THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 90 OF 2021
(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 31 of 2021)

DOTEA HAMSINI.....APPELLANT

VERSUS

STEVEN MGENDIHAMA.....RESPONDENT

JUGDEMENT

Date of Last Order: 06/05/2022
Date of Judgment: 18/05/2022

MONGELLA, J.

The dispute at hand concerns a rice farm located at Kibaoni area Ihahi Ward within the district of Mbarali in Mbeya region. The respondent instituted a suit in the District Land and Housing Tribunal for Mbeya at Mbeya (the Tribunal) claiming to be declared the rightful owner against the respondent. She claimed to have been allocated the farm in dispute by the village authority of Ihahi. She claimed that the respondent invaded the farm and destroyed her crops.

The respondent also claimed to be the rightful owner. He claimed to have acquired the farm from his parents. He said that the farm initially

belonged to his father and mother named Abel Mgendihama and Angelina Semwela, respectively, who used it since 1986. His father died and his mother continued using the farm. His mother later fell sick whereby she failed to continue using the farm and decided to hand it over to him in 1999. He added that he has been using the farm since 1999 without disturbance and the applicant has never used the said farm.

The Tribunal ruled in favour of the respondent. The decision is now challenged by the appellant in the appeal at hand on four grounds as hereunder:

1. *That, the trial Tribunal erred in law and fact for failure to evaluate the appellant's evidence thereby reaching a wrong conclusion.*

2. *That, the Trial Tribunal erred in law and fact basing here say (sic) and cooked evidence for the respondents side without taking into consideration that there were no supporting documents produced in court to be the owner of Deceased father and his mother, the land which was allocated from the village council of Ihahi since 1986. (sic)*

3. *That, the Trial Tribunal erred in law and in fact when ignored to entertained (sic) receipt produced in court by the Appellant which was annexed in her Application to show documents of which the Application could relied during the hearing of the Application. (sic)*

4. *That, the District land and Housing (sic) did not make an appropriate interpretation of the case laws in support of its judgment in circumstances of this case.*

Both parties appeared in person and prayed to argue the appeal by written submissions, the prayer which was granted by the Court. The written submissions were filed in Court in adherence to the scheduled orders.

Addressing the 1st ground, the appellant argued that it is evident from the proceedings that there was no evidence adduced to confirm that the respondent is the owner of the disputed land measuring 2 acres. She said that there was no evidence on 2 acres as the respondent testified that the land in dispute measures 1 acre. She as well challenged the respondent's evidence that the farm belonged to his parents who acquired the same in 1986 on the ground that there was no any receipt presented showing that his father and mother were allocated the land by Ihahi village in the said year. She added that even the members of Ihahi village council were not brought to confirm the respondent's assertion. He was of the view that the persons who allocated the land to the respondent's parents were key witnesses but were not brought rendering the respondent's evidence weak.

On the other hand, she said, the appellant was allocated the land in dispute since 2004 and has been in occupation for 22 years whereby she planted rice without disturbance until 2019 where the dispute arose. She faulted the Tribunal for ignoring to consider the receipt from Ihahi village

which allocated the land to the appellant measuring 2 acres. She had a stance that the Tribunal misdirected itself for failure to note that the evidence by the respondent's witnesses was confusing.

She further argued that the Tribunal erred as it did not visit the *locus in quo* to satisfy itself on the size and location of the farm in dispute. She was of the view that the fact that the appellant claimed 2 acres while the respondent said that it was 1 acre necessitated a visit to the *locus in quo* to confirm the claims. In her view, the failure to visit the *locus in quo* defeated justice.

With regard to the second ground, the appellant challenged the respondent's evidence for being hearsay and cooked. She thus faulted the Tribunal for relying on such evidence. The basis of her argument was that there was no receipt presented by the respondent to corroborate his assertion and no chairman confirmed his allegation. She faulted the Tribunal for failure to analyse the respondent's evidence to prove that the land belonged to the respondent.

