IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 36 OF 2022

(Arising from the decision of Land Application No. 63 of 2019 in the District Land and Housing Tribunal for Tarime at Tarime)

BETWEEN

MWITA CHACHA NYAHERI..... 1ST APPELLANT

SAMWELI MWITA CHACHA.....2ND APPELLANT

VERSUS

COL. MACHERA MWISE MACHERA..... RESPONDENT

JUDGEMENT

24 October & 15 November 2022.

M. L. KOMBA, J.:

This appeal traces its root in the decision of District Land and Housing Tribunal for Tarime at Tarime (the trial Tribunal) over Land Application No. 63 of 2019, where parties in this appeal were dispting over the ownership of a piece of land measured 155 x14.9 meters in Kegonga 'B' Matongo Village in Tarime District. The trial Tribunal decided the mater in favor of the respondent in this appeal. Dissatisfied decision of the trial Tribunal, the appellants lodged this appeal with 4 grounds which can be summarized as;

1. That the trial Tribunal introduce the new issue which was not raised by any party.

2. That the trial Tribunal considered the respondent evidence which is lighter.
3. That the disputed land measurements mentioned by the respondent does contradicted with the evidence adduced.
4. The respondent evidence contradicted his witnesses' evidence.

At the hearing of this appeal parties consented the appeal to be disposed of by way of written submission and the court so ordered. The filing schedule was set and parties complied with it as ordered by the court. All submissions were filed by counsel of both parties.

Having read submissions from each side, I opt to discuss the grounds of appeal randomly. I will start with the first ground which the counsel for the appellants, Ms. Happiness Robert is seeking to challenge the procedure taken by the Chairman of the trial Tribunal who assumed facts and then, facts were answered in favour of the respondent. She referred this court at page 5 of the judgement, the paragraph insisted that '*Mgogoro umezuka baada ya Mjibu maombi wa kwanza kulipwa fidia kwenye eneo lake ndipo akavamia eneo lenye mgogoro ambalo mleta maombi alipewa na mama yake na kisha mjibu maombi wa kwanza akamruhusu mjibu maombi wa pili kujenga nyumba kwenye eneo hilo na kusababisha mgogoro.*'

It was her submission that these words were neither adduced by respondents nor the appellants and that the words were creature of the trial Tribunal. In support of her point, she referred this court on section 110(1) and (2) of the Law of Evidence, Cap 6 submitting that the burden of proving existence of facts is primarily on the parties and thus the tribunal erroneously involved into the parties' legal duty. To facilitate the proposition put forward she refer this court to the case of **Joseph Marco vs Pascal Rweimamu** (1977) TLR 59 where it was held that it was improper for trial Magistrate to assist parties.

The respondent's learned advocate Mr. Hassani Mawazo prefaced his reply submission by urging this court to consider that it was the respondent who informed the trial Tribunal that issue and denied the assistance from the trial Tribunal. He refers this court at page 25 of typed proceedings where the respondent said '*Mgogoro umezuka baada ya Mwita Chacha Nyaheri kuvuka mpaka na kujenga kwenye eneo langu.'* He recon his submission by citing the case of **Rock Beach Hotel vs. Tanzania Revenue Authority,** Civil Application No. 52 of 2003, CAT at Dar es salaam, (unreported) that respondent successful proved his case at the trial Tribunal and that statement at page 5 of the judgement should be ignored by this court as it is misleading.

Both counsel submission on the first ground was supported by quotations from judgment and from proceedings. According to my interpretation these are two different massages. The one from the judgement has more qualifications which was not part of the testimony. It is not because the 1st appellant sold his land that's why he encroaches into respondent's land. The issue in dispute is who own disputed piece of land and since when. This court once warned the Magistrate on assisting one party. See **Joseph Marco case (supra).** As rightly submitted by Ms. Robert, which this court agree, it is the duty of the parties to prove their case and not otherwise as it is provided under section 110 of Cap 6. The **Rock Beach Hotel case (supra)** relied by the respondent is distinguishable in the sense that facts in issue in the current appeal were creature of the trial Tribunal while in the referred case parties proved their case. From the wording of section 110 of Cap 6, court find this ground has merit.

The size of the land was argued on 3rd ground of appeal. Counsel for appellants informed this court that during trial respondent pleaded that the disputed land measures 155 x 14.9m while during hearing he testified that the land measurements are 155 x 19.6 x 14.9m. Ms. Robert submitted that it has been already settled that parties are bound by their own pleadings and relied on the case of **Charles M. Mbusiro vs John Bunini,** Land Appeal

No. 6 of 2021 HC at Musoma and the Court of Appeal decision in **James Funke Ngwagilo vs Attorney General** (2004) TLR 161 and concluded that respondent did not prove his case during trial.

Replying to this ground, Mr. Mawazo submitted that respondent who was PW1 during the trial he stated that the disputed piece of land is measured 155m x 19.6 mx 14.9 m as depicted from page 17 of typed proceedings. He further said the same was correctly featured in page 2 of the judgment and even in decree and that when the Tribunal visited the locus quo it records 15m x 155m x 19.6m and elaborated that the difference is very minor. From that he concludes by starting that the evidence adduced by respondent during trial was consistence. It was his submission that the measurements in the pleading which is 15m length and 14.9m width was just a slip of the pen and should not be considered as respondent is not aware of what he is claiming.

