IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPEAL No. 39 OF 2020

(Arising from District Land and Housing Tribunal Land Appeal No. 15 of 2017, which originated from Application No. 02 of 2017 of Ilujamate Ward Tribunal)

MIHUMO LUCHAGULA.....APPELLANT

VERSUS

ABEL M. IKOMBE .....RESPONDENT

JUDGMENT

21st April - 24th May, 2021

TIGANGA, J

Before the Ward Tribunal of Ilujamate Ward in Misungwi District, the appellant Mihumo Luchagula sued the respondent, Abel M. Ikombe for recovery of the piece of land which was allocated to him by his grandfather one Luchagula Mongo.

The background information of this dispute is that the respondent is the uncle of the appellant, a brother of the appellant's mother. The appellant is a grandson of one Luchagula Mongo who is also the biological father of the respondent, and a mother of the appellant.

According to the appellant, before the demise of the late Luchagula Mongo, he allocated the appellant a land to use for farming; he stayed there using the land up to 2003 when the appellant shifted to Ng'hwabuyi where he stayed for seven years. But later, he returned to his uncle's home village, following the hostile weather condition to his children.

During the time of his absence, the said land was being used by his uncle, the respondent in this appeal, and part of the land had already been sold by him to Emmanuel Pinda, Chari Gerald, Luguna Gerald and Abel M. Luchagula, the latter being the appellant's young brother.

The appellant asked the respondent to vacate the land but the respondent refused, even when the respondent was being called in clan meetings he was not attending. Following that state of affairs, the appellant sued him before the ward tribunal.

Before the Ward Tribunal, the respondent narrated that he has been for long time farming the land in dispute having obtained it from his father when he was still alive. He knew no rights of the appellant in the same land and asked the tribunal to declare him the owner.

PW2 Robert Luchagula, who testified for the appellant, said the land was being used by the appellant before he shifted to another place before he came back and found the land being used by the respondent.

That was also the version of PW3 Abel Luchagula who said the land was being used by the appellant, before he shifted to another place, where he stayed for long, and on his return, he found the land had already been in the hands of the respondent, who by then had already returned from his work and started to use land.

The evidence of witnesses who testified for the respondent, who are Mpina Luchagula, John Ludayila, Caphlen Ludayila, and Amos Luchagula, is to the effect that, the farm was the property of the respondent having been given the same by his late father. Basing on the evidence narrated above, the Ward Tribunal ruled out that the appellant had established and proved to be entitled to the land, the Ward Tribunal therefore declared him the lawful owner of the land.

Aggrieved by the decision of the Ward Tribunal, the respondent filed before the District Land and Housing Tribunal for Mwanza a Memorandum of appeal containing four grounds of appeal as follows;-

i. That, the Ward Tribunal erred in law and fact by not warning itself that the matter before it was premature on the ground that the respondent (Appellant in the appeal) has no locus standi,

ii. That, the Ward Tribunal erred in law and fact by adjudicating the matter without evaluating the evidence adduced by both parties, that the respondent did not produce any clear evidence that the land in dispute was allocated to him by his grandfather.

iii. That, the Ward Tribunal erred in law and facts by recording that the land in dispute is Majaruba 52 while the appellant stated that land in disputed is Majaruba 21.

iv. That, the trial chairman erred in law and facts by not considering that the respondent is not among the deceased's children. Therefore he is not entitled to inherit the deceased's estates.

The appeal was objected by the appellant, who was the respondent before the District Land and Housing Tribunal by filing a reply to the memorandum of appeal. That reply can be condensed in the simple term that, the trial Ward Tribunal was justified as the dispute was mature and the appellant (who was the plaintiff before the Ward Tribunal had *locus standi.* Further to that he brought evidence which proved him to be the

owner having allocated the land by his grandfather. Also that the land in disputed was as correctly recorded by the Ward Tribunal 52 Majaruba, not 21 as alleged.

