THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 32 OF 2022

(Originating from Land Application No. 143 of 2018, The District Land and Housing Tribunal for Morogoro)

MAURA GIBLON VICENT (administratrix of the estate of the late MARTIN KABENGWE) ..... APPELLANT

VERSUS

ANDREA ADAM MWASELE ..... RESPONDENT

JUDGMENT

Hearing date on: 16/06/2022

Judgment date on: 22/06/2022

NGWEMBE, J.

This is the first appeal arising from the decision of the District Land and Housing Tribunal for Morogoro (Tribunal). The core of the dispute is five acres of farm land located at Mawasiliano, Mkundi Ward (Formerly known as Kihonda Ward) in Municipality of Morogoro. The appellant Ms. MAURA GIBLON VICENT being an administratrix of the estate of Martin Kabengwe, sued the respondent, alleging to have trespassed over the said five (5) acres of land part of the alleged fifteen (15) acres property of the late MARTIN KABENGWE. The deceased Martin Kabengwe was a husband to the appellant whose estate is administered by her after being appointed by Kawe Primary Court in May 2016. The decade died on 6th January, 2016.

From the available evidences on record, Martin Kebengwe was living in both Morogoro and Dar es Salaam. In the year 2000 he applied to the street Land Committee for allocation of farm land, along with other citizens. He was allocated 15 acres of farm land at Mawasiliano, Kihonda Ward (currently Mkundi Ward). The street Land Committee (Village Land Committee) after due process and after complying with all prerequisites like contribution towards development programs in the Village, among others, he contributed in construction of Mkundi Primary School. Moreover, he effected some development therein by building a hut and planting different types of trees. Some of the Committee members worked under him in developing the said land. It seems there was mediation before the Chairman between the appellant and respondent the (Mr. Andrea) and also there was a case with one Dr. Elsie Mwankenja, the decision therein was in favour of the appellant.

In year 2017, the administratrix in the cause of discharging her statutory duties, she realized that MARY MWASELE, mother of ANDREA ADAM MWASELE has trespassed into five acres out of 15 acres of land They cleared some trees and put some beacons. The said MARY claimed to have been allocated such land by the Ward Executive Officer in year 2003 and registered it on her son's names. MARY MWASELE stood on the shoes of the respondent ANDREA ADAM MWASELE before the tribunal.

Before the tribunal, each side tendered letters of allocation among other exhibits. The trial Tribunal ruled that, the appellant's documents were forged, but the respondent's documents were authentic and reliable. Thus, proceeded to award five (5) acres of disputed land to the respondent.

Dissatisfied therein, the appellant exercised her right to appeal to this court, armed with six grievances namely: -

1) That, the Tribunal erred in law and in fact when based its determination and final decision upon the material facts that never existed in the statement of cause action by the petitioner;
2) That the Tribunal erred in law and fact by usurping the expert opinion role and issued expert opinion in respect to the handwriting on the disputed date without seeking expert opinion from forensic bureau department of police;
3) The Tribunal erred in law and fact when he concluded the exhibit P2 was a forged document in a civil land suit without jurisdiction;
4) That there are relevant documents in respect to the disputed land and if the chairman had considered them, he would not have arrived to the same decision as he did, copy of the receipt by the late Martin Kabengwe contribution to the village development dated 7/3/2000 is herewith attached to form part of this appeal;
5) That the trial chairperson erred in law by failing to consider all the relevant facts in evidence surrounding the matter before it and determine the petitioner herein as the lawful owner of the suit property.
6) That the tribunal erred in law and fact by failing to adhere to the principle of law of evidence during trial.

Messrs Francis Mwita and Richard Giray, learned advocates had the conduct of this appeal for appellant and respondent respectively before the tribunal and as well as in this appeal. Mr. Giray filed a reply to the above grounds disputing each and every ground raised by the appellant.

On the hearing of this appeal, Mr. Mwita dropped the 6th ground and consolidated grounds 2nd and 3rd. The rest were argued separately. On the first ground, he attacked the trial tribunal for introducing new facts which were not pleaded in the applicant's pleading. The trial Tribunal based on those new facts in its judgment. He referred this court to diverse parts of pleadings. Contradicted that the statement on allocation of such land to the appellant on 17/03/2002 was not contained in the pleadings neither in the Written Statement of Defence. Thus such statement was from the chairperson's own invention.

Referred this court to page 10 of the tribunal's judgment, he insisted that, as the trial chairperson rightly observed, parties are bound by their pleadings, even courts are bound by the parties' pleadings. To support his argument, he cited the case of **Madam Mary Silvanus Qorro Vs. Edith Donath Kweka, Civil Appeal No. 102 of 2016** at page 15. Thus prayed this ground be allowed.

