THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 62 OF 2021

(*Originating from the District Land and Housing Tribunal for Mbeya in Application No. 267 of 2019)*

GERALD CHIKWEO .....APPELLANT

VERSUS

ROZI MKWAMA .....RESPONDENT

JUDGMENT

Date of last order: 8th July, 2022

Date of judgment: 31st August, 2022

NGUNYALE, J.

The appellant GERALD CHIKWEO is in this Court challenging the judgement and decree of the trial Tribunal over a piece of land measure ¾ acres located at Mtamba village within Mbarali District. The respondent is the decree holder over the suit land by virtual of the judgement and decree of district Land and Housing Tribunal of Mbeya at Mbeya pronounced on 31st day of March 2021.

The disputants are struggling in court over the suit land each side claiming ownership. While the appellant claim to be the rightful owner by virtual of

being allocated by the village authorities way back in 1965 when he was 18 years old, the respondents claim ownership after she bought the same way back in 1982 from DW2 Dora Senguda and she has been using it undisturbed throughout until the dispute arose in the year 2018. Sometimes In year 2018, the appellant instituted a land dispute In the Ward Tribunal but later in 2019 he instituted in the District Land and Housing Tribunal whose decision is the subject of this appeal. The appellant had three witnesses, while the respondents had three witnesses also. Upon considering those testimonies the trial Tribunal ruled in favour of the respondent that; -

> *"kutokana na ushahidi huo baraza limefikia maamuzi kuwa madai haya hayana msingi. Ardhi yenye mgogoro ni mali halali ya mdaiwa Rozi Mkwama. Mdai hakuthibitisha vilivyo kuhusu mipaka halisi kati yake na mdaiwa na kama mdaiwa alivuka Kwenda kwa mdai. Kusosekana kwa ushahidi huo kunafanya maelezo ya mdai kukosa uzito.*
>
> *Kwa misingi hiyo nakubaliana na maoni ya wazee wa baraza hili tukufu walioshauri kuwa;*
>
> *'Naona shamba lenye mgogoro apewe mdaiwa Rozi Mkwama'*
>
> *Pia Vivian Chang'ombe alishauri kuwa;*
>
> *'shamba lenye mgogoro apewe madaiwa Rozi Mkwama'*
>
> *Kwa misingi hiyo madai haya yametupiliwa mbali. Mdaiwa ametangazwa kuwa mmiliki wa sehemu yenye mgogoro. Gharama za shauri zitalipwa na mdai."*

That being the final verdict of the trial Land Tribunal, the appellant exercised his statutory rights to appeal to this court. With assistance of his advocate Jackson Abraham Chaula, came up with six grounds of appeal, quoted hereunder:-

One, that the trial tribunal erred in law and facts for failure to consider the appellant's case.

Two, that the trial tribunal erred in law and facts to rule in favour of the respondent who failed to describe the boundaries of the suit land.

Three, that the trial tribunal erred in facts and law for relying on the contradictory evidence on the part of the respondent.

Four, the trial tribunal erred in law and facts for failure to order to join the necessary party namely Dora Sigunda.

Five, that the trial tribunal erred in law and facts for failure to analyse the evidence ion record.

Sixth, that the trial tribunal erred in law and facts for relying on the principle of adverse possession to the detriment of the appellant.

On the hearing of this appeal, both parties were represented by learned advocates. While the appellant was represented by Jackson Abraham

Chaula learned counsel, the respondents were represented by Ladislaus Rwekaza learned advocate.

Mr. Chaula argued the 1st, 2nd and 5th grounds of appeal together. He submitted that there is no doubt that the suit land belongs to the appellant as attributed by strong evidence adduced by PW1(the appellant), PW2 (John Yombo) and PW3 Daniel Zuberi. All witnesses were at the common stand that the disputed land belongs to the appellant as he was allocated by the members of the land committee under Chief Wanzagila since 1965 and he left it to be used by his sister without interference for all that time. The respondent started fracas by interfering the appellants land in 2018. It is the duty of the court to first collect, analyse and assess the evidence to see how far it touches a person. To bolster the point of analysis and assessment of evidence the appellant counsel cited the case of **James Bulolo & Another vs R** (1981) TLR 283 and the case of **Hussein Idd & Another vs R** (1986) TLR 166. The trial tribunal was to consider the evidence in detail.

