THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 139 OF 2022

(Arising from the District Land and Housing Tribunal for Morogoro in Land Application No. 113 of 2018)

AURERIA PHILIPO (administrator of the estate of the late Claud Benedict) ..... **APPELLANT**

VERSUS

MATHIAS LAZI ..... **RESPONDENT**

JUDGMENT

Hearing date on: 04/05/2023

Judgment date on: 15/05/2023

NGWEMBE, J.

This appeal is preferred by Ms. Aureria Philipo, a widow and administrator of the late Claud Benedict. The late Benedict owned a plot of land at Changarawe, Mzumbe Ward in Mvomero district within Morogoro region. The respondent was once his tenant and later his neighbour when he managed to acquire a plot of land just next to the deceased's land and established his premises therein.

It seems the respondent was a good neighbour to the late Claud for years from 1979 when he acquired the land and no dispute ever arose on the ownership of their respective neighbouring plots until when the said Claud passed away in year 2015. The appellant having been appointed as an administratrix of the deceased estate in 2018, sued the respondent before the trial tribunal in Land Application No. 113 of 2018, claiming among others, that the respondent who owned a neighbouring

land, had invaded the appellant's land by crossing the boundary and build some pig sheds. That efforts to face the respondent to remedy the situation were fruitless, so she prayed the trial tribunal to issue a declaratory order on ownership in her favour, perpetual injunction, general damages and costs against the respondent.

The respondent in his written statement of defence denied the allegations and further stated that, he did not invade the appellant's land and that the disputed land is not the appellant's property. Rather, the appellant and him are neighbours occupying land plots adjacent to each other, separated by a wall he built in 1992. He acquired his land since 1979 and has been using the same ever since without any interruption.

When the case was in progress, one assessor resigned from office the matter therefore proceeded with one assessor under section 23 (3) of the **Land Disputes Courts Act, Cap 216 RE 2019.** After receiving the evidence from both sides and after visiting *locus in quo*, the tribunal was satisfied to the balance of probability that the appellant did not prove her ownership to the required standard. Alternatively, the tribunal reasoned that, since the respondent had settled in that land for more than twenty years, it could not be reasonable to disturb him. Proceeded to dismiss the application with costs.

Such verdict aggrieved the appellant who now appeals to this house of justice intending to challenge that decision of the trial tribunal based on the following grounds: -

1) It did not consider PW2's strong evidence on boundaries.
2) It disregarded the assessor's opinion without reason.
3) It relied on adverse possession which was not proved according to law.

4) It made a decision basing on the respondent's contradictory evidence.

5) Declared the respondent as the owner and the appellant a trespasser which was not true.

On the hearing date of this appeal, the appellant secured the services of learned advocate Fred Julius Sanga, while the respondent was represented by learned advocate Ignas Seth Punge.

When the learned advocate for the appellant was invited to address this court, he followed the grounds of appeal in *seriatim* form. Thus, on the first ground, he challenged the tribunal in its ruling that, PW2's evidence was hearsay. To his position the evidence was not hearsay same was true as corroborated by the testimony of PW1. Justified his argument by referring this court to the case of **Shida Mohamed Nondole Vs. Emmanuel Raphael Nkuwi, Civil Appeal No. 5 of 2022** page 15 – 16. In that case, this court sitting at Dar es Salaam referred to **Subraminium Vs. Public Prosecutor [1956] W.L.R. 965** and comprehensively explained circumstances under which the third party's statement becomes hearsay evidence. Therefore, the evidence of PW2 was not hearsay.

Addressing on the second ground, Mr. Sanga advanced his argument by challenging the chairperson's decision that he failed to consider the assessor's opinion without giving any reason contrary to section 24 of the Land Disputes Act (**Cap 216**), supported by judgement of **Elilumba Eliezel Vs. John Jaja, Civil No. 30 of 2020** at page 11.

On the third ground that, there was no counter-claim and thus, no adverse possession applied for. He was of the stance that, the tribunal wrongly applied the doctrine of adverse possession. He made reliance

on the case of the **Registered Trustees of Holy Spirit Sisters of Tanzania Vs. January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016** at page 25 and 26 on elements of adverse possession.

