IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 08 OF 2021

(From the Decision of the District Land and Housing Tribunal of Karatu at Karatu Land Application No. 06 of 2016)

KULI TACTO AWU..... APPELLANT

VERSUS

JACOB SHANGWE YATOSH..... RESPONDENT

JUDGMENT

16th May & 14th June, 2022

TIGANGA, J.

This appeal originates from the decision of The District Land and Housing Tribunal of Karatu, at Karatu herein to be referred to as DLHT before which the respondent sued the appellant for the invading his land measuring 3.75 acres of land situated at Kitongoji cha Umbwang' Laja Village within Karatu District, Arusha Region with its boundaries described in the application filed before the DLHT herein after referred to as the suit land. In the application, the respondent applied for the following reliefs against the appellant.

(i) The declaration that the applicant/now respondent is the owner of the suit land

(ii) The respondent be declared the trespasser

(iii) Cost of the application be provided

(iv) Any other relief that the Honourable tribunal could consider just and appropriate to grant.

Before the DLHT the respondent was declared the lawful owner of the suit land. That decision aggrieved the appellant who decided to challenge it by filing this appeal. The appeal steams into the following grounds to wit;

1. That, the District Land and Housing Tribunal erred in law and fact for failure to consider good and credible evidence adduced by the appellant and his witnesses rather it relied on the weak and unreliable evidence of the respondent and his witnesses.
2. That, the District Land and Housing Tribunal erred in law and fact to make its decision in favour of the respondent while the appellant proved his case on the balance of probability that the disputed land is his lawful property since allocation of 1979 and he owned, occupied and used the same without any disturbance.

3. That, the District Land and Housing Tribunal arrived at the erroneous decision as it made wrong reasoning and it failed to properly scrutinize the evidence adduced during trial as the result it made wrong decision.

4. That, the District Land and Housing Tribunal erred in law and fact to arrive into finding that, the respondent has been in occupation and use of the disputed land for long time (from 1967 to 2015) while there was adduced no sufficient evidence on that regard.

5. That, the trial Tribunal wrongly relied on the testimony/ evidence of AW5 and AW6 on the ground of being neighbours contrary to the pleadings and their testimonies are unreliable.

6. That, the trial Tribunal erred in law and fact to ignore and reject with no stated good reasons, the evidence given by the respondent's witnesses who were leaders of the locality and participated in allocating the disputed land to the appellant's father.

7. That, the trial tribunal erred in law and fact to rely on the testimony/ evidence of AW2, AW3 and AW4 on the ground of being respondent's lessee in the disputed land while there was no

sufficient evidence on the lease agreement between them and the respondent and;

8. That, the trial tribunal totally erred in law and fact to ignore the strong evidence which also observed during visiting locus that appellant and respondent are separated by "Korongo" and traditional trees.

The facts and brief background of this contention gleaned from the record will help to understand the root cause of this dispute, it stands as follows. In 2015 misunderstanding over the peace of land measuring $3^{3/4}$ Acres located in the village of Laja, Umbwang sub-village in Karatu District erupted. The respondent complained of the said land allegedly to be his, being trespassed into by the appellant. The land itself is said to have been delimited by ravine in the West, Gadiye Seria in the East, Joseph Lulu in the North and Tacto Awu in the south. Owing to failure of amicable resolution over the contention between parties, the respondent resorted to judicial means by filing the dispute with the DLHT. The matter was heard on merit where the findings of the DLHT were in favour of the respondent herein. It was because the appellant was aggrieved by the said decision he filed the above ground of appeal listed above.

With leave of this court, hearing was conducted by way of written submission, the appellant had the service of Mr. Samwel S. Welwel, learned Counsel for drawing only, while the respondent was legally served by Mr. Qamara Aloyce Peter also learned Advocate. Mr. Welwel joined and argued together the first and second grounds together and so he did to the third and fourth grounds of appeal . The remaining grounds were argued separately.

