IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 27 OF 2022

(Originating from Land Application No. 167 of 2015 of the District Land and Housing Tribunal for Moshi at Moshi).

SALEHE FADHILI MTETI (As a legal representative of the deceased Hadia Salehe) **.....APPELLANT**

VERSUS

MARTIN MRISHA..... 1ST RESPONDENT

HONORATHA ADOLFU..... 2ND RESPONDENT

JUDGMENT

27/10/2022 & 24/11/2022

SIMFUKWE, J.

This is an appeal from the decision of the District Land and Housing Tribunal of Moshi (trial Tribunal) in Land Application No. 167 of 2015.

The historical background of this appeal is that; the deceased Hadia Salehe instituted a land dispute before the trial tribunal against the respondents alleging that the respondents had trespassed to her land located at Kahe Village. She also alleged that the said land belonged to her since 1975 as she acquired it after clearing the shrubs and made 35 acres. She alleged further that; she cultivated the disputed land until in 2012 when the respondents trespassed therein.

The 1st respondent denied to be a trespasser. He claimed that the Village Land Committee of Mawala allocated him six acres and later he was given

two more acres. That, he also bought two acres from Alfred Mwandika, he bought four and a half acres from Anyweruse Bandengenya, four acres from Upamba and later he bought ten and a half acres. He called witnesses to support his evidence.

On part of the 2nd respondent, she denied to be a trespasser. She alleged that the appellant was the trespasser to her land which she claimed ownership through customary right of occupancy.

The said Hadia Salehe passed away before determination of her dispute, thus the appellant herein was appointed to be administrator of her estate.

The trial tribunal after hearing both parties dismissed the application on the reason that the applicant had failed to substantiate her claim against the respondents. The appellant was not satisfied thus he decided to file this appeal on the following grounds:

1. *That, the trial chairman erred in law and facts for failure to determine the owner of the suit land between the three parties as each of them claimed to be the owner of it as a result left the dispute among them unresolved.*
2. *That, the trial chairman erred in law and facts for holding that failure of the applicant (now appellant) to bring documents which show who allocated the suit land to Hadia Salehe (the deceased) made his evidence in admissible.*
3. *That, the trial tribunal grossly erred in law and facts for not finding that the evidence given by the respondents both oral and documentary was fabricated, worthless and unreliable.*
4. *That, the trial chairman made a gross error for holding that the respondents tendered documents/certificates of customary right of*

occupancy which were issued by the village land allocation committee and sale agreements which show that the 1st respondent bought the land from villagers who were allocation (sic) the land by the Village land allocation committee while there is no certificate of customary right of occupancy, or any lawful document (s) which show that the respondents or any villagers were allocated the land which was tendered by the respondents.

5. *That, the trial chairman erred in law and facts for failure to properly evaluate and analyze the evidence of the parties thus reaching at a wrong and unjust decision.*
6. *That, the trial tribunal erred in both law and facts for concluding that the appellant has not proved his case merely because he did not bring documents to show who allocated the suit land to Hadia Salehe (the deceased) while he had given credible and sufficient oral evidence to show how the suit land was obtained and how it was trespassed by the respondents.*

During the hearing of this appeal, the appellant was represented by Mr. Erasto Kamani, learned counsel, the 1st respondent was represented by the learned counsel Mr. Martin Kilasara while the 2nd respondent was unrepresented. The 2nd respondent prayed the matter to be argued by way of written submissions his prayer was granted. The parties timely filed their respective submissions.

Supporting the first ground of appeal that the trial Chairman left the dispute unresolved, Mr. Kamani was of the view that the trial tribunal was supposed to declare the lawful owner of the suit land between the parties since each of the three claimed to be the owner of that land and prayed to be so declared.

That, the legal representative of Hadia Salehe claimed that the suit land belonged to Hadia Salehe which she obtained in 1975 after clearing unoccupied bush which later on came to be Mawala village and he prayed the tribunal to declare the said Hadia Salehe lawful owner. That, the 1st respondent alleged that he was given part of the suit land by the village land allocating committee and other portions were purchased from the villagers and prayed the Tribunal to declare him the lawful owner. At the same time, the 2nd respondent also claimed that the suit land was allocated to her by Mawala village land allocating committee.

