

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

LAND APPEAL NO. 39 OF 2022

*(Originating from Land Application No. 1 of 2022 of the District Land and
Housing Tribunal for Maswa)*

NJILE ZAMU MASALA.....APPELLANT

VERSUS

MHANDI KILUMI.....1ST RESPONDENT

MADUHU KILUMI.....2ND RESPONDENT

NTUGA KILUMI.....3RD RESPONDENT

NSIYA NGESE.....4TH RESPONDENT

YATUGUTA MADUHU.....5TH RESPONDENT

JUDGMENT

28th March & 16th June 2023

MASSAM, J:

Being aggrieved with the whole decision of Maswa District Land and Housing Tribunal (herein DLHT), the appellant appealed to this court armed with the six grounds as depicted from the memorandum of appeal.

1. *The trial tribunal erred in law and in fact by not determine both issue rose during hearing of application.*
2. *That, the trial tribunal erred in law and in fact by not analyzing properly the weight of evidence tendered by the appellant as a result delivered the judgment which is arbitrary, oppressive and unfair to the appellant.*
3. *That, the trial tribunal erred in law and in fact by deciding that the claim by the appellant has no merit whereas the appellant's claim for trespass by the respondent into her late father's land.*
4. *That, the trial tribunal erred in law and in fact by deciding that the appellant's mother is the one who knows the suit property while the appellant is legal representative of late Zamu Masala.*
5. *That, the trial tribunal erred in law and in fact by deciding that there's no trespass instead each parties to the dispute have their own piece of land and it's a border dispute.*
6. *That, the trial tribunal erred in law and in fact by deciding using and inference that, the instant application is the same with border dispute arose in 2003 while the cause of action in the dispute arose in 2017.*

Briefly, the appellant filed a claim at Maswa DLHT claiming that the respondents trespassed on his farmland located at Mbiti Village within the District of Bariadi at Simiyu Region in 2017. The appellant alleged that he filed the application as the administrator of the estate of his late father who cleared the said farm in 1956 and since then they have been in occupation of the suit land without any disturbance. On their side, the 1st and 2nd respondents alleged that the disputed land is their property, and they were born and raised there. While the third witness of the respondents who was the Village Hamlet testified that he has been solving the disputes between the appellant and the respondents herein whereby the appellant's sister trespassed on the respondents' farm and his evidence was supported by that of 4th witness who supported what was submitted by the 3rd witness.

After the tribunal heard both parties, it came up with a decision that the appellant failed to prove his claim as the disputed property belong to the respondents and they did not trespass to the land as claimed by appellant. Being aggrieved the appellant filed the present appeal.

At the hearing of the appeal, Mr. Agricola Evarist, learned counsel represented the appellant whilst the Respondents appeared in person,

unrepresented. With the consent of the parties and leave of the court, the appeal was disposed of by way of written submissions.

Though the 1st ground was abandoned, they replied and submitted that the evidence of the respondents at the tribunal was watertight compared to that of the appellant. He added that it was DW3 and DW4 who were material witnesses as the ones who also resolved the disputes between the appellant's sister and the respondents over the same land in dispute, thus why the case was decided in their favour. They argued further that the dispute over the disputed land was resolved in 2003 when the appellant's mother proved that the disputed land belong to the respondents herein. They supported their arguments with the case of **Agatha Mshote vs Edson Emmanuel and 10 Others**, Civil Appeal No. 121 of 2019 (CAT-Unreported).

On the 2nd ground of appeal, the appellant submitted that the trial tribunal failed to analyze and give weight to the evidence of the appellant herein. He submitted further that, the disputed land belongs to Zamu Masala since 1956 when he cleared the land and when he died in 1978 it remains in the hands of the family who has been using it since then. His evidence was supported by the evidence of PW3 who said he also participated in clearing the disputed land. Appellant also complained that the trial tribunal failed to evaluate the evidence and reached an

erroneous decision. He referred this court to the case of **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (CAT, Unreported).

Responding to the 2nd ground of appeal, the respondents submitted that, the disputed land was once the property of their deceased grandfather who passed away in 1984, and left the same to their father Kilumi Maduhu who also passed away in 1999. Thus, the respondents cannot trespass on their grandfather's land which later on left to their father.

On the 3rd and 5th grounds of appeal, the appellant submitted that at the trial tribunal, the evidence shows that the disputed land belongs to the appellant's father and the respondents trespassed on it, the same was evidenced by PW3 and PW4. It was his further submission that the respondents failed to prove how they became the owner of the land apart from inheriting it from their parents. Thus, it was the appellant who proved his claim other than the respondents.

On the 4th grounds of appeal, the appellant submitted that as the legal representative of the late Zamu Masala, he knew well all of his properties. He submitted further that, the trial tribunal misdirected itself

that his mother was the one who knew well the properties of the late Zamu Masala while he was legal representative of the late Zamu Masala.

Again page 8 and 9 of the proceedings misdirected the chairman by relying on the evidence which mention another person of which that person was not called to be as witness before the trial tribunal of which these facts by DW3 and DW4 creates doubt hence had no weight to the respondent case. So he said that for the tribunal to rely on the alleged notion was to summon Mwana Manyama the mentioned person to testify rather than relying on the facts of DW3 and DW4 without any proof.

He added that failure to call important witness the court may draw a negative inference on a party called witness before the court to testify, to cement the same he brought a case ***Azizi Abdallah vs. Republic (1991)TLR 71***. So this court is attracted to resolve this issues in favour of appellant since the weight of evidence by the appellant is higher than that of the respondents.

On the last ground, the appellant complained that the trial tribunal erred in law and in fact by deciding using the inference that the instant application is the same with the border dispute arose in 2003 while the cause of action in the disputed land arose in 2017. He submitted that there were no previous conflicts between him and the appellant as

witnessed by Dw1 and DW2 that's why he filed the application at the tribunal. Also the land in dispute is nearby Maduhu 's land as witnessed by Pw3, So this entails on description of the suit land, so this entails that in 2017 the respondent expanded the land by encroaching six acres of appellants land.

Further to that there is no proof submitted by the respondent or their witnesses (village leaders) to witness that previously there was a border conflict rather than words with have no value as the law require that any person who wants the court to rely on established facts has a duty to proof as it was as required by **Section 110 of the Evidence Act**, cap 6 R.E 2019 which read as follows that;

110(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

So he lastly submitted that for the tribunal to rely on the fact that in 2003 there was the conflict relating with the land in dispute there was must be evidence to proof.

Replying to the above grounds of appeal. The respondents submitted that the appellant was appointed as administrator of the estate of his late father, however, he has to be aware of the origin of the properties he claimed as administrator. They submitted further that he representing the deceased so he was supposed to file a suit as an administrator, not in his capacity as required by **Item six (6) of the 5th schedule to the Magistrate's Court Act**, Cap 11 R.E 2019.

It was their further submission that the matter concerning the disputed land was already determined by Mhango Ward Tribunal between the respondents and the appellant's sister (Witness Zamu) who unsuccessfully appealed to Maswa District Land and Housing Tribunal. Therefore, the application at the trial tribunal was res judicata as per **Section 9 of the Civil Procedure Code**, Cap 3 R.E 2019 which reads.

"That no court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or

any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue was been subsequently raised and has been heard and finally decided by such court”

In brief rejoinder, the appellant prayed for the court to consider their submission despite being late to file the submission one day as their counsel was suffering from toothache they need to be missed to attend before the court when their case was called for orders.

Having carefully considered the rival arguments advanced by the counsel for the parties and after having examined the record of appeal, the main issue to be considered by this court in this appeal is on evaluation of evidence before the trial tribunal and whether the respondent presented a strong case before the trial tribunal.

Prior to the determination of the main appeal, the respondents in their submission in reply raised a preliminary objection that the appellant's submission was received out of time and prayed for the same to be rejected.

In his rejoinder, the appellant admitted that he was late for one day as his counsel was sick and suffering from Toothache and his

counsel produced a sick sheet from Rock City Polyclinic dated on 14.4.2023 to prove the same.

Am aware that when a party is delayed in filing a submission, he is supposed to seek leave of the court before filing his submission out of time and each day of delay has to be accounted for.

In this appeal, since the appellant was late for one day as his counsel was sick, and he brought a sick sheet to prove the same and regarding that sickness to be sufficient reason to prove the same, as held in the case **Emmanuel R. Maira vs. The District Executive Director Bunda District Council** ,Civil Application no 66 of 2010 the Court of Appeal of Tanzania stated as follows;

"Health matters in most cases are not the choice of a human being cannot be shelved and nor can anyone be held to blame when they strike".

So this court for the interest of justice and for reason mentioned above the raised PO will be overruled, and the court will proceed with the determination of the appeal on merit.

It is worth noting 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 critical scrutiny. As it was held in the case

of **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74/2019 (CAT at Dodoma, Unreported) that:

"This being a first appeal, this Court has to subject the entire evidence on record to a fresh re-evaluation and come to its conclusions."

I will start with the 2nd ground of appeal where the appellant complained that the evidence was not well evaluated by the trial tribunal. In determining the application, the tribunal raised the following issues:

1. Nani Mmiliki halali wa eneo la mgogoro.
2. Nafuu zipi wadaawa wanastahili kuzipata.

To prove his application at the DLHT the appellant stated that, he is an administrator of the estate of his late father. His late father acquired the disputed land in 1956 and the dispute arose in 2017 when the respondents invaded it. He submitted that his young brother is living in the disputed land. His evidence was supported by that of PW2, PW3, and PW4 who also submitted that the disputed land belongs to the appellant herein as it once belonged to his late father.

On their side, the 1st and 2nd respondents submitted that the disputed land belong to their grandfather who gave it to their father, and

they are using the disputed land since their birth without any disputes. Their evidence was supported by that of DW3 and DW4 who were once the village leaders in 2003 and they participated in solving the dispute between the appellant's sister and the respondents herein and it was decided they belong to the 1st and 2nd respondents.

They submitted further that apart from solving the disputes the disputed land belongs to the father of the 1st and 2nd respondents and not the appellant's father.

It is a cardinal principle in Civil Cases that he who alleges bears the burden to prove. The same was held in the case of **Lamshore Limited and J. S.Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330 it was held that:-

"He who alleges a fact must prove it."

See also **Sections 110 and 112 of the Evidence Act**, Cap.6 [R.E2019].

Guided by the cited authorities, in our present case the burden lies on the appellant to prove the existence of the alleged fact in this case. To discharge the said duty the appellant only submitted that the land belongs to his late father and he is claiming the same as an administrator of the estate of his late father. However, he had nothing to

prove his claim and he did not explain how his father became the owner of the disputed land compared to the respondents whose evidence was supported by then leaders such as DW3 who was the village hamlet.

Having examined the evidence given by both parties this court does agree with the decision of the trial tribunal that the appellant failed to discharge his duty by proving his claim on the balance of probabilities.

Given the aforesaid, I find no merit in the appeal. Consequently, I dismiss the appeal in its entirety with costs. The decision of Maswa DLHT is left undisturbed.

It is so ordered.

DATED at **SHINYANGA** this 16th day of June 2023.



A handwritten signature in blue ink, appearing to read "R.B. Massam", is written over the printed name.

R.B. Massam
JUDGE
16/6/2023