IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT ARUSHA

LAND APPEAL NO. 03 OF 2022

(C/f the Decision of the District Land and Housing Tribunal for Karatu in Land Application No. 30 of 2017)

ISRAEL JOHN .....APPELLANT

VERSUS

DAUDI JOHN ..... RESPONDENT

JUDGMENT

Date of last order: 05/10/2022

Date of Judgment: 26/10/2022

MALATA, J.

In Tanzania, it is well settled legal position that, whoever alleges existence of any fact bears the duty of proving existence of that fact. That position is resounded from the Evidence Act. Cap. 6 R.E.2019. Section 110 (1) of the Act provides:

> *"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".*

Additionally, section 112 of the Act depicts,

> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall be on any other person"*

The Court of Appeal in the case ***Berelia Karangirangi vs Asteria Nyalwambwa, Civil Appeal No. 237of2017(CAT-unreported)*** at pg.7 and 8, the Court had this to say:

> *"...we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove.... It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."*

It is trite law that in balance of probabilities rule, if the evidence is such that the court or tribunal can say, we think it is more probable than not, the case succeeds, but if it is otherwise then the case fails. For clarity on how the rule of balance of probabilities in civil cases works, I will dwell on the explanations given in ***H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586D-H,*** where Lord Nicholls of Birkenhead stated:

> *"The balance of probability standard means that a court is satisfied that an event occurred, if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."*

Moreover, in ***B vs Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR.340,*** *Lord Bingham CJ* said:

> *"... the civil standard of proof does not invariably mean a bare balance of probability. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters. Applying these principles to the records of the case at hand, I am highly convinced that the evidence given by the appellant had failed to prove in the balance of probabilities that the disputed land belonged to her father."*

It is therefore duty of the trial court to ensure that parties to a case discharge their obligations to the dictates of the law and not otherwise. The duty is bestowed to the trial court/tribunal which has advantage of assessing who between the parties tells the truth. Upon assessment of weight of the adduced evidence and its reliability, the court/tribunal will be in a place to know who between the parties tells the truth on the matter. The Appellate Court's duty is verifying on how the evidence was assessed and analysed to prove the fact in issue. With emphasis, section 45 of the Land Disputes Courts Act Cap 216 R.E. 2019 that states:

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence*

unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."

Lastly, the defunct East African Court of Appeal in the case of ***Peters Vs. Sunday Post Limited (1958) EA 424*** at page 429 had once held:

"It is a strong thing for an appellate court to differ from the finding, on the question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court would itself have come to a different conclusion".

Having prefaced some principles that govern disposition of this matter, I thus indulge on the substantive part of the case. In a nutshell, the parties to this appeal are blood brothers sharing one father and mother, the late John Lulu (father) and Marry Gaalu Yamet (the living widow). The spouses were blessed with good number of children, the parties to this appeal inclusive. These blood relatives have been in irreconcilable land dispute since 2016 to date, each party claiming to be the lawful owner of the same land but at least they are owning customarily. Amicable settlement proved failure, as the parties decided to hold horns. Eventually, they approached the justice dispensation pillar for final reaction as to who is a rightful owner of the landed property in question.

The Appellant approached the District Land and Housing Tribunal for Karatu, seeking declaration that he is the lawful owner of the land as he was given by their mother, Marry Gaalu Yamet. On the other hand, the Respondent vehemently disputed stating that he is lawful owner following allocation by the village land allocation committee. Upon hearing of the case, the trial tribunal declared the Respondent herein a lawful owner of the land in question.

Dissatisfied by the decision of the District Land and Housing Tribunal for Karatu in Land Application No. 30 of 2017, delivered on 14th December 2021, the Appellant approached this Court raising five grounds of appeal as hereunder:

1. *That, the trial tribunal erred both in law and fact to determine the case and delivering the Judgment in favour of the Respondent who actually did not produce a letter of allocation of the land done by the Village Council together with the minutes of the Village Assembly, Village Council or land committee of the Village Council;*
2. *That, the trial tribunal, erred when it failed to analyse the evidence from both sides, as a result it delivered a wrong decision;*
3. *That, the evidence contained in Exhibit D-1 was wrongly admitted and relied upon as it is contrary to the provision of section 53, 54(1) (2) (a)(b)(c) of the Village Land Act, Cap 114 R. E. 2019.*

4. *That, the trial tribunal misdirected itself and wrongly to apply and invoke the principle of adverse possession in favour of the Respondent contrary to the evidence adduced at the trial; and*
5. *That, the trial tribunal erred in law and fact to determine the case and decided in favour of the Respondent while there was non-joinder of the necessary party.*

To prove ownership of the land, the Appellant sought support of four witnesses (AW1, AW2, AW3 and AW4). Maria Gaalu Yamet, (AW2) testified that she is the mother of the parties herein. During subsistence of their marriage between her and John Lulu, they acquired properties, movable and immovable including the land in question. (AW2) stated that prior to villagization in 1974 they were in ownership of the said land. Sometimes in 1995, before her husband died, they distributed land to their children, the parties to this appeal inclusive. All the land including three acres in dispute were owned customarily.

AW2 testified that the disputants herein were given five acres each, the rest of the land including the one in dispute (the suit land), was left under ownership the spouses. Following death of John Lulu in 1995, the land was left under ownership of AW2. In November 2016, AW2 transferred ownership of the suit land to the Appellant, AW1. She stated that there was no re-allocation of the land in question to anybody and that AW1 is the last born who is taking care of her survival as opposed to the Respondent (DW1) herein. AW2 supported her testimony by the transfer agreement (exhibit P1) which reads as follows:

"MKATABA WA KUKABIDHI SHAMBA KATI YA MARIA GAALU YAMET NA ISRAEL JOHN LULU.

Paragraph 3 of the Agreement provides

(i) "Shamba la kwanza ni la ekari tatu iliyopo kitongoji cha TDD na mipaka yake ni kama ifuatavyo: -

. Mashariki inapakana na shamba la **Nicola Yarot**

. Kaskazini inapakana na shamba la **Tluway Mandoo**

. Magharibi imepakana na shamba la **Israel John**

. Kusini imepakana na shamba la **Daudi John na Felisi Aweda**

Paragraph 4 of the Agreement provides that;

"Kwa Mkataba huu natamka kuwa maeneo yote yaliyotajwa katika kipengele (1-4) hapo juu nimeyatoa kama zawadi kwa mkabidhiwa Israel John Lulu na atayamiliki kama mali yake na hakuna mtu atakayehoji uhalali wa zawadi hii niliyoitoa bila ya masharti yoyote"

The transaction was witnessed by among others, Village Executive Office for Slahhamu Village and the Primary Court Magistrate for Karatu. AW finally testified that the Respondent herein invaded and cultivated the su land without consent of AW2 for three years. The testimony of AW1, AW and AW4 collaborated that of AW2.

In short, the above narration represents historical background of ownershi of the land in dispute by John Lulu and Maria Gaalu Yamet. In 2016 th surviving widow transferred ownership of the land to the Appellant throug exhibit P1 and in presence of the Village Executive Officer for Slahham Village.

On the other hand, the Respondent, Daudi John (DW1), called five witnesses to prove ownership of the suit land. DW1 testified that, prior to his allocation of the land in question, it was owned by one Daniel John the blood brother of the parties to the appeal. He accounted that Daniel John abandoned the land and went to live in Babati. As the land was abandoned, DW1 applied for allocation of the suit land by the village land allocating committee. The allocating committee acceded to the request and allocated the land to DW1 in 1988. That is how he became the owner of the land. However, no document was tendered to prove such transaction, including minutes of the Village Land allocating Committee or application letter to that effect.