It was the opinion of Mr. Kamani that the trial tribunal after evaluating evidence ought to have declared the owner of the land. That, instead of declaring the owner, the trial Tribunal at page 8 of the typed judgment stated that the issue as to who is the lawful owner of the suit land had been clearly answered by admissible evidence of the respondents who had tendered sale agreements and customary rights of occupancy obtained from the seller and village land allocation committee.

It was the averment of Mr. Kamani that in absence of specific declaration of the owner of the suit land by the trial tribunal, tendering of the admissible documentary evidence alone did not and can never by itself answer the issue of ownership of the suit land. He continued to state that even if it is assumed that the Chairman meant that the suit land belonged to the respondents, yet there is no explanation as to which respondent between the first and second respondent was the owner of the land considering that each of them claimed to be the owner of that land or whether it is jointly and collectively owned by both respondents.

Mr. Kamani emphasized that failure of the trial tribunal to declare the owner of the suit land has left the dispute over ownership of that land unresolved.

On the 2nd ground of appeal, the learned counsel for the appellant condemned the holding by the trial Chairman at page 8 of the typed judgment that the applicant's evidence was inadmissible merely because he did not bring documents to show who allocated the suit land to Hadia Salehe, the deceased. He argued that the said holding has so many implications which render the tribunal's judgment invalid. Mr. Kamani noted that the trial chairman made a serious mistake by disregarding all evidence which was given orally by the appellant and his witnesses simply because he did not produce documents. Also, the trial chairman misdirected himself by assuming that ownership of the land in the village can only be proved by production of documentary evidence.

It was submitted further that, the trial chairman made gross error by thinking that non production of documentary evidence rendered oral evidence given by the appellant and his witnesses inadmissible. That, the dismissal of the application was to the great extent influenced by wrong assumption of the trial chairman that the applicant's evidence was inadmissible while it was not. Lastly, by holding that evidence of the applicant was inadmissible means that the proceedings of the trial tribunal contain inadmissible evidence and therefore invalid and the same cannot be left to stand.

The learned counsel for the appellant argued the 3rd, 4th and 5th grounds of appeal jointly, that the trial chairman did not properly evaluate the evidence on record.

He submitted to the effect that since 1987 when the local government was established, the authority which was mandated to allocate land available in the village land and to grant customary right of occupancy is the Village Council which is the authority entrusted with management and administration of village land on behalf of villagers in the village pursuant to **section 8(1)(2)(3)(5) and (6) of the Village Land Act 1999**. That, all applications for land in the village is made to the Village Council which then discusses and decides the applicants who should be allocated land and the size which each of them should or should not be allocated. The Village Council then records minutes which shows the persons who have applied for land, the accepted and unaccepted applications and the reasons thereto. The minutes are finally presented at the ordinary village assembly for approval or disapproval to allocate/grant customary right of occupancy.

He continued to state that a person who wants to prove that he was allocated land by the village government he must produce minutes of the Village Council which allocated him that land. The learned counsel claimed that witnesses of the respondents nowhere did they tender minutes or any other document showing that the respondents were allocated the suit land by Mawala Village Council.

Mr. Kamani believed that the trial chairman misdirected himself on the reason that there was no village land allocation committee at the village level which could have granted land or customary right of occupancy to the respondents since the land allocation committees are found at the district level and they were established by **Regulation 3 of the Land (Allocation Committees) Regulations 2001** many years after the time which the respondents alleged they were granted land and

customary right of occupancy. He averred that even if it is assumed that there was a village land allocation committee in Mawalla village in 1990s (something they strongly deny) that committee could not have power to allocate land or customary right of occupancy to the respondents.

Thus, there is no doubt that any evidence or allegations which purport to show that the respondents were allocated land by the village land allocation committee is baseless and unreliable.

The learned counsel continued to state that there are so many indications that evidence of the respondents was fake and unreliable. One of them is the evidence concerning 2 acres of land which the respondents claimed to be part of the suit land. That, DW1, one Martin Mrisha who is the respondent herein testified that he was given the said 2 acres on 27/5/1994. He tendered a document which was admitted as Exhibit D1 to support his argument. DW5, one David Kiwalu Laize who was the village chairman testified however that a village assembly which approved the first respondent and 12 other applicants to be allocated 2 acres of land each was held on 13/10/1994. DW5 tendered a minute of the purported village assembly to support his contention.

The learned counsel questioned as to how it could be possible for the 1st respondent (DW1) to be allocated 2 acres of land on 27/5/1994 while the village assembly which approved him to be allocated that land was held on 13/10/1994, more than four months later if it was not fabricated evidence.

