IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA DISTRICT REGISTRY)

AT MBEYA

MISCELLANEOUS LAND APPEAL NO. 11 OF 2021

(From Land Appeal No. 38 of 2019, of the District Land and Housing Tribunal for Mbeya. Originating from Application No 21 of 2019 at Igurusi Ward Tribunal)

TUKWAGA SABWIFA.....APPELLANT

VERSUS

UPENDO MWASENGO .....RESPONDENT

JUDGEMENT

Date of Last order: 02.09.2021

Date of Judgement: 22.10.2021

Ebrahim, J.:

The appellant herein had initiated a case at Igurusi Ward Tribunal, Mbarali District claiming that the respondent has encroached into part of her farm. As it could be gathered from the proceedings on record, parties herein were both married in the same family. The appellant's husband was the elder brother to the respondent's brother. The appellant stated at the trial Tribunal that when their husbands died, they left them pieces of neighbouring lands but the respondent encroached into the appellant's farm by ¼ an acre. On her side, the respondent stated that she was married in

1981 and found the appellant already married. She said each family were farming in their own farms. The respondent testified further that the appellant's husband died year 2000 and the respondent's husband passed on year 2010. She said by then, there was no any dispute on the farm until recently when the appellant's son called her to their home claiming for the farm.

After hearing the evidence from both sides, the trial Tribunal reached a decision that the disputed land is the property of the appellant.

Aggrieved, the respondent here in successfully appealed at the District Land and Housing Tribunal for Mbeya at Mbeya. After considering the submission filed by both parties, the appellate Tribunal reversed the decision of the Ward Tribunal on the basis that the respondent has been using the land for more than 30 years and that the appellant failed to show that the respondent was a mere invitee.

Aggrieved, the appellant has come to this court raising four grounds of appeal as follows:

1. That the appellate DLHT erred in law and facts for failure to hold that the respondent was a mere invitee and user of the land under license or owner's consent in referring to the strong

evidence tendered by the appellant and which was not disputed by the respondent.

2. That the DLHT erred in law for holding that the respondent is entitled to the land in dispute while the chairman failed to consider the wise opinion and votes made by members of trial Tribunal pronounced judgement in favour of the Appellant.
3. That the DLHT for Mbeya erred in law and facts for failure to evaluate and analyse the evidence tendered at trial Tribunal hence reversing and departing from the findings of the trial Ward Tribunal which was sound and justifiable.
4. That the appellate chairman erred in law and facts for giving decision in favour of the respondent while assessors not participated to give their opinion as required by the law.

This appeal was argued by way of written submission whereby the appellant appeared in person unrepresented and the respondent preferred the services of advocate Beatrice Kessy.

Submitting in support of the appeal, the appellant adopted her grounds of appeal and mainly focused on the testimonies of her witnesses that the land was being used by Mwasengo and another witness who said he knew the boundaries. She also referred to the question by the Respondent as to whether she has been given the land or leased in arguing that an invitee cannot become an owner even if she used the land for over 30 years. She stated also that the

respondent did not call village leaders to disapprove appellant's claim.

The appellant contended also that the evidence of the appellant was heavier than that of the respondent and she referred to **section 45 of the Land Disputes Court Act, Cap 216 RE 2019** which discourages the reversal of the decision or order of a Ward Tribunal or DLHT on account of any error or omission. Lastly, she cited the High Court of **Martha Mwakinyali and Abel Mwakinyali Vs. Hamis Mitogwa**, Misc Land Appeal No. 13 of 2013, HC – Mbeya in bringing the point that assessors did not participate in giving their opinion as required by law. She prayed for the appeal to be allowed and quash the decision of the DLHT.

Responding to the submissions by the appellant, counsel for respondent in referring to the evidence in record contended that the appellant has not stated how she acquired the disputed land and nowhere has she shown that she invited the respondent to the land. (for the respondent to be an invitee). She referred to the testimony of the respondent that since she joined the family in 1981, she was cultivating the same land with her husband and the same was for the appellant whose husband passed on year 2000.

Counsel for the respondent commented on what she termed as procedural irregularity as the witnesses were called on 12.12.2019 after both the appellant and respondent were already heard on 10.12.2019.

