IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND APPEAL N0. 6 OF 2021

SHEM KALINGA (Suing under a Power of Attorney of ANASTAZIA KIBIKI.....APPELLANT

VERSUS

JANE KALINGA.....RESPONDENT

JUDGEMENT

Date of last order: *24/02/2022*

Date of Judgement: *10/03/2022*

MLYAMBINA, J.

The maxim that a party who alleges must prove existence of his allegation, i.e "*incumbit probation qui dicit, non qui negat*" is central part in this land appeal. The burden of proof principle is stated in **Halsbury's Laws of England, 4th edition at paragraph 10** that: "*To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2), adduce evidence sufficient to satisfy them to the required standard or degree of proof.*" The same principle is reflected under *Section 110 (1) and (2) of the Evidence Act, Cap 5 [R.E. 2019].* In order to analyse as to who had the duty to prove his/her assertion in this matter, I will first state the brief facts of the case and consider at length the arguments of both parties in this appeal. Before the trial Tribunal,

the Appellant was the Applicant. He had the following allegation: *One*, he is the lawful owner of the disputed land located at Kaning'ombe Village, Masaka Ward, within Kilolo District of Iringa Region since 1970. *Two*, he has been in occupation and utilization of the disputed land from 1970 to the date he was unreasonably invaded by the Respondent who started erecting a building without any colour of right. *Three*, the Respondent has never owned the suit land and prayed among others a prayer that, he be declared the lawful owner. The Respondent, on the other hand, despite denying the Appellant's claims, she claimed for ownership over the disputed land. During hearing of the suit, the basic issue framed for determination was; *who is the lawful owner of the disputed land?* After hearing, the trial Tribunal had the following findings: *First*, the Appellant failed to prove her claims. *Second*, the Respondent's evidence was strong compared to the evidence of the Appellant. Hence, the trial Tribunal dismissed the Appellant's suit without costs as the parties related each other. Being aggrieved, the Appellant hereinabove raised four grounds of appeal namely:

1. That, the District Land and Housing Tribunal erred in law and in fact for passing a decision in favour of the Respondent without any evidence tendered before it in support of her allegation.

2. That, the District Land and Housing Tribunal erred in law and facts by passing the decision in favour of the Respondent by relying on the evidence of DW1, DW2 and DW3 who never witnessed the DW4 being given the disputed plot by her father while failing to consider the evidence of PW2 and PW3 for Temahunge's family.

3. That, the District Land and Housing Tribunal erred in law and in facts for being bias in passing the decision.

4. That, the District Land and Housing Tribunal erred in law and in fact failure to consider the time Anastazia Kibiki has been occupying the suit plot.

The afore grounds of appeal are based on two major issues; *one*, whether the trial Tribunal poorly evaluated the evidences and: *two*, whether the trial Tribunal was biased in reaching the impugned decision. The term bias here may mean; an inclination, idea or feeling that the trial Tribunal's decision being in favour of the Respondent is preconceived as being unreasonable due to its conduct.

The appeal has been argued by way of written submissions. As regards the first ground of appeal, the Appellant through Counsel Desidery Ndibalema advanced three arguments: *First*, no any evidence was tendered before the trial Tribunal so as to support the allegation that the Respondent was given the suit plot by her father. *Second*, no any witness was called to testify before the trial Tribunal who was present when the suit plot was given to the Respondent by her father. *Third*, the trial Tribunal only decided the matter on allegations by the Respondent which was contrary to *Section 110 (1) and (2) of the Law of Evidence, [supra]* which provides that:

> *(1) Whoever desires any Court to give Judgment as to any leg right or liability depending on the existence of the facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of prove lies on that person*

It was the Appellant's considered view that; the Tribunal was not convinced in any how in rendering the impugned Judgment. Also, the alleged giver one Sprian Kalinga had no title to pass as he never owned the suit land if at all the suit land was given to the Respondent. *Thus, he who does not have a legal title to land cannot pass good title over the same to another.* This position was emphasized in the case of **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205.

It was the Appellant's submission that the Respondent's father never owned the suit plot and there is no evidence to that effect.

The second ground of appeal was that the District Land and Housing Tribunal erred in law and facts by passing the decision in favour of the Respondent by relying on the evidence of DW1, DW2 and DW3 who never witnessed DW4 being given the disputed plot by her father while failing to consider the evidence of PW2 and PW3 for Temahunge's family. It was argued by the Appellant that, it is from the record that PW3 testified that the suit land was allocated to Anastazia Kibiki sometime in 1970. Thus, this witness is credible as he comes from the Temahungi's family and the evidence of PW2 is very clear there is no any contradiction as the Tribunal thought. PW2 and PW3 have affiliation as they are both coming from the same family of Temahungi who offered the suit land to the Applicant.