On the 3rd ground, she faulted the Tribunal for failure to consider the receipt from Ihahi village council proving the allocation of the farm in dispute to her. She said that during the hearing on 14th June 2021, she presented receipts dated 15th November 2004 and 13th August 1996 and the same were attached to Land Application No. 29 of 2021. In what I failed to grasp well its connection to the ground of appeal, she claimed that the Tribunal entertained Land Application No. 29 of 2021, but the

judgment shows Land Application No. 31 of 2021. She considered it an abuse of the process of the Tribunal.

Under the 4th ground she challenged the Tribunal for failure to make appropriate interpretation of the case laws in support of its judgment. She contended that without specifically indicating any case laws the Tribunal misdirected itself in its decision thereby basing its decision on personal views and reaching a wrong decision. She prayed for the appeal to be allowed.

The respondent opposed the appeal. He replied generally to the grounds of appeal whereby he supported the Tribunal's decision. He argued that the decision was entered after proper analysis and evaluation of the evidence tendered before it. Referring to the case of ***Hemed Said vs. Mohamed Mbilu*** [1984] TLR 113 he argued that it is not the duty of the Court to find evidence but of the parties and that the party whose evidence is heavier than the other is the one entitled to win the case.

He referred to **section 110 of the Evidence Act, Cap 6. R.E. 2019,** arguing that the one who wishes for the court to decide in his favour must prove the alleged facts. He contended that it was the duty of the appellant to prove ownership of the disputed land, but failed. On the other hand, he said, it was the respondent who proved his ownership over the disputed land. He invited the Court to consider the provisions of ***section 119 of the Evidence Act*** which charges the duty of proving ownership to the person claiming ownership against the one in possession of the thing/property. Basing on this provision, he challenged the appellant's claim contending

that the appellant failed to state how she acquired the disputed land and how she invited the respondent to the disputed land.

He maintained his argument that he was the one who proved to own the disputed land against the appellant whereby he testified to have acquired the same from his late parents and is still using the land for cultivation without interference. He considered his evidence heavier than that of the appellant.

In addition he challenged the appellant's assertion that she was allocated the land in 2004. On this, he argued that the appellant failed to mention the authority that issued the land to her, but relied on the principle of adverse possession claiming to have used the land for more than 12 years without interference. He said that the principle does not apply in the matter at hand because under the law permissive or consensual occupation does not amount to adverse possession. In support of his argument, he referred the case of ***Registered Trustees of Holy Spirit Sisters of Tanzania vs. January Kamili Shayo and 136 Others***, Civil Appeal No. 193 of 2016 (CAT at Arusha, unreported).

In rejoinder, the appellant, while conceding to the legal position that the one with heavier evidence must win, challenged the respondent's evidence for not being credible. She maintained her stance that the evidence was hearsay and cooked. She added that the respondent in his submission did not dispute her assertions connoting that he was in agreement. On those bases she distinguished the case of ***Registered Trustees of Holy Spirit Sisters of Tanzania*** (supra) cited by the respondent.

In what I find a new ground, she further challenged the conduct of the case by the Tribunal whereby she claimed that there was no fair hearing as she tendered receipts by attaching them to her application, but the Tribunal Chairman did not indicate the same in the proceedings as being tendered in evidence.

Lastly, she maintained her point that the Tribunal failed to evaluate the evidence in Land Case No. 29/31 of 2021 thereby reaching an erroneous decision. She was of the view that the Tribunal Chairman acted as an arbiter in the case he presided.

I have considered the appellant's grounds of appeal, the parties' arguments and the Tribunal record. I shall deliberate on the grounds of appeal in seriatim. The appellant's main contention on all the grounds is on evaluation of evidence by the Tribunal. This being the first appellate court, I shall examine and evaluate the evidence accordingly while deliberating on the grounds of appeal.

