IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 61 OF 2021

(Original Land Application No. 67 of 2019 District Land and Housing Tribunal for Tarime at Tarime)

GRISELA KAPIS ..... APPELLANT

VERSUS

PETER WARYOBA ..... RESPONDENT

JUDGMENT

7th and 30th March, 2022

F. H. MAHIMBALI, J.:

The appellant is dissatisfied with the findings of the trial DLHT of Tarime which decreed in favour of the respondent over a dispute of the suit land. Whereas the respondent claimed that the suit land is belonging to him having been given by his deceased father during his life time, the appellant on the other hand maintains that the said suit land is hers.

The background facts of the case establish that the respondent who is the son of the late Waryoba Matiko, boarders land with the

appellant Grisela Kapis who is the widow of Kapis Harani. During the life time of the appellant's husband Mzee Kapisi Harani and the respondent's father Waryoba Matiko, there has been a peaceful living over the disputed land. The dispute is said to have arisen in 2018 following the demise of the appellant's husband. The respondent who claims to be given the said land by his late father during his life time, claims that the appellant invaded his land measuring 8 acres. He claimed that the suit land measuring 8 acres is his as given by his late father during his life time. That the said suit land belonged to the father of the respondent has been supported by the testimony of PW2, PW3,PW3, PW4, PW5, PW6 and PW7. All these pointed fingure against the appellant as source of the dispute by invading the land of the respondent by inviting DW2 – Mr. Omoja Silvanus who is a step son of the appellant and makes his living there.

On the other hand, the appellant without establishing how she came into possession of the said suit land, claims that the land in dispute is hers. The respondent is the one who invaded her following the demise of her relatives and husband. She claims that the said land is hers and it is them who welcomed the parents and fore fathers of the respondent to use it and they all lived there peacefully. Just after the

demise of the respondent's father and her relatives and parents, it is when the saga commenced. Without establishing the various cases she won against the respondent, the appellant claimed to have land dispute with the respondent on numerous times over the disputed land and all the time she emerged victorious at Village level, Ward Tribunal and DLHT. She wondered why the said suit was then filed again. She maintained that the suit land is hers. Her claims on ownership of the said land is supported with the evidence by DW2, DW3 and DW4. DW2 appears to be her step son to her husband, testified that the land belongs to the appellant and they are born there. DW3 who was once local leader (Village chairperson in 2009), testified how he recognised that area as belonging to the appellant. Likewise, is DW3 who shortly and without any further description too, he stated that the suit land belongs to the appellant.

Upon hearing of the case, the trial DLHT ruled in favour of the respondent as the rightful owner of the suit land against the appellant. That bemused the appellant, thus the basis of this appeal grounded on six reasons namely:

1. *That, the trial tribunal chairman misdirected himself on points of facts and law to act with a biased mind against*

the evidence of the appellant's witness and thus prejudicing his case.

2. *That, the trial tribunal erred on points of law and facts when it failed to find that the respondent's acquisition of the land was questionable but took it as wholesale to be true and correct.*
3. *That the trial Tribunal misdirected itself to condemn DW2 as a perpetrator of the dispute without establishing negatively the relationship between him and the appellant.*
4. *That since there was no issue as to where the appellant was living, the trial Tribunal erred on points of facts and law to find that by reason of not living in the land dispute, disentitled her from ownership.*
5. *That, the trial chairman misdirected himself on points of law when he failed to scrutinize the evidence fully and exhaustively to come to a conclusion that was analysed effectively and sufficiently.*
6. *That since there was an issue that was framed but not anyhow resolved, the trial tribunal erred to leave it undecided despite evidence being presented in proof of it.*

During the hearing of the appeal, Mr. Baraka Makowe, learned advocate appeared for the appellant whereas the respondent was represented by Mr. Daudi Mahemba, also learned advocate.