On the 6th ground of appeal, the appellants' counsel submitted that the tribunal wrongly decided in favour of the respondent who said that she bought the land in 1983 while no proof was associated by her version. Adverse possession is in favour of the appellant who owned since 1965.

On the 2nd and 4th grounds of appeal he submitted that the responded failed totally to explain even the boundaries between the appellant and her. The claim of the appellant is about ¾ acres which the respondent has encroached. The appellant's sister was in use of the same without interference for the whole time till fracas brought by the respondent. The trial tribunal failed to order the necessary party to be joined i. e DW2 who alleged that she sold the suit land to the respondent. The counsel ended by inviting the appellate Court to allow the appeal with costs.

The respondent counsel submitted that the contention that the trial tribunal failed to analyse evidence is an afterthought because the Tribunal properly evaluated and analysed the evidence of both the appellant and the respondent herein. The judgment is very clear about evaluation of evidence of both parties. The appellant came with two contradictory positions about land allocation. In one side he says he was allocated in 1965 by Chief Wanzagila and on the other side he says he was allocated by five members.

It was the further submission by the respondent counsel that the appellate Court is invited to draw an adverse inference that if members of the land committee were called, they would have given evidence contrary to the appellants interest and probably he would have revealed the bare fact

that the respondent is the lawful owner of the suit land as the tribunal properly decided in favour of the respondent. He cited the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113 in which it was hereunder held; -

i. N. A

ii. In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of evidence.

iii. Where for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interest.

In the circumstance he submitted above he prayed the Court to dismiss the 1st 3rd and 5th grounds of appeal and the judgment and decree of the trial tribunal be upheld.

On the complaint that the evidence was not evaluated, the respondent counsel submitted that the first appellate Court has power to re-evaluate the same. According to him the principle was observed in **R. D. P Pandya vs Republic** [1957] EA 336 that the court may conduct what is equated with re-hearing where the court is duty bound to re-evaluate the entire evidence on record.

In further hearing the respondent counsel on the 6th ground of appeal that the trial tribunal erred to find that the respondent bought the suit

land without proof of the same. The respondent and her witnesses were consistent, concrete and the evidence were water tight.

The appellant concluded his submission by blaming that the trial tribunal failed to join the necessary party one Dora Singunda (DW2) and without explaining how Dora Sigunda came into possession of the suit land. It was the view of the respondents that misjoinder or nonjoinder of the parties is not fatal as rule by the Court of Appeal of Tanzania in the case of **Abdi M. Kipoto vs Chief Arthur Mtoi**, Civil Appeal No. 750 of 2017 Court of Appeal of Tanzania at Tanga (unreported). In the present appeal the party complained to be joined as the necessary party was Dora Singunda who was called as the witness (DW2) by the respondent thus being called as a witness his role to be joined as the necessary party was discharged because she could have nothing to tell the court other than what she testified as a witness that she is the one who sold the suit land to the respondent in 1982.

In rejoinder the appellants counsel appreciated the position of the respondent that re-evaluation is within the ambit of the first appellate Court. It was their view that when the entire evidence is evaluated clearly by the Court, then the appeal will be allowed.

In order to adequately determine the present appeal I wish to rely on the following issues; -

i. *Whether the tribunal evaluated evidence of both parties*
ii. *Whether there was non joinder of necessary party.*

Starting with the first issue, this essentially deals with the burden of proof under sections 110 and 115 of the Law of Evidence Act [Cap. 6 R.E. 2022] enacting that the burden of proof lies on the person who alleges. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case. See the case of **Anthony M Masanga v Penina Mama Ngesi and Another,** Civil Appeal No. 118 of 2014 (unreported),

Equally important is the cherished principle of law that parties are bound by their pleadings discussed in various cases. See **The Registered Trustee of Islamic Propagation Centre (IPC) vs The Registered Trustees of Thaaqib Islamic Centre (TIC),** Civil Appeal No. 2 of 2020 (unreported).

In this appeal, it was the appellant who had burden of proof because is the one who filed the application in the Tribunal. The appellant's evidence was that he was allocated the suit land in 1965 by five members, at the same time he said he was allocated by leaders of wazangira. During submission he stated that he was given by chief wazangira. In the application it was pleaded that since being allocated the suit land was in use by his sister until 2010. On the other hand, the respondent case was that she bought the suit land from Dora Senguda in 1982 and since then has been in occupation. The seller supported the evidence of the respondent.

