IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL No. 02 OF 2021

(Originating from Land Application No. 15 of 2017 of the District Land and Housing Tribunal for Mwanza at Mwanza)

SERIKALI YA KIJIJI KARUMO..... APPELLANT

VERSUS

WAHALALIKA SIYONKA..... RESPONDENT

JUDGMENT

16th February & 25th March 2022

TIGANGA, J.

This appeal is in respect of the decision in Application No. 15 of 2017 filed and decided before the District Land and Housing Tribunal herein after, DLHT, by Honourable E. Masao- Chairperson, in which the DLHT heard and granted the application in the favour of the applicant, the late Wahalalika Siyonka, who is now deceased, by declaring him the lawful owner of the suit land.

Initially, the respondent (the late Wahalalika Siyonka) had sued the respondent, Serikali ya Kijiji Karumo, claiming among other things that, he be declared the legal owner of the suit land and that the respondents and their agents be permanently restrained from interfering the suit land.

He claimed to have acquired the land by way of inheritance from his father Nsiyonka Luchili, though he did not exactly say when he inherited the said land from his father. He also contended that, he has been using the land for both residential and agriculture and has developed the same by constructing three residential houses thereon. However, according to him, on several accessions during the period of between 2015 and 2017, the respondents kept demanding him to vacate the suit land alleging the same land to belong to the village council.

It was following that demand by the appellant, he filed Application No. 15 of 2017 before the District Land and Housing Tribunal for Geita which after hearing and considering all evidence brought before it, it came to a conclusion that the respondent was the lawful owner of the disputed land and made an order permanently restraining the respondents from interfering with the peaceful enjoyment of the said piece of land by the applicant. The trial Tribunal went further and directed that, if need be, the said land had to be acquired for public use, then, the respondent was entitled to a full, adequate and fair compensation. That decision aggrieved the appellant who decided to appeal to this court against the whole of the said decision, advancing the following grounds of appeal namely;

1. The trial Tribunal Chairperson erred in law and facts for delivering judgment without complying with the order of visiting the locus in quo of the suit premise contrary to the nature of the dispute.
2. The trial Tribunal Chairperson erred in law and fact in disregarding the testimony of DW1, DW2, DW3 and DW4 and weight of exhibit D1 and D2 which proved that the suit premise belongs to the village Council and not the applicant/respondent herein.
3. The trial Tribunal Chairperson erred in law and fact by finding that the respondent who was the applicant is the lawful owner of the suit land by adverse possession and inheritance while there is no sufficient evidence in relation to the said possession and validity of the alleged inheritance of the suit premises from the forefathers. The appellant states that according to law, ownership of all village land during 1970s belonged to the village government unless allocated to the applicant by the village council.
4. The trial Tribunal Chairperson erred in law and fact by relying on the evidence of PW2 and PW3 while their testimonies were not reliable in respect to the admitted exhibits D3.
5. The trial Tribunal Chairperson erred in law by holding in favour of the respondent herein while the applicant at the tribunal level sued non-existent person.

On 30th September 2021 when the matter was called on for hearing, Mr. Matiku, State Attorney representing the appellant, made a prayer to amend the memorandum of appeal so that he could add two more grounds of appeal. This was following the discovery of some new issues after receiving a copy of the proceedings. The counsel for the respondent had no objection to that, so this court allowed the prayer consequent of which the following two grounds were added as follows;

6. The trial Tribunal Chairperson erred in law to hold in favour of the respondent herein while there was no opinion of assessors which have been reflected in the proceedings.
7. The trial Tribunal Chairperson erred in fact to hold in favour of the respondent without visiting the locus in quo despite the fact that the appellant prayed for that before the Tribunal to visit the disputed land.

After filling the two additional grounds, a hearing order was made, and with leave of the court, the application was argued by way of written submissions. Following that order and a schedule to file the submissions, parties complied with the schedule by filing their respective submissions as ordered.

The appellant was represented by Mr. Matiku, learned State Attorney whereas the respondent was represented by Mr. Siwale, learned Advocate. In his submission in support of the appeal, Mr. Matiku, learned State Attorney stated that, he would argue all grounds of appeal except grounds number seven which he dropped.

For purposes of brevity and making this judgment unnecessarily long, I will not reproduce what the parties submitted in their respective written submissions, but I will refer to the respective in the course of tackling each particular ground of appeal for which the arguments were made.

In this judgment I find it pertinent to start with the first ground of appeal, then the second and third grounds which will be argued jointly and together, then the fourth, fifth and sixth grounds of appeal which will be dealt with separately depending on the results of the first three grounds of appeal.

Starting with the first grounds which raises the complaint that, the trial Tribunal Chairperson erred in law and facts for delivering judgment without complying with the order of visiting the locus in quo of the suit premise contrary to the nature of the dispute. This ground presents the complaints similar to the one raised in the seventh grounds of appeal

which was dropped but during the submissions by the appellant, it was argued.

With regard to the first ground of appeal, the counsel stated that, after they had closed their defence case, by the prayers of the parties, the Tribunal made an order that the Tribunal visits the *locus in quo*; however, the visitation was not conducted due to the reason of lack of transport.

Explaining the spirit behind visiting the *locus in quo,* the counsel submitted that, the whole purpose of visiting the *locus in quo* intends to verify the evidence adduced during trial. He argued that despite the fact that the appellant offered transport to take the tribunal to the disputed area, but the Tribunal Chairperson turned down the offer on the ground that, they are not allowed to use parties' vehicles. The counsel was of the view that, had the Chairperson agreed to visit the disputed area she would have come up with a different conclusion. Counsel referred this court to the case of **Sikuzani Saidi Magambo & Another vs Mohamed Roble**, Civil Appeal No. 197 of 2018 to that effect.

Replying to what was submitted by the counsel for the appellant, Mr. Siwale, learned counsel for the respondent submitted with regard to

the first ground of appeal that the Tribunal Chairperson erred nothing by delivering a decision without first visiting the *locus in quo* as the said visitation failed due to lack of transport. He stated that, the allegation that the appellant offered to provide transport is a misconception. The counsel for the respondent cited section 34(1) of the Land Disputes Courts Act (supra) and the case of **Nizar M.H. Ladak vs Gulamali Fazal Janmohamed** [1990] TLR 29 to stress on the point that, visiting *locus in quo* is not mandatory but it is done when the court consider it as necessary. He furthered his submission that the trial Tribunal made several orders to visit the locus in quo but failed. However, with the evidence adduced by both parties, the Tribunal was of the view that, it was enough to rely on the evidence on record to compose its decision.

Furthermore, he submitted that parties did not object when they were asked whether the visitation was necessary and that failure to do so would prejudice any of them. Therefore in his opinion the ground lacks merit, he asked the same to be dismissed.

That being a summary of what has been submitted in respect of the first ground, I would like to premise the ground first on looking at the legal frame work and the circumstances in which visitation of the *locus in quo* can be ordered and done. To the best of my understanding, the

requirement to visit the *locus in quo* is not provided by statute or regulations i.e the Land Disputes Courts Act, Cap 216, or Regulations, i.e the Land Dispute Court (The District Land and Housing Tribunal) Regulations, 2003, GN. 174 of 2003. The same is a creature of case law, and it is done at the discretion of the Court or tribunal especially when it is necessary to verify evidence adduced by the parties during trial. This is according to the authority in the case of **Sikuzani Saidi Magambo & Another vs Mohamed Roble**, (supra) in which it was held *inter alia* that, the same can be done where the circumstances of the case render it to be necessary. Also see, the case of **Nizar M.H vs Gulamali Fazal Janmohamed** [1980] TLR 29 as relied upon in the case of **Jovent Clavery Rushaka and Devotha Yipyana Mponzi vs Bibiana Chacha,** Civil Appeal No. 236 of 2020, CAT-DSM.

Now the issue remains to be how does the necessity of visiting the *locus in quo* arise? In other words how can the court or tribunal determine the necessity of visiting the *locus in quo*? From the practice, it become necessary for the court to visit the *locus in quo* where the pleading and the evidence given by the parties leaves some issues unresolved which the court needs to satisfy itself by way of observation and verification at the site. The visitation of the locus in quo may be

sought by the parties or the court may move itself *sou moto* and order the visitation of *locus in quo*.

In the case at hand, after the closure of the defence case on 23/07/2019, the tribunal ordered the visitation of the *locus in quo* to be done on 23/08/2019 on the condition that, when the transport will be available. On that date, that is, on 23/08/2019, the same was not done and there were no reasons given, it was instead ordered that, the visiting be done on 25/09/2019 on which it was also not done and no reasons were given, consequence of which it was once again postponed up to 14/11/2019. Yet still, on 14/11/2019 the visiting was also not done because there was no transport, consequently, it was postponed up to 21/01/2020 and the case was adjourned up to that date. However, on 21/01/2020, there is no record of visitation of the *locus in quo* and there is also no record that, the case was taken before the trial Chairperson for necessary orders. What is revealed by the record is the order of the date of judgment. The question which arises is, if at first it was necessary for the tribunal to visit the *locus in quo*, at what time that necessity ceased to exist? How did the tribunal fill the gape of the evidence it wanted to verify by visiting the *locus in quo* without necessarily causing injustice to the parties? And how did the tribunal do

away with an order for visiting the *locus in quo* it made without expressly vacating it with reasons?

I find, from these questions raised herein above that, the tribunal was not justified to do away with the order of visiting the *locus in quo* it initially made. It would have been justifiably done so after involving the parties and giving the reasons at least explaining that on review of the evidence, there was no necessity of visiting the *locus in quo* and that non visitation would not occasion any injustice to the parties, something which was not done. That said and from those shortcomings the first ground of appeal is meritorious and it is hereby allowed.

Next is the second and third grounds of appeal, these two grounds combined, may conveniently read as follows, the trial Tribunal Chairperson erred in law and fact in disregarding the testimony of DW1, DW2, DW3 and DW4 and weight of exhibit D1 and D2 which proved that the suit premise belongs to the village Council and not the applicant/respondent herein, while at the same time finding that, the respondent who was the applicant is the lawful owner of the suit land by adverse possession and inheritance while there is no sufficient evidence in relation to the said possession and the validity of the alleged inheritance of the suit premises from the forefathers and without regard

to the fact that, according to law, ownership of all village land during 1970s belonged to the village government unless allocated to the applicant by the village council.

Arguing in support of the second ground of appeal, it was the counsel's submission that exhibits D1 and D2 which were tendered and admitted in evidence contained minutes of the Chigoto Suburb meeting in which it was deliberated the disputed land was allocated for building school. That meeting involved PW2 and PW3 who were present. However, and to the surprise of the appellant, the witnesses PW2 and PW3 who were present in those meetings and never objected the issue of ownership of land by the appellant, testified for the respondent something which shows luck of trustworthy consistency thus affecting their credibility.

He contended that according to the evidence adduced, the disputed piece of land was reserved for cattle grazing and firewood collection. He further submitted that, village land is managed by the village council which is mandated to allocate land to individuals. Therefore the village council is better positioned to know about ownership of the disputed land than any other person.

Arguing in support of the third ground of appeal, counsel for the appellant submitted that, stated that the issue of adverse possession was not proved as it is shown on the records that, the respondent invaded the suit land in the year 2015 and that there had been no any dispute over the said land before and all the villagers knew the land to be a reserved land.

It was his further submissions that, the operation vijiji took place in the year 1974 to 1975 during which period people were allocated and moved to vijiji and since then the disputed land belongs to the village council thus the issue of inheritance also has no legs to stand on.

In the reply submissions by the counsel for the respondent regarding the second ground of appeal, it was submitted that the Chairperson did not err to accord weight to the evidence by PW2 and PW3 and hold in favour of the respondent herein. This is because it is the court's discretion to credit the evidence adduced by the parties to the suit in compliance with the law and thereafter enter judgment in favour of one party. To buttress he cited the case of **Talian Langoi vs Musee Loserian** (1999) TLR 379.

Replying to the third ground of appeal, counsel for the respondent submitted that there was no error in holding that the applicant is the

lawful owner of the suit land by inheritance as the evidence adduced by the applicant and his witnesses was watertight. He referred this court to article 24(2) of the Constitution of The United Republic of Tanzania of 1977 and the authority in the case of **Attorney General vs Lohay Akoonay and Joseph Lohay**, Civil Appeal No. 36 of 1995 TLR 80 to stress on the submission that it is unlawful to deprive a person of his property for the purpose of nationalisation or any other purpose without there being fairly compensated, he also cited the case of **Rashid Baranyisa vs Hussein Ally** (2001) TLR 471 to support his contention.

Regarding the issue of adverse possession, it was argued by counsel for the respondent that, the same does not apply to the case at hand because of the respondent's right over the suit land is by inheritance. Also the fact that twelve years have not lapsed thus it was his humble view that the ground has no merits.

In deciding these grounds of appeal, reading between lines, these two grounds of appeal are presenting the issue of ownership of the suit land. The grounds challenge the findings of the trial tribunal that, the respondent proved to be the owner of the land by adverse possession and inheritance. It is the principle of law that, in this country land may be acquired for ownership by an individual via the following methods,

one, by one person purchasing it from another. In that process, the vendor must be the lawful owner having also acquired the land legally before he passes title to the purchaser. **Secondly,** land may also be acquired by government or land allocating authority allocating to any person a piece of land on the conditions attached to that grant. **Thirdly,** land may be used by way of inheritance where a person with good title dies and the persons entitled to inherit his estate inherit the land from among the estate of the deceased relative. **Fourthly,** land may be acquired as a gift by a person with good title giving it to another person out of love and affection.