In those first two grounds Mr. Welwel was of the view that, the trial DLHT did not properly evaluate the evidence and testimonies adduced by the appellant's side. He further submitted that, had the DLHT clearly evaluated the said evidence, it would have reached to a different findings and declared the appellant the lawful owner of the suit land.

His arguments strongly relied on the evidence that, the land was re-allocated to the father of the appellant since 1979. Also, that those who were members of the re-allocating committee testified in the DLHT to such effect. Mr. Welwel went on saying that, the evidence of the appellant and DW2 (Ten Cell Leader during the exercise) were backed-up by the evidence of DW3 (The then Secretary of the Committee).

By way of comparison he submitted that, the evidence of the respondent was very weak to prove the case on the standard required. This, according to him, is due to the fact that, he did not bring witnesses who witnessed him being allocated the suit property in 1967 as he alleges. Also, that those who were brought as witnesses are too young to understand the occasion of land allocation which is alleged to have happened way back in 1967.

On grounds three and four Mr. Welwel contended that, the trial DLHT failed to properly analyse the evidence and therefore reached to erroneous decision. He said, the ravine as permanent delimitation was there since 1979 and that is what made the respondent and appellant's father to live in peace and harmony for the whole time as witnessed. Therefore, ruling that the respondent lived in the disputed land since 1967 was a misconception of facts.

Arguing ground five, Mr. Welwel submitted that, neither the application form which the respondent relied upon when filing an application before the DLHT nor the testimony of AW5 and AW6 which stated that they are neighbours to the disputed land were in his view he considered. The testimonies of the witnesses called by the respondent

became and remained insufficient to prove the case therefore it was not proper for the respondent to be declared as the lawful owner.

Regarding the sixth ground of appeal, he complained that the trial chairperson erred for not giving reasons as to why he rejected or ignored the evidence without giving reasons highlighted the example of the evidence of DW2 and DW3

Regarding the seventh ground of appeal, Mr. Welwel submitted that, there was no proof on the existence of lease relationship between the respondent and his alleged lessees AW2, AW3 and AW4 of which the DLHT chairperson based his decision to decide in favour of the respondent. He said, no any documentary evidence was tendered to justify the relationship. To buttress the argument, he cited section 64 of the Land Act, Cap, [113 R.E 2019]. To him, this provision of the law provides that, any land disposition including lease must be in writing. Thus, on this ground Mr. Welwel rested the argument by arguing that the DLHT if at all, would have properly directed its mind, would have found that leasing for up to 10 years without documentary evidence is tantamount to illegality.

Lastly, on the eighth ground of appeal, Mr. Welwel faulted the decision of the DLHT on its final observation during visitation of locus in

quo. That, after the courts' findings that there was a ravine as one of the boundaries on the suit land, it was wrong to conclude in its judgment that, there were no permanent marks separating lands for the parties. In his view, it was very upset hearing the DLHT going even contrary to the evidence of the appellant which certified the same to its existence.

Counter arguing the appeal and supporting the decision of the DLHT, Mr. Qamara submitted that, the evidence of the appellant was weak and contradictory to prove ownership, in support of his argument he referred to two area of contradiction that is the boundaries and the size of the suit land. Mr. Qamara went on arguing citing the alleged contradictions, he submitted that the appellant at one point said in his evidence that, the size of the disputed land is six acres, while at another points he said it is $3^{3/4}$ acres, that according to him can be found at page 32 of the impugned proceedings.

Not only on that aspect of contradiction, but also cited the evidence of DW1, DW2 and DW3 which evidence he considers to be supporting the case of the respondent. Mr. Qamara further said that, the evidence given by DW3 who was the secretary of the land allocating committee that there are other people who acquired land prior to their

committee who were not affected by the subsequent re allocation is a sufficient proof that the respondent's land was also not affected by the subsequent re-allocation.

On the ground of the witnesses who were leasing the landed property the subject of this contention, (AW1, AW2 and AW3), Mr. Qamara said that, they managed to establish by their evidence that, the appellant trespassed to the suit land which they were leasing from the respondent for quite a number of years without being interfered with by the appellant or any other person.

