IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF SHINYANGA)

AT SHINYANGA

LAND APPEAL NO.95 OF 2021

(Originating from Shinyanga District Land and Housing Tribunal on Land – Application 33/2021)

JOHN STEPHEN .....APPELLANT

VERSUS

1.MAHONA NTIGA
2.MACHIYA NDANYA } **..... RESPONDENT**

JUDGMENT

30th September, 2022
6th October, 2022

L. HEMED, J.

The matter at hand originates from the decision of Shinyanga District Land and Housing Tribunal (DLHT) in Land Application No. 33 of 2021 which was delivered on 5th November, 2021 in favour of the 1st Respondent herein, one **MAHONA NTIGA.**

At the trial Tribunal, the Appellant herein **JOHN STEPHAN** had instituted a suit against the present Respondents **MAHONA NTIGA** and **MACHIYA NDAHYA** claiming ownership of the suit piece of land measuring twelve (12) acres located at Sanjo village, Idakilo Ward in Kishapu District.

In his Application which he used to institute the suit at the DLHT, the appellant claimed that the dispute arose in 2011 when the 1st Respondent invaded into the suit land by cutting down trees which belonged to the Appellant. His prayers were for declaration that he is the owner of the suit land and that the respondents are trespassers.

After having heard evidence from all parties concerned the DLHT found that the 1st Respondent had proved to be the owner of the disputed land. The Appellant was aggrieved by such decision hence the appeal at hand on the following grounds:

> *"1. That, the trial Tribunal erred in law and fact by declaring the ownership of the disputed land to the 1st Respondent relying on his evidence which have a lot of ambiquity and not genuine (sic).*

2. That, the Trial Tribunal erred in law and fact for failure to properly record the oral evidence and testimony provided by the appellant.

3. That, the Trial Tribunal erred in law and fact for failure to properly evaluated the evidence provided by all parties while relying on the evidence provided by the 1st Respondent which are ambiquity and not genuine (sic)

4. That, the Trial Tribunal erred in law and fact by stating that the Appellant failed to bring the witness who were involved in the distribution of land by their late father as they will tell the truth against the appellant while the witness appeared before the Tribunal for more than two times but they did not heard because of regular adjournment of the session caused by the 1st Respondent (sic)

This matter was heard exparte following the non-appearance of the respondents who were served by substituted serve by publication in Nipashe News paper dated 27/09/2022.

When the Appellant was invited to submit on his appeal he only said, the matter started longtime since 2011 and that he has appealed against the decision of the DLHT for Shinyanga. He prayed for the court to consider his appeal.

Let me turn to discuss the grounds of appeal as they are in the memorandum of appeal. I have examined the four (4) grounds and found that ground 1, 2 and 3 concern with evaluation of evidence, thus I am going to discuss them jointly. While ground 4 will be discussed separately.

As to evaluation of evidence, I have gone through the proceedings and noted that the evidence on record adduced to support the appellants case was to the effect that he inherited the suit property from his father in 1999 and continued to use it up to the year 2011 when the 1st Respondent invanded to it. The Appellant called his nephew one John Joshua who testified as PW2 that the piece of land was given to the Appellant in 1990. PW2 testimony contradicted with the evidence given by the Appellant who said he got the land in 1999.

Evidence to support the 1st Respondent's case was such that the 1st respondent got the suit land in 1990 by purchasing it from one Machiya Ndalya.

The Sale Agreement was executed before the ten cell leader at Sanjo. He tendered the Sale Agreement (exhibit D1.)

It was also testified that the land of the late father of the Appellant was bordering the suit land, but the same was sold by the Appellant and one George Mwandu on 10/4/2022, the sale agreement was admitted into evidence.

Another witness (DW2) one Juma Luchina testified that the suit land belongs to the 1st Respondent. He ones hired for two years where he cultivated cotton. Later on the Appellant here invaded the suit land. The testimonies of DW1 and DW2 were also supported by the evidence of one Malingwa Bujiku.

From the above evidence the 1st respondent proved by oral and documentary evidence that he acquired the piece of land in 1990. The Appellant's evidence was that he inherited it from his father in 1999. From this fact, the 1st Respondent was the first to acquire title over the suit land.

Through exhibit "D1" there is ample evidence that the Appellant had sold the piece of land which belonged to his late father on 10/4/2011, the land which is bordering the suit land.

From the record, the evidence adduced to support the 1st Respondent's case was heavier than those adduced, to support the Appellant's case. In the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 the court held that:

> *"According to law both parties cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

In the case at hand, the trial chairman properly evaluated evidence on record, it was thus inevitable for the 1st Respondent to win the case. In the circumstance, I find no merits in grounds 1, 2 and 3.

Regarding the 4th ground of appeal the appellant is levelling blames to the trial Tribunal for stating that the appellant failed to bring witness who were involved in the distribution of land by their late father as they would have told the truth against the Appellant. He asserted that the witness appeared before the DLHT for more than two times but they were not heard due to adjournments. I have perused the proceedings and found that on 22/7/2019 the appellant after having concluded adducing evidence he said this.

"Applicant: I will call the witness, I have one witness to call.

The said witness appeared before the trial Tribunal on 5/10/2020 and testified as PW2. On the same date, the Appellant/ Applicant said:-

"Applicant: Only this witness is enough. I close my case"

From the record the Appellant out of his free will brought only one witness and closed his case at libety. The fact that the choice not to call any other witness was made without being compelled by any including the trial tribunal, then the trial chairman was justified to state that if there was an important witness who was not called inference has to be drawn that if they would have appeared they would have testified against the Appellant. This position was set by the court in **Hemed Said vs. Mohamed Mbilu** (supra) that:

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

From the fore going, the 4th ground of appeal fails.

In the final analysis, I find no merits in the appeal. Since the appeal has been determined exparte, I dismiss it with no order as to costs. It is so ordered.

DATED at **SHINYANGA** this 5th October, 2022.

L. HEMED

JUDGE

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

Right of Appeal fully explained.

L. HEMED
JUDGE
06/10/2022