

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

LAND APPEAL NO. 1 OF 2022

(Originating from the District Land and Housing Tribunal for Mbulu at Dongobesh, Application No. 2 of 2020)

TABU WELWEL APPELLANT

Versus

**THE REGISTERED TRUSTEES OF EVANGELICAL
LUTHERAN CHURCH OF TANZANIA,
MBULU DIOCESE RESPONDENT**

JUDGMENT

3rd August & 12th October, 2022

Masara, J.

Tabu Welwel ("the Appellant") unsuccessful sued the Respondent in the District Land and Housing Tribunal for Mbulu ("the trial tribunal") over a piece of land measuring 20 acres. The suit involved ownership over a surveyed piece of land with Customary Right of Occupancy No. 77/MB/02, located at Mangisa Village, Yaeda Ampa Ward in Mbulu District Manyara Region ("the suit land"). The Appellant prayed that the suit land be declared the property of the Appellant and that the Respondent be ordered to give vacant possession of the suit land. Further, that the Respondent be permanently restrained from entering and using the suit land.

According to the records, the Appellant had two versions of how the suit land came into her possession. In the Application she stated that her ownership of the suit land came about in 1970's during Operation Vijiji, when the suit land was unreservedly given to her by her father, Welwel Bariye. During hearing of the suit, the Appellant and her witnesses testified that the suit land was given to her by her father-in-law, the late Lagwen Ami in 1988. The said Lagwen Ami died in 1989. She testified that the suit land was given to the Appellant for taking good care of the deceased. That the Appellant enjoyed peaceful ownership of the suit land until 2017, when the Respondent trespassed into the suit land, built a church therein and evicted the Appellant.

On its part, the Respondent disputed the claims by the Appellant. The Respondent stated that it was allocated the suit by Mangisa Village Authority in 1983. That, being a religious institution, the Respondent built a church therein and worshipping services as well as other religious services have been taking place there since then. The Respondent surveyed the land by the aid of Mbulu District Council surveyors and in 2018 a Customary Certificate of title No. 77/MB/02, dated 29/08/2018 was issued to it.

After considering the evidence of the Appellant and that of the Respondent, the trial tribunal was satisfied that the evidence of the Respondent was weightier to that of the Appellant. The trial tribunal based its decision on the certificate of title issued to the Respondent. In its view, that was evidence to prove that the Respondent was allocated the suit land. That as the Appellant did not have any document to prove ownership of the suit land, her application had no merits. The trial tribunal dismissed her claims and declared the Respondent the lawful owner of the suit land. Unamused, the Appellant has preferred this appeal on the following grounds:

- a) That, the learned chairman of the trial tribunal misdirected himself in declaring the respondent as the lawful owner of the suit land, while there was no any tendered document showing how the respondent was allocated the same by the village council;*
- b) That, the learned chairman of the trial tribunal misdirected himself in declaring the first (sic) respondent as the lawful owner basing on the customary right of occupancy tendered by the respondent while the same was illegally obtained;*
- c) That, the learned chairman of the trial tribunal misdirected himself in holding that the appellant failed to prove his (sic) ownership of the suit land due to inconsistencies of the evidence and the facts in the application, while the said inconsistencies do not touch the root of the case; and*

d) That, the learned chairman of the trial tribunal misdirected himself as he did not properly analyse the evidence of the parties before delivering judgment.

At the hearing of the appeal, the Appellant was represented by Mr Abdallah Kilobwa, learned advocate, while the Respondent had the assistance of Ms Regina Joel Panga, learned advocate. By consent of the Court, it was resolved that the appeal be argued by filing written submissions.

Submitting in support of the first ground of appeal, Mr. Kilobwa contended that it was wrong for the trial tribunal to declare the Respondent the lawful owner of the suit land because there was no document tendered to prove that the suit land was allocated to the Respondent by Mangisa Village Council. He asserted that the village being part of the government, can neither be the source of land disputes nor can it allocate land to individuals without putting it in writing. He concluded that the trial tribunal erred in relying on the Respondent's mere words that the suit land was allocated to it by the Village Council.

