THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 57 OF 2019
(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 35 of 2018, Hon. Mapunda, Chairman.)

RUSIA HEZELONI.....1ST APPELLANT
SIKUJUA AKIM.....2ND APPELLANT

VERSUS

ARON MWAWEZA.....RESPONDENT

JUDGEMENT

Date of Last Order : 30/07/2021
Date of Judgement: 26/08/2021

MONGELLA, J.

In the District Land and Housing Tribunal for Mbeya at Mbeya (the Tribunal), the respondent sued the appellants over a piece of land located at Ilindi village in Mbeya rural district. He claimed to be the lawful owner of the suit land having acquired the same through execution of a decree issued by the primary court of Mbalizi in Civil Case No. 111 of 1997 against one Matai Mlagila. He further claimed that he had been in undisturbed possession of the suit land from that time until the year 2017 when the appellants invaded his land.

The appellants, on their part, also claimed to be the rightful owners having inherited the land from their mother. The claimed to have been in possession of the suit land since 1984 when their mother died. That their mother was allocated the suit land by a local chief named "Mponda."

The Tribunal in the end ruled in favour of the respondent something which annoyed the appellants. Seeking to impugn the decision, they filed this appeal on four grounds as follows:

1. *That the trial Tribunal erred in law and facts by holding that it had no jurisdiction to declare the decision of primary court illegal, while the decree and judgment of the said case No. 111 of 1997 was not tendered before it during the hearing of the case for it to take judicial notice.*

2. *That the trial Tribunal erred in law and fact for reaching at that decision, while the decree and judgment on Civil Case No. 111 of 1997 was time barred.*

3. *That the trial Tribunal erred in law and facts in holding that the disputed property belongs to the respondent while the appellants are in use of the disputed land for more than 21 years.*

4. *That the trial Tribunal erred in law and facts basing on the respondent and his witnesses' evidence in reaching its decision while ignoring strong evidence of the appellants and their witnesses.*

Both parties appeared in person and the appeal was argued by written submissions filed in this court in accordance with the scheduled orders. In their written submission, the appellants stated that they abandoned the second ground. However, upon reading their submission, I noted that they abandoned ground four as well.

Arguing on the first ground, they first referred to section 110 (1) of the Evidence Act, Cap 6 R.E. 2019, which puts the burden of proof, of existence of facts, on the person wishing the court to pronounce judgment in his favour. In consideration of this provision of the law, they argued that though the respondent alleged that there was a decree and judgment of the primary court, to which he acquired the land in execution thereof, he produced nothing to prove his allegations. In the premises, they faulted the Tribunal decision for wrongly relying on the facts adduced by the respondent.

The appellants further challenged the Tribunal decision which accepted the respondent's assertions on the ground that the issue of existence of the primary court decree was not diluted by the appellants on cross examination. They contended that the trial Tribunal erred in its reasoning because it is the duty of the court to ensure that justice is done to both sides of the case. On this issue, they had a stance that drawing such a conclusion to a layperson seriously infringed the appellants' rights. Thus the Tribunal ought to have demanded for the production of the judgment and decree to satisfy itself that the same exists. Further, the appellants contended that knowing which questions to ask on cross examination is

an art done professionally; hence it was difficult for the unrepresented appellants to get correct questions to ask.

In addition, the appellants challenged the Tribunal's construction of section 58 of the Evidence Act, Cap 6 R.E. 2019, which requires the courts to take judicial notice on documents listed under section 59 (1) of the same Act. They were of the stance that the Hon. Chairman misconstrued the said provision by merely believing what was said by the respondent on existence of the primary court decree and judgment without inquiring as to its truth by requesting copies thereof. They argued that the mere mentioning of the case number does not suffice to prove the facts asserted. They were of the view that the Hon. Chairman ought to have invoked the provisions of section 59 (3) of the Evidence Act which direct the court to refuse to take judicial notice of any fact it is called upon to do so until such person produces any such document as it may consider necessary to enable it to do so.

The appellants concluded on this ground by contending that the Tribunal Chairman misdirected himself in shifting the burden of proof to the appellants, while it was the duty of the court to inquire on the existence of the facts asserted by the respondent.

On the third ground, the appellants contended that the Tribunal erred in disregarding evidence that the appellants have been in use of the suit premise for so many years. They argued that there was no dispute during the hearing that the appellants and their mother have been in use of the suit land since 1983. Referring to the testimony of DW3, they further argued

that DW3 corroborated their testimony when he testified to have accommodated their deceased mother who lived in the disputed land with the said Matai Mlagila as her concubine. They further referred to the testimony of DW4 who testified that the land in dispute belonged to the appellants' mother.