Last, that after the death of Luchagula Mongo, his grandfather, it was decided that each person continue to use the land allocated to him before the death of the late Luchagula Mongo. That was in Land Appeal No. 15/2017 filed in the District Land and Housing Tribunal on 16/02/2017 before the same was dismissed for want of prosecution on 23/08/2017.

The dismissal was however set aside on 17/10/2018, after an application to set it aside had been granted and the appeal became restore filed and heard on merits. Following that restoration the appeal was heard *inter partes*, in which the District Land and Housing Tribunal allowed the appeal in Land Appeal No. 15/2017.

In its decision the District Land and Housing Tribunal chairman, found that as between the parties, the appellant who was the respondent before it did not give evidence by bringing witnesses who were present when the land was being handed over to him, to prove that he was actually allocated the land. Despite the fact that he said that he was

handed over the land in the presence of the village chairman, but yet still he did not call him to testify and prove the allegations.

Further to that, having taken into account that the late Luchagula Mongo had many children, it creates doubt as to why he did not call any of his children to witness. He said as all the witnesses who supported the current appellant simply said that, the appellant was just farming the land before he shifted to Mwigilo, in his opinion the appellant did not prove the case at the required standard to be entitled to a declaration to be the owner.

In his decided opinion the appellate chairperson, that the appellant was not a direct heir of the late Luchagula Mongo, but could indirectly inherit from her mother who is the daughter of the late Luchagula Mongo. Therefore if entitlement to inherit, then it was actually supposed to be through his mother of what she inherited from her late father the late Luchagula Mongo.

It is also the decision of the District Land and Housing Tribunal that it was not proper for the trial Ward Tribunal to apply and rely on Haya customary law in deciding the dispute between the parties. He said the

Local Customary Laws (Declaration) Order, 1963 provides for general guideline of using customary rules, that if the dispute involves members from certain tribe, then customary law of such tribe must be used to settle and resolve the dispute. In his opinion, it was wrong for the Ward Tribunal to invoke Haya customary law to decide the disputes which involved members from Sukuma tribe.

In differing with the opinion of the honourable assessors, he said that cultivation of land as a family member at the permission of family does not automatically entitle a person using the land the ownership of the same.

He instead allowed the appeal, quashed the decision by the Ward Tribunal and set aside the order which declared the appellant the owner of the land in dispute and consequently declared the respondent to be the lawful owner of the said land.

Aggrieved by the decision of the District Land and Housing Tribunal, the appellant filed five grounds of appeal styled as follows:-

a) That the trial chairman erred in law and fact by entertaining Land Appeal No. 15/2017 while the decree appealed against had already been executed vide application No. 107/2017.

b) That the trial chairman erred in law and fact by holding that the Ward Tribunal invoked Haya customary law to settle the dispute among Sukuma natives while there are no records in Ward Tribunal proceedings where the Haya customary laws were invoked.

c) The trial chairman erred in law and fact by allowing the appellant's appeal while the record show that the respondent was in possession of land in dispute for a long time without disturbance for more than twelve years.

d) That the trial chairman erred in law and fact by holding that the Land in dispute was given to the respondent as an invitee while the respondent's evidence proved that he was given to occupy and use it for good.

e) That the chairman erred in law and fact by not considering the ruling emanating in Land Revision No. 4/2019 dated 31st July 2019.

The appellant asked for the decree passed by the District Land and Housing Tribunal to be quashed and set aside, the judgment of the Ilujamate Ward Tribunal and execution order thereof be upheld.

With leave of this court, the appeal was argued by way of written submissions where parties filed their respective submissions as required by the order of the Court.

In the submission in chief filed in support of the appeal, the counsel for the appellant submitted that, it was incorrect for the District Land and Housing Tribunal to entertain Land Appeal No. 15/2017, while the order to be challenged had already been executed in total. The counsels submitted that a lot of information which in essence were unrelated with the ground he raised, these information and arguments went as far as challenging the same tribunals acts of issuing the two execution orders, one issued in execution of the decision of the Ward Tribunal, at the period when the appeal was dismissed for want of appearance, second being issued after the dismissed appeal had been restored and allowed.

