THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND APPEAL NO.21 OF 2021

(Land Application No. 27 of 2020 in the District Land and Housing Tribunal of Lindi at Lindi)

SELEMANI RASHIDI KAUNDA *(Administrator of the Estates of the late RASHIDI KAUNDA)* ..... **APPELLANT**

VERSUS

OTILIA TANSILO MILANZI *(Administratrix of the Estate of the late ELIZABETH KANGALA)* .....**RESPONDENT**

Date of last order: 17/05/2022
Date of Judgment: 31/05/2022

JUDGMENT

MURUKE, J.

The appellant Selemani Rashidi Kaunda (Administrator of the Estates of the late **Rashidi Kaunda**) being aggrieved by the decision of Lindi District Land and Housing Tribunal in Land Application No. 27 of 2020 dated on 12/05/2021, preferred present appeal raising Eight grounds, listed in the Memorandum of appeal.

On the date set for hearing appellant was represented by Yuaja Balankiliza, Advocate, while respondent appeared in person. By consent, they agreed appeal to be argued by way of written submission, both adhered to the scheduled order of the court. Appellant submitted on first ground that, the records of the trial court shows that form No.1 does

disclose the estimated value of the property in dispute which was the essential facts to determine the jurisdiction of the tribunal as per Regulation 3(2)(d) of the Land Disputes Courts (District Land and Housing Tribunal) Regulation, 2003. Since the matter of jurisdiction was not considered properly, he prayed first ground of appeal be allowed.

On second ground he submitted that, before amendment and repealed of section 32 of the Land Disputes Court Act, Cap 216 R.E. 2019, the language of the District Land and Housing Tribunal was English or Kiswahili except for the record and judgment shall be in English. The current Written Laws (Miscellaneous Amendments) Act, 2021 changed situation now Kiswahili language is also allowed as a language of records in all proceedings and judgment but this matter at the trial tribunal determined before the amendment of Act Cap 2016 R.E. 2021 put into force. Chairperson did not treated parties fairly because the evidence and testimonies of the appellant taken in English but when came on the respondent side, she changed language into Kiswahili.

Third ground it was submitted that, the Chairperson seriously faulted to decide the matter in favour of the respondent based on the said witnesses. Oral evidence must be admitted if it has been adduced by the person who saw, heard or perceived by any sense. He was of the view that all the respondent witnesses were not fallen within of the mentioned categories. Fourth and six ground he submitted that, the trial Chairperson was not correct to hold that the respondent lived into the suit land for 12 years while she failed to put properly into the evidence of the appellant and neighbor of the suit land.

Fifth ground it was submitted that, the trial Chairperson assertion was a result of the personal bias and emotion because nowhere in the proceedings of the trial tribunal the respondent or witness testified that

the respondent lived into the suit land from 1957. Seven ground, trial Chairperson did erred for failure to comply legal procedure when and after visited an area in dispute. The proceedings of the trial tribunal speak itself that the trial Chairperson promised the parties that the notes will be read out in the tribunal room on 13/04/2021 but the same date the records shows that Chairperson did read notes when they appeared before the tribunal room such date. Appellant added further that, the proceedings also reveal that the tribunal visited the locus in quo on 5/03/2021 without assessors. On eight ground he reiterated what he was submitted in ground five.

In reply, respondent on first ground he submitted that, the case is to be disposed basing on merit, as to the procedures in Regulation 3(2) (d) of the Disputes Courts (District Land and Housing Tribunal) Regulations, 2003. It was stipulated in the judgment at the early paragraph the value of the disputed plot is 5,000,000/=. The issue of preliminary objection the appellant ought to have discussed at the trial not at this stage. The issue of the case in the ward tribunal being dismissed was clearly stated. As a result, the appellant required to sue as the administrator of the estate of the late Rashid Kaunda.

On second ground, she submitted that, respondent was supposed to show how he was affected by the act of the trial chairperson recording the proceedings using both English and Kiswahili language. Third ground she submitted that; the appellant seems not to be conversant with the facts he is tending to defend. DW2, DW3 and DW4 were credible witnesses they were conversant with the evidence adduced. All the three witnesses had personal knowledge as to who was the right owner of the land in dispute. In fourth and six ground she submitted that, nowhere in the records of the trial tribunal neither one or all the

defendant witnesses testified that the respondent trespassed in the land in dispute in the year 2018. They all testified of having personal knowledge to the owner being the respondent. In ground five he said, there is no bias on the side of the trial Chairperson. On ground seven she submitted that, all the procedures in respect of visiting locus in quo was properly followed. It is not the fastened rule that the locus in quo must be visited while in company of wise assessors. The parties were fully represented and there was not contention as to the boundaries. The absence of assessor did not affect the proceedings at all. In last ground she argued that, is totally wrong and not correct at all the evidence recorded match with the findings and judgment of the trial tribunal.

In rejoinder, appellant submitted that, it is clear that in the judgment the trial Chairperson asserted the value of the property is 5,000,000/= but nowhere in the proceedings or in the form No.1 of which used to institute the application the parties disclosed the said value asserted in the judgment. In respect of second ground, he added that, it is legal principles and practice that parties be treated fairly. The evidence of appellant and his witnesses taken in English were very short compared to the respondent and her witnesses which were recorded in Kiswahili. In third, fourth and six grounds he reiterated what he was submitted in his written submission. In the remaining grounds seven and eight he also reiterated what he was submitted.

I have keenly gone through both parties' submissions, trial court proceedings and evidence on record the center of the dispute is, who is the right owner of the disputed land. As the first appellate court, had a duty to subject all the evidences adduced at the trial court to see if the trial court properly evaluated the evidence of both parties. This requirement of the law was established by the Court of Appeal in the

case of **Mapambano Michael @ Mayanga Vs. The Republic, Criminal Appeal No. 268 of 2015** (unreported) at Dodoma, where it was stated that;

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh reevaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether."*

In the present appeal, among others the appellant complained that the trial chairperson erred in law and facts in determine the matter in favour of respondent. The law is well settled, the burden of proof in civil cases lies upon the one who alleges to be favoured by court as provided under section 110(1)(2) and section 111 of the Law of Evidence Act, Cap 6 R.E 2019, this position of law was also reiterated by the former Eastern Africa Court of Appeal in the case of **The Eastern African Road Services Ltd Vs. J.S Daris & Co. Ltd [1965] EA 676** at page 677 it was stated that;

> *"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."*

In total, the one who alleges that his/her right was take or infringed by another person had a duty to bring evidences to prove his case and to make court to believe that the other party has no right over the disputed property. To prove his case at the trial appellant paraded three witnesses including himself. Appellant (PW1) testified that he obtained the disputed farm from his deceased farther who passed away on 1984 owned the said land in 1959. He said after the death of his farther, the land was under supervision of his mother who died on 1992. On 2017 he decided to go at home to take that land. Because he was not staying at the suit land, he left it to be under care of her sister Idaya Juma who

on 25/12/2018 informed him that the suit land was invaded by Elizabeth Kangara, respondent's mother.

In turn, respondent paraded four witnesses including herself, the evidence of DW1(Otilia Tasilo Milanzi) was to the effect that, the disputed land belongs to his gland farther allocated by one Mzee Mussa Licheku on 1954. Her mother was born there on 1957, they continued living in the said land cultivated and planted cashew nuts trees. Her parents continued staying in the disputed land until their house broken down. Her grand farther continued to use the land until she die, but her mother continued staying on the disputed land until the appellant came to complain. She added that, appellant came in the disputed land on 2018. Respondent sold his plot to another person, after he sold his land, he stated to demand her land.

DW1's evidence corroborated by the testimony of DW2(Mwanahawa Mussa Chocheo), who testified that, respondent's grand farther escaped the war, then reached in the disputed land where they were allocated the said land by DW2's grand farther. Then, DW1's leaved the place and left the said land to DW1's mother. Appellant sold his plot approximately of one acre. Respondent's mother lived in the house in the disputed land which is still there until now. DW3(Somoe Abdallah) told trial tribunal that appellant sold his land, buyers had already constructed houses. DW4(Hamis Mohamed Kawambe) who said that, he was assigned by PW1 to clear/ cultivate the disputed land and to make a boundary so that they cannot trespass to DW1's mother's land.

Looking on above summarized evidence of both parties, there are two issues for consideration. **First**, whether the trial tribunal had jurisdiction to entertain the dispute in respect of Form No.1 of the application lodged

by the appellant. **Second**, whether the appellant proved his case at the trial tribunal.

