IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 126 OF 2021

(Arising from the Judgment of the District Land and Housing Tribunal for Tarime at Tarime in the Land Application No 25 of 2017)

CHACHA ISARARA BHOKE ..... 1ST APPELLANT

MWITA ISARARA BHOKE ..... 2ND APPELLANT

MACK ISARARA BHOKE ..... 3RD APPELLANT

VERSUS

MAGAIGWA MTUNDI ..... RESPONDENT

JUDGMENT

27th September & 07th October, 2022

F. H. MAHIMBALI, J.:

The appellants in this appeal unsuccessfully claimed ownership of the disputed land at the District Land and Housing Tribunal. They are dissatisfied by that decision thus this appeal.

It was claimed by the appellants at the DLHT that they are heirs to the land in dispute after the distribution of the deceased's estate (their father) who died in 2001. That from 2001 up to 2016, they claim to be

in possession and use of the said land until when the respondent invaded their lander in 2016.

Following the decree of the trial tribunal dismissing their claims against the respondent they have preferred this appeal to this court armed with a total of seven grounds of appeal namely:

1. *That, the trial tribunal erred both in law and in fact by not considering the fact that the appellants have been in occupation of the suit land for more than twelve (12) years.*
2. *That, the trial tribunal erred both in law and fact by failure to analyse properly the evidence adduced by the appellants and instead relied on the weak evidence of the respondent.*
3. *That,, the trial tribunal erred both in law and fact by not recording the opinion of the assessors in the judgment.*
4. *That, the trial tribunal erred both in law and fact for admitting considering and acting on exhibit "D1" while the same had no signature of the witnesses.*
5. *That, the trial tribunal in law by denying the 1st appellant right to be heard.*
6. *That, the trial tribunal erred both in law and fact by recording evidence differently from what adduced by the appellants during hearing.*
7. *That, the trial tribunal erred both in law and fact by not considering documentary evidence tendered by the appellants.*

During the hearing of appeal the appellants appeared in person unrepresented whereas the respondent was represented by Mr. Emmanuel Werema, learned advocate.

In his submission in support of the appeal, the 1st appellant just prayed for the adoption of their grounds of appeal and be part of his submission. Having said that, he prayed that the appeal be allowed as he has no more to add.

The second appellant on his part argued that the trial tribunal didn't do justice to them. He challenges the admissibility of D1 exhibit which was wrongly received by the court as lacking legal value with its authenticity. It is not signed by the all members of the said committee and that it is not dully stamped.

Furthermore, he criticised the judgment as recording the year their father died in 2011 instead of 2001. As if this is not enough, the manner the evidence of the respondent was reproduced in the said judgment is extensive compared to the appellant's evidence. On this, they registered their bias to the trial chairperson.

Similarly was the submission of the 3rd appellant that at the trial tribunal, the right to be heard was not fully accorded to them. He too

criticised the D.1 exhibit as being not genuine document. That their exhibits were not accorded full weights instead, the trial chairperson only considered the forged document and considered as real (D1 EXHIBIT).

In consideration of their submissions, grounds of appeal and the evidence at the trial tribunal, the appellants are praying that their appeal be allowed.

On the other hand, Mr. Werema learned advocate resisted the appeal. On the first ground of appeal, he submitted that there has not been evidence that the appellants owned the land prior to the respondent. He submitted that the respondent is the owner of the Suitland as per evidence in record i.e from 1995 to date.

On the second ground that there was no proper analysis of the evidence he countered it and argued that as per evidence in record, it was the appellants' evidence that is contradictory. He amplified that it was contradictory in terms of value of their evidence. When the cause of action arose and how the said Suitland was obtained.

On the size of the land, the first appellant testified to be 275 meters to 150 meters (length and width). However, the 2nd appellant,

testified that the same land is measuring 275 to 152 meters (length and width respectively). On this, Mr. Werema argued that the appellants are not sure of the real boundaries.

As to when the cause of action arose, the same is not clear. On says it was in 2016 (in page 10 of the typed proceedings but the other says in 2010(at page 16 of the typed proceedings).

As to how they came into possession of the said suit land, the 3rd appellant stated that they inheritated as they were born there. If that is the case the law is, a person claiming ownership, has a duty of disapproving the claimant that he is not the owner (see section 119 of the TEA).

On failure of recording the assessors' opinion as per third ground of appeal, he argued that in terms of section 24 of LDCA empowers chairperson what to do with the assessors' opinions.

In countering the validity of exhibit D.1 of the case, Mr. Werema was of the firm view that the same passed the legal test on its admissibility. The document is self-explanatory. The same is dully stamped. The accusations against the chairperson are of no legal value as they missed the point.

Grounds no 5 and 6 he argued them jointly argued. Mr. Werema wondered as to how their right to be heard was infringed in the conduct of this case where each was accorded with the said right. He urged this court to go through the whole record and see how the proceedings were recorded and assess its evidence. The argument that the appellants' evidence was partially or briefly recorded/considered he urged this court to re-evaluate the said evidence.

On the seventh ground of appeal, he vehemently challenged it on the premise that parties are bound by their pleadings. Their application (plaint) had no documents annexed. As per first trial conference, the appellants indicated that they had no any documents to render during trial. Either, there was no any notice of producing any additional document to be relied upon.

In all this, he prayed this court to dismiss the appeal with no costs.

The appellants on the other hand (in their rejoinder submission), they maintained that the land in dispute is theirs as given by their late father.

