

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 26 OF 2022

(Arising from Land Application No. 15 of 2020, of the District Land and Housing Tribunal for Tarime at Tarime)

MWITA ROZANA MARWAAPPELLANT

VERSUS

KINGINGA ISAMBE RESPONDENT

JUDGMENT

30th March & 23rd May 2023

F. H. Mahimbali, J.

The appellant in this case unsuccessfully filed land case at the trial tribunal for a claim of land against the respondent and five others (not parties to this appeal). Upon full hearing of the case (on merits), the trial tribunal dismissed the appellant's claims of ownership of the said land and in its place declared the respondent as rightful owner of the disputed land.

Not amused with the trial tribunal's decision, the appellant has opted for this appeal armed up with a total of two grounds, namely:

- 1. The respondent did not prove the case on balance of probability as per dictates of the law.*

2. The trial tribunal erred in law and fact to declare the respondent as the lawful owner of the suit land basing on evidence which is judgement of the ward tribunal which does not form part of the records.

On these two grounds, the appellant through Mr. Tumaini Kigombe, learned advocate, prayed the appeal to be allowed with costs.

During the hearing of the appeal, whereas the appellant was represented by Mr. Tumaini Kigombe learned advocate, the respondent fended for himself.

In arguing the first ground of appeal, Mr. Kigombe learned advocate was of the view that the appellant had sufficiently established his case on balance of probability that he is the rightful owner of the suit land. On the other hand, he argued that the respondent substantially failed to establish how he got the said land. The evidence thereof is insufficient of material for the respondent to be declared the rightful owner of the suit land against the appellant as proclaimed by the trial tribunal. He criticized the trial tribunal's findings giving weight on exhibits DE1, DE2 and DE3 in the absence of the Ward Tribunal's judgment. He clarified that even the relied documents (DE1, DE2 and DE3) bear different names such as ***Isambe Vs. Mwita Rosana*** (DE1), whereas land Application no. 15 of 2020 parties are **Marwa Vs. Kigingwa Isambe and 5 Others.**

In line with the first ground of appeal, the appellant is challenging the DLHT's decision because it paid credit to judgment of the case whose copy was not tendered in the said tribunal for scrutiny and satisfaction which then is contrary to **Order XIV, Rule 17 (1) & (2)** of the CPC.

On his part, the respondent strongly resisted the appeal saying that the appellant's evidence was lighter than that of the respondent as far as the ownership of the said land is concerned. Thus, he maintained his position that the trial tribunal properly and sufficiently evaluated the evidence in record and accordingly reached a proper verdict as per law.

I have critically traversed the evidence at the trial tribunal, judgment thereof and the arguments in the grounds of appeal preferred. The important question to ask is whether the appeal has merit.

First, I agree with Mr. Kigombe's argument that failure to tender material evidence has the same impact as failure to call the important witnesses, in which case adverse inference can be drawn against the party failing to tender the material evidence as it is the case when there is failure to call important witnesses (See **Hemed Said Vs. Mohamed Mbilu**, [1984] TLR 114).

Coming back in the case at hand, did the appellant sufficiently (then applicant at the trial tribunal) establish her case at the trial tribunal? As to how he established her case at the trial tribunal, this is important part of his evidence, I quote:

*"...Eneo hilo lipo katika Kijiji cha Ntagacha kata ya Ganyange. Eneo hilo ni ekari 8. Vijiji vilikuja wakati wa Nyerere mwaka 1974. Tuliambiwa tuhame tukajenge Pamoja. **Serikali ya Kijiji cha Ganyange ndio ilinipa eneo hilo kuanzia mwaka 1974, nilianza kuishi pale. Sikumbuki nilitoka pale mwaka gani.** Wakati wa vita tulihama pale tukaja kuishi Ntagacha center. Baada ya kuhamia center, lile eneo tulikua tunalitumia kwa kulima. Kwenye eneo hilo, kuna miti ya aina ya mkaratusi, kahawa. Miti ya mkaratusi mimi ndiyo nilipanda. Hivyo miti niliipanda mwaka 1975. Kwa sasa hivi Kigina ndiyo anatumia eneo hilo. Sikumbuki mwaka aliovamia. Baada ya kuvamia, nililipoti kwa Katibu Tawala na kisha akaenda kwa Mkuu wa Wilaya Tarime.*

Her ownership of the said disputed land has been confirmed by her son (PW2), and the then VEO (PW3) of their village who said in his testimony that the respondent is a stranger to the area as the appellant is the rightful owner of the said plot in lieu of her deceased husband. Exhibits P1, P2 and P3 are relevant documents to that assertion.