Arguing the first ground and the third grounds of appeal together, Mr. Makowe submitted that the trial chairperson discussed in length the

personality of DW2 and therefore departed from the gist of the case. (see pages 4 and 5 of the typed judgment of the trial chairperson). He is of the view that the trial chairperson misdirected his mind and therefore prejudiced the appellant's case (see page 5). As at the locus in quo, it was established that the one who was within the premises of the land in dispute was Silvanus Omoja, therefore as per framed issues of the case, the one who intervened the suit land was not Grisela as ruled but Silvanus Omoja (see page 7 of the typed proceedings) considering the framed issues and what has been decreed by the trial Tribunal.

Submitting on grounds number two, four and six, he submitted that in his general view, the trial chairperson misapprehended the evidence of the case. The respondent is nowhere establishing that he is the heir. None of the witnesses for the prosecution established that the respondent is the heir. He thus wondered if then he had proper locus of the case. Even if the language used was "he was given" but contextually it doesn't suggest so. Furthermore, the trial tribunal's judgment has not evaluated the evidence by the both parties. In his view, there was a failure of justice in this case.

When visiting the locus in quo, the trial chairperson established at page 5 of the typed judgment that the appellant's dwelling houses were

far from the suit land but Silvanus Omoja's dwelling house was within the suit land. On this, he submitted that it is not a requirement of law that owner of the land is supposed to erect building to cover the whole area of the land for it to be lawfully owned by him or her.

In his conclusion, he submitted, it is his firm view that the trial chairperson did not consider the evidence in record. He then called upon this honourable court to revise all the proceedings so that the matter can start afresh.

On the other hand, Mr. Mahemba reacted on the submissions made. He was of the firm view that as per available evidence, the trial chairperson was justified in reaching that verdict and naming DW2 a perpetrator of the dispute. He submitted so because, DW2 is the son to the appellant. As the appellant testified in her testimony that she lives in the disputed land, but when at the locus in quo the appellant was not living there but DW2. Thus, it was right for the DLHT to rule that the appellant is not the owner of that land but the respondent as per available evidence. With this submission it is true that DW2 is the whole source of the dispute.

With grounds 2, 4, 5, and 6 as have been argued generally, he too argued them generally that as the respondent was the rightful owner of the disputed plot, since 1987, he had a good title. He is not the heir but was bestowed so by his father during his life time. All the time there has been peaceful enjoyment of the said land until 2018 when the appellant intervened. He insisted that the respondent was justified to own the said land though not by inheritance but by being bestowed.

On the issue of failure to evaluate the said evidence of the appellant, he admitted that there has not been even the general evaluation of the whole evidence of the case. However, he is of the view that even if this Court steps into the shoes of the trial tribunal, as per available evidence, the verdict will be the same. This is because, the respondent's evidence is solid and watertight.

Regarding the findings at the locus in quo, it is the fact that the appellant was not living there but DW2. This was an obvious fact and not chairman's views. As Grisela (appellant) stated in her evidence that she was living there, but when at the locus in quo was paid, it was established that the appellant is not living there but DW2 (her son).

With the issue of res-judicata, there is no proof if that fact is in record. Thus, it is a misplaced argument. It is merely an afterthought issue by the learned counsel.

He concluded by urging this Court that if there are to be established any irregularities by the DLHT, this Court to have a look at section 45 of the LDCA and consider if the said irregularity has occasioned any injustice.

In his rejoinder submission, Mr. Makowe submitted that what the DLHT's chair remarked is his own finding and not evidence in record. If one peruses the proceedings at the locus in quo, there is nothing of that. However, at page 5 of the judgment, the wording is *"this is my personal findings ...."*. He thus insisted that, it is now important for this court to rule on importance of visitation at the locus in quo.

On the issue of res- judicata, he submitted that though it has not been one of his grounds of appeal, but it being the trial Tribunal, upon hearing that issue of there being similar suits previously dealt with involving these parties on the same plot, would have been inquisitive to know the truth of the claims by ordering production of the copies of the relevant judgment and proceedings to be availed for satisfaction of the

said fact. For not ordering so, it has closed its eyes on important relevant facts.

