Court registry, the appellant contended that the DLHT for Chato was established by Government Notice

No. 206 of 2014 and it caters for Chato and Biharamuro districts and appeals emanating therefrom lie to this Court in Mwanza.

Overall, the appellant prayed that the appeal be allowed and have the decision of the DLHT quashed and set aside with costs.

Addressing in rebuttal, the respondents began by contending that the appellant's act of preferring a memorandum of appeal instead of a petition of appeal is of fatal effect as the requirement to prefer the petition of appeal is imperative. To support his argument, the counsel relied on the decision of ***Director of Public Prosecutions v. Lameck Nshashi & 8 Others***, CAT-Criminal Appeal No. 65 of 2016 (unreported) in which the DPP's appeal filed by way of memorandum of appeal was declared incompetent. The counsel held the view that the severity of the infraction is such that the same cannot be saved by the oxygen principle.

With respect to the Court's powers to handle the appeal that originates from Biharamulo, the respondents were unanimous that the Court is properly moved and clothed with powers to handle the matter.

Submitting on the grounds of appeal, the respondent's counsel stated that the testimony of PW1 clearly stated that allocation of the land was done in 2014 by the village council while PW2 testified to the effect that he was one of the members of the village council that sat in 2014 and

allocated land the to the respondents. This testimony was supported by the evidence of PW3 who said that the suit land was allocated to the respondents. The learned counsel submitted that this testimony emboldened the respondents' position that the suit land was allocated to them.

The counsel further contended that documentary testimonies were also tendered including payment receipts that showed the amount which was paid out as a prerequisite for the allocation. The respondents concluded by urging the Court to dismiss the appeal with costs.

The appellant's rejoinder was mainly a reiteration of what was submitted in in chief. On the memorandum of as opposed to petition, the appellant maintained that it was proper that the appeal was preferred by way of a memorandum, consistent with the Court's decision in ***The Registered Trustees of Ansar Muslim Youth Centre Muheza Branch v. Severin Materu***, HC-Land Case No. 31 of 2013 (unreported).

Before I delve into the heart of the main contention in these appeal proceedings, it behooves me to address two nagging issues. These relate to propriety or otherwise of preferring the appeal by way of a memorandum and not as a petition of appeal. The second issue was in respect of the Court's jurisdiction to entertain an appeal whose subject

matter is situate in Kagera region which is within the territorial powers of the Bukoba registry of the Court. This latter issue has been sufficiently justified by both counsel and it is settled. With respect to the former, it is my conviction that section 38 (2) of Cap. 216 cited by the appellant relates to appeals which originate from the Ward Tribunal and this is what ***The Registered Trustees of Ansar Muslim Youth Centre Muheza Branch*** (supra) is all about. I take the view, nevertheless, that the two terms, as correctly contended by the appellant bring a very blurred difference that is of less significance and having no impact to the substantive rights of the parties. In this respect, I feel compelled to borrow a leaf from the reasoning of this Court in ***Basil Masare v. Petro Michael*** [1996] TLR 226, this Court (Mroso, J., as he then was) wherein it was held as follows:

> *"What substantive distinction can one make from the use of the words `petition' or `memorandum' when referring to grounds of appeal to a higher court? I must confess, I can see no such distinction although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. In my view, if an appellant uses the word `memorandum' instead of the word `petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent. That would be making a mountain out of a mouse mound unnecessarily."*

Disposal of these issues takes me back to the substance of the instant appeal. The singular question to be resolved in that respect is whether the disputed land was allocated to the respondents and whether such allocation conformed to the laws and procedures that govern allocation of village land. I will address this issue by making no particular reference to the grounds of appeal as submitted by the appellant.

Let me begin by stating that from the submissions made by the counsel and review of the record of the proceedings, the land in dispute is a village land reserved for Kiruruma Village in Biharamuro district. It follows that its management, including disposal thereof, is governed by the provisions of the Village Land Act, Cap. 114 R.E. 2019. In terms of section 8 of the said law, such management is the responsibility of the Village Council. The exercise of the management function is consistent with the provisions of section 8 (2) and (3) of Cap. 114 which provide as follows:

> "2. *The village council shall exercise the functions of management in accordance with the principles applicable to a trustee managing and the villagers and other persons resident in the village were beneficiaries under a trust of village land."*
>
> "3. *In the management of village land, a village council shall have regard to-*
>
> *(a) the principle of sustainable development in the management of village land and the relationship between land use, other*

natural resources and the environment in and contagious to the village and village land;

(b) the need to consult with and take account of the views and where it is so provided, comply with any decisions or orders, any matter in the area where the village land is;

(c) the need to consult with and take account of the views of other local authorities having jurisdiction in the area where the village land is."

With respect to allocation of village land, the relevant provision is sub-section 5 which provides as hereunder:

"5. A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly.'

The contention held by the appellant is that anything that did not conform to the provisions of the cited law cannot be said to be a legitimate allocation and, in respect of this case, the argument is that no evidence was submitted to prove that any such allocation followed the path charted in the cited provision of the law. The appellant contended through DW1 and DW2 that the respondents were told to apply for allocation of land by paying the sum of TZS. 40,000/- as entrance fees, followed by TZS. 50,000/- per acre, and that out of 150 families, 17 families, including the respondents, were defiant. It is due to the said failure that the allocation process stalled. The respondents are sharply opposed to this contention.

They firmly contend that, having paid the requisite fees, impositions and contributions, the respondents had complied with terms and conditions set out in the meeting held on 13th March, 2014, and that the respondents had already acquired the right of allocation to the disputed land.

While it is not disputed that the respondents made some payments as contributions towards various projects such as national torch, laboratory and entrance fees, it is clear that the sum of TZS. 50,000/- payable per each acre, which would serve as a conclusive proof of compliance with the terms of allocation, was not paid or at least it is not evidenced. This followed the letter dated 6th April, 2016, that came from the Office of the District Executive Director, stopping the allocation process to allow a joint meeting which would bring on board other key stake holders. This means that up until April 2016, none of the respondents had been allocated any part of the disputed land. No minutes of the village assembly were produced to prove that subsequent to the suspension of the allocation in April, 2016, such allocation was resumed. This contradicts the respondents' contention that allocation was done in 2014. If payment of impositions, as evidenced by Exhibits PE1, 2 and 6, was a condition precedent for allocation of the suit land then it cannot be said that such allocation would be made in 2014 while the receipts were issued in 2015, unless there was

an express resolution or instructions that such payment was to be deferred for a year or so subsequent to the purported allocation. But if we are to believe that such allocation was done in 2014 as alleged, the logical conclusion is that the 2016 suspension of the allocation would be an exercise in futility since all the respondents had been allocated the suit land in 2014. From the evidence of exhibit DE 2, up until 27th January, 2015, conditions set for allocation of land to the respondents had not been met.

But even assuming that the there was evidence to prove that TZS. 40,000/- and TZS, 50,000/- were paid in compliance with conditions for allocation of the suit land, such payments would only prove that the criteria or conditions precedent for allocation were met or initiated, but actual allocation would only be done consistent with section 8 (5) of Cap. 114, and that would be proved by producing minutes of the village assembly to sanction the disposition of the suit land. Absence of all this, coupled with suspension of the allocation in 2016 lend credence to the appellant's contention that the allocation process was not brought to a conclusive end, and the respondents cannot claim to be lawful owners of the suit land.

From the foregoing, I am not persuaded that the respondents adduced evidence that sufficiently proved the contention that they were

lawful owners of the suit land, and justify the conclusion made by the trial tribunal that the respondents were legally allocated the suit land. I hold the view that the impugned decision defied the cardinal principle of evidence as enshrined in sections 110 and 115 of the Evidence Act, Cap. 6 R.E. 2019. This principle requires the party who alleges existence of a certain fact to satisfactorily prove such existence. The principle got a widened scope through commentaries and judicial interpretations across jurisdictions. In commentaries by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* it was stated at page 1896 as follows:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The learned authors' views are in sync with a splendid reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372,

which was cited with approval in the decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (MWZ unreported), wherein the following excerpt was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

I am of the considered view that the trial tribunal made a finding based on a narrow view that did not take into consideration that the evidence which would decisively settle the contest ought to have taken into account the fact that allocation of village land entails following the procedural steps enshrined in the law i.e. section 8 (5) of Cap. 114.

In the absence of all that, I find the appeal meritorious and I allow it. I set aside the decision of the trial tribunal. Since the appellant commenced the allocation process that involved requiring the respondents to effect

payments some of which were made, the appellant should immediately put a plan which will facilitate allocation of land to the respondents consistent with the requirements of the law and such other terms and conditions as were agreed in a meeting held on 14th January, 2014.

Each party to bear own costs.

It is so ordered.

DATED at **MWANZA** this 14th day of August, 2020.

THE HIGH COURT OF TANZANIA
MWANZA

M.K. ISMAIL

JUDGE

Date: 14/08/2020

Coram: Hon. M. K. Ismail, J

Appellant: Absent

Respondents: 1st, 2nd, 3rd — Mr. John Edward, Advocate

B/C: B. France

Court:

Judgment delivered in chamber, in the absence of the appellant but in the presence of Mr. John Edward, learned Counsel for the respondents, in the presence of Ms. Beatrice B/C, this 14th day of August, 2020.

M. K. Ismail

JUDGE

At Mwanza

14th August, 2020