Mr. Kamani also questioned the authenticity of the said minutes of the general assembly (Exhibit D5) and a paper which was tendered by the 1st respondent (Exhibit D1) on the following grounds: first, it does not show

the area at which the land which is said to have been approved to be allocated is situated; second, it is not known whether that minute is related to the suit land or other land; third, the said minutes does not show which size of land was allowed for each of the applicants to be allocated and fourth; the said minute was not signed by the villagers who were alleged to had attended that meeting; fifth; the said minutes contain two headings. On the first page, it is titled **Mkutano Mkuu wa Kijiji cha Mawalla** (minutes of ordinary village assembly) and at page 5 which contains names of attendants bears the heading **MAHUDHURIO YA MKUTANO WA DHARURA KIJIJI CHA MAWALLA** (minutes of extra-ordinary village assembly). The learned advocate was of the view that **"Mkutano Mkuu wa Kijiji"** and **"Mkutano wa Dharura wa Kijiji"** are two different meetings. Thus, the issue to be considered here is how could a single meeting contain two different headings if not a fabricated document?

The learned counsel further questioned the said minutes by stating that at page 5 it shows that the purported village assembly was presided over by three chairmen, namely Manaseh Maina, Pariti Kiwalu and Msafiri Ramadhani (see attendance No. 3, 4 and 5) and purported to have been endorsed by a person known as Mbao who was not even among the villagers who attended that meeting.

That, one will wonder as to how a single village assembly could be chaired by three chairmen who did not even endorse minutes of that meeting if that was not a work of forgery.

The appellant's counsel also referred to Exhibit D1, and argued that like exhibit D5 the same is also not authentic as it is not known which kind of

document is that. He argued that according to its contents, the said document is just an information or a letter which was prepared by Mawalla village secretary in collaboration with the 1st respondent herein in order to serve their interest. He referred to the 9th line of the said document where it is written:

> *"kua barua hii naomba asisumbuliwe na mtu yeyote katika shamba hilo na katika eneo hilo".*

Another query which was raised by Mr. Kamani is in respect of 6 acres of land which was said to be part of the suit land. That, DW1, DW4 and DW5 told the tribunal that the 1st respondent (DW1) besides 2 acres, he was also given/borrowed other 6 acres of land by Mawalla village government. Mr. Kamani commented that it was not explained when he was given or borrowed that land, and which authority actually gave him that land and which village assembly approved him to be given or borrowed that land. That, no document was tendered to prove that the 1st respondent was actually given 6 acres of land by Mawalla village government. He called upon the court to resolve the issue as to whether it could be possible for the 1st respondent to be given 6 acres of land by the village leaders instead of the village council and without approval of any village assembly. The answer will definitely be no.

The learned counsel also challenged evidence of the 2nd respondent (DW7) by arguing that the said witness stated that she is the one who was allocated the suit land by what she called village land allocation committee and she tendered a number of documents which were collectively admitted as Exhibit D7 and some of the documents consist the names of persons who were not even parties to this case. There was no

explanation as to how she got those documents but the trial chairman concurred that she had brought documents which showed that she was allocated land by the Village Land Allocation Committee.

Supporting the sixth ground of appeal, Mr. Kamani contended that the trial tribunal erred both in law and facts for concluding that the appellant had not proved his case merely because he did not produce documents to show who allocated the suit land to Hadia Salehe (the deceased) while he gave credible and sufficient oral evidence to show how the suit land was obtained, how it was used and how it was finally trespassed by the respondents.

That, PW1, one Salehe Mteti who was the legal representative of Hadia Salehe, testified that Hadia Salehe took and occupied for herself 35 acres of land by clearing a bush which was not occupied by anybody in 1975 and was known as Kahe village. At that time Mawalla village had not yet been established. She continued to own and use that land customarily without impediment from anybody. PW1 told the tribunal that even when Mawalla village was established from Kahe village in 1977 it took recognition of villagers who were owning land customarily in that area including Hadia Salehe. In support that fact he explained that, there was no notice from Mawalla village council which has ever been sent to Hadia to notify her that she is not the owner of that land or that she should vacate that land.

PW1 told the tribunal that Hadia Salehe occupied and used those 35 acres more than 36 years without being disturbed by anybody. That, it was in 2011 when the respondents trespassed 15 acres of that land.

The learned counsel also referred to the evidence of PW2 and PW4 one Omary Ally and Bashiri Yusuph respectively who testified that the suit land is the property of Hadia Salehe which she obtained in 1975 by clearing unoccupied bushes since 1975 up to 2011. They explained that they also occupied land in that area using that method and they owned that land to date.

Mr. Kamani thought that according to the manner by which that land was obtained, it was immaterial for the trial chairman to decide that the applicant was supposed to produce documents showing who allocated the suit land to Hadia Salehe. He also believed that it is not mandatory to prove ownership of land owned customarily by producing documentary evidence as oral evidence is the best evidence compared to documentary evidence.

In conclusion, the learned counsel for the appellant prayed the court to allow the appeal with costs by quashing and setting aside the judgment and proceedings of the trial tribunal. Also, he prayed this court to order Land Application No. 167/2015 be heard afresh before another impartial chairman.

Replying the first ground of appeal on allegations that the trial tribunal failed to declare who is the lawful owner of the suit land; Mr. Kilasara for the 1st respondent submitted to the effect that this ground is frivolous, unfounded and devoid of merits. He argued that as a matter of law and practice there is no specific style of writing a judgment. However, in terms of **Regulation 20 (1) (a) to (d) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, GN 174/2003**, it

is clear that a judgment of the tribunal has to contain brief statement of facts; findings on the issues; a decision and reasons for the decision.

Mr. Kilasara said that from the impugned decision it is clear that there was no dispute of boundaries between the respondents (who are neighbours thereto) in respect of their respective acquired lands. That, each respondent filed his defence and categorically testified at the tribunal explaining how, when and where they obtained their respective lands. Mr. Kilasara stated further that the dispute as activated by the appellant, was over the alleged trespass; but as per DW7, it was the appellant who trespassed the suit land.

Mr. Kilasara explained that after hearing the parties, the trial tribunal made a finding of facts on the issue as to who is the lawful owner of the suit land. It was answered by the admissible evidence of the respondents who tendered both sales agreements and customary right of occupancy. That, at page 8 of the decision, the tribunal held that there was credible and sufficient evidence that the respondents never trespassed the suit land as alleged by the appellant. It was further held that the Appellant failed to substantiate his claim of ownership and trespass thereto.

Mr. Kilasara formed an opinion that since there was no dispute of boundaries between the respondents and that the tribunal held that the appellant failed to substantiate his claim of ownership. Further, that the respondents managed to prove that they were owners of the disputed land, then by necessary implication the respondents are owners of their respective suit land.

Responding to the second ground of appeal that the appellant's evidence

was held to be inadmissible only because of failure to tender documentary evidence; It was submitted to the effect that there is no dispute that the appellant never tendered any documentary evidence to substantiate his frivolous claim of ownership over the suit land. Also, it is clear from the evidence on record that his evidence was mere hearsay which in terms of the **Evidence Act, Cap 6 R.E 2019** is inadmissible. Mr. Kilasara added that the Appellant also failed to properly describe the size of the suit land and he failed to tender any documentary evidence. That, on balance of probabilities, the Appellant's evidence was weak and unreliable.

Concerning the third, fourth and fifth grounds of appeal which concerns evaluation of evidence, the learned counsel for the 1st respondent submitted that before reaching into his decision, the presiding chairman must analyze and evaluate the evidence before it in an attempt to answer the framed issues. He said that the trial tribunal duly complied with those requirements of the law and at the trial three issues were framed to wit: *who is the lawful owner of the suit land; whether the Respondents have trespassed the suit land and what reliefs are the parties entitled to.*

Mr. Kilasara explained that evidence on the record is that the 1st Respondent acquired ownership of his respective land partly by way of allocation from the Village Council and partly from the previous owners by way of sale. The title for customary right of occupancy as well as sale agreements were tendered and freely admitted at the tribunal as Exhibits. He argued that during cross examination, the said Exhibits were not seriously impeached by the Appellant to render the same incredible. That, they could not have obtained the said land without

approval of the local authority (Mawala Village Council) which Mr. Kilasara believed that had authority over all village land including the power to allocate land to its villagers. Since it's a legal person, the leaders therein act for and on her behalf to execute its functions.