Having heard the submissions from both parties and digested the evidence in record and the proceedings at large (at the trial tribunal) the

vital question is one, who between the appellants and the respondent are lawful owners of the suit land.

What can be gathered from the evidence of PW1-PW4 (appellants) they all claim that the disputed land as belonging to them after they had been given by their father during his life time. That each one was given his own portion of land. That the total land area as used/owned by their father up to 2001 was 550X440 land size (length and width respectively). However, the land in dispute covers almost half of it i.e 275 X150 meters (length and width).

PW5 is one the uncles to the appellants and respondent. His testimony is to the effect that the appellants and the respondent are relatives as their parents are bloodly related. Both of their father are now dead. As who owned the disputed land, PW5 was of the view that despite the clan meeting's findings (D2 exhibit) his position is different from that. To him, the Suitland belongs to the applicants because in 1992, the respondent had shifted from the village and that the respondent's land was taken by other villagers. Equally was the testimony of PW6, that the respondent had shifted from the suit land in 1992 to Kewanja village.

On the other hand, the respondent claims ownership of the same suit land as he was given by his father in 1989 who passed away in 1990. In 1995 he applied for official ownership of the village Government which certified so via D1 exhibit Amongst the attendants as neighbours (witnesses) was DW2 (Chacha Mwita Nyakimori). DW2 in his testimony stated how he recognised the father of the respondent (Mzee Mtundi Nyokininda) as owner of that land prior to 1995.

As if this was not enough, DW3 (Maria Mwita Itembe) testified how in 1994 – 2015 had been using that land (they hired from the respondent orally). That during the hire period, none disturbed them (herself and her husband).

As per this evidence then, who is the rightful owner of the disputed land. Is it the applicants or the respondent. In reaching that finding, the only guiding tool is the evidence. This is because, it is trite law that he who alleges, must prove the existence of those facts so as the court to declare so (see section 110 and 111 of TEA, Cap 6 R. E. 2022). In the case **Hemedi Said vs Mohamed Mbilu** (1986) TLR is that there cannot be equal evidence by parties in a dispute. Only a party with heavier evidence is the one who must win. In this case after I had assessed the evidence in record I have the following observation.

First, there is no detailed or clear evidence that the appellants' father owned that land in dispute for him to pass title to his children (appellants) before he died in 2001. If there was such evidence, then either it was not established or that it fell short (PW5 and PW6). I say so on the basis of the testimony of DW2 and DW3 and exhibit D1. In essence, the appellants' evidence whether their father owned that part of land is unestablished. It is also not clear how he got it.

Supposing that the appellants were given the said land by their father in 2001 prior to his death if they had been in active use of it, the said dispute would have arisen earlier than 2014 or 2016.

Supposing also that the appellants' father had divided his plot to each of the appellant, whose land then amongst the appellants has been interfered by the respondent? (The suit land 275 X 150 meters).

The evidence by PW5 that the respondent had shifted from Matongo village to Kewanja was not a licence of invasion of his land if he had active control of it through DW3. In the total analysis of the evidence in record, the respondent case is more credible through the evidence of DW1 – DW3 which in essence out weigh that of the appellants in terms of quality and credence.

Reverting to the grounds of appeal, there has not been proof that the appellants (any) has been in active use of the disputed land for over 12 years uninterruptedly. There is no evidence that any of the appellants using that land as alleged.

On the issue of analysis of evidence, I think I have done it sufficiently. The analysis done by the trial tribunal and this court both arrive at the same conclusion which is in favour of the respondent.

The fourth ground of appeal falls short as what the law provides is not reproducing of the assessors' opinions in the judgment but first whether the said assessors' opinions have been prepared and read out in court to parties before judgment. Secondly, whether the said opinions have been considered by the trial chairperson and the reasons for differing in the event of difference. With this, the trial tribunal's records are clear as it is reflected *"... I concur with the assessors' opinions that are in favour of the respondent, I proceed to dismiss the application with costs"*

On the fourth ground of appeal which is on admissibility of exhibit D1, I find this ground as baseless. This is because a mere mentioning of

witnesses in the said document was not necessary that they had to sign it. In this document, by its nature didn't want signing of witnesses.

The validity of D1 exhibit didn't solely depend on the signature of the witnesses, unless there was assertion that none participated. But with the testimony of DW3 (whose name is in the 5th entry in D1 exhibit), the appellants' argument does not hold any water.

The averment in the fifth ground that the appellants were not accorded with the right to be heard, I have failed to condense it for lack of establishment. None of the appellants as per proceedings was denied admission of his testimony or evidence. Each testified and his evidence is in place.

In the absence of a counter evidence on proceedings, the raised concerns in the sixth ground of appeal that the appellants' evidence was not properly recorded is unjustified. I will be in a hard position to adjudge it unless there was evidence to counter the recorded proceedings at the trial tribunal.

With the last ground of appeal that the appellants' documentary evidence were not considered, in my traverse to the whole trial court's

proceedings none tendered. As parties are bound by their pleadings none is annexed in their plaint neither subsequently notified as per law.

All this considered and done, the appeal is dismissed in its entirety. As the appeal concerns relatives, parties shall bear the own costs. I so find and order.

DATED at MUSOMA this 07th day of October, 2022.

F.H. Mahimbali

JUDGE

Court: Judgment delivered 07th day of October, 2022 in the presence of the first appellant, respondent and Mr. Gidion Mugoa, RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE