IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 114 OF 2020

(Originating from Application No. 20 of 2017 at the District Land and Housing Tribunal for Muleba at Muleba)

JOSEPH JACOB BYASHAO---------- APPELLANT

VERSUS

MESHACK OBADIA KANYAMBO----------1ST RESPONDENT

PAULETHA GIDION----------2ND RESPONDENT

BUHAYA VILLAGE COUNCIL----------3RD RESPONDENT

JUDGEMENT

Date of Last Order: 05/09/2022

Date of Judgment: 16/09/2022

A. E. Mwipopo, J.

Joseph Jacob Byashao, the appellant herein, sued the respondents namely Meshack Obadia Kanyambo, Pauletha Gideon and Buhaya Village Council in Appliation No. 20 of 2017 before Muleba District Land and Housing Tribunal (DLHT) for trespassing into the suitland situated at Buhaya Village, Kagoma Ward in Muleba District. The DLHT dismissed the application in its judgment delivered on 17.11.2020 for want of merits and declared the 1st respondent the legal owner of

the land in dispute. The appellant was aggrieved and filed the present appeal against the decision of trial DLHT.

The appellant has a total of 5 grounds of appeal as they are found in the petition of appeal filed in Court. The said grounds of appeal are as follows:-

1. *That the trial Tribunal erred in law to hold that the suit land is the property of the 1st respondent by purchasing it from the 2nd respondent who was allocated the same by the 3rd respondent, whereas had never owned a good title on the suit land by virtue of the law.*
2. *That as the 3rd respondent had no good title to dispose to the 2nd respondent thus the 2nd respondent has nothing to transfer to the 1st respondent by way of purchase.*
3. *That even the procedure of allocating the land to the 2nd respondent by the 3rd respondent was not complied with such as application by use of village land forms and issuance of certificate of customary right of occupancy on Land Form No. 21.*
4. *That the trial tribunal's assessors did not participate in the decision according to the requirement of the law.*
5. *That the appellant proved his good title unto the suit land.*

On the hearing date, the appellant was represented by advocate Alli Chamani, whereas, the 1st respondent was represented by advocate Danstan Mutagahywa. The 2nd and the 3rd respondents were absent despite the copies of summons filed in Court showing that the 2nd and 3rd respondent were duly served

with summons. Then, the Court ordered hearing of the appeal to proceed in absence of the 2nd and 3rd respondents.

The counsel for the appellant submitted in support of the appeal the 1st, 2nd, 3rd and 5th grounds of appeal. He abandoned the 4th ground of appeal. It was his submission on the first ground of appeal that the 3rd respondent was not the lawful owner of the suit land as result he could not have passed the right of ownership of the suit land to the 2nd respondent who sold the land to the 1st respondent. In the case of **Faral Mohamed vs. Fatuma Abdallah,** [1992] TLR 205 it was held that he who does not have a good tittle to land cannot pass the title to another. The witness of the 2nd respondent stated that 2nd respondent was allocated the land by the 3rd respondent. The Village Council owns land according to section 118 of the Local Government (District Authorites) Act, Cap. 287 R.E. 2002. The section provides that Local Government Authority may acquire land or right to the use of any land, with approval of the Minister, within or outside the jurisdiction. The said procedure was not complied. In the case of **Charles Mushasi vs. Nyamiaga Village Counsel,** High Court at Bukoba, Civil Case No. 08 of 2016, (unreported) at page 21 the procedure of the village to acquire the land was elaborated. The 3rd respondent did not acquire the land according to the law.

He added that the evidence available does not show that the 3rd respondent do exist. The Village are established in accordance with village and Ujamaa Villages

Act, 1971. The same was stated in the case of **Lalata Mbigewala vs. Henry Mwamlima,** [1979] LRT No. 3 where it was held that the Ujamaa Village could not have owned Land prior to the enactment of the Villages and Ujamaa Villages Act. The same position was stated in the case of **NAFCO vs. Mubadar Village Council** [1985] TLR 88 at page 90. In this case, there is no evidence tendered to prove that the village do exist, when it was established and if the village own land.

On the procedure of 3rd respondent to allocate land to the 2nd respondent, the counsel for the appellant said that the procedure was not complied. The Village Land Act, Cap. 114 R.E. 2002 in section 22 (3) provides for the procedure of allocating land by the village Council. The Village Land Form No. 21 has to be issued which is certificate of occupancy of Village Land. The certificate has to be issued to the person who was granted the land by the Village Council. There is no proof that the village assembly has approved for the 2nd respondent to be allocated land by the Village Council. The same position was stated in the case of **Ruth Blasio Msafiri vs. RC Kagera Region and 4 Others,** Land Case No, 07 of 2013, High Court Bukoba Registry, (unreported) at page 8. Thus, there is no proof that the 2nd respondent was properly allocated land by 3rd respondent.