In respect to the fourth ground, Mr. Sanga was straight to point out the contradictions that were made by DW1 and DW2 who testified that, the boundary between the parties were wall built by the respondent in year 1992, while DW3 said the boundary was a water canal (mfereji wa maji). Those contradictions were able to decide otherwise.

On the fifth ground, he just challenged the tribunal's finding as were wrong on the true ownership of the suit land. Thus, concluded that this appeal has merit same may be allowed.

In turn advocate Ignas Punge stood firm to challenge this appeal as unmerited based on misconception of facts and law. In a very brief submission, he pointed out that DW2's evidence was purely hearsay. Replying to the second ground, he referred to page 3 of the tribunal's judgment and added that, the assessor's opinions were read to the parties in court and well considered by the chairperson. Went further that, the wall was built in 1992, thus, the cause of action would be barred by operations of Law of Limitation. He supported his argument by referring to the case of **Nassoro Uhadi Vs. Musa Kalunge [1982] T.L.R. 302.** Went further that there was no contradiction in the respondent's evidence and if any, same was minor, he then prayed this appeal be dismissed with costs.

Having addressed the parties' submissions, I now move to the merit of this appeal. For convenience and consistence, I will first dispose of the second ground, then I will follow with the third ground as both

raised some relevant questions of law, which if allowed may preempt other grounds. Grounds 1, 4 and 5 will be jointly dealt with as they are together raising the question of analysis of evidences. The significant submissions by both learned advocates is acknowledged, the legal research and authorities presented before this court is appreciated.

The second ground had a complaint that, the assessor's opinion was not considered, it was Mr. Sanga's suggestion that this court should follow the decision in **Elilumba Eliezel Vs. John Jaja.** Actually, what transpired in **Elilumba**'s case is very different from this one at hand. In that case the proceedings of the tribunal did not reflect the assessor's opinion anywhere, but the chairperson purported to refer to them in his judgment that he concurred to them. The Court of Appeal proceeded to nullify the tribunal's proceedings. That is the position of the law as the law stands, that when section 23 and 24 of **the Land Disputes Courts Act** are not adhered to, the whole proceeding are vitiated. On the other side, Mr. Punge did not dispute the legal position, but he held his stance that the assessor's opinion was given, read to the parties and well considered in the judgement.

Extracting from the tribunal's record I found that the assessor's opinion was given by the assessor himself in writing. On 30/09/2022 the opinion was read to parties and soon thereafter, that same day, judgement was delivered. Advocate Sanga submitting in support of the appeal averred that, the chairman disregarded the sole assessor's opinion without giving any reason. Mr. Punge maintained that, the opinion was considered at page 3 of the judgment. This court also visited the said judgment at page 3 is partly reproduced hereunder: -

"Katika shauri kati ya Hemedi Vs. Mohamedi Mbilu [1984] TLR. 113 mahakama iliamua wadaawa katika shauri wote

hawawezi kushinda...na kwamba mdaawa mwenye ushahidi mzito ndiye anastahili kushinda shauri. Mjumbe wa Baraza, Jane Mngazija alikuwa na maoni kwamba Mleta maombi ni mmiliki wa ardhi ya mgogogro. Mjumbe Nsana aliacha kazi ya ujumbe wakati shauri likiendelea, hivyo kifungu cha 23 (3) cha sheria ya Mahakama za Ardhi kilitumika. Kwa msingi huo, baraza litaangalia mdaawa mwenye ushahidi mzito na ndiye atakayeshinda shauri hili"

The above may be interpretated to mean, in the case of **Hemedi Vs. Mohamedi Mbilu [1984] TLR. 113** the court ruled that both parties cannot win the case but he whose evidence is heavier than the other. That one assessor Jane Mngazija had the opinion that, the appellant was the rightful owner of the disputed land but the tribunal shall rule in favour of the one with strong evidence.

