

**IN THE HIGH COURT OF TANZANIA  
(IRINGA DISTRICT REGISTRY)  
AT IRINGA**

**LAND APPEAL NO. 29 OF 2020**

**(Originating from the decision of Iringa District Land and Housing  
Tribunal Land Application No. 20 of 2019 rendered on 30<sup>th</sup> day of  
September, 2020)**

**CHIKU MAKOLE (as the Administratrix of the Estate of the Late  
MWANNE Y. CHIKUNI..... APPELLANT**

**·VERSUS**

**ADOLPHINA CHENGA                      .....                      RESPONDENT**

*21/10 & 7/12/2021*

**JUDGMENT**

**MATOGOLO, J.**

This is an appeal filed by the appellant one Chiku Makole (as Administratrix of the Estate of the Late Mwanne Y. Chikuni) after being aggrieved by the judgment and decree of Iringa District Land and Housing Tribunal in Application No. 20 of 2019 rendered on 30<sup>th</sup> day of September. The facts of the case are that, the appellant instituted a suit against the respondent claiming the land alleged to have been trespassed by the respondent, that application was dismissed. The appellant was aggrieved

with the decision, he has appealed to this court in which he filed memorandum of appeal with a total of three (3) grounds as follows:-

1. That, the honorable Tribunal erred in law and fact by procuring the judgment which differs from the decree thereof.
2. That, the honorable Tribunal erred in law and fact by not considering the overwhelming evidence adduced by Appellant rather than weak evidence adduced by the respondent.
3. That, the honorable tribunal erred in law and fact by accepting and entertaining hearsay evidence henceforth holding in favor of the respondent.

The Appellant herein prays as follows;

- (i) That this Honourable Court be pleased to allow this appeal.
- (ii) That the decision and decree of the District Land and Housing Tribunal of Iringa be nullified.
- (iii) Costs of this appeal be borne by the respondent.
- (iv) Any other relief (s) that this honourable Court may deem fit and equitable to grant.

At the hearing of this appeal parties were represented by advocates, the appellant was represented by Mr. Emmanuel Kalikenya Chengula learned advocate while the respondent was represented by Ms. Miniva M. Nyakunga learned advocate. The appeal was argued through written submissions.

Mr. Chengula abandoned ground of appeal No.1 thus he remained with grounds No.2 and 3.

With regard to the ground of appeal No.2 that, the honorable Tribunal erred in law and fact by not considering the overwhelming evidence adduced by appellant rather than weak evidence adduced by the respondent. Mr. Chengula submitted that, during the hearing before the trial Tribunal at page 2-3, DW1 in her testimony told the Tribunal that, her husband got the land from Kagaweke Kikoti who was the chairperson, however the same testimony was defeated by the respondent's sole witnesses one Tribullius Msuya who testified that he became a resident of Mafinga and Public servant since 1973. He went further that John Chikuni was given the land since 1975 as he was the one of the members whom were allocating land to the public servant but this witness didn't tender any evidence even the minutes of the village council meeting to support his testimony to that effect. Mr. Chengula was of a considered opinion that, the evidence by respondent was weak which proves nothing but lies hence leads miscarriage of justice.

He submitted further that, the evidence by PW1 was clear and strong to the effect that, she inherited the suit land from her late father since 1979, the same testimony was corroborated by PW2 the ten cell leader who testified that on the same premises the respondent was owned by John Chikuni and Mwanne, whereas on the same premises the respondent was found trespassed as per exhibit P1 dated 19/03/2008 and 12/09/2008 she pleaded and committed herself to effects payments for the cleared

trees as titled " ULIPAJI MITI AND MADAI YA GHARAMA ZA NAULI NA CHAKULA the same acts was done on the same disputed land. She said basing on that circumstance, the evidence by the appellant was strong enough to prove the case before the trial tribunal.

Mr. Chengula submitted further that, the appellant's evidence was heavier than that of the respondent, to support his argument he cited the case of ***Hemed Said versus Mohamed Mbilu [1984] T.L.R.***

Mr. Chengula submitted that, the respondent did not prove his case before the trial tribunal on the balance of probability.

He went on contending that, the trial tribunal went on reasoning that the written statement of defense of 18/11/2019 was signed by thumb by the appellant the facts which makes the basis of that decision that the same differs from the signature on other documents tendered as an exhibits at page 3 of the typed judgment, he said, pleadings are not evidence and cannot be the basis of a decision except where amounts to admission. To support his argument, he cited the case of ***Rashid Nkungu vs. Ally Mohamed*** [1985] TZ HC 36 and the case of ***Joseph Chacha Magabe v Board of Trustees of CCM***, HC Land Appeal No.11 of 2021 at page 6 and 7.