All in all, he cited the decision in the case of **Amri Hassan vs Dotto Ramadhani**, Misc. Land Appeal No. 33 of 2020 which according to him it discouraged to initiate or continue cases where the order sought to be challenged has already been executed.

Regarding the second ground of Appeal, which raised a complaint that, the District Land and Housing Tribunal erred in law by holding that the Ward Tribunal made use the Haya customs in its decision while in fact there is no evidence on record proving the same.

He submitted that, since the District Land and Housing Tribunal, realized that the parties to this dispute belonged to the Sukuma community, then he would have used section 34 (1) (2) of the Land Dispute Courts Act [Cap 2016 R.E 2019] to make such inquiry as it may deem necessary where it would have used the said Sukuma customs to resolve the matter. He said it was wrong for the District Land and Housing Tribunal to rely on the ground which did not exist and fault the judgment of the trial court.

Regarding the 3rd ground of appeal, the counsel submitted that, the District Land and Housing Tribunal erred when it ignored his good defence of adverse possession, which defence was strong and clear as there was evidence that he occupied the land for more than 12 years.

He referred this court to page 3 of the decision of the Ward Tribunal that the evidence is very clear that, he cleared the land in 1989 and

used/cultivated it until 2003 when he shifted to Ng'hwabuyi and stayed for seven years and returned when he found his land occupied by the respondent. He said the appellant meet five ingredients mentioned at page 12 of the decision of **Susana Maige vs Ikoma Njiga**, Land Appeal No. 84/2013, an unreported.

Submitting on 4th ground of appeal, that the chairman erred when he held that the appellant was just an invitee to the land while in fact he called witnesses to prove the case that he was given the land to occupy and used it for good and was cultivating it, he invited this court to look at the evidence of the appellant as submitted before the Ward Tribunal and find that he had strong evidence to prove his case.

He submitted that the evidence that the appellant was cultivating the land just as a family member has no foundation in evidence therefore it was *suo moto* raised by the chairman of the District Land and Housing Tribunal on appeal.

Being aware of the decision of the Court of Appeal in the case of **Maigu E. Magenda vs Arbogast Maugo Magenda**, Civil Appeal No. 218/2017 (unreported) in which the Court of Appeal held that, an invitee

cannot be taken to be an adverse possessor. He distinguished the case with the matter at hand on the ground that, in that case the allegation that the appellant was an invitee was pleaded by the respondent, something which is dissimilar to this case.

He also indicated to be aware with the authority in the case of **Susana Maige vs Ikoma Njiga,** Land Appeal No. 84/2013 in which this court allowed an appeal on the ground that the respondent was only the invitee hence can't become the adverse possessor, he reminded the court that even in that case, the fact was pleaded, it was not raised *suo moto* by the court.

Regarding the 5th ground of Appeal, he submitted that, the appellate chairman erred when he failed to take into account the fact that Land Revision No. 4/2019 blessed the execution which had already been effected through Misc. Application No. 107/2017 between the parties. He in the end asked for the appeal to be allowed with costs.

The respondent in his reply submissions, while arguing the first ground of appeal submitted that, the right to appeal is constitutional so long as the procedures are adhered to. The argument that the appellate

Tribunal was not supposed to allow the appeal simply because the execution had already been made is absurd. He submitted that, the respondent filed his appeal within time. The Tribunal after considering the appeal, allowed it thereby reversing the decision of the Ward Tribunal with its consequential order (including execution).

Regarding the second ground of appeal, the appellant submitted that, the District Land and Housing Tribunal did not tread into error when it held that, the trial Ward Tribunal relied on Haya Customary law. He referred this court to document titled **"Muhtasari wa Kesi ya Mihumo Luchagula Dhidi ya Abel M. Ikombe"** which bears the name and signature of those who constituted the coram of the Ward Tribunal, that it made reference to the customary law of Haya tribe.

