

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA**

LAND APPEAL NO. 64 OF 2022

(Arising from the District Land and Housing Tribunal for Mbeya at
Mbeya in Land Case No. 250/2019 dated 12th May 2022)

Christina Chaupepo (*Administratrix of the Estates of the
Late Chaupepo Boimanda*) **APPELLANT**

VERSUS

1. Vitusi Bernarld
2. Zyolla Watson **RESPONDENT**

JUDGEMENT

Date of last Order: 29.11.2022

Date of Judgment: 17.02.2023

Ebrahim, J.

Having been unsuccessful at the District Land and Housing Tribunal for Mbeya at Mbeya, the appellant herein suing as an administratrix of the estate of the late Chaupepo Boimanda Mpomwa has instituted the instant appeal raising four grounds of appeal as follows:

1. That the trial Tribunal erred in law and fact by abandoning the application before it and focus on extraneous matters which was not issues for determination raised by the parties.
2. That the trial Tribunal erred in law and fact in its evaluation and analysis of evidence adduced by parties, hence reached to unjust decision.
3. That the trial Tribunal erred in law and facts by deciding the matter in favour of the 1st Respondent basing on the purported sales agreements which were not stamped.
4. That the trial Tribunal erred in law and fact when it failed to account for the time the appellant had been in use of the premise without any interruption from the 1st Respondent.

The genesis of the dispute is the ownership of the disputed land measuring about $\frac{3}{4}$ of an acre situated at Mikocheni area at Kanga Village within Songwe Region. The appellant is claiming that the disputed land is the property of their deceased father whom she is the administratrix of his estate and that both respondents particularly the 1st respondent invaded it. The appellant claims further that her father was allocated the virgin land by the village authority way back in 1970s and they have been living in it ever since. She said at all that time, her late father never disposed of the land and the sale agreements tendered during the trial by the 1st respondent are not known to her. She called six witnesses to prove her assertion of facts.

On the other hand, the 1st respondent vigorously disputed the claim by the appellant and contended that he purchased the suit land way back in 2016 from one Venance Magala who had also purchased the disputed land from the late Chaupepo in 1994. He called four witnesses to disapprove the appellant claim.

After hearing the evidence from both sides, the trial Chairman agreed with the opinion of the assessors and made a finding that the appellant had no enough evidence to claim that the suit land is her father's as her father disposed of the same when he was alive.

Dissatisfied by the decision of the trial Tribunal, the appellant filed the instant appeal.

This appeal was disposed of by way of written submission as per the schedule set by the court. The appellant appeared in person whereas the 1st respondent was represented by advocate Mwasumbi. The appeal proceeded ex parte on part of the 2nd respondent as he did not enter appearance even at the trial Tribunal.

In her submission in support of the grounds of appeal, the appellant argued the 1st and 2nd grounds of appeal together.

Referring to the agreed issue for determination on who is the legal owner of the disputed land, the appellant argued that the trial tribunal directed itself on the case which was not part of the present case. She argued further that the trial tribunal based its decision on the evidence from the respondent's case and abdicated its duty of to scrutinize the case to meet ends of justice on both parties. The appellant claimed also that the tribunal was wrong not to summon the second respondent as a key witness to the previous case for just adjudication of the instant case.

She further challenged the sale agreements tendered by the 1st respondent during the trial as not genuine. She argued that the sale agreement was between Venance Magalla and Vitus Siwale while the case is between Christina Chaupepo and Vitus Benarld. She pointed out the anomaly on the said agreement that the buyer did not sign the same. As for the case number 23/2017 that was used by the trial tribunal to make reference thereof, the appellant submitted that the case was talking about Siwale and not the 1st respondent.

In arguing the last ground of appeal, the appellant stated that the said Venance who was alive in year 2000 when Chaupepo Mpomwa died did not mention the issue of buying and selling the land in dispute. She further faulted the Tribunal for failure to consider that the appellant and her relatives have been dwelling in the disputed land without disturbances for almost thirty years after the death of their father.

Lastly, she raised the issue of mis-joinder of a necessary part for failure to join the seller of the said disputed land. Finally, she prayed for the appeal to be allowed with costs.

Responding to the arguments raised by the appellant, counsel for the 1st respondent contended that in so far as the issue for determination was concerned, the trial Tribunal directed itself in addressing the issue of ownership as reflected at page 2 paragraph 1 of its judgement. He stated therefore that the first ground of appeal is baseless.

Responding on the complaint for not calling the 2nd respondent as a key witness, counsel for the 1st respondent argued in terms on **Order IX Rule 8 of the Civil Procedure Code, Cap 33 RE 2019** that the tribunal was correct to proceed with the case since the 2nd

respondent denied himself right to be heard. He further referred to the provisions of **Regulation 11 (1)(c) and (2) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, No. 174 of 2003** which provides for the manner that the Tribunal shall follow in a case where one of the defendants or respondents do not enter appearance at the hearing date. I would wish to make a correction on the law here that the law referred should be Order IX Rule 7 of the Civil Procedure Code, Cap 33 RE. 2019.

