IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE APPEAL NO. 28 OF 2018

(From the decision of the District Land and Housing Tribunal for Mtwara in Land Case No. 20 of 2016)

FATUMA H. NAMWANJE.....1ST APPELLANT
MOHAMEDI MAJIDI MGONGO.....2nd APPELLANT
GOODLUCK NYANTAHE..... 3RD APPELLANT
FAUSTINI HAMISI MATIKU.....4TH APPELLANT
MOHAMED A. KOMBORA.....5TH APPELLANT

VERSUS

SHAIBU HASSAN KIOZE.....RESPONDENT

JUDGMENT

Hearing date on: 14/8/2020
Judgment date on: 06/10/2020

NGWEMBE, J:

This appeal was first by before Judge Twaib, who ordered both parties to put in writing their legal arguments and file them in this court. The disputants unanimously complied with that court order. However, in the

cause, Justice Twaib was transferred from Mtwara High Court Registry to the High Court of Tanzania at Kilimanjaro registry. Above all, Judge Twaib before his transfer, on 3rd January, 2019 issue an order the Chairman of the District Land and Housing Tribunal for Mtwara, to take additional evidence by way of a visit to the *locus in quo,* in the presence of all parties to the case. The order was as follows:- "*The Tribunal certify the additional evidence so taken to this court and state its opinion as to the credibility of the witnesses who will give additional evidence. Finally, the Tribunal should then return the entire record to this court, for this court to determine the merits of the appeal".* Such order were complied with and filed in this court on 6th March, 2020.

Following compliance of all the court orders, parties with their advocates appeared before me on 23rd July, 2020, whereby, they agreed that since this appeal was argued by way of written submissions, and bearing in mind the preceding judge Twaib is transferred to Kilimanjaro, then they consented this court to proceed to compose judgement according to the available records in the file and their written submissions, thus, this judgement.

To recap just briefly, it is on record that the disputants are in loggerheads on a piece of land described as Plots Nos. 298 and 299 Mbae farm, located in Mtwara Municipality. The respondent sued the appellants at the District Land and Housing Tribunal for Mtwara, through Land Case No. 20 of 2016, praying among other reliefs, declaration that the applicant (respondent) is the lawful owner of the suit land. Thus, the main issue on trial was

whether the applicant (respondent herein) was the lawful owner of the suit land.

In his testimony the respondent Shaibu kioze (PW1) told the trial Tribunal that he is the owner of the suit land as he was given by Said Mussa Nyengedi (PW3). He tendered documents dated 12/08/1999 for plots Nos. 298 and 299 and land form 35 dated 31/05/2007, which were all admitted by the Tribunal as exhibit P1. He also testified that at that particular time of year 1999, the suit land was a thick forest, and that he hired some people to clear it.

At the time when he was clearing it, he was stopped by the Army. The dispute between himself and the Army ended up to the High Court as per exhibit P2. In turn the High Court decided that an area measuring 4644 square meters is owned by the Army, while he should remain with the land outside the land reserved for the Army.

His testimony was supported by PW2 Muhibu Hassani Mnamba and PW3 Saidi Mussa Nyengedi, the original owner of the suit land. It is on record that PW2 told the District Tribunal, that he participated in the survey of the suit farms owned by Said Mussa Nyengedi in year 1982 up to 2000.

PW3 also testified that he owned the two farms No. 298 and 299 at Mbae area. In year 2007, he transferred the same to the respondent (PW1). Further, said since he was located the suit land on 12/08/1999, there was

neither other owners nor house therein save only thick forest, which he cleared himself and used it up to the year 2007, when he handed over to the respondent.

In turn the appellants (Respondents) at the District Tribunal, adduced their evidences seriatim. DW1 told the Tribunal that she was sued for an area which has mangoes and cashew nuts trees, which is her property. That she was born and met her grandfather and mother living therein. She said her grandfather Salum Masud and his wife Bibi Bint Kombe were buried there. Her mother and one Hamis Mtimba were also buried therein.

Further argued that, there are people who are currently living therein and that it is her family who issued the plots to those who built therein. She produced a bank pay slip, which shows that her brother was paid compensation for the suit land. Her testimony was supported by Hamisi Mohamed Ngumbo (DW2) who told the Tribunal that he is a chairman for Mangamba Chini Street. That being a Chairman, his duties are to ensure peace and security in his area. That in March 2015, the respondent (Kioze) went to him to complain that his farm has been trespassed. That on 30/04/2015 he gathered them and asked each to prove how he got ownership of the suit land. That after hearing them, he was satisfied that the suit land is owned by the family of Fatuma (DW1), as she was born there, her parents were born there, grown up there, lived therein and were buried therein.

DW2 went on to state that the respondent (Kioze) told him that he purchased the suit farm from Issa Mnyengedi (PW3). That he as chairman asked Issa Mnyegendi to prove the same. He said the boundaries which were identified by Issa Mnyegedi and Kioze differed each other as each of them identified different areas. This witness concluded in his testimony that Fatuma (DW1) is the rightful owner of the suit land. Other witnesses, DW3, DW4 and DW5 testified that they own their respective areas in the suit land after purchasing the same from Fatuma Namwenje (1st appellant).