DW1 testified further that, Daniel John (DW3) came back and claimed his land. This led to a dispute over ownership of the land between Daniel John and Daudi John. The Village elders resolved the dispute and DW3 agreed to surrender ownership of the land in dispute to DW1. Exhibit D1 witnessing the surrender was tendered. It is titled:

> *"Suluhu ya Mgogoro wa shamba kati ya Daniel John na Daudi John – 18/01/2006"*

Exhibit D1 was witnessed by one Joseph J. Awet, the Village Executive Officer of Slahhamu village and other village elders. As per the above piece of evidence, Daudi John became the owner of the land with effect from 18/01/2006. However, exhibit D1 does not mention the three acres in question but just land. DW3, Daniel John testified that, he left to Babati in 1982 but continued to cultivate up to 1985. He left the land in question under the supervision of DW1 who decided to apply for re-allocation from the Village.

Part of his evidence is as follows:

> *"Shamba lile nilipewa mwaka 1974 wakati wa operation vijiji na Baba yetu aligawiwa wakati ule, nililitumia mpaka 1982 nikahamia Babati, nikaendelea kulima mpaka 1985* ***nikamwachia shamba Daudi, baadaye 1988, Serikali ya Kijiji wakasema Daniel hayupo na sichangii michango hivyo shamba atapewa Daudi (Respondent), 2006 nilienda Ofisi ya Kijiji wakaniambia shamba langu amepewa Daudi kwani nililitelekeza."*** *(Emphasis added)*

DW1 did not oppose the DW3's testimony, meaning DW1 applied for re-allocation of the land from the Village while being aware that the same was left under his supervision by DW3. It is in that regard, on return, DW3 claimed his land from DW1, his young brother. DW1 illegally benefited ownership of the land which was left to him as custodian but decided to apply for ownership from the Village knowingly, the land belongs to DW3. The rest of the witnesses corroborated the evidence of DW1 and DW3. In short, that was the Respondent's evidence on how he owned the land. Having gone through the evidence on record, this Court has duty to deliberate on the following issues:

i. *Whether the Respondent had acquired good title over the land in dispute;*
ii. *Whether Respondent has proved to be in bona fide possession, and ownership of the land since 1988; and*
iii. *Whether the tribunal properly invoked and applied the principle of adverse possession.*

This Court, being the first Appellate forum in this case has duty to exercise powers within the parameters of the law. At this juncture, I am guided by the principles established in the case of ***Peters Vs. Sunday Post Limited*** *(supra) and section 45 of Cap. 216. Moreover, in the case of* ***Re B [2008] UKHL 35,*** Lord Hoffman defined the term balance of probabilities to mean:

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."*

It should be remembered that, Courts decide disputes according to the available evidence, applicable laws and jurisprudence of the time. Courts do not invent facts of the case but relies on what the parties have presented before the court.

In the present appeal, the first, second and third grounds are conjoined and tacked together. Basically, the Appellant is complaining that the respondent was declared the legal owner of the land in dispute in the absence of tangible evidence, oral or documentary evidence proving such ownership. As stated

above, the land in question is to date owned customarily, as such ownership has to be proved in that line.

The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules, their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, on part of that specific land to which such rules apply. None of the parties have established the applicable customary rules of that area.

DW1 in his evidence stated that he was allocated the land by the Village Land Allocating Committee, however there were no minutes or any document of the said committee verifying such allocation. In the absence of the same there must be concrete evidence proving how the Respondent attained ownership. There was no evidence from the Village if there was such committee with mandate of allocating village land to the villagers. Against what DW1 testified, DW3, the blood brother of DW1 testified that he was the owner of the land in dispute and in 1985 when he left to Babati, in the course thereof, he left the land under DW1's supervision. On his return back, he asked for his land from DW1 but was told that it has been allocated to DW1. This led to conflict between DW1 and DW3 which was settled by Village elders and ownership was left to DW1, as exhibit D1 depicts. This clearly shows that DW1 was not the owner but a trespasser. He used fraud means to deprive DW3, hence applying for allocation the land knowingly that the same was entrusted to him by DW3.

Despite that fact, exhibit D1 is silent on the number of acres and any other descriptions of the land allocated to DW1. Exhibit D1 included also a letter

written by one Joseph J. Awet, the village Executive Officer for Slahhamu Village dated 12/12/2017. It was written eleven years after signing exhibit D1. The letter described the presence of three acres but addressed to what is said to whom it may concern." *YEYOTE ANAYEHUSIKA"*

This Court considered the same but it found itself in predicament, due to the following: ***First***, why was it written, ***two,*** what prompted writing such a letter, ***three,*** under which circumstances, ***four,*** where did he get the three acres mentioned in the said letter while exhibit D1 did not mention them and ***five***, what is the secret behind writing the letter.

It is the view of this Court that the evidence by the Respondent carries overwhelming doubts and untrustworthiness. Further the way how he tricked DW3 to get ownership is questionable. I am of the view that in ordinary sense, being customary owned land, proof of ownership could be by way of clearing vacant bush, inheritance, purchase, gift, allocation by relevant government authorities or adverse possession. No evidence proving that he acquired through any of the above way.

Another version is that of AW2 the mother of AW1, DW1 and DW3, She admitted to have transferred ownership of the suit land to AW1 as per exhibit P1. In her testimony, she accounted that during subsistence of their marriage, they acquired and owned the land before villagization and continued to own it until 2016 when she transferred it to AW1, their last born. She further stated that, upon passing away of the late John Lulu, she remained the sole owner until 2016. Finally, she testified that, DW1 invaded and cultivated for three (3) years.

Without hesitation, this Court finds that there is no evidence establishing that the Respondent acquired good title over the land by any means. This is due to lack of evidence proving how he acquired ownership of the land. Evidence by DW3 shows that DW1 acquired the suit land by defrauding DW3 in the purported allocation. One cannot benefit from his illegal means, DW1 inclusive. Grounds **one, two** and **three** are therefore answered in affirmative.

The fourth ground by the Appellant is that the trial tribunal erred in law and fact in invoking the defence of adverse possession in deciding the case. In discussing this complaint, the Court is guided by numerous court decision. However, let it be known that, the mere long use of the landed property does not entitle a person or trespasser to ownership of the same. In the case of ***Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 others,*** *Civil Appeal No. 193 of 2016* (unreported), the Court propounded that:

> *"In our well- considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession. Possession and occupation of land for a considerable period of time do not, in themselves, automatically give rise to a claim of adverse possession..."*

Citing the English decisions- ***in Moses v Lore grove [1952] 2 QB 533; and Hughes v. Griffin [1969] 1 All ER 460***, the Court in the above cited decision highlighted on the eight elements of adverse possession (a) That there had been absence of possession by the true owner through

abandonment (b) That the adverse possessor had been in actual possession of the piece of land; (c) That the adverse possessor had no colour of right to be there other than his entry and occupation (d) That the adverse possessor had openly and without consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of the land for purposes for which he intended to use it; (e) That there was a sufficient animus to dispossess and an animo possidendi; (f) That the statutory period, in this case twelve years, had elapsed (g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and (h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result (i) A person asserting the doctrine of adverse possession should have no colour of right over the suit land except his entry on the same without the owner's permission.

In the appeal at hand, the tribunal based its decision on exhibit D1 which in fact blessed the fraud by the Respondent as the land was left to him by DW3 and DW1 applied for its ownership knowingly the same to be under him as custodian. This was fraud on the part of the Respondent. The fact that DW3 returned and claimed his land, his testimony waters down the issue of adverse possession as quoted herein above. DW1 was very much aware how the land became under his possession, abandonment could have not occurred as the land was left under his supervision and care. This automatically defeats the claim of ownership through adverse possession. The fourth ground of appeal is therefore answered in affirmative.

The complaint in the fifth ground is that the tribunal erred in law in ruling in favour of the Respondent while there was non-joinder of the necessary

party. The Appellant argued that since AW2 testified to be the previous owner of the land in dispute, the tribunal ought to have ordered AW2 a party to the case. In resolving this ground, this Court will guided by principles of joinder and non-joinder of a party.

I am alive to the principle that it is the plaintiff who decides who to sue and who should not be sued in a case, the liberty applies to proper parties, but does not apply to a necessary party. In the suit at hand, it is the transferor (AW2) was not sued and the Appellant holds firm view to the stance that AW2 was a necessary party. *This attracts the pertinent question who is a necessary party?*

It is trite to note that establishing whether a person is a necessary party to the suit or not is subjective. Usually depends on the facts of a particular case. In the case of ***Abdullatif Mohamad Hamis Vs. Mehboob Yusuf Osman and Another,*** *Civil Revision No. 6 of 2017* (unreported) the Court of appeal had once held that:

> *"The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed. Whether or not, in the absence of the party, an executable decree may be passed."*

A general distinction of the two was made in the case of ***Suryakant D. Ramji Vs. Savings and Finance Limited and Others*** *[2002] TLR 121.*

This Court in determining the question of joinder and non-joinder of parties had this to hold:

> *"As who can, be joined as a party to a suit the legal stand is very clear - the plaintiff may decide to join both proper parties and necessary parties. While a plaintiff cannot avoid joining the latter, it is within his discretion as regards to who should be fished from the former category. A necessary party in litigation is the one against whom the relief is sought or without who an effective decree cannot be passed by the court, and those whom the law requires to be impleaded. On the other hand, proper parties are those whose presence enables the court to decide effectively and finally the dispute presented before it, and these include those who in one way or another, are interested or connected with the relief being asked for as against others. The excerpt above on the necessary party is parallel to what was held by the Court of Appeal in* ***Abdullatif Mohamed Hamis Vs Mehboob Yusuf Osman and Another (supra)*** *where it devotedly set two tests as parameters to apply in a particular case. The court adopted the following tests;* ***"First,*** *there has to be a right or relief against such a party in respect of the matters involved in the suit and;* ***Second,*** *the court must not be in a position to pass an effective decree in the absence of such a party"*

Guided by the above legal position, it is without iota of doubt that there is no relief sought which would affect AW2, warranting to join her. Further, AW2 testified that while living with the late John Lulu, owned the land in

dispute and in 2066 she transferred ownership to AW1. AW2 was made aware of the case and testified before the tribunal. She made her case as there was no relief sought against her. The mere fact that she was the previous owner does not necessarily make her a party based on the principles guiding joinder of parties in a suit as propounded above. As such, the fifth ground therefore fails.

It is evident that DW3 testified that the land had once belonged to him before being taken away by DW1. This is found in the evidence of DW3, DW1 and exhibit D1. However, there was no proof if at all DW3 was legal owner before transferring such ownership to DW1. There was no evidence proving such allocation. This is the first version. The testimony by AW2 the mother of the AW1, DW1 and DW3 is to the effect that, AW2 and her late husband John Lulu acquired that land before villagization and the same has never been re-allocated to anybody. She added that DW1 invaded and cultivated for three years. This is another version.

These two versions of story prompted this Court based on analysis of evidence on record to resolve who is the owner of the land in question? The evidence by AW2 that the said land belonged to them (AW2 and the late John Lulu) and that the same has never been re-allocated to anybody, including DW3, her son and in the absence of any evidence to the contrary, this Court believes that evidence and hold that, the said land belongs to AW2 and the late John Lulu who together acquired the same before villagization in 1974. Any purported allocation of the said land by non-existing Government authority was *void abinitio*.

The transfer of land from AW2 to AW1 was justified because AW2 had better title to pass than anyone else. The law is trite that no one can transfer title that himself does not have. Therefore, the Appellant lawfully acquired the suit land from his mother, AW2, who owned it with the late John Lulu prior to his death.

Consequently, this Court finds the appeal meritorious and allow it on the basis of assigned reasons herein above. The decision of the trial tribunal is hereby quashed and set aside. The Appellant is declared the lawful owner of the suit land. The Respondent is condemned to pay costs.

It is accordingly ordered.

DATED at **ARUSHA** this 26th day of October, 2022

G. P. Malata

JUDGE

26th October, 2022

Right of appeal explained to the parties

G. P. Malata

JUDGE

26th October,2022