**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**LAND APPEAL CASE NO 237 OF 2020**

*(Originating from the Judgment and Decree of the District Land and Housing Tribunal for Kilombero/ Malinyi District at Ifakara in Land Case No 40 of 2018 before Hon. C.P Kamugisha – Chairman)*

**SEIF ALLY NDALI.....APPELLANT**

**VERSUS**

**ZAINABU MTOYAGE.....1ST RESPONDENT**

**GERVAS KUPEWA .....2ND RESPONDENT**

**JUDGEMENT**

*Last Court Order on: 10/5/2022*
*Judgement date on: 02/6/2022*

**NGWEMBE J**

Before the District Land and Housing Tribunal for Kilombero/Ulanga at Ifakara, the appellant herein unsuccessfully, sued the first and second respondent claiming among others, ownership of a piece of land equal to 30 X 64.2 meters. It is also evident that, the appellant and the 1st Respondent are blood relatives, in the sense that the appellant is a son of the deceased who was a blood brother and sister of the 1st Respondent, thus, an aunt from the same lineage. Upon demise of her brother of the 1st respondent, the appellant was appointed an administrator of the deceased estate. Therefore, commenced his duty to

collect all properties of his father's estate, including a piece of land subject to this appeal. During trial, the appellant Seif Ally Ndali claimed that, the 1st and 2nd respondents, without legal justification, executed a sale agreement over the suit land measuring 60 x 30 meters, located at Makerere village in Malinyi Ward within Malinyi District in Morogoro Region. *(hereinafter referred to as a suit land).*

Upon hearing that dispute, the District Land and Housing Tribunal, conclusively decided in favour of the respondents. Added that, the lawful owner of the disputed land is the 1st respondent who had every legal right to sale part of it or the whole land to the 2nd Respondent. Thus, the transaction between the 1st and 2nd respondents was valid and the purchaser is a lawful owner of the suit land.

Such declaration dissatisfied the appellant, hence appealed to this court clothed with four grounds namely:-

1. *The trial Tribunal erred in law and fact for failure to properly analyze the evidence of both parties hence caused miscarriage of justice;*
2. *That the trial Tribunal erred in law and in fact for ignoring the principle of invitee;*
3. *That the trial Tribunal erred in law to give its judgement based on untrustworthy and unreliable evidence of the respondents; and*
4. *The tribunal erred in law and in fact to give its judgement based upon contradictory evidence of the respondents.*

On the hearing of these grounds of appeal, both parties were represented by learned counsels. The appellant was represented by

advocate Fredrick Msumari, while the respondents were represented by Stephine Shitindi. However, upon hearing both parties on this appeal and upon perusal to the proceedings of the tribunal, I realized that the tribunal did not visit *locus in quo,* thus, failed to come up with clear location of the suit land.

More so, perusing the evidences adduced by the appellant and respondents as recorded by the trial Tribunal, I realized that *visiting locus in quo* was inevitable. For instance, the appellant and his witnesses strongly testified that, the deceased was granted that land by the Village Government in year 1977. At the same time the 1st respondent came up strongly, that her mother was granted the same piece of land in year 1975 or 1976 by the same village Government. Moreover, the 1st respondent added that, the appellant's father was residing at Malinyi, while the suit land is at Makerere village. In such state of evidences, visiting *locus in quo* became inevitable.

Therefore, I proceeded to order the chairperson of the District Land and Housing Tribunal for Kilombero/Malinyi at Ifakara, together with the disputants and their counsels to visit *locus in quo* prior to determination of the appeal on merits. Visiting *locus in quo*, took unnecessary long time, however, at the end on 29/4/2022, the chairperson and the disputants and their counsels managed to visit *locus in quo*. The report of that visit was admitted in court in the presence of both parties and their advocates on 10th May, 2022. Hence, form part of the court proceedings and this judgement.