Arguing grounds 2 and 3 on allegation of forgery of exhibit P2, he challenged the tribunal for concluding that, P2 was a forged document, while there was no evidence to that conclusion. Insisted that, it was improper for the tribunal to have investigated and made finding over the fact of criminal nature, without proof beyond reasonable doubt. Added that, the maker of the document (Exhibit P2) one Mr. Paul Edward (PW2) who was the street Chairman testified that, he authored P2 in year 2000.

Submitting on ground four, Mr. Mwita referred this court to page 7 of the trial tribunal's judgement that, had the chairperson considered the receipt which the appellant had, he would have arrived into a different conclusion.

On the fifth ground, he submitted that, PW2 authenticated that he was the street chairman from year 1999 to 2004, which fact was not disputed. Went further that, they allocated the land to the appellant on 07/03/2000. Therefore, had the chairperson evaluated the evidence properly, he would have decided in favour of the appellant. Continued, to point on the evidence of DW3 who claimed to have been the Street Secretary (Katibu wa Mtaa), claimed that the respondent was allocated five acres in dispute, and that the appellant did not appear in the register of land owners in the Street Register book, while the said register book was not tendered as exhibit. In conclusion, he prayed this appeal be allowed, and prayed the suit land be reverted back to the true owner.

Advocate Giray responded on the same trend. Addressing the first ground, stood firm that the tribunal was correct to have referred the date of 17/03/2002, as the date averred by the appellant. The appellant filed two applications and the chairperson relied on the first version. Regarding ground 2 and 3, he just maintained that the defect in P2 required no expert opinion to conclude that, the document was forged.

Submitting on ground four, briefly made reference to the case of **Abdallah Abbas Najim Vs. Amin Ahmed Ally [2006] TLR. 55,** which held that, an annexture cannot qualify to be evidence until when it is tendered and admitted in court or tribunal as exhibit. The alleged receipts were not tendered during trial same cannot be used.

Arguing on the fifth ground, insisted that the tribunal considered the whole evidence, hence arrived into a just decision. The issue of land register book was a new issue, which was not evidenced during trial. Pegging his last point, he prayed this appeal be dismissed forthwith.

In rejoinder Mr. Mwita insisted that, during trial they had only one application, the second copy of application as alleged by the respondent is unknown to them. Went on to clarify on the date of land allocation to be on year 2000 as opposed to year 2002.

Having consciously summarized the arguments advanced by the learned counsels and upon careful perusal to the whole evidences adduced during trial, I have observed clearly that, the application before the trial tribunal had one application as opposed to the alleged two applications. it is equally true that the first page the application had two different versions stamped together. The trial tribunal seems to have based its decision on the first leaf, without stating anything on what featured therein or at least resolving that contradiction. The appellant has disowned the first version of the first page, which was different in form and in content with the rest.

The way it appears, the first leaf features as if it was implanted. It is unknown what transpired in the tribunal, which was the custodian of the case file. What raises more confusion is the version relied upon by the tribunal was known by the respondent's counsel, but unknown by the appellant. The appellant's copy did not have the imbedded first page. I have asked myself if the respondent's advocate was aware of it as he demonstrated in his submission, why did he not assist the tribunal at the earliest stage? Why would the tribunal choose to base its decision on the first version without addressing the anomaly? There are other features found in the said extra page, apart from having something strange to the appellant in content, also it bears the font type and style of its own, distinctive from the rest of the document. It is unknown how did that happen and who was behind it. But the last responsible person was the chairperson who was bound to address the same before making

his decision. That should not be taken as against any of the parties but whoever did it was illegal.

Therefore, the first ground is allowed on the following reasoning; the tribunal was duty bound to let the parties address it and resolve between the two-conflict pleading, which among the two was a true version to be relied upon. The tribunal did not do that. Since the tribunal relied on the document unknown to the appellant, same prejudiced her because the tribunal based its verdict partly on that unknown version.