They added that the respondent did not dispute that he found the appellants living in the land in dispute. They challenged the testimony of PW2 who testified that the respondent went to him with a letter from Mbalizi primary court directing him to handle to the respondent the land in dispute and he did so in 2003. On this, they argued that there is a contradiction in the testimony of the respondent and that of PW2. That is, when PW3 claims to have handed the suit farm to the respondent in 2003, the respondent claimed that the appellants invaded the suit land in 2017. Considering their assertion that they have been in use of the suit land for more than 20 years and they are still there to date, they wondered how the respondent and PW2 testified that they never saw the appellants living in the land for all those years until 2017 when the respondent alleges that the land was invaded. Basing on this submission they prayed for their appeal to be allowed.

The respondent on his part resisted the appeal. He first raised a legal issue to the effect that the appeal is incompetent for not being accompanied by copies of the impugned judgment and decree. They referred the court to the provisions of Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap 33 R.E 2019, which requires every appeal to be accompanied by a

copy of decree and judgment appealed against. In the premises, they prayed for the appeal to be struck out with costs.

Without prejudice to the legal issue raised as above, the respondent went ahead to defend on the grounds of appeal. He however, made a general reply whereby he supported the Tribunal decision. He argued that the Tribunal was correct in its decision as the respondent established his case.

With regard to contention on the primary court judgment relied upon by the Tribunal in reaching its decision, the respondent argued that the appellants' contention that the primary court's judgment was not tendered is misconceived as the Tribunal took judicial notice of it. He argued that the Tribunal was correct in reasoning that it had no jurisdiction to nullify the primary court decision since the two courts lie under different pillars. To support his argument he referred the court to the case of ***Zena Charles v. Daniel Mpamba and 6 Others***, Land Appeal No. 48 of 2016 (HC at Mbeya, reported at Tanzlii).

He maintained that he acquired ownership of the suit land through execution of the primary court decree and the appellants and or their mother did not file objection proceedings to challenge the execution. He argued that the appellants failed to prove their case on balance of probabilities. In addition, he contended that the fact that the land in dispute has been in possession of the appellants does not justify ownership by the appellants. Basing on these arguments he prayed for the appeal to be dismissed with costs.

After considering the arguments of the parties and going through the Tribunal record, I find that there is one issue to be resolved in this matter. That is, who is the rightful owner of the land in dispute? However, before embarking on deliberating on this issue, I wish first to address the legal issue raised by the respondent regarding competence of the appeal for not being accompanied by copies of judgment and decree.

I agree with the respondent that the law, as provided under **Order XXXIX Rule 1 (1) of the Civil Procedure Code**, requires an appeal to be accompanied by copies of judgment and decree appealed against. See also: ***MIC Tanzania Limited v. Hamisi Mwinyijuma & 2 Others***, Civil Appeal No. 64 of 2016 (HC at DSM, unreported). However, in the matter at hand, I find the respondent's claim unfounded. I have gone through the court file and found that the memorandum of appeal filed by the appellants is duly accompanied by copies of the decree and judgment appealed against. I think, probably the memorandum of appeal served to the respondent might not have been accompanied by the copies of judgment and decree. In the premises, the record to be considered is the court record, which I find to be competent. Having found as such I move to deliberate on the main issue in this appeal.

Both parties claim to be the rightful owners of the suit land. While the appellants claim to have inherited the same from their deceased's mother, one Theresia Mwasile, in 1984, the respondent claims to have acquired the suit land through execution of a court decree issued by the primary court of Mbalizi in 1997. He claimed that he sued one Matai Mlagila and obtained the said decree against him. From the submission of

the appellants and the testimonies of the witnesses as seen in the Tribunal judgment and proceedings, the said Matai Mlagila and Theresia Mwasile lived as concubines whereby it was Theresia Mwasile who invited Matai Mlagila to her land.

I have read the judgment of the Tribunal and just as argued by the appellants, the Hon. Chairman ruled in favour of the respondent in consideration of the primary court decree. The appellants claim that it was not proved in the Tribunal by the respondent that there was indeed such case and resulting decree from the primary court. They claimed that no such judgment and or decree were tendered in evidence in the Tribunal. The respondent on his part argued that the Tribunal took judicial notice of existence of the decree and thus was right in its decision.

It is evidenced from the proceedings and Tribunal judgment that no judgment or decree was presented in court as evidence. In his judgment however, the Tribunal Chairman reasoned that the testimony of the respondent with regard to the primary court decree was not diluted by the appellants as they never cross-examined the respondent's witness on the issue of execution of the primary court decree. He further reasoned that the appellants' main argument was that the suit land did not belong to the said Matai Mlagila, but to their mother. In consideration of the appellants' argument, the Hon. Chairman further reasoned that he is not seized with jurisdiction to declare the primary court decision illegal. He added that, if the appellants needed to challenge the execution, they ought to have filed objection proceedings in the primary court whereby they would show their interest over the said land.

