IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

LAND APPEAL NO 41 OF 2021

(Originated from Land Application No. 21 f 2019 in the District Land and Housing Tribunal at Musoma)

MASOYA MAHEMBA ..... APPELLANT

VERSUS

NYASUMA KIHAGA ..... RESPONDENT

JUDGMENT

8th September & 8th October,2021

F. H. MAHIMBALI, J.:

The appellant one Masoya Mahemba and the respondent Nyasuma Kihaga have a dispute of ownership of land both parties claiming possession over the same land located at Iserere village within Serengeti District. Whereas the appellant claims that he is in possession of the said land since 1976, the respondent on the other hand claims possession of it since 1987 where he owned it jointly with her deceased husband. They had acquired ownership by clearing the virgin land and had been in peaceful possession until in 2016 when the dispute on ownership between them arose. It is unfortunate that the respondent's husband is

now deceased. The interesting thing of this dispute is that, both parties claim ownership of land by invading the virgin land by clearing it.

Upon hearing the parties, while shaking hands with one assessor, the trial tribunal (chairperson) declared the respondent as the lawful owner of the disputed plot as per available evidence in record.

This aggrieved the appellant; thus, the basis of this appeal being armed with a total of four grounds of appeal namely: -

1. *That the trial chairperson erred in law and in fact by pronouncing judgment in favour of the respondent basing on uncorroborated evidence.*
2. *That the trial chairperson erred in law and fact by entering judgment in favour of the respondent without paying site visit.*
3. *That the trial chairperson erred in law and fact by entering judgment in favour of the respondent basing on the ground of joint ownership without considering evidence from both sides of ownership.*
4. *That the trial chairperson erred in law and fact by pronouncing judgment in favour of the respondent while she failed to prove her ownership.*

Basing on these grounds of appeal, the appellant prays that this honourable court quashes the judgment and decree of the DLHT of Mara

at Musoma in Land Application No.21 of 2019 and that the appellant be declared lawful owner of the disputed land.

During the hearing of the appeal, the appellant was represented by Miss Agness learned advocate, whereas the respondent fended for herself.

With the first ground of appeal, that the trial chairperson erred in law and fact by basing his judgment on uncorroborated evidence, it has been submitted that this is contrary to the law as per section 165 and 166 of the TEA (Cap 6) R. E. 2019. The law demands that the evidence must be corroborated between one evidence and another by different witnesses. In the absence of corroborated evidence, the evidence is unreliable. In this case the respondent's testimony is that the land in dispute measures 16 X 15 paces. However, DW2's testimony is to the effect that the land in dispute is 118 length but doesn't know the width (pages 10 and 11 of the typed tribunal's proceedings). DW1's testimony on one hand is to the effect that she started owning the said area in 1987 by clearing the virgin land, but on the other hand DW2 (her witness) testified that DW1 started owning the place in 1975 (pages 3 and 4 of the judgment). DW1 in her testimony testified further that she started construction on the said area in 1987 (page 10 of the typed

proceedings) but in cross examination, she stated that she started building in 2016. This is a vital contradiction in law as it is not clear exactly when the said construction actually started. That the same DW1 stated in cross examination that she left in 2015 while leaving her two children there. This is a clear contradiction as it is not clear as exactly which is which. Thus, the testimony of DW1 and DW2 seem to be un-corroborative and thus in contradiction with section 165 and 166 of TEA, yet the same has been used to determine the case in favour of the Respondent. In the case **Amratlal t/a Zanzibar Hotel (1980)** TLR 31 it was held that *"an appellate court should not disturb concurrent findings of facts unless it is clearly shown that there is misapprehension of the evidence, miscarriage of Justice or violation of principles of law or practice"*

Miss Agness learned advocate is of the view that, the trial chairperson erred in law by giving judgment in favour of the Respondent while there is a clear violation of the law in misapprehension of the evidence on record.

