IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 32 OF 2021

DELEFA MISUNGWI ..... APPELLANT

VERSUS

MILIKA JAMES ..... RESPONDENT

JUDGMENT

19th August, & 4th November, 2021

ISMAIL, J.

This appeal arises from the decision of the District Land and Housing Tribunal for Chato at Chato (DLHT) in Application No. 14 of 2020. At stake, in the trial proceedings, was a claim of a piece of land located in Kakeneno village, Nyarutembo Ward in Chato District. The contention by the applicant then (the appellant herein) was that the disputed land is his, and that the respondent trespassed onto it, cut down trees, made charcoal, and ordered his people to do some farming. He enlisted the assistance of the DLHT and prayed for a perpetual injunction restraining the respondent from

trespassing onto the land. Simultaneously, he requested the DLHT to declare him as the lawful owner of the suit land.

The respondent was valiantly opposed to the appellant's contention. She claimed that the suit land was hers, having acquired it from a Mr. Mashaka who has since passed away. The sale was done on 20th June, 1999, in the presence of her late husband.

After a hearing that saw three witnesses testify for the appellant, against four for the respondent, the gentleman assessors and the chair of the DLHT held a unanimous view that the suit land belongs to the respondent. Consequently, the respondent was declared a lawful owner of the suit land.

Expectedly, this decision was too bitter to take for the appellant. He took the view that intervention of this Court was necessary, through the instant appeal, which has four grounds of appeal, reproduced as hereunder:

1. *That, the trial tribunal erred in law and facts to declare the respondent lawfully (sic) owner of the suit land basing on inconsistence (sic) and contradictory evidences.*
2. *That the trial tribunal erred in law and facts to decide that the appellant failed to prove his ownership over the suit land as its (sic) against the evidence on record.*

3. *That the trial court (sic) erred in law for not analyzing and evaluating evidence on records (sic) as a result the appellant's evidence was not considered leading to miscarriage of justice.*

4. *That the trial court (sic) proceeding, judgment and decree is tinted (sic) with fatal irregularities and illegalities, thus the trial tribunal's decision and decree is non-executable.*

Pursuant to an order of the Court, made on 19th August, 2021, the appeal was argued by way of written submissions. The appellant was given the usual privilege of setting the ball rolling.

Submitting on grounds one, two and three collectively, the appellant contended that he proved his ownership of the suit land satisfactorily, and consistent with the requirements of section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019. The appellant's contention was based on the testimony adduced by PW1, PW2, PW3 and Exhibit PE1. The appellant argued that the totality of all this was to establish that the suit land belonged to him. He decried the DLHT's decision to hold that the appellant had failed to prove his ownership over the suit land.

On the other side, the appellant contended that the testimony adduced by the respondent and her witnesses was full of contradictions which border on the year in which the said land was acquired, people who witnessed the sale, and whether it is the respondent or her husband who purchased it.

With respect to year, the appellant's argument is that the suit land was acquired in 1996 while DW2 testified that the said land was bought in 1999. He went further to submit that there was also a variance on who witnessed the sale between Hindiya Luheke, as testified by DW2, and Alphonsi Kiporo (village chairman), as testified by DW4. He further contended that, whereas DW1, the respondent, testified that she bought the suit land, DW4 testified that the acquisition was done by the respondent's deceased husband. He argued that no evidence was adduced to prove any of that. The appellant argued that these contradictions and inconsistencies were not minor. They go to the root of the matter, and that in his opinion, the same ought to have been resolved in his favour.

With regards to analysis and evaluation of evidence, the appellant's take is that, had the DLHT properly evaluated the evidence, he would not have relied on the testimony of PW4 to declare the respondent as the lawful owner of the land. He further argued that DW1, DW2, DW3 and DW4 were not credible witnesses and that their testimony ought to have been disregarded. Discarding the testimony of DW4, the appellant's contention is that his disposition of the land to Mashaka was invalid on the ground that she could not give what she did not have (nemo dat quad non habet). This implied that whoever acquired title from Mashaka did not have a good title.

