THE UNITED REPUBLIC OF TANZANIAT

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 47 OF 2021

(Originating from Decision of the District Land and Housing Tribunal for Kyela in Land Appeal No. 49 of 2017 arising from Land Case No. 36 of 2017 in Katumba Songwe Ward Tribunal)

ALFRED MWALWIBA ..... APPELLANT

VERSUS

WILLIAM MWAKYELU ..... RESPONDENT

JUDGMENT

Date of last order: 17/08/2022
Date of judgment: 30/09/2022

NGUNYALE, J.

The appellant Alfred Mwalwiba filed Land Case No. 36 of 2017 in the Katumba Songwe Ward Tribunal suing the respondent William Mwakyelu over a portion of land which he alleged to be a clan land. The Tribunal decided in favour of the respondent. The respondent preferred Land Appeal No. 49 of 2017 in the District Land and Housing Tribunal for Kyela whereby the appellate Tribunal overturned the decision of the trial

Tribunal on the ground that the appellant was time barred to redeem the clan land sold 11 years ago.

Being aggrieved with the decision of the first appellate Tribunal he knocked the doors of this Court through Misc. Land Appeal No. 15 of 2018 to challenge the decision of the said appellate tribunal. This Court found that the decision of the first appellate Tribunal was erroneous because it was decided by the Tribunal which was not well constituted because the wise assessors could not fully participate. The defect was marked to be fatal hence the Court ordered the trial ***de novo*** by another Chairman with a new set of assessors. The first appellate Tribunal conducted re-hearing of the appeal and ended with the decision in favour of the respondent on the ground that the appellant had no locus stand to claim the clan land.

The appellant was aggrieved with the findings and the decision of the first appellate Tribunal, he preferred the present appeal basing on three grounds of appeal; **one**, that the appellate Tribunal erred in law and fact when ruled out that the appellant had no ***locus standi*** in this matter, **two**, that the appellate Tribunal erred in law and fact to award costs in favour of the respondent and **three**, the appellate Tribunal erred in law

and fact by failure to consider the evidence available in the record of the trial Tribunal.

By consent of the parties the appeal was herd by written submissions, the Court is very grateful to the parties for the timely compliance to the scheduling orders of filing the relevant submissions. After having read the grounds of appeal and the rival submissions by the parties the Court went further to determine the appeal basing on the issues to be raised in due course.

In the first ground of appeal the issue is whether the appellant had *locus standi* to institute the suit in the ward Tribunal. The issue of *locus standi* is very clear that, the one with interest is the one who can institute the suit. The common law principle dictates that a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. See the case of **Lujuna Shubi Ballonzi Senior** (supra) which was cited by the respondent counsel where it was held; -]

> *"...locus standi is governed by the common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with".*

Moreover, in the case of **The Registered Trustee of SOS Children's Villages Tanzania vs Igenge Charles and 9 Others,** Civil

Application No.426/08 of 2018 CAT Mwanza, borrowing a leaf from our neighbour in Malawi, the Supreme Court in the case of **The Attorney General vs. Malawi]Congress Party and Another,** Civil Appeal No. 32 of 1996 observed as follows:

> *"Locus standi is a jurisdictional issue, it is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently close relation to it so as to give a right which requires prosecution or infringement of which he brings the action."*

Therefore, a person whose rights or right has been infringed by another person can seek before the court a remedy or relief either personally or through an authorised agent. In addition, if a person who brings action has no locus standi the circumstance raises an issue of jurisdiction which must be considered at the earliest opportunity be it by the parties or the court itself.

In the case at hand, the appellant claimed ownership of the clan land. The cases cited by the appellant of **Samson Mwambene** (supra) states;

> *"As interested member of his clan or family; the respondent had an independent right to sue for what he believed and was found to be, his deceased father's property due to inheritance. That power did not depend on his having had to be clothed with administration powers or consent of the clan or family members first. In any event, he had already been clothed with*

consent and authority of clan members at the time he preferred the suit. He thus had locus standi".

