IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI DISTRICT REGISTRY)
AT MOSHI

MISCELLANEOUS LAND APPEAL NO. 8 OF 2022

(C/F Appeal No. 54/2021, DLHT, Moshi. Originating from Land Case No. 32/2021 Kahe Magharibi Ward Tribunal)

HALAFANI ABRAHAMAN..... APPELLANT

VERSUS

FADHILI JUMA MZIRAY.....RESPONDENT

JUDGMENT

Last order 2/2/2023
Judgment: 24/2/2023

MASABO, J

This is a second appeal. It emanates from Kahe Magharibi Ward Tribunal in Land Case No. 32/2021 and the District Land and Housing Tribunal of Moshi (DLHT) in Appeal No. 54/2021. Briefly, the applicant herein had instituted a claim against the respondent for trespassing his 1¾ acres of land located at Mawela Village valued at 3,000,000/= which we shall refer as the suit land. The ward tribunal heard both parties and declared the respondent to be the rightful owner of the suit land.

Aggrieved by the decision of the ward tribunal, the appellant appealed to the DLHT in Land Appeal 54/2021 which dismissed his appeal and upheld the decision of the trial tribunal. Aggrieved further, he has filled this appeal on the following grounds: -

1. That the Trial Chairman of the Tribunal erred both in fact and in law when failed to know that the Respondent's father being a key

witness didn't testify to give the suit land to the Respondent despite his presence before the trial tribunal.

2. That the Trial Chairman and the Appellate Chairman erred both in law and in fact when he failed to know the suit land forms part and parcel of total sum of four (4) acres in respect of Application No. 189/2017 before the appellate tribunal.
3. That the appellate chairman erred in law when failing to include the opinions of both assessors on his judgment as they were read to the parties which led to miscarriage of justice on the appellant's part.
4. The trial tribunal and the appellate tribunal erred both in law and in fact when failed to properly evaluate, assess and analyze the evidence as a whole which led to rule on respondent's merit.

The appellant was represented by Mr. Gideon B. Mushi, Advocate while the respondent was unrepresented. With the consent of the parties, hearing proceeded in writing and both parties filed their submissions before the court as required.

Supporting the appeal, Mr. Mushi abandoned the 3rd ground of appeal and proceeded to submit on the 1st, 2nd and 4th grounds. He argued that, during trial the respondent did not call key witness, that is, his father, one Juma Salum Kondo and his grandfather, one Salum Kondo. The omission was an error and attracts an adverse inference against him. In support, he cited the case of **Mujuni Joseph Kataraiya v Samuel Mtambala Luhangisa and Another** [1996] TLR 53. Mr. Mushi argued further that the evidence presented by the respondent in the trial court was not

enough to declare him the owner of the suit land. He was declared the owner because, the trial tribunal failed to evaluate the evidence and so was the first appellate court. Thus, this court is duty bound to re-assess and re-evaluate the said evidence. He then cited the case of **Deemay Daati and 2 others v Republic** [2005] TLR 132 in fortification. As regards the strength of the appellant's case, Mr. Mushi submitted that, although the appellant did not bring any witnesses, he succeeded to prove his case through documentary evidence that the suit land is part of a 4 acres land subject to Application No. 189/2017 before the DLHT in which he was declared the lawful owner.

In his reply, the respondent addressed each ground separately. On the first ground he argued that the appellant's evidence was not watertight to justify a finding that he is the rightful owner. Further, he argued that the appellant's claim is for 2 acres of land which is different from the one in Application No. 189/2017. They are different in size and boundaries. Thus, the appellant's argument that the suit land is similar to the one in the previous suit is baseless. On omission to call witnesses he argued that it is baseless as it is not the number but the quality of evidence that matters. He cited the case of **Hemedi Saidi v Mohamed Mbilu** [1984] TLR 113 to support his argument. On the second ground he argued that the suit land which belongs to him is distinguishable from the one that is claimed by the appellant. He also raised an issue on limitation of time under section (3) (1) and item 22 of the First Schedule to the Law of Limitations Act [Cap 89 RE 2019] and cited the case of **Yusuph Same and Another Vs Hadija Yusuf** [1996] TLR 347 in support of his submission that even if the appellant had established that the suit land

belonged to him and that the respondent was unlawfully occupying it, his claim would not have sailed under the principle of adverse possession as more than 18 years has lapsed since the respondent started to occupy the said land. On the fourth ground, he argued that the trial tribunal properly assessed the credibility of witnesses and found out that the respondent's evidence was stronger than the appellant's evidence. The case of **Hemedi Saidi v Mohamed Mbilu [**1984] TLR 113 was referred in support his argument that the appellant was duty bound to prove his case. He prayed the appeal be dismissed with costs.

