IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND CASE APPEAL NO. 42 OF 2022

(Originating from Land Application No. 36 of 2019 of Moshi District Land and Housing Tribunal)

GODLIZEN JACKSON MASHINGIA (As a Legal representative of the estate of the late Edna Jackson Mashingia)

..... APPELLANT

VERSUS

MARIAM JACKSON..... 1ST RESPONDENT

ANDESON JACKSON..... 2ND RESPONDENT

DAVID JACKSON..... 3RD RESPONDENT

EDSON JACKSON..... 4TH RESPONDENT

JUDGMENT

12/12/2022 & 26/01/2023

SIMFUKWE, J.

The appellant herein unsuccessfully sued the respondents herein before the District Land and Housing Tribunal claiming a piece of land measuring one acre located at Iwa Village, Tela Kati Hamlet, Kirua Vunjo West Ward within Moshi District in Kilimanjaro Region.

It was alleged by the appellant before the trial tribunal that the suit land was jointly owned by the late Jackson David Mashingia and the late Edina Jackson Mashingia who were lawful husband and wife during their lifetime

and they were biological parents of the appellant herein. It was further alleged by the appellant that in 2015 the respondents herein trespassed into the suit land and destroyed one of the houses at the suit land. Being a legal representative of the late Edina Jackson Mashingia, the appellant and his family were also prevented from visiting the suit land where the graves of appellant's biological parents are found.

In their defence, the respondents herein stated among other things that the suit land and the houses built thereon were their properties.

In its decision, the trial tribunal found that the respondents were the lawful owners of the land and houses since 1977 when Mariam Jackson was taken there by her late husband Jackson Mashingia.

Being aggrieved by the judgment and decree of the District Land and Housing Tribunal of Moshi, the appellant preferred the instant appeal against the whole decision and decree on the following grounds:

1. *That, the Tribunal chairman erred in law and fact for failure to evaluate properly the evidence in record as a result arrived into erroneous decision.*
2. *That, the Tribunal Chairman erred in law and fact for failure to giving (sic) weight and consider the Appellant's evidence in his judgment.*
3. *That, the Tribunal Chairman erred in law and in fact for declaring the Respondents lawful owners of the suit land in absence of the counterclaim by Respondents.*

The appellant prayed that the judgment and decree of the District Land and Housing Tribunal be quashed and set aside and substitute it with an

order that the suit land form part of the estate of the late Edina Jackson Mashingia.

The appeal was argued by way of written submissions. The appellant had the service of Mr. Tumaini Materu learned counsel while the respondents were unrepresented.

In support of the grounds of appeal, Mr. Tumaini Materu prayed to abandon the 3rd ground of appeal and argued the 1st and 2nd grounds of appeal jointly. He averred that the appellant herein and his witnesses adduced credible evidence at the trial Tribunal on how and when the suit land came into possession of the late Edina Jackson Mashingia. That, in the year 1953 the late Edna Jackson Mashingia and the late Jackson David Mashingia got married and in the same year they were given the suit land by their father Mangi David Mashingia. That the late Jackson David Mashingia and the late Edna Jackson Mashingia built three houses on the said land and used the same as their matrimonial home.

Mr. Materu contended that on part of the respondents their evidence was not clear and contradicted itself on how the suit land came into their possession. He said that the 1st respondent testified that she acquired the suit land from her mother-in-law at the same time she alleged that she acquired the suit land from her husband the late Jackson Mashingia through a will dated 2/6/2009 left by the late Jackson David Mashingia.

It was argued further that if the 1st respondent acquired the suit land from her mother-in-law, how comes that the body of the late Edna Jackson Mashingia and the late Jackson David Mashingia were buried into the suit land and DW1 did not take any action against an order of the court contained in exhibit P1.

Apart from the above argument, Mr. Materu submitted further that the 1st respondent tendered documents which were photocopies and were not annexed to their written statement of defence which were admitted at the trial Tribunal as exhibit D1, D2 and D3. That, during the hearing the admission of the said photocopies was strongly challenged. However, the trial tribunal admitted them. The learned counsel for the appellant was of the opinion that exhibits D1, D2 and D3 were admitted contrary to **section 68 of the Evidence Act, Cap 6 R.E 2019** which governs admission of secondary evidence as there was no notice to produce or to rely on secondary evidence in the record of the trial tribunal. He prayed that the said documents be expunged from the record of the trial Tribunal.

Mr. Materu went on to insist that evidence on the record clearly reveal that evidence of the appellant was more credible that the evidence of the respondents. However, the findings of the trial Tribunal based only on the evidence of the respondents and did not take into consideration the evidence of the appellant. He made reference to the case of **Peters v. Sunday Post Ltd (1958) E.A 424,** in which the Court of Appeal for East Africa set out the principles in which an appellate court can act in appreciating and evaluating the evidence. Among other things it was held that:

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."*

From the above decision, Mr. Materu submitted that from the record it is very clear that the Tribunal Chairman failed to appreciate the weight of the appellant's evidence, as evidence of the appellant revealed that the appellant and her relatives were born and lived into houses constructed onto the suit land by the late Edna Jackson Mashingia and late Jackson David Mashingia. He prayed this Honourable Court to look the evidence on record afresh and make its own findings of fact and allow the first and second grounds of appeal.

In their joint written submissions, the respondents replied from the outset that the grounds of appeal by the appellant have no merit and deserve to be expunged with costs. They submitted that the trial tribunal properly analysed, evaluated, weighed and considered evidence of both parties upon arriving to its decision. That, it should be noted that the late Jackson David Mashingia whom his mother was Bibi Maole had two wives to wit the late Edna and the 1st Respondent. That, since the 1st respondent got married on diverse dates in 1977, she kept on living on the suit land with her husband and her mother-in-law Bibi Maole.

The respondents submitted further that the fact that the late Edna was buried on the suit premise does not justify that she is the real owner of the suit property. That indicated that the said Edna should be buried near the grave of her husband and not otherwise. That, Edna as wife of the late Jackson David Mashingia had her place of abode. It was their contention that the respondents' evidence clearly justified their ownership of the suit property.

Concerning the issue of exhibit D1, D2 and D3; the respondents contended that the appellant had not shown where exactly in record/

proceedings the purported concern was raised. That, such assertion by the appellant was an afterthought hence, the same deserves to be disregarded.

In conclusion, the respondents submitted that they lived without any disturbance until after the death of the late Jackson David Mashingia when the appellant and his agents started to disturb the respondents from enjoying quiet possession of the suit land.

In his rejoinder, the appellant reiterated his submission in chief and insisted that evidence of the respondents contradicted itself on how they acquired the suit land as it was impossible for the 1st respondent to acquire the ownership of the suit land from Bi Mawole and at the same time from the late Jackson Mashingia as contended by the 1st respondent. That, the respondents had their own homes and land properties at Uchira within Moshi District and Rongai within Rombo District, but after the death of Edna Jackson Mashingia in the year 2015, the respondents emerged and claimed ownership of the suit land.

Regarding the issue of failure to challenge the documents before the trial Tribunal, Mr. Materu re-joined that they disputed all documents tendered by the 1st respondent, however, the trial Chairman overruled all objections regarding admissibility of those documents. That, during the hearing at the trial Tribunal there was no respondents' testimony which was left unchallenged in cross examination.

I have considered the grounds of appeal, the parties' rival submissions as well as the trial Tribunal's records. The main issue for determination is whether this appeal has merit. Both grounds advanced by the appellant concern evaluation of evidence.

Having gone through the trial Tribunal's judgment and this being the first appellate court, it is trite law that the court is duty bound to re-analyse and re-evaluate evidence of both sides and come up with its own findings where necessary to do so. This has been stated in numerous decisions of the Court of Appeal. In the case of **Makubi Dogani vs Ngodongo Maganga, (Civil Appeal No. 78 of 2019 [2020] TZCA 1741** at page 11 it was held that:

> *"...this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and* ***if warranted, arrive at its own decision.*** *" Emphasis added*

In his decision at the last page, the trial Chairman stated among other things that:

> *"**Let me see if** the evidence adduced during the trial is able to answer correctly the issues framed at the commencement of the trial, Whether the suit land is a part of the late EDNA MASHINGIA, s estate. The answer is that, the land is not a part of the deceased estate due to credible evidence given that the land was the property of late Jackson Mashingia's mother where the 1st respondent was accommodated and later given to be her property with her sons who built two houses therein.....**Taking into consideration the incredible evidence given by the applicant and his witnesses in respect to the application, I hereby reject an entire application and there is order to costs.*** *" Emphasis added*

With respect to the learned trial Chairman, the above quoted paragraph from the decision of the trial Tribunal has no evaluation of evidence of both parties. His wording clearly revealed biasness on part of the appellant herein as he did not state how evidence of the appellant was incredible. Even on the last page but one, of the judgment, the Hon. Chairman commented in the cause of recording evidence of Michael David Mashingia *that "therefore the applicant's claims are unfounded and so vague."* There is no back up of the said conclusion.

The law is very clear on how to arrive at a decision. **Regulation 20 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003** provides that:

> *"The judgment of the Tribunal shall always be short, written in simple language and shall consist of:*
>
> *(a) A brief statement of facts;*
> *(b) Findings on the issues;*
> *(c) A decision; and*
> *(d) Reasons for the decisions."*

In the case of **Stanslaus R. Kasusura and the Attorney General vs Phares Kabuye [1982] TLR 338** it was held that:

> *"The trial Judge should have evaluated the evidence of each of the witness, assess their credibility and made a finding on the contested fact in issue."*

In this case, the trial Tribunal did not evaluate evidence of the appellant and state the reasons for its decision apart from terming evidence of the appellant as incredible without further explanation. On my perusal of the

trial tribunal's record, I came across exhibit D1 which is the decision of Kirua Vunjo Primary Court in Shauri la Mirathi Na. 1/2014. At the last page but one, of the said decision; it was observed inter alia that the Will left by the late Jackson Mashingia was to the effect that the farm at Kitimbirini Tela Iwa (suit land) in which the late Edna Mashingia was residing belonged to her and her children. Then, the late Edna Mashingia was appointed to administer the farm in which she was residing only as other farms had already been distributed by the late Jackson Mashingia. In addition, before the trial tribunal when cross examined, the 1st respondent stated inter alia that it was true that Edna's house and land were distributed before Jackson's death and that the said land was one acre. The 1st respondent also admitted to had demolished the house at the suit land and that it was true that she had trespassed therein. The proceedings of the trial tribunal dated 28/2/2022 in respect of DW1 (1st respondent) are relevant.

From the available evidence on record, I hesitate to give credence to the evidence of the respondents as the same fell short of the required standard in civil cases. In the case of **Daniel Apae Urio vs Exim (T) Bank, Civil Appeal No. 185 of 2019 [2020] TZCA 163** the Court of Appeal held that:

> *"The yardstick of proof in civil cases is the evidence available on record on whether it tilts the balance one way or the other. Departing from this yard stick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases."*

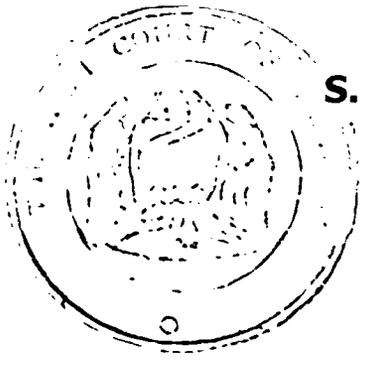
Basing on the above findings of this court, I am of the opinion that the trial tribunal misdirected itself by finding that evidence of the appellant

was incredible without evaluating the same and advancing any reason. On balance of probabilities, evidence of the appellant was more credible and reliable than that of the respondents.

It is for that reason that I hereby quash and set aside the findings of the trial tribunal and hold that the disputed land is part of the estate of the late Edna Mashingia. Appeal allowed with costs.

It is so ordered.

Dated at Moshi this 26th day of January 2023.



S. H. SIMFUKWE

JUDGE