Mr. Kilasara referred the court to the case of **Paul Yustus Nchia vs. National Executive Secretary, Chama Cha Mapinduzi and Another, Civil Appeal No. 85 of 2005** (CA) at Dar es Salaam which at pages 12-13 while quoting with approval the learned authors of **Blackstone's Criminal Practice (1992)** stated that:

> "A *party who fails to cross - examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness - box or, at any rate to make it plain to him at that stage that his evidence is not accepted.*"

Also, he cemented his point by referring to the case of **Martin Misara vs the Republic, Criminal Appeal No. 428 of 2016;** in which it was held that:

> *"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."*

It was the contention of Mr. Kilasara that there was never any dispute between the 1st Respondent and the Village council with regard to the allocation of the said land; even the purported serious allegations of forgery were never raised and proved at the trial tribunal. Thus, any averment condemning the village council are superfluous and grossly misconceived.

Mr. Kilasara insisted that, the 1st Respondent and his witnesses including the local authority leaders clearly testified in his favour on how, when and where he acquired his land. He also testified to have enjoyed continuous quiet possession thereof for other twenty years until 2015 when the Appellant started claiming ownership thereof.

Mr. Kilasara asserted that the 1st Respondent and his witnesses gave detailed account on when and how the 1st Respondent acquired the suit land. He tried to explain to this court evidence of the 1st respondent and his witnesses and commented that these witnesses emphatically identified the suit land and testified that the first Respondent duly acquired his respective pieces of land including part of the suit land. He argued that the tribunal records are self-explanatory.

Concerning the appellant, Mr. Kilasara argued that none of the witnesses testified to be present during the acquisition of the suit land. He said that neither the Appellant nor the deceased ever filed any case claiming trespass and or ownership thereto. The learned counsel commented that the Appellant's claim is thus frivolous, unfounded and in any event hopelessly time barred.

Mr. Kilasara emphasized that in determining this dispute, the tribunal properly evaluated evidence before it hence reaching a fair and just

conclusion that the Respondents were the lawful owners of the suit land. Therefore, the same cannot be faulted based on evidence which was never adduced at the trial.

He referred to the case of **Hemedi Saidi v Mohamedi Mbilu [1984] TLR 113** in which His Lordship Sisya J. held that:

> *"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence."*

In the instant matter, the learned counsel for the 1st respondent insisted that on balance of probabilities there was ample and credible evidence adduced by the first Respondent at the Tribunal that pointed to irreversible conclusion that he is the lawful owner of his respective pieces of land including part of the suit land and has enjoyed continuous quiet possession thereof.

The learned counsel insisted that the Appellant has no any equitable interest to the disputed land but rather, she is a mere trespasser to it as rightly held by the trial tribunal. That, according to the records, the first respondent acquired part of his land from Mawala village council since 1994 and purchased other portions from other villagers who also acquired from the same Village Council since 1994. For over twenty years between 1994 and 2015 there was no dispute of ownership between the appellant (Hadia Salehe) and the respondents herein. He added that the appellant has never been a neighbour to the 1st respondent.

It was submitted further that the Appellant's claim was trespass over a piece of land and she failed to substantiate his claim. She could not even

describe the alleged trespassed land and exactly what portion of the 1st Respondent was trespassed if at all was true and her witnesses were not credible. However, the Respondents' testimonies were well corroborated by the local authority leaders as well as neighbours.

Mr. Kilasara emphasized that in determining this dispute, the tribunal properly evaluated the evidence before it hence, reaching a fair and just conclusion that the Respondents' evidence was credible and sufficient to prove their respective ownership over the suit land. He added that, the tribunal was indeed impartial and its decision cannot be faulted.

Mr. Kilasara concluded that this appeal is devoid of any merit and he prayed the same to be dismissed in its entirety with costs and the decision of the trial tribunal be upheld.

The 2nd respondent in reply to the 1st ground of appeal that the trial tribunal did not declare the lawful owner, she submitted that the respondents were decided to be the lawful owners of the suit land. She referred to page 7 of the judgment to support her contention.

Regarding the 2nd ground of appeal, the 2nd respondent supported the findings of the trial Tribunal that the suit land was not the property of the appellant since evidence was presented to prove that the respondents were the lawful owners as they tendered admissible evidence such as customary right of occupancy, sales agreement and oral evidence to prove their ownership. That, the appellant failed to adduce evidence to prove that the suit land belonged to Hadia Salehe. She also stated that in civil matters the law is certain that a person whose evidence is heavier than that of the other is the one to win. He referred to the case of **Hemedi Said** (supra) to support his argument.