He submitted that, the District Land and Housing Tribunal invoked section 34 (1) (c) Land Dispute Courts Act [Cap 216 R.E 2019], as he inquired and discovered that the parties were Sukuma by tribe, that is why he found and held that it was not proper to use the Haya customary law to resolve the dispute involving sukuma parties. For that reason, he asked the ground to be dismissed for being flimsy and illusionary.

Regarding the 3rd ground of appeal, he submitted that there is no evidence to prove that appellant was an adverse possessor, though it is clear that he was not disturbed during the time he was cultivating on the suit land because he was a mere invitee. He said there is no evidence to prove that the late Luchagula Mongo gave the suit land to the appellant herein, but they simply said that, the appellant was cultivating on the suit land before he left to Mwigilo.

He said that there is no relative called who would have proved that the late Luchagula Mongo actually gave the suit land to the appellant, neither did he call the village chairman who was alleged to be there and witnessed the handing over of the shamba (suit land). He invited this court to make reference to section 64 (4) (1), (a) of the Land Act [cap 113 R. E. 2019] which requires any sort of deposition to be in writings, therefore if the appellant wants to rely on the first version, then he is duty bound to apply principle that the same is not enforceable if it is not in writings. He said the suit land then remained in the estate of Luchagula Mango who is the respondent's father hence the respondent is the beneficiary to it.

If he will rely on the claim of adverse possession the same will not stand because he was a mere invitee, as in a number of decided cases

including **Susana Maige vs Ikoma Njiga**, Land Appeal No. 84/2013, the appellant was invitee cannot acquire title of ownership of the land.

On the fourth ground of appeal the appellant claim that the District Land and Housing Tribunal chairman moved himself *suo moto* to hold that the appellant as a family member or invitee while it was not raised by the respondent at the trial Tribunal. In his submission he said that, the findings based on the evidence of the appellant and all his witnesses said that the appellant was given the land for cultivation only, that is why the District Land and Housing Tribunal inferred that he was a mere invitee.

He submitted that the appellate Tribunal being the first appellate court, has duty to review the record of evidence of the trial Tribunal in order to determine whether the conclusion reached upon and, based on the evidence received. In buttressing that position, he cited the **Csi Construction 1997 Ltd vs First Asurance Company Limited**, Civil Appeal No. 119/2019 and **Sugar Board of Tanzanai vs Ayubu Nyimbi and 2 others** Civil Appeal No 53 of 2013. He also referred this court page 6 and 7 of the decision of the appellant Tribunal in Land Appeal No. 15/2017.

Regarding the 5th ground of appeal, the respondent submitted that, in Land Revision No. 4/2019 this court set aside the order intended to stay the execution, but the order on revision did not stop the pursuit of the appeal or bar it.

On that, he reiterated what he submitted in the first ground of appeal regarding the constitutionality of the right of appeal. In the end he submitted for this court to be pleased to dismiss the appeal and uphold the decision of the District Land and Housing Tribunal.

In rejoinder, the appellant submitted while acknowledging that, the constitution of the United Republic of Tanzania, 1977, article 13 provides for appeal as the right, but that right is not absolute, it is subject to some conditional limitations and one of the limitation is that one elaborated in the case of **Amri Hassan** (supra), that once an execution is effected no appeal will be entertained thereof. According to him, this is built on two perceptions, first, that at the time the order for execution was effected the respondent was no longer interested to take legal action, second, the appeal was filed with intention to abuse the court process.

Regarding the second ground of appeal he submitted that throughout the decision of the Ward Tribunal there is no use of customary Law of Haya. He submitted that the words used to refer on the Haya customary law are contained in the document titled "Muhtasari" which literally means "Minutes".

Regarding the request by the respondent to this court to observe section 64 (1) (a) of the Land Act [Cap 113 R. E. 2019], he said the said law is not applicable as it came into force in 1999, while the land in dispute was acquired in 1989, and actually the law cited does not apply to he village land.

He in the end asked the judgment of the District Land and Housing Tribunal to be reversed and set aside and the judgment of Ilujamate Ward Tribunal and execution order thereof be upheld and costs be borne by the respondent.