Replying to the third and fourth grounds Mr. Qamara argued that, it is the testimony of AW6 that the ravine thereof was a recent feature which was also not in the area of the respondent only, the evidence was that the suit land which belonged to the respondent is demarcated by the terrace (tuta) with the land of Tartoo Hawu. He said, during the visitation of the locus in quo, it was clearly stated that, prior to that, there was no a ravine, it developed later.

On ground five, Mr. Qamara submitted that, in the application form, there is no the requirement of mentioning the names of neighbours as prerequisite condition and neighbours are not precluded from giving evidence.

Mr. Qamara while arguing ground six said that, DW2 and DW3 did not tender any material evidence like minutes of re-allocation which is flop from proving ownership. On the ground of lease agreement, Mr. Qamara argued that, the purported lease was not in itself a disposition as contended by the appellant. Lastly, arguing ground eight the learned advocate reiterated the submission on grounds four and six.

In his rejoinder, Mr. Welwel at the prefix maintained his submission in chief, he did not add anything save for few explanations of some issues which at the expenses of brevity, I will not reiterate.

Therefore, hot arguments by Advocate after such tag of war between Advocates for parties, the determinable issue in this appeal is whether this appeal is meritorious.

At the outset, I would like to state that this court has been subjected to plane submission authorities as the learned counsels barely argued their positions without much support or the case authorities. However, reading between lines the grounds of appeal, it is crystal clear that they are all about evaluation of evidence as well as burden and standard of proof. I have passed through the judgment of the trial DLHT, it truly lacks evaluation and analysis of evidence.

This being the first appellate court, it is enjoined to re-evaluate the evidence of the trial DLHT in order to sufficiently reach to a justifiable decision. The position of re-evaluation of evidence by the first appellate court was observed in legion of cases some of them being; **Christina d/o Damiano versus The Republic,** Criminal Appeal No. 178 of 2012, **Emmanuel Aloyce Daffa versus The Republic,** Criminal Appeal No. 131 of 2021, **Salhina Mfaume And 7 Others versus Tanzania Breweries Co. Ltd**, Civil Appeal No. 111 of 2017 and **Future Century Limited versus TANESCO,** Civil Appeal No.5 of 2009 (All unreported) where in the latter case, the Court of Appeal of Tanzania observed that;

> *"This is a first appeal. The principle of law established by the Court is that the appellant is entitled to have the evidence re-evaluated by the first appellant court and give its own findings."*

Guided by the above authorities, I find it proper and just to re-evaluate the evidence of presented before the DLHT as hereunder;

Passing through the evidence, it is very apparent that the evidence of AW1, AW2 and AW3 justify that they were given portions of land to cultivate in the suit land. The one who gave them those portions is the respondent. For instance, AW2 (Theresia HHando) at page 17 of the impugned proceedings testified as follows;

"I have known the Respondent in the Villager (sic) and (sic) Resident of Buger. I have leased for 15 years, I have never seen into (sic) the area, I have used it from 2000 up to 2015 without any dispute (sic), I am surprising (sic) for the Respondent to enter on it and cultivated (sic) by force."

AW3 Maria Boniface Lulu at page 20 of the said typed proceedings evidenced that;

"I have leased from 2008 without dispute (sic) I have used it until invaded by the Respondent is (sic) 2015. I have leased it (sic) 1 3/4, Fausta Same- one acres (sic) and Theresia Hhando one acres (sic) of land. I know the Respondent, he is (sic) villager and living into the same kitongoji, the Respondent's father has (sic) shared the boundaries with the Applicant [North side]. I pray for the Tribunal to declare the Applicant's as the lawful owner of the suit land."

AW4 Fausta Sanka at page 21 of the impugned proceedings also said;

"I am called Fausta Sanka, I was born at (sic) the village since long time ago (sic). On 4/01/2015, the Respondent has invaded into the shamba of the Applicant, I know that shamba I have used to lease one acre of land. The all shamba was invaded which has 3 3/4 of acres of land".

