IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LAND APPEAL NO. 2 OF 2021

(Originating from the Judgement of the District Land and Housing Tribunal for Iringa at Iringa in Land Application No. 92 of 2017)

FELOMENA PETER MAWATA@TALIYAMALE.....APPELLANT

VERSUS

ABBAS ANTHONY KILUMILE.....1ST RESPONDENT

DEREMSI MSENA.....2ND RESPONDENT

JUDGEMENT

Date of Last Order: *22/02/2022*

Date of Judgement: *15/03/2022*

MLYAMBINA, J.

The Appellant herein upon being aggrieved with the decision of the Iringa District Land and Housing Tribunal in *Application No.92 of 2017* appeals against the whole judgement and decree with three grounds of appeal namely: *One*, the Trial Tribunal erred in law and facts by failure to evaluate and consider the evidence adduced by the Appellant which is stronger than that of the Respondents. *Two*, the trial Tribunal erred in facts and law by delivering judgement basing on illogical reasoning and giving rights of ownership to the 1st Respondent. *Three*, the trial Tribunal erred in facts and law in delivering judgement in favour of the Respondents whose evidence are weak, contradictory and unreliable.

The appeal has been argued by way of written submissions. It can be noted that all of the three grounds of appeal are centred on poor evaluation of evidences by the trial Tribunal.

As regards the first ground of appeal, the Appellant argued that; the trial Tribunal had failed to evaluate the evidence of the Appellant which was very strong as testified. The evidence of the Appellant was that she acquired disputed land from her uncle one Norbert Kavindi where she was given on 1958 and witnessed by her mother Lidia Kavindi, Elizabert Kavindi and Mwalusi Mawata and Others.

It was the Appellant's submission that she used to cultivate, planted trees and sadly there are graves as she buried on that land her beloved two children and there are "mapagale" (the old houses which are belongs to her).

According to the Appellant, the above piece of evidence was vehemently corroborated by her witnesses. PW2-Edward Mawata, testified that; it was true that, she was given the disputed land from her uncle one Norbet Kavindi in 1958 and she made an exhaustive improvement by planting trees and there are two tomb which she buried her children. Also, PW3, Richard Cosmas Mlamka stated that he knew the disputed land because he was born there and grew there. He studied from Primary to Secondary in the same Udumka Village where the disputed land is located. He further stated that, the disputed land is known to him as he used to live and cultivate on the same land for years without any interference. He participated to plant trees upon consent from her mother. All what is stated by these witnesses were

neither disputed nor cross-examined. The same evidence was further corroborated by PW4-Ignas Mawata.

The Appellant asserted that the trial Tribunal failed to evaluate the evidence by non-direction on the evidence which was very strong and reliable as adduced by the Appellant. Also, he failed to evaluate the evidence by misapprehending the substance, nature and the quality of that evidence which was testified by the Appellant and was not challenged/cross examined by the Respondents and their Advocate. For instance, the Appellant stated that; in the disputed land there are graves and planted trees and was not cross –examined and by so doing, the Respondents agreed that there are graves and trees of which the trial Tribunal ignored and finally granted those graves of the Appellant's children to the Respondents which is contrary to principles governing administration of justice.

On the other side, according to the Appellant, the Respondent's evidence is weak on the sense that DW1-Abbas Anthony Kilumile testified that; at the end of the 20 acres where he purported to have bought the disputed land, there are pine trees and at the boundary there are milingoti trees-of two types. Also, he conceded at page 30 that the disputed land bordered with the land of Norbert Kavindi of which the same land is used by the Appellant for long time and sometimes he was employed by the son of the Appellant to cultivate. Furthermore, he stated that, the Appellant was not involved during the sale while she bordered the disputed land and used by her for a long time. By so doing, the Appellant was of the opinion that the tendency of ignoring the Appellant when they were doing sale is tantamount to making adverse inference once they called her will have testified contrary to their

wishes. It was the Appellant submission that; if the Appellant was the one who used to cultivate the land and was never involved, then encroachment was inevitable.

Additionally, the Appellant argued that; the Respondents' evidences are weak in the sense that, DW2- Deremsi Kufasimwiko Msena testified that; he knew the Appellant as his neighbour and he even failed to mention the persons who witnessed the sale. The purported neighbor as written in the sale agreement was not involved but they wrote their names and they did not sign to authenticate that the boundaries are ok or not especially the Appellant who used to cultivate the land as they said that she was using the land of Norbert Kavindi. It was the Appellant's view that the disputed land being unsurveyed the ones demarcating the sold land was essential in order to avoid these disputes.

