THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

LAND APPEAL NO. 34 OF 2021

(***Originating from the District Land and Housing Tribunal of Mbeya District at Mbeya Application No. 193 of 2016***)

FRANK ROMAN MATEMU ..... APPELLANT

VERSUS

MASHIMU DADI MABOGA & 17 OTHERS ..... RESPONDENTS

JUDGMENT

Date of last order: 17/06/2022
Date of judgment: 24/08/2022

NGUNYALE, J.

The application No. 193 of 2016 which was decided on 3rd day of March 2021 by the District Land and Housing Tribunal (DLHT) for Mbeya at Mbeya is the subject matter of this appeal. The appellant claimed to be the owner of farm Land No. 1188 located at Kapunga Village in Mbarali District within Mbeya Region which he acquired from the 19th respondent and subsequently he was issued with the certificate of occupancy by the 20th respondent. The appellant alleged that the respondents encroached part of the suit land, thus he preferred the very application before the DLHT seeking to be declared the lawful owner of the suit land. The

respondents are HASHIMU DADI MABOGA, YOBU SIKILO, NELSON ZABRON SIKILO, AMAN NGULO, ALLY YUSUPH ALLY, JUMA NJOYO, LAMA Y. KILEMILE, PROSPER KAJUAMBALINA, HUZUNI KILEMILE, BRAISON MWAMELE, RASHO HAMISI, MOHAMED PELELA, WILLE MWANSANGA, SHUKU MWANGALA, DAUDI MSIGWA, DAMASI MSIGWA, CHRISTOPHER MBILINYI, UKWAVILA VILLAGE COUNCIL, KAPUNGA VILLAGE COUNCIL and MBARALI DISTRICT COUNCIL, hereinafter are referred to as the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th,9th,10th,11th,12th,13th,14th,15th,16th,17th,19th and 20th respondents respectively.

The DLHT conducted full trial which was concluded in favour of the respondents. The Tribunal found that the suit land was the lawful property of the respondents. It was the reasoning of the trial tribunal that the suit land was allocated to the respondents prior to the time alleged by the appellant that he was also allocated the same land by the 19th respondent, therefore the granted right of occupancy granted to the appellant was unlawful because it was illegally issued over the land rights of the respondents.

The appellant was aggrieved with the decision of the DLHT, he preferred the present Land Appeal No. 34 of 2021 basing on nine grounds of appeal per amended memorandum of appeal filed on 26th October 2021; -

1. *That the trial tribunal erred in law and fact to declare the respondents as the legal owners of the land in dispute despite of the presence of evidence proving to the contrary.*
2. *That the trial tribunal erred in law and fact for failure to evaluate evidence which could prove the case in favour of the respondents.*
3. *That the trial tribunal erred in law and in fact for entertains new and or other matters which were not the fact in issue something which led to unjust decisions.*
4. *That the trial tribunal erred in law and in fact for pronouncing judgment which is ambiguous, as a result the judgment does not solve the issue of ownership of the land.*
5. *That the learned trial chairman ruled in forgetfulness by failing to declare the respondents as trespassers since the suit land has been lawful owned by the appellant way back 2005 up to 2016 without any disturbance.*
6. *That the tribunal failed to make proper analysis of the evidence both during the proceedings and that obtained to the site which resulted the doubtable decision.*
7. *That the trial tribunal did not take into account the doctrine of adverse possession.*
8. *That the tribunal misdirected it self in believing the respondents evidence in spite serious discrepancies in them.*

The appeal was disposed by written submission as proposed by the parties and blessed by the Court. The appellant was dully represented by Irene Mwakyusa learned advocate. The 1st, 2nd and 3rd respondents were represented by Marry Paul Gatuna (Advocate) while the 4th , 5th , 6th, 7th, 8th, 9th,11th, 13th, 14th, 15th, 16th and 17th respondents were enjoying the service of Ambroce Menance Nkwera (Advocate) also the 18th to 20th respondents were ably represented by Helman Mpogole learned State

Attorney. All of them complied to the scheduling order for filing the respective submissions.

Counsel for the appellant dropped 4th, 5th and 7th grounds of appeal and submitted only on the remaining grounds of appeal.

The first and eighth grounds of appeal were argued jointly that the trial tribunal decided contrary to evidence on the record which reveals that the appellant was legally allocated the suit land by Kapunga village Council and thereafter the relevant authorities granted the right of occupancy to the appellant. The said fact is confirmed by the testimony adduced by the appellant and DW11 Clement Rajab Mgaya. The trial Chairman did not question the authenticity of the right of occupancy issued to the appellant about its legality. The testimony of DW13 Joel Isaya was clear that one piece of land cannot have customary right of occupancy and granted right of occupancy. The calling of the children of the appellant to testify was not necessary because what they would have testified was proved by documentary evidence and other witnesses. If the trial Chairman would have considered well exhibit No. P1 certificate of occupancy and other evidence would have arrived at the different decision which most probably would have been in favour of the appellant. It was their opinion that the judgment of the tribunal was not based on the evidence adduced in court.