On the other hand, the respondent in his testimony at the trial tribunal on ownership of the said disputed land says this:

"Shauri hili lilikuja hapa kama shauri namba 73 la mwaka 2019, mdai akiwa anaidai mimi Kigingi Isambe eneo la ukubwa wa ekari 8. Shauri likaja mara ya kwanza tarehe 7/02/2020. Pia kulikua na rufaa kutoka Baraza la kata muomba rufaa nikiwa ni mimi na mjibu rufaa akiwa Simoni Wambura kwenye eneo hilo hila la hekari 8. Nililitarifu baraza kuwa ninadaiwa na watu wawili kwenye eneo moja. Baada ya Baraza kujiridhisha eneo ni moja, ilifuta rufaa namba 65 ya Mwaka 2020, likabaki shauri moja lililofunguliwa na Mwita Rozana, madai namba 73 ya Mwaka 2019. Baraza lilimuamuru mdai afanye marekebisho kwenye shauri hilo ili amuunganishe mjibu maombi kuwa mdai namba 2. Shauri hili lilisikilizwa na kutolewa maamuzi amabayo nilipewa haki ya kumiliki eneo hilo (D1 exhibit na pia vielelezo D2 na D3)..... kutokana na vielelezo nilivyovitoa, mimi sijavamia eneo hilo bali ni mmiliki halali wa eneo hilo. Pia nilishafanya kesi na mdai na mimi kuwa mshindi kwenye eneo hilo. Naomba Baraza litangaze mimi kuwa mmiliki wa eneo hilo na nafuu zingine ambazo mahakama itaona zinafaa....."

As to how he came into possession of the said area, the respondent testified in cross examination:

*Eneo hilo nilipewa na kamati ya ardhi ya Kijiji mwaka 1991. Zamani lilikua linamilikiwa na baba, baadae likamilikiwa na Serikali ndio maana sisi tulipewa na serikali kama ndugu. Tulipewa wawili mimi na ndugu yangu aitwae **Manyanya Isange** ambae eneo lake ameuzua na kumuuzia Nyahiri na Marko Pheres. Eneo langu ni hekari **8 hadi 10** ambalo limezungushiwa na mikonge. Familia yetu ina vijana sita kwa mama mmoja. Wanne waliobaki hawakufanyiwa dhuluma*

*kwasababu walipewa maeneo mengine na na eneo lililokua linamilikiwa na baba **kuna maeneo mengine wamepewa watu wengine tofauti na sisi.** Si kweli kuwa eneo hilo alipewa mleta maombi. Alipewa mama yake na alihama kisha eneo hilo likabaki ni la serikali. Mimi nilijengewa na serikali ya Kijiji ili niishi pale kwa lengo la kulinda mipaka".*

I have thoroughly examined the trial tribunal's judgment as to the basis of the verdict in favour of the respondent. In my scrutiny, of the three exhibits (P1 – P3) tendered by the appellant, none clearly confirms her ownership of the said land over the respondent. P1 exhibit was just an administrative letter in which was not granting ownership to her but exhibiting that there was land dispute amongst village members. As regards to exhibit P2, it was an appeal judgment of the High Court (Mwanza District Registry) between Simon **Sanawa against Marwa Rozana, Paulo Rozana and Mwita Rozana.** The respondent Kigingwa Isambe was not one amongst them. Similarly, P3 exhibit, was a 2003 minutes' meeting of Ganyange village confirming that there was land dispute between the appellant and Wambura Isambe (Simon Sanawa). So, these documents though relevant but only to the extent of dispute as between the appellant and Simon Sanawa and not otherwise.

