THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 28 OF 2022

(Arising from the decision of the District Land and Housing Tribunal of Mbeya in Application No. 259 of 2020)

BIADA MGENI.....APPELLANT

VERSUS

EZEKIEL DONALD MLAWA.....RESPONDENT

JUDGMENT

Date of Last Order: 15.02.2023
Date of Judgment: 24.03.2023

NDUNGURU, J.

In this appeal, the appellant one, Biada Mgeni, has knocked the doors of this Court seeking to challenge judgment and decree of the District Land and Housing Tribunal of Mbeya (henceforth the trial tribunal) in Application No. 259 of 2020. Before the trial tribunal, the respondent, Ezekiel Donald Mlawa sued the appellant, Biada Mgeni for trespass over a suit land located

at Kilimatinde hamlet, Warumba village within Songwe ward in Mbarali District.

In his testimony, the respondent, Ezekiel Donald Mlawa testified that, he was allocated the said suit land by the Warumba village council way back in May, 1983. He further told the trial tribunal that, the suit land was used for paddy cultivation since 1983 up to 2018 when the dispute arose.

The appellant totally refuted the respondent's claim. Further, the appellant contended that, she owns the disputed land for many years and also alleged that, she bought the said disputed land from one, Ernest Mlawa in 2004.

Having heard the evidence tendered by the both parties together with their witnesses, the trial tribunal found that, the respondent's evidence was heavier than the evidence adduced by the appellant. In the final analysis, the respondent emerged a winner and was declared the lawful owner of suit land and the appellant was ordered to pay the respondent the costs of the suit.

The appellant was unhappy with that decision and hence filed the present appeal seeking to assail the decision of the trial tribunal fronting the following grounds of complaint as follows: -

1. That, the trial tribunal erred in law and fact for failure to properly to assess, examine and to evaluate the evidence adduced thereto by the appellant during the hearing of the dispute.
2. That, the trial tribunal erred in law and fact for disregarding the documents tendered by the appellant and consequently came out with biased decision.
3. That, the trial tribunal erred in law awarding damages to the respondent in absence of proof.

When the appeal was placed before this Court for hearing, the appellant enjoyed the service of Mr. Felix Kapinga, learned advocate whereas Mr. Salvatory Twamalenke, learned advocate appeared for the respondent. The matter was argued by the way of the written submissions following the order of this Court and both parties have adhered to the scheduled order, save as the learned advocate for the appellant opted not to file the rejoinder submission.

Before proceed with his submission in respect of the grounds of appeal, Mr. Felix Kapinga, learned advocate for the appellant opted to abandon the third ground of appeal.

Arguing to the first ground of the appeal, Mr. Felix Kapinga submitted that, the trial tribunal erred in law and facts for failure to properly assess, examine and evaluate evidence adduced thereto by the appellant during the hearing of the dispute. In addition to that, he contended that, the trial chairman failed to adhere the principle applicable in the composition of judgment and evaluation of evidence. Illustrating further, Mr. Felix Kapinga contended that, firstly, there was no summary of what the witnesses testified before the trial tribunal and secondly, there was no critical analysis or evaluation of each witness' testimony.

Again, he submitted that, the decision of the trial tribunal does not reflect what is contained in the proceedings. He cited the case of **Abubakar J.H Kilongo and another Versus Republic, Criminal Appeal No. 230 of 2021 CAT**, **Leonard Mwanashoka Versus Republic, Criminal Appeal No. 226 of 2014 CAT** (both unreported), **Amir Mohamed Versus The Republic (1994) TLR 138** and **Stanslaus Rugaba Kasusura and another Versus Phares Kabuye (1982) TLR 338** to bolster his submission.

In the second ground of appeal, Mr. Kapinga criticized the judgment of the trial tribunal on the ground that did not regard the documents tendered by the appellant and consequently came with biased decision. He continued to submit that, the sale agreement between Ernest Mlawa and the appellant and the settlement deed were tendered by the appellant and the same were admitted and marked as Exhibit "D1" and "D2" by the trial tribunal but were disregarded as if were not tendered and admitted before the trial tribunal.

He further submitted that, the act of expunging the document during the composition of the judgment for reason of non- payment of stamp duty while the same document was tendered and admitted as exhibit during the hearing without any objection is a contravention of fundamental principle of the right to be heard. He cited Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 and the case of **Festo Japhet Mkilana Versus National Bank of Commerce Limited, Civil Appeal No. 324 of 2019 CAT (unreported)** to cement his argument.

