THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 81OF 2021
(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 213 of 2018)

EMMANUEL s/o MWAVELA.....APPELLANT

VERSUS

RUCHANO s/o DANGALA.....RESPONDENT

JUGDEMENT

Date of Hearing : 25/05/2022
Date of Judgment: 22/06/2022

MONGELLA, J.

In the District Land and Housing Tribunal for Mbeya (the Tribunal, hereinafter), the respondent instituted a suit against the appellant claiming, among other things, that the appellant be declared a trespasser in the suit land; that the appellant be permanently restrained from constructing in the land in dispute; and compensation for damage done in the suit land. He claimed to be the rightful owner of the land in dispute having purchased the same from one Flora who is now deceased. He said that the size of the land was 25 x 66 paces reaching a road.

The appellant as well claimed to be the rightful owner. He testified that he was allocated land with size 20 x 25 neighbouring the late Flora's land whereby there was a footpath dividing the lands. He claimed that the respondent was the one who invaded his land.

The Tribunal found the respondent the rightful owner of the suit land and ordered the appellant to vacate and demolish the buildings he erected in the suit land. Aggrieved by the decision, he filed the appeal at hand on three grounds, to wit;

1. *That, the trial Tribunal erred in law and fact for failing to evaluate well the evidence adduced by the appellant and his witness before the trial Tribunal on balance of probabilities thereby reaching a wrong decision.*

2. *That, the trial Tribunal erred in law and in fact in deciding in favour of the respondent while lacked clear evidence in proving the ownership of the land in dispute.*

3. *That, the trial Tribunal erred in law and fact in failure to observe that the suit land belonged to the appellant since 1985 used it continuously for more than thirty two (32) years and that the respondent was time barred to claim over it (sic).*

The appeal was argued orally. The appellant who appeared in person argued the appeal generally. He said that he was given the suit land by the village council in 1985 whereby his neighbour was one Flora Mshana.

He said that he lived in harmony with Flora for a long time, however later Flora fell sick and advertised on selling her house. He said that she sold the house to the respondent, but in selling the house no neighbour was involved. He claimed that when Flora died the respondent claimed to have bought his house as well and sued him over his house. He added that the respondent instead of suing the deceased's brother who supervised the sale, he sued the witness one Michael Mshana.

The appellant added that during hearing in the Tribunal the respondent was asked as to why he sued the witness and as to why he bought the house without involving neighbours whereby he replied that he was told to buy the house as well. He added that the respondent failed to bring the seller and witness to the sale agreement, who are one Wilson Mshana and Yotam Kalenge, despite being told to do so and the same are available. He claimed to be living in the house on the land in dispute to date and that he took the sellers to the police station whereby they denied to have sold the land in dispute, but the police directed them to go to court.

The respondent was represented by Mr. Justinian Mushokorwa, learned advocate. Mr. Mushokorwa first noted that the appellant's submission based on how his neighbour, Flora Mshana sold the land to the respondent. He argued that the submission was not based on the grounds of appeal thus posing new grounds and taking them by surprise. However, on the other hand, he proceeded to submit that the appellant was aware of the sale of the land by his neighbour Flora because, as seen at page 34 of the Tribunal proceedings, he testified that after the respondent bought

the land from his neighbour Flora Mshana, they lived in harmony without any dispute with the respondent.

He was of the view that the appellant was not prejudiced by the sale for all that long time as he would have taken steps to object the sale. Mr. Mushokorwa added that during the hearing in the Tribunal, the appellant never stated that the late Flora sold his house. That, the claim has been brought up at this appellate stage. He said that the respondent instituted the matter in the Tribunal following the appellant encroaching into his land. He found the appeal lacking merit considering as well that the appellant abandoned his grounds of appeal.

In his brief rejoinder, the appellant contended that no justice was done to him as the sellers were not brought to court to testify and at the police station they denied selling his land.

I have considered the arguments by the parties and thoroughly gone through the Tribunal record. Though Mr. Mushokorwa was of the view that the appellant abandoned his grounds of appeal, on close scrutiny of his submission I find that he argued generally on the 1st and 2nd grounds. These grounds refer to the evidence on record, which he claims was not considered. I shall therefore base my deliberation on the 1st and 2nd grounds. I shall not entertain the 3rd ground as there in nothing in the appellant's submission suggesting any connection with this ground.

Going through the parties' submissions and the record I find it clear that the dispute between the parties is on the boundary separating their plots

whereby each claims that the other encroached to the other's land. This is because both of them testified to be neighbouring each other.