On the other hand, scanning exhibits D1 to D4, none explicitly declares the respondent as rightful owner of the disputed land but only execution proceedings. For them to be valid, it was expected that there

should have been competent decree or judgment confirming the said award as claimed by the respondent. In the absence of the said decree, it was dangerous to declare the respondent as rightful owner basing on those incomplete documents only. As it stands, the best the trial tribunal would have done was to dismiss the appellant's case without confirming the other party as rightful owner unless there was counter evidence of the said establishment against the appellant. That means, it should have just ended there that as between the appellant and respondent, the appellant's claims are not established against the respondent. That was sufficient.

Moreover, digesting the appellant and the respondent's case (evidence), it is clear that the appellant on one hand claims to be given the said land by village authority in 1974 during operation vijiji. However, she says, she doesn't know when they left the said premises but, on their return, they found that the respondent was then occupying the said land in dispute. On the other hand, the respondent also claims to be in possession of the said land since 1991 after the demise of his father and later confirmed his ownership by the village authority. The challenge with both evidence is this, none adduced evidence in court confirming the said grant by the village authority as claimed.

The above notwithstanding, in totality of the appellant's case as compared to that of the respondent, I am legally convinced that since it is the claimant who is duty bound to establish his/her case as per balance of probability, only when the duty is discharged is the court to pronounce verdict in his/her favour. Otherwise, the claims stand to fail. Only a party with stronger evidence must be declared the winner (see the decision in the case of **Hemed Said vs Mohamed Mbilu**, (1984) TLR113) reading it conjunctively with section **3(2)b, 110 and 111** of the TEA Cap 6, R.E, 2022. Also, in **Bhoke Kitang'ita vs Makuru Mahemba**, Civil Appeal No222 of 2017 at page 7 and 8, the Court of Appeal ruled clearly that a person with long possession is entitled to possession by adverse possession. I have no good reasons to fault the findings of the trial tribunal on that.

In Tanzania, there are several ways in which a person can acquire land including allocation by the village council, or by grant of right of occupancy, purchase, inheritance and gift. In any of these ways, there must be proof of ownership of the said land. A mere allegation is not sufficient. The law is, who alleges must prove (**section 110 and 111** of the TEA). The burden of proof regarding the question whether any person is the owner of anything to which he is shown to be in possession, is on the person who asserts that he is not the owner

(**Section 119** of Tanzania Evidence Act). In this case, it was expected that the appellant should have established that duty at the DLHT that the respondent is not owner of the said land, the duty which the appellant failed to discharge.

So, even if there was not tendered judgement of the Ward Tribunal in case No. 73 of 2019 declaring the said right over the respondent, by principle of long possession of the said land against the appellant, it is making good sense that the appellant must have abandoned the said land after shifting to the center as quoted above in her testimony: *Serikali ya Kijiji cha Ganyange ndio ilinipa eneo hilo kuanzia mwaka 1974, nilianza kuishi pale. **Sikumbuki nilitoka pale mwaka gani. Wakati wa vita tulihama pale tukaja kuishi Ntagacha center** [Emphasis added].* By this extract of her own testimony, it is clear that the appellant had abandoned her land which then became under full control and use by the respondent. A person with long possession is entitled to possession by adverse possession or by principle of priority (See **Bhoke Kiatangita Vs. Makuru Membe**, Civil Appeal No. 222 of 2017, CAT – unreported).

It may be concession as well by the respondent on the other hand that part of their father's land was taken by village authority and given it to other people. Though not so clear which was the appellant's land

against the respondent, yet there is evidence that the said land is now under full control and use by the respondent. How the appellant lost control over it, she cannot recall. It is then herself to blame, as the court cannot assume the role of being an investigator to the parties' case. That is the parties' sole responsibility to guide the court in reaching her just verdict. Failure of it, is failure to establish one's case.

All this said and done, this Court finds no merit in the appeal. I thus dismiss it with costs.

DATED at MUSOMA this 23rd day of May, 2023.



F.H. Mahimbali
Judge

Court: Judgment delivered today the 23rd of May, 2023 before E. G. Rujwahuka, Deputy Registrar in the presence of the appellant and respondent being in person and Mr. K.S. Rutalemwa, RMA, present in Chamber Court.

Right of appeal explained.

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Deputy Registrar.