

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

MISC.LAND APPEAL NO. 6 OF 2020

(Arising from Land Application No. 1 of 2019 of the Shinyanga District Land & Housing Tribunal)

JUMA KAHESHI.....APPELLANT

VERSUS

ELIAS MIPAWA..... RESPONDENT

JUDGMENT

21st April & 21st May, 2021

MKWIZU, J.:

Appellant Juma Kaheshi was a respondent in Land dispute No 06 of 2018 before Maganzo ward tribunal where current respondent Elias Mipawa filed a land dispute claiming to be the legal owner of the suit land which he alleged was initially owned by his parents and came to his hands after their death. Respondent informed the trial tribunal that, he gave the said land to his sister who is the appellant's stepmother (married to the appellant's father) for use only. The land continued to be used by his in law even after the death of his sister. After the death of his brother in-law, stated respondent, appellants' grandfather divided the said land to his grandchildren including

the children of his sister's co wife who were not concerned with the said land that is why he decided to file a suit claiming the said land.

Appellant partly supported the above facts. He said, the suit land is his. He was given the suit land in the year 2012 by his grandfather Kulwa Kaheshi. Trial tribunal found for the respondent.

Discontented appellant filed an appeal to the DLHT. His appeal was however unsuccessfully hence this second appeal on three grounds which essential boil down into two issues that chairman failed to analyse properly the evidence by the appellant on the records and that respondent did not prove his claim on the required standards.

Both parties appeared in person during the hearing of this appeal. Being lay persons, their submissions were short. While appellant's main complaint was that the DLHT's decision is without justification for failure to evaluate the evidence tendered, on his party, respondent opposed the appeal generally.

I have given the rival submissions, the grounds of appeal and the records a due considerations. Main issues for this court's determinations are

1. *whether the claim before the trial tribunal was proved*
2. *Whether both two lower tribunals correctly and properly evaluated the evidence on the records.*

The two issues cover the three grounds of appeal presented by the appellant. It should be noted here that this is a civil matter where the burden of proof is on the person who asserts existence of certain facts. The principle is expressly provided for under section 110 (1) and (2) of the Evidence Act [Cap 6 R.E. 2019] which provides that:

"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist

(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."

The above position of the law has been emphasised in a number of decisions namely, **The Attorney General v. Eligi Edward Massawe**, Civil Appeal No. 86 of 2002, **Anthony M. Masanga vs. Penina (Mama Ngesi) and Others**, Civil Appeal No. 118 of 2014 (all unreported), **Manager, NBC Tarime v. Enock M. Chacha** [1993] TLR 228 to mention just a few. As a

general principle the burden of proof in the above provisions of the law never shifts to the adverse party until the party on whom the obligation lies discharges his, and that the burden of proof is not thinned on account of the weaknesses of the opposite party's case.

The respondent in this appeal is the one who initiated these proceedings. He was duty bound to prove his allegations before the trial tribunal. The question before the court is whether the respondent successfully discharged his duty to prove his claim.

In his evidence given on 24th November, 2018, respondent said the suit land is his, he gave it to his sister, the appellant's step mother for use and that he filed a suit after learning that it has been divided to his late sister's co-wife's children. How and when he gave the said land to his sister was not part of his evidence. Two other men supported his evidence. Kabanza Tungu testified that respondent gave his sister the suit land for use and Nubi Shija testified that the land was being used by a woman known as Ngwanidadi but he failed to explain the relationship between Mgwanidadi and the respondent during cross examination.

On the other hand, appellant said he got the suit land from his grandfather Kulwa Kaheshi in the year 2012. On how Kulwa Kaheshi acquired the said land, appellant said he got it since the colonial period. And he confirmed that respondent's sister was married to his father. Ngwiga Masanja and Paulo Kaheshi supported the appellant. Segeni Sayi witnessed the division of the claimed land by the appellant's grandfather to his grandchildren including the appellant and therefore confirmed to the trial tribunal that the land belongs to the appellant.

There was a mention in the proceedings the earlier on filed cases between the respondent and appellant's grandfather but no evidence was tendered to substantiate the same so the court is denied the advantage of understanding the truth of the matter and its connection with the dispute at hand. I will for that reason not discuss much this point.