On the second ground of appeal, she submitted that the trial tribunal erred in law and fact in determining the matter without paying visit to the locus in quo. She submitted that at page 3 of the judgment,

DW1 stated to have fenced the land in dispute. DW2 as per page two of the judgment is recorded to have stated that at the disputed land, there are two houses and one toilet. All this is confusion and not true. Had the tribunal chairperson visited the site (locus in quo) as per proceedings dated 13th January 2021, he would have been satisfied with what is actually in the field. Thus, in this case, there was a need to visit the site for the tribunal's satisfaction. In her opinion, the trial tribunal reached this decision wrongly for failure to apprehend important facts at the locus in quo. The said DW2 is not bordered with the land in dispute but there is another neighbour who boarders that land.

In the third ground of appeal, Miss Agness submitted that the trial chairperson erred in law and fact by giving the verdict in favour of the Respondent on the basis of joint ownership in disregard to the evidence of both sides of ownership. As per page 11 of the typed proceedings, DW2 states that the husband of DW1 is deceased and Mr. Chacha Kikondo was appointed administrator who handed over the plot to the respondent (DW1), but this administrator didn't go to the trial tribunal to give his testimony. Thus, all stated is not established anywhere. In the circumstances of this case, it is hard to believe the testimony of the

respondent alone. There ought to have been extra evidence to clear the said visible doubt.

With the last ground of appeal, it has been submitted that the trial chairperson erred in law and fact to determine the matter in favour of the respondent while the respondent herself failed to prove her ownership. In comparison with the testimony of the appellant, she is in all fours that her case was well proved by size, location and boundaries in compliance to Reg. 3 (2) b of the LDCA – GN 174 of 2003 that at the disputed land, there must be clear identification of the area by boundaries. She cited the case of **Audax M. Tibanyendera VS Hamza Sued and 10 others** Land case No. 13 of 2016 High Court Bukoba at page 9 where Ntulya J, said;

> *"The law under Reg 3 (2) b of the GN 174 of 2005 requires specification of Land before dispute on Land is determined"*

In this case, there are numerous irregularities which needed the trial chairperson of the tribunal to have taken into account. In page 5 of the Judgment, the trial chairperson ruled that *"there is ample evidence that the Respondent had proved her case as per tribunal's satisfaction that she owned the said land jointly with her husband"*

The law is clear that in civil cases the one with heavier weight evidence is entitled to judgment in his/her favour. In the case of **Hemed Said Vs Mohamed Mbilu** (1984) TLR 113 it was held that:

> *"According to law, both parties to the suit cannot tally but the person whose evidence is heavier than that of the other, is the one that who must win."*

With this, she is of the opinion that the appellant in this case was denied his right of possession of the said land in dispute. Thus, by these grounds of appeal it is her submission that the appeal be allowed with costs, and the appellant be declared the owner of the land in dispute.

On the other hand, the respondent who is unrepresented resisted the appeal. She submitted that the said area is hers (herself and her deceased husband). They started owning it since 1987. They acquired the said land by clearing the bush and since then they have been using the said area undisturbed until 2016 when the saga came into being. As she is in occupation and use of the said land from 1987 to 2012 when her husband died, she has never been in disturbance by anyone during all this time. She is thus of the firm view that the DLHT rightly decreed her as owner of the said plot wrongly claimed by the appellant.

In her rejoinder submission, the appellant's counsel reiterated her submission in chief. As regards the argument why she went to the site alone and without implicating the local leaders, it is her submission that the said visit was personal and not official. It was just to get satisfied with her client's facts and knowing the real situation at site.

I have dispassionately considered the arguments by both sides in consideration of this appeal. The issue for determination is whether this appeal is meritorious. In arriving to the merit of the appeal, the important issue for consideration is who is the rightful owner of the said land in dispute.