Admittedly, there are several issues which are not in dispute, such as, the father of the appellant and mother of the 1st respondent lived in one village called Makerere in Malinyi District. Prior to the formation of

Malinyi District in year 2016, the village was part of Kipingu village which was officially formed in year 1976 during operation villagization. Therefore, the father of the appellant and mother of the 1st respondent were founding members of Kipingu Village in year 1976 &1977.

Moreover, the alleged original owner, that is, father of the appellant and mother of the 1st respondent lived peacefully from 1976 up to his death in year 2001. Above all, after his demise, the parties were peaceful until 2016, when the appellant was appointed an administrator of the deceased estate who died on 27/3/2001. The dispute was instituted in the District Land and Housing Tribunal in year 2018, hence parties are still in the corridors of justice to date.

It is equally important to note that, the suit land comprises 64.2 meters to 30 meters only. These facts are not disputed and all form the bases of this appeal.

Arguing on this appeal, the learned advocate Msumari submitted strongly that the selling of the suit land was made in year 2009 instead of 2001 or 2006. Therefore, the tribunal was misdirected to think the sale was executed in year 2001 instead of 2009. Added that the original owner founded the suit land in year 1977, but soon after his death in year 2001, the 1st respondent was invited to stay in that land of the deceased.

Strongly argued that, the 1st respondent was an invitee and she never owned it. Since the 1st respondent was an invitee, she will remain so forever. She could not possess it. Lastly invited this court to review the whole evidences and decision of the trial tribunal, then nullify its decision.

In reply the learned advocate Shitindi contradicted the submission of the appellant as irrelevant and the appeal should be dismissed. Added

that, the issue of year 2009 was not testified during trial save only on 2001. At the same time, the 1st respondent sold the suit land to the 2nd respondent in year 2004. Since then to 2018 was equal to 14 years. The 2nd respondent enjoyed ownership of such land peacefully for all that time. Added that, since the deceased never owned such piece of land, same cannot be claimed by the appellant as an administrator. Insisted that, the mother of the 1st respondent was not an invitee, but the original owner. Thus, was right to sell part of her land and another part is still occupied by herself. Referred this court to the case of **Linus Chengula Vs. Frank Nyika, Civil appeal No. 131 of 2018** that new issues on appeal is prohibited.

In brief rejoinder, the learned advocate for the appellant reiterated to his submission in chief and added that, adverse possession does not apply to an invitee. Insisted that the 1st respondent was an invitee to the suit land. Since the 1st respondent had no title over the suit land, she could not pass title to the 2nd respondent. Even the cited cases are irrelevant and inapplicable.

I have consciously considered the rival arguments of the learned advocates in line with undisputed facts narrated herein above, I find the real issue in dispute is who owns that piece of land? The disputants are not the original owners of the suit land rather they are children of the original owners.

It is well known in our country that, in year 1973 up to 1978, there was a national policy called operation villagization which followed the Government desire to transform scattered homesteads of many Tanzanians to live in an organized and registered villages. So, the task of creating villages that would develop along socialist lines was an immense

duty. Massive operations to reorganize scattered homestead into villages throughout the country was mounted. By year 1977 many villages were successfully organized. Such operations were backed by law called **The Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975.**

Following that operations, many people left their original homes and farms to the place where the Village Government under leadership of the District Commissioners located them as new residential areas. Such policy resulted into creation of new villages, while others were abandoned. Such policy of Villagization affected land ownership and social life.

Above all, Tanzania continued to have several other land reforms, which ended up in year 1999 where two Land Laws were enacted. One being responsible for Village Lands Cap 114 R.E. 2019 and another on surveyed land best known as Land Act Cap 113 R.E. 2019. Even the land dispute resolution was created outside the normal legal system, save only at the level of the High Court and the Court of Appeal. The purpose was to Fastrack land dispute settlements based on true evidences from within the society or village or Ward. People within the locality know each other and their particular traditional land ownership. Likewise, the location of land during operation villagization (Kihamo), is well known and respected by each member of that village or society. Therefore, it is not expected to have land conflicts arising from Villagization of 1974 to 1978. Whoever, retrieves land disputes related to that national policy won't win rather will be seeking unfounded and unnecessary conflicts.