While relying on Exhibit PE1, the sale agreement, the appellant argued that, if the contention that the respondent bought the suit land in 1999 is any thing to go by, then this is a case of double allocation since he, himself, acquired the same land way back in 1994. He argued that, whenever such a case occurs, the first grantee is deemed to have a better title. He backed his contention by citing the case of ***Colonel Kashmir v. Naginder Singh Matharu*** [1988] TLR 162.

The appellant was critical of the DLHT's reasoning that, since the appellant did not visit the suit land and locate the boundaries then the land in dispute did not belong to the appellant. It was his argument that, since the suit was not on the size of the land in dispute, a visit to the suit land was not necessary.

Submitting on the 4th ground, the appellant held the view that there was a change of assessors midway through the hearing of the case. The appellant argued that a new pair of assessors, Mushobozi and Ntaruma, took over the proceedings. He argued that the new assessors came at the time when the old pair of Tasinga and Ntaramuka had sat and heard the testimony of the appellant and his three witnesses. He argued that this conduct was contrary to the provisions of section 23 (2) and (3) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. Terming it an illegality, the appellant argued

that the consequence of all this was to vitiate the proceedings of the tribunal, as was held in the case of ***Erica Chrisostom v. Chrisostom Fabian & Justinian John***, CAT-Civil Appeal No. 137 of 2020 (unreported).

In the end, the appellant prayed that the appeal be allowed with costs. In the alternative, he prayed that an order for trial de novo be made subsequent to nullification of the proceedings on account of the cited illegalities and irregularities.

The respondent enlisted the services of Mr. Celestine Ngailo, learned counsel. Submitting on grounds 1, 2 and 3, the respondent defended the decision of the DLHT to dismiss the application, the ground being that the appellant failed to prove ownership of the disputed land. Relying on section 110 (1) and (2) of Cap. 6, the respondent argued that the appellant failed to discharge the burden of proving the contention that the suit land belongs to him. The respondent argued that the testimony of DW1, as corroborated by DW2, proved that the suit land was bought at TZS. 70,000/-, and her husband was present, and that the said land belonged to a Mr. Mashaka.

Turning to the testimony of PW1, PW2 and PW3, the respondent submitted that the appellant alleged that he acquired the suit land from a Mr. Rugalila Malonjo but the alleged seller did not feature in the testimony adduced by the appellant and his witnesses. In the respondent's view, failure

to line up the said witness means that his testimony would be prejudicial to his interests.

The respondent further contended that the testimony of PW1 and PW2 was disharmonious with one another, especially on the side where the appellant borders the respondent. While the former said it was on the southern part, the latter said it was on the western part. Terming that the said testimony as fabricated, the respondent argued that, on the contrary, that of the respondent's witnesses was impeccable and consistent. She argued that the sale agreement (Exhibit PE1) tendered by the appellant lacked certainty on the actual size of the suit land and the neighbours surrounding the suit land. She contended that it was quite in order for the DLHT to disregard the said agreement and that the DLHT was fortified by the provisions of section 29 of the Law of Contract Act, Cap. 345 R.E. 2019 which provides that an agreement, the meaning of which is not certain, or capable of being made certain, is void.

Regarding the visit to the locus in quo, the respondent argued that such visit is purely in the discretion of the court or tribunal, as was stated in the case of ***Sikuzani Said Magambo & Another v. Mohamed Robie***, CAT-Civil Appeal No. 197 of 2018 (unreported). She argued that, in this case, the DLHT felt the need for such visit but the appellant willfully rejected the

call by the DLHT. In the respondent's thinking, such decision implied that the appellant knew the probable consequence of the visit would be adverse to him.

Responding to the contention that there was a double allocation, the respondent contended that such principle is only applicable to surveyed land where a dedicated authority does the allocation of land. In that respect, the respondent argued that the decision in ***Colonel Kashmir*** (supra), cited by the appellant, is inapplicable in the circumstances of this case.