On the 1st ground, the appellant basically raises three issues being: **One**, that there was no evidence that the land in dispute measures 1 acre and that the land belonged to the respondent's parents since 1986 whereby they were allocated the land by the village council as no member from the village council was presented to testify to that effect. **Two**, that the Tribunal failed to consider the evidence that the appellant obtained the land in dispute since 2004 and has been growing rice in the farm for 22 undisturbed years. However, I find this issue connected to the 3rd ground of appeal and shall therefore reserve my deliberation and deal with it

while addressing the 3rd ground. **Three**, that the Tribunal never visited the *locus in quo*.

With regard to the first issue, it is on record that while the appellant claimed that the land in dispute measures 2 acres, the respondent claimed that it measures 1 acre. I have gone through the evidence presented by both sides and found none of them proved his/her assertion as they testified mere words. To that effect it was the appellant's word against the respondent's. I suppose it was on this claim that the appellant faulted the Tribunal for not visiting the *locus in quo* as stated in the third issue above. In my view however, I do not find the visit to the *locus in quo* necessary. This is because the dispute was on ownership and not boundaries or size of the land necessitating a visit to ascertain the demarcations and the size. The parties knew the location of the disputed land and that sufficed.

Generally, the visit to *locus in quo* is usually discouraged to avoid chances of rendering courts witnesses in the case. The legal position is settled to the effect that a visit to the *locus in quo* is to be done only when the court wishes to ascertain the accuracy of a piece of evidence where there happens to be conflicting evidence on issues such as location of the land, boundaries and features on the land. In the case of ***Avit Thadeus Massawe v. Isidory Assenga***, Civil Appeal No. 6 of 2017 the Court of Appeal (CAT) set this position. While quoting in approval the decision from the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of ***Evelyn Even Gardens NIC Ltd and the Hon. Minister, Federal Capital Territory and Two Others***, Suit No.

FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017, the CAT held:

> *"The factors to be considered before courts decide to visit the locus in quo include:*
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> 1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (See* ***Othiniel Sheke v. Victor Plankshak*** *(2008) NSCQR Vol. 35, p. 56)*
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> 2. *The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see* ***Akosile v. Adeyeye*** *(2011) 17 NWLR (Pt. 1276) p. 263)*
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> 3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see* ***Ezemonye Okwara v. Dominic Okwara*** *(1997) 11 NWLR (Pt. 527) p. 1601)*
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> 4. *The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. [Emphasis added]*

The CAT further quoted in approval another Nigerian case of ***Akosile v. Adeyeye*** *(2011) 17 NWLR (Pt. 1276)* which was relied upon in ***Evelyn's case*** (supra) in which it was held:

"The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."

In the case at hand, the issue in dispute was not on location, features on the land, extent or boundaries thus rendering it irrelevant to visit the *locus in quo*. The size of the land in dispute was only mentioned by the parties in evidence but was not in dispute.

With regard to the claim that there was no evidence that the land belonged to the respondent's parents having been allocated the same by the village authority, I first of all agree with both parties that the legal position as settled under **section 110 of the Evidence Act** and the case of ***Hemed Said vs. Mohamed Mbilu*** (supra) is to the effect that the one who alleges must prove, and the one with heavier evidence is entitled to win the case.

In the matter at hand, the appellant as the claimant had the onus of proving that the land in dispute was hers. In her testimony, she claimed that she was allocated the land by Kibaoni village council. I however find her testimony wanting in sufficiency on the following grounds: Though in her submission in this appeal she claimed to have been allocated the land in 2004 and claimed to have presented documentary evidence to that effect, the Tribunal proceedings reveal that she had no idea as to

when she was allocated the land. When questioned by the Tribunal she replied that she did not remember when she was allocated the farm by the village government.

Though she claimed in her testimony to have used the farm for so many years, when questioned about her neighbours, she at first said that she did not know her neighbours. Later she changed and said that her neighbours are her enemies. When cross examined by the respondent she mentioned the neighbours to be one Ngoma, Sapala, and Saatanda. Her evidence was full of contradictions on material issues thus not credible.