On the 5th ground of appeal, the counsel for the appellant said that the appellant proved his title to the suit land on the balance of probabilities. In the case of **Hemed Said vs. Mohamed Mbihu** [1984] TLR 113 at page 116 it was

held that the person whose evidence is heavier than that of the other is the one who must win. The trial Tribunal held that the appellant failed to discharge the burden of proof in this case. The Chairman of the Tribunal wondered why the appellant did not bring any evidence from king Ntale proving that he was allocated the suit land. This was misdirection by trial Chairman since not all acquisition of the land should be in writings. The Chairman said that the testimony of PW2 was hearsay as he was not present and treated his evidence as of no value. But, PW2'S evidence still has value since the witness testified that he saw the appellant occupying the suit land since 1980. PW2 was told by the Village Chairman one Petro Shubi that the area of dispute is the property of the appellant. It is difficult to get a witness from 1942 when the King allocated land to the appellant.

The counsel added that the 2nd respondent sold the suit land to the 1st respondent, but the sale did not follow the lawful procedure. The Court of Appeal in the Case of **Bakari Mhando Swanga vs. Mzee Mohamed Bakari Shelukindo and 3 Others,** Civil Appeal No. 389 of 2019, Court of Appeal at Tanzania at Tanga, (unreported), at page 8 it held that according to section 142 (1) of the Local Government (District Authorities) Act, Cap. 287 R.E 2002, the sale of the land was supposed to have blessings of the Village Council: Both parties were supposed to prove the ownership of the suit land. Since the 3rd respondent has no good title to transfer the land to the 2nd respondent, the 2nd respondent

had no good title to transfer the land to the 1st respondent. This evidence of appellant and his witnesses on the balance of probabilities was heavier than that of the respondents.

In his reply, the counsel for the 1st respondent said on the 1st and 2nd grounds of appeal that the 3rd respondent acquire land according to section 7 of the Village Land Act, Cap. 114 R.E 2002. There are 5 scenarios where the village may acquire land including the process stated by the counsel for the appellant on Cap. 287 R.E 2002. For this case, section 7 (1) (c) and (d) of the Village Land Act provides the scenarios which village may acquire land through the Village Council, Villagers and District Council to allocated the land to the village. Thus, not necessarily the Village may acquire land in accordance with Cap. 287 R.E. 2002.

The counsel for the 1st respondent stated further that there was no dispute over the existence of the village and ownership of the 3rd respondent on the land in dispute. As there was no dispute over the 3rd respondent ownership over the suit land, the parties could not have adduced the evidence on the way 3rd respondent acquired the land or his ownership over the land. The appellant never disputed in his pleading the existence or the way the 3rd respondent acquired the suit land. As the appellant was the one who sued the 3rd respondent, he was the one who know that the 3rd respondent do exist and that there was no dispute over its existence. As result, it was not on issue before the trial Tribunal. Thus, the 1st

and 2nd grounds of the appeal has no merits. It was upon the appellant to prove that the suit land belongs to him.

On the 3rd ground appeal, the counsel said that there was no issue before the trial Tribunal that the village allocated the suit land to the 2nd respondent. The process of allocating the land by the village to another person is used to protect the village land. As a safeguard, the procedure of approval by the village assembly or village council has to be proved to the allocated land. But, if the village does not dispute that it allocated the land to someone, the same need not to be proved.

The actual dispute is the ownership of the suit land between the appellant and the 1st respondent. The 2nd and the 3rd respondents were joined as necessary parties. The 3rd respondent has proved that it allocated its land to the 2nd respondent. The appellant was supposed to prove that the suit land belongs to him. The 3rd ground of appeal has no basis. The case of **Ruth Blasio Msafiri's** (supra), is distinguished since in the cited case the appellant was claiming that he was allocated the suit land by the village but the village denied and said that it allocated land to another person. In the present case the circumstance is different as the Village Authority has stated that it allocated land to the 2nd respondent but the appellant claims that the land does not belong to the village.

The counsel said on the last ground of appeal that the appellant failed to prove that he owned a good title to the suit land. The appellant had duty to prove

on balance of probabilities that he is the lawful owner of the suit land according to section 110 (1), (2) and 111 of the Law of Evidence, Cap. 6 R.E 2019. The evidence of the appellant shows that the land in dispute belongs to his father. The appellant was not present when the land was allocated to his father by the King. His father who was allocated land did not come to testify.

Moreover, the evidence of PW2 on the ownership of the land is hearsay as he stated in this testimony that he was told about the ownership of the suit land by Petro Shubi. Thus, there is no evidence over the ownership of the land by the appellant. The appellant evidence is just a hearsay which the law does not permit. The same could not be relied as the basis of decision. On the other hand, the 1st respondent testified that he bought the land from 2nd respondent. The 2nd respondent testified that he sold the land to the 1st respondent and that he acquired land from the 3rd respondent. The 3rd respondent testified that the land was allocated by village council to the 2nd respondent. This evidence by the respondents are heavier than that of the appellant.

Regarding the issue that the sale of the suit land between the 2nd respondent and the 1st respondent was not approved by the village council, the Court of Appeal was advising parties in sale of village land to consult the village council before embarking into the sale transaction. But, the evidence shows that the village knows

that the land belongs to the 2nd respondent and it testified on the ownership of the suit land. Thus, the parties were not prejudiced in any way.

In rejoinder, the counsel for the appellant said that the Village Land Act does not provide for how the village acquires land. It is not known as to when the 3rd respondent acquired the suit land. There is no such evidence in the record. Even though the issue of ownership of the suit land by the 3rd respondent was not in the pleadings, this being the court of law it has to look into the proceedings to see if the procedures of acquiring land was followed. The parties in the trial District Land and Housing Tribunal had no legal representation thus they could not have known those legal issues. The principle in the case of **Ruth Blasio Msafiri,** (supra) is the procedure of allocating land according to section 8 of the Village Land Act.

On the importance of the blessing of the village council on the sale of the land, the counsel say in rejoinder that the sale was between the 2nd and 1st respondents which have no blessing of the Village Authority. The 3rd respondent did not sale the land to the 1st respondent.

From the lengthy submissions from both parties, the issue for determination is whether or not the appeal has merits.

In determination of this appeal, I will commence with 5th ground of appeal whether the appellant proved his case on the required standards.

The general rule in civil suits is that he who alleges must prove. This is provided by sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002. The said sections provides as follows:-

> *"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 those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, 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."*

The standard of proof is on the preponderance or balance of probabilities. This was stated in the case **Ikizu Secondary School vs. Sarawe Village Council**, Civil Appeal No. 163 of 2016, Court of Appeal at Mwanza, (unreported).

The counsel for the appellant said in his submission on the 5th ground of appeal that the appellant proved his title to the suit land on the balance of probabilities. He said that appellant's evidence was heavier than that of the respondents and it proved on balance of probabilities that the appellant's father was occupying land from 1980 and that the respondents failed to prove that the title to the suit land was properly transferred to the it 1st respondent. The counsel for the 1st respondent said that it was the duty of the appellant to prove the ownership of the suit land and the appellant failed to prove the same.

In the present case, it is the appellant who had duty to prove that the suit land belongs to him. The reason is that he was the one who instituted the suit in the DLHT against the respondents. The appellant claimed in his pleadings and in his testimony that the land in dispute belongs to him. He said in his testimony which was recorded on 29.09.2017 while aged 49 years that the suit land was allocated to him in 1942 by Watemi and that he said that he was using the land since then. It is not possible for the said land to be allocated to the appellant on 1942 as by 2017 he was aged just 49 years. Appellant was not born by 1942. It was when appellant was answering assessors questions when the appellant said that it was his father who was allocated the land in 1942. Another witness for the appellant is Lodovick Muhoza - PW2 who testified that he shifted to Buhaya Village in 1980 and he was told by then Village Chairman namely Petro Shubi that the suit land belongs to the appellant. This is all the evidence brought by the appellant and he closed his case.

It is obvious that the evidence adduced by the appellant failed to prove that the land in dispute was allocated to him as he stated in his examination in chief or allocated to his father as he said when answering to the questions by assessors. The appellant did not bring any evidence from Watemi to prove that he or his father was allocated the suit land. There is neither documentary evidence nor witness to prove the allocation of the suit land to the appellant or to his father.

The evidence of PW2 on the ownership of the land is hearsay as the witness was testifying from what he heard from Petro Shubi. PW2's evidence does not show if the witness knew the suit land well as she is not the neighbor to the suit land.

The counsel for appellant said in his submission that PW2's evidence is not whole hearsay as he saw the appellant occupying the suit land since 1980. Unfortunately, this is not found in the record and this was not what PW2 said in his testimony. Her testimony was that the Village Chairman of 1980 namely Petro Shubi told him that the suit land belongs to the appellant and he was told he will be allocated another land. He did not say that the appellant was occupying the suit land.

Further, the appellant who testified as PW1 is not a credible witness. In his examination in chief he testified that he was allocated the suit land by Watemi in 1942, but when asked question by assessor he said that the land was allocated to his father. This is contradiction to his testimony. The appellant said that his father is alive, but he did not call him to testify on how he acquired the suit land.

On the other hand, the 1st respondent was able to prove that he purchased the suit land from the 2nd respondent. DW2 who was the Village Chairman at the time of sale said he witness the sale and approved the said sale as the 2nd respondent had valid title to the suit land. The 2nd respondent testified as DW4 and she said that she was allocated the suit land by the Village Council in 2007

after her application to be allocated land was passed by Village Assembly. She tendered receipt of allocation of land – Exhibit DE1. 2nd respondent said that she sold the suit land to the 1st respondent after her child became sick.

Desdery Mshumbusi – DW3 testified that she is neighbor to the suit land and that in 2007 the Village allocated the land to the 2nd respondent and later on the 1st respondent purchased the same. DW3 said that the appellant has never been her neighbour to the suit land.

DW6 who is the current Buhaya Village Chairman testified that the documents available in the office shows that the suit land was Village land before the same was allocated to the 2nd respondent in 2007. Under such circumstances, it is obvious that the evidence of the respondents was heavier than that of the appellant. Hence, the trial DLHT properly held that that the 1st respondent is the rightful owner of the suit land.

On the 1st, 2nd and 3rd grounds of the appeal the appellant said that the transfer of the suit land from the 3rd respondent to the 2nd respondent, from the 2nd respondent to the 1st respondent was not proper. It was his submission that the 3rd respondent had no good title to the land as there is no evidence to prove that 3rd respondent which is Village Council do exist and was registered and there is no evidence to prove that the Village acquired land according to the law. The process of passing the land from the 3rd respondent to the 2nd respondent was not

proper as there is no evidence proving that the 3rd respondent allocated land to the 2nd respondent according to the law. As 3rd and 2nd respondent had no good title to the land, they could not have right to pass the land to another person.

Despite absence of the evidence showing how the 3rd respondent acquired the suit land, the evidence from DW2, DW3, DW4, DW5 and DW6 proved that the suit land was owned by the Village before the same was allocated to the 2nd respondent. Further, the evidence available in record proved that the 3rd respondent allocated the suit land which is two acres to the 2nd respondent who sold it to the 1st respondent. This evidence is havier than that of the appellant and proved the ownership of the land to the 1st respondent on balance of probabilities.

However, as I stated earlier herein, it is the appellant who has the duty to prove his ownership of the suit land on balance of probabilities. The said onus only shift to the respondents when the appellant discharge such onus. If the respondent adduce his evidence after the appellant has discharged his onus to prove the case, then the Court has to decide which among the evidence from the parties in the suit is heavier. This position was stated in the case of **Anthony M. Masanga vs. Penina (Mama Ngesi) and another**, Civil Appeal No. 118 of 2014 (unreported), cited with approval the case of **In Re B [2008] UKHL 35**, where Lord Hoffman in defining the term balance of probabilities states that:-

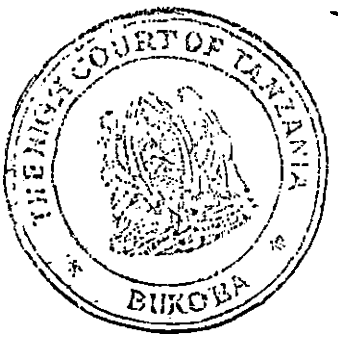
"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge lt. a value of 0 is returned and the fact is treated as not having happened if he does discharge it; a value of 1 is returned to and the fact is treated as having happened".

The similar position was stated in another case of **Daniel Apael Urio vs. EXIM (T) Bank**, Civil Appeal No. 185 of 2019, Court of Appeal of Tanzania at , (unreported), where it was held that:-

"To begin with, we wish to state the standard of proof in civil cases that, it is on balance of probabilities. This position has been stated by the Court in a number of decisions. In ***Mathias Erasto Manga vs. Ms. Simon Group (T) Limited****, Civil Appeal No. 43 of 2013 (unreported) for instance, while reversing the finding of the trial High Court, the Court held that the yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other. Departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases."*

Therefore, from the evidence available in record, the appellant failed to discharge the evidential burden to prove his ownership of the suit land and the respondents' evidence is heavier than that of the appellant. Consequently, the

appeal is dismissed in its entirety for want of merits. The appellant is ordered to pay for the cost of this suit. It is so ordered accordingly.



A.E. MWIPOPO

JUDGE

16/09/2022

Court: The Judgment was delivered today in the absence of all parties.

A.E. MWIPOPO

JUDGE

16/09/2022