First of all, I agree with the Hon. Chairman's position that the Tribunal is not seized with jurisdiction to interfere with the decision of the primary court and that if the appellants wished to challenge the execution they ought to have filed objection proceedings to that effect. However, in my considered view, the Hon. Chairman ought to have considered and thoroughly analysed the evidence provided by both sides.

The Hon. Chairman believed the respondent's version on the ground that the appellants did not dilute the respondent's testimony as they never cross-examined him regarding the suit in the primary court. I have gone through the proceedings, and to the contrary, as seen at page 8 of the typed proceedings, the 2nd appellant cross-examined the respondent regarding the suit in the primary court. Though not in a fashion that a trained lawyer would do, I find that she inquired on the details of the said suit.

In their submission, the appellants challenged the Hon. Tribunal Chairman's act of blindly believing the respondent's assertion that he acquired the land in dispute through execution of the primary court decree. They were of the stance that the Hon. Chairman ought to have requested for further proof whereby the respondent ought to have produced the said judgment and decree of the primary court. They argued that the Hon. Chairman wrongly took judicial notice of the judgment and decree and instead ought to have invoked the provisions of **section 59 (3) of the Evidence Act, Cap 6 R.E. 2019**. For ease of reference, the provision states:

> *"If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."*

The above provision gives the court discretional powers to decide whether or not to call upon the party to provide documents on facts the said party calls upon the court to take judicial notice. In my considered view however, the court has to invoke its discretion judiciously. After going through the proceedings, I find the matter at hand, necessitating calling of documentary proof before the Tribunal could act on the respondent's assertion that he acquired the suit land through execution.

First of all, the respondent did not explain as to what was the primary court case all about leading him to obtain a decree against the said Matai Mlagila. In addition, I have gone through the proceedings and found material contradictions between the respondent (PW1) and his witness, PW2. While the respondent claimed that he obtained the land in dispute on 03rd July 1998, PW2 stated that he handed the land upon effecting the primary court order on 01st February 2003. The law is clear that when there are material contradictions between the witnesses, the credibility of the witnesses' testimony is diminished. See: ***Ernest Sebastian Mbele v. Sebastian Sebastian Mbele & 3 Others***, Civil Appeal No. 66 of 2019 (CAT at Iringa, unreported).

Further, PW2, the Village Executive Officer, testified that on 01st February 2003, the respondent took to him a letter purportedly from the primary court directing him to effect the execution of the decree by transferring

the suit land from the said Matai Mlagila to the respondent. He tendered exhibit P1, which was a letter that he wrote to the primary court magistrate at Mbalizi primary court, notifying him that he has already effected the execution and the land in dispute has already been handed to the respondent.

I in fact find the said exhibit P1 so doubtful. This is because PW2 only tendered the letter he alleged to have written to the primary court magistrate informing him of the execution. He however, did not tender the letter he alleged to have received from the primary court directing him to execute the decree. The said letter as well does not make any reference to any letter or order from the primary court. If PW2 really received orders from the primary court to execute a decree, he ought to have presented the said order as well. In addition, the VEO is not a court broker to execute court decrees.

The respondent, while cross-examined by the 1st appellant, claimed that after obtaining the land in 1998, he did not use the said land. Instead, he left it in the care of some villagers until the year 2017 when he wanted to sell it. This is so doubtful as well because the respondent did not mention a single person/villager/village that he left the land to care for.

In consideration of the above observation, I find that it was highly important for the respondent to prove that he acquired the suit land through execution of a court decree against the said Matai Mlagila. The trial Tribunal erred in acting on the respondent's mere assertions regarding the court decree without concrete proof.

Considering the testimonies of the parties, the said Matai Mlagila lived under one roof with the appellants and their deceased mother, Theresia Mwasile. As per the testimony of the appellants' witnesses, the appellants' deceased mother invited the said Matai Mlagila to cohabit, but he never owned the land in dispute. In the premises, it was imperative for the said primary court order for execution to be presented in the Tribunal to prove that it really mentioned the land in dispute to be handed to the respondent for execution of its decree.

In consideration of the fact that the respondent failed to prove the existence of the alleged primary court judgment, decree and order for execution over the land in dispute, this court finds that the appellants are the rightful owners of the suit land, having acquired the same through inheritance from their late mother. Consequently, the Tribunal judgment and decree are hereby quashed. The respondent shall pay costs of the suit to the appellants.

Appeal allowed.

Dated at Mbeya on this 26th day of August 2021.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 26th day of August 2021 in the presence of the 1st appellant and the respondent.

L. M. MONGELLA
JUDGE