THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

LAND APPEAL NO. 133 OF 2019

(Arising from land Appeal No. 44 of 2018 of Kilombero/Ulanga District Land Tribunal at Ifakara)

IBRAHIM SHAIBU KIPANDE (administrator of estate of Shaibu Adam Kipande) .....APPELLANT

VERSUS

DANIEL LIPAMBILA .....RESPONDENT

JUDGMENT

Last Court Order on: 15/12/2021

Judgment date on: 16/12/2021

NGWEMBE, J:

The appellant being an administrator of the estate of his father Shaibu Adam Kipande preferred this appeal against the judgement and decree of the District Land and Housing Tribunal delivered on 28/5/2019.

The source of dispute is a piece of land, which the appellant from the beginning did not know its size, but claimed to be owned by his late father. Being an administrator, had a duty to claim back that land from the respondent. However, according to the evidences adduced at the District Land Tribunal, the deceased wife, who is her mother and elder brothers

are still alive, but he did not prefer to call them as witnesses. Due to the evidences adduced during trial, the chairman and wise assessors, unanimously declared that the suit land belong to the respondent whose land was allocated to him by the village council in year 2007, while the original owner died on 2014. It is evident that since 2007 to 2014 the respondent and the deceased Shaibu Adam Kipande existed without any conflict in respect to that piece of land. After demise of the original owner and after obtaining letters of administration, the dispute arose, to date is yet to be settled.

Much as the respondent was declared a lawful owner of the suit land, yet the appellant was aggrieved, and exercised his statutory rights to appeal to this court having three grounds:-

1. The trial tribunal erred in law and in fact for its failure to appreciate the fact that the allocation to the Respondent was illegal and was done contrary to the demand of law;
2. The trial tribunal erroneously held in favour of the respondent, while knowing that the disputed premise belongs to appellant as the natural owner whose ownership has not been terminated whatsoever;
3. The trial tribunal erred in law and in fact to decide the dispute in favour of the respondent whose evidence suggest that the disputed premise was someone's property prior to his allocation.

Finally, asked four reliefs from this court including the prayer to allow the appeal and the appellant be declared the lawful owner and the respondent to pay costs.

On the hearing date of this appeal, parties prayed to dispose of the appeal by way of written submissions. Both have complied with the court schedule of filing their written arguments.

Arguing on the first ground the appellant questioned the lawfulness of the Village Council in allocating the suit land to the Respondent. Made reference to section 8 (5) of the Village Land Act which prohibit allocation of any land prior to the consent of the village assembly. Argued quite strongly that the respondent was not allocated the suit land by the village council. To support his argument, he referred this court to the case of **Udaghwenga Bayay and 16 others Vs. Halmashauri ya Kijiji cha Vilima Vitatu and another, civil Appeal No. 77 of 2012.** Also referred this court to section 110 (1) and 112 of the Evidence Act.

Submitting on the second and third grounds jointly, he argued that his father was in possession of the suit land since 1970 and he acquired same through clearing virgin land. Therefore, any allocation of it to the respondent was illegal. To justify his argument, he referred this court to the case of **Village Chairman NK.C.U. Matea Vs. Anthony Hyera [1988] T.L.R. 188.**

Upon citing this precedent, the appellant rightly argued that since the appellant's father was the original owner of the suit land, then the village

Government was not allowed to allocate that land to the respondent without consultation to the owner. Thus, rested by attacking the tribunal for an apparent error to declare the respondent as owner of the suit land.

In response the respondent argued on the first ground that the appellant failed to identify the alleged suit land, which was owned by his father. During trial the appellant was ignorant of what he was claiming for, because he did not even know the size and location of the suit land. Thus, failed to discharge his burden of proof. Added that the respondent was allocated four acres of land by Mahutanga Village Council.

Responding to the second and third grounds, basically he dismissed them as baseless with no merits. Since the respondent acquired the suit land in year 2006 while the deceased was still alive until his demise in year 2016 he continued using it peacefully in the presence of the alleged original owner. Invited this court to revisit the whole trial evidences with a view to satisfy, if at all, there was an error committed by the trial tribunal. Rested by referring this court to the case of **Deamay Daati & 2others Vs. R, [2005] T.L.R. 132**. Thus, insisted that the appeal be dismissed with costs.

In this appeal both parties made though research and rightly submitted with relevant authorities. However, before, I consider the evidences adduced during trial, I think it is pertinent at this juncture to highlight some of the principles of land law, which will guide this court in the course of considering this appeal. The said principles include; **first,** he who

alleges must prove the allegation and the person whose evidence is heavier than the other, is likely to win the case; **Send** the burden of proof in civil cases is on preponderance of probabilities; **Third** the one with burden of proof on his shoulder also has a burden of evidential proof.

In light of this appeal, undoubtedly, the appellant had unshakable burden of proof on balance of probabilities that he knew the land he was claiming for, and he was certain that the respondent illegally trespassed over the suit land. In our jurisdiction this principle is codified under section 110 (1) (2) and section 111 of The Evidence Act [Cap 6 R.E 2019], for easy reference the two sections are quoted hereunder:-

> *Section 110(1) "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that facts exist"*
>
> *(2) "When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person"*
>
> Section 111 *"the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side"*

It is a legal requirement that, one who alleges his right has been infringed by another party, bears evidential burden to satisfy the court that indeed his right which is recognized by law has been taken unlawfully by another person. This position was repeated in the case of **Lamshore Limited** & **Another Vs. Bazanje K.U.D K, [1999] T.L.R 330**, the court held:-

"The duty to prove the alleged facts is on the party alleging its existence"

The above position of law was also observed by judges of East African Court of appeal in the case of **The East African Road Services Ltd Vs J. S Daris & CO. Ltd [1965] EA 676 at page 677** where it was held:-

"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant"

Similar position was reiterated by the Court of Appeal in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] T.L.R 419,** held:-

"It is an elementary principle that he who alleges is the one responsible to prove his allegations"

In this appeal, the appellant had uncompromised duty to build a prima facie case against the respondent with a view to convince the tribunal to believe that the respondent had no right over the disputed land. It is a settled law that always court determine disputes based on the evidence adduced during trial; and the applicable laws. Mere allegations of trespass without evidential proof shall not satisfy neither court nor tribunal to decide on his favour.

In respect to this appeal, the evidence on record indicates quit clearly that the suit land was allocated to the respondent by the Village Land Committee in year 2006. This piece of evidence was testified by the

respondent supported by two members of that committee who were DW2 Edward Damian Lupati and DW3 Scolastica Pius. In the contrary, the appellant testified that the suit land was owned by his late father since 1970 and in cross examination, he rightly confessed that "I don't know the size of the suit land". None of the appellants' witnesses testified clearly to have known the suit land and knew when the deceased acquired it. Most of them alleged to have been told by another person which amounts into a hearsay evidence. It is a well-developed principle of law that, hearsay evidence is not admissible in law. Section 62 (1) (a) of The Evidence Act, prohibit admissibility of hearsay evidence as follows:-

> *"Oral evidence must, in all cases whatever, be direct, that is to say- if it refers to a set which could be seen, it must be evidence of a witness who says he saw it"*

It is a fundamental principle of law that hearsay evidence is not admissible in court. The same position was well discussed by **SARKER'S LAW OF EVIDENCE 17th Edition 2010 Volume 1 at page 138.** Likewise, in the case of **Hibrahimu Gabriel Vs. Chilohi Augustine, Civil Appeal No.14 of 2018** (unreported) the Court held:-

> *"In this regard a person who was alleged to have been allocated a piece of land and who saw the fact was Ibrahim Gabriel (the appellant) and not Leodgar Ibrahim that it was just a hearsay evidence which cannot be admissible"*

In the whole proceedings during trial, there is no way this court can say that the appellant proved ownership of the suit land by his late father. In the case of **Khalfan Abdallah Hemed Vs. Juma Mahende Wang'anyi, Civil Case No 25 of 2017** (unreported) when adopting the principle laid down in the case of **Hemed Said Vs. Mohamed Mbilu [1984] T.L.R 113,** the court held:-

> *"The person whose evidence is heavier than that of the other is the one who must win"*

Similar to this appeal, the testimony adduced by the respondent was heavier and reliable than that of the appellant. The evidences on record do not support the appellant, rather creates more doubt than proving the allegations of ownership on balance of probabilities. Undoubtedly the appellant abdicated his duty to prove the allegations of ownership of the suit land by his late father on balance of probabilities.

In answering the first ground of appeal, whereby the appellant strongly attacked the village council for wrongful allocation of the suit land to the respondent. He supported this argument with valid precedents, but this ground is defeated with a fact that the appellant either by ignorance or by design failed to join the Village Government as a necessary party. The cited precedents were decided against the Village Government after being made parties to the suit. In any event failure to join the Village Government, this court cannot decide against a none party to the suit. Therefore, this ground must fail.

Likewise, the second and third grounds are hovering around failure of the appellant to join the Village Government. Even the referred judgement in **Village Chairman K.C.U Mateka** (Supra), yet cannot apply in this appeal for the same reason.

I would therefore, safely conclude that based on available documents and evidences on record, the respondent is a true owner of the suit land.

Unfortunate may be to the appellant, the law knows no sympathy, whoever has right, the law will protect him, but whoever does not have a colour of right, the law will not be on his side.

In view of the aforesaid, I find that the evidence of the respondent was heavier than of the appellant. So I have no justifiable reason to depart from the decision of the District Tribunal.

I therefore, proceed to uphold the findings, decision and orders meted by the District Land and Housing Tribunal. Consequently, I dismiss this appeal with costs.

I accordingly order.

Dated at Dar es Salaam in chambers this 16th day of December, 2021.

P. J. NGWEMBE

JUDGE

16/12/2021

Court: Ruling delivered at Dar es Salaam in Chambers on this 16th day of December, 2021 in the presence of both parties in persons.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

16/12/2021