He went on to submit that, the sale of the village land is quite different with the sale of the land in urban area. In addition to that, he contended that, the sale of village land is governed by the Village Land Act Cap 5 R.E. 2019 and the Local Government (District Authorities) Act Cap 287 R.E.

2019. To support his submission, he cited the case of **Bakari Mhando Swanga Versus Mzee Mohamed Bakari Shelukindo and 3 others, Civil Appeal No. 389 of 2019 CAT** (unreported). Finally, he prayed for the Court to allow this appeal with costs.

Responding to the first ground of appeal, Mr. Twamalenke stated that, the trial tribunal analyzed and examined the evidence adduced by the appellant. He referred this Court at page 2 and 3 of the trial tribunal's judgment saying that such appellant's evidence was evaluated and examined therein. Also, he submitted that, the case of **Abubakar J.H Kilongo and another** (supra) does not state that, the Court is required to assess only the evidence adduced by the respondent but also even the evidence adduced by the appellant (both parties).

He continued to submit that, it is the duty of the Court of law to assess the evidence adduced but it is is the burden of the parties to prove their case. He cited the case of **Ziad Mohamed Rasool General Trading Co. L.L.C Versus Anneth Joachim Mushi (Executrix of the Estate of Emmanuel Patrick Msoma (deceased), Civil Case No. 21 of 2020 High Court at Dar es Salaam**, (unreported) to buttress his submission.

In replying the second ground of appeal, Mr. Twamalenke contended that, there is no dispute on admissibility of the Exhibit D1 and D2 but the argument came to the reliability of the said Exhibits which were tendered by the appellant before the trial tribunal. In addition to that, he argued that, the sale agreement which was admitted and marked as exhibit D1 was objected by the respondent on the admissibility of the said document.

He referred this Court at page 24 of the trial tribunal's typed proceedings to the effect that the respondent was objected the admission of the sale agreement but the trial tribunal admitted the same and marked as exhibit D1. Also, he contended that, the said sale agreement lack stamp duty. He cited section 47 (1) of the Stamp Duty Act Cap 189 R.E. 2006 to cement his argument. He went on to submit that, since the appellant did not submit a reliable document hence his fact did not match section 110 of the Evidence Act Cap 6 R.E. 2019.

After careful considered of the entire record of the trial tribunal and the rival submissions made by the parties in this matter, the issue calling for determination is whether this appeal has merit or not.

Starting with the first ground of appeal, my determination is that, this ground of appeal centers on the issue of evaluation of the evidence on

record by the trial tribunal. This Court being the first appellate Court, is vested with powers to re-evaluate, analyze, and consider the evidence on record. I therefore shall re-evaluate and reconsider the evidence on record and come up with my own findings. This stand is underlined in the case of **Deemay Daati and 2 others Versus Republic (2005) TLR 132,** the Court of Appeal of Tanzania stated that;

"The learned Judge on first appeal was entitled to re-evaluate afresh the evidence and come to the conclusion that the appellants were improperly acquitted by the trial Court"

The same position is elaborated in the case of **Ndizu Ngasa Versus Masisa Magasha (1999) TLR 202** where the Court of Appeal of Tanzania observed that;

"The first appellate Court has a duty to re-assess the evidence of the trial Court"

Also, see the case of **D.R. Pandya Versus Republic (1957) E.A 336** and **Mkaima Mabagala Versus The Republic, Criminal Appeal No. 267 of 2006 CAT** (unreported). This being the first appellate Court, it is empowered to do so.

For easy of re-assessment of the evidence, I consider as crucial to give a summary of the evidence adduced by the parties before the trial tribunal.

The evidence on record is to the effect that, the appellant bought the disputed land from one, Ernest Mlawa in 2004 and tendered the purported sale agreement as exhibit D1. Also, the record is revealed that, the appellant's children were used the said disputed land since 2004 for paddy cultivation.

Further, it is on the record that, the appellant brought two witnesses namely; Husen Edward as SU2 and Wahabi H. Ngovano as SU3. In his testimony, SU2 told the trial tribunal that, he is a member of the village government since 2017. He went on testify that, in 2018 there was dispute between Ernest Mlawa and the appellant, in that dispute the appellant complained the piece of land purchased from Ernest Mlawa still was used by another person. Finally, SU2 said that he participated as secretary in the reconciliation between Ernest Mlawa and the appellant and the said reconciliation deed was tendered and admitted as exhibit D2.

In other side, SU3 told the trial tribunal that, told the trial tribunal that, he was the chairman of the village land council and he was the one

who wrote the said sale agreement between Ernest Mlawa and appellant. Again, SU2 testified that, there arose dispute between Ernest Mlawa and appellant over the disputed land and during the hearing one, Ernest Mlawa said that he did not remember if he had sold the said disputed land to the appellant.