Starting with the first issue, the question of jurisdiction is of paramount important to be considered by each court or tribunal before determine the matter. In the case of **Honourable Attorney General Vs. Reverend Christopher Mtikila, Civil Appeal No. 45 of 2009**(unreported) where defining the word jurisdiction the court said:

> *"What is jurisdiction? According to Stroud's Judicial Dictionary of Words and Phrases. In the narrow and strict sense, the jurisdiction of validity constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference.*
>
> *1) To the subject matter of the issue or*
> *2) To the persons between whom the issue is joined*
> *3) To the kind of reliefs sought or to any combination of these factors."*

The jurisdiction of the trial tribunal established under section 15 of the Land Disputes Court Act, Cap 216 R.E 2019, which reads as follows:

> *"Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Tribunal shall in all proceedings of a civil nature relating to land be limited to the disputed land or property valued at three million shillings."*

Appellant said the application lodged did not disclosed value of the disputed property. I have reviewed the record on trial. At paragraph 4 of the application, it was stated clearly the estimated value of the suit property is Tshs. 5,000,000/= (Five Million Tanzania Shillings) only. So, I am in a settled mind that, the trial tribunal had jurisdiction to entertain this dispute in accordance to section 15 of the Act cited above.

Coming to the second issue, the law is very clear that, the burden of proof in civil cases is on balance of probability and the one who evidence is heavier than other is the one who wins the case. In the case of **Sokwo Vs. Kpongbo 2008 & NWLR PT 1086 P 342** at page 344 it was stated that;

> *"It is a cardinal principle of Law that he who asserts must prove his case with credible and unchallenged evidence. In civil case, a party who wishes to succeed in obtaining judgment in his favour must adduced such credible evidence for such cases are decided on preponderance and balance of probability. It is after a plaintiff has proved his case in this manner that the burden of proof shift."*

I have no doubt that, the appellant tried to explain the history of the disputed land. But neither himself or his witnesses testified who exactly the owner of the disputed land. More confusion came when he testified that he even never knows when her farther acquired the disputed land and the size of the said land as testified by PW2 on cross examination, where he responded that, **I don't know the size of the disputed land**. In normal situation, I don't think if a person can claim against his father's land without knowing where did his farther obtained the said land or the size of the said land. In the book written by **Sarkar on Sarkars Laws of Evidence, 18th Edn, M.C. Sarkar, S.C and P.C. Sarkar**, published by Lexis Nexis, it was stated at page 1896 as follows:

> *".....the burden of proving a fact rest 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. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason ..... until such burden is discharged the other party is not required to be called upon to prove his case. The court has to examine as to*

whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party….."

More so, there is unchallenged evidence that, appellant sold his plot, the buyer-built houses thereon. Then PW1 travelled to Dar es salaam. At page 14 of the trial tribunal typed proceeding reads as follows; **Muombaji eneo lake ekali moja na ameshauza. Alipoona ameuza eneo lake akaja kudai la kwetu**. All these evidences never challenged by appellant. Instead, he only insisted that the disputed land belongs to his deceased farther. I think he was required to explain in detailed, how, when the disputed farm came into his deceased farther possession, the size of the disputed farm, where did the said farm located, how did it come into his possession and when. He was also required to answer the question raised by respondent that he sold his plot and travelled to Dar es salaam. In my opinion those are central issues supposed to be clarified by appellant to prove his case. There is a lot to be desired in the evidence of appellant which left a lot of questions. In the case of **Hemed Said Vs. Mohamed Mbilu [1984] TLR 113** the court held that;

"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of other is the one who must win."

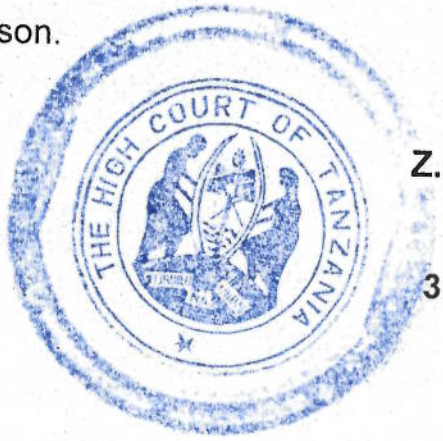
The evidence on records, as paraphrased above, is heavier than the evidence of the appellant. In totality, this appeal has no merits. Accordingly dismissed with costs.

Z.G. Muruke

Judge

31/05/2022

Judgment delivered in the presence of both Happiness Sabato Advocate holding brief of Yuaja Balankiliza for the appellant, and Respondent in person.



Z.G. Muruke

Judge

31/05/2022