Submitting on ground four of the appeal, the respondent strongly denied that there was change of assessors midway through the hearing of the matter. She argued that Messrs Ntaramuka and Mushobozi were the only assessors who sat in the matter throughout the hearing. She submitted that at no point in time did Mr. Tasinga replace any of the assessors. She further submitted that both of the assessors gave their opinions in the matter.

The respondent prayed that the appeal be dismissed with costs.

From these contending submissions, the broad question is whether this appeal carries any merit.

I will address this question by first picking ground four of this appeal. The argument by the appellant is that there was change of assessors midway through the proceedings. Such change, in the appellant's view, represented

an infraction to the law which requires that assessors be present throughout the proceedings. I have combed through the proceedings with a view to establishing if such change was effected illegally or irregularly. What is gathered is that when proceedings began, assessors who sat with the Chairman of the DLHT were Messrs Tasinga and Ntaramuka. But the pair only featured during the preliminary stages prior to commencement of the hearing. Hearing of the case began on 20th January, 2021, on which date Mr. Mushobozi and Ntaramuka were paired as assessors who sat on that date and in all other subsequent proceedings, until the conclusion of the proceedings. It is misleading to contend that there was such a change as contended by the appellant. It is my considered view that, while such practice is abhorrent, nothing can put the DLHT in any blemished position in that respect. Consequently, I take the view that this ground is hollow and I dismiss it.

Grounds 1, 2 and 3 have touched on a number of aspects and I will address them separately. The first is with regards to contradictions which are said to be apparent on the face of the evidence testified by the respondent and her witnesses. These alleged contradictions relate to the date of acquisition of the disputed land and those who witnessed the sale. Going through the testimony, it is clear that there was a variance with

respect to the year in which the respondent allegedly acquired the land. Is it 1999 that featured during cross examination or 1996 that she testified on during the examination in chief? The other area of controversy is on those who witnessed the sale, and whether it is the respondent or her deceased husband that bought the suit land.

As I address this issue, let me restate the position of the law with respect to contradictions. The trite position is that discrepancies and inconsistencies in the witness' testimony are contradictions which can only be considered adversely if they are fundamental. If the contradictions are of trifling effect, then the same ought to be ignored. In ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010 (unreported), it was held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."*** [Emphasis added]

The decision in the just cited case followed in the footsteps of another splendid decision of the Court of Appeal of Tanzania in ***Dickson Elia***

Nsamba Shapwata & Another v. Republic, CAT-Criminal Appeal No. 92 of 2007 (unreported), in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It was held as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.* ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.*** *"*[Emphasis supplied]

In ***Mukami w/o Wankyo v. Republic*** [1990] TLR 46, the Court of Appeal took the view that contradictions which do not affect the central story, are considered to be immaterial. See also: ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012.

While I acknowledge that there were contradictions or discrepancies with respect to the year of acquisition of the suit land; those who witnessed the sale, and whether the husband was present or not, nothing conveys any sense that such variances were discrepancies of a form or magnitude that

would affect the central story. They are trifling and inconsequential and, therefore, ignorable. Consequently, I choose to attach no weight to the appellant's contention in this respect.

The appellant has decried the decision of the DLHT to hold that the appellant's 'refusal' to visit a locus in quo was an undoing. The view held by the appellant is that the impugned decision was significantly influenced by this holding, and that this was a flawed position.

It is worth of a note, that a visit to the locus in quo is ordered where issues at stake relate to location of the disputed land, boundaries and/or physical features of the disputed land. This view was underscored in the case of ***Avit Massawe v. Isidory Assenga***, CAT-Civil Appeal No. 6 of 2017 (unreported), in which it was held:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land the extent the boundaries and boundary neighbour, and physical features on the land."*

The foregoing position highlighted the splendid holding which was made in ***Mukasa v. Uganda*** [1964] EA 698 at 700, wherein the Court of Appeal for East Africa held as follows:

> *"A view of a locus in – quo ought to be, I think, to check on the evidence already given and where necessary, and*

possible, to have such evidence ocularly (sic) demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence".

See also: ***Nizar M.H. Ladak v. Gulamali Fazal Janmohamed*** [1980] TLR 29.

Looking at the circumstances of this case, such visit was a matter of necessity as what appears to be a dispute on ownership hinged on the boundaries that separate the land owned by the appellant from that of the respondent. There is also an issue of location and who neighbours who and on which side of the disputed land. These would be resolved had the appellant acceded to the call to have the parties and the DLHT visit the locus in quo and have a shared sense of what the parties are squabbling on. The appellant's reluctance drew an adverse inference and I see nothing irregular in the stance taken by the DLHT in that respect.

There is also an aspect of the appellant's failure to bring on a witness to testify that he sold the suit land to the appellant. By the appellant's own admission, the alleged seller was alive and available, but his decision not to

bring him on was informed by the fact that other witnesses and Exhibit PE1 sufficed in proving ownership.

The law has not put a number of witnesses that may be required in proving one's case. This is in terms of section 143 of Cap. 6. This means that a party is free to settle on any number of witnesses he needs to prove a certain fact, and the choice to call or not to call a witness has a bearing on his case. Where the would-be witness is available and his presence to testify would have a decisive effect but the party in whose favour such testimony would serve chooses not to call him, adverse inference may be drawn. (See: ***Mashaka Mbezi v. Republic***, CAT-Criminal Appeal No. 162 of 2017 (unreported)). In this case, presence of the purported seller would resolve the lingering questions that surround the ownership of the disputed land. I am in agreement with the respondent that circumstances of this case demanded that the said witness be availed for testimony.

The appellant has also introduced an aspect of double allocation of the suit land, contending that since the appellant was the first grantee, then the disputed land should be declared his. His contention is premised on the decision of ***Colonel Kashmir*** (supra). It is true that where double allocation of a piece of land is proved, the right of occupancy granted earlier on

subsists. This was propounded by this Court in ***Hamisi Sinahela v. Hassan Mbwele*** [1974] LRT 28, in which it was held:

> *"A grant of a right of occupancy over a piece of land when a prior right of occupancy over the same piece of land still subsists is irregular, accordingly, the prior grantee of a right of occupancy is entitled to the land."*

The respondent's contention, which sounds plausible to me, is that double allocation and applicability of the principle can only arise where the allocation is purported to be done by one authority. Invariably, this is in respect of registered land. In the circumstances where each of the 'warring' parties allege to have acquired the disputed land from different sellers who do not have any connection to one another, invocation of such principle is nothing short of a misplaced effort. I hold that the contention is barren and I reject it out of hand.

Finally, there is a contention that the DLHT did not properly evaluate the evidence adduced by the appellant. Such failure culminated in the decision of declaring the respondent the lawful owner of the land. My scrupulous review of the evidence adduced by the parties and their respective witnesses does not give me that impression. On the contrary, the respondent's case was nothing short of credible and convincing, and I do not see anything that conveys the feeling that the appellant's case was strong

and overwhelming. I hold that the DLHT's decision was sound and distilled from a thorough analysis of the evidence adduced before it. It is in view thereof, that I take the view that the appellant's contention is hollow and I dismiss.

Overall, I find grounds 1, 2 and 3 of the appeal misconceived and I dismiss them.

In the upshot of all this, I hold that the appeal is barren of fruits and I dismiss it in its entirety. Consequently, I uphold the decision of the DLHT. The respondent is to have her costs.

Order accordingly.

DATED at **MWANZA** this 4th day of November, 2021.

M.K. ISMAIL

JUDGE

Date: 04/11/2021

Coram: Hon. C. M. Tengwa, DR

Appellant:

Respondent: Absent

B/C: J. Mhina

Court:

Judgment delivered today in the absence of both sides.

C. M. Tengwa

DR

At Mwanza

04th November, 2021