IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE APPEAL NO. 10 OF 2019

(From the Decision of the District Land and Housing Tribunal of Mtwara District at Mtwara in Land Case No. 37 of 2017)

FATUMA HAMIS.....APPELLANT

VERSUS

FATU BAKIRI.....RESPONDENT

JUDGMENT

19 Nov. & 22 Dec. 2020

DYANSOBERA, J.:

The appellant herein lost her suit she had filed before the District Land and Housing Tribunal for Mtwara at Mtwara in Land Application No. 37 of 2017 in which she had claimed a declaration that she was the lawful owner of the suit premise, an order of permanently prohibiting and restraining the respondent, their agents and workmen from trespassing to and interfering with the applicant peaceful enjoyment of his land, general damages and costs. She now appeals to this court on the following grounds of appeal:-

1. That the trial court erred in law and fact by failure to consider that the appellant is the adverse possessor of the suit land basing on the fact that she owned the same since 2000.

2. The trial tribunal misdirected itself by condiering weak evidence with was adduced by respondent without considering that the appellant is the rightful; owner of the the land in dispute and her evidence had enough weight compared to that of the respondent during the trial.
3. That the trial tribunal failed to consider correct boundaries of the suit premises which were shown by the appellant as a result there was miscarriage of justice on the part of the appellant because the trial tribunal warded the respondent with the portion in dispute, which is the property to of the appellant.
4. The trial chairperson intentionally departed from the opinions of assessors that culminated in a wrong decision of the trial tribunal which resulted to miscarriage of justice on the part of the appellant.
5. The tribunal erred in law by holding that the respondent is the rightful owners of the land in dispute without justifiable reasons to back up their decision

With the above grounds of appeal, the appellant is praying that the decision of the trial tribunal be quashed and set aside, a declaration that the appellant is the rightful owner of the portion of land in dispute, costs and any other reliefs.

The respondent has resisted the appeal by filing a reply to the memorandum of appeal.

Briefly, the evidence the appellant gave at the Tribunal in support of her claims were brief. She said that she was born in 1950 and is a resident of Kitama I Village. She stated that she had a case against the respondent which was appealed against and this court ordered the case to start afresh. She argued that the respondent trespassed the suit farm to harvest cashewnuts, potatoes and cassava while she, the appellant, was using the suit land and that in 2017 when she went to harvest cashewnuts she met the respondent's child who termed her as a thief of the cashewnuts which are not in the area in dispute. She was beaten. She asserted that the farm is hers, it belongs to her father who died a long time ago and she is the successor and the respondent, therefore, is a trespasser. She emphasised that she is fighting for the suit farm as it is the property of her father and the respondent wants to take it away from her by force.

On cross examination, the appellant admitted that she did not know when her father died and when she obtained it. She insisted that she claims the suit farm as a property of his late father but at the same time admitted that she was not the administratrix of the estate. Two witnesses, namely Saidi Saidi Mniha (PW 2) and Issa Saidi Ndolya (PW 3) testified in support of the appellant's case.

On her part, the respondent denied to have trespassed. She detailed that her father left from Chawi village, went to Kitama and requested from one Mtapoka a piece of land to build and live. He then erected a house but then left back to Chawi. The piece of land reverted back to Mtapoka who is present to date. She argued that her father's land was bounded to that of Mtapoka. She was supported in this by Abdallah Bakili (DW 2).

The District Land and Housing Tribunal visited the locus in quo and was satisfied that the parties' fathers did not build in the suit land but used the area for cultivation purposes. It observed that the applicant's area which has no dispute was at the North side while that of the respondent which is also not in dispute was on the South side. According to the Tribunal, the problem with the parties was the boundary.

The two assessors, namely Switbert Msoga and S. Hidaya were of the view that the boundary which was to be respected was that shown by the appellant as each has her own suit farm.

The Hon. Chairman, however, differed with the lay members in their opinion. His finding was, partly, to the following effect.

> "So I subscribe to the boundary identified by the respondent because it reflects a truth of existence of right of the applicant's farm from her father being respected and left there as it was being used by their fathers. Indeed, respondent has no ill will while in my view, the applicant who just want to robe away part of the respondent's portion of cashewnuts trees to include and incorporate it into her farm area."

The chairman was also influenced by the demeanour and credibility of the respondent as will be revealed later in this judgment. With those observations, the Chairman dismissed the suit holding that a correct boundary separating the parties is that shown by respondent which has not taken the applicant's farm. He declared the disputed portion to be part of the respondent's farm; the rightful owner thereto while applicant has no right to own it. He further directed that the applicant has to remain with her farm at North side where his father built and lived therein as suit farm was not part of the area his father owned and used.

The hearing of this appeal was argued by way of written submissions. A close look at the written submissions reveal that the submission of the appellant which she wrongly entitled as "RESPONDENT'S WRITTEN SUBMISSION" was a repetition of the five grounds of appeal while the respondent's written submission in opposition to the appellant's appeal was a denial of the appellant's assertions in the grounds of appeal.

I have considered the record of the trial Tribunal, the grounds of appeal, the joint reply to the appellant's memorandum of appeal and the submissions of either parties.

As the record of the trial Tribunal clearly shows, the dispute between the parties was the boundary between their respective pieces of land which are adjacent. It would seem the appellant was not sure of what exactly she was suing about. According to her application and the evidence, she was suing against the respondent of trespassing her suit land measuring about one and half acres which belonged to her father but as the record of the proceedings and judgment of the trial tribunal reveals, the parties were disputing on the boundary.

The issue for determination is whether the Tribunal can be faulted in its finding in favour of the respondent. There is no dispute that the Tribunal saw and heard the parties and their witnesses testifying, visited the locus in quo, saw the parties' portions of land and the boundaries.

In deciding in favour of the respondent, the Hon. Chairman assessed the demeanour of the witnesses and believed that the respondent was telling the truth. Can he be faulted in this? I think not.

In the first place, the appellant was, to a great extent, hesitant in proving her claims as revealed in the proceedings. For instance, the appellant is recorded to have stated at page 5 of the trial tribunal's proceedings as follows:

> *"The suit farm is mine. It is of my father. It is taken away by the respondent. Respondent is just trespassing the suit land. My father is dead and I am his successor. My father died a long time ago. That is why I am fighting the suit farm, it is a property of my father"*

In her cross examination, the appellant admitted that she did not know when her father died and how he acquired the land.

Second, in his decision, the Hon. Chairman considered and assessed the demeanour and credibility of the witness in question. This is clear at page 7 of the typed judgment. He is recorded to have stated:-

> *"Therefore, respondent's evidence is supported by the demeanour and credibility that what she has testified is nothing save it has reflected a truth only just as we have seen such reality during inspection and check out we did at the disputed farm and I am satisfied so that she is trustworthy for her evidence and situation at the site"*

On the assessment of credibility of a witness, the Court of Appeal in the case of **Abdallah Fakih Makame v. Gharib Bakari Seif and another**, Civil Application No. 3 of 2010 CAT-Zanzibar observed:-

But in assessing credibility is in the realm of a trial court. In doing so, the court takes into account not one, but a number of factors, such as, the witness desire to be truthful, motive, general integrity, general intelligence, opportunity for exact observation, capacity to observe accurately, firmness of memory to carry in the mind the facts observed, capacity to express what is clearly in the mind, reputation and demeanour and other surrounding circumstances among others

In the case under consideration, the appellant has offered no material upon which this court can fault the trial Tribunal's assessment of demeanours. Indeed going by the record according to the judgment of this court in Land Case Appeal No. 6 of 2008 to which the appellant referred in her Application before the District Land and Housing Tribunal and which this court takes judicial notice, the appellant was clear that the land the respondent is alleged to have trespassed initially belonged to the late Hamis Mohamed Nyandachi, which, after his death, was inherited by his children, the appellant inclusive. The appellant did not cultivate the farm partly because she was married in a different village leaving it in the hands

of his sister and partly because, after she divorced with that husband, she returned back to her home village but to find that the respondent had sold it to one Ibrahim Ndola. The same appellant had told the Tribunal that in 2001 she made a report to Kitongoji chairman one Chivauja after she found Ibrahim Ndola cultivating the farm. In such circumstances, it was difficult for the appellant to be precise with the boundary of the said farm.

The appellant's complaint in the 4th ground of appeal that the Chairman departure from the opinions of the assessors and came to a wrong decision resulting into miscarriage of justice is baseless. This is so because, the Chairman who was not in law bound with the opinions of assessors rightly differed with them.

For those reasons, the appeal is devoid of merit and is, accordingly, dismissed with costs to the respondent.

Order accordingly.

W.P. Dyansobera

Judge

22.12.2020

This judgment is delivered under my hand and the seal of this Court on this 22nd day of December, 2020 in the presence of the appellant and the respondent.

W.P. Dyansobera

Judge