Ground 2 and 3 sought to challenge the tribunal for concluding a finding that exhibit P2 tendered by the appellant was a forged. I have considered all what was submitted by the learned advocates, but as this issue touched what is clearly stated by the law, I will not go through each of the minor points raised therein and argued by the learned counsels, though my conclusion may fall in one of the slots. First, it is neither law nor good practice to take slightly on matters of criminal in nature. Any allegation of criminal act must be proved in a separate criminal case and the standard of proof is beyond reasonable doubt. The law states otherwise that, such fact can be raised, in civil matters but it must be proved by a much higher standard than the ordinary burden of proof in civil cases, though not beyond reasonable doubt. This position draws its inference from the Court of Appeal decision in the case of **Omari Yusuph Vs. Rahma Ahmed Abdulkadr** [1987] TLR 169, where inter alia held:-

> *"I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings, that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases"*

The rationale behind this rule was explained by the same court in page 175 as follows:-

> *"...the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof"*

In similar vein, in the case of **City Coffee Ltd Vs. The Registered Trustee of Ilolo Coffee Group [2019] 1 TLR. 182,** the Court held:-

> *"...it is clear that regarding allegations of fraud in civil cases of the particulars of fraud, being serious allegation; must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases"*

In our case, though the position is as above, I am satisfied that there was no proof to the required standard that exhibit P2 tendered by the appellant was a forged document. I have examined the document, though I am not a forensic documentary expert, yet I failed to see why the tribunal ruled it as a forged document and disregard it despite the testimony of its maker (PW2). To my understanding, exhibit D1 had nothing much special than exhibit P2. Exhibit P2 was captioned "KIBALI CHA KUJIUNGA NA KATA YA KIHONDA" its direct interpretation is 'permission to join Kihonda Ward'. Its contents indicates that the appellant was accepted to be a resident of Kihonda ward, thus given 15 acres of land as he requested. The document was signed by the Ward Executive Officer, the Chairman and the applicant. At the same time D1 was captioned as "YAH: KUPEWA EKARI TANO (5) NA SERIKALI YA MTAA WA MAWASILIANO" and signed only by the Ward Executive

Officer. When the two documents are compared and contrasted, legally, under the Village Land Act, the Ward Executive Officer has no land to offer, but all village land is under the custody of the Village Council operating through its committees.

Without labouring much on this issue, certainly the tribunal erred in defying the principle on burden of proof on exhibit P2. I am settled, had the chairperson applied properly the principles of law as I have endeavoured to amplify herein above, he would have arrived into a different conclusion in respect to exhibit P2 and in the whole verdict. Thus grounds 2 & 3 are meritorious.

In respect to ground four, the appellant's counsel suggested that the trial tribunal would have considered documents concerning the appellant's contribution, which was rejected for not being annexed in the pleadings. With due respect the counsel's argument tried to introduce new jurisprudence. I am in agreement with what Mr. Giray, has submitted on this point. He referred this court to the persuasive decision of the High Court of Zanzibar in **Abdallah Abbas Najim (supra)** which ruled that, annexures to the plaint are not exhibits in evidence, unless they are tendered and rightly admitted in court/tribunal. Unfortunate, the said receipts were not annexed in the pleadings. More so, the appellant ought to issue notice attaching those receipts to be relied upon during trial. Such notice is issued prior to the date of hearing.

The same position was expounded by the Court of Appeal in the case of **Shemsa and 2 Others Vs. Seleman Hamed Abdalla, Civil Appeal No. 82 of 2012 (unreported)** held:-

"We think we need to overemphasize what we take to be trite law that the judgment of the Court or quasi-judicial tribunal

must be grounded on evidence properly adduced during the trial, otherwise it is not a decision at all. The purported decision becomes a nullity"

Following the above, the trial tribunal is blameless to what it did. It had no other avenue known in law through which could consider the said documents or at least believe that they existed among others. Equally, it was the appellant's duty under section 112 of **The Evidence Act [Cap 6, R.E. 2019]** to adduce the contents of those receipt during trial, even if, same were not admitted. This position is backed by section 112 which is quoted hereunder: -

"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."

Conclusively, it was the duty of the appellant to follow the legal procedure in producing those receipts, if at all, they were relevant and vital evidences as strongly stressed by advocate Mwita. Attaching those receipt in a petition of appeal at the appellate level is unknown procedure, hence, this ground must fail, consequently dismissed for lack of merits.

Considering on the last ground (Ground five) of this appeal, which relate to the alleged failure of the chairperson to consider the evidence of both parties. The respondent's counsel argued strongly that the available evidences were well analysed before arriving into a just decision.

In determining this issue, I found prudent to be guided by some basic legal principles. It is a well-established principle of law that, he

who alleges must proof the allegations'. In civil cases, the standard of proof is on balance of probability or preponderance of probability. The party whose evidence is heavier than the other is likely to win the case.

Section 110 (1) (2) and 111 of **The Evidence Act [Cap, 6 R.E 2019]** clearly provide same as quoted hereunder:-

"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"

"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"

This has been reiterated by the Court of Appeal in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] TLR. 419**, that: -

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

In this matter, the appellant's evidence was well corroborated by PW2 (Street Chairperson) and PW3 (Steven Kihiyo - the ten-cell leader (Balozi wa Mtaa). Both testified that in Mawasiliano Street, there were bushland and the Street Authority decided same be divided into farming activities.