He cited the case of **Elias Stephen vs Republic** (1982) TLR 313 where the Court inter alia stated that findings of fact and conclusion of the court in a case must be based on the evidence adduced in court. He invited the Court to find that the appellant had heavier evidence than the respondent. The appellant is entitled to be declared as the true owner of the suit land and not the respondents.

The 2nd and 6th grounds of appeal were also argued together. The learned Counsel for the appellant submitted that it is imperative for the trial tribunal to evaluate and analyse the entire evidence as a whole before reaching its decision. In this case the leaned Chairman did not analyse evidence thus he reached to a wrong decision basing on mere words of the respondents. More prominent evaluation is required. The learned Chairman ruled out is favour of the respondents only based on the ground that the suit land is situated at Ukwavila village while it is clear from the evidence of DW13 that the determination of the proper boundary between Kapunga village and Ukwavila village did not change the ownership of the individuals over the land. He was of the view that this Court as the first appellate Court may entail a critical review of the material evidence on record in order to test the soundness of the trial Court's findings. He

referred the Court to the case of **Deemay Daati and 2 others vs. Republic** (2005) TLR 132 where the Court of Appeal Stated; -

> *"The learned Judge on first appeal was entitled to re-evaluate afresh the evidence and came to the conclusion that the appellants were improperly acquitted by the trial Court"*

The appellants Counsel submitted that the Court as the first appellate Court is entitled to look at the evidence and make its own findings.

On the third ground of appeal the learned Counsel submitted that new issues i. e extraneous matters were illegally entertained. He invited the Court to allow this appeal.

The learned Counsel for the 4th to 17th respondents except the 10th respondent submitted in reply to the appellants submission. Likewise, he preferred to respondent to the 1st and 8th grounds of appeal together. He submitted that the appellant failed to prove that he was a lawful owner of the suit land and further he failed to prove as to where the suit land is located between Ukwavila village and Kapunga village. The appellant failed to prove the case on the balance of probability. The testimony of PW1 was to the effect that he bought the suit land from Kapunga village and he bought only 50 acres and 200 acres were bought for members of his family, unfortunately none of the members of the family came to testify to that effect. It was the view of the learned Counsel that it was a

big error on the eyes of the law. The appellant failed to call material witnesses who could prove the same.

In his further submission the learned Counsel for the 4th to 17th respondents stated that the testimony of DW11 Clement Rajabu Mgaya which the appellant Counsel referred to be the evidence to be relied upon by the appellant was wrongly assumed. DW11 did agree on the disputed land being located at the village of Ukwavila and not at Kapunga village and he also stated that the suit land belongs to the respondent. Henceforth the averments by the Counsel of the appellant that the land belonged to the appellant is out of context but also DW11 testified to the effect that the suit was located to Ukwavila village and not at Kapunga village. On failure to call a material witness the appellant stated further that it was held in the case **of Mustafa Ebrahim Kassam t/a Rustam and Brothers v. Maro Mwita Maro**, Civil Appeal No. 76 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 17 when quoting the decision of the case of **Hemed Said v. Mohamed Mbiru** (1984) TLR 113 that; -

> *"where for undisclosed reasons, a party fails to call a material witness on his side, the Court is entitled to draw an adverse inference that if the witness were called they would have given evidence contrary to his interest"*

The appellant has submitted that customary right of occupancy and granted right of occupancy cannot exist at per the position which the respondent states that is an obvious assertion. The evidence on record state that the appellant was allocated the suit land in 2005 at Kapunga village but the respondents here in testified to the effect that their originality in relation to the suit land goes back to 2002 before the appellant herein was located and the appellant had yet registered and obtained the alleged right of occupancy in the land. The right of occupancy was illegal obtained by the appellant as critically analysed by the trial Chairman when analysing evidence.

On 2nd and 6th grounds of appeal the respondent was of the view that the DLHT analysed and evaluated the evidence which was to the effect that the respondents were allocated land by the village allocating committee of Ukwavila village and paid necessary fees around 2002. Therefore, they owned the land before the appellant who claim to have been allocated in 2005 by Kapunga village. The trial Tribunal made a critical analysis on evidence on record and nothing came outside the evidence tendered before the tribunal. The appellant witnesses PW2 and PW3 testified that the appellant only prayed to be granted 50 acres of the land by the Kapungu village and not 250 acres but they were only mere statements

without evidence which shows that the appellant was given 50 acres by Kapungu village due to that the tribunal failed to make analysis on mere words of PW2 and PW3. The appellant failed to prove how he obtained 200 acres because the allocating authority as testified by PW2 and PW3 that they only gave the appellant 50 acres. The averments raised by the appellant that his family was located 200 acres evidentially was not proved. The learned Counsel stated that the respondent evidence was water tight to the standard required in civil cases, which is on balance of probability. The appellant certificate was not lawful obtained as in his testimony he averred that he was only allocated 50 acres of the land but to the dismay of the tribunal he tendered exhibit P1 which had 250 acres and claimed that 200 acres belonged to his family. Unfortunately, the family members were not called by the appellant to testify that they were allocated such 200 acres of land.

