IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO.26 OF 2020

ATHUMANI DENGU.....APPELLANT

VERSUS

HALIMA SWALEHE.....RESPONDENT

(From the judgement of Kondoa District Land and Housing Tribunal)

O.Y Mbega-Chairman

Dated 10th day of March, 2020,

In

Land Appeal 85 of 2019

.....

JUDGMENT

9thMarch&6thMay,2022

MDEMU, J:.

This is a second appeal. In the Ward Tribunal of Palanga, the Respondent Halima Swalehe filed a land dispute registered as Land Case No.10 of 2019 for a declaration that, she be declared the rightful owner of a 9 acres' land located at Isini Village. The suit was decided in her favour. The Appellant herein appealed to the District Land and Housing Tribunal (DLHT) for Kondoa which dismissed the appeal on merits. Further aggrieved by the decision of the first appellate tribunal, the Appellant lodged this instant appeal on the following grounds: -

1. *That, the Honourable Chairman erred in law and in fact for deciding in favour of the Respondent without considering that the Appellant started to own the land in dispute since 1974 after being given the same by his father namely CHOMIMO and continued to develop the same up to 2017 when the dispute arose with the Respondent herein.*
2. *That, the Honourable Chairman erred in law and in fact for deciding in favour of the Respondent basing on weak and contradictory evidence adduced by the Respondent and her witness during the trial at the Ward Tribunal.*
3. *That, the Honourable Chairman erred in law and in fact for deciding in favour of the Respondent without proper evaluation of evidence adduced by the parties.*

When the matter was scheduled for hearing on 9th of March, 2022, the learned Advocate Ms. Sara Ngereza appeared for the Appellant. The Respondent didn't appear. This Court having been moved by Ms. Ngereza and upon considering the affidavit of the Process Server sworn on 27th of

May,2021, it is apparent that, the Respondent has wilful refused summons. It was consequently ordered the appeal be heard ex-parte.

In her submissions concerning the grounds of appeal, the Learned Counsel, after abandoning the third ground of appeal, submitted that, in the Ward Tribunal, it was revealed that, the disputed land belongs to the Appellant since 1974 as he was given the same by his father. This fact was neither contradicted nor cross examined by the Respondent at the trial tribunal. As per the evidence, the Respondent claimed to have cleared the disputed land since when she was young. However, she didn't specify which year she made the clearance.

According to the learned Counsel, the testimony of the Respondent at the trial tribunal is tainted with contradictions. One among them is that, the Respondent asserted to have begun to clear the land since when she was young but her own son one Omary Saidi stated that, they started to clear the disputed land together. The second contradiction is on the size of the disputed land. Whereas her son Omary Saidi stated the size to be 3-4 acres; the Respondent claimed that the size is nine (9) acres.

Furthermore, the Counsel submitted that, at times, the Appellant's son utilized the disputed land but the Respondent didn't claim ownership. She only begun to disturb the Appellant after the death of the Appellant's

son. She said that, this impliedly establishes that the Respondent acknowledged that the disputed land solely belongs to the Appellant. Finally, the counsel prayed the appeal be allowed with costs.

Having heard the Appellant's Counsel submissions, and after going through the findings and decisions of the two lower tribunals, I find the issue to be dealt with is whether the lower tribunals directed themselves in proper evaluation evidence as to declare the Respondent herein the rightful owner of the suit land. In circumstances where two courts or two tribunals, as in this case, have concurrent decisions on their findings as to facts, this being the second appellate Court should not interfere unless there is misapprehension in assessment of such facts. See **Neli Manase Foya vs Damian Mlinga [2005] TLR 167.** In resolving this appeal, I will also be guided by this principle.

At the trial tribunal, the Respondent contended to be the real owner of the disputed land as she is the one who established the farm. According to her, though she is the real owner, she did not manage to stay and utilize the disputed piece of land, rather she allowed the Appellant's mother-in-law to stay and use. The said mother in law died and was buried on that area. After that death, the Respondent allowed one of the Appellant's sons named NTAURE to utilize the area, who also died later.

According to the Respondent, another son of the Appellant invaded the disputed land and proceeded to use claiming to belong to the Appellant. With this evidence, surprisingly, the Respondent did not manage to prove when she acquired the said land.

In response, the Appellant claimed the disputed land to be his as he got it from his late uncle one CHOMIMO. He then managed to construct a building in 1974 which still exists. This piece of testimony was neither disputed nor cross examined by the Respondent at the trial tribunal. In this regard, the legal principle set in the case of **Nyerere Nyague vs. Criminal Appeal No.67 of 2010** (unreported) is such that: -

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said"*

The omission of the Respondent to dispute on the years and how the Appellant got into acquisition to the disputed land led this Court to draw adverse inference that she conceded on the assertion. Again, in civil cases, the person whose evidence is heavier than that of the other must win. See the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR**

113. It is also important to note that, a party who wish the decision to be in his favour bears the evidential burden and the standard of proof is the balance of probability. See the case of **Barelia Karangirangi vs.Asteria Nyalambwa,Civ.Appeal No.237/2015** (unreported).

Consequently, this Court have reached to the consensus that, at the trial tribunal, the Respondent did not satisfactorily discharge her burden of proof. As said earlier on, the two tribunals concurred on matters of facts and determined in favour of the Respondent. This court hereby interferes with such concurrent finding of facts due to misapprehension of such facts as hereunder:

One, the Respondent failed to establish how she acquired the said land. Did she clear herself or by her son as testified? **Two**, there is contradiction on the size. The respondent said nine (9) acres whereas her witness stated the size to be 3-4 acres. **Three**, important witness especially one who used the land after the demise of the Appellant's son were not called. **Four**, there is un-contradicted evidence that the Appellant resided in the disputed land and constructed a hut which is still existing. Had the trial tribunal and the DLHT took account into these facts, would not have declared the Respondent the rightful owner.

In the upshot, the appeal is allowed. No order as to costs. It is so ordered.

Gerson J. Mdemu

JUDGE

6/5/2022

DATED at **DODOMA** this 6th day of May, 2022

Gerson J. Mdemu

JUDGE

6/5/2022