Elaborating the second ground of appeal, Mr Kilobwa stated that exhibit D1 (the customary certificate of occupancy) was wrongly tendered and admitted in evidence because it was processed in 2018 while the dispute arose in 2016. It was learned counsel's submission that despite being

aware of the existence of the dispute, the Respondent proceeded to process a certificate of occupancy in respect of the suit land. It was his contention that since the Respondent failed to prove how the suit land was allocated to it by Mangisa village council, the certificate was fraudulently procured. He prayed that the said certificate of occupancy be expunged from the court records.

Expounding the third ground of appeal, Mr Kilobwa faulted the trial tribunal chairman for holding that there were inconsistencies in the Appellant's application and evidence adduced on how the suit land was allocated to her, depicting that the said inconsistencies did not go to the root of the case. According to Mr. Kilobwa, it is an undisputed fact that there was a dispute over a piece of land measuring 20 acres between the parties. In addition to that, it was his assertion that the tribunal chairman did not show in the ruling how the inconsistencies affected the Appellant's ownership over the suit land.

Submitting on the fourth ground of appeal, the learned counsel fortified that the trial tribunal did not evaluate the evidence of the parties, adding that what is found on the record is just a summary of the evidence of the parties. It was counsel's submission that the Respondent's evidence was full of inconsistencies, however the same were not addressed due to the

fact that the evidence was not subjected to a thorough evaluation. For example, according to Mr Kilobwa, DW4 (Elifuraha Massawe) failed to identify the boundaries of the suit land while other two witnesses mentioned boundaries which were incompatible with those found in exhibit D1. He added that the Respondent was supposed to call one of the current village leaders to produce minutes of the Village Council that allocated the Respondent the suit land. Mr Kilobwa asserted that it is doubtful for the Respondent, a religious entity to own land without any document from the time it was allocated to it to the time it obtained the certificate of occupancy, which is almost 35 years. Another inconsistency pointed out by the Appellant's counsel is that all the Respondent's witnesses testified that the Respondent was allocated piece of land measuring 20 acres while exhibit D1 shows that the suit land measures 20.2 acres. It was his view that the certificate of occupancy has no bearing with what has been adduced in evidence. Ultimately, Mr Kilobwa prayed that the appeal be allowed with costs by declaring the Appellant lawful owner of the suit land.

Resisting the appeal, Ms Panga in response to the first ground of appeal, submitted that the Respondent's evidence was cogent warranting declaring it the lawful owner of the suit land. She referred to the evidence

of DW1, who was the village chairman in 1983 when the suit land was allocated to the Respondent; the evidence of DW2, who received the suit land on behalf of the Respondent; the evidence of DW3, who assisted during allocation of the suit land and that of DW4, the estate manager of the Respondent. She intimated that all such evidence corroborated each other; hence proving that the suit land is the lawfully property of the Respondent. It was Ms Panga's further contention that the Respondent proved the case on the balance of probabilities, placing reliance on the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113**. She asserted that it was for the Appellant to prove her ownership of the suit land which she failed.

Submitting on the second ground of appeal, Ms Panga asserted that the Appellant's contentions that the certificate of occupancy was illegally obtained are just mere words without any evidence. Relying on the decisions in **Hidaya Ilanga vs Manyama Manyoka (1961) E.A 705** and **Omari Yusuf vs Rahma Ahmed Abdulkadir [1987] TLR 169**, Ms Panga amplified that whenever there is an allegation of fraud in civil cases, the standard of proof rises to that of proof beyond reasonable doubts, as per section 110 of the Evidence Act, Cap. 6 [R.E 2019]. According to counsel for the Respondent, it was upon the Appellant to

bring evidence to support her claim that the customary right of occupancy was illegally obtained. Further, that the Appellant did not cross examine or object to the admission of the certificate of title; thus, it cannot be expunged from the record at this appellate stage. To support her argument, Ms Panga relied on the case of **Shadrack Balinago vs Fikiri Mohamed & Others, Civil Appeal No223 of 2017** (unreported).