Digesting the arguments in ground no.1 of the appeal and the evidence in record, for sure the evidence of the respondent is short of substantial material to support her case. I say so because, her own testimony at the trial court is self-contradictory. Whereas DW1 describes the land as being 16 X 15 paces, DW2's testimony is to the effect that the land in dispute is 118 paces length but doesn't know the width (see pages 10 and 11 of the typed trial tribunal's proceedings). This is a very significant discrepancy of the case's testimony which in essence materially contradicts the respondent's case. Considering further the testimony of DW1 at the trial tribunal, she testified that in the said land

she borders with **Nyamosongómbe**, d**ispensary**, **Chacha Msenyi** and **Rhobi Mbogo** as her neighbours. Surprisingly, none of them came at the trial tribunal to testify on that. On the other hand, the appellant mentioned **Mosi** and **Chacha Ngómbe** as his neighbours. Of the two neighbours, at least one Chacha Ngómbe testified as PW2 for the appellant. The reason why Mosi didn't come at the trial tribunal for his/her testimony is not stated. Nevertheless, in comparison between the appellant's evidence and that of the respondent, it is tempting to hold that the respondent's evidence is materially and substantially self-contradicting when paying attention the testimonies of DW1 and DW2 regarding the size of the plot, occupation and bordering.

In the second ground of appeal, the learned counsel is of the observation that as per circumstances of this case, the visit to locus in quo was necessary and inevitable for the justice of the case. The reason advanced by the trial chairman that the road is impassable to reach the locus is not descriptive. For the interests of justice in the circumstances of this case, the visit to the locus in quo was not only important and necessary but inevitable. I say so because each party claims ownership of the said land in dispute since 1976 and 1987 respectively. Ownership of land from 1976 and 1987, there must be some visible developments

by each one claiming ownership and occupation of it. The legal position is "*who alleges must prove*" (s.110 and 111 of the Tanzanian Evidence Act, Cap 6, R.E 2019). Considering the evidence adduced in this case, I agree with the learned counsel for the appellant that for the interest of justice and all fairness, there was a need of paying visit to the locus in quo. In the case of **Avit Thadeus Massawe Vs. Isidory Assenga**, Civil Appeal no. 6 of 2017, the Court of Appeal of Tanzania quoting the case of **Akosile Vs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 restated the importance of making visit to the locus in quo which summarized as follows:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."*

The practice of visiting a *locus in quo* is not novel in our jurisdiction. The Court of Appeal in the case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29, faced a scenario whereby the trial magistrate visited the locus in quo and the judge

sitting on appeal also did so. The Court of Appeal was of the view that such visit should be done only in exceptional circumstances by the trial court to ascertain the state, size, location and so on of the premises in question. Clarifying on the point, the Court stated:

> *"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator. At the trial, we ourselves can see no reason why the magistrate thought it was necessary to make such a visit. Witnesses could have given evidence easily as to the state, size, location and so on of the premises in question. Such evidence could, if necessary, be challenged in cross-examination. But at least the magistrate made his visit on the application of a party to the trial. We completely fail to see why the first appellate judge thought it was necessary for him to visit the premises. He was dealing with an appeal."*

The importance of visit to *locus in quo* has been seen in the case of **Avit Thadeus Massawe Vs. Isidory Assenga**, Civil Appeal no. 6 of 2017 where the Court of Appeal faced with an issue of ownership between two plots (no.16 and 17) at Kindi area within Moshi District where the Court of Appeal directed the trial High Court to take additional evidence in respect of the actual location of the suit property. The Court of Appeal further directed that a high ranked Land Officer from the

responsible Land Office, Moshi District be involved in the exercise of identifying Plots. No. 16 and 17 Kindi Msasani within Moshi District and locate on which Plot the suit property is. The trial High Court should then certify such evidence to the Court with a statement of its own opinion on the credibility of the witness or witnesses who had given additional evidence. The trial High Court shall also make sure that the parties to the appeal and their advocates are present when the additional evidence is taken.

In the circumstances, the Court of Appeal refrained from dealing with the merits of the appeal whose determination of the appeal was stayed pending the availability of the additional evidence.