PW2 and PW3 were members of the committee that allocated 15 acres of land to the late Martin among others. They testified that actually 15 acres of farmland was allocated to the late Martin. PW4

(Hillary Kitipi) was along with the late Martin and happened to work on his land for some time.

On the other side, the evidence of DW1 (Mary Mwasele) claimed to have made an application for land allocation, while DW2 (Elsie John Mwankenja) alleged the respondent was his neighbour. Supplemented such evidence by the evidence of DW4 (Mr. Melchior Boniventure – Ward Executive Officer), confirmed to have allocated the five acres of land to the respondent. Out of those pieces of evidences, the question is, whether the five acres allocated to the respondent was part of the fifteen (15) acres already allocated to the late Martin? If this question is answered in affirmative, the following question is whether the owner, the late Martin was consulted and consented to it?

From the evidences on record, it is evident that, in year 2000 a farm land measuring 15 acres was allocated to the late Martin Kabengwe by the Street Land Committee. Likewise, in year 2003, the Ward Executive Officer upon application by the respondent (DW1), allocated five (5) acres of farm land out of those 15 acres already owned by Martin Kabengwe. DW1 in her testimony stated that, the land in dispute belonged to her, but registered the same in her son's names (the respondent) who by then was an adult of 19 years old. Reasons for such move were not disclosed and I take no issue to it.

Undoubtedly, the evidence on record is clear that the five (5) acres of land was allocated to the respondent from the land already owned by Martin and without his consent or being consulted. Second, the respondent was allocated the alleged farm land by Ward Executive Officer. The question is, under which law the Ward Executive Officer exercised such powers? Obvious under Village Land Act, which was enacted in year 1999, the Village Land is under custody of Village

Council. The Ward Executive Officer has no powers over village land. Even by assumption, that the said officer had powers, which is denied, and that the respondent was allocated such land by a proper authority, the subsequent allocation in a land already allocated to another person must be invalid from inception.

In the circumstances, even if the tribunal believed that, the respondent was properly allocated that land, the issue of double allocation would arise. The tribunal would still be wrong for failure to apply the known principles relevant on issues of double allocation. This court in the case **Victor Sungura Toke Vs. Regina Chaula and 2 others, Land Case No. 27 of 2014, (HCT, Dsm),** observed a general rule of double allocation as I hereby quote: -

> *"Whenever there is double allocation of land, consideration has to be given to the person who was first allocated the land in dispute, unless there is sufficiently cogent and qualitatively good version of the evidence to the contrary"*

The above is known as priority principle. The Court of Appeal in a number of cases has insisted the need to follow that principle. In the case of **Ombeni Kimaro Vs. Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal No. 33 of 2017, (CAT, Dsm)** held:-

> *"The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have title over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other"*

Contemplating deeply on the applicable laws, I have no doubt in my mind, the second allocation of the same piece of land whether by proper or improper authority, yet was invalid in law because the second allocating officer had no land to offer to the respondent. In any event the respondent would not have superior title over the appellant who acquired it three years earlier and no revocation was entered in terms of section 44 of **The Village Land Act [Cap 114 RE 2019].**

Following the heart of sections 110, 111 and 112 of The **Evidence Act** and the methodology laid in the case of **Hemedi Vs. Mohamedi Mbilu [1984] TLR. 113**, the tribunal had to weigh and decide whose evidence is stronger. My scaling of evidence, brings a clear result that, the appellant's evidence sufficed a proof required in civil cases. Had the trial tribunal followed the letters of law, it would have reached to the same finding. Therefore, it was wrong to have allocated the five acres to the respondent without legal authority, worse still in a land already occupied by another person through due process. This ground is therefore meritorious, thus allowed.

In event and for the reasons so stated, this appeal is meritorious, same is allowed save only in ground four (4) which I dismissed it. I therefore, proceed to set aside the judgement and decree of the trial tribunal. Consequently, the appellant is declared the rightful owner of the disputed five acres of farm land which is part and parcel of 15 acres. Considering the circumstances of this appeal and bearing in mind that the respondent acted in believing that he was properly allocated such land, then it is just and equitable to order each party to bear his/her costs.

Order accordingly

DATED at Morogoro in Chambers this 22nd June, 2022

P. J. NGWEMBE

JUDGE

22/06/2022

Court: Delivered at Morogoro in Chambers on this 22nd day of June, 2022 in the presence of Raphael Mathew for Francis Mwita, Advocate for the Appellant and Richard Giray Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

22/06/2021