The evidence from witnesses from both sides, including the appellant and the respondent, shows that between the parties' plots there is a footpath separating their plots. I have gone through the evidence and found no clear evidence indicating that the appellant crossed over the footpath and entered the respondent's land. In the Tribunal, the respondent was the complainant whereby he claimed that the appellant had trespassed his land. It is trite law that the one who alleges must prove. It is also trite law that the duty of proving the case lies with the plaintiff/applicant. This is provided under **section 110 (1) and (2) and section 112 of the Evidence Act, Cap 6 R.E. 2019** which states:

> *"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 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.*
>
> *112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

The legal position as settled above was reiterated and emphasized by the CAT in the case of ***Geita Gold Mining Ltd. & Managing Director GGM v. Ignas Athanas***, Civil Appeal No. 227 of 2017 when revisiting its previous

decision in ***Anthony Masanga v. Penina (Mama Mgesi) & Another***, Civil Appeal No. 118 of 2014, (CAT, unreported).

As such the respondent had the obligation of proving that the disputed portion of the land was rightfully his. To that effect the respondent testified to have purchased the land from one Flora Mshani, who is deceased. There was no dispute about that fact as the appellant testified the same. The dispute lied with the size and boundaries of the land purchased. He claimed that the land he purchased measured 25 x 66 paces. His testimony was supported by PW2, one Lucas Likange, who claimed to be a member of the land allocating committee and participated in allocating the land to the late Flora Mshani measuring 25 x 66 paces in 1985. The record however, shows that all defence witnesses who were also allocated plots in the area, testified to have been allocated plots measuring 20 x 25 paces.

DW6, the late Flora Mshani's relative, who also witnessed the sale transaction between Flora and the respondent first testified that the plot was 25 x 30 paces, which was the size of all the plots allocated to the villagers. Later, during cross examination by the respondent's counsel, he changed and said that the plot was 25 x 66 paces, but explained further that the size of the plot got increased during road demarcations whereby the plots were re-sized. DW6, though also sued, I find his testimony being in favour of the respondent. Considering the testimonies of these witnesses, I find there is a contradiction between PW1, PW3 and DW6 on the size of the plot at the time of buying.

PW1, the respondent, said that when buying, the VEO one Kalenge measured that plot at 25 x 66 paces, however, the VEO was not called to testify. This was a material witness and failure to bring a material witness leads the court to draw an adverse inference against him. See: ***Hemed Said v. Mohamed Mbilu*** [1983] TLR 113. The testimony is also contradicted by DW6, a witness to the sale, who testified that at the time of buying, the size was 20 x 30 and later increased with road demarcations.

In the premises, I find that the size of the respondent's plot was not 25 x 66 at the time of buying as he claims. If at all DW6's testimony is true, then the respondent's land was increased while encroaching the appellant's land. However, on the other hand, the respondent testified that his land has not yet been surveyed due to the conflict at hand. In the premises, I also find DW6's testimony contradicted as to how the size of the plot was increased as no survey was conducted on the plot.

The evidence shows that the appellant was facing the main road and the respondent was behind him. That the appellant's plot was reduced by the road constructed. However, the appellant gave evidence that the road construction never took much of his land. I find the evidence unchallenged because neither of the parties testified on the size of the land taken by the road or the remaining one.

In consideration of the contradictions on the size of the plot at the time the respondent bought his plot, by the respondent's witnesses, I am of the view that the contradictions are material and going to the root of the matter. The Court of Appeal in the case of ***Paulina Samson Ndawanya vs.***

Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported) ruled that the court will only sustain such evidence which is more credible than the other on a particular fact to be proved. The Court reiterated this position in the case of ***Bakari Mhando Swanga vs. Mzee Mohamedi Bakari Shelukindo & 3 Others***, Civil Appeal No. 389 of 2019 (CAT at Tanga, reported at Tanzlii). In the matter at hand, I find the major dispute lies on the size making the boundaries of the plots owned by the parties. The appellant's evidence was consistent thus more credible than that of the respondent.

In consideration of my observation as above, I find the appellant the rightful owner of the disputed portion of the land and declare him as such. The appeal is therefore allowed with costs to be borne by the respondent.

Dated at Mbeya on this 22nd day of June 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 22nd day of June 2022 in the presence of both parties and Mr. Felix Kapinga, learned advocate, holding brief for Mr. Justinian Mushokorwa, for the respondent.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE