IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF SHINYANGA)

AT SHINYANGA

LAND APPEAL NO. 23 OF 2021

(Originating from Maswa District Land and Housing Tribunal in land Appl. 53 of 2019)

MHELA BAKARI .....APPELLANT

VERSUS

MANONI BAKARI & ANOTHER.....RESPONDENT

JUDGMENT

26th September, 2022
6th October, 2022

L. HEMED, J.

At the District Land and Housing Tribunal for Maswa (DLHT) the Appellant herein **MHELA BAKARI** unsuccessfully Instituted Land Application No. 53 of 2019 against the present respondents **MANONI BAKARI and DEUS MAKAMA** claiming ownership of the suit land located at Lung'hwa village, Itilima, District within Simiyu Region. In his

Application, before the trial tribunal the Appellant claimed to have purchased the suit land from the 2nd Respondent in 1994.

The respondents in their separate written statement of defence disputed the claim and stated further that the suit premises belong to the 1st Respondent as was sold to him by the 2nd Respondent on 20th December, 1993.

Before the trial tribunal the Appellant's evidence was such that the respondents invaded the disputed land measuring 18 acres which he purchased from the 2nd respondent in exchange with heads of cattle and the sum of Tshs 27,500/=. He called on witness (PW2), one Kabambo Nguli who just said that the disputed land is the property of the Appellant, but he did not know how he acquired it.

The evidence of the 1st Respondent was to the effect that in the year 1993, he purchased the suit land measuring 37 ½ acres from the 2nd Respondent in exchange with 8 heads of cattle and 15 goats. The transaction was witnessed by the wife of the 2nd Respondent and other four witnesses. He tendered the sale Agreement (D1). The evidence of

1st Respondent was supported by the testimony of Ndilana Bakari (DW2) and that of the 2nd Respondent the vendor of the suit land.

At the end, the trial Tribunal found the 1st Respondent the owner of the suit land measuring 37 ½ acres situated at Lung'hwa village Itilima District Simiyu Region.

The Appellant was not satisfied with the decision hence this appeal on the following grounds:

"1. That the trial Tribunal erred in law and fact to dispose the matter by failing to visit the locus in quo while the size of the disputed land was confusing.

2. The trial Tribunal erred in law and facts in its decision that the appellant is not entitled to own the land due to lack of documentary evidence while he produced the same and the tribunal disregarded it.

3. That the trial tribunal erred in law and fact by determining the matter in favour of the Respondent and granting him what is not in dispute."

On the hearing date, the Appellant who appeared in person argued that the DLHT, disposed of the matter without visiting *locus in quo*. He asked this court to visit the disputed land.

Regarding ground 2 of the Appeal, he submitted that during hearing he tendered all documents he used to purchase the suit land and were admitted into evidence.

As to the 3rd ground of appeal he submitted by blaming the trial tribunal to give the suit land to the 1st respondent which he said it belongs to him.

In reply thereto, the 1st Respondent stated that there was no visitation of the *locus in quo* because all parties were satisfied with what they adduced before the court. According to him, it was not necessary to visit *locus in quo.*

He submitted further that the Appellant did not tender any document to prove his claim on ownership of the suit land. He added that on his part, he tendered the Sale Agreement which was considered by the trial court.

He finally submitted that the trial court granted to the 1st Respondent which he was entitled, nothing else.

The 2nd respondent's submission was to the effect that the trial tribunal did not visit *locus in quo* because parties had requested so. As to the tendering of document, the 2nd Respondent argued that, the appellant attempted to tender photocopies which were rejected by the trial tribunal. In his rejoinder, the appellant only insisted that this court should visit *locus in quo.*

Having heard the submissions from the parties let me start determining the first ground of appeal on the failure of the trial tribunal to visit *locus in quo*. I have gone through the proceedings of the DLHT and found that the Appellant closed his case on 23/7/2020. On the said date, the Appellant did not pray for visitation of the *locus in quo.*

I have also noted that the 2nd Respondent's case was closed on 09/2/20211. The proceedings of that particular date do not show if any party had requested for visiting of the *locus in quo*. From the proceedings of the trial Tribunal it is evident that the parties never requested for visitation of the *locus in quo*. I am also of the firm view that visit of the

locus in quo should be done only in exceptional circumstances by the trial court to ascertain the state, size and the location of the premises in question. I have found from record that the parties in this matter were not disputing on the size, state or location of the disputed land. The center of disputed was on ownership. In my opinion, there was nothing to verify at the *locus in quo*. Visiting of *locus in quo* is not mandatory and court should strive to avoid. In the case of **Nizar M. H vs. Gulamali Fazal Jarimohamed** [1980] TLR 29, the Court of Appeal of Tanzania held that;

> *"It is only in exception circumstance that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator"*

Therefore, in the circumstance of the case at hand it was not necessary to visit *locus in quo*. The chairman of the DLHT was justified not to visit. Ground No. 1 fails for want of merits.

The 2nd ground of appeal is faulting the decision of the trial tribunal holding that the appellant is not entitled to own the land due to lack of

documentary evidence while he produced the same and were disregarded. The appellant gave his testimony on 6th April, 2020. According to be proceedings the Appellant tendered no document to prove his claim on ownership of the suit land nor did he attempt to tender any document. From the record, it is thus no doubt that the Appellant had no documentary evidence to prove that he purchased the suit land from the 2nd Respondent. Section 110 (1) and (2) of the Evidence Act, [Cap. 6 R.E 2019] requires the person who alleges to prove the alleged fact. In the present case, the appellant had alleged to have purchased the suit land from the 2nd respondent, thus he had the duty to prove the said allegations. In the present case the trial Tribunal was justified to find that he had failed to prove his case. In the same vein, ground number 2 fails.

In the last ground, No. 3, the Appellant is faulting the decision of the DLHT by determining the matter in favour of the 1st Respondent and granting him what was not in dispute. The pleadings which were filed in the DLHT in respect of the dispute before it, concerned with ownership of landed property situated at Lung'hwa village, Itilima

District, in Simiyu Region. The core issue for determination before the trial Tribunal was *"Whether the suit land is the property of the applicant or first respondent."*

According to evidence on record, the 1st Respondent managed to prove how he acquired the suit land. He tendered documentary evidence Sale Agreement (D1) which supported his oral evidence. The 1st Respondent's evidence was supported by the evidence of the vendor of the suit shamba, the 2nd Respondent.

The Appellant evidence could not show how he acquired the property the size of the land, location and boundaries of it. In the circumstance it was inevitable for the 1st Respondent to win because his evidence was found to be heavier than that of the Appellant. The court in the case of **Hemed said Vs Mohamed Mbilu** [1984] TLR 113 held that,

> *"...parties to a suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win."*

In the present case, it was inevitable for the 1st Respondent to win before the trial tribunal. In that regard, I find no merits in the 3rd ground of appeal.

In the final analysis, I find that the trial chairman properly determined the matter before him. It was also justifiable to declare the 1st Respondent owner of the suit landed property. The appeal at hand has no merits. It is thus dismissed with costs. Order accordingly.

DATED at **SHINYANGA** this 4th day of October, 2022.

L. HEMED
JUDGE

Delivered in the presence of all parties appearing in person this 6th October, 2022.

Right of Appeal explained.

L. HEMED
JUDGE