Replying the 3rd ground of appeal, it was submitted that the respondents are the lawful owners of the suit land and they tendered admissible evidence such as customary Right of Occupancy and sales agreement which the 2nd respondent was of the view that the same was worth, reliable and not fabricated.

She continued to submit that during the trial, to prove her ownership, she tendered customary right of occupancy which was admitted as Exhibit D7. She opined that the tribunal properly evaluated the evidence. She referred to **section 110(1)(2) of the Evidence Act** (supra) which imposes the burden of proof to the one who alleges.

On the 4th ground of appeal, the 2nd respondent submitted to the effect that the 2nd respondent proved her ownership by tendering the customary right of occupancy which was admitted as Exhibit D7, while the appellant did not give credible evidence during the trial to move the trial tribunal.

Responding to the 5th ground of appeal on evaluation of evidence, the 2nd respondent stated that, the trial tribunal properly evaluated the evidence. She argued that the appellant did not show error or how the trial chairman did not evaluate and analyze evidence of the parties. That, the trial chairman made critical analysis of the evidence of both parties. The 2nd respondent stated further that the documents (customary right of occupancy) were issued by Kibaru and Mbao in the year 1993 and she tendered the said customary right of occupancy to prove her ownership.

Lastly, on the 6th ground of appeal that the appellant had not proved his case merely because he did not bring documents, the 2nd respondent submitted to the effect that **section 2 of the Land Registration Act, Cap 334 R.E 2019** has defined owner as follows:

"owner' means in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered."

From the above definition, the 2nd respondent stated that presentation of registered interest in land is prima facie evidence that the person so registered is the lawful owner of the said land. She referred to the case of **Amina Maulid Ambali and 2 others vs Ramadhan Juma, Civil Appeal No. 35 of 2019** (CAT)at page 9 the Court of Appeal stated that:

"In our considered view, where two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

The second respondent continued to state that the trial tribunal decided in favor of the respondents because he saw that evidence of the respondent was heavier and stronger than that of the appellant. She cited **section 110(1)(2) of the Evidence Act** (supra) which was cited earlier to support her argument.

The 2nd respondent urged the court to dismiss this appeal with costs and sustain the decision of the trial tribunal.

In rejoinder the appellant's counsel reiterated what had been submitted in chief. In respect of the 1st ground of appeal, Mr. Kamani insisted that the issue of ownership of the suit land was not expressly declared by the trial tribunal. He argued that the doctrine of necessary implication cannot be applied in ascertaining what a decision of a court is all about as the same is the rule of statutory construction which is used to fill the gaps.

On the second ground of appeal, the learned counsel reiterated what he submitted in chief. He insisted that if the trial chairman evaluated the said documents instead of calling them certificates of customary right of occupancy, he could have found that those documents were worthless and unreliable.

On the rest grounds of appeal, the learned advocate reiterated his submission in chief.

That marked the end of submissions of both parties.

I have very well considered the grounds of appeal, the parties' rival submissions as well as the trial tribunal's records. In the due course of scrutinizing this appeal, I will deal with one ground after another following the path which the learned counsels applied in their submissions.

On the 1st ground of appeal, the appellant condemned the trial chairman for failure to determine the ownership between the three persons: the appellant, and the two respondents. He was of the view that even if it is assumed that the trial tribunal meant that the lawful owners were the respondents, still it is not known which respondent is the owner between the two.

In reply to this contention, the learned counsel for the 1st respondent stated that the respondents denied the fact that they trespassed to the suit land. He argued that there was no dispute of boundaries between the respondents and that the tribunal correctly held that the appellant failed to substantiate his claim. The 2nd respondent replied that the trial tribunal rightly declared the respondents to be lawful owners.

I have examined the trial tribunal's records, in determining the issue as to *'who is the lawful owner between the parties',* the trial Chairman had this to say:

> *"Another issue is who the lawful owner of the disputed land is, the question has been very clearly answered by the admissible evidence of the respondents who have tendered both sales agreements and Customary Right of Occupancy obtained from the sellers and village land allocation committee. The applicant didn't bring any document to show who allocated the land in question to the deceased who claimed to have been there for a couple of years before her death. Failure to do this makes his evidence inadmissible.*
>
> *...taking analysis of the evidence given during the trial the honorable tribunal finds that this matter has no merit and the applicant fails to substantiate his claims against the respondents."*

From the above quoted paragraph, I am of considered opinion that the trial Chairman resolved the dispute of ownership. The above words suggests that allegations against the respondents were dismissed.

Also, the learned counsel for the appellant argued that even if it is assumed that the respondents were declared the lawful owners, still it is not known which respondent is the legal owner between the two.

With due respect to Mr. Kamani, there is no dispute between the two respondents herein. The dispute is between the appellant herein and the respondents. On part of the respondents, each one of them testified in

respect of his/ her portion of land. Basing on the above findings, I am of settled opinion that the first ground of appeal has no merit.

Turning to the 2nd ground of appeal, the learned counsel for the appellant faulted the trial tribunal for holding that the appellant's evidence was inadmissible just because he did not tender documentary evidence and disregarded oral evidence of the appellant. Mr. Kamani was of the view that documents are not the only evidence to prove ownership.

On the other hand, the respondents alleged that the appellant failed to tender documentary evidence. They stated that on balance of probabilities as envisaged under **section 110 of the Evidence Act** (supra), the respondents' evidence was heavier than that of the appellant.

In civil cases, the standard of proof is on balance of probabilities whether evidence tendered is oral or documentary. The court will decide in favour of the party whose evidence is heavier than the other. The applicant who is the appellant herein was supposed to adduce evidence heavier than that of the respondents. The burden of proof never shifts to respondents until the plaintiff/applicant discharge the same. In the case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama, Civil Appeal No.305 of 2020** at page 14 the Court of Appeal stated that:

> *"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."*

It should be noted that it doesn't matter whether the evidence is documentary or oral. What is required for the party to do is to present evidence which is heavier than that of the adverse party. In the instant matter the trial tribunal was of the view that the respondents' evidence was heavier than that of the appellant.

This takes me to the 3rd 4th and 5th grounds of appeal on evaluation of evidence, in which Mr. Kamani argued that the trial tribunal did not properly evaluate the evidence. His concern in respect of these grounds was that the authority which was required to allocate land is the village council and the respondents didn't tender minutes from Mawalla village Council to substantiate that they were allocated the said land. He argued that no village land allocation committee could have granted land to the respondents.

The learned counsel for the 1st respondent in reply to this issue stated that the exhibits were freely admitted. He added that there was no way the respondents could get the land without the same being allocated to them.

Meanwhile, the law applicable in land allocation in villages is **the Village Land Act** in which **section 8** empowers the Village Council to manage the village land.

In this case, the respondents claimed that they were allocated the said land in 1994 prior to the establishment of village councils.

Thus, the learned counsel for the appellant misdirected himself for contending that the authority for allocating land in the village was the village council.

On the same ground, Mr. Kamani faulted the authenticity of the minutes of general assembly (Exhibit D5) by arguing that the same does not show the area which had been allocated, the place where the land is situated, the size and that it has no signature.

Mr. Kilasara for the 1st respondent stated that the issue of forgery was not raised at the trial tribunal. He also stated that local leaders testified on balance of probabilities.

This issue will not consume much of my time. I have gone through the hand written proceedings, the said right of occupancy and the sale agreement were admitted without objection from the appellant and his advocate. It is strange that the same advocate is challenging the said documents in this appeal. The same applies to **exhibit D7**, and **exhibit D5** the minutes of the village meeting which were admitted without objections. The Court of Appeal in the case of **Abbas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017** at page 20, quoted with approval the decision of the Supreme Court of India in **Malanga Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162** which held that:

> *"It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless the author thereof is examined, the contents thereof cannot be held to have been proved*

unless he is examined and subjected to cross-examination in a Court of Law."

Likewise, in this case, the appellant is estopped and precluded from faulting the admissibility of documents which he did not object at the trial.

Lastly on the 6th ground of appeal, it has been alleged that the trial chairman erred by concluding that the appellant had not proved his case. The learned counsel for the appellant tried to explain the evidence which the appellant tendered before the tribunal. On part of the respondents, it was submitted that the appellant failed to substantiate his claim of trespass.

This issue has been explained in details under the 2nd grounds of appeal. Thus, discussing this ground will be repetition. I therefore reiterate my findings on the 2nd ground of appeal.

On the strength of the above findings, I hereby dismiss this appeal with costs for lack of merits.

It is so ordered.

Dated and delivered at Moshi this 24th day of November, 2022.

S. H. SIMFUKWE

JUDGE

24/11/2022