IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

MISC. LAND APPEAL NO. 42 OF 2020

(Originating from Rukwa District Land and Housing Tribunal Land Appeal No. 3 of 2020 Sumbawanga Asilia Ward Tribunal Land Appeal No. 37 of 2020)

WILLIAM KIPE .....APPELLANT

VERSUS

SPECIOZA MAJURA.....RESPONDENT

JUDGEMENT

Date of Last Order: 26/ 07/ 2022

Date of Judgement: 22/09/2022

NDUNGURU, J

This is a second land appeal. The matter originates from Land Dispute No. 3 of 2020 of Sumbawanga Asilia Ward Tribunal. At Sumbawanga Asilia Ward Tribunal the appellant successfully sued the respondent claiming ownership of the piece of land (disputed land). Aggrieved the respondent successfully appealed to the District Land and Housing Tribunal (first appellate tribunal). Dissatisfied with the first appellate tribunal the appellant has filed the present appeal in this court comprised of four (4) grounds of petition of appeal which are quoted hereunder: -

1. *The first appellate tribunal chairman erred in law and fact for failure to apprehend the fact that the appellant was allocated with right of occupancy by virtue of being customary owner of the land in dispute.*
2. *The first appellate tribunal chairman erred in law and fact for failure to consider long occupation and use of the land in dispute by the appellant which is the material fact in determination of ownership.*
3. *The first appellate tribunal erred in law and fact for disregarding credible documentary evidence of the appellant.*
4. *The first appellate tribunal chairman erred in law and fact in relaying on the evidence of the respondent which was very weak, contradictory and unworthy of truth.*

When the appeal was at the hearing stage, the appellant had a legal service of Mr. Mathias Budodi, learned advocate, whilst the respondent appeared in person, unrepresented.

Submitting in respect of the first ground of appeal Mr. Budodi submitted that the first appellate tribunal reached to the wrong conclusion that the appellant was given the title without compensation. That right cannot pass to the new owner without payment of compensation to the previous owner. Further, Mr Budodi submitted that the appellant was

allocated or obtained the disputed land in 1973. The appellant's evidence was corroborated by the evidence of Abel Kamwela who told the tribunal that the appellant owned the suit land from 1973 before it was surveyed. He said when such evidence was given the respondent never cross examined on such heavy evidence.

Further, he submitted that the act of the appellant being allocated almost 6 (six) plots in the same area proved what he testified that when the council surveyed the plot gave him six plots instead of paying him compensation. The presence of permanent and plants such as trees and sisal prove that he was the one who planted. The plants which the respondent uprooted. He was of the view that the customary ownership on the part of the appellant was proved. He referenced the case of **Amina Maulid Ambali & 2 others V. Ramadhani Juma,** Civil Appeal No. 35 of 2019 CAT (Unreported). Where the court observed that when two persons are competing on the ownership, the one with certificate is regarded as owner unless when proved that the certificate was unlawfully obtained. The appellant had produced certificate issued in 2006.

It was his further submission that the judgment of District Land and Housing Tribunal stated that the respondent told the tribunal that her land was taken in 2002. Even if the appellant could have taken it unlawfully, the respondent did not take any action for 17 years when filed the case at the

tribunal. That is again very doubtful. Her conduct supports the evidence of the appellant.

As regards the 2nd ground, Mr Budodi submitted that the appellant owned the land way back 1973. Even if he was allocated in 2006 as shown in the certificate still it is 13 years of his ownership. But the presence of permanent trees and sisal is sufficient evidence that he has been occupying for a long time. Thus, the principle of "adverse possession". He referred the **Didas Kauzen V. Oscar Kauzen** Misc. Law Appeal No. 2 of 2019 (HC) Unreported. Thus, the appellant owned under the principle of adverse possession which the court should apply.