The respondent Counsel cited the case of **James Makundi vs. Permanent Secretary Ministry of Lands, Housing and Human Settlement Developments and 2 Others**, Civil Appeal No. 181 of 2021, Court of Appeal of Tanzania, at Dar es Salaam (unreported) where it was observed; -

> *"In our considered view, when two persons have a competing interest in a landed property, the person with a certificate thereof will always be taken to*

be a lawful owner unless it is proved that the certificate was not lawful obtained"

The respondent cement that the appellant obtained the said certificate of title unlawful.

In respect of the 3rd ground of appeal which allege that the tribunal relied on extraneous matters the Counsel for the 4th to 17th respondents submitted that the appellant Counsel has not elaborated those new issues. It was the view of the learned Counsel that the tribunal Chairman managed to contain the issues raised and arrived at fair decision basing on the testimony of the witnesses before the tribunal.

Ms. Mary Paul Gatuna for the 1st 2nd and 3rd respondent submitted in respect of the 8th and 1st grounds of appeal that the Court should disregard the 8th ground because the appellant failed to establish the alleged discrepancies in the evidence on record. On the 1st ground she submitted that the appellant failed to establish that he proved his claim to the satisfaction of the tribunal that he was allocated the suit land by Kapunga village council. The allegations that he was allocated the suit land by Kapungu village were merely made by the appellant and his witnesses without proof.

About the 2nd and 6th grounds of appeal in which the appellant complain that the tribunal did not analyse and evaluate evidence Ms. Gatuna submitted that the evidence was well analysed. Such analysis found that **one**, the evidence of the respondent was heavier, **two**, the appellant has mere allegations that he was allocated the suit land by Kapunga village while the heavy evidence proved that the land was allocated by Ukwavila village, Kapunga village had no capacity to allocate land of another village. **Three**, the appellant contradicted himself about size of the land he was allocated, he said he was allocated 50 acres only and 200 acres was for the family but the analysis of the DLHT found that he deserved to claim 50 acres and not 250 acres, **four**, the respondent were allocated the suit land in 2002 by Ukwavila village prior to the alleged allocation to the appellant. The first to be allocated stands as the lawful beneficiary. She cited the case of **Helena Elias Choma vs. Magambo Makongoro**, Land Appeal No. 165 of 2019 (unreported) it was stated; -

> *"In other words, if rights are legally created in favour of two persons at different times, the one who was the first in time should have advantage in law ... I dont therefore associate myself with the decision made by the tribunal in respect of this principle"*

Five, if it is true that the appellant was allocated the suit land by Kapunga village, then the allocation in question was not proper because the same land was already allocated to the respondents as correctly analysed by

the trial tribunal. Because allocation and survey to the land owned by another person without his permit is illegal. In its analysis of evidence, the tribunal stated in part; -

> *"... ni wazi kuwa upimaji juu ya milki ya mtu mwingine bila kibali chake ni haramu kwa kuwa wadaiwa walikuwa ni watu wa kwanza kupewa na walipewa na mamlaka sahihi."*

On the third ground where the appellant laments that the trial tribunal decided basing on extraneous or new matters Ms. Gatuna stated that the appellant has not pointed out those extraneous matters therefore the ground is worth of being dismissed.

Mr. Helman Mpogole learned State Attorney submitted in favour of the 18th and 20th respondents. His submission in all aspects was supporting the position submitted by other respondents.

The appellant had an opportunity to rejoin over the submission of the respondents. He reiterated what he said in submission in chief whilst he invited the Court not to regard the submission by the Mr. Mpogole and Mr. Ambroce M. Nkwera which according to him was a copy and paste reply submission from each other because such practice is not allowed in the legal practice, he prayed the Court not to take into consideration the respective submissions.

After hearing the rival submission by the parties, the Court is bound to rule out as to whether the trial Tribunal was right to rule in favour of the respondents. In determining the appeal, the 1st and 8th also the 2nd and 6th grounds of appeal will be considered together and the 3rd ground will be dealt independently.

Before I start answering the grounds of appeal, I wish to commend one thing about the lamentations of the appellants Counsel that the submission by the Mr. Mpogole and Mr. Ambroce M. Nkwera were a copy and paste reply submission from each other. The appellant has not relied on any law which prevent such practice, after all he has not even laid foundation that such practice existed. Lack of legal stance on his lamentations I refrain from determining the lamentations because they have no effect to the root of the appeal.