That being the summary of the records, the grounds of appeal and arguments by parties, I will in my endevour to discuss the grounds of appeal, deal with one ground after the other.

Starting with the fist ground of Appeal, which raises a complaint, it was not proper for the District Land and Housing Tribunal to entertain Land Appeal No. 15/2017 while the decree appealed against had already been executed vide Application No. 107/2017. From this ground one issue can be framed for determination that, whether the fact that the decree appealed against has already been executed bars the appeal?

In resisting this proposition, the respondent submitted that the right of appeal is constitutional, it cannot be taken away by the facts that the order sought to be appealed against has already been executed. I entirely agree with the counsel, on top of that, I would like to say that the right of appeal form the Ward Tribunal to the District Land and Housing Tribunal is provided under section 19 of the Land Disputes Courts Act, [Cap 216 R. E. 2019] which provides that;

> *"A person aggrieved by an order or decision of the Ward Tribunal may appeal to the District Land and Housing Tribunal"*

Under section 20 (1) the appeal needs to be filed within forty five days or if the appellant is late, and needs to appeal, he must, under section 20 (2) give good cause to secure extension of time to appeal out of time.

Now, having so filed an appeal under the two subsections, then the District Land and Housing Tribunal must, under subsection (3), hear and determine the said appeal as provided hereunder;

> *"where an appeal is made to the District Land and Housing Tribunal within the said period of forty five days or any extension of time granted, the District Land and Housing Tribunal* ***shall hear and determine the appeal****" [Emphasize added]*

From this provision, it goes without saying that Land Appeal No. 15/2017, having been filed within time under section 20 (1), the District Land and Housing Tribunal had no any other option than to hear and determine it, in terms of section 20 (3) of the Land Dispute Court Act, which provision is couched in a mandatory terms. The fact that the decree of the Ward Tribunal had already been executed could not in any way take away the jurisdiction of the District Land and Housing Tribunal to hear and determine the appeal properly filed. That said, I find all authorities cited in support of this ground distinguishable and inapplicable in the case at hand, the ground is devoid of any merit, it is thus disallowed.

Regarding the second ground of appeal that the trial chairman erred in law and fact by holding that the Ward Tribunal invoked Haya customary

law to settle the dispute among the Sukuma natives while in fact there is no record in the Ward Tribunal proceedings where the Haya customary law was invoked, from this complaint, one issue can be framed for determination, that is whether there is on record, the proof that the Haya customary law was used to determine the ownership dispute between the parties and if the same was used whether it was proper?

In law section 50 of the Land Disputes Courts Act, [Cap 216 R.E 2019] allows the use of customary law in resolving the disputes, but the law is categorical that it must be the customary law prevailing within its local limits of jurisdiction. For purposes of clarity, the same is quoted in extensor as hereunder.

> *"50(1) In the exercise of its Customary Law jurisdiction, a Ward Tribunal shall apply the Customary Law prevailing within its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that some other Customary Law is applicable but it shall apply the Customary Law prevailing within the area of its local jurisdiction in matter of practice and procedure to the exclusion of any other Customary Law."*

On this ground, while the appellant complain that there is no record showing that the Haya customary law were used, the respondent complain that there is such a use, and specifically referred to a document titled *"Mhutasari wa kesi ya Mihumo Luchagula Dhidi ya Abel M. Ikombe"* therefor that can not be a judgment.

In dealing with the first issue whether the Haya customary law were used in the decision or not, this issue needs not take most of my time, as the evidence must be on record. I passed through the records, I found in the original hand written record, and the typed copy, but which was signed original ink by the members of the tribunal who presided over the case before the Ward Tribunal, but which was signed original, titled "Mhutasari was kesi ya Mihumo Luchagula Dhidi ya Abel Ikombe" the following passage which for easy reference, I quote it in extension.