In all these four modes of acquisition, the holder of land must have proof of how he acquired the land. For instance, in government allocation, it is expected for a person to prove by offer or right of occupancy/title deed, bearing his or her name. In the mode of acquisition by way of purchase, the person is expected to prove the acquisition and ownership by exhibiting the sale agreement or where the land is registered by transfer. While where the same is by inheritance, he is expected to show the probate and administration process which really passed the said land from the deceased to him or her. Last, if the

acquisition is by way of gift, then the owner is expected to prove it by the deed of gift.

In this case, the respondent said he acquired the land by way of inheritance, but he did not in his evidence prove by telling the court the whole administrative process which made him acquire such land. He did not even tell the court in his evidence, when did his late father pass away and who was the administrator of the estate of his late father who passed the title to him. Neither did he show the document like an assent to bequest nor any other document.

It is a principle of law that he who alleges must prove, and in civil cases the standard of proof is on the balance of probabilities. This is true when reading section 110 read together with section 3(2)(b) of the Evidence Act [Cap 6 R.E 2019]. It is also the position of the Court of Appeal of Tanzania in the case of **Godfrey Sayi Vs. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (Unreported) explained:

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil*

cases, the Court in ***Anthony M. Masanga Vs Penina (Mama Ngesi) and Another,*** *Civil Appeal No. 118 of 2014 (Unreported), cited with approval the case of* ***Re B [2008J UKHL 35****, where Lord Hoffman in defining the term balance of probabilities states that: "If a legal rule requires a fact to be proved (a fact in issue), a judge or jury* ***must decide whether or not it happened****. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1.* ***The fact either happened or it did not****. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof.* ***If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."*** [Emphasis supplied]

In this case, the respondent was required to prove that he owns the land after he had inherited it from his father, he was supposed to give evidence on such a proof which he did not do. Therefore he failed to discharge the burden of proof on the required standard of civil cases that he actually owns the land after he had inherited the same.

The land in dispute is located in the appellant's village, and section 7 (1) (a) of the Village Land Act [Cap. 114 R.E 2019] defines the village

land to consist of the land within the boundaries of a village registered in accordance with the provisions of section 22 of the Local Government (District Authorities) Act. No evidence has been brought regarding the registration of the appellant's village, however, throughout the record it has never been disputed that the said village exists and it is where the land in dispute is located. Therefore by these facts we can correctly infer that the appellant village is recognized one by both parties and the fact that the person representing the appellant village is the State Attorney, from the District Council brings us to the conclusion that, the Local Government (District Authorities) recognizes the appellant village to be the village within the meaning of the law.

It is also worthy noting that section 8(1)(2) and (3) of the Village Land Act (supra) vest the responsibility of the management of all village land to the Village Council as the trustee on behalf of the beneficiaries. In so doing, the village council is guided by the principle of sustainable development and should consult the general public in such function.

This means every land in the village which its ownership has not been proved by any individual is as a matter of law held by the village Council as the trustee on behalf of the villagers. This means that, there is no loose land in the village, the land is either owned by individuals or

the village council. In this case as the respondent was required in law to prove that he acquired the land by inheritance process something which he did not prove, that means the land remained under the trusteeship of the village Council therefore the respondent failed to prove the claim as required by law.

In as far as I am aware that, Article 24(2) of the Constitution of The United Republic of Tanzania of 1977 and the Authority in the case of **Attorney General vs Lohay Akoonay and Joseph Lohay**, Civil Appeal No. 36 of 1995 TLR 80 recognise the land ownership as a constitutional right, however, that is possible where the person has established his ownership via either of the four modes mentioned herein above. As in this case the respondent alleged to have acquired the land through inheritance, but has failed to prove by evidence first, that the land was the property of his late father, secondly, that he inherited it by either a legal or even customary process, he can not be protected by the provision of the constitution and the above cited case authority.

From the above exposition, the issue of ownership is substantive as opposed to the procedural issues which are contained in the 4th, 5th and 6th grounds of appeal. It follows therefore that, since the respondent who was the applicant/claimant before the District Land and

Housing Tribunal failed to prove the substantive issue of ownership, as I have found herein above, there is no need of dealing with the procedural aspect of the use of assessors, and the weight of the evidence of PW2 and PW3 because where the substantive part of the case has not been proved, the procedural part becomes useless even if the same were complied with. Having stated as above, I find the failure to prove ownership especially the mode of acquisition of land disentitles the respondent the decree that he is the lawful owner of the land either by adverse possession or inheritance thus making the findings by the tribunal to have no base, consequently rendering the appeal to be meritorious and deserving. With the findings on these grounds, without even going through the remaining grounds of appeal, the Appeal is allowed; the land in dispute is under the village Council as the trustee of the land for the beneficiaries. i.e the villagers. Given the nature of the dispute, and the relationship of the parties, no order as to cost is made.

It is accordingly ordered

DATED at **MWANZA** this 25th day of March, 2022.

J.C. TIGANGA

JUDGE