What is transpired at the locus in quo upon visitation, is so important that is recorded clearly. As per pages 17 and 18 of typed proceedings if one digests clearly, suggests that the said land as belonging to the estate of the deceased (respondent's father). It is thus his observation that had the trial chairperson paid an eye to it carefully, would have established that the respondent's locus over the land is questionable. He further reiterated his earlier submission that if the appellant was ruled to be old enough to invade the suit land but Silvanus Omoja, then the suit was supposed to be against Silvanus Omoja and not the appellant.

In the circumstances of this case, he submitted that the retrial order is so important, this is because the respondent cannot claim land against a stranger party whereas leaving the necessary party – Mr. Silvanus Omoja (DW2).

As what should this Court do on the encountered errors, Mr. Makowe differed with Mr. Mahemba that what is provided under section 45 of the LDCA, saves only two errors namely; "improper rejection or

improper admission of evidence". That said, section 45 of the LDCA is inapplicable in the circumstance of this case to save the encountered errors. He stressed that in the circumstances of this case, the best solution is retrial and directives that the necessary parties be sued.

I have dispassionately considered the submission by both sides. It is now the Court's turn to digest them and make finding as to the meritoriousness of the appeal as argued.

On the first and third grounds of appeal, it is clear that the main controverse of the appellant is on the bias mind of the trial Chairperson against DW2 who is the son of the of the appellant. That, the whole decision by the trial chairperson is almost propped on what has been considered as personal views of the Hon. Trial Chairperson against DW2. This contention has been countered by the respondent's counsel that what has been commented by the Hon. Trial Chairperson in his findings as per page 4 and 5 of the typed judgment, is the truth of the matter. That behind the appellant is this DW2. Therefore, it was right for the Hon. Trial Chairperson to make that finding as per available evidence in record.

I have critically traversed the judgment of the DLHT. The introductory part i.e pages 1-3 is very clear in which the Hon. Trial Chairperson underscores the claims of each party and what the witnesses for each side support the claims for each one. That done, it was expected then the Hon Trial Chairperson basing on the evidence on record to respond the three framed issues which are:

1. *Whether the applicant is the lawful owner of the disputed plot.*
2. *Whether the respondent invaded the disputed land*
3. *Relief the parties are entitled to.*

Unfortunately, instead of answering these three framed issues, the Hon. Trial Chairperson changed the gear, and made the following remarks, I quote:

> *"kabla sijajibu hoja hii naweza kusema kuwa mgogoro huu unachochewa kwa kiasi kikubwa na shahidi wa pili wa mjibu maombi Bw. Silvanus Omoja. Nasema hivyo kwasababu, nimekuwa nikisikiliza kesi hii tangu ilipofunguliwa tarehe 29/10/2019 hadi kufikia hatua ya kuandika hukumu hii. Ukimuangalia mjibu maombi ni bibi wa miaka 94 hivyo kwa hali ya kawaida asingekuwa na ujasiri wa kuvamia ardhi ya mtu yoyote. Lakini tangu kufunguliwa kwa shauri hili tarehe 29/10/2019, Bw. Silvanus Omoja ndie amekuwa akimsindikiza mjibu maombi hapa barazani kitu ambacho*

kwa hali ya kawaida ya ubinadamu ni sawa kumsaidia kulingana na umri wa bibi huyu. Wakati tunaanza kusikiliza mashahidi wa mleta maombi, mashahidi wote sita wa mleta maombi walimtaja Bw. Silvanus Omoja ambae inasemekana alikua anaishi Mwanza na hafahamiki kijijini Masonga kumsahwishi mjibu maombi kuvamia eneo hilo lenye mgogoro ili ampe yeye Bwana Silvanus Omoja aweze kutumia eneo hilo. Kwakuwa Bw. Silvanus Omoja alitajwa na mashahidi wote sita wa mleta maombi na kwakuwa hakuwa sehemu ya wadaawa kwenye shauri hili, baraza liliona busara kwa Bw. Silvanus Omoja apate nafasi ya kujieleza hapa Barazani kuhusiana na tuhuma zinazomkabili na kumshawishi mjibu maombi kuvamia eneo lenye mgogoro. Baraza lilipompa nafasi Bw. Silvanus Omoja, alikana kuhusika na mgogoro huu na kudai eneo lenye mgogoro ni mali ya mjibu maombi.