From that understanding, and having so said, it is observed that both the father of the appellant and mother of the 1st respondent were first relatives, and both were allocated land in the respect village and

throughout their life, had no conflict over land matters, until they peacefully rested. Obvious, due to the villagization policy, the original owners were compelled to shift from their original domiciles to the new areas as per the tribunal's record. Upon being allocated such pieces of land, they resided therein peacefully for the rest of their live. One may wonder why conflict after demise of the original owners? To answer this question, I have to peruse inquisitively the testimonies adduced during trial before the District Land and Housing Tribunal.

Beginning with the testimonies of Ally Omary Majiji of 70 years old (RW3), boldly testified that, the first respondent is her neighbor since 1975 during operation villagization (Kihamo) to the date he testified. Expressed that the 1st respondent was a wife of Mahambi, but later divorced, she then turned to her mother in the suit land, until her mother died living behind the 1st respondent continuing utilizing the suit land to date. During cross examination RW3 insisted that, the suit land was allocated to her mother of 1st respondent in year 1975 and since then to date she is therein. Denied to know the appellant and that had no land therein.

In the same vein, the 1st respondent being 75 years old, testified eloquently and confidently that her mother was granted the suit land during operation Villagization (Kihamo) and she occupied such land until her death. In turn, she automatically continued to occupy such land to date. In cross examination she denied to have sold it to Mwalimu Luhenge, but admitted to know Ally Ndali as her brother who lived at Malinyi. Also admitted to have sold part of her land to the 2nd respondent. But denied strongly that Ally Ndali never lived at Makelele but lived at Malinyi.

The same evidence was testified by Brighton Betuel Mangesho of 50 years old. That, since his younghood, he found the 1st respondent occupying the suit land to date. In cross examination, he insisted that he knew the 1st respondent since his younghood, that she has been occupying that piece of land without any interruption from any person.

This piece of evidence is totally contrary to the appellant's evidence whose version is as if they were testifying into two different pieces of land. For instance, Ansigary Joseph Msambila of 74 years old, testified with confidence that at the time of operation villagization, he was a secretary of Kipingu village and participated in allocating the suit land to the father of the appellant in year 1977 during operation "Kihamo". In cross examination by Wise Assessors, (Fatuma Shaban) denied to know the 1st respondent, that he never allocated land neither to the 1st respondent nor her mother.

More interestingly is the evidence of Zuberi Mohamed Ndali of 68 years old, who testified that in year 1977, the suit land was allocated to the applicant's father who was his brother. That in year 2001 the 1st respondent went to him asking to use the suit land, but he refused, later in year 2004 was told that she has sold part of it to the 2nd respondent. Went further to testify that, the original owner, built a house therein, which was used by the mother of the 1st respondent until her death in year 1989.

Another strong testimony on same line of evidence was Edward Joseph Libali aged 80 years old. He strongly testified that being a member of the village council, he participated in allocating such piece of land to the late Ally Ndali. Above all, he denied to know the 1st respondent and who located her such land.

Having summarized such evidences as required by law; from the outset, the evidences on record implies that there are two pieces of land. Both sides had old citizens who stood firm to know well the suit land for the appellant and others for the respondent. Even some of them indicated to have participated in allocating such land to the disputants. As such, the first implication is that the disputants are struggling into two different plots of land. Out of that state of evidences, this court found prudent to order the Chairperson of the tribunal to visit *locus in quo*, which he did. Such report will help this court to clear some doubts.

The report clearly provide that the suit land is only one, located at Musumbiji "A" Hamlet in Makerere village at Malinyi Ward within Malinyi District in Morogoro region. Previously, the area was at Kipingu Village but in year 2016 the new District of Malinyi was formed, such village of Makerere was made part of that new District. At the same time, Kipingu Village was created in year 1976during operation Villagization. Went further to disclose that the area in dispute comprise 30 meters to 64.2 meters only. The neighbouring persons to the suit land are:- at the east side is street road, north side is TARURA roard while the west side is bordering with Nganywila and the south side with Mangesho.