Thereafter, the chairperson proceeded to analyse the evidence and at the end, he ruled that, the appellant's evidence was weak and therefore he dismissed the application contrary to what the assessor so suggested. In that context, the question is whether the chairperson's statement constituted reason for departure from the assessor's opinion? At the onset I confess that there is no typical structure of reasoning that the chairperson must give in order to depart from the assessor's opinion and I know no precedent to that effect. What I am sure is that, reasons must be given.

What the chairperson reasoned is simply that, although the wise assessor opined the appellant should win the case, but the analysis of evidence on record confirms the appellant to have weaker case compared with the respondent's case. Following the laid down precedents in the case of **Hemedi Mbilu**, the respondent was entitled

to win. I would accept the argument of advocate Punge, that what the chairperson reasoned satisfied the spirit of **section 24 of Cap 216.** Although I may confess that the style used by the chairman was not so common, but the reasons for departing from the assessor's opinion was expressed and same were clear as I have pointed earlier. This ground is therefore must fail as I hereby dismiss in total.

The third ground raised a question of whether the trial court properly applied the doctrine of adverse possession, the appellant's counsel referred this court to the case of **The Registered Trustees of Holy Spirit Sisters of Tanzania Vs. January Kamili Shayo and 136 others**, where 8 ingredients of the doctrine of adverse possession were enshrined to be: -

i) That there had been absence of possession by the true owner through abandonment;

ii) That the adverse possessor had been in actual possession of the piece of land;

iii) That the adverse possessor had no color of right to be there other than his entry and occupation;

iv) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of the land or purposes for which he intended to use it;

v) That there was a sufficient animus to dispossess and an animo possidendi;

vi) That the statutory period in this case twelve years had elapsed;

vii) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

viii) That the nature of the property was such that in the light of the foregoing, adverse possession would result.

I have had a studious consideration of that decision and others relevant to the subject matter, including the English cases referred therein, **Moses Vs. Lovegrove [1952] 1 All ER 1279** and that of **Hughes vs. Griffin and another [1969] All ER 460**. I accept the expounded as the main ingredients of the doctrine of adverse possession. The courts in our jurisdiction have followed the same obediently. Some of the decisions by this court on the doctrine are **Catherine Kwarai Vs. Lucas Gidalimo (Land Appeal 2 of 2022) [2022] TZHC 9782, Hamisi Mghenyi Vs. Yusufu Juma, Land Appeal No. 61 of 2008, HCT at Dodoma (Unreported)** and **Samson Mwambene Vs. Edson Mwanyingili [2001] TLR 1.**

It is also agreed that, where a person has secured possession by any other means like purchase or grant by an authorised person, he cannot claim under the doctrine of adverse possession. To tell the rest, I am satisfied Mr. Sanga was correct in interpreting the application of the doctrine of adverse possession and the trial chairperson would be faulted had he based his decision on the doctrine in the circumstance of this case.

Yet Mr. Sanga went astray in one aspect, I suppose he did not read the tribunal's judgment between lines. It is because the respondent never raised any defence of adverse possession and therefore, had no burden of proving such adverse possession. Further the observation made by the chairperson was purely an *obiter dictum* which in all dimensions did not form the basis of his decision. Reading the judgment as a whole, it is very clear that the basis of the decision was the weight of the evidence on ownership and demarcations, but not that of adverse

possession. The phrase *obiter dictum* is a Latin phrase well harnessed with an interpretation by **Black's Law Dictionary 9th edition**, as follows: -

> *"obiter dictum [Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."*

Further reference is made from **William M. Ule et al., Brief Making and the Use of Law Books 304 (3rd ed. 1914) that: -**

> *"Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' that is, incidentally or collaterally,* ***and not directly upon the question before the court;*** *or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion. In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably."*

This court is of the considered opinion that *obiter dictum* even when made per in curium or with any error may not constitute a ground of appeal unless it has public significance to cure the misapprehension of the law and in most cases, it cannot change the verdict. There are many precedents by this court and parties may wish to refer to the cases of **Godwin Lyaki and Another Vs. Ardhi University, Misc. Civil Application No. 242 Of 2020**, **Donald Patrick Vs. Mtendaji wa Kijiji Kiriba, Civil Appeal No. 1 of 2020** and **Arusha Art Limited Vs. Gem Rock Venture Co. Ltd (PC Civil Appeal 25 of 2022)**

[2023] TZHC 15688 where under the like circumstance, in the latter case, this court sitting at Arusha ruled: -

> *"The cited part of the decision by the appellant is obiter dictum with no legal effect as it does not form part of the decision, thus cannot be appealed against. So, this court finds no merit on this ground too"*

My verdict would be different if the reasoning so complained of was a ratio decidendi in the case before the tribunal. Apart from that, it was correct statement of the law by the chairperson when he ruled that it is unfair to disturb the long occupation of the land as decided by this court in the case of **Hadija Fundi Malite Vs. Ahmed Maneno Malite (Misc. Land Appeal 124 of 2016) [2018] TZHCLandD 104.**

In this case the respondent has been in such occupation for more than 44 years and the said wall was built some thirty-one (31) years ago and kept servicing the same for years. This fact and the general rule should not be confused with the doctrine of adverse possession which has been discussed. For this reason, I will as well dismiss this ground.

Regarding the first, fourth and fifth ground, it is clear that the tribunal ruled that, PW1 and PW2 evidence was both hearsay and contradictory altogether and thus dismissed the claim declaring the disputed strip of land as the respondent's property.

The controlling issue is whether the tribunal properly evaluated the evidence before it. As a matter of settled principle, this court being the first appellate court, is duty bound to reevaluate the evidence laid before the tribunal. This is a trite law followed in our jurisdiction through a number of cases, including in the case of **Registered Trustees of Joy in the Harvest Vs. Hamza K. Sungura, Civil Appeal 149 of 2017, CAT at Tabora** where the court observed: -

"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."

See also **Tanzania Sewing Machine Co. Ltd Vs. Njake Enterprises Ltd (Civil Appeal 15 of 2016, CAT at Arusha** and **Attorney General & 3 Others Vs. Nobert Yamsebo [2013] T.L.R. 501** among many others.

Relevant also is the law on burden and standard of proof in civil cases. On this I hold no doubt that both counsels are conversant with. Mr. Sanga referred to the case of **Shida Mohamedi Nondole** by this court where my brethren Judge Ismail referred to the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha, CAT Civil Appeal No. 45 of 2017** and extensively discussed the burden and standard of proof in civil cases. The law remains as stated in those precedents, also under section 3 (2)(b) and 110 of **The Evidence Act Cap 6 RE 2022.** This court in determining the question as to whether the tribunal properly analyzed the evidence, it will be guided by the above provisions and precedents.

In a bid to make this court fault the trial tribunal's decision in respect of PW1 and PW2's evidence, Mr. Sanga invited this court to **Mohamed Nondole's** case, which I had the grace to digest about what amounts to hearsay evidence, it was *inter alia* held: -

"Evidence of a statement made to a witness by person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is obtained in the statement. It is not hearsay and is admissible when it is proposed to

establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made"

This court does not doubt the above statement of the law. It has been the position ever since. For the evidence to be hearsay it usually depends on the fact sought to be established. Even section 62 of **the Evidence Act, Cap 6 RE 2022** provides the same as above. It reads: -

Section 62. - (1) *"Oral evidence must, in all cases whatever, be direct; that is to say -*

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner"

In the case before the tribunal, the appellant had a duty to prove that the sheds were built in his land. But the appellant (PW1) stated that she heard from her mother that sheds were built. Also, PW2 as to whether or not the orange tree was the boundary, he testified that, he did not see the tree being planted (as a boundary), but he was told by the land lord that when tilling the land, he should not cross such tree. I know that the landlord would give him such conditions even for some other reasons.

On whether the respondent's evidence was contradictory, I found some; DW3's mentioned the wall among the improvements made on the land, but stated that the boundary was a canal and explained that it is the line where the appellant was ending is tilling her land. This was inconsistent to that of DW1 and DW2 who stated clearly that the boundary was the wall (fence).

Following the rules discussed above on the first appellate court's duty and the duty of the court in resolving the contradictions, I have observed that the contradiction was not serious. DW2 and DW3 are sons of DW1, any failure by DW3 to describe the boundary would not water down his testimony in other facts nor would it discredit the testimony of DW1 and DW2. I am of the opinion that taking the evidence of DW1 and DW2 alone a clear case of the defence was established.

Again, as it will be observed in the course, it was not the respondent's duty to prove her case until when the appellant established hers and managed to shift the burden to him. But in this case, no burden was shifted to the respondent. In this aspect I accept the trial chairperson's reasoning on the burden of proof and that under section 119 of **the Evidence Act, Cap 6** it was the appellant's duty to prove that the respondent was not the owner of the land in which he built the said sheds. That duty was even more serious to her, considering that the respondent built the said sheds within the fence and the said fence was built since 1992.

Further, the appellant stated that, she and her husband shifted to Dar es Salaam letting her mother live in their house. So, it was her mother who told her of the respondent's invasion to their land by building the pig sheds, the year was not mentioned in the pleadings nor in the testimonies and she did not call her mother to testify. The

appellant did not know the size of these two plots of land, her persistence on the orange tree being a boundary does not make sense, as the respondent who planted the said tree in year 2002 was after many years of existence of wall fence and full occupation of the suit land by the respondent. In any event, the tree was not meant to demarcate those two plots of land.

The respondent stated that, the said sheds were built within the fence which fence was built in year 1992 and there was no dispute between them. It is after the death of the appellant's husband that the complaint was initiated. The appellant testified before the tribunal that she sued the respondent before the Ward tribunal and won, but she did not present any document before the trial tribunal.

I have observed that the appellant who had the burden of proof, did not discharge the same. This court has deeply considered the allegations that the appellant won the dispute at the Ward tribunal, the question is why she opted to file a new case instead of executing the judgment she already had in her favour if at all she won at the Ward Tribunal? If the respondent had actually invaded the appellant's land, why did the deceased not protest against it since 1992 when the fence wall was built for the first time? If the appellant was aware of the invasion since 1992, why she failed to take a step against the invader? A sketch from *visiting locus in quo,* show that the said pig sheds are inside the fence, it is unknown why the appellant did not sue for the fence wall, but sues for the pig sheds which were built inside the fence years later? All these questions were to be cleared by the appellant by her plaint and testimonies, but she did not bother to establish and prove them.

As such, no doubt, the claim was not established and proved to the required standard of balance of probability. It is unfortunate for the appellant's counsel attempts to criticise the respondent's defence, while the appellant's burden of proof was not even performed.

It is not the first time this court insists that the defendant bears no burden of proof until when the plaintiff has established his case. See for instance the case of **Mohamedi Kakanga Vs. Selemani Mvogo (Land Appeal 112 of 2022) [2023] TZHC 16244**, similar to the holding, is **Shida Mohamedi Nondole's** case (Supra) where the court observed: -

> *"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"*

I would reiterate and apply the above in this case, that the appellant had the duty to establish her claim to the standard required; balance of probability; - *first* - that the disputed land is her property and *second* - that the respondent has invaded by building the pig sheds therein as she claimed in the plaint (application). However, I am satisfied the plaintiff's evidence did not reach the standard on the two points above. Even the minor contradiction between DW3 and other defence witnesses would not count. Otherwise, the respondent's evidence was strong, correctly as the chairperson found in his judgment. The allegations in ground one, four and five which were addressed jointly had no valid point, they are dismissed altogether. I accept the chairperson's analysis of the evidence and this court would have arrived to the same conclusion.

Having addressed all the grounds as above shown, I find the whole appeal is devoid of merits and I proceed to dismiss it entirely with costs.

Order accordingly.

Dated at Morogoro this **15th day of May, 2023.**

P. J. NGWEMBE

JUDGE

15/05/2023

Court: Judgement delivered at Morogoro in Chambers this 15th day of May, 2023 in the presence of the Appellant, Mr. Fred Sanga, Learned advocate for the appellant, in the presence of Respondent.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

15/05/2023

Right to appeal to the Court of Appeal explained.

THE HIGH COURT TANZANIA MOROGORO

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

15/05/2023