The above cited case of **Samson Mwambene** (supra) was cited also in several decided cases of this Court such as the case of **Ezekiel Kalimilo** (supra) which was cited by the appellant also where it was stated that an interested member of a clan or family can sue even without having being appointed as an administrator and, in the case of **Petro Misalaba V. Mabula Sanane,** Misc. Land Appeal No.21 of 2020 HC Mwanza it was held that;

"...the respondent has not given any semblance of proof that he belongs to the clan which he purports to be the owner of the disputed land. But, even if he did and, noting that there may be other members who would harbour a similar interest, proof would be required on whether the respondent has a concurrence of other members of the clan and that they are settled on him as a choice to represent them....A properly constituted court would not allow any person to meddle in the affairs of a property in respect of which his interests are not ascertained".

Having seen the quoted decisions by the court of appeal and the high court it is my view that the law is settled through court practice on what it means by *locus standi,* does not necessarily mean to have the letters of administration especially to the person who want to redeem the clan land. In this case at hand the appellant when he testified before the ward Tribunal, he said that the disputed land belonged to the clan of Bakari Mwalwiba Mwamafupa and he is a member of the clan. Before

his death Bakari gave the said land to his daughter Jenti Lwiba (PW2). The evidence of the appellant was supported by PW2 who is the member of the clan and he inherited the farm in dispute from her father.

It is my view that the appellant has *locus standi* to sue on the clan land, basing on the reason stated above. Thus, I concede with what has been submitted by the appellant counsel that the appellant had locus standi. The interest of the appellant over the disputed land is well established and, the appellant had *locus standi* to commence a suit against the respondent over the land which he alleges it belong to his clan. The appellant filed a case before the ward tribunal as a member of the clan to claim clan land and not his land. The cases cited by the respondent in the issue of *locus standi* are distinguishable from this case at hand. Therefore, this ground has merit.

Regarding the second ground that the appellate Tribunal erred in law and fact to award costs in favour of the respondent. The law is very settled that awarding of costs is the discretion of the court. In the case of **Shapriya & Company Limited V. Regional Manager, Tanroads Lindi**, Civil Reference No.1 of 2018, CAT DSM where the case of **Nkaile Tozo v. Phillimon Musa Mwashilanga** [2002] TLR 276 was cited, although it is concerned with the construction of section 30 (1) and (2)

of the Civil Procedure Code, Cap. 20 RE 2002 (CPC) governing the award of costs of, and incidental to, all suits. The relevant part of that decision is at pp. 278-279, which state as follows:

> *"... that the awarding of costs is not automatic. In other words, they are not awarded to the successful party as a matter of course. Costs are entirely in the discretion of the court and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide one/ like in all matters in which Courts have been invested with discretion the discretion in awarding or denying a party his costs must be exercised judicially and not by caprice (See the Indian case of Naramma v. Katomma (1965) 1 and WR 433). Thus, when a party successfully enforces a legal right and in no way misconducts himself, he is entitled to his costs as of right: Civil Service v. GSN Company [1903] 2 KB 756 CA".*

Essentially it is common cause that costs of, and incidental to were elaborated by the Court in **Tanzania Fish Processors Ltd. v Eusto K. Ntagalinda,** Civil Application No.6 of 2013 (unreported) that costs ordinaryily follow the event unless otherwise decided. In exercise of its discretion to award costs the court is enjoined to award costs to the successful party on the basis of the principle that "*costs follow the event.*" Nonetheless, it is also trite that the court may withhold costs to a successful party on any justifiable ground, which may include party's misconduct.

The court is enjoined to state explicitly and specifically which party is to meet the costs of the action of the other party to the action. That is so especially on the reason that an award of costs to one party against the other gives a benefit to the former and imposes a liability on the latter. Such an award, therefore, cannot be merely implicit.

In the instant case, the appellate tribunal was very clear when awarding costs. It clearly stated that the appellant was responsible for the costs. The trial Chairman used the principle of costs follow the event because the respondent was the successful party. Thus, the second ground of appeal has no merit it is worth of being dismissed as I hereby do.

In the third ground of appeal that the appellate tribunal erred in law and fact by failure to consider the evidence available in the record of the trial Tribunal. This ground of appeal has been argued collectively by the parties when arguing the first ground. When arguing the first ground of appeal It was ruled that the appellant had a *locus standi*. The ground of appeal is not specific, but in my view the appellate tribunal considered the evidence available in the trial tribunal's records enter its decision. The law is specific that the one who alleges must prove the allegations. The provisions of section 110 of the Tanzania Evidence Act [cap 6 R.E 2019] provide as follows;

"(1) Whoever desires any court to give judgement 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.

