

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 07 OF 2023

(Originating from the judgment and decree of the District Land and Housing Tribunal for Manyara at Babati, in Land Application No. 69 of 2019)

SLAQWARA TRUWAY.....APPELLANT

VERSUS

BONDAY STILA.....1ST RESPONDENT

MUSA KIBUO @ NTANDU2ND RESPONDENT

JUDGMENT

27th April & 5th June, 2023

Kahyoza, J.:

The appellant was aggrieved with the decision of the District Land and Housing Tribunal for Manyara at Babati (the tribunal), hence, preferred this appeal with 4 grounds of appeal, however, via written submission in chief – the appellant abandoned the fourth ground of appeal, and therefore remained with 3 grounds of appeal, namely;

- 1. That, the trial tribunal erred in law and in fact for failure to properly evaluate evidence adduced by me (sic). The*

appellant thereby arriving at a wrong decision in the face of law.

- 2. That, corollary to the ground no.1 the trial (sic) tribunal erred both in law and fact when it failed to put into consideration (sic) documentary evidence adduced by the appellant, in so doing it arrived at an improper decision at law.*
- 3. That, the trial tribunal's decision is bad in law as it passed its decision basing on the sale agreement between the 1st and 2nd respondents while the 1st respondent had no good title over the disputed land, as a result it arrived at a wrong decision on the face of law.*

At the hearing of this appeal, Ms. Veneranda Joseph, Advocate represented the 2nd Respondent while Mr. Paschal Peter, Advocate, appeared for the appellant and the 1st respondent was unrepresented. This appeal was argued by way of written submissions. Parties filed the written submission in chief and the reply, without the rejoinder, therefore I will refer the two.

The background, the appellant (who happened to be the Applicant in the trial tribunal) filed an application on land trespass seeking for a declaration that he is the lawful owner of the suit land measuring 3¹/₂ acres, located at Bashang' village, Wareta Ward and Hanang' District within Manyara Region.

To substantiate his case, the appellant (Pw1- **AW1**) testified that the suit land is bordered by Nade Sikai (West), Lazaro Basso and Petronia (South), Slaqwara Tluway (East) and Amakopa (North). That he was given the said land by his grandfather, one Tlatlaa Daime in the year 1986, as a gift *inter vivos*. It was documented (exhibit P1), in the presence of the Waleta Village Chairman, his grandfather (the late, since 1990) and his father (the late, since 1994). That in 2007 he hired it to Moshi Slaqwe (Pw3-**AW3**) for two years, then, from 2009 to 2017 he hired it to Michaeli Tsila, the 1st respondent (Pw4- **RW4**). Surprisingly and without good title to land, RW4 sold 2¹/₂ Acres (Approximately) to the 2nd respondent (Pw5-**RW5**). The Appellant came to the discovery of the same, when he went to cultivate his land in 2017, he lodged his complaint in the Ward tribunal, later on, the same decision was nullified by the DLHT and a new trial was ordered.

Homa Nade, (Pw2- **AW2**,) the son of Nade Sikai and a neighbour to the suit land, testified that the neighbours to the suit land are Nade Sikai (West), Lazaro Basso and Petronia (South), Slaqwara Tluway (East) and Amakopa (North). That the land, measuring 3¹/₂ acres, belongs to the appellant, formally it belonged to appellant's grandfather. Additionally, the said land was hired to Moshi Slaqwe (Pw3-**AW3**) and the 1st respondent.

Moshi Slaqwe (Pw3-**AW3**), who resides in the same hamlet with parties, testified that the suit land, measuring $3\frac{1}{2}$ acres, was hired to him by the appellant from the year 2007 to 2008. That they had a gentleman's agreement, therefore there was no any written document to that effect. Further, that the suit land belongs to the appellant, and neighbours are Nade Sikai (West), Lazaro and Petronia (South), Slaqwa Tluway (East) and Amakopa (North).

On the other hand, Thomas Sanka, (Dw1-**RW1**), a resident of Bashang' village, testified that in the year 2017 the 1st respondent sold $1\frac{1}{2}$ acres to the 2nd respondent. The said sale was documented and he was one of the witnesses to the transaction. That he was not sure as to the fact that the disputed land measures $3\frac{1}{2}$ acres. Neighbours are Andrea (North), Thomas Sanka (South), Slaqwara Tluway (East) and Bonday stila (West).

Daniel Bura, (Dw2-**RW2**), a resident of Bashang' village, testified that the 1st respondent sold $1\frac{1}{2}$ acres to the 2nd respondent. The said sale was documented and he was one of the witnesses to the transaction. That there was a remaining parcel of land that belonged to the 1st respondent.

Lazaro Basso, (Dw3-**RW3**), testified that he is among the neighbours (Nade Sikai (West), Lazaro (South), Slaqwa Tluway (East) and Andrea kopa

(North)) to the suit land measuring $3\frac{1}{2}$ acres, which belongs to the 1st respondent, as he saw him entering there in the year 1999. That, a parcel of land measuring $1\frac{1}{2}$ acres was sold to the 2nd respondent by the 1st respondent. That the Appellant locked horns with the 1st respondent in the aftermath of the said sale, of which he was not part to the said sale agreement. That the 1st respondent relocated to Bashang' village, and not a native villager. That, between 2015 and 2018 he was a hamlet chairperson. That the 1st respondent does not stay within the suit land.

The 1st respondent (Dw4- RW4) testified that the appellant is his nephew. That the suit land measuring $3\frac{1}{2}$ acres, having Andrea Kopa (North), Lazaro Basso (South), Slaqwara Tluway (East) and Sikai Nade (the late, on the West), belongs to him, as he cleared a bush in 1999. And, that he sold 2 acres, from it, to the 2nd respondent in 2017 when he was having a sick child. That Thomas Sanka, (Dw1-**RW1**), and Lazaro Basso, (Dw3-**RW3**), witnessed the said sale agreement. That he normally hires land for cultivation purposes, but never hired one from the appellant. That it was the appellant to whom he left his sick child when he went to look for money.

RW5 testified that he bought 2 Acres of the suit land from RW4 on the 20th day of January 2017 and the same was documented (exhibit **R1**).

In the end, the DLHT found the 2nd respondent to be the lawful owner of the suit land as a *bona fide* purchaser.

I am aware as to the duty of the High Court in appeals, as stated by the Court of Appeal in **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009, that-

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

It is therefore duty of the trial court to ensure that parties to a case discharge their obligations to the dictates of the law and not otherwise. Upon assessment of weight of the adduced evidence and its reliability, the court will be in a place to know who between the parties tells the truth on the matter. The duty is bestowed to the trial court which has advantage of assessing who between the parties tells the truth. As stated by the court in **Omary Ahmed V.R. (1983)**TLR 32 (CAT) that:

*"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a re-assessment of credibility" (see also, **Jacob Tibi Funga V.R.(1982)** TLR 125; **Antonio Dias Caldeira V Frederick Augustus Gray** (1936) 1 ALL ER 540)."*

The Appellate Court's duty is verifying on how the evidence was assessed and analysed to prove the fact in issue.

Issues for determination are: -

- 1. did the tribunal fail to evaluate the evidence?**
- 2. did the tribunal ignore the appellant's documentary evidence?**
- 3. Was the tribunal justified to rely on the sale agreement?**

In essence the determination of this matter rests on credibility of witnesses and documentary evidence.