I have keenly read the submissions presented by the parties as well as the records of the trial tribunal and the appellate tribunal and I will now proceed to determine the appeal. Since the 3rd ground of appeal was abandoned; I see no need to address the same. I will, therefore, address grounds number 1, 2, and 4 which raise three issues: - **one**, whether the respondent omitted to call material witnesses and whether an adverse inference can be drawn against him, **two,** whether the suit land forms part and parcel of four acres involved in Application No. 189/2017; and **three**, whether the trial tribunal failed to properly evaluate, assess and analyze the evidence as whole.

Starting with the first ground, the law does not require a specific number of witnesses to prove a case as what matters most is not the quantity of witness but the quality of evidence produced by such witnesses and their credibility (see **Skona Loryan Munge and 2 Others versus Republic** (Criminal Appeal No. 51 of 2020) [2022] TZCA 773 Tanzlii). It is similarly trite that the law expects that all material witnesses necessary to prove

the alleged facts be called to render their evidence in court. The omission to call such witness attracts an inference adverse to the party that ought to have called them. As stated in **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008, CAT (unreported):

> "...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."

In the present case, records from the ward tribunal demonstrate that in his evidence, the respondent stated that the suit land was originally owned by his grandfather from whom the ownership devolved to the respondent's father one Salumu Juma Salum Kondo and later on to him in 2003 and he was since then cultivating the same uninterrupted until in 2021 when the appellant accused him of trespass. It is also apparent that none of these two was called upon to testify as to how the suit land changed hands and devolved to the respondent. Cleary, in my view, these two persons, notably the appellant's father, were material witnesses as their evidence would have helped the court to resolve the main question as to ownership. Failure to summon them as witnesses was indeed fatal hence attracts an adverse inference against the respondent's case. The actual damage of such an inference to the respondent's case is, however, dependent upon the whole evidence produced in court and can only be determined after I have answered the 2nd and the 4th grounds of appeal as it is only then that the weight of the evidence rendered by the respondent as whole can be ascertained.

The 2nd and the 4th issue to which I now turn, seek to determine whether the trial tribunal and the appellate tribunal properly evaluated the evidence on record. In particular, on the second ground of appeal the appellant has argued that the trial tribunal ignored that the suit land had previously been litigated before the DLHT in Application No. 189/2017 in which the appellant was litigating with 2 other people, namely Yona Hadson and Azarai Hadson (not party to this suit). Further, the two tribunals ignored that at the termination of the said suit which ended amicably by a consent judgment entered after the parties signed a deed of settlement, the appellant was declared the lawful owner of the suit land comprising of 4 acres. It was Mr. Mushi's further submission that the appellant presented documentary evidence before the trial tribunal in proof that the suit land formed part of the four acres awarded to him by the appellate tribunal in Land Application No. 189/2017 but this was totally ignored. The evidence, he has argued, sufficed as proof that he owns the land. Had the trial tribunal and the appellate tribunal properly evaluated this piece of evidence *visa -a-vis*, the rest of the evidence on record, it would have established that indeed the suit land is part of the four acres which belongs to him. The respondent was opposed.

Having scrutinized the record I have observed that before the ward tribunal the appellant while testifying as PW1 claimed that the land is part of the 4 acres forming part of the consent judgment Land Application No. 189/2017. In substantiation, he produced a copy of the consent judgment in respect of Land Application No. 189/2017. On his party, the respondent rendered no document but he called two witnesses to support his case. DW2, Anthony Alfred Mjema, deponed that the respondent is his neighbor

and that the suit land belongs to the respondent as he acquired it from his father who also acquired the same from his father, the respondent's grandfather. He also testified that the respondent has been on uninterrupted occupation of the suit land for a long time. DW2, Hamad Hamis, told the tribunal that the appellant and the respondents are his neighbors. The appellant complained to him that the respondent trespassed his land but to his knowledge, there is no trespass as the land occupied by the respondent is his. As per this witness, both parties have parcels of land along the same area which borders his farm. There is also in addition, a sketch map drawn by trial tribunal after it visited the *locus quo*. Having evaluated all the evidence, the trial court found the appellant to have failed to prove that the land belonged to him and it dismissed the application. The DLHT had a concurrent finding. It dismissed the appeal and confirmed the dismissal order. In this appeal, I have been invited to reverse the concurrent finding and the dismissal order.