The appellant as well never brought any of her supposedly neighbours to testify on her behalf, which I consider material witnesses. As much as the law does not compel a particular number of witnesses to be summoned to prove a certain fact (see: **section 143 of the Evidence Act, Cap 6 R.E. 2019**), the law is also trite that non-calling of material witnesses leads to drawing of adverse inference on the party that ought to have called such witnesses. See: ***Hemed Said v. Mohamed Mbilu*** [1983] TLR 113; and ***Aziz Abdallah v. Republic*** [1991] TLR 71.

The appellant presented PW2, one Ally Shabani, to testify on her behalf. PW2 testified that he was the village Chairman though did not state the period in which he led the village. I have scrutinized PW2's testimony and found it contradictory and unrealistic, thus not credible. At first, he said that in 2005 it was announced for people to apply to be allocated the farms. Then he said that the land/farms were given back to the previous owners in 2005 following a court order from Chimala primary court.

However, he failed to present the court decision which he claimed to have acted upon in re-allocating the land to the appellant.

Second, it is surprising that the appellant who is claimed to have owned the land before 2005 and re-allocated the same in 2005 through a court order never testified to that effect. Her testimony was that she was allocated the land in 2005 by purchase from the village council. In addition, PW2, when questioned by the Tribunal, testified that he did not know the respondent's farm and did not know the appellant's neighbours. This renders his previous testimony unworthy of credibility because if he is/was the village Chairman and came to testify in favour of the appellant, he ought to know well the land in dispute. As it appears, he had no idea of the suit premises which he was testifying on. In the premises, I find that the appellant failed to discharge her duty in proving that she was really allocated the land in dispute by the village council.

On the other hand, the respondent testified to have obtained the land in dispute from her parents whereby at first it was used by his father and mother. His father died and her mother continued using the farm until when she fell sick and left it to the respondent to continue using since 1996. The respondent presented DW2, one David Hamis, who testified to be neighbouring the respondent's farm. DW2 testified that the farms were allocated in 1986 by Kibaoni village authority whereby he was given 1 acre and the respondent's father, one Abel Mgendihama, was allocated a farm close to his. He also testified to have never seen the appellant using the farm in dispute. This evidence was never shaken by the

appellant during cross examination. As a neighbour, DW2 was a key witness to the case and gave unshaken testimony.

The above findings bring me to the 2nd ground whereby the appellant challenges the respondent's evidence for being cooked and hearsay. Her main argument in challenging the respondent's evidence as such is to the effect that no member of the village council was presented. First of all the appellant in her testimony has not shown in which way the said evidence is hearsay and cooked. The respondent, who testified as DW1 explained how he obtained the farm from his parents. DW2 as well, in his capacity as a neighbour, explained how the farms were allocated in 1986 and that he witnessed the respondent and his parents using the farm in dispute. I do not find their testimonies hearsay.

The law does not compel a specific number of witnesses to be brought to court to prove a certain fact. See: **Section 143 of the Evidence Act, Cap 6 R.E. 2019**; and the case of ***Ahmad Omari vs. The Republic***, Criminal Appeal No. 154 of 2005 (CAT at Mtwara, unreported). It can only be fatal if a witness not brought is a material witness.

However, as much as, village council members can be considered as material witnesses in matters like the one at hand where parties claim to have been allocated land by the village council, I am of the view that the obligation to bring such witnesses lied with the appellant as the claimant to prove her allegations and not the respondent. This is because the burden of proof does not shift to the respondent. To that effect the appellant presented PW2, but for the reasons stated above, regarding

contradictions and unrealistic testimony, I have already ruled that PW2's testimony was not credible.