This was held in the case of **Abdul Karim Haji V. Raymond Nchimbi,** Civil Appeal No. 99 of 2014 (unreported), its decision was cited with approval in the case of **Africarriers Limited V. Millennium Logistics Limited**, Civil Appeal No.185 of 2018 CAT DSM, it was stated that;

"...It is an elementary principle that he who alleges is the one responsible to prove his allegation".

Therefore, it was the duty of the appellant before the trial Tribunal to bring evidence to prove the fact which he alleges. Things went to the contrary, he did not call any witness from the family members to prove that the disputed land belong to him or to PW2 or to both of them or to the clan members. The evidence adduced by the appellant as argued in the 1st ground of appeal he said that he is from that clan and he claim for the clan land. The said land was given by the deceased to his daughter Jenti Lwiba. PW2 Jenti Lwiba was called to testify but she testified that the land in dispute is her own land. I therefore concede with what was submitted by the respondent counsel that the appellant

and his witness failed to prove how the clan land come into their possession. As members of that clan they were to prove when and how they become in possession of the suit land since the death of Bakari Mwalwiba Mwamafupa. When he testified at the beginning, he claimed that he filed a suit to claim his own land and not the land of the clan. Likewise, PW2 claimed that the land in dispute belongs to her.

The general rule in civil cases is that the burden of proof has to be discharged on the balance of probabilities, and it lies with the one who alleges. Section 112 of TEA provides;

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence ....".*
>
> Under section 3(2)(b) of the same Act provides as follows;
>
> *"In civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability".*

This means that in civil cases a fact is said to be proved when there is balance of probabilities. This was held in the case of **Paulina Samson Ndawavya V. Theresia Thomas Madaha**, Civil Appeal No. 53 of 2017, the case was cited in the case of **Oliva James Sadatally V. Stanbic Bank Tanzania Limited,** Civil appeal No. 84 of 2019, CAT DSM, where it was stated that;

"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other".

Coming to this case at hand the appellant failed to prove his case on balance of probabilities that the land claimed is that of the appellant or his witness PW2 or the clan.

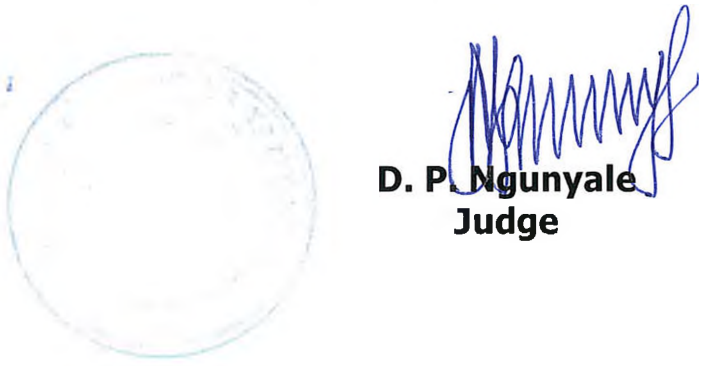
The respondent on his side proved that he bought the disputed land from Mwakapiki, the same was testified by DW2.

Thus, the claim by the appellant that the land was given to PW2 was not proved by any other family member. The other contradicting position of the appellant that the clan land was his own land was not even proved. In my view the evidence would have merit if there was corroborative evidence to that effect especially evidence from other family members. Mere claim without evidence to prove the claim is nothing but allegations which are not evidence. Even though it is not necessary to have documentary evidence, but the witnesses should give enough evidence to prove the fact at issue.

In the same trend, the third ground of appeal also has no merit. The appellant has failed to discharge his duty of proving the allegations on the balance of probabilities.

Having said and done, the appeal by the appellant is bound to fail. He failed to prove about ownership of the suit land. The appeal is hereby dismissed with costs for lack of merit. Order accordingly.

Dated at Mbeya this 30th day of September 2022.



D. P. Ngunyale
Judge