In the subsequent proceedings (after compliance to its directives), the Court of Appeal remarked:

> " *We have carefully considered the additional evidence availed to the Court to which the counsel for the parties had no issues with. It is both pre-emptive and conclusive of the fact relating to the location of the suit house. It unveiled a somewhat unison tale, the whole truth. CW1, a reliable Land Officer, who participated in the visit to the locus in quo used a similar Survey Plan PW2 used during his testimony (Exh P2) and told the High Court that the suit house is on Plot No. 16 and that*

Plot No. 17 was yet to be developed. Even before us, neither of the counsel entertained doubts on his credibility or the Survey Plan (Exh P2) used in locating the plots and the suit house. They agreed that the suit house is on Plot No. 16. Given the circumstances, there is therefore no dispute that Plots No. 16 and 17 are undoubtedly not one and the same. A glance at the appellant's evidence shows that his claim was in respect of the respondent entering and occupying his house situated on Plot No. 16 whereas the respondent disputed the claim on the basis that he was living in a house situated on Plot No. 17.....".

Being guided by the decision of the Court of Appeal in the manner the dispute in the case of **Avit** (supra) was resolved, it shows how important the visit to the locus in quo in certain scenario is. In the current matter, I am aware that the dispute involves un-surveyed land. Thus, the manner of establishing ownership could not be easy as it was in the case of **Avit** (supra), nevertheless the reasons advanced by the trial chairperson didn't suit the resolution of the matter. Instead, the trial chairperson rushed to award the respondent with the said land as the verdict is not clearly supported by any cogent and clear evidence to connect the respondent with the said land. As there was want of evidence in respect of ownership to the said land in dispute, the best solution was to gather much material from the *locus in quo.*

With the third ground of appeal, I beg to differ with **Miss Agness** learned advocate that it is not necessary that when a land is jointly owned between a husband and wife, when one dies then there must be probate matter or administration cause for a property to pass title to the surviving spouse. Probate or administration cause is only available where the property involves the sole ownership of the deceased.

With the last issue, I am at one with the learned advocate that in digest of the evidence of the case as per tribunal record, it is want of sufficient evidence to give a verdict with certainty. The evidence in record is not conclusive as who owns the said land in dispute between the two. The legal position is "*who alleges must prove*" (s.110 and 111 of the Tanzanian Evidence Act, Cap 6, R.E 2019). This being a civil case, the standard of proof is on balance of probabilities (Section 3(2)(b) of The Tanzania Evidence Act, Cap 6, R.E 2019). Digesting as a whole the evidence of the suit at the trial court, it is not certain on balance of probabilities who exactly owns that land; the appellant or the respondent. With the available evidence on record, to be certain and for purposes of resolving the real controversial issue between the parties it is important that the DLHT performs the important task it reserved of visiting the locus in quo. The findings that the respondent Nyasuma

Kihaga is the lawful owner of the disputed land is not supported by good and cogent evidence. That the appellant's evidence being skimpy and un-convincing, it is equally not conclusively supportive by evidence in record. In fact, I am aware that in Tanzania, there are several ways in which a person can acquire land including allocation by the village council, or by grant of right of occupancy, purchase, inheritance and gift. Intrusion to a land by adverse possession is not a formal way of acquiring land, however if one fulfils the legal condition can by chance acquire land though it is so risky. None of these ways have been sufficiently proved by these rival parties in this land dispute on the manner each acquired the said land. The available evidence in record is one that each intruded the said land by clearing the virgin land.

With this wanting evidence and in consideration of the fact that the trial tribunal escaped the necessary and important task of visiting the locus in quo, in the circumstances of this case and for the interests of justice and all fairness of the case, by virtue of section 43 (1) b of the LCDA Cap 216, R.E 2019 the proceedings of the trial tribunal from 13th January, 2021 to 21st April, 2021 are quashed and set aside for want of completing that important task of visiting the locus in quo. Likewise, the resulting judgment thereof is quashed and set aside. In its place, I order

there be a visit to the locus in quo, gather evidence from the site regarding size, location, boundaries by involving the parties, tribunal witnesses (such as local authorities, neighbors and others as the case may be) get opinions from the tribunal assessors and recompose the judgment as per law considering the new evidence to be obtained.

DATED at MUSOMA this 8th day of October, 2021.

F. H. Mahimbali

JUDGE

08/10/2021

Court: Judgment delivered this 8th day of October, 2021 in the presence of both parties and Mr. Gidion Mngoe – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

08/10/2021