As regards the 3rd ground, as he submitted in the 1st ground, that the appellant had a certificate. He referred the case of **Amina Maulid Ambali case (supra)**. He reminded this court to section 61 read together with section 100 (1) of TEA, that where there is documentary evidence oral evidence cannot supersede. Thus, the holder of certificate has paramount right.

As to the 4th ground, he submitted that the respondent evidence was very weak and contradictory. As regards when the respondent got the plot, her evidence was that she got the suit land in 1976 while her witness DW2 told the court that the respondent got the plot in 1979. That alone raises doubt as to when she got it. The evidence is not coherent. Further as to

when the council took the plot, respondent says it was in 2002 while DW3 says it was in 2005 thus the evidence is not worth of credible. Thus, the first appellate tribunal could have taken into account on balance of probability and could have given right to the appellant. Thus, he prayed for the appeal be allowed with costs.

In reply, the respondent submitted that it is not true that the appellant owned the land from 1973. But she was the one who owned the land when the council took the land. She obeyed the law and wrote to the council for compensation, but there was no response. She was the one who owned the suit land customarily.

She further submitted that the evidence of Abel Kamwela had no evidential value because his evidence was hearsay which is not admissible Abel Kamwela's evidence was that he was told by the appellant the story thus his evidence is hearsay. She went on to submit that, she was not heard by the Ward Tribunal that is why she appealed to the first appellate tribunal. That it is not true that her evidence was tainted with contradiction, this is because at the Ward Tribunal the records were tempered thus, she believed even her evidence/details were tempered. What her witnesses testified at the trial tribunal having given opportunity to be heard were not recorded verbatim some of the details were changed. For instance when she was asked the size of her plot, she said from East it

has 25 square meters but the tribunal recorded 20 square meters, but they recorded 25 square meters. Thus, it is quite clear that the tribunal had interest on the matter. She thus appealed and won the case.

She submitted that they shared the border with the appellant. The appellant first planted sisal as a border, but later he planted sisal inside her plot, the plot cannot have two sisal borders at one side. The trees he had planted were not in her plot but later overlapped to her plot by planting newly trees which she disputed. The title was given after the land has been taken from her. She prayed the appeal be dismissed.

In rejoinder, Mr Budodi submitted that the letter which the respondent alleges to have written had to be tendered in court. Further if the land was given back to her this could be in writing. The appellant had never raised on the tempering of the proceedings before the first appellate tribunal thus she cannot raise it now.

The fact that the land was taken in 2002 the course of action started to accrue in 2002, but she did nothing.

He prayed the appeal be allowed.

Now the main issue for determination before this court is whether the appeal is meritorious.

This being a civil case, the principle of the law in civil litigation is that he who alleges must prove that those facts exist. This is provided under

the provision of **section 110 (1)** of the Law of Evidence Act, Cap 6 RE 2019.

The first issue which stand for my deliberation is whether the appellant was allocated with right of occupancy by virtue of being customary owner of the land in dispute.

At the trial tribunal, the appellant testified before the trial tribunal that he owned the plot since 1973. He went on testifying that he has been using the plot until when it was acquired by the government. That the government surveyed the plot and granted the appellant with the right of occupancy in 2006. That in a year 2017 he saw two young persons who were hired by the respondent uprooting the sisal trees. Then he sued the respondent at the trial tribunal for trespass.

His witness Abel Kamwela testified that the disputed land belongs to the appellant. That they had land adjacent to each other. He said the dispute over the plot arose in 2017 being informed by the appellant.

On her part, the respondent testified at the trial tribunal that she owned the disputed land located at kanondo since 1976 after being given by her mother. She testified further that in a year 2002 she got funeral then she went to Musoma. When she came back found the plot had been acquired by the government being informed by her mother. She inquired about the compensation but in vain. In a year 2016 she was informed that

the acquired plots have been returned back to the original owners, thus she confirmed her plot through Chairperson of local area of Makutano and 2017 she started clearing the disputed plot. She was then sued at the trial tribunal by the appellant.

Her first witness one Zubeda Makaranga testified that she knows the disputed plot, and his sister respondent started using it in 1979. Later on, the government acquired the plot. She stated that the appellant was cultivating on the north of the disputed land. That respondent and Kamwela were neighbours to disputed land. She testified that the disputed plot belongs to the respondent.

Her second witness one Sophia Aloyce testified that the respondent and appellant had plots of land adjacent to each other. She stated that in a year 2005 the government acquired such plots, and people complained. Upon return of the plots by the government to the original owners, the appellant claimed the plot owned by the respondent.

Her third witness Athuman Makaranga testified that the plot belongs to the respondent and he said the respondent had been using such plot since 1976. He stated that the appellant trespassed the plot of the respondent.

After considering the entire testimony above, and records of appeal it is my firm view that both appellant and the respondent had a piece of plots adjacent to each other.

The evidence of the respondent above and his witnesses was strong enough as regards on how she came into possession of the disputed plot. That the evidence is to the effect that she was granted the disputed plot by her mother in a year 1976. That she continued using the disputed plot until when it was acquired by the Municipal Council of Sumbawanga in 2002. Unfortunately, as per record reveals the Municipal Council of Sumbawanga did not pay any compensation to the original owners, including the respondent. The Municipal Council went on distributing such plots to new owners including the appellant. The appellant was granted letter of offer of right of occupancy in a year 2006 before such plots were returned back to the origin owners. Thus, the letter of right of occupancy granted to the appellant is invalid in that view. Thus, the argument by the learned counsel for the appellant that the appellant has a certificate (documentary evidence) over respondent cannot stand. Therefore, both the first and third grounds cannot stand, hence dismissed.

It appears that following cancelation of the plots acquired by the Municipal Council of Sumbawanga and the decision to redistribute them to the original owners, the appellant confiscated the disputed plot owned by

the respondent. As testified by herself the respondent, she stated that sometimes on several occasions she was on safari for instance in a year 2002 when the plots were acquired by the government, she was at Musoma for funeral and 2016 was at Manyara. All these occasions she was writing letters to the Municipal Council of Sumbawanga reminding for unpaid compensation in respect of the plot acquired. Thus, the ground that first appellate court failure to consider long occupation (adverse possession) and use of the land in dispute by the appellant which is second ground devoid of merit. It is my consideration that respondent did not abandon the disputed plot as alleged by the appellant as she was making follow up to the respective authority.

As to the fourth ground, the appellant contended that evidence of the respondent is weak, contradictory and unworthy of truth. Mr Budodi submitted that on how respondent got the plot her evidence was that she got the disputed land in 1976 while her witness DW2 stated that respondent got it in 1979. As to when the Municipal Council acquired the plot, Mr Budodi submitted that respondent said it was 2002 while DW3 said it was in 2005, thus he reasoned that their evidence cannot be relied upon.

It is necessary to reiterate that contradictions by any particular witness or among witnesses cannot be avoided in any particular case. It was observed in the case of **Dickson Elia Nsamba Shapwata vs**

Republic, Criminal Appeal No. 92 of 2007, unreported, that regularly in all trials, normal contradictions or discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence of the incident. The Court added that a material contradiction or discrepancy which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterised, the Court held that minor contradictions, discrepancies or inconsistencies which do not go to the root of the case for the prosecution cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case.

In this case at hand, having scrutinized the part of the evidence referred to by the appellant's counsel, I have no doubt to say the contradictions, or discrepancies pinpointed by the learned counsel for the appellant are minor which do not go the root of the party's case. Thus, this court may just overlook such contradictions, or discrepancies as human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story. See the case of **Evarist Kachembeho & Others vs Republic** [1978] L.R.T 70. Therefore, the complaint by the appellant's counsel is of no merit.

In fine, considering foregoing discussion the appeal by the appellant is devoid of merit, thus it is dismissed in its entirety. Costs of this appeal be borne by the appellant.

It is so ordered.

D. B. NDUNGURU

JUDGE

22. 09. 2022