According to the Appellant, the suit land was solely owned by Anastazia Kibiki a mother of Shem Kalinga. Anastazia was a wife of Sprian. It was further submitted that; PW1 is old enough and he is one of Sprian's children. The Appellant further submitted that DW1, DW2 and DW3 never witnessed any transaction between the Respondent and Sprian. Further, there is no any evidence showing that the said witnesses were present at the time Sprian was giving the suit land to the Respondent.

It was submitted by the Appellant that; there is neither a Will from Sprian giving the suit land to the Respondent nor a written deed of gift to that effect. The allegation that Sprian gave the suit land to the Respondent is not backed by any evidence. It is without doubt that the trial Tribunal failed to even evaluate the evidence hence relying on the testimony of the said DW1, DW2 and DW3 who never witnessed what the Respondent alleges negating the testimony of the Appellant and his witnesses which could help the Tribunal to reach at the fair Judgement. The main issue is not who constructed the structure on the suit land. The issue was who is a rightful owner of the suit land and whether the suit land was legally passed to the Respondent.

The third ground of appeal was that; the District Land and Housing Tribunal erred in law and in facts for being bias in passing the decision. It was the Appellant's submission that the trial Tribunal has been bias throughout its decision by attacking the Appellant and his witnesses without asking a question as what is the evidence from the Respondent to substantiate her allegation as no any witness was called to testify that he or she was present at the time the suit land was given to the Respondent. It was the Appellant's

belief that this could be a good question to the trial Tribunal to ask itself and reach at the fair conclusion. Instead, the trial Tribunal has directed itself on the construction of the structure on the suit land instead of determining the issue at hand leading to the citing of the irrelevant cases which are actually distinguishable to the matter in dispute.

It was the Appellant's submission that; the trial Tribunal has been so bias just from the begging and so standing on the shoes of the Respondent who never presented any evidence of being given the suit land by Sprian. This biasness should not be entertained by this Court but to set aside the entire Judgement.

The last ground of appeal was that; the District Land and Housing Tribunal erred in law and in fact failure to consider the time Anastazia Kibiki has been occupying the suit plot. The Appellant argued that Anastazia Kibiki has been occupying the suit land since 1970. That she has been occupying the same before even the death of her husband Sprian who died in September 2018. Further, all the time until the dispute arose there was no any interruption by any one until when the Respondent came to build a house claiming that the suit land belongs to her as she alleges that it has been given to her by her father Sprian. It was the Appellant's considered view that; time is of more essence and the same should be considered. Why claiming after the death of Sprian.

Again, Sprian never said it before his wife and his other children. There is no doubt that the Respondent in 1970 she was not yet born hence cannot even say anything on the ownership of the disputed land by her father.

In reply, the Respondent's Counsel one Mr. Jally Willy Mongo called upon this Court being the first appellate Court in hearing the appeal, be guided by the following legal principles at the time of making a decision of the present appeal: *First, this Court being the first appellate Court in this appeal, is mandated to re-consider and re-evaluate the trial Tribunal's evidence.* Reference was made to the case of **Peters v. Sunday Post Limited** [1958] E. A. 424. *Second, the burden of proving a fact rests 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.* Reference was made to a book titled **M. C. Sarkar & S. C. Sarkar, Sarkar's Law of Evidence, 18 Edition,** LexisNexis, Haryana, (2014) at p. 1896 citing with approval the case of **Constantine Line v. I. S. Corpn** [1941] 2 ALL. ER 165, 179. Third, *if at the end of the case the evidence of the claimant does not carry a reasonable degree of probability, but not so high as required in criminal case, the opposite party must be given the benefit of doubt.* Reference was made to the case of **Miller v. Minister of Pensions** [1937] 2 ALL. ER 372.

Further, the Respondent posed the basic question to be determined by this Court that; *Did the Appellant discharge his burden of proof in her claims of ownership and utilization of the disputed land from 1970 to 2019?* In view of the Respondent, this issue was properly answered negatively by the trial Tribunal.

As regards the Appellant arguments that the evidence of PW2 and PW3 were credible and their evidence had no contradictions, the Respondent's Counsel, opined that, there is a total misconception on the part of the Appellant. *First,*

the evidence of PW2 and PW3 was considered by the trial Tribunal as can be seen at page 3 of the typed judgement. *Second,* having considered the evidence of PW2 and PW3, the trial Tribunal rejected it because it was hearsay evidence and the same had contradictions. The contradictions related also with the evidence of PW1.