He argued on the issue of sale agreements i.e., exhibits D1 and D2 that the records shows that the same were determined and the decision was made on it.

He also commented concerning the reference made in respect of Case No. 23/2017 that the same was a dispute between Zyola Watson and the 1st respondent before the Ward Tribunal of Kanga which was decided in favour of the 1st Respondent. As for the complaint by the appellant that the Tribunal failed to take into consideration the time in which the appellant was using the disputed land uninterrupted, counsel for the respondent referred the court to the general principle of the law on the onus of proof in civil cases that **"he who alleges must proof"** under the

balance of probability i.e., **sections 3(2)(b) and 110 and 111 of the Evidence Act, Cap 6 RE 2022**. To cement his argument, he urged the court to visit persuasive case of **Eunice Mashaija Noventh and Edison Noventh Mashaija Vs Ansibert Nkete**, Land Appeal No. 101 of 2020 (HCT – Unreported). He concluded on the point that the appellant had a duty to prove to the Tribunal on the ownership of the disputed land of which she failed. He prayed for the appeal to be struck out with costs.

In rejoinder, the appellant had nothing add, she repeated her earlier contentions.

I have dispassionately followed the rival submissions by the parties. In essence what could be gathered from the arguments and the whole case in general, the bone of contention is on the legal ownership of the disputed land.

As the records would reveal, this is the first appeal. Therefore, in addressing the grounds of appeal, I am mindful of the fact that I am obliged without fail to subject the entire evidence on record into objective scrutiny and draw own inferences and findings of facts if merited having regard to the fact that the trial court had the advantage of assessing the credibility of the witnesses in so far

as demeanour is concerned. This principle was enunciated by the Court of Appeal in the cases of **Jamal A. Tamim vs. Felix Francis Mkosamali & the Attorney General**, Civil Appeal No. 110 of 2012 (unreported); and **Martha Wejja vs. Attorney General and Another** [1982] TLR 35, to mention but a few.

Again, having gone through the submissions and the proceedings in the record, I shall also direct myself to the principles of the law that *"he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence were given at all on the other side"* –**section 110(1) and 111 of the Law of Evidence Act, Cap 6 RE 2019.**

Before I proceed to address the grounds of appeal, I find it apt to firstly comment on the issue of mis-joinder of parties as raised by the appellant in her submission.

The appellant claimed that the purported seller of the disputed land was not part of the case hence resulted to unjust decision. I do not agree with her assertion.

The law i.e., **Order 1 Rule 9 of the CPC, Cap 33 RE 2019** provides that:

"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."[emphasis is mine].

In this case, it is the appellant who instituted the case against the 1st and the 2nd respondents on the land that she claims it was invaded by the 1st respondent. The trial Tribunal considered the matter accordingly as to whether the 1st respondent invaded the disputed land as claimed by the appellant. In the circumstances therefore and in consideration of the position of the law that permits the court to proceed with the determination of the issue in controversy; and the fact that the issue on controversy was the ownership between the appellant and the 1st respondent, I hurriedly agree with the counsel for the 1st respondent that the Tribunal was not barred to proceed with the case and it correctly did so. Thus, the argument raised on the mis-joinder is baseless.

The appellant did not submit on the 3rd ground of appeal where she complained that the purported sell agreements were not stamped but rather embarked on a new issue that the sale agreements features a different person from the one who

trespassed to the appellant land who is Vitus Bernald and not Vitus Siwale.

First of all, this issue was never raised during the trial and the appellant who was represented did not object nor cross examined on whether the said Vitus Bernald and Vitus Siwale are different people. It is cardinal principle of the law that failure to cross examine the witness on an important fact, ordinarily implies the admission of that fact (see the case of **Shadrack Balinango Vs Fikiri Mohamed and 2 Others, Civil Appeal** No. 223 Of 2017 (CAT)).

Furthermore, it is not a ground of appeal raised by the appellant and it cannot mysteriously feature in the submissions since submissions are elaborations of the grounds of appeal. More-so, there is undisputed documentary evidence that the late Chaupepo sold his land before his demise way back in 1994 to Venance Magala. This is proved by exhibit D1, D3 (minutes of the clan meeting of 31.12.2015 of the late Chaupepo concerning his estate), D4 (the decision of the Ward Tribunal giving the 1st respondent ownership of the disputed land), D5 and D7 that by the times of the death of the appellant's father, the land was owned by Venance Magala. Moreover, during the hearing of the

case at the Tribunal, the 1st respondent was recorded as Vitus Bernald Siwale. Thus, the argument by the appellant that the case at the Ward Tribunal and the sale agreement features another person is an afterthought and baseless.