The trial Tribunal, having considered the evidence of both parties, as summarized herein above, believed the version given by the applicant (respondent) and declared him the lawful owner of the suit land. The respondents (now appellants) were aggrieved by the above findings and lodged an appeal to this Court through the services of Phoenix Advocates. In their memorandum of appeal, the appellants raised three grounds of appeal which read as follows:

1. That the Tribunal grossly erred in law and fact by failing to consider the issue of adverse possession towards the 1st appellant who has been in the suit land for more than 12 years.

2. That the Tribunal grossly erred in law and fact by declaring ownership of the suit land to the respondent without sufficient evidence.

3. That the Tribunal erred in law and in facts by failing to consider the entire evidence adduced by the appellants.

As I have already stated herein above, both parties are represented by learned advocates. When the parties appeared on 5th February, 2019 with their advocates for hearing, that is, Mr. Issa Chiputula, learned Advocate for the appellants and Mr. Kibasi Mwangisi, learned Advocate for the respondent, by consent, the Court ordered the appeal to be heard by way of written submissions. The parties filed their written submissions according to the scheduling order. However, and with surprise in rejoinder, the appellants' counsel, raised an objection against the competence of Mr. Kibasi Mwangisi to act as respondent's counsel. Since it was a new issue, being not canvassed in the appellants' submission's in chief, Mr. Kibasi was allowed to file his written submissions in reply to the issue.

Mr. Kibasi opted not to respond on the issue and the Court partly sustained the objection by holding that the reply submission filed by Mr. Kibasi on the merits of the appeal were ineffectual, null and void. Thus, technically, there was no reply submission from the respondent on the merits of the appeal.

However, in view of the overriding need to do justice to the respondent, the Court allowed the respondent to file a fresh reply submission on the merits of the appeal within 14 days from 12th June, 2019. Still the respondent never filed a fresh reply submission on the merits of the appeal as directed by this Court. In turn the Court being guided by the decisions in **Godfrey Kimbe Vs. Peter Ngonyani, Civil Appeal No. 41 of 2014 (CAT** at Dar es salaam); **National Insurance Corporation of (T) Ltd & another Vs. Shengena Limited, Civil Application No. 20 of 2007** and

Patson Matonya Vs. The Registrar Industrial Court of Tanzania & another, Civil Application No. 90 of 2011 (both unreported) found that failure by the respondent to file his reply submission on the merits of appeal after the Court has ordered a hearing by written submissions was tantamount to being absent without notice on the date of hearing. On that basis, the court found that the merits or otherwise of the appellants' appeal would be determined on the basis of the appellants' submission alone and the evidence on records.

In their submission, the appellants' counsel argued that, he who alleges must prove the allegations, and that in civil cases the standard of proof is on the balance of probabilities. That in this appeal the record provide that the respondent acquired ownership of the suit land from PW3, but the mode of acquisition is subject to criticism as to whether the respondent bought the said suit land or the same was transferred by way of natural love and affection. That it was expected under normal circumstances, PW3 to be aware of the size of the land in dispute as well as the boundaries and neighbors if any, but PW3 failed to remember the size of the suit land as well as the boundaries and neighbors around the suit land. PW3 and DW2 talked on different areas as shown at page 32 of the proceedings.

He submitted further that the testimony of the respondent was different from what he averred in his pleadings. That in his pleadings he averred that the respondent is the lawful owner of the suit land, bought in 2007 from one Said Musa Nyengedi, but in his testimony at page 13 the

respondent testified that, he did not buy such land. Also the testimony of PW3 at page 20 stated that he did not sale the suit land and that the respondent is his relative. But looking from exhibit P2, it shows that the respondent bought the suit land from Said Musa Nyengedi. Also looking at the transfer document, especially, Land Form No. 30, it shows that the transfer was by way of natural love and affection. The contradictions create difficulties for this Court to believe the story of the respondent.

On the ground related to adverse possession, the appellants' counsel submitted that, the Tribunal erred by failing to consider the issue of adverse possession towards the 1st appellant who has been in the suit land for more than 12 years. That all the elements of adverse possession as held in the case of **Buckinghamshire CC Vs. Moran [1990] Ch 623 (CA)** was proved by the 1st appellant. That the 1st appellants *inter alia* testified that on 2016, she was about 60 years in the suit land. She was born at the suit land and his parents were living and buried on the farm. That she inherited the suit land from her late mother named Zainabu Salumu Makame.

In addition, she proved ownership of the suit land as her brother namely Salum Hemed were paid compensation of the gas project, which were conducted therein, and all receipts for payments were admitted before the Tribunal as exhibit P1 without any objection from the respondent. That

even the testimony of the respondent at page 12 impliedly supported the evidence of 1st appellant, when he said that he met the appellant already built houses in the disputed area. On that basis of such submissions he invited this Court to interfere with the judgment of the District Tribunal.