It is her last submission on 4th ground that the respondent evidence was contradicted in great extent leave alone inconsistent with the finding of the Trial Tribunal. Ms. Robert pointed that respondent informed the court at page 17 of the proceedings that he started owning the disputed land in 1986 while at page 19 he said that he started owning the disputed land in 1980. That not enough the trial Tribunal had its version in judgment that

respondent started to own the land in 1974. She expounded that another contradiction is the size of disputed land which have different measurements as submitted in the third ground. It was her submission that these contradictions go to the root of the subject matter which resulted from the truth that respondent never owned the land and relying to the second-hand information and that respondent did not prove his case to the required standard. Ms. Robert prayed this court to allow the appeal.

Responding to the 4th ground Mr. Mawazo submitted that there was no contradictory evidence on the side of the respondent. He referred the evidence of PW1 in the proceedings when he informed the court that the land in dispute was given to him by his mother in 1986 and the same was testified by PW2 at page 28 of the proceedings. It is his further submission that the year 1980 quoted by the appellant in proceedings was slip of the pen in the due process of adjudication of the matter. Mr. Mawazo insisted that the chairman put it clear in judgement that respondent acquired the suit land in 1986 from his mother. To fortify his stance, Mr. Mawazo referred the Court to section 96 of Civil Procedure Act and the decision of this court in the case of **VIP Engineering & Marketing Ltd vs Society General De Surveillance (SA) & Another**, Commercial case no. 16 of 2000

(unreported) that the court has the duty to ensure that court records are true and they represent an accurate record of the proceedings.

Next for consideration by this court are grounds 3 and 4 which I find convenient to discuss them conjointly. As raised by Ms. Robert there is inconsistence of the size of the disputed land and the year which the appellant claim to start occupying the said piece of land. Inconsistence is clearly pointed by the counsel for appellants and Mr. Mawazo hide under the excuse of slip of the pen. If at all there was such a problem, respondent was supposed to apply to the trial court rectify these errors as it is provided in the Civil Procedure Code, Cap 33 R. E. 2019;

S. 96 of Cap 33 on amendment of judgements, decree or orders

> *'Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or* ***on the application of any of the parties****'. Emphasis supplied.*

I join hand with respondent counsel that it's the duty of the court to correct errors in judgement, decree and orders. Court needs to be moved to do so. It was expected the respondent to apply for such correction but respondent did not apply for rectification of the said errors as required by law. Until when the matter is determined on this appeal there is no record show that the trial

Tribunal was moved to correct clerical errors if at all was clerical, and therefore one can say that this justification of slip of the pen came afterthought. See **Gapoil (Tanzania) Limited vs. Tanzania Revenue Authority and 2 others**, Civil Appeal No. 9 of 2000, CAT at Dar Es Salam

After careful consideration of the entire record and the rival submissions by advocates for the parties, the question that remains to be answered, to which the learned counsel for appellants' attention was also drawn, is whether the respondent prove his case to the balance of probability. It is instructive to state that this being the first appeal, the Court has power to re-appraise the evidence on record and draw inferences of facts.

It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. The party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. See, for **example Godfrey Sayi v. Anna Siame as Legal 12 Personal Representative of the late Marry Mndolwa**, Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of Cap 6. This means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.

It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. I seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported):

> *"...**the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof** It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...**" [Emphasis added]*

Let us now see as to whether the respondent managed to prove his case as required by law. Looking critically at the testimonies and record on the trial tribunal, I have noted that, **One,** the respondent pleadings and testimony differ as he pleaded his piece of land measures 155m x 14.9 m while, during hearing he testified that the land measurements are 155m x 19.6m x 14.9m. **Two,** respondent in his testimony at page 17 of the proceedings allege to own the disputed land in 1986 while at page 19 asserted that he started owning the same piece of land in the year 1980 and the Chairman of the trial Tribunal stated clearly at the first page of the judgement that respondent claimed to own the disputed land since 1974.

The fundamental rule of pleading is that a party can only succeed on the basis of what he has pleaded and proved. He cannot succeed on a case not set up by him. He also cannot be permitted to change his case at the stage of trial if it is inconsistent with his pleadings. Such variation would cause surprise and confusion and is always looked upon by courts with considerable dis-favor and suspicion. See **African Banking Corporation vs Sekela Brown Mwakasege** Civil Appeal 127 of 2017 [2020] TZHC 1952 (10 March 2020); [2020] TZHC 1952 while quoting **Narendra v. Abhoy, Air 1934 CAL 54 (FB).**

From above position of law and decided cases, this court finds ground 3 and 4 are meritorious on the sense that the respondent did not prove his case to the required standard.

From the foregoing paragraphs, I allow this appeal, I set aside the order of District Land and Housing Tribunal and I declare that the appellants are rightful owner of the disputed land.

Each part shall bear its own costs.

Right of appeal explained.

M. L. KOMBA

JUDGE

15th November, 2022

Judgement delivered in chamber in this 15th day of November, 2022 the presence of both appellants and in the presence of respondent and his Advocate Mr. Mawazo.

M. L. KOMBA

JUDGE

15 November, 2022