She based her submission on the civil justice cannon enshrined under the provisions of **section 110(1) of the Evidence Act, Cap 6 RE 2019** that a party who wishes to be given legal right following the existence of facts, must prove that those facts exists. She also referred to the case of **Hemed Said Vs Mohamed Mbilu** [1984] TLR 113 on the principle that the person whose weight is heavier must win.

Responding on the issue of assessors, she referred to page 6 of the judgement where the appellate Tribunal quoted in its judgement the opinion of the assessors.

I have carefully followed the rival submissions by the parties. The bone of contention here is whether there is strong evidence that appellant's land was encroached by the respondent.

Before going into evidence in analysing deeper the issue on controversy, I find it befit to first address the issue of assessors challenged by the appellant and irregularity of procedure as claimed by the counsel for the respondent.

Beginning with the issue of assessors, certainly, **Section 23(2) of the Land Dispute Courts Act, Cap 216 RE 2019** provides for the assessors to give out/state their opinion before the Chairman pronounces his/her judgement. More so **Regulation 19 (2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulation, 2003** requires every assessor who has been present at the conclusion of the hearing of the case to give his opinion in writing. The requirement of receiving of assessors' opinion as provided by the law has been extensively expounded by the Court of Appeal in the case of **Edina Adam Kibona Vs Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 (CAT – Mbeya) where it was stated that:

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal,* ***as a matter of law, assessors must fully participate and at the conclusion of evidence****, it terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili.* ***That opinion must be in the record and must be read to the parties before the judgment is composed****. For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment.* ***However, in view of the fact that the***

record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. *And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose"* [emphasis is mine].

Tailoring the above guidance of our Apex Court to the instant case, firstly, both two assessors who sat with the appellate chairman gave out their opinion in writing as conspicuously seen in the court records. Secondly, on 13.05.2020 where both parties were present, the appellate chairman recorded at page 3 of the typed proceedings that assessors' opinion was availed to parties and he further scheduled a date for judgement which was on 25.06.2020. It is therefore my firm stance that opinion of assessors is well in the record and was read to the parties before pronouncement of judgement. Moreover, the appellate chairman quoted the substantive part of their opinion in the judgement. This ground of appeal is therefore without merits.

As for the issue of irregularity in recording evidence, the law i.e. **section 15(1)(2) and (3) of the Ward Tribunal Act, Cap 206 RE 2019** provides for the procedures in conducting the proceedings at the Ward Tribunal. The said provision of the law reads as follows:

"15. (1) ***The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.***

(2) A Tribunal shall, ***subject to the provisions of this Act, regulate its own procedure.***

(3) In the exercise of its functions under this Act a Tribunal shall have power to hear statements of witnesses produced by parties to a complaint, and to examine any relevant document produced by any party". [emphasis is mine]

The above provision of the law, gives leeway to the Ward Tribunal to relax its proceedings to suit its users. In-fact that was the purpose of having Ward Tribunals to the people who literally do not know the technical procedures in stating their cases or seeking their rights. That being the position therefore, the procedural irregularities envisaged by the counsel for the respondent do not bind the Ward Tribunal as they are guided by their own procedure. Unfortunately, counsel for the respondent has not even illustrated to the court which are the said procedures that have been flouted.

Now coming to the substantive issue. It is undisputed that the suit land is un-surveyed. Hence, strong evidence is needed from one party over the other in claiming ownership. In determining this appeal, I shall also be guided by the cardinal principle of the law in

civil cases that *he who alleges must prove and the person bearing a burden of proof also bears evidential burden.*

The complainant testified before the Tribunal that the respondent encroached into her land. Looking at the evidence of the appellant at the trial Tribunal, she said that her farm and the respondent are neighbouring and they have been left those farms by their husbands. When the respondent wanted to know what was her status on the farm regarding as to whether she was an invitee or she leased the same, the appellant simply stated that she saw her as her own child, but now she has changed and she wants it back. Responding to further cross examination question, she said that the respondent has been using the said farm since she got married. When questioned further by the assessors as to whether the issue was before the respondent's husband died, she admitted that her brother in-law (respondent's husband) told her that they had an agreement with his older brother (appellant's husband) and the appellant did not take any action or wanted to know what was the agreement. It follows therefore that the said farm including the disputed premises were in respondent's husband possession for all those years. Furthermore, according to her statement she admitted to have let go of the farm which was used by the respondent's husband even after the passing

of her husband in year 2000 whilst the respondent husband passed on year 2010.