> *"Baraza la Ardhi la Kata liliendelea kuchunguza kwa makini na kina msimano wa Mihumo Luchagula, pia likiangalia sheria aina ya Mashamba ya mtu kuhama shamba la ukoo na kushindwa maisha likaona sheria ya kitabu cha customary law of Haya Tribe, sheria ya mwaka 1945 aya ya 578 hadi 583 zinaonyesha kuwa mmiliki wa shamba la ukoo hawezi kunyang'anywa shamba hilo iwapo ataliacha na kwenda mahali kuishi*

panapojulikana lakini akiacha hilo shamba na asijulikane anapoishi basi halmahsuri ya wana ukoo wanamtaka kuchagua mwanaukoo mwingine kulisimamia hilo kwa kifupi sheria hiyo inaruhusu kwa maelezo haya kuwa ushahidi unarudishiwa shamba lake bila kudai matunda yaliyopatikana humo wala mmiliki hatadai chochote kwa kumrudishia shamba lake."

From the above passage, there is no dispute that the Ward Tribunal substantially based on the Haya customary law as referred in that document. However the appellant dispute that to be a judgment, relying on the word "Muhtasari" to be "minutes" however, that word does not only have that one meaning, it may also mean according to TUKI - Swahili English Dictionary by the institute of Kiswahili Research of University of Dar es salaam" Muhtasari: means, *summary, abridgment, précis, conspectus, in a summary, etc.*

From the above meaning, it can be conceptually inferred that the Ward Tribunal meant the word "Muhtasari" to be, a summary of the case not as "minutes" as the appellant wants the court to conceive it.

Further to that, it can be also concluded that, that was actually a decision of the Ward Tribunal in a summary form as at the end, it concluded that;

"kwa kuzingatia sheria na mwenendo mzima wa sheria baraza la Ardhi na usuluhishaji limeamua kuwa kuanzia leo tarehe 25/01/2017, shamba litakuwa mali halali ya Mihumo Luchagula" (Emphasize added].

This, from no further ado, is nothing but the decision of the Ward Tribunal as it is the one in which the right of the parties were declared, and it was signed by all presiding members. Now the issue is whether it was proper to invoke and apply Haya customary law in the Sukuma community. I think and properly so that, it was not proper, because customs binds those who are subject to them. If the parties are sukuma, then they must be subscribing to sukuma customs as opposed to Haya customs, therefore it was not proper to use Haya customary law in deciding their dispute. The second ground of appeal is therefore refused and disallowed.

Regarding the 3rd ground of appeal which raises a complaint that, the appellate District Land and Housing Tribunal erred, when it failed to invoke the doctrine of adverse possession in favour of the appellant as relied and invoked by the trial Ward Tribunal. The doctrine of adverse possession was defined and well articulated by the Court of Appeal in the case of **The Registered Trustees of Holy Spirit Sisters Tanzania vs January**

Kamili Shayo and 136 others, Civil Appeal No. 193/2016 - CAT Arusha, in which the Court of Appeal of Tanzania while relying on the inspiration of the Kenyan case of **Mbira vs Gachuhi [2002] 1 EA 137 [HCK],** which also relied on two English decisions in **Moses vs Lovegrove** [1952] 2 QB 533 and **Hughes vs Griffin** [1969] all ER 460 it was held *inter alia* that;

> *"on the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the followings:-*
>
> *a) That there had been absence of possession by the true owner thought abandonment.*
> *b) That the adverse possessor had been in actual possession of the piece of land.*
> *c) That the adverse possessor had no color of right to be there other than his entry and occupation;*
> *d) That the adverse possessor had openly and without the consent of the true owner done acts which were in consistent with the enjoyment by the true owner of land for purposes for which he intended to use it.*
> *e) That there was as sufficient animus to dispossess and an animo possidendi;*
> *f) That the statutory period in this case twelve years had lapsed.*

g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period, and;

h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.

In this case the trial Ward Tribunal declared the appellant the owner because he has been in occupation of land continuously for more than twelve years; from 1989 to 2003.

However, that was reversed by the District Land and Housing Tribunal on the ground that he was an invitee to the land and has been using it as a family member.