Starting with the 1st and 8th grounds of appeal these grounds of appeal are centred on the issues of evidence. The appellant complains that there was enough evidence for the trial Tribunal to decided in his favour but the tribunal could not consider it well instead it misdirected itself in believing the respondents evidence in spite of presence of serious discrepancies. The appellant submitted that his evidence proved that he was the lawful owner of the suit land which he was allocated by Kapunga village in 2005.

He was of the view that his evidence and the evidence of DW11 proved the fact. The respondent's submission does not support the arguments of the appellant. All respondents were of the view that the evidence of the appellant could not prove ownership of the suit land because he could not bring material witnesses alleged to be co-owners of the suit land i. e members of his family. He could not prove location of the suit land between Ukwavila village and Kapunga village. The respondents were allocated the suit land since 2002 prior to his allegations of being allocated by Kapunga village in 2005.

I had time to read thorough the evidence and noted that the appellant evidence cannot be the basis for proving the case on the balance of probability because his testimony is to the effect that he was allocated 50 acres by Kapunga village and other land was for members of his family but exhibit P1 the certificate of occupancy is for ownership of more than 200 acres. In the circumstance of such anomaly his evidence cannot prove ownership of 250 acres, I therefore agree with the respondents that he failed to bring material witnesses to prove his assertion that other members of his family are also owners of the suit land. In the other side there is evidence that the respondents, especially the 3rd respondent was allocated the suit land since 2002 prior to the time which the appellant

alleged to have been allocated. Likewise, the 6th respondent bought the piece of land from the 4th respondent. The 4th respondent also was allocated in 2002. The other evidence of DW9 proves that he was allocated 10 acres in 2002 and he subsequently sold the same to the 1st respondent. The appellant alleges that he was allocated around 2005. This piece of evidence convince that the appellant was allocated land which was already in the hands of other respondents. It is a principle of law that the first to be allocated is a lawful owner unless there is evidence to the contrary. The case of **Helena Elias Choma** (supra) as cited by the respondents is relevant that the person who was the first to be allocated stands to an advantageous position.

The 2nd and 6th grounds of appeal contain lamentations of the appellant that the trial tribunal did not evaluate evidence as a result it ended with a wrong decision. It was the position submitted by the appellant that the DLHT ruled basing on the arguments that the suit land is located at Ukwavila village which is wrong. The appellant invited the Court to re-evaluate evidence. All respondents were of the different view. Each of the respondents Counsel admitted that the Court has authority to re-evaluate evidence but their stance was that the trial Tribunal subjected evidence to proper evaluation and ended to a correct finding. It was the view of

the respondents that proper analysis was done and it was proved that the respondents were allocated by Ukwavila village council in 2002 while the appellant alleges to have been allocated later in 2005.

The Court is of the informed opinion that the trial tribunal subjected evidence to proper evaluation and ended with a balance decision as submitted by the respondents. The evidence of the appellant could not prove that he was lawful allocated the suit land. His evidence left a lot to be desired, for example why the members of the family were not called to prove that they were allocated such land and why he was given a certificate of occupancy for the whole land while the village council had authority to grant only 50 acres. PW2 testified that the applicant was allocated 50 acres only, therefore, DLHT was right to rule in favour of the respondents basing on evidence before it.

In the proceedings of trial Tribunal, there Is no way this Court can say that the appellant proved ownership of the suit land. In the case of **Khalfan Abdallah Hemed Vs Juma Mahende Wang'anyi**, Civil Case No 25 of 2017 (unreported) when adopting the principle laid in the case of **Hemed Said Vs. Mohamed Mbilu** [1984] TLR 113, the court held: -

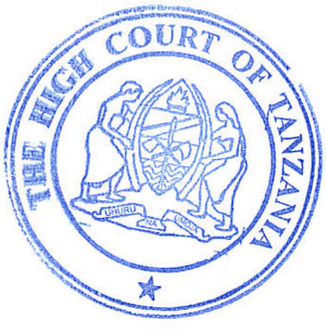
> *"The person whose evidence is heavier than that of the other is the one who must win"*

Similar to this appeal, the testimony adduced by the respondent was heavier and reliable than that of the respondent. The trial Chairman directed properly his minds to the evidences and applicable laws and he ended with a correct decision in favour of the respondents. I have no good reason to fault the findings of the trial tribunal.

The argument that the tribunal decided basing on extraneous matters I think this is not the matter to detain long the Court. The appellant could not point out the alleged extraneous matters to be considered during determination of the appeal. Therefore, this ground of appeal is unmerited.

In the end result I think the tribunal was justified to end up with the decision in favour of the respondents. The appeal is hereby dismissed with costs for want of merit.

Dated at Mbeya this 24th August 2022.



D. P. Ngunyale
Judge