In his side, the respondent who testified as SM1 alleged that the said disputed land was allocated to him by the Marumba village council on May, 1983. He further told the trial tribunal that, the suit land was used for paddy cultivation since 1983 up to 2018 when the disputed arose. The respondent relied upon tax payment receipt of the disputed land and deed from the office of village executive officer which was used to apply loan all admitted and marked as exhibit P1 and P2 respectively. Also, the record is revealed that, the respondent called three witness to support his case.

The first witness in favour of the respondent was one, Rashid Tandika who testified as SM2. His evidence was to the effect that he is the neighbour of the respondent. He further stated that they have bordered the farm on the north side.

Another witness in favour of the respondent was one, Mary Msigwa, testified as SM3. She told the trial tribunal that, she is the neighbour of the

respondent. Also, she stated that, she is at the upper side and the respondent is on the lower side.

The last witness in favour of the respondent was one, John Mgaya, who testified as SM4. His evidence was to the effect that he is the neighbour of the respondent. He further testified that, the respondent come to complain that his farm had been invaded. Finally, he stated that, thereafter the respondent followed the legal procedure and he went to testify as witness.

From the piece of evidence pointed out above, it is my opinion that, the allegation of the appellant being the lawful owner of the disputed land is centred based on the exhibit D1 and D2. Looking to the exhibit D1, it is my considered opinion the said document does not qualify to be sale agreement. I hold so because first, the said document does not indicate who is the vendor and who is purchaser and second, the title of the document does not disclose that, if the said agreement is about of the sale of land or otherwise.

And the exhibit D2 which is reconciliation deed, it is my considered view that, the said exhibit D2 does not transfer ownership from Ernest Mlawa to the appellant and is not proof of the state of ownership over the

property in dispute in favour of the appellant. I hold so because the said document is reveals that, one Ernest Mlawa only agreed to lease the said piece of land to the appellant up to 2019. Again, the said exhibit D2 is not reliable evidence I hold so because the said documentary evidence is altered in some parts of the said document hence rise doubt. Even the respondent in his testimony denied to have signed such document.

Furthermore, this Court asked itself why the appellant did call Ernest Mlawa to testify in her favour. On that regard, it is my considered view that, the appellant failed to bring material witness to prove her assertion that, she bought the dispute. land from Ernest Mlawa. Therefore, this Court draw an inference that if that witness called would has given evidence contrary to the appellant's interest. See the case of **Hemed Said Versus Mohamed Mbilu (1984) TLR 113**.

Conversely, the respondent's evidence was water tight to the standard required in civil cases and the same confirmed by the evidence adduced by the SM2, SM3, and SM4 that they bordered with the respondent's piece of land. In comparison with the appellant's evidence, I am confident to hold that the respondent proved the ownership to the balance of probabilities. This means that, the respondent's evidence is more cogent than that of the appellant. See the case of **Peter Versus Sunday Post Ltd (1958) E.A.**

424 and **Stanslaus Rugaba Kasusura & another Versus Phares Kabuye (1982) TLR 338**. Therefore, I find this ground of appeal has no merit.

In relation to the second ground of appeal, I agree with Mr. Kapinga that the trial tribunal was wrong to disregard exhibit D1 only for the reason that the purported sale agreement did not have stamp duty. This position is well elaborated in the case of **Elibariki Mboya Versus Amina Abeid, Civil Appeal No. 54 of 1996** (unreported) where the Court of Appeal of Tanzania observed that;

"Non-stamping of the instrument did not in law constitute a basis for faulting the decision of the Resident Magistrate's Court"

Again, I agree with Mr. Kapinga that, the moment the exhibit is admitted as such becomes part of the record of the Court. Further, it is settled principle of the law that, the admission of the document is one thing and weight and reliability of the said document is another thing. This Court being a first appellate Court got the room to re-evaluate and weigh the evidence adduced before the trial tribunal including exhibit D1 and D2 as demonstrated above. Similarly, for the reasons shown earlier, I have found that exhibit D1 and D2 are not reliable and lack weight to support

the appellant allegation and also to convince this Court. Having dismissed the first ground of appeal, also this ground is bound to crumble too.

In the upshot of what I have said above, I decline to set aside the decision of the trial tribunal. Further, I am satisfied that the trial tribunal was right to declare the respondent a lawful owner of the disputed land and accordingly, I find this appeal be bereft of merit. In fine, this appeal is hereby dismissed with costs.

It is so ordered

D.B. NDUNGURU
JUDGE
24/03/2023