During judgment the chairman analysed and weighed evidence of both parties and found that of the appellant has not used the suit land directly rather his sister. The tribunal further found that the appellant's evidence contained some contradictions on who actually allocated the land to him. This piece of evidence was weighed against that of the respondent who was found to be in actual possession of the land and that her evidence was straight without contradiction.

Having considered the above, the chairman reasoned that the appellant was not in actual possession compared to the respondent whose evidence proved that since 1982 has been occupying and using the suit land.

Although there was no evidence on appellant being allocated the suit land as alleged, still his ownership could have been strengthened by being in actual possession. The respondent asserted that since 1982 has been in use and occupation while the appellant failed to prove his actual possession.

Before I start to consider the appeal, it is important to note the facts which are not in dispute. From the testimony of both parties, it is not in dispute that the appellant and the respondent are owning farms at Uturo Mtamba village. Those farms are sharing boarders. The appellant PW1 testified that the respondent Rose Mkwama is one of his neighbours to the farm who later exceeded ¾ acres to his farm. The appellant farm measures 5 acres but she encroached ¾ of it. Rozi Mkwama (DW1) testified that the applicant's sister was farming land of Gerald Chikweo (the appellant) where they share boundaries. The only dispute is whether the respondent encroached the appellants portion measured ¾ acres.

The analysis and reasoning of the trial tribunal went short because the learned Chairman could not consider and evaluate well the evidence of the appellant. The appellant testified that he was allocated in 1965 his land which include the suit portion. The alleged contradiction between the Chief Wanzagila and the five members is not the contradiction which goes

to the root of the fact that he was allocated land in 1965. The issue of continuous occupation has been well stated in the testimony of PW1 the appellant and PW2. The appellant's sister was using the suit land for a long time till 2010 when she died. The fact that the suit land was left to be used by the appellants' sister does not mean that the appellant was not in occupation of the same. The respondent (DW1) in her testimony conceded that the appellants' sister was farming there and she later passed away. During cross examination PW1 said that his sister never became the owner of his land. PW2 testified that he was leased the suit farm for two years between 2011 and 2012 by the appellant, for such period of two years he was in use of the suit land without any interruption from anybody including the respondent. The respondent did not cross examine or testify in her testimony on this fact that PW2 leased the suit farm for two years 2011 and 2012 without any interruption and he used to see the respondent to the southern part of the suit land. I therefore agree with the appellants counsel that the evidence of the appellant proved the case on the balance of probability that the suit land was a property of the appellant. The fact that he was allocated is not in dispute because it is not in dispute that the appellant was owning land there from such premise I thus ruled that the alleged contradiction about allocation does not go to the root of the case. The evaluation done by the Tribunal

failed to consider properly the fact that the appellant leased the suit land for two years without interruption and her sister was in use of the appellants' land including the suit portion without any interruption. To that end, I am settled that the evidence of the appellant was watertight compared to the respondent's evidence.

After a thorough perusal of the proceedings of trial Tribunal, there Is no way this court can say that the respondent proved ownership of the piece of land measured ¾ acre. 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** (supra), 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 appellant was heavier and reliable than that of the respondent. Had the trial Chairman directed properly his minds to the evidences on record and applicable laws, obvious would have decided otherwise, than what he did.

With regard to second issue non-joinder of necessary party. The appellant complained that the seller Dora Senguda was not joined while the respondent state even if the buyer was to be joined the flaw was cured

by her being called as witness. Indeed, under Order 1 Rule 9 of the Civil Procedure Code [Cap 33 R: E 2022] no suit is to be defeated only for reason of non-joinder. In the present case, it is pertinent to consider that non-joinder of parties has been raised at the appellate stage because it was not considered at the trial court. At this stage the Court cannot interfere and order for the name of any party to be joined where it finds to be just and necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit.

However, it is important to also take into account the fact that each case has to be determined in accordance with its peculiar circumstances. See the case of **Stanslaus Kalokola v Tanzania Building Agency and Another,** Civil Appeal No. 45 of 2018.

In the present appeal upon going through evidence of both parties this court is of the view that the said Dola Segudo had nothing peculiar to make her a party. That said the second issue is answered in negative and the complaint of the appellant is unmeritorious because non-joinder cannot defeat the suit by any means.

Having done and said, this appeal has merits it is hereby allowed, I proceed to quash the decision of the trial Tribunal and order that the

appellant is the lawful owner of the suit land. Costs be borne by each party.

Dated at Mbeya this 31st day of August 2022.

D. P. Ngunyale
Judge