

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL NO. 42 OF 2021

**(Arising from Land Application No. 56/2017 of Geita District Land and Housing
Tribunal Judgment)**

**SYLVESTER MATHIAS KAPAMA (Administrator of the Estate of the late
Lusetula Somanda.....APPELANT**

VERSUS

SAMWEL KAPAMBO..... RESPONDENT

JUDGMENT

Date of Last order 29/9/2022
Date of Judgment 07/10/2022

R. B. MASSAM, J.

The appellant lodged this appeal challenging the decision of the District and Housing Tribunal at Geita in application No.56 of 2017 which decided in favor of the respondent, briefly, it goes that one Lusetula Somanda [deceased] bought a plot measuring 2.5 acres from Manyilizu Sagani in the exchange of two goats. The appellant was using that plot since then until 2005 when the respondent trespassed and refuse to vacate the said land creating a loss to the family of deceased one Lusetula Somanda. The

administrator of the estate filed the application to pray for the following reliefs:-

1. A declaration that the disputed land belonged to the deceased.
2. A permanent injunction restraining the respondent from interfering with the disputed land.
3. Payment of Tshs. 15,000,000/= as general damage.
4. Costs of the case.
5. Any order which tribunal may deem fit to grant just.

At the end of the trial, the tribunal declared the respondent to be a legal owner of the disputed land and the application was dismissed with costs. Aggrieved by the decision, the appellant appealed before this court fronting four grounds of appeal as follows: -

1. That the trial Tribunal failed to acknowledge that the time limitation cannot start to run where the evidence adduced shows the respondent was allocated a different piece of land.
2. That the trial Tribunal did not direct its mind on the fact that the evidence of the respondent was totally different from the documents he had tendered as evidence.

3. That the trial Tribunal erred in law to start counting the limitation of time from the time of death of the late Lusetula Somanda whereas the dispute started on 2015.
4. That as there is no evidence that the dispute arose in 1988 the trial Tribunal grossly misdirected itself on its decision.

When the matter was called for hearing the appellant had the service of Mr. Pauline Michael Rwechungura while the respondent appeared in person unrepresented. Submitting to his appeal Mr. Pauline Rwechungura submitted that this appeal is from Misc. Land Appeal No. 56/2017 which originated from Geita District and Land Housing Tribunal, where the respondent won the case.

In his side, he submitted arguing on 1, 2 and 3 grounds jointly and the 4th ground separately. Submitting grounds Numbers 1, 2, 3, he said that the evidence by the respondent was contradicting exhibit DE1, so the respondent has no idea which plot was given to him by the village council and thus why he found himself trespassing to the disputed land. He avers that after the respondent was given the land by the committee he was never shown the demarcation, so he don't know that land specifically.

The second reason is that exhibit DE1 directs that plot was for building and it was small in size but in this dispute, the land had 2.5 acres so one cannot be allocated for building but farming, and those acres are mentioned nowhere.

Again, the village council did not show to the court if they own it before giving it to the respondent for the village council had no power to give it out to the respondent because the plot was under the administration of Donje Manyirizu through the wife of late Lusetula who was the first owner. He avers that, exhibit DE1 show that the said area does not have a house, while the respondent said that he was given that plot to build a house, the respondent was given that plot in 1994, and Lusetula died in 1988, so in his side he is worried that, the said DE1 meant another plot and not the disputed one.

On the fourth ground, he submitted that, there was no evidence that the land dispute started on 1988, because in their side, the dispute started on 2015 and the time for counting starting when trespasser started to use that plot, and the court must have evidence that respondent had information as elaborated in the case of **Ramadhan Mkongera vs. Cassian Paul** 1988 TLR No. 56. In the said case it held that counting for suing the claiming land started when the dispute started and the owner got information. So, he must

have enough evidence that the trespasser used that land for more than 12 years. In this present case, the relative of the owner did not know if their plot was trespassed as they saw respondent 2015, so the tribunal was wrong to say that the land dispute stated on 1988.

In his reply respondent submitted that he is 88 years old, the submission of the appellant was not true as he won all cases which were filed and the said plot was given to him on 20/02/1994 after staying for a long time without being developed by the owner. He said that, he is not a trespasser as he was given that plot legally, in his case he called his witness who testified well thus why he won the case several times, that he was given the plot by the committee of five people who are Lameck as a chairman, James Nangara, Daudi Rwetuta, Mzambiba, Buwawa Ibarara, all members have already died,

He added that, after he was handed with the land, he started to prepare it to build but he fell sick up now he is still sick. He continued by saying that in that plot he had some trees there to prove that he was the legal owner.

In his rejoinder, Mr. Pauline Michael submitted that respondent after being given that plot, he did not hand it over thus why the respondent is not sure if the land in dispute is his land or not.

I have considered the record of appeal, exhibit DE1, and submissions for and against the appeal from both parties the pertinent issue for determination is **whether the appeal has merit.**

The duty of this court is to make sure that parties brought evidence which can prove his/ her case, in the side appellant submitted to this court that, the evidence of the respondent was contracting compared with the exhibit tendered to the court, on his side, he never objects the respondent to be given the plot but his concern is that the respondent never handed over the said plot so he doesn't know his plot well. Also, the said exhibit DE1 show that the respondent was given that plot for building but he did not build it. In the side of the respondent, he submitted that he was given that land in 1994 by the village council he fail to develop it because he fell sick and he had some bricks there as building materials.

Also, on the side of the respondent, DW2 and DW3 said that they were the ones who gave the respondent that plot as a committee, and they did not put demarcation as it was well known. The law is settled that he who

wants the court to consider that a certain fact exists has the duty to adduce evidence to that effect. See the case of **Dr. A. Nkini and associate Limited vs. National Housing cooperation** civil appeal No. 72 of 2015, Antony **Masanja vs. Masanja vs. Penina [Mama Mgesi and Lucia Anna]**. So in the side of the appellant had a duty to prove by bringing evidence that the disputed land belongs to them and not the respondent.

It is trite law that the burden of proving the existence of certain facts lies with the person who alleges. This position was restated in a number of decisions including the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported), it was held:

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other."

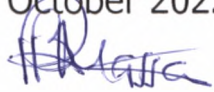
Pursuant to the position of the law above, I am of the view that the appellant failed to prove ownership of the suit land. The respondent managed to prove that the suit land was allocated to him since 1994 and

he manage to call the witnesses who were the members of the village council, and in the hearing, the respondent brought exhibit DE1 to support his arguments.


That said and done, the respondent's evidence appears weightier than that of the appellant and the appeal therefore fails. The respondent has managed to prove ownership of the suit land and I proceed to hold that he is the lawful owner of the suit property. Considering the nature of the dispute and the parties involved, each party shall bear their own costs. It is so ordered.

Dated at Mwanza this 7th day of October 2022.




R.B. MASSAM
JUDGE
07/10/2022

COURT: Judgment delivered on 07th day of October 2022 in the presence of Mr. Pauline Rwechungura advocate forth Appellant and in the absence of te respondent.


R.B. MASSAM
JUDGE
07/10/2022