Submitting in opposition to the third ground, Ms Panga amplified that facts to establish the source of acquisition in proving ownership of land are very crucial. She supported the tribunal's decision stating that there were inconsistencies between the adduced evidence and the Appellant's application. Relying on the case of **Yara Tanzania investment Ltd vs Charles Msemwa & 2 Others, Commercial Case No. 5 of 2015** (unreported), she maintained that, since there were inconsistencies between the Appellant's application and evidence adduced, that casted doubts on the Appellant's acquisition and ownership of the suit land. She made reference to the decision in the case of **Emmanuel Abraham Nanyaro vs Peniel Ole Saitabau [1987] TLR 47.**

On the fourth ground, it was Ms Panga's submission that the trial tribunal correctly found the evidence adduced by the Appellant insufficient. She maintained that the whole evidence was subjected to evaluation and the

Respondent's evidence was found weightier than that of the Appellant. She prayed for dismissal of the appeal with costs.

I have duly considered the grounds of appeal, the record of the trial tribunal and the submissions by counsel for the parties. From the grounds of appeal presented, issues for determination are whether the customary certificate of occupancy (exhibit D1) was properly procured and procedurally admitted in evidence and, flowing from the first issue, whether the trial tribunal was justified in declaring the Respondent the lawful owner of the suit land.

Notably, the first issue covers the first and second grounds of appeal as presented by the Appellant. Mr. Kilobwa faulted the trial tribunal for admitting exhibit D1 while the same was processed after the dispute arose. He was of the view that the said exhibit was fraudulently obtained by the Respondent. On her part, Ms Panga resisted the submission stating that the allegation that the customary certificate of ownership was wrongly and fraudulently obtained by the Respondent are mere words which are not backed up with any tangible proof.

After examining the record, I noted that on 03/05/2021 DW4, Elifuraha Massawe, in his evidence, informed the trial tribunal that he was the estate manager of the Respondent. He narrated that the customary

certificate of occupancy was obtained after the land was surveyed by surveyors from Mbulu District Council, land department. He narrated reasons which delayed surveying of the suit land since 1983 when the same was allocated to the Respondent. That, the title was sought after the Respondent resolved to formalize and seek title deeds in every church that it owned.

On 20/09/2021, when DW4 tendered the said certificate so that it could be admitted as exhibit, the Appellant was asked if she had any objection but she replied she had none. The customary certificate of occupancy was admitted in evidence as exhibit D1. The record shows that the Appellant was given the right to cross examine on that exhibit and that right was accordingly exercised. Therefore, the contention by the Appellant's counsel that exhibit D1 be expunged from Court record is untenable because the said document passed through all tests of being admitted as exhibit. What he should be asking is that the Court disregards the same instead of expunging the same as the process to admit it is impeccable.

The Court of Appeal in **Makubi Dogani vs Ngodongo Maganga, Civil Appeal No. 78 of 2019** (unreported), stated the following:

"It is a settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did

not utilize that opportunity, challenging the said exhibits at this stage is nothing but an afterthought."

Furthermore, the allegation that the said certificate was forged is, in my view unsubstantiated. There is no evidence on record to show how and who forged the said customary certificate of occupancy. It is a well-established principle of law that where a party relies on fraud, that fraud must be specifically pleaded and particulars of fraud alleged be stated on the face of the pleadings. Order VI Rule 4 of the Civil procedure Code, Cap. 33 [R.E 2019], which is also applicable in the trial tribunal, provides that mandatory requirement. The Appellant did not conform to that mandatory requirement of the law. The same principle was reiterated by the Court of Appeal in the case of **City Coffee Ltd vs The Registered Trustees of Iloilo Coffee Group, Civil Appeal No. 94 of 2018** (unreported), thus:

"In view of the foregoing, it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."

Fortified by the above position, the first issue which resolves the first and second grounds of appeal is devoid of merits.

It is also important to state that the timing of issuance of the customary right of occupancy cannot be a ground to impugn its authenticity unless there exist evidence to show that the same was improperly obtained. Such evidence, in my view is absent. Notably, all the four witnesses for the Respondent stated that the suit land was allocated to the Respondent in 1983, by the Village Council. As pointed out earlier, DW4 explained in details the reason behind being issued with the exhibit D1 in 2018.