DW2- further stated that, the disputed land was in care of Gaitan and was handled to him through writing and he did not produce that writings. Through that evidence the Appellant made an adverse inference that, there was no such handling over of the disputed land. Also, when asked by assessor one Mgongolwa, he admitted not to know how long he used that suit land. The Appellant invited this Court, as the first appellate Court, to re-evaluate the entire evidence and come up with its own findings. She cited the case of **Deemay Daati and Two Others v. Republic** [2005] TLR 132 where it was held *inter alia* that:

> *ii) It is common knowledge that where there is misdirection and non-direction of the evidence, or the lower Court has*

misapprehended the substance, nature and quality of the evidence, an appellate Court is entitled to look at the evidence and make its own findings of the fact. [Emphasize is mine]

In the light of the afore arguments, it was submitted that the evidence of the Appellant is very stronger than that of the Respondents. The Appellant cited the case Of **Hemedi Saidi v. Mohamed Mbilu** [1984] TLR 113 in which it was 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.

The Respondents in their reply submissions were of contention that; the trial Tribunal properly evaluated the evidence adduced by the parties and proceeded to deliver a decision basing on a stronger evidence adduced by the Respondents at the trial.

According to the Respondents, the pertinent issue which has to be determined in this appeal, also at the trial is; *"who is the lawful owner of the disputed land".* Thus, it is a cardinal principle in civil cases the one who alleges must prove the allegation. In support of such principle, the Respondents cited *Section 110 and 1 12 of the Tanzania Evidence Act Cap 6 [R. E. 2019]* and the case of **Lamshore Limited and J.S. Kinyanjui v. Bizanje 12 K. V.D.K** [19991 TLR 330.

It was the Respondent's considered opinion, at the trial the Appellant being the Applicant failed to prove her allegations that she is the lawful owner of

the disputed land. Throughout the trial her evidence was flowed with contradictions, hearsay evidence and inability to call material witnesses to prove her allegations against the Respondent.

It was the Respondent's submission that the Counsel is misdirecting this Court as it is crystal clear from the record of the trial Tribunal proceedings, the Appellant testified that; she acquired the disputed land from her uncle in 1978 instead of 1958.

The Respondent went on to submit that; the Appellant evidence was not collaborated by her witnesses PW2-Edward Mawata, PW3-Richard Cosmas Mlamka and PW4-Ignas Mawata as contended by the Appellant in her submission. PW2 testified that the Appellant was given disputed land on 1958. However, he was not present when the allocation was done, PW-3 on hearsay evidence testified that; he was told that the disputed land belongs to the Appellant.

The Respondent called upon the Court to note that the Appellant did contradict herself on when she acquired the disputed land as between 1978 and 1958. Furthermore, the Appellant failed to call material witnesses (Lidia Kavindi, Elizabeth Kavindi, Mwalusi Mawata, and Peter Mawata) who were present when she was given the disputed land by her uncle, and throughout the trial she did not state where they are. On the point of not calling material witness and its consequences, the Respondent re-cited the case of **Hemedi Saidi** (*supra*) in which it was held:

> Wherefor undisclosed reasons, a party fails to call a material witness on his side; the Court is entitled to draw

an inference that if the witnesses were called they would have given evidence contrary to the party's interest.

It was submitted that the evidence adduced by the Respondents was strong and clear, precisely on the issue of ownership. The 2nd Respondent/DW2-Deremsi Msena testified that; he was allocated the disputed land by his grandfather in 1963 in the presence of Aloyce Mdemeka, Feresina Demeka and Gaitan Mlonganile and went on to identify the boundaries of the disputed land. His evidence was collaborated by DW3-Gaitan Mlonganile. The later testified that; he was present when the 2nd Respondent was given the disputed land in 1963 by his grandfather.

On other side, the 1st Respondent/DW1-Abbas Anthony Kilumile strongly testified that; he acquired the disputed land lawfully after purchasing from the 2nd Respondent. He tendered a sale agreement which was admitted by the Tribunal as exhibit DI and he went on to identify the boundaries of the disputed land, the testimony which was also corroborated by DW2 and by DW3.

From the afore evidences, there is no dispute that the second Respondent purchased the suit land from the first Respondent. The intriguing issue, however, is; *who is the rightful owner of the suit land as between the Appellant and the first Respondent*. The Appellant pleaded on her application where and when she got the disputed land. She got from her uncle one Norbert Kavindi in 1978. But, when cross examined by the Counsel for the Respondents, she replied on 1958. Therefore, she cleared the contradiction happened thereto. Indeed, I do agree with the Appellant's

that the Appellant's contradiction on the year by itself does not affect the root of the case. It is a contradiction which was cleared by the same witness while still under oath. As submitted by the Appellant, the piece of evidence to the effect that she got the suit land from her uncle is very cogent and was collaborated by her witnesses including PW3- Richard Cosmas Mlamka who for his entire life used to live with his mother and other relatives. The Appellant testified that she has exhaustive developments for long time without interference on the disputed land. Such evidence was not controverted by either the Respondents nor their witnesses.

I have noted the trial Tribunal relied and believed the evidence of Gaitan Mlonganile as the supervisor of the sold land while in real sense the handle over of the sold land is questionable and unreliable because each other told a different story. DW-2 told the trial Tribunal that; he left the land to Gaitan in 1972 and when cross-examined he replied that, the land was handed over through writing but he never produced that document. DW-3 one Gaitan Mlonganile on the other side, when cross-examined replied that there is no document signed when the 2nd Respondent left the land to him for supervision. The contradiction and inconsistence of the defence evidence goes to the root of the case.

The Respondents, through tracing principle, failed to grasp up their historical ownership of the disputed land from the purported year 1972 to 2010 when the same land was sold. Therefore, this Court cannot rely and accord any weight that piece of evidence.

Of importance, there is evidence that the Appellant used to cultivate the suit land, planted trees and there are graves of her two loved children and there are mapagale (the old houses which belongs to her). Such evidences have not been contradicted on balance of probabilities. The Respondents neither denied existence of such graves, nor laid any story as to whether such graves exist on their permission. If this Court is to allow the Respondents to own a land which has graves of the Appellant's issues, it will not only be against justice but also against humanity. It could only do so if the Respondents proved on balance of preponderance that the suit land belongs to them.

It is the further findings of this Court that the mere findings of the trial Tribunal that the evidence of the Appellant was a hearsay lacks weight. Existence of the so called "mapagale" and graves cannot be a mere hearsay unless one proves that there are no such structures. For that reason, I find the trial Tribunal ought to have had given most consideration such evidence and make a proper evaluation of evidences by applying tracing principle as to who was the original owner and on how the suit land passed legally to the current owner.

In the light of the above, I agree with the Appellant that the trial Chairman failed to evaluate the evidence by misapprehending the substance, nature and the quality of that evidence which was testified by the Appellant and was not challenged by the Respondents and their Advocate.

Further, there was evidence by DW2 that the disputed land was in care of Gaitan and was handled to him through writing but he did not produce that document, the act which weakened the evidence of the Respondents.

On the second ground, the Appellant argued that the trial Tribunal erred in facts and law by delivering judgement basing on illogical reasoning and giving rights of ownership to the 1st Respondent.

The Appellant argued that; the trial Tribunal had illogical reasoning by ignoring the evidence of the other witnesses in composing the judgement. The judgement of trial Tribunal lacks criteria to be a judgement as it was illogically reasoned. Thus, the trial Chairman judged the evidence of the Appellant and making conclusion without prior evaluating the evidence which is not true.

In reply, it was the Respondent's contention that the trial Tribunal Chairman evaluated the evidence in his judgement and made a conclusion as it can be seen at page 3 and 4 of the judgement, the Appellant's contention that the trial Tribunal statement "the applicant and his three witnesses failed to prove on balance of probabilities that the applicant is the lawful owner" indicates that the trial Tribunal reached to a decision without prior analyzing the evidence is misconceived. It was the Respondent's considered opinion that it is only a format of judgement of the trial Tribunal which highly varies depending with the circumstance of each case as it was stressed so in the case of **Caritas v. Mkwawa** (1996) TLR 239.

Moreover, it was the Respondent's view that the trial Tribunal logically reasoned at page 3 of the judgement that PW3 evidence is of hearsay since neither PW3 was present nor witnesses the allocation of suit to the Appellant. He was told that the suit land belongs to the Appellant. It was the Respondent's contention that PW3 was not a credible witness to support

Appellant's endeavor to prove ownership. Hence, all what he testified that he was born, grew, studied and planted trees on the disputed land are unfounded on proving Appellant allegations she is the lawful owner of the disputed land. Thus, the trial Tribunal was logical on holding that his testimony was hearsay.

This Court do subscribe with the Respondent submission that, judgement writing has no standard style and format. However, a legal judgement, among other elements, must be well reasoned. In the case of **Mkulima Mbagala v. Republic,** Court of Appeal of Tanzania Criminal Appeal No.267 of 2006 (unreported) it was stated:

> *For a judgement of any Court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.*

Indeed, a judgement should cut across all ingredients as stated in the cited case of **Omary Abdallah Kilua v. Joseph Rashid Mtunguja,** Civil Appeal No.178/2019 (unreported) at page 8-9.

After going through the impugned trial Tribunal judgement, I noted and do agree with the Appellant that the decision was tainted with illogical reasoning

contrary to the requirement of a sound judgement. The evidences of the prosecution case were illogically considered. For example, the evidence of the Applicant (Appellant herein) was corroborated by other witnesses including PW2-Edward Mawata, who testified *inter alia* that it was true that, the Appellant was given the disputed land from her uncle one Norbert Kavindi in 1958 and she made an exhaustive improvement by planting trees and there are two tomb thereon of her two children. Also, PW3, Richard Cosmas Mlamka stated that he knew the disputed land because he was born and grew there. It can therefore not be reasoned that the evidences of the Appellant's witnesses were a hearsay.

On the third ground, it was argued by the Appellant that the trial Tribunal erred in facts and law in delivering judgement in favour of the Respondents whose evidence are weak, contradictory and unreliable.

According to the Appellant, the trial Tribunal believed the Respondents evidence which is weak and contradictory for instance, DW3-Gaitan Mlonganile who had contradiction when he replied at cross examination that " when the sale took place the family of Nobert Kavindi was absent" while DW4 stated that Nobert Kavindi participated in selling of the land between the Respondents and DW2- said that when I sold the land I involved the neigbour and one of the neighbor is Nobert Kavindi.

Furthermore, DW3 testified that he commenced to use the land when the 2nd Respondent left Udumka in 1977 to Kihanga while DW4 stated that:

> *Before 2010 the land was used by the 2nd Respondent, I don't know if he used whole land but what I know he used*

his land. There was no any person who used the land apart from the 2nd Respondent.

In reply to the 3rd ground of appeal, it was the Respondent's submission that; the evidences of the Respondents were not weak, contradictory and unreliable, the Respondents evidence was straightforward, clear and reliable in ascertaining who is the lawful owner of the disputed land. Considering that the pertinent issue was who is the lawful owner of the suit land and considering there was no dispute that the 1st Respondent purchased the suit land from the 2nd Respondent via a sale agreement on 2010 tendered as an exhibit and admitted by the Tribunal, and considering both DWI, DW2 and DW4 testified the sale took place on 2010 thus the contradiction from DW3-Gaitan Mlonganile as to when the sale of the suit land took place is trivial.

It was the Respondent's view that the Appellant's Counsel misdirected himself on the aspect that DW2 testified that when he sold the suit land he involved the neighbor and Nobert Kavindi. That, the assertion is wide of the mark as it is crystal clear DW2 did not testify when he sold the suit land he involved Norbert Kavindi, DW2 only.

Furthermore, it was the Respondent's view that all of the contradictions highlighted by the Appellant in her submission with regard to whether there was a document signed when the land was handled by DW2 to DW3 to supervise, and who commenced to use the suit land when 2nd Respondent left Udumka in 1977, are minor as did not do to the root of the matter.

Hence, the trial Tribunal was correctly on holding in favor of the Respondents as their evidence was consistent and reliable.

The Respondent supported the findings in the case of **Emmanuel Abrahamu Nanyaro v. Penile Ole Saitabalu** [1987] TLR 47 cited by the Appellant's Counsel. Thus, unreliability of witnesses, conflicts, inconsistencies of evidence entitle a judge to reject evidence. However, it was his view that; not in all circumstance the judge will reject the evidence, in circumstances where such contradictions are on trivial matter and does not affect the root of the matter does entitle the Court to reject the evidence on its entirety as it was emphasized by the Court of Appeal of Tanzania in the case of **Shukuru Tunugu v. The Republic** Criminal Appeal No. 243 of 2015 (unreported) where Ndika J.A at page 7 held:

> It is therefore true that the existence of contradictions and inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility, but the discrepancies must be sufficiently serious and must concern matters that are relevant to the issue being adjudicated, to warrant an adverse finding. As this Court said in **Said Ally Saif v. R.** Criminal Appeal No. 249 of2008 (unreported)
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> > It is not every discrepancy in prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled.

> Minor contradictions and inconsistencies on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected on its entirety.

From the foregoing, I do agree with the Respondent's submission that the contradiction from DW3-Gaitan Mlonganile as to when the sale of the suit land took place is trivial. Even, there is no dispute that the first Respondent sold the suit land to the second Respondent. However, there are other contradictions which brings doubt. For example, the evidences by DW3-Gaitan Mlonganile that when the sale took place the family of Nobert Kavindi was absent while DW4 stated that Nobert Kavindi participated in selling of the land between the Respondents and DW2- said that when he sold the land he involved the neigbour and one of the neighbor is Nobert Kavindi. For those reasons, I agree with the Appellant that the Respondent's evidence should have been rejected by the trial Tribunal for being weak, contradictory and unreliable as per the case of **Emmanuel Abrahamu Nanyaro** (*supra*).

At any event, the evidence of the Appellant herein as against of the first Respondent was water tight. If the trial Tribunal had an objective evaluation of the entire evidence before it by properly considering the prosecution evidence vis a vis the defence evidence, it could have found that the prosecution evidence was most cogent.

In the premises of the above, the appeal is allowed with costs. Order accordingly.

Y.J. MLYAMBINA

JUDGE

15/03/2022

Judgement pronounced and dated 15th March, 2022 in the presence of Counsel Marco Kisakali for the Appellant and in the presence of Counsel Jonas Kajiba for the Respondents. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

15/03/2022