

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND CASE APPEAL NO. 101 OF 2020

(Arising from Muleba District Land and Housing Tribunal Application No. 56/2016)

**EUNICE MASHAIJA NOVENTHAPPELLANTS
EDISON NOVENTH MASHAIJA**

(As Administrators of the estate of late Noveth Bernado Mashaija)

VERSUS

ANSIBERT NKETE..... RESPONDENT

JUDGMENT

Date of Judgment: 25.03.2022

A.Y. Mwenda, J

The present appeal emanates from the District Land and Housing Tribunal's Decree and order in Application No. 56 of 2016 dated 06.10.2020. In the said case (original case), the late Noveth Bernado Mushaija Sued the respondent one Ansbert Nkete for the following orders, to wit:

- (i) Declaration Order that the disputed Land belong to the Applicant.
- (ii) Permanent injunction restraining the respondent, his agents, assignees and or their successors from further encroachment/trespass, use or occupation of the suit land
- (iii) Costs of the application.

- (iv) Any other orders and reliefs as the Honorable Tribunal Should deem fit and proper to meet the ends of justice.

When the applicant finished testifying in support of his application he passed away. This led to appointment of Eunice Mashaija Noveth (the 1st appellant) and Edison Noveth Mashaija (2nd appellant) as administratrix and administrator of the estate of the late Noveth Bernado Mushaija respectively. They took over the case by calling other witnesses. When both parties closed their cases the trial tribunal pronounced judgment in favor of the respondent.

Aggrieved by the decision meted by the District Land and Housing Tribunal, the appellants lodged the present appeal with nine (9) grounds which can be summarized in that the Tribunal's judgment was delivered against the weight of evidence.

During the hearing of the present appeal the appellants appeared in person without any legal representation while the respondent enjoyed the legal services of Mr. Josephat Rweyemamu, learned counsel.

To urge this appeal the 2nd appellant was first to take the floor. In his submission, he begun by challenging the District Land and Housing Tribunal for its failure to accord weight to the applicant's receipt and instead it did to the respondent's which was gotten after the applicant had already received his. He said, while the applicant got his receipt in 1986, the respondent got it in 1989.

Further to that the 2nd appellant submitted that on top of the applicant's evidence other witnesses were lined up especially AW1, a neighbor who also bought his land on the same date as the applicant. He said the respondent's evidence was cooked one as RW3 who testified for the respondent was only 10 years old when the transaction was undertaken.

On her part, the 1st Appellant Submitted that before the District Land and Housing Tribunal they tendered application letter, response letter from the allocation authority as acknowledgement of allocation and payment receipts. On the other hand, the respondent also did the same but his receipt contains a lot of information such as amount of money paid, neighbors and the boundaries. To them, this is strange because he ought to have tendered application letter and documents in a sequence as they did. She added that, the respondent's witness one Imelda was not credible because she had a conflict with the applicant/appellants over boundaries which they then settled. She said during pendency of their conflict, the said Imelda never stated that there was another neighbor whose land was also encroached by the applicant. The 1st appellant went on submitting that the respondent encroached into their land in 2015 and when they went to the Ward Tribunal with intent to file a suit they were told that their dispute was already dealt with before the same Tribunal.

She again added that the Hon. Chairman faulted them for their failure to call members of the clan council to prove their case while the said witnesses died long way back but strangely the respondent was declared a victor despite his failure to do the same. She then concluded by submitting that they were allocated their land by CCM Izigo because in 1986 CCM was the allocation authority of the land as it was not easy to separate CCM's mandates with those of other Government agencies.

She thus prayed the present appeal to be allowed with costs.

Responding to submissions by the appellants, Mr. Rweyemamu, learned counsel for the respondent stated that the District Land and Housing Tribunal decided this matter correctly basing on evidence from both sides.

He said in analysing of the evidence, the District Land and Housing Tribunal went through every exhibit and compared it with the other parties' and then made its findings. He said among the three exhibits tendered by the appellants, one of which was issued by CCM but had no stamp and the Hon. Chairman was correct when he declined accord weight on it.

The learned Counsel for the respondent further submitted that the main issue which this court is bound to do deal with is the correctness of Hon. Chairman's analysis and the conclusion reached. He said the exhibits tendered by the appellant

are three only which are **AE1**, **AE2** and **AE3**. He said, the said exhibits were all discussed in the proper perspective and finally found the respondent's evidence heavier the appellants.

The learned counsel for the respondent concluded his submission pointing out that the grounds of appeal raised by the appellants are baseless and cannot overrule the decision of District Land and Housing Tribunal. He thus prayed that the District Land and Housing Tribunal's decision be upheld and this appeal be dismissed with costs.

In rejoinder, the 2nd Appellant briefly submitted that it is true that the receipt had no stamp but to them what matters is that the letters accompanying them were stamped and the said receipt is a result of the said (accompanying) letters. He also added that all the letters and receipt bear one person's signature and the missing stamp on the receipt is not their fault. He thus concluded by praying this appeal to be allowed. On her part, the 1st Appellant did not have much to rejoin other praying this appeal to be allowed because it has merits.

Having summarized submissions from both sides and having gone through the proceedings and judgment, it is now time to deliberate on the fate of the present appeal. To do so this court found it prudent to raise issue(s) for determination which is whether or not the appellant proved their case to the standard required before the District Land and Housing tribunal.

As it was rightly pointed out by the Hon Chairman, it is trite principal that he who alleges must prove. this principle was discussed in the case of **BARELIA KARANGIRANGI VERSUS ASTERIA NYALWAMBA, CIVIL APPEAL NO.237 OF 2017, CAT** (Unreported) where the court held inter alia that :-

“At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must Prove.”

The court went further to highlight the origin of this rule by stating that:-

"The rule finds a backing from section 110 and 111 of the Law of Evidence Act, [Cap 6 RE 2019] which among other things state:

110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in suits lies on that person who would fail if no evidence at all were given on either side.”

Also in the same case while discussing the evidential burden in civil proceedings the court held as follows:-

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

Again, in the case ***ANTHONY M. MASANGA VERSUS PENINA (MAMA MGESI) AND ANOTHER, CIVIL APPEAL NO. 118 OF 2014, CA, (Unreported)*** the court held inter alia that:

"...in civil cases, the burden of proof lies on the party who alleges anything in his favor..."
[emphasis added].

See also the case of ***ATTORNEY GENERAL & OTHERS V. ELIGI EDWARD MASSAWE & OTHERS, Civil Appeal, No. 86 of 2002, CAT (Unreported).***

Guided by above principles, it is important to note that the appellants had the burden to prove their case to the standard articulated above. During trial before the District Land and Housing Tribunal, the applicant asserted that in 1986, the village government announced intention to allocate land. Those interested had to apply upon payment of Tshs. 150 as service fees. He paid and in turn he was

issued with letter of approval and the date for allocation. He tendered a letter dated 19.11.1986-Exhibit AE.1, a letter dated 10.12.1986 –Exhibits AE2 and Allocation receipts dated 13.12.1986 –exhibits AE.3 He said he was then allocated the land and issued with a receipt. He said he developed the land but later the respondent encroached his land.

On the other hand, the respondent testified that he acquired the in 1989 from Izigo Village council and in support thereof he tendered a receipt issued on 22.07.1989(Exhibit RE2).

As the records shows the Hon. Chairman analyzed the evidence of both sides and examined both side's exhibits. At the end of the day he was satisfied that the respondent evidence is heavier than that from the appellants. This court is in agreement with the findings reached by the Hon. Trial Chairman in that the appellants failed to prove their case. As summarized hereinabove the appellants evidence was that the applicant acquired the land in dispute in 1986. They produced documentary exhibits AE1, AE2 and AE3. Having analyzed the said exhibits the Hon. Chairman found that they cannot be relied on. This court is also in agreement with the Hon. Chairman that the said exhibits cannot be relied on to prove ownership of the land. Exhibit AE 1 is a letter written by CCM Izigo addressed to the applicant requiring him to pay Tshs. 300/= as Land application fees. The problem with this receipt, as it was rightly stated by Hon. Chairman is that the

author of the said letter is Chama Cha Mapinduzi, Ofisi ya Tawi Izigo. As we are all aware, Chama Cha Mapinduzi is not Land Allocating Authority and the ruling party has never taken away the duty of other organs such as Land Allocation. Bad indeed the applicant himself during cross examination said between 1986 and 1990, the land allocating authority was VILLAGE GOVERNMENT or VILLAGE COUNCIL. This position was also asserted by AW2 who was called by the applicant to support his case as he alleged they applied the land together in 1986. AW2 stated categorically that village authority was the land allocating authority and not CCM. This challenge is also visible in exhibit AE2, a letter addressed to the applicant requiring him to attend land allocation exercise. This too is a document which does not conclusively prove ownership of the land in dispute. In this receipt, there are a lot of information missing, like land size, boundaries and location. It is therefore unsafe to rely on this receipt to prove ownership of the land.

On the other hand, the respondent, in defending his case testified that he acquired the land in dispute in 1989 from Izigo Village Council. He produced a receipt which was marked RE. 2. The Hon. Chairman analyzed it and concluded that the same proves his ownership of the land in dispute. I have gone through Exhibit RE.2 dated 22/7/1989. This receipt is issued by Izigo Village land committee. The same also bear a stamp marked HALMASHAURI YA KIJIKI CHA IZIGO, REG. NO. ZM/KIJ/167, MULEBA. This receipt also describes the size of land and location.


Now if we are to compare between exhibit RE2 (tendered by the applicant) with the appellants' AE1,2 and 3, one may clearly note that Exhibit RE2 is heavier than Exhibits AE1,2 and 3.

Having scrutinized and re-evaluated the oral and documentary evidence adduced at the trial, I join hands with the Hon. Trial Chairman that the appellants did not prove ownership of the land in dispute and this appeal is not merited. This appeal is therefore dismissed in its entirety with costs.

Dated at Bukoba this 25th day of March, 2022.

 A.Y. Mwenda
Judge
25.03.2022

This Judgment is delivered in chamber under the seal of this court in presence of the appellants and in the presence of the respondent.

 A.Y. Mwenda
Judge
25.03.2022