He went on submitting that, it should be noted, that is why the trial tribunal didn't ask itself as to what situation leads other documents to be signed by initial signatures and others by thumb as well as the chairman of the Tribunal had never been an expert of handwriting to the extent of

disqualifying the evidence tendered by appellant as compared to what was signed in written statement of defense. Mr. Chengula prayed for this appeal to be allowed with costs, the decision and decree of the District Land and Housing Tribunal of Iringa be nullified.

With regard to ground of appeal No.3 that the honorable Tribunal erred in law and fact by accepting and entertaining hearsay evidence thus decided in favor of the respondent. Mr. Chengula submitted that, at the trial the respondent testified that the disputed land was allocated to her by the Village Local Government but she never tendered the minutes of the village meeting which consented the suit land to be given to the respondent as alleged in her testimony nor Certificate (Customary Right of Occupancy) to support her argument to that effect, as Government always works on papers and not otherwise. He submitted further that, the respondent before the trial Tribunal shows that she was not aware with the historical background of the suit land in dispute. He said, the respondent at page 5 paragraph 5 of the trial court typed proceedings said that, "*....the respondent was given the land in 1975 by Village Government though he was absent during allocation*", thus her evidence remains hearsay evidence which he said is inadmissible. To bolster his argument he referred this court to the case of ***Gigecha Njuga versus Republic*** [1965] E. A 773.

Mr. Chengula concluded by praying for this appeal to be allowed with costs together with other relief (s) that this Court may deem fit and equitable to grant.

In reply Ms. Nyakunga submitted with regard to the second ground of appeal that, at the trial Tribunal the appellant filed the case that the respondent trespassed to the disputed land, she had the burden to prove her allegation.

She said, the appellant ought to know that the case before the trial Tribunal was civil in nature, the law places burden of proof upon a person, that is "*he who alleges must prove*". She went on contending that, the issue is whether the appellant managed to prove her case on the preponderance of probability.

She argued and referred the case of ***Godfrey Sayi versus Anna Siame as a legal representative of the Mary Mndolwa***, Civil Appeal No. 114 of 2012 (unreported), in which it was held that:-

*"It is similar common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities".*

She submitted further that, failure by the respondent to produce any document to support her testimony does not mean she failed to prove the case. The evidence which was given by PW2 the ten-cell leader, totally negates the evidence of the appellant who was the applicant before the trial Tribunal and supported the testimony of the respondent, that he saw

the respondent using the disputed land for more than twenty years. This is clearly appearing on page 2 of the judgment where PW2 stated:-

*"The respondent is in use of the land for more than twenty years".*

Ms. Nyakunga submitted further that, the law provides clearly under section 110 through 113 of the Law of Evidence Act, Cap 6 R.E 2019 on who have burden to prove the allegation.

She contended that, the one who alleges must prove no matter how the weak evidence that will be provided by the respondent. It was the appellant who had the burden to prove the allegation but she failed to do so. The standard of proof which is required to convince the trial Tribunal is on the balance of probabilities. To support her position, he referred the case of ***The Registered Trustees of Joy in the Harvest versus Hamza K. Kasungura***, Civil Appeal No.149 of 2017 (unreported) at page 18-19, the Court of Appeal adopted the position which was stated in the case of ***Paulina Samson Ndawavya Versus Theresia Thomas Madaha***, Civil Appeal No.45 of 2017 (unreported) where the court held that:-

*" It is again trite that the burden of proof never shift to the adverse party until the party on whom the onus lies discharges his, and that the burden of*

*proof is not diluted on account of the weakness of the opposite party's case".*

She also referred the case of ***Lukondo Luseke versus Shukrani Lusato***, Civil Appeal No. 19 of 2019 H/C at Mwanza (unreported) and the case of ***Agatha Mshote versus Edson Emmanuel and Others***, Civil Appeal No. 121 of 2019 CAT at Dar es Salaam (unreported) where the court clearly stated that:-

*"in our view, since the burden of proof was on the appellant rather than the respondent unless and until the former had discharged hers, the credibility of the respondent was irrelevant. It is thus our firm view the appellant's criticism against the learned trial judge is, with respect, without any justification and so, ground one is held to be devoid of merit".*

She submitted further that, the appellant failed to prove on the ownership of the disputed land in relation to the evidence which was tendered before the trial Tribunal. Also, the other issue is on the relevancy and admissibility of the documents which were tendered by the appellant to the trial Tribunal. She submitted that, the appellant tendered two exhibits which were BARUA YA ULIPAJI WA MITI PAMOJA NA GHARAMA ZA CHAKULA NA NAULI this was marked as Exhibit P1, even though this



exhibit was admitted but was not relevant to the matter in controversy. The document was found not supportive as it was having two different signatures of the respondent and the respondent has stated before the trial Tribunal that she had never sued about tree cutting.