On the 3rd ground, the appellant raises two issues. First, she faults the Tribunal for not considering the receipt from Ihahi village council proving allocation of land to her whereby she has been in use of the land for 22 years undisturbed. She claimed to have obtained the land in 2004. Second, she faults the Tribunal for entertaining Land Application No. 29 of 2021, but in the judgment showing that it is Land Application No. 31 of 2021.

Concerning the first issue, the appellant submitted that on the hearing held on 14th June 2021 she presented receipts dated 15th November 2004 and 13th August 1996. I have gone through the proceedings and found no documentary evidence tendered by the appellant as she claimed. I suppose by arguing that the receipts were attached to the application she meant that the receipts ought to have been considered by the Tribunal as evidence proving her ownership of the land. With all respect, I find that the appellant is wildering in misconception.

The law is settled to the effect that it is until when a document is tendered, cleared and admitted in evidence by the court, the same can be considered by the court as evidence. In the case of ***M/S SDV Transami (Tanzania) Limited vs. M/S STE DATCO***, Civil Appeal No. 16 of 2011 (CAT, unreported) the Court of Appeal while revisiting its previous decision in ***Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited*** [2006] TLR 343 ruled that:

> "... ***It is mandatory that for a document to form part of the record of the suit it must first be admitted in evidence. Therefore, the proper procedure is that, the document must first be cleared for admission before it is used in evidence ... a document which is not admitted in evidence cannot be treated as forming part of the record of the court.***" [Emphasis added].

Therefore, for not being admitted in evidence the receipts claimed by the appellant as proof in evidence could and cannot be considered as they do not form part of the evidence on record. Even if the Tribunal would have considered the document in the circumstances, the same would be an irregularity. See also: ***Robinson Mwanjisi & 3 Others vs. Republic*** [2003] TLR 218; and ***Kunduchi Beach Hotel & Resort vs. Mint Master Security Tanzania Limited***, Civil Appeal No. 67 of 2014 (CAT, unreported). The appellant therefore provided no proof on her claim that she was allocated the land by the village council.

The appellant further faulted the trial Tribunal for registering Land Appeal No. 29 of 2021, but recording Land Appeal No. 31 of 2021 in its judgment. I have gone through the entire record and found no such thing. The Tribunal case file, typed proceedings and judgment make reference to Land Application No. 31 of 2021. On the pleadings it appears that it was recorded Land Application No. 29 of 2021, but the same was cancelled and recorded Land Application No. 31 of 2021.

I am of the view that the correct case number was Land Application No. 31 of 2021 and that is why the pleadings were altered. If a mistake was

done in numbering the case during filing of pleadings, I do not find any problem with correcting the mistake. However, even if the case number is still incorrect, the same could not be brought as a ground in this appeal because the appellant can still file for review in the Tribunal for it to put the record clear. The claim cannot vitiate the proceedings and decision of the Tribunal.

On the last ground, that is, the 4th ground, the appellant faults the Tribunal decision on the ground that no reference or interpretation of case law was made to support the decision. She was of the view that the decision was based on personal views. I, in fact, shall not allow this ground to detain me much. First of all the appellant has not mentioned the provisions of the law or case law relevant to her case that ought to have been considered by the Tribunal.

Second, I have gone through the judgment and find no flaws in it. As much as judgments may not attain perfection, application of case law or statutory provisions depends on the issues involved in the case. In the case at hand the question to be determined regarded ownership of land between the parties. Both parties adduced evidence in support of their allegations and the Tribunal examined and evaluated the evidence and reached its verdict. It did not base its verdict on personal views as claimed by the appellant, but on examination and evaluation of the evidence before it. Non citation of case law cannot render a judgment defective. It was upon the applicant to state which settled legal positions were infringed by the Tribunal in its decision.

Having said all, I find the entire appeal lacking merit for failure by the appellant to prove her ownership over the farm in dispute. The appeal is therefore dismissed with costs.

Dated at Mbeya on this 18th day of May 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 18th day of May 2022 in the presence of the parties appearing in person.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE