THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 9 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Mtwara, at Mtwara, Land Application No. 42 of 2020)

MBARAKA ABDALLAH NALENDA ……1ST Appellant

ZUWENA MOHAMAD …….…… 2ND Appellant

BAKARI CHITWAGA …….. 3RD Appellant

ANAFI NANKUNA ……..…… 4TH Appellant

MFAUME SELEMANI NANTINDINGA …….. 5TH Appellant

Versus

ABDALLAH IBADI NALENDA (Administrator of Estate

of The Late IBADI ABDALLAH NALENDA ……Respondent

JUDGEMENT

Date of Last order: 09.03.2023

Date of Judgement: 02.06.2023

Ebrahim, J.:

Having been unsuccessful at the District Land and Housing Tribunal for Mtwara at Mtwara, the Appellants herein have instituted the instant appeal raising six grounds of appeal as follows;

1. *That the Honourable Learned Chairman of the trial tribunal grossly erred in law and fact to decide the matter in favor of the respondent as a rightful owner of the land in dispute despite the*

fact that the respondent did not prove his case at the required standards.

2. *That the Honourable Learned Chairman of the trial tribunal misdirected himself for failing to discover that as the letter of administration are questionable as the said IBADI ABDALLAH NALENDA died on 20th November, 2009. While letters of administration to the respondent was given on 08th August, 2019 in probate case No. 65/2019.*
3. *That the Honourable Learned Chairman of the trial tribunal erred in law and fact for failed to analyze the heavy testimonies tendered by the appellants and their witnesses that the suit land is the properties of the Appellants and not the properties of the deceased one Ibadi Abdallah Nalenda.*
4. *That the Honourable Learned Chairman of the trial tribunal seriously erred in law and fact by departing from the opinion of the one assessor without any good or sufficient reasons.*
5. *That the Honourable Learned Chairman of the trial tribunal grossly erred in law and fact by not considering the fact that the respondent has failed to adduce legal and binding documents to prove the ownership of the suit land.*
6. *That the Honourable Learned Chairman of the trial tribunal erred in law and fact when proceeded to ignore even the recorded evidence of the appellant's side on the ownership of the suit land.*

The genesis of the dispute is the ownership of the disputed land situated at Malatu Village, within Newala District, at Mtwara Region.

The Appellants are claiming that the disputed land is their property and that the Respondent is not a rightful owner of the disputed land. The Respondent is the nephew of the 1st Appellant. The 1st Appellant and the Respondent's late father (Ibadi Abdallah Nalenda are brothers). The Respondent had initially instituted a suit claiming that the 1st Appellant invaded the disputed land of ten acres and one plot of land both located at Malatu Shuleni village in Newala District left by his late father and sold them to the 2nd ,3rd ,4th and 5th Appellants. The Respondent claims also that his late father was the lawful owner of the disputed land and plots which he acquired by inheritance and bought from respective authorities and persons.

During the trial the Appellants called nine witnesses to prove their assertion of facts. The Respondent on the other hand vigorously contended that his late father Ibadi Abdallah Nalenda is the lawful owner of the suit land and he called two witnesses to prove his claim. After hearing the evidence from both sides, the trial Chairman agreed with the opinion of one of the assessor and made a finding that the Appellants had no enough evidence to claim that the suit land is theirs. Dissatisfied with the decision of the trial Tribunal, the Appellants filed the instant appeal.

This appeal was disposed of by way of written submission as per the schedule set by the court on 10.02.2023. The Appellants were represented by advocate Gide Magila whereas the Respondent appeared in person.

In their submission in support of the grounds of appeal, counsel for the Appellants opted to abandon grounds No. 2, 4 and 6.

He argued the 1st and the 5th grounds of appeal together. Appellants' counsel began his submission by citing the provisions of Section **110 (1) (2) and 111 of the Evidence Act, [CAP 6 R.E 2019]** which dictate the position of the law that the burden of proof lies on the party who asserts existence of facts and needs the case to be decided in his/her favor. He stated that the Respondent and his witnesses failed to discharge the assigned burden of proof by failing to state which property between the two (a farm and a plot land) was purchased and from whom or from which authority and which one was obtained from inheritance.

He further argued that the evidence by the trial Tribunal shows that the late Abdalla Nalenda Selemani who was the father of the 1st appellant and the Respondent's late father left behind six farms which were bequeathed to the 1st appellant and his brother the late Ibadi

Abdallah Nalenda (father of the respondent) sold two farms for the purpose of obtaining money for treatment. The result of which he was left with only one farm which was handed over to the Respondent. They tendered **exhibit D1 titled kitabu cha Wazazi na Watoto** and referred to the second last page in order to prove their assertion which was the book of records of the late Ibadi Abdallah Nalenda which showed that the late Ibadi Abdallah Nalenda left one farm. He stated that the same was backed up by the testimony of **Salum Musa (SU2)**.

He argued further that the respondent was duty bound to prove his father's ownership of the suit properties by proving in evidence all issues he raised in pleadings and failure to do the same does not warrant him to shift the burden to the appellants. To cement his argument, he cited the Court of Appeal of Tanzania case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama, Civil Appeal No. 305 of 2020, page 14 (unreported)** which quoted with approval the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha Civil Appeal No. 45 0f 2017 (unreported)** it was observed that;

> *"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and*

> *should not be departed from without strong reason... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...*"

Arguing the 3rd ground of appeal, he stated that in civil case the case is tested by weighting the quality and credibility of the evidence of the parties and ascertaining the probability of the fact to have happened. However, the trial tribunal failed to analyze the evidence of the parties relied on the evidence of the respondent which does not fit to the principle of balance of probability as provided under **Section 3 (2) (b) of the Evidence Act, [CAP. 6 R.E 2019]**.

He contended further that the respondent's unproved claim the 1st appellant sold the suit properties to 2nd, 3rd, 4th, and 5th appellants is not true because the 1st appellant testified that each appellant herein has been independently owning his/her own piece of farm since long time ago as stated by SU5 as he stated that he owned the suit farm since 1995, the evidence which was corroborated by Kombo Sabihi Chihaka who was the successor husband to the wife of the late Ibadi Abdalah

Nalenda. Also 2nd, 4th, and 5th appellants denied to have bought their pieces of his farms from the 1st appellant. He cited the cases of **IKIZU SECONDARY SCHOOL vs SARAWE VILLAGE COUNCIL, Civil Appeal No.163 of 2016 (unreported)** which relied on the case of **ANTHONY M. MASINGA vs PENINA (MAMA MGESI) & Another, Civil Appeal no. 118 of 2014** on the legal position that a fact must be proved.

He spoke about the fact that the respondent was living out of the suit land hence he could have the correct information.

Responding to the arguments raised by the appellant, counsel for the respondent urged this court to re-scrutinize and re-evaluating the entire evidence adduced during trial - **Pandya v R 1957 E.A 336**.

Starting with the 1st ground of appeal, counsel for the respondent also based his arguments on the requirement of the law that he who asserts must prove **- "Affirmati Non Neganti Incumbit Probatio"** meaning *the burden of proof is upon him who affirms – not on him who denies to wit.*

Referring to the facts of the case, he said the respondent (PW1) gave un-contradictory testimony that during his life time his late father Ibadi Abdalah Nalenda owned many properties including the four farms situated at Malatu village within Malatu ward in Newala District and a

plot of land.

That after the death of the said Ibadi Abdalah Nalenda the 1st appellant assumed the powers of administrator and illegally took all control over the deceased properties without even being appointed as an administrator or executor and never tendered any minutes of the clan meeting. He said the 1st appellant also invaded one farm of the deceased. Counsel for the respondent contended that much as the 1st respondent promised to handle the farms until he is back from Dar Es Salaam, but when the respondent went back to Newala the 1st appellant totally refused even to show the boundaries of the four farms belonged to the late Ibadi Abdalah Nalenda. Referring at page 6, 7, 8, 9 and 10 of the typed proceedings of the trial tribunal, counsel for the respondent explained that the respondent discovered that two farms were illegally sold by the 1st appellant to 2nd appellant, one farm is unlawfully possessed by the 5th appellant while one plot of land was sold by the 1st appellant to the 4th appellant. He said the testimony of PW1 was corroborated by Shaibu Hashimu Lugomba (PW2) at pages

12,13 14 and 15 of the typed proceedings who told the trial tribunal that he knows very well the properties left by the late Ibadi Abdalah Nalenda including five cashew nut farms situated at Malatu-Newala

with their boundaries as they are situated in one area and that four of them being the farms in dispute. PW2 further testified that after the death of Ibadi Abdalah Nalenda all his properties including the five farms were under control of the 1st appellant who was not ready to provide anything amongst the deceased properties until when the respondent went to the elder child of the late Ibadi Abdalah Nalenda. He urged the court to note that the 1st appellant did not deny the fact that the four farms belong to the late Ibadi Abdalah Nalenda but he said he will divide them when the respondent will be back from Dar es salaam but unfortunately he did not. He pointed to this court that neither PW1 nor PW2 were cross examined by the appellants while adducing their testimonies on the existence of the said four farms which implies the acceptance of the truth of the witnesses evidence as observed in the case of **Nyerere nyangue v the Republic, Criminal Appeal No 67 of 2010.** From the above position, the learned counsel invited the court to conclude that the 1st and 5th grounds of appeal have no merits.

Coming to the 3rd ground of appeal, counsel for the respondent argued that the appellants have failed to show how the trial tribunal failed to analyze the said testimonies adduced by the appellants and

their witnesses instead they have argued on burden of proof and standard of proof which was the first ground.

They acknowledged the existence of **section 3 (2) (b) of the Evidence Act [Supra]** however they said that the provision of the law would be applicable in their situation if the respondent had failed to prove his ownership of the said four farms that it was owned by his late father Ibadi Abdalah Nalenda. He said the respondent managed to prove that the 1st appellant has sold amongst four farms to other appellants namely, Zuwena Mohamad, Bakari Chitwanga Niyopa, Anafi Nankuna, and Mfaume Selemani Nantindinga contrary to the law as the said 1st appellant was neither an executor nor administrator of the late Ibadi Abdalah Nalenda.

He further contended that the trial chairman of the tribunal properly analysed the testimonies adduced by both parties including that of the appellants and their witnesses and finally came up with a just decision that the suit land are the properties of the deceased Ibadi Abdallah Nalenda and hence under the administration of the respondent as evidenced at page 3 and 4 and the detailed analysis of the appellants' testimonies at pages 5 ,6 ,7 ,8 ,9 and 10 of the trial judgment.

He prayed to the court to disregard the testimony of the 1st appellant because he said he acquired the suit land by inheritance from his late father namely Abdallah Nalenda Selemani but he failed to adduce probate or letters of administration granted by the court after the death of the said Abdallah Nalenda Selemani. Hence, the means of acquiring the said land is questionable.

He contended further that, during the trial the 1st appellant said that Salumu Chihite was the one who divided the six farms which belonged to the late Abdallah Nalenda Selemani to the 1st appellant and Ibadi Abdallah Nalenda (page 17 of the proceedings). However, the 1st appellant failed to call the said Salumu Chihite to testify as a material witness instead he called another person called Salumu Mussa. He referred to the position of law that failure to call material witness may invite the court to draw an adverse inference to the failed party. He referred to the case of **Lamshore Limited and J. S. Kinyanjui v Bazanje K. U. D. K [1999] TLR 330** where it was held that: -

"He who alleges a fact has the duty to prove it"

The respondent counsel was therefore of the views that proving a fact goes hand in hand with calling all material witnesses and produce all necessary documents as exhibits. He also referred to the case of

Hemedi Said vs Mohamedi Mbilu 1984 TLR 113, where it was observed that;

> *"Where for undisclosure reasons, a party fails to call a material witness on his side the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interest"*

Again, in the case of **Aziz Abdallah vs R 1991 TLR 71 at Page 72**, it was stated that;

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"*

He concluded on the point that since the said Salumu Chihite was a material witness who was alleged to be the one who divided the six farms of the late Abdalla Nalenda Selemani to his children to wit the respondent and the 1st appellant; failure to call him as a witness is fatal and invited this court to draw an adverse inference against the appellant's side. He also questioned the authenticity of Exhibit D1 and Exhibit D2 which were tendered in court on 17th may 2022 (see page

20 and 21 of the proceedings) whereby more than 65 days have passed from 10th March, 2022 after the 1st appellant had testified in court as the same could have been prepared after the 1st appellant testimony. He concluded also that in law, the 1st appellant had neither better nor good title over the disputed land to enable him to sale to any person and hence the sale automatically becomes void abinitio. He referred to the testimony of Zuwena Mohamed (3rd appellant) acknowledged to be given the said piece of land by the 1st appellant when she said that:

"Kipande cha shamba ninachokimiliki nilipewa na mjibu maombi wa kwanza kwa kuwa sikuwa na sehemu ya kulima"

The learned counsel acknowledged all the cited cases by the Appellants, he argued however that while they are in agreement with the principles established in the above cases but they are of the view that they are distinguishable with the circumstance of their case on the basis that the respondent managed to prove the ownership of the said four farms.

I have dispassionately followed the rival submissions by the parties.

Beginning with the 1st and 5th ground of appeal, I agree with both

parties that it is the cardinal principle of the law that "he who alleges must prove" as provided for under **Section 110 of the Evidence Act CAP 6 RE 2019**.

It was held in the cited case of **Hemed Said vs. Hemed Mbilu (supra)** that:

> *"in law both parties to a suit cannot win, but the person whose evidence is heavier than that of the other is the one who must win."*

The above cited case implies that courts should be moved to decide the case by the weight of evidence adduced by the parties and after a thorough evaluation of such evidence in its totality.

Having gone through the submissions and the proceedings on record, it is undisputed that the respondent is a legal administrator of the estate of Ibadi Abdalla Nalenda. The evidence adduced by **PW2** at the trial tribunal was that the late Ibadi Abdalla Nalenda had left cashew nut farms, one house and one plot which all are located at Malatu. **DW2** on the other hand told the trial tribunal that the late Ibadi Abdalla Nalenda and the 1st appellant are the children of his late brother and after his death, he left six cashew nut farms which were bequeathed to the two children and each one got three farms. The

late Ibadi Abdalla Nalenda was bequeathed the farms which were at Malatu village and the 1st appellant bequeathed the farms which were at Malatu juu. When he was replying to the 3rd appellant, **DW2** told the trial tribunal that he did not distribute a virgin land to the late Ibadi Abdalla Nalenda and 1st appellant. Also, **DW3** has agreed to be allocated with a piece of land by the 1st appellant.

Furthermore, the 5th appellant when testifying at the trial tribunal he said that he does not agree with the claim of the respondent and that the disputed land is not his but the property of Mr. Mussa Luhuna who is at Serengeti. The said Mussa Luhuna was not called as a witness to testify on his ownership. On top of that he said he does not know how Mussa Luhuna had acquired the disputed land. Other appellants plainly claimed to own the disputed land and some claim to have been in the disputed land for a long time. Being in a land for a long time does not necessarily guarantee them to be the owner of the suit land. This position was observed in the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs. January Kamili Shayo & 136 Others Civil Appeal No. 193 of 2016 (CAT-Arusha) (unreported)** that in law an invitee cannot assume ownership by claiming continuous occupation of the land.

I am abreast to the rule of the law of evidence under **Section 119 of the Evidence Act, Cap 6, RE 2002** that:

> *"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who assert that he is not the owner"*

The essence of this legal position has been commented by **M.C.Sarkar and S.C. Sarkar in Sarkar's Law of Evidence in India, Pakistan Bangladesh, Burma & Ceylon, at page 2003, 17th Edition, volume 2** that:

> *"This section embodies the well-known principle that possession is prima facie evidence of ownership. Possession of property movable or immovable, affords prima facie presumption of ownership as men generally own property they possess. Possession is a good tittle against anyone who cannot prove a better (tittle)".*

Fitting the above comment by the scholars and the position of our law with the facts of this case, it is obvious that respondent managed to prove his genesis of ownership of the disputed land possessed by the appellants. There is no evidence to the contrary on how the appellants legally acquired the disputed land and the appellants failed to discharged their legal burden of such proof. Besides, the right to be

bequeathed a property is not abrogated by the fact that the said beneficiary was not around when the parent passed on. This ground of appeal therefore has no merit.

As to the issue of evaluation of evidence; it is clear that 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, the court shall have due consideration to the quality of such evidence- **Hemed Said Vs Mohamed Mbilu(supra)**. Moreover, as alluded earlier, since the appellants were 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 **Page 14 of 16 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."*

As alluded earlier, the law requires that "he who alleges must prove". To the contrary the appellants failed to discharge their burden of proof. That notwithstanding, the respondent on the other hand managed on the balance of probability, to prove a fact that his late father was bequeathed the suit land by his father as also evidenced by DW2 and the 1st appellant confirmed that him and the late Ibadi they were bequeathed the land by their late father but the late father of the respondent had sold his piece of land so that he can be able to treat himself. However, he did not have any proof on that assertion before the trial tribunal.

Before I pen off, I find it apt to observe in passing the argument by the counsel for the appellants that the 1st appellate court is discouraged to interfere with the findings of the trial court unless there is miscarriage of justice, misinterpretation/improper application of the law, failure to evaluate or consider important piece of evidence, etc. I find his observation is misguided because he is mixing up between the law discouraging the 2nd appellate court to interfere with the concurrent findings of the two lower courts unless on the above stated circumstances; and the obligation of the first appellate court.

Having said that and owing to the above findings, I find the appeal to

be unmeritorious and I dismiss in its entirety with costs.

Ordered accordingly.

R.A.Ebrahim
Judge

Mtwara
02.06.2023.