The report supports the evidence of Beatus Mangesho whose age is 50 years old but confirmed that since his younghood, he found the 1st respondent living and cultivating the suit land. According to the report, Magesho is a close neighbor of 1st respondent and the suit land. He testified as quote hereunder:-

> *"In the year 1975 my father was allocated land during operation kihamo. The 1st respondent is my neighbor of my land I was given by my father. So for all the time I have*

*resided over my land, the 1st respondent has been my neighbor all the time and she is in occupation of that land to date"*

Such piece of evidence is equal to the report of the Chairperson of the tribunal. Now the question is, whether the appellant ever lived and occupied such suit land? If the answer is in affirmative, then the subsequent question is whether the appellant lived together with the 1st respondent? Was he known to his neighbors including Mr. Magesho? Due to the evidences on record, it is clear, the appellant could not reside in the suit land together with the 1st respondent. Such land is not even an acre, how possible be occupied by both disputants? These questions ought to be answered by evidence of disputants. However, I have tirelessly perused the trial tribunal's record, same are not forthcoming. Now whether the appellant/ applicant proved his ownership before trial tribunal?

Obvious there are certain cherished principle of law governing civil cases including land disputes, should not be forgotten. That, the burden of proof lies on the party who seeks protection of the court. I am fortified by the provisions of sections **110 and 111 of the Law of Evidence Act [Cap 6 R.E, 2002],** which among other things state as follows:-

> **Section 110,** *"Whoever desires any court to give judgement as to any legal righty dependent on existence of facts which he asserts must prove that those facts exist.*
>
> **Section 111**. *"The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side"*

Considering these two sections of law, the Court of Appeal in the case of **Attorney General & 2 others Vs Elig Edward Massawe & others, Civil Appeal No. 86 of 2002** (Unreported), made reference on the same sections on burden of proof on civil cases. It is a common knowledge, that in civil proceedings, the party with legal burden also bears the evidential burden and the standard is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil cases, the Court of Appeal in **Godfrey Sayi Vs. Anna Siame as legal representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012** (unreported), and in **Anthony M. Masanga Vs. Penina (Mama Ngesi) and another, Civil Appeal No. 118 of 2014** (unreported), the Court of Appeal cited with approval, the case of **Re B [2008] UKHL 35,** where Lord Hoffman, provided the most lucid definition of the term "balance of probabilities" to mean:-

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened"*

Based on these precedents when compared with the evidences revaluated herein above, I am certain the respondent not only during trial

but even on this court, has built a strong case against the appellant. Therefore, this court has a duty to protect her.

The evidence collected and recorded by the trial tribunal, does not support the assertion of the appellant, rather demand this court to provide protection to the respondent.

In conclusion, I find no fault by the trial tribunal. The available evidences do not support the assertion that the respondent was an invitee rather is the true owner of the suit land. Above all, the available evidences are neither contradictory nor untruthfulness. Rather, the whole evidences together with the report cited above meet in one point that the respondent is the true owner of the suit land.

Accordingly, and for the reasons so stated this appeal lacks merits and there are no viable reasons to depart from the decision of the tribunal. Therefore, I proceed to dismiss this appeal. Due to the circumstances of this appeal, I order each party to bear his/her own costs.

**I accordingly Order**

DATED at Morogoro this 2nd June, 2022

**P.J. NGWEMBE**

**JUDGE**

**02/06/2022**

**Court:** Judgement delivered at Morogoro in Chambers on this 02nd day of June, 2022 in the presence of Hassan Nchimbi for Josephine Mbena and Fredrick Isaac Mushi for Josephine Ndelike Advocate for the Respondent.

**Right to appeal to the Court of Appeal explained.**

**P.J. NGWEMBE**

**JUDGE**

**02/06/2022**