The appellant when he was defending the application before the DLHT and his witnesses are at agreement that the land was re-allocated to the appellant's father in 1979. DW3 who in principle agrees with the

appellant that the land was re-allocated in 1979 and who was also the secretary of the re-allocating committee among other things says at pages 40 and 41 of the impugned proceedings that;

> *"The area of Jacob (The Respondent) was on west side of Korongo, sub-village of Laja. The Applicant was re-allocated by the other committee prior of (sic) our committee. We have (sic) re-allocated in 1979. (sic) during the "Madaraka Vijijini." Those who have (sic) occupied their land were not affected by re-allocation of land. That the Korongo separated them is a very (sic) big- it has of (sic) six (6) to ten footsteps."*

The respondent and his witnesses said that; the respondent was allocated the suit land in 1967 almost 7 years before the respondent's father was re-allocated the land. According to the evidence as above stated by the then secretary of the allocating committee (DW3), the second allocation committee which was under his secretaryship did not affect the first allocated land. This simply means that, the land by the appellant which was allocated in 1967 was not affected by the second allocation in 1979.

Principally the law is very certain that, the one who wants the court to believe his facts must prove the same. This principle is not new

in our legal system. Section 110 of the Law of Evidence Act, [Cap. 6 R.E 2019] at provides as follows;

> *"110. -(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

The Court of Appeal of Tanzania fortifying on the above principle of the law observed in the case of **Geita Gold Mining Ltd and Managing Diretor GGM versus Ignas Athanas,** Civil Appeal No. 227 of 2017 that;

> *"In the joint Written Statement of Defence of the appellants at page 26 of the record of appeal, a list of names of people who were allegedly compensated (Annexture GGM3) in the suit land have been shown but the name of the respondent is not reflected anywhere in the said list. This suggests that the respondent was not compensated, so in such a situation the burden of proof lies on the appellants to prove that the respondent was among those persons compensated.*

Owing to that, the appellant before before the DLHT that there was re-allocation of land and that his father was re-allocated the disputed land. Having alleged that, the duty to prove the allegation lies on him. It cannot be shifted to the respondent who still maintains that, there was no re-allocation of his land which was allocated to him in 1967. In my settled view, this part of evidence and requirement of law cited herein above is in conformity with the evidence of AW2, AW3, AW4 which state that, they have been using the suit land portioned to them for subsistence use of about years say, AW2 (Theresia Hhando) 15 years.

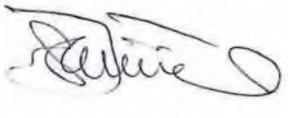
That being the proved facts, it was expected for the appellant who resides in the locality where the suit land is located it is very surprising seeing such person remaining calm while his land was being trespassed into by intruders. It can therefore be inferred that, he so remained because he knew the facts that, the suit land does not belong to him. Borrowing leaf from criminal law experience on the principle of timely reporting or mentioning the suspect at the earliest opportunity possible as an assurance of reliability, it is also expected that a person who owns the land will timely take action if he sees his land being invaded, failure to do so casts doubts on the reliability of the evidence brought later.

Mr. Welwel has also raised the issue of written agreement in land disposition. To buttress his point his cited section 64 of the Land Act, [Cap. 113 R.E 2019]. For easy of reference, I hereby reproduce the said section as it reads;

> *"64.-(I) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if- (a) the contract is in writing or there is a written memorandum of its terms;*
>
> *(b) the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced."*

The provision of the law cited above is of the Land Act [Cap. 113 R.E 2019]. This law does not apply in village land. It only applies to granted right of occupancy and surveyed land. The evidence adduced in this appeal is crystal clear that the land in disputes is a village and un surveyed land which is governed by the Village Land Act, [Cap. 114 R.E 2019]. Further to that, it was not disposed or mortgaged it was leased. In the event therefore, the provision cited by Mr. Welwel and the mode of dealing with the land are distinguishable in the circumstances of this appeal. For the foregoing reasons, I see no merit in this appeal. I hereby dismiss it on its entirety with costs.

It is accordingly ordered.



DATED at **ARUSHA**, this 14th day of June, 2022

J.C. TIGANGA

JUDGE