Siku ya tarehe 5/5/2021, baraza hili lilitembelea eneo lenye mgogoro, cha kushangaza lilimkuta Bw. Silvanus Omoja amejenga kwenye eneo la mgogoro na anaishi hapo. Lakini pia baraza liliweza kuona nyumba na mashamba ya mjibu maombi yakiwa yapo mbali na na yamejitenga na eneo lenye mgogoro. Maelezo ya hapo juu yakiwa ndiyo msimamo wangu naona hoja ya kwanza imejibiwa kwa ufasaha kuwa mleta maombi ni mmiliki halali wa eneo lenye mgogoro baada ya kupewa na baba yake tangu 1987 na kulitumia eneo hilo hadi mwaka 2018....."

My point is here, this comment was not bad to make as basis of discrediting the appellant's case, however he was duty bound to evaluate the case's evidence and say why he thinks DW2 is the perpetrator of the said dispute. By attacking DW2 in his judgment, he personalized so much to the extent of vivid bias. Whereas the verdict would be the same, the legal approach is what matters. I agree that judgment writing is an art, however in reaching your verdict, it is expected that the following feature out: Introduction, Facts, Issues, Law, Application of law to the facts, Ruling, Order (**IFILARO**) or **IFISLADO**: Introduction, Facts, Issues, Submissions, Law, Application of the law to facts, Decisions, Order. In this case, I have not seen how submissions in evidence have responded the issues and the position of the law so as to reach to that conclusion. I thus, agree with Makowe learned advocate that there has not been a serious discussion of the evidence how the same responded the issues on the applicable laws. By saying so, grounds 1, 3 and 5 are answered in affirmative that there has been bias by the trial chairperson and that there has been no clear evaluation of evidence visa vis the framed issues.

On grounds 2, 4 and 6, the general submission has been this that the trial chairperson misapprehended the evidence of the case. The

respondent is nowhere establishing that he is the heir. None of the witnesses for the prosecution established that the respondent is the heir. He thus wondered if then he had proper locus of the case. Even if the language used is "he was given" but contextually it doesn't suggest so. On the other hand, Mr. Mahemba is of the firm view that on the available evidence, the trial chairperson was justified in reaching that verdict and naming DW2 a perpetrator of the dispute. He submitted so because, DW2 is the son to the appellant. As the appellant testified in her testimony that she lives in the disputed land, but when at the locus in quo the appellant was not living there but DW2. Thus, it was right for the DLHT to rule that the appellant is not the owner of that land but the respondent as per available evidence. He is thus of the firm view that DW2 is the whole source of the dispute.

In my digest to these three grounds of appeal, it is true that there has been no legal evaluation in reaching that verdict. However, if the appellant is aggrieved by the verdict of the case on assumption findings that the one who was in suit land is DW2 and not the appellant, it is astonishing then to find her being aggrieved if that is true. Unless the assumption by the DLHT is true that behind the appellant is DW2. Otherwise, it was not expected for the appellant to be aggrieved if the

suit land is owned by DW2, suggesting that it belongs to him and not her. By the DLHT's findings that the suit land as per available evidence belongs to the respondent, why then being aggrieved? On the other hand, I agree that for a suit land to be owned or occupied, it is not necessarily that it should all be built or dug the whole of it. Ownership of land is not necessarily determined by occupation or settlement over the whole of the land claimed to be owned. The same is established by possession, however active use of the land is necessary especially on un-surveyed land for it to be safe from adverse possessors or land grabbers.