I am abreast to the rule of the law of evidence under **Section 119 of the Evidence Act, Cap 6, RE 2002** that:

> *"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who assert that he is not the owner"*

The essence of this legal point has been commented by **M.C.Sarkar and S.C. Sarkar in Sarkar's Law of Evidence in India,** Pakistan Bangladesh, Burma & Ceylon, at page 2003, 17th Edition, volume 2 that:

> *"This section embodies the well-known principle that possession is prima facie evidence of ownership. Possession of property movable or immovable, affords prima facie presumption of ownership as men generally own property they possess. Possession is a good tittle against anyone who cannot prove a better (tittle)".*

Fitting the above comments by the scholars and the position of our law with the facts of this case, it is obvious that the appellant had a duty to prove that the respondent's husband (now the respondent) who was in possession of the disputed land for all those years was not

an owner of the disputed piece of land, hence the encroachment claims against the respondent.

The respondent told the court that from when she was married year 1981, she has been cultivating the piece of land and the appellant and her husband were cultivating theirs. She is now surprised that the appellant is claiming the encroachment.

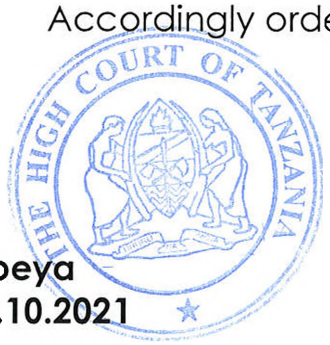
In granting the application to the appellant, the trial Tribunal contended that the respondent said they were availed the land by the village council but did not have any exhibit to prove the same. I must state here that equally the same, even the appellant did not have any exhibit of the allocation of the land. The trial Chairman relied on the evidence of one Daud Samwel Mbwito who claimed that he was the Hamlet Chairman and knows the boundaries. However, when cross examined about the land being given to the husband of the respondent and for how long the respondent has been using the same; he denied knowing anything about the land being given to the respondent or how long she has been using the same while at the same time saying that he would have known if the land has been given to her. Again, the said Hamlet Chairman could

not prove or show which area exactly was the land owned by the respondent's husband to differentiate or tell the boundaries in proving the encroachment. To the contrary, the appellant admitted that all along each family had their own farm and even when asked by the respondent brother, she was told that brothers whom had left them the said farms had sorted the matter. Looking again at the evidence on record, the respondent has not been using any other farm than the one she got from her husband. The same goes with the appellant. Thus, there is no proof anywhere that the appellant at any given time availed piece of land to the respondent or her husband to call her an invitee but rather both of them obtained pieces of land from their husbands who were brothers. The other two witnesses called by the appellant admitted to not know the boundaries between the two brother's farms. This proves that each brother had his own farm. At this juncture, I find that the appellant claim that the respondent has encroached into her land is not proved as she was first supposed to prove that the respondent husband had no right over the land, when was he invited by his brother and if at all, why after all those years when her brother in law told her that they had an agreement with his brother, the appellant did not want to know what was the agreement or take further action.

Counsel for the respondent cited the case of **Hemed Saidi V Mohamed Mbilu** [1984] T.L.R 113 at page 116 in cementing her argument that it is the position of the law that a person whose evidence is heavier than that of the other is the one who must win. I fully subscribe to the said position. Further, I am also of the stance that in measuring the weight of evidence, it is not a number of witnesses that matters but rather the quality of evidence. That being the position, the appellant has failed to prove what was required of her from the facts that she asserted existed. Accordingly, I find that the respondent evidence has much weight than that of the appellant.

At the end result, I dismiss the appeal with costs and upheld the decision and findings of the appellate Tribunal.

Accordingly ordered.



R.A. Ebrahim
Judge

Mbeya
22.10.2021