As it was before the Tribunal, the issue is whether the appellants herein are the lawful owner of the suit plots. From the evidences on record, as summarized herein above, it is apparent that the respondent refers to a land which was surveyed in year 1980 up to year 2000 as farm No. 298 and 299 Mbae area, which was allocated to PW3 who later transferred it to the respondent in year 2007. PW3 said, since he was allocated the suit on 12/08/1999, there was neither other owners nor houses, but only forest. In year 1999 it was a forest and when he was clearing it, he was stopped by the Army and the dispute arose between them, which dispute ended in the High Court. Thus, the High Court apportioned such land into two, one for the Army and another part remained for the respondent.

The appellants' testimony on the other hand, refers to the land where Fatuma (DW1) was born and met her grandfather and mother living therein. The land where her grandfather Salum Masud, his wife Bibi Binti Kombe, her mother and one Hamis Mtimba were also buried therein. They refer to the land where there are houses built therein and graveyard. A land where DW3, DW4 and DW5 have houses and they are currently living therein after purchasing pieces of land from Fatuma (DW1).

Considering critically, on the above pieces of evidences, it seems the appellants were referring to a different land from that referred by the respondent. A similar concern was noted by the trial Chairman in his judgment when he partly noted: *"...it is the applicant who fought for the suit land with the Army since 2012 via exhibit P2. It is 2012 when the applicant hired people to clear the suit land the Army emerged to stop him from doing so.* ***Therefore, if at all 1st respondent was really occupying and dwelling into the suit land together with her family or relative I wonder as to why the Army officers didn't find them at the site..."***

In effect, the trial Tribunal doubted the credibility of the appellants' testimony when they claimed to have been in the area at all times for more than 60 years, up to 2016 when the dispute arose.

This court by its order dated 01/03/2020, found that a site visit was inevitable in order to confirm whether the parties were referring to the same land with regard to the location, size, and boundaries. Since such piece of information or evidence was lacking, this Court, directed the trial Tribunal to take additional evidence by visiting *locus in quo* and give its opinion on the size and location of the disputed land.

The chairman of the Tribunal upon visiting *locus in quo*, he opined, that the land in dispute is measured 5.78 acres. That the plots of land which are currently occupied by the 2nd, 3rd, 4th and 5th appellants respectively are not

on the suit land, that they are outside of 5.78 acres. This opinion seems to suggest that the claim by the 1st appellant (DW1) that she has been on the suit land for quit long time and part of it was sold to the 2nd, 3rd, 4th and 5th appellants, may be correct for they are occupying pieces of land outside the suit land.

In fact, the trial Tribunal's opinion after visiting *locus in quo* is in line with its earlier opinion when partly held: "if *at all 1st respondent was really occupying and dwelling into the suit land together with her family or relative I wonder as to why the Army officers didn't find them at the site"*

Along with the above observation, I'm of the opinion that the determination of this case is entirely based on the evidence and real facts in the ground. The law is well settled that a dispute which is based on facts may properly be resolved by the trial Tribunal, which had an advantage of hearing witnesses and visiting *locus in quo*. On this, I'm fortified by the observation made by Lord MacMillan in the much-quoted decision of the House of Lords in **Watt Vs. Thomas (1947) 1 A.E.R at p. 590** where held:-

> *"the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on question of fact"*

In similar vein the East African Court of Appeal in the case of **Peters Vs. Sunday Post Limited (1958) EA 424** at page 429 held:-

> *"It is a strong thing for an appellate court to differ from the finding, on the question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court would itself have come to a different conclusion"*

The trial Tribunal, which had an advantage of assessing who between the parties was telling the truth, believed the respondent's witnesses and based its findings on the same. It weighed the testimony of both side and found that the respondent's testimony was heavier than that of the appellants.

In civil cases, including land matters like the present one, the party whose evidence is heavier than that of the other is the one who must win. In the case of **Hemedi Saidi Vs. Mohamedi Mbilu [1984] TLR 113.** This Court being the appellate Court find no reasonable ground upon which can disturb the findings of the trial Tribunal. The trial Tribunal's decision was purely based on facts and evidences of credible witnesses and facts on the ground when the Tribunal visited *locus in quo.* Even after directing the

chairman of the Tribunal to visit *locus in quo*, yet the answer is the same that the land occupied by the appellants is outside the respondent's land.

In totality the only logical conclusion in the circumstances of this case is to quash the judgement of the trial Tribunal and set aside its Decree, consequently proceed to order each party to remain in his/her piece of land. Above all parties should cooperate to put permanent boundaries between them. Each party to bear his own costs. It is so ordered.

DATED and DELIVERED at Mtwara this 6th day of October, 2020

P.J. NGWEMBE

JUDGE

06/10/2020

Court: Judgement delivered at Mtwara in Chambers on this 6th day of October, 2020 in the presence of Ms. Tecla Kimati Advocate for the Appellants and in the presence of Respondent in person.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

06/10/2020