She went on submitting that, another document which was tendered before the trial Tribunal was letters of administration of the estate of the late John Chikuni, the document was admitted as Exhibit P2 but was irrelevant because it explains generally that the appellant is administratrix of the deceased estates, does not explain about the ownership of the disputed land.

She contended that, the documents which were tendered before the trial Tribunal were irrelevant when it comes to the issue of proving ownership. Hence the appellant had failed to prove her case on the balance of probabilities before the trial Tribunal and the Tribunal rightly decided against her.

Submitting on the allegation by the counsel for the appellant that, the respondent failed to prove the case on balance of probabilities, she said it has to be noted that the burden of proof never shift to the adverse party whom the onus lies discharge that burden as earlier stated, the weakness of the respondent's case cannot salvage the up light of the unproven appellant's case. To that, she cited the case of ***Agatha Mshote versus Edson Emmanuel and Others*** (supra).

With regard to ground of appeal No. 3 Ms. Nyakunga submitted that, the allegation by the learned counsel for the appellant that, the evidence

relied upon by the trial Tribunal was hearsay evidence as the respondent neither tendered minutes of the village meeting nor certificate (Customary Right of Occupancy) to mean no documentary evidence was tendered. She said the respondent testified before the trial Tribunal that they got the disputed land from the village government and they used the land freely since 1975, the evidence which was supported by PW2 who said the respondent was in use of the disputed land for more than twenty years. She went on contending that, DW2 on his side testified that the respondent herein was given the land in 1975 by village Government however during allocation he was absent.

She went on submitting that, the onus of proof was on the appellant than the respondent no matter how weak the evidence of the respondent was. The appellant was required to discharge his duty of proving his case, but he failed to do so. To support her argument, she referred the case of ***The Registered Trustees of Joy in the Harvest versus Hamza K. Kasungura*** (supra) and the case of ***Paulina Samson Ndawavya Versus Theresia Thomas Madaha*** (supra). She contended that, the decision which was made by the Tribunal was based on the credibility and reliability of the evidence which was adduced during the trial.

Ms. Nyakunga concluded by praying to this court to dismiss this appeal with costs.

In rejoinder Mr. Chengula basically he reiterated his submission in chief but he added that, the respondent intent to mislead this court of record, the contention that, burden of proof never shift is irrelevant in this

case, he invited this court to look into the records at page 2 last paragraph of the typed judgment, where the defence witness DW1, adduced evidence thus, there were shift of the burden of proof. He said as the respondent and DW2 defence witness alleged to have bought the disputed land from the local authority, they were duty bound to prove by bringing village officer, minutes of the village meetings or witness from village authority to justify his testimonies.

With regard to the case of ***The Registered Trustees of Joy in the Harvest versus Hamza K. Kasungura*** (supra) cited by the respondent, he said it fully supports the position and contention of the appellant. He said in that case at page 18 para 2, 20, 4 and 5 and page 21 of the typed judgment the Court of Appeal upheld the appeal by declaring the appellant to be the lawful owner of the property and the respondent was ordered to pay costs.

He submitted further that, the trial Tribunal ignored the wise assessors' opinion without any justification, the assessors opined in favor of the appellant because of the strong evidence by the appellant. Mr. Chengula concluded by insisting this court to allow this appeal with costs and the decision and decree of the District Land and Housing Tribunal of Iringa be nullified.

Having read the respective submissions by the parties, and examining the grounds of appeal as well as the trial Tribunal records, the issue to be determined here is whether this appeal has merit. As the

appellant abandoned ground of appeal No.1 and argued only grounds No.2 and 3, I will also base my discussion on those grounds of appeal.

In the second ground of appeal, the appellant complained that, the Tribunal erred in law and fact by not considering the overwhelming evidence adduced by appellant instead relied on the weak evidence adduced by the respondent.