On the issue whether the respondent had locus standi to claim the suit said land on the basis of the fact that it belonged to his father, I am of the different view from that of Mr. Makowe. I say so, basing on the fact that there has been no adverse evidence on the fact that the said land was originally owned by Mr. Martin Kanga, then waryoba Matiko who is the father of Peter Waryoba (the respondent herein). As it is the testimony of Mr. Peter Waryoba (PW1) that he was given the said land by his father during his life time, then in the absence of adverse evidence against it, as between the appellant and the respondent the issue of locus standi cannot stand. The dispute should have been

between respondent and his relatives if there was to happen an issue of ownership between them. So far, I find things settled on that aspect. It is merely a quest to Mr. Makowe.

Having traversed all the grounds of appeal, I now revert to an important question what then should this Court do in the circumstances of this case on the encountered deficiencies. Should retrial be the course as I am invited to nullify the judgment and orders of the trial DLHT or I should step into the shoes of the trial tribunal and make findings accordingly? I resort to the latter, that for the interests of justice and in determination of the rights of the parties, evaluation of the evidence is the right course. In so doing, if retrial is necessary, it will be directed properly in the due course.

I have digested the appellant's case at the DLHT, in essence DW1, DW2, DW3 and DW4 support the averment that the land belongs to the appellant. However, none of them says how the said appellant obtained the said land. There is no any tangible evidence explaining the manner on how the said land in dispute owned by the appellant but under active use of DW2 came into her possession. Is it by inheritance, bestowment, purchase or allocation by the relevant authority? None is said on it.

However, on the other hand, the respondent through PW1 – PW7, there is concurrent evidence that connects respondent and ownership of the suit land as was originally owned by the respondent's father before it became under full control of PW1 (the respondent). How he came to posses it, PW1 says it was bestowed to him by his deceased father during his life time. By being bestowed, suggests giving someone something that is otherwise likely to fall into probate administration upon the owner being demised. On that basis, I am confident that the respondent in respect of the suit land has weightier evidence than the appellant. I say so basing on the fact that, in civil claims, a fact is said to be proved upon establishment on a balance of probability that it exists (see section 3(2)b of the Tanzania Evidence Act, Cap 6, R.E 2019). In the current matter, I am of the considered view that, the respondent proved ownership against the appellant. Only a party whose evidence is heavier than the other, is the one who must win and not otherwise (See also **Hemed V. Mohamed Mbilu** [1984] TLR 113). The issue of *resjudicata* purportedly raised by Mr. Makowe, would have made sense if had there been establishment of the said fact. The law is, who alleges must prove (Section 110 – 112 of the Tanzania Evidence Act, Cap 6 R.E 2019). Be it reminded that, a court of law is no one's mom, but a temple

f justice. For justice to be seen done, there be evidence by both arties. As it is civil case, the law is *"proof of a fact in a balance of robabilities"*. Has there been proof of the fact of resjudicata? For it to e established, there ought to have been proof as per law. (See **lelisho Sindiko vs Juliua Kaaya** (1977) L.R.T. 18) otherwise, a good gal advice is *"in dubio pro reo"*, that is, where there is doubt, don't act. he DLHT was justified to refrain from acting in the absence of proof iat the suit had already been determined as alleged. As it was a plea of irisdiction, it could have even been pleaded now at this Court (at ɔpeal level) upon production of that proof as alleged. That has not een done either.

However, in consideration of the evidence of DW2 that the suit nd belongs to the appellant but himself was spotted being occupying it ı the back of the appellant, might attract a serious legal concern in xecution process, should the respondent wish to enjoy the full fruits of s decree. In my considered view, so long as the appellant appears to aintain ownership of the same suit land and as the said DW2 seems to ɛ the son of the appellant, I am of the legal stance that as between the ɔpellant and the respondent, the ownership of the said land has been on preponderance of probability been established to vest on the

respondent. Should there be any legal claim by the anyone else against the respondent on ownership claim, the same shall be dealt with accordingly.

That said, the appeal is dismissed in its entirety with costs.

DATED at MUSOMA this 30th day of March, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered this 30th day of March, 2022 in the presence of Respondent. Mr. Gidion Mugoa, RMA and Appellant being absent.

Right of appeal is explained.

F.H. Mahimbali

Judge

30/03/2022