The Counsel for the Respondent invited this Court to re-consider and re-evaluate the other serious contradictory issues pointed herein below from the evidence of PW2 and PW3 in relation with PW1's evidence in making a Court decision: *One*, during cross examination, PW1 claimed that, PW2 and PW3 witnessed the handing over transactions of the disputed land from Temahungi Mnyifuna to Anastasia Kibiki. *Two*, PW1 further claimed that, PW2 and PW3 knew nothing on the size of the disputed land which was offered. *Three*, PW1 claimed that, Anastasia Kibiki was given the disputed land measuring 31/41 walking paces.

It was the Respondent's reply that; PW2's evidence differed with PW1's evidence. During examination in chief, PW2 stated that, he was informed by his father (Temahungi Mnyifuna) that the disputed land was given to Anastasia Kibiki. However, during cross examination, he changed his goal and responded that he was present when Anastasia Kibiki was given the disputed land as he was called by his father to be present at the time of transactions. PW2 said, he was together with his father, Anastasia Kibiki and Siliakusi Mnyifuna (PW3) during transactions.

Thus, unfortunately, the evidence of PW3 does not tally with either of PW1 or PW2. PW3 responded as follows during cross examination; at the time their father was handing over the disputed land to the Appellant they were

8 people; Paskali Mnyifuna (PW2), Eldenego Mnyifuna, Venancia Mnyifuna, Damian Mnyifuna, Venance Mnyifuna, Simon Mnyifuna, Fitoria Mnyifuna and our young father Mikaeli Mnyifuna.

The Respondent went on to reply that; apart from the above contradictions pointed out, during cross examination PW2 responded as follows; the Appellant was given the disputed land measuring ½ of acre and he knew the size of the disputed land because he measured and was walking paces of 30/30. However, PW3 responded during cross examination to the effect that, the disputed land which was given to the Appellant was measuring ¼ of acre. And that, in 1970 the disputed land was not measured by PW2. That, the disputed land is measuring 17/35 walking paces. Based on the above pointed contradictions, it was the Counsel for the Respondent's conclusion that, the Appellant never discharged her burden of proof that, she was given the disputed land by Temahungi Mnyifuna.

The Respondent questioned; did the Appellant also prove that, she occupied and utilized the disputed land from 1970 to 2019? From PW1, PW2 and PW3's evidence, the issue was not proved. PW1 whose evidence was hearsay, admitted during cross examination that, in 1975 and from 2000 to 2016, the Appellant never lived in the disputed land. PW1 further admitted that, he never remembered when and for how long the Appellant lived in the disputed land. On the side of PW2, during cross examination responded that, from 1974-2000 and 2000-2016, the Appellant never lived in the disputed land. Unfortunately, when PW3 was cross examined, he responded that; from 1970-2019, the Appellant lived in the disputed land. This concludes that, PW3 contradicted the evidence of PW1 and PW2.

Based on the foregone submission, without any flicker of doubt, it was the Respondent's submission that the Appellant totally failed to discharge her burden of proof. Therefore, the evidence of the Appellant failed to carry a reasonable degree of probability. The benefit of doubt has to be resolved in favour of the Respondent to whom the burden of proof never shifted to her and the same she had very strong evidence as was held by the trial Court.

In rejoinder, as far as the burden of proof is concerned, it was the Appellant's submission that the Respondent invaded the suit land by constructing the house claiming the ownership of the suit land further claiming that she was given the same by his late father Sprian Kalinga without presenting any document either a WILL or Deed of Gift to substantiate her allegation. It was therefore the Appellant's submission that the Respondent had a duty to prove such allegation. The Appellant cannot rely on the weakness of defence to prove her case.

Further, the Appellant rejoined that it is the Respondent who trespassed the suit land. Therefore, it is her who should prove ownership of the same. The Appellant called upon to consider that before the death of the husband of Anastazia Mr. Sprian Kalinga, the Respondent's father, there was no any dispute in respect of the suit land and Anastazia was all the time occupying the suit land until she went to Dar es Salaam for medication.