In **Bahati Maketa vrs. The Republic**, Criminal Appeal no.118 of 2006, when the Court of Appeal of Tanzania at Mwanza was entangled with the issue of credibility of witnesses it observed that:-

*"It is generally agreed that in assessing the credibility of a witness, the court has to adopt a careful and dispassionate approach and critically evaluate the evidence in order to find out whether it is **cogent, persuasive and credible.**" (Emphasis added)*

The same was reflected in **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR. 419, that: - "It is an elementary principle that he who alleges is the one responsible to prove his allegations". The standard of proof is well explained in **Paulina Samson**

Ndawanya vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported), where the Court of Appeal stated:

*"It is equally elementary that since the dispute was in civil case, the standard of proof was on a **balance of probabilities** which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved." (Emphasis added)*

After the recital of relevant guiding principles, I hereby wish to state that the following facts are undisputed; **one**, that, the appellant and the 1st respondent are relatives. The appellant is the respondent's nephew; **two**, that, this land dispute arose in 2017 as the aftermath of the 1st respondent's act of disposing 2 acres from the suit land to the 2nd respondent, via exhibit R1; **three**, that, Andrea Kopa (North), Lazaro Basso (South), Slaqwara Tluway (East) and Sikai Nade (the late, on the West) are the neighbours to the suit land; **four**, that, 2 acres (out of 3¹/₂ Acres) are in possession of the 2nd respondent, the rest are in possession of the 1st respondent.

To support the appeal, Mr. Paschal Peter, the appellant's advocate submitted that the trial chairman erred in law by failure to consider evidence that the appellant acquired the suit land from his grandfather via exhibit P1 and he remained in occupation up to 2007 when he started leasing it, including, to the 1st respondent. The said evidence was in full support to that

of AW2 and AW3. And that the tribunal erroneously believed the sale agreement, which was fabricated and uncalled for.

On the other side, Ms. Veneranda Joseph, the second respondent's advocate, submitted that the trial tribunal properly evaluated the evidence adduced by both parties and reached a correct decision. To buttress her argument, she cited and supplied the copy of judgment in **Barelia Karangirangi vrs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 and section(s) 110 and 111 of the **Evidence Act**, (Cap 6 R.E 2022) in cementing that it was upon the appellant to prove his case, of which he failed.

Did the tribunal fail to evaluate the evidence?

I had a cursory review of the tribunal's judgment. I am unable to support the contention that the tribunal did not analyse the evidence. It analysed and found the respondent's evidence with more weight than the appellant's evidence. The next question is whether the tribunal was justified to find for the respondents.

This is a first appellate court with a duty to re-evaluate the evidence on record. I will do that. The appellant's evidence was that he got the disputed land in 1986 from his grandfather who is the 1st respondent's brother. While giving evidence the appellant deposed that he was 52 years

old in 2022, thus, he was given the disputed land when was he was 16 years old. He tendered a transfer deed which was admitted as exhibit P1. I examined exhibit P1, to say the least, it is not a document to rely upon for the following reasons; **one**, while it was alleged that the document was prepared in 1986 the same looks to be prepared very recent. It was prepared on paper which has been muddied to look old; **two**, surprisingly the document was executed on A4 photocopy paper. It is common understanding that there was no A4 papers in 1986.; **three**, the stamp on the document looks to be so modern. It is round and the words look as if they are written by a computer. The tribunal was justified not to attach much weight to the document.

In addition, the appellant had a duty to call a witness to prove that he obtained the land by gift. It is on record that three of people who signed the transfer deed are dead. However, the whereabouts of Mr. Gabriel Ama, one of the witness was not made clear. I wonder why did not summon him. I examined the appellant's witness, Noma Nade (Pw2-2Awe) aged 30 years did not know anything about the transfer deed. He deposed that-

"Najua ni shamba la mleta maombi tangu nakua. Na amekuwa analima na kukodisha kwa watu kama Moshi na Bonday"

I went through the evidence of Moshi Slagwe (48 yrs) (**Pw3- AW3**) whose evidence was that he hired the disputed land from the appellant in 2007 -2008. He added after 2008 he moved away from the village. He was therefore not aware who was in occupation. Moshi Slagwe (48 yrs) (**Pw3- AW3**) did not prove how the appellant acquired the disputed land. I find the evidence of how the appellant acquired title to the disputed land wanting.