Counsel for the Applicant urged the Court to fault the trial tribunal's evidence due to the failure by the Respondent to show evidence that the land in question was given to it by the Village Council. I do agree with him that it was important for such evidence to be obtained. However, gauging the evidence procured from leaders and persons who witnessed the handover of the land, the trial tribunal cannot be faulted for deciding against the Appellant. Her evidence did not meet the required standards of proof in civil cases. On the contrary, the evidence by the Respondent was consistent. As the standard of proof in civil matters is on the preponderance of evidence, the trial tribunal was right in holding as it did. Thus, the first issue is resolved in favour of the Respondent.

I now turn to the second issue which is on the evaluation and analysis of evidence, covering the 3rd and 4th grounds of appeal. Mr. Kilobwa faulted

the trial tribunal's decision for holding that there were inconsistencies in the Appellant's evidence and that the trial tribunal did not evaluate the evidence. Ms Panga does not agree.

I have revisited the trial tribunal's records, particularly the application form that was filed in the tribunal on 10/01/2020. Under paragraph 6(a)(i) of the application the Appellant stated:

*"That, the dispute in this case involves an invasion of a parcel of land of about twenty (20) acres which is solely owned by the applicant herein. The applicant's ownership of the said suit land started in 1970's during operation vijiji when the **applicant was given the same as unconditional gift by her father one Welwel Bariye**. From there the applicant has been in peaceful occupation of the same."* (Emphasis added).

Unfortunately, that version was not replicated in Court. In her testimony, the Appellant stated that the suit land was allocated to her by her father-in-law, one Boay Lagwen in 1988. That version was cemented by her three witnesses. When cross examined by the Respondent's counsel, the Appellant had this to say:

"I was given the suit land by my father-in-law Lagwen Ami after I married to his son Boay Lagwen. The suit land never belonged to my father Welwel Bariye as the Application shows, I was given the suit land in the year 1988 and not 1970 as shown in the Application ..."

From the above excerpts, the contention by the Respondent's counsel that there were inconsistencies between the adduced evidence and the application is vindicated. It is a celebrated principle of justice that parties are bound by their pleadings. The pleadings filed by the Appellant did not support the evidence adduced. In this regard, I am guided by the Court of Appeal decision in the case of **Juma Jaffer Juma vs Manager, PBZ Ltd and 2 Others, Civil Appeal No. 7 of 2002** (unreported), where it was held: *"Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on such issues."*

The Appellant, through her counsel, also urged the Court to hold that the trial tribunal's finding is faulty for lack of analysis of evidence. I do not agree with him. In my view, the trial tribunal chairman thoroughly evaluated the evidence adduced as can be gleaned at pages 6 to 9 of the trial tribunal judgment. I see no further need to re-evaluate the evidence because the trial tribunal exercised that duty comprehensively.

I find the contention that there were inconsistencies in the evidence by the Respondent's witnesses and exhibit D1, in respect of the size of the suit land, unfounded. According to the evidence of DW1, who participated in allocating the suit land to the Respondent, at the time of allocation of the suit land they measured the same by footsteps. After the survey

exercise, it is when the suit land was found to be 20.2 acres. Obviously, a piece of land measured by footsteps and one measured by tape measure would be slightly different. The fact that in their evidence Respondent's witnesses testified that the suit land measured 20 acres while exhibit D1 shows that it measured 20.2 acres is not cannot be a serious inconsistency that may impugn the decision correctly arrived to by the trial tribunal. This difference, in my view, arose due to the two distinct methods applied in measuring the suit land.

The Appellant also sought to impugn the decision for inconsistencies due to the fact that the Respondents witnesses mentioned different borders of the suit land. I have examined the records available and I agree with Ms Panga that such inconsistencies, if any, are insignificant and cannot be held to be material in the circumstances. It is not disputed that the land subject of the dispute is the one mentioned in exhibit D1. With the exception of DW 4 who stated that he was unable to recall the neighbours of the suit land, all the other witnesses appear to be consistent in their description of the suit land. That said, the second issue is also resolved against the Appellant.

From the foregoing, the Appellant's appeal is found wanting. It stands dismissed. The decision of the trial tribunal is hereby confirmed. In the

exercise of my discretion and considering circumstances obtained from the record, I direct that each party bears their own costs.



Y. B. Masara

JUDGE

12th October, 2022