More so, the Respondent never claimed any ownership of the suit land before the death of her father. Going through the pleadings (Defence of the Respondent) and the reply to the Appellant's submission there is no any evidence attached showing that the Respondent was given the suit land. And

no any witness was called to testify who saw the Respondent's father giving the suit land to the Respondent. All the Respondent's witnesses were testifying about the Respondent's father's ownership which was not the dispute before the trial Court. The dispute was as to whether the Respondent owns the suit land and under which capacity. It was the Appellant's submission that the trial Tribunal erred in law and in fact for failure to determine the issues at hand as the Respondent was the one to prove the ownership which she failed.

In view of the Appellant, it was the Respondent's duty to prove that the suit land was given to the Respondent of which she failed even to mention a day, date and or a year the same was given to her, what she alleges is that she was given without even explaining as to whether it was given as a gift or under a will that is inheritance. The Respondent's father had 8 children. The Respondent's father if at all wanted to give the suit land to the Respondent, he could not fail to call at least one of his children to be present at the time the suit land was given to the Respondent.

According to the Appellant, the trial Tribunal was to take into consideration of the missing facts and evidence because the dispute was between the Appellant and Respondent. It was the Appellant's submission that the Respondent was to bring evidence to the Tribunal in order to prove that he was given the suit land which the trial Tribunal failed to take into consideration and finally misdirected itself arriving at a wrong decision.

I have considered the submissions of both parties at length with the view of clearly knowing the truth. I will start with the cardinal principle of evidence.

It is trite law that he who alleges must prove. The complainant before the trial Tribunal was the Appellant herein. Therefore, it was the duty of the Appellant to establish his claims on ownership of the suit land. The Appellant's claim that it is the Respondent's duty to prove that the suit land was given to her is misplaced. It was the legal duty of the Appellant to satisfy the Court, on the balance of probabilities, that he is the owner of the suit land. The Appellant cannot shift the burden of proof to the Respondent. The Applicant (Appellant herein) cannot rely on the weakness of the Defence to prove his case. The Appellant's allegation that it is the Respondent who should prove ownership because she is the one who trespassed the suit land does not have any basis in claims of this nature.

Further, having gone through the entire evidences, I noted despite of not proving on how the Appellant legally acquired the suit land, there a number of contradictory evidences on his part. *One*, as observed by the trial Tribunal, PW1 when cross examined, he replied that the suit land belongs to his parents. Upon further cross examination, PW1 replied that his Father Cyprian Kalinga was not the owner of the suit land. At the same time, his pleading (application) lays a claim that the suit land belongs to the Applicant (Appellant herein). *Two*, as spotted by the Respondent is that of PW2 and PW3. During cross examination, PW2 responded that; from 1974-2000 and 2000-2016, the Appellant never lived in the disputed land. Worse, when PW3 was cross examined, he responded that; from 1970-2019, the Appellant lived in the disputed land. This concludes that, PW3 contradicted the evidence of PW1 and PW2. *Three*, during cross examination, PW2 replied that the Appellant was given the disputed land measuring ½ of acre and he knew

the size of the disputed land because he measured and was walking paces of 30/30. PW3 on his part responded during cross examination to the effect that, the disputed land which was given to the Appellant was measuring ¼ of acre.

The issue of biasness was equally not backed up by the Appellant. I understand that bias is an important ground of impeaching evidence or decision if it is prejudicial. However, the Appellant capitalized his wrong position of calling upon the Respondent to prove how she acquired the suit land as if the Respondent was the claimant before the trial Tribunal. The Appellant merely submitted that the trial Tribunal has been bias throughout its decision by attacking the Appellant and his witnesses without asking a question as what is the evidence from the Respondent to substantiate her allegation as no any witness was called to testify that he or she was present at the time the suit land was given to the Respondent. I still maintain that it was not the duty of the Respondent to establish the claim. It was the duty of the Appellant to prove on balance of preponderance his ownership claim of the suit land.

To the contrary, as observed by the trial Tribunal, there are cogent evidence in favour of the Respondent. The evidence by the Respondent herself (DW1) as reflected at page four of the impugned judgement. She testified that the suit land was handled to her by her father one Cyprian Kalinga in 2016. That evidence was corroborated by one Adriano Chula Benedict (DW2). The later told the trial Tribunal that he was the Secretary of the land allocation committee when the suit land was allocated to the Respondent's father in 1974. The evidence of DW1 was further corroborated by Mathias Sulikombe

Lukosi (DW3). Such evidences were cogent enough to render the impugned decision in favour of the Respondent herein.

In the result, the appeal is hereby dismissed with costs for lack of merits. Order accordingly.

Y.J. MLYAMBINA

JUDGE

10/03/2022

Judgement pronounced and dated 10th March, 2022 in the presence of both parties in person. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

10/03/2022