In determining these two grounds, the invitation and the appeal as a whole, I am mindful that this is a second appeal. Hence, as a general rule, I am bound by the concurrent findings of the two tribunals. An interference with the concurrent finding would only be justifiable where it is crystal clear from the records that in arriving at the concurrent findings, the trial and appellate tribunal misapprehended the evidence on record, omitted to consider available evidence or made wrong conclusions on the facts and in so doing they have occasioned a miscarriage of justice. This position has been stated in a plethora of authorities including in **Wankuru Mwita v. Republic** Criminal Appeal No. 219 of 2012 CAT (unreported) where it was stated that: -

> "...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

Also see **Geofrey Laurent @ Mbombo vs. Republic** Criminal Appeal No. 385 of 2015, CAT; **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; and **Mussa Mwaikunda v. Republic** [2006] TLR 387 and

Back to the merit of the appeal, it is a cherished legal principle that the burden to prove an alleged fact is always on the person alleging the said fact hence the maxim "he who alleges must prove" (see **Barelia Karangirangi v Asteria Nyalwambwa** (Civil Appeal No. 237 of 2015) [2019] TZCA 51. The appellant being the claimant before the tribunal was duty bound to prove that the suit land belonged to him. As the trial and appellate tribunal found that he miserably failed this duty it is, therefore, to be decided by this court whether he discharged this duty and if so, whether the trial and appellate tribunal erred in their concurrent findings. Looking at the record, I hasten to answer this question in the negative as the appellant called no witness in substantiation of his claim. His evidence heavily relied on the consent judgment which, much as it should have been a sufficient proof, it did not disclose sufficient materials in proof that the disputed land was his or that it was part of the 4 acres litigated in

Land Application No. 189/2017. In the consent judgment rendered brefly held thus:

> Wadaawa wamemaliza mgogoro huu kwa maelewano ambayo tayari wameyasajili kwenye Baraza hili tarehe 12/2/2021.
>
> Hivyo kama ilivyokubalika mwombaji anakabidhiwa **eneo lake la eka 4 lililopo Kijiji cha Mawela Kata ya Kahe Magharibi Wilaya ya Moshi**. Kila upande utabeba gharama zake isipokuwa za kusajili maelewano haya ambazo zitalipwa na mdai.
> Imeariwa hivyo.
>
> Signed
> P.J.Makwandi
> Mwenyekiti
> 15/2/2021

Clearly there no indication let alone a proof that the said 4 acres had any relation with the disputed land. Under no circumstances can this evidence be said to have overweighed the evidence rendered by the respondent's witnesses who demonstrated ample knowledge of the suit land. Needless to highlighting, to win the case, the appellant needed to do a little more to substantiate his claim. It was not sufficient for him to produce the consent judgment. He ought, in my view, to call the persons he litigated with in the said case or to produce the settlement deed showing boundaries of his land but this was not done. Under the premises, he cannot fault the two tribunals for holding in his disfavor while he did not avail sufficient evidence to support his case. In further perusal of the record, I have observed that he unpoetically produced the deed of the settlement at the appeal stage by appending the same to his submission

in support of the appeal which was materially wrong and offensive of the law. Certainly, the appellant missed the boat.

In the foregoing, I take a firm view that this is not a fit case in which this court sitting on a second appeal can interfere with the concurrent findings of the two tribunals as it is evident that there was no misapprehension of evidence or law but the appellant miserably failed to prove his ownership of the suit land. The 2nd and 4 issue are answered negatively. The concurrent findings of the ward tribunal and the DLHT are upheld and the appeal is dismissed with costs.

DATED and **DELIVERED** at **MOSHI** this 24st day of February 2023.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

24/2/2023

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MOSHI DISTRICT REGISTRY