Coming to the issue of evaluation of evidence. The appellant in this case testified (**PW1**) that her father passed on year 2000 and the invasion occurred in 2019. She said she was present when her father was given the suit land by the village council in 1970 and that by then she was an adult. According to the proceedings on record, when the appellant was adducing evidence in 2019 she was 53 years old. This means in simple mathematics that she was born in 1966 and in 1970 she was only four years old. Meaning she was a child and not an adult as she said under oath!!! Her witness

PW2 – Timoth Jackson, while claiming that he knew the disputed land to be the property of the appellant's father, he admitted that he was born in 1972 and became the hamlet chairman in 2009. However, he could not prove if the late Chaupepo had any documents of ownership of the disputed land nor did he speak about the sale of the property by the deceased in 1994 to Venance Magala. His evidence simply based on the fact that he

saw the deceased living in the disputed land. **PW3, Abdallah Kassimu** apart from testifying that he knew that the deceased was availed land in 1970's he had no clue as to whether the late Chaupepo disposed of the land in 1994. He even admitted that he could not know if the said land was disposed of because he is not a relative. **PW4 Henos Sailon Shomba**, also had no tangible evidence on the ownership of the disputed land to the appellant apart from the fact that he saw the deceased living in the land. Moreover, he became the village chairman in 1999 whilst the 1st respondent tendered a sale agreement showing that the deceased sold the land to Venance in 1994. He testified also that Alcado Chaupepo, **PW5** was released in 2004 which shows that at some point he was in jail. **Alcado Chaupepo PW5** apart from saying that the land is their property and that it was demolished in 2019 had nothing much to prove as to their ownership of the said land.

On the otherhand the 1st respondent (DW1) told the trial Tribunal that he purchased the suit land in 2016 from Venance Magala who acquired the suit land by purchasing it from Chaupepo, the deceased year 1994. He tendered exhibit D1 to prove the

transaction between the deceased and Venance Magala. He also tendered a sale agreement between himself and Venance Magala (exhibit D2) as well as the minutes of the family meeting concerning the estate of the deceased exhibit D3 showing that by the time of his death, the deceased had already disposed of all his assets including the disputed land. All the stated facts and the exhibits were not disputed by the appellant's side during the trial. **DW1** admitted that the deceased was his uncle but he did not buy the disputed land directly from him because by then he was already dead. The 1st respondent's testimony was supported by **DW2 Eliza Clemence**, the deceased's sister. She testified before the court that the disputed land is the property of the 1st respondent who purchased it from Venance Magala. She said his brother sold the land to Venance Magala in 1994 and she was present but the appellant was not present when the land was sold because she was already married living elsewhere. She said it was their family land and they were all living there with their late mother and that the deceased was allowed to sale the same. **Simon Magala Kauzeni (DW3)** is the son of Venance Magala. He said that his father sold the disputed land to the 1st respondent for

Tshs.2,000,000/- and he was present. He admitted not being present when his father bought from Chaupepo but he knows that Chaupepo was allowed by his father to continue living in the land together with his sister Eliza and their mother. His father died in 2017. He testified that the disputed land is the property of the 1st respondent. **Fortunatus Damiani Mwasenga (DW4)** testified that the late Chaupepo did not leave behind any property as he sold them. He said he sold the disputed land to Venance Magala who sold it to Vitus Siwale.

As it can be seen from the evidence on record, the disputed land is not surveyed. Thus, strong evidence to prove ownership is required from either side.

Nonetheless, it is also the position of the law that a party whose evidence is heavier wins the case and in evaluation of the evidence, it is not the quantity that matters but the court shall have due consideration to the quality of such evidence – see the case of **Hemed Said Vs Mohamed Mbilu (1984) TLR 113**.

Moreover, as alluded earlier, since the appellant was the one who alleged ownership of the disputed land, she had the prime duty of proving such ownership. I fortify my stance by the holding of the

Court of Appeal in the case of **Jasson Samson Rweikiza Vs Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020 (CAT) where it was held that:

*"...it is again elementary law of burden of **proof never shifts to the adverse party until the party on whom onus lies discharges his**, burden of proof is not diluted on account of the weakness of the opposite part's case."*

Taking guidance of the above stated law, indeed, after revising the evidence of both parties and their witnesses, this court observed that the issue concerning the disputed land had once been resolved by the Ward Tribunal in Land Case No. 23/2017 as referred by the trial Chairman in the evaluation of evidence. However, there is enough documentary evidence to prove that the late Chaupepo disposed of his land before his death. As testified by DW4, the late Chaupepo was simply invited to continue living in the disputed land by Venance. Therefore, the late Chaupepo and his family including the appellant were mere invitees. I am aware of the position of the law that a mere licensee or an invitee cannot use long use of the land as a consideration that they are legal owners as the appellant wants the court to believe.

As alluded earlier, the law requires that "he who alleges must prove". To the contrary the appellant failed to discharge her burden of proof. That notwithstanding, the respondent on the other hand managed on the balance of probability, to prove a fact that he purchased the land in 2016 from Venance Magala with documentary proof.

Owing to the above findings, I find the appeal to be unmeritorious and I dismiss in its entirety with costs.

Ordered accordingly.



Mbeya

17.02.2023

A handwritten signature in blue ink, appearing to read "R.A. Ibrahim", written over a horizontal line.

R.A. Ibrahim

JUDGE