In my perusal to the record the same is clear that the appellant has been using the land and used that land since 1989, when Luchagula Mongo was still alive, he used it up 2003 and shifted therefrom to Ng'hwabuyi for seven years before he shifted to Nkolati and on his return he found the land occupied and used by the Respondent before he commenced the proceedings in 2016.

Which means, he also abandoned the said land for 13 years, and in that period the same was occupied by the respondent in the capacity or

pretext of the lawful heir of the late Luchagula Mongo his late father who was an original owner of the land in dispute.

Now looking at the evidence it has been established that, the appellant possession of land and actual use of it, ceased in 2003 and he has been out of the land for 13 year. For that reason it goes without saying that the trial Ward Tribunal was not justified to hold that the appellant was an adverse possessor of the land in question, therefore District Land and Housing Tribunal was justified to reverse it for the reasons given. This ground also lacks merits and it is hereby dis allowed.

Regarding the 4th ground of appeal that, the District Land and Housing Tribunal erred when it held that the respondent was an invitee to the land not the owner. In this ground of appeal, the issue for determination is whether the appellant was given the land for good or just for use only? Whereas the appellant avers that he was given the land for good by his grandfather the late Luchagula Mongo, and he was so given before the then village chairman, the respondent avers that he was given to farm the land only but not permanently. The burden of proof to prove that the late Luchagula Mongo gave the land to the appellant for good

rested on the shoulder of the appellant. Now the issue is whether the appellant discharged that duty?

The answer to that question can be ascertained from the record, as it has amply and clearly indicated by the record, all witnesses who were called to support the appellant's case, said that they saw him using the land but no one said and proved how he got the land. The only person, who would have probably proved that, was the chairperson whom the appellant alleged to be present when the appellant was being given land by the late Luchagula Mongo, but to the disappointment of this court, that person was not called by the appellant to prove that important fact.

It is trite law as sufficiently amplified in the case of **Azizi Abdallah vs The Republic** [1991] T.LR 71 which though it is a criminal case, but its principle cut across all type of cases. In that case it was held *inter alia*, that;

> *"...the general and well know rule is that, the prosecutor is under a prima facie duty to call those witnesses, who from their connection with the transaction in question are able to testify material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution"*

In this case, the appellant had a duty to prove his ownership to the land in question before he was entitled to be so declared. This is because, being not a direct heir of the late Luchagula Mongo, he was supposed to bring evidence to proved that the land was transferred to him. However, as indicated by his evidence, the person who would have proved as he was said to be present when the late Luchagula Mongo was giving the appellant the land, was the alleged village chairman. The appellant did not call that witness, and said nothing regarding his non calling. That being the case, the District and Housing Tribunal was therefore entitled to make adverse inference against the appellant as failure to call that witness left a lot of important issue unproved. This ground of appeal also fails, as there is no evidence brought by the appellant to prove that he is the owner of the land, therefore the District Land and Housing Tribunal was justified to hold as such.

Last is the 5th ground of appeal which raises a complaint that, the appellate District Land and Housing Tribunal erred for not considering the ruling of this court in Land Revision No. 4/2019 dated on 31/07/2019. This ruling in my considered view had nothing to do with the appeal before the District Land and Housing Tribunal. The ruling in Land Revision No. 4/2019,

ruled that, it was not proper for the District Land and Housing Tribunal to stay the execution of the Ward Tribunal's decision while the execution was already completed therefore, the District Land and Housing Tribunal had nothing to stay. This Ruling did not at all deal with the rights of appeal of the parties and its resultant decisions thereof and did not prevent any person who was aggrieved by the order or the judgment of the original proceedings to appeal. That said, I find this ground misconceived, and therefore meritless.

In the upshot, I find the whole appeal unmaintainable, it fails in total, it is therefore dismissed with costs.

It is so ordered.

DATED at **MWANZA**, this 24th day of May 2021

J. C. Tiganga

Judge

24/5/2021

Judgment delivered in open chambers in the presence of the parties respective Advocates as per coram. Right of appeal explained and guaranteed.

J. C. TIGANGA

JUDGE

24/5/2021