The appellant alleged that the 1st respondent hired the disputed land from him since 2009 to 2017. As submitted by the second respondent's evidence, there is no such evidence. He did not tender an agreement or call people who witness the agreement be oral or written. He did not specify what were the terms of hire agreement. I am not convinced that there was such an agreement.

It should not escape our mind that he who alleges must prove. The appellant was a claimant, so he had a duty to prove his claims that he obtained the disputed land by gift *inter vivos*. The issue was not whether Moshi Slagwe (48 yrs) (**Pw3- AW3**) hired the disputed land or not. See the decision in **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph** (supra).

I am alive of the fact that the burden of proof in civil cases is not static. It moves from the plaintiff to the defendant after the former adduced evidence by balance of probability. Having considered the appellant's evidence, I am in doubt if he discharged his duty to make the burden shift to the respondents. All in all, I will move to consider the respondents' evidence. As stated by the tribunal there is no doubt that the 2nd respondent bought part of the disputed land from the 1st respondent. The question is whether the 1st respondent had title to the disputed land. Bonday Slaa (Pw5) deposed that he cleared a virgin land in 1999. He was categorical that the dispute land belonged to him. He said he sold part of it in 2017 as he had a sick child. He stated that the dispute commenced after he sold his land. He added that the appellant wanted to buy the disputed and land. When the appellant failed to pay, the first respondent sold the land to the second respondent. Then, the appellant commenced the dispute.

The first respondent's evidence was supported by Lazaro Basso (**Dw3**) (49 years old), who was a hamlet chairman. He deposed that the appellant was his neighbour and that he knew the respondents. He started that the dispute land was the 1st respondent's property. Lazaro Basso (**Dw3**) is witness who is credible. He is a leader, hamlet chairman 2015 - 2018. Apart from that he deposed that he witnessed the 1st respondent clearing the

disputed land in 1999. At that time, he was 26 years. He was old enough to know what was going on. I find the evidence of Lazaro Basso (**Dw3**) and the 1st respondent more credible than the appellant's evidence on how he acquired the disputed land.

I am of the view that the tribunal analysed the evidence. As stated the second ground of appeal is bound to fail. The tribunal was justified for the reasons stated not give weight to exhibit P1, the appellant's evidence. It is not authentic.

As to the third ground of appeal, there is no doubt that the 1st respondent sold the disputed land to 2nd respondent so it was proper for the tribunal to give weight to the sale agreement.

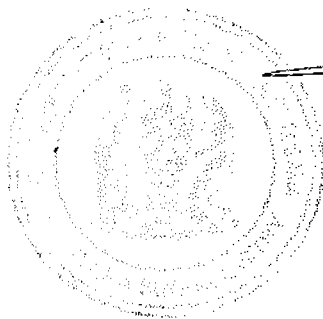
In the end, I find that the appellant's appeal was instituted without merit. I dismiss the appeal without merit. I uphold the tribunal's findings that the appellant did not prove his claim. However, I hesitate to uphold the finding that the second respondent is the lawful owner. The tribunal awarded a relief which was not prayed for. The second respondent did not pray to be declared the lawful owner so it was not proper for the tribunal to declare him the lawful owner. It was enough to hold that the appellant failed to

prove that he was the lawful owner of the suit land and dismiss the claim. I quash the tribunal's order declaring the second respondent a lawful owner.

I dismiss the appellant's appeal, uphold tribunal's finding that the appellant did not prove to own the disputed land and quash the declaration that the second respondent is the lawful owner. The appellant shall bear costs of this appeal.

It is ordered accordingly.

Dated at **Babati** this 5th day of June, 2023.



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J. R. Kahyoza

JUDGE

05/06/2023

Court: Judgment delivered in the presence of the appellant in person, Ms Veneranda Joseph the second respondent's advocate who was also present and in the absence of the first respondent. Ms. Fatina (RMA) is present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line.

J. R. Kahyoza

JUDGE

05/06/2023