Given the evidence on the records as hinted above, I find difficulties in concluding that respondent did discharge his duty of proving the claim to the required standards. Looking at the adduced evidence, the link between the respondent and the suit land is missing in three aspects. One, there is no evidence establishing how and when the respondent got the said land from

his parrents. Secondly, the records are silent on when exactly the suit land was given to the respondent's sister as alleged. Thirdly, even assuming that the respondent did give his sister the said land, it is not in the courts records on why, if the respondent is the owner, left the land on the appellant father's use even after the death of his sister and her husband just to claim it back after its division and from only one beneficiary. The said unexplained facts above is a clear evidence that respondent failed to prove his claim on the balance of probabilities.

On whether the tribunal evaluated the evidence on the records properly, I will go straight to the decisions of the two tribunals below. In its decision, the Ward tribunal said:

"Wajumbe wa baraza hili wamepitia maelezo yao wote wawili pampja na maelezo ya mashahidi wao. Baada ya kuyapitia baraza limegundua kuwa eneo wanalozozania miaka ya nyuma lilikuwa la wazazi wake na Mzee ELIAS MIPAWA na baada ya kufariki wazazi wake na Mzee Elias eneo hilo alilimiliki yeye Mzee Elias na baadaye alimgawia na dada yake kwa ajili ya kilimo na baada ya hapo Mme wake na dada yake Elias alilimiliki baada ya kufariki Mke wake hivyo baada ya miaka kadhaa aliligawa kwa wajukuu zake hata na wale ambao lilikuwa haliwahusu mmoja wapo ni huyu Juma Kaheshi. Hata alipopewa nafasi ya kumuuliza maswali alisema hana swali. Hivyo kupitia baraza hili tumegundua kuwa mmiliki halali wa hilo eneo ni Mzee Elias..."

I don't think if the above decision was arrived at after a proper evaluation of evidence brought by the parties. In departing with the opinion of the tribunal assessors, the 1st appellate tribunal chairperson said at page 6 and 7 of his decision:

"...no evidence as said which had proved that the land belonged to the appellant father, the evidence is that the land belongs to the respondent and was left by their father and could not be divided the way it was done and no evidence was brought to the attention of the ward tribunal or before this tribunal to show in what capacity the appellant grandfather divided the land said to be of his late son..."

The above assessment of evidence is doubtful. While the trial tribunal decision contains no evaluation of evidence, the 1st appellate tribunal's decision, in my considered opinion, tends to shift the burden of proof to the appellant (original respondent) contrary to the law. As explained herein above, there is no evidence on the records proving how respondent acquired the said land from his father. There is also no evidence on why he did not claim the suit land immediately after the death of his sister just to wait until the death of his brother in-law and after the division of the said land to the appellant.

Appellant's story of evidence is clear that the land belonged to his grandfather and that he only divided it to his grand children after he was tired of using it. The appellant had no burden of proof. In **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) Court of appeal quoted with approval part of the text at page 1896 of Sarkar's Law of Evidence, 18th Edition, M.C. Sarkar, S. C. Sakar and P. C. Sarkar published by Nexis Lexis that:

"...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 weaknesses of the other party..."

Trial tribunal as well as the 1st appellate tribunal failed to appreciate the principle of the law above. It was not the duty of the appellant to prove on

what capacity his grandfather divided the land but rather the respondent's duty to prove his claim before the trial tribunal the burden which he did not discharge.

To say the least, the appellant's grounds of appeal are meritorious. The claim before the trial tribunal went unsubstantiated and both the trial ward tribunal and the 1st appellate tribunal failed to properly evaluate the evidence on the records leading to a wrong conclusion.

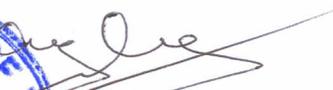
For the reasons given above, I allow the appeal, the decisions of the two tribunals below are quashed and set aside. The appellant Juma Kaheshi is declared a lawful owner of the suit land with costs.

It is so ordered.

DATED at SHINYANGA this 21st day of May, 2021


E.Y. MKWIZU
JUDGE
21/5/2021

Court: Right of Appeal explained.



E.Y. MKWIZU
JUDGE
21/5/2021