There is the argument by Mr. Chengula that, DW1 told the Tribunal that, her husband got the land from Kagawele Kikoti who was the chairperson however the same testimony was defeated by the respondent's sole witnesses one Tribullius Msuya who testified that he become a resident of Mafinga and Public servant since 1973, and that John Chikuni was given the land since 1975 since he was one of the members who were allocating land to public servants but this witness didn't tender any evidence even a minute of the village council meeting to support her testimony to that effect.

He was of the considered view that, the evidence by the appellant was strong enough to prove the case before the trial tribunal.

Ms. Nyakunga on her side with regard to the ground of appeal No. 02 argued that the respondent has sufficient evidence to prove her ownership over the suit land as she has been in continuous occupation of it for more than twenty years as stated by PW2 in her evidence.

*"The respondent is in use of the land  
for more than twenty years"*

Upon carefully reading the District Land and Housing Tribunal, there is clear and ample evidence from the respondent that she has been in continuous occupation of the land for 20 years. The evidence of DW1 and DW2 establish that. This evidence was also corroborated by the evidence of PW2 during cross-examination as can be seen at pages 12 and 13 of the trial Tribunal proceedings. The respondent could not be left in occupation of the suit land for 20 years continuously without any interference. Despite failure by the respondent to tender before the Tribunal documents such as the village council meeting minutes while allocating her the land that by itself does not weaken her evidence. Mr. Chengula cannot be heard arguing that the trial Tribunal on weak evidence of the respondent instead of strong evidence of the appellant. The appellant's evidence is weak as the same tends to support the respondents evidence. The trial Tribunal was justified to decide for the respondent basing on the evidence adduced and received by the Tribunal. I do not see any merit in the 2<sup>nd</sup> ground of appeal.

With regard to the third ground of appeal Mr. Chengula submitted that, at the trial tribunal the respondent testified that the disputed land allocated to her by the Village Local Government but she never tendered neither the minutes of the village meeting which consented the suit land to be given to the respondent as alleged in her testimony nor Certificate ( Customary Right of Occupancy) to support her argument to that effect, as Government always works on papers and not otherwise. To him he views the evidence of the respondent as hearsay and not supported by

documentary evidence. I think Mr Chengula is not more right, Ms. Nyakunga submitted that, the respondent told the trial Tribunal that, they got the disputed land from the village government and used the land freely from 1975, the evidence which was supported by PW2. The act of the respondent occupying the land continuously for 20 years without any interference is an assurance that the said land belongs to her. So it is not true that the Tribunal relied on hearsay evidence, but relied on the truthful evidence of DW1 and PW2. The land was allocated to her by John Chikuni since 1975 and she has been in occupation of such land for 20years undisturbed. The appellant cannot rise now claiming the said land, her right to claim it was limited to 12 years.. Basing on the testimony by PW2 let us assume that, the respondent was given or not given the said land by John Chikuni and he uses it for more than 20 years which is over and above the limitation period for recovering the land, it is obvious that she acquired the title or ownership of that land by adverse possession.

Mr. Chengula also complained that, the chairman departed from the wise opinion of assessors who opined for the appellant but assigned no reason for not considering those opinions. It is a requirement of the law that if a judge does not agree with assessor's opinion he/she should record his reasons. See the case of ***Nyehese Cheru versus R [1988] TLR 140*** the court held that:-

*"where the trial judge does not agree with the opinion of an assessor, or assessors he/she should record his*

*reasons, or else the omission might lead to the vitiation of the conviction”.*

But in the instant case the chairman adhered to the above requirement, the trial chairman after depart from assessor’s opinion he recorded his reasons as can be seen at page 3 of the DLHT typed judgment.

Having discussed as herein above it is my considered opinion that, this appeal has no merit the same is dismissed with costs.

It is so ordered.

**DATED** at **IRINGA** this 7<sup>th</sup> day of December, 2021.



  
**F.N. MATOGOLO**  
**JUDGE.**

**07/12/2021**

Date: 07/12/2021

Coram: Hon. F. N. Matogolo – Judge

Appellant: }  
Respondent: } Present  
C/C: Grace

**Mr. Raymond Byombalirwa - Advocate:**

My Lord I am appearing for the Appellant, I am also holding briefs for Mr. Nyakunga advocate for the Respondent. The matter is for judgment we are ready.

**COURT:**

Judgment delivered



*F. N. Matogolo*  
**F. N. MATOGOLO**

**JUDGE**

**07/12/2021**