IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODMA

MISCELENEOUS LAND APPEAL NO. 43 OF 2022

(C/F Land Case Application No. 15 of 2021 before the District Land and Housing Tribunal for Iramba at Kiomboi)

RASHIDI MUNA MWANGI .....APPELLANT

VERSUS

HAJI MUNA MWANGI.....1ST RESPONDENT
HASSAN RAMADHAN.....2ND RESPONDENT
MWAJABU OMARI .....3RD RESPONDENT

JUDGMENT

Last order 7/8/2023
Judgment: 11/8/2023

MASABO, J.:-

The appellant was the applicant in Land Application No. 15 of 2021 before the District Land and Housing Tribunal for Iramba at Kiomboi (the trial tribunal). He is aggrieved that the outcome of this matter whose hearing proceeded *ex parte* the respondents was in his disfavor and he was on top of that condemned to pay costs. His appeal is based on the following three grounds of appeal:

1. The trial tribunal's chairman erred in law and facts to dismiss the appellant's case unreasonably provided that he proved his case on the balance of probability while the respondents did not enter appearance to defend.
2. That, the trial chairman erred in law and fact to ignore the appellant's witness testimony by putting the facts that the witness never testified.

3. That, the trial tribunal's chairman erred in law and fact to order costs for the respondents whom willfully and without any justification never entered appearance during the trial.

After the appeal being lodged, the respondent was all served but they never entered appearance save for the 1st respondent. Consequently, the appellant prayed and was granted leave to proceed with the hearing *ex parte* the 2nd and 3rd respondents on 7/8/2023. On that date, the appellant and the first respondent appeared in person unrepresented.

Invited to address the court on his grounds of appeal, the appellant submitted that he is discontented because the hearing proceeded *ex parte* the respondents after they all willfully defaulted appearance. He was the only party who entered appearance on the date of hearing, testified in support of his claims and had witnesses who testified in his favour but to his dismay, the trial tribunal held in favour of persons who defaulted appearance.

On his part, the respondent submitted that he did not willfully default appearance and as the record will show, he was entering appearance only that on the date of hearing he was indisposed. Therefore, the tribunal made no error in granting him costs as he was entering appearance and even filed his reply all of which involved costs which had to be compensated. He also argued that, even his co respondents were entering appearance before the tribunal. In a short rejoinder, the appellant submitted that he objects payment of costs as the respondents had defaulted appearance.

I have considered the submissions alongside the tribunal's record whose summary is as follows. The appellant instituted an application before the trial tribunal on 13th July 2021 asserting that he owns a suit land measured four (4) acres and situated at Milade village, Tumuli ward, Iramba District in Singida Region which he acquired by clearing a virgin land in 1980. That, the 1st and the 2nd respondent trespassed into the said land in 2021 and sold the same to the 3rd respondent. The application was contested by the 1st and the 2nd respondent through their respective written statement of defence. The 1st respondent who is the appellant's sibling admitted to have sold the suit land to the 3rd respondent but claimed that the suit land was his and for that reason he had the right to dispose it of to the 3rd respondent. On his part, the 2nd respondent refuted the claims and averred that, he did not sale the suit land. His role in the sale was that of a mere witness to the sale between the 1st respondent and the 3rd respondent who did not file any reply although the record shows that all the respondents were entering appearance but on the date of the hearing, 11/5/2022, they were all absent hence the ex parte hearing.

As per the record, during the *ex parte* hearing, the appellant testified as PW1 and his witness, Hamis Seleman, testified as PW2. In his testimony, PW1 told the Tribunal that he is the rightful owner of the suit land comprising of four (4) acres bordered to the North by Ibrahim Njowu, to the south by Abdul Juma, to the East by Hamis Athuman and to the West by Ibrahim Njowu. He

told the tribunal that he acquired the suit land in 1980 after clearing a bush and has since this time used the suit land for crop cultivation and for grazing but in 2020, he was informed that the 1st and 2nd respondent has sold it to the 3rd respondent. His sole witness, PW2, testified that he knows that the land belongs to the appellant as he was hired to clear it while it was virgin. Asked for clarification by the assessors and the chairman, he responded that he does not remember the year he cleared the suit land. As to its size and location, he testified that it was about 3 acres and it bordered Hassan Ramadhan to the North, Abdul Juma to the South, Muna Mangi to the East and Ibrahim Njowu to the West. Later on, he stated that he was paid Tshs 16,000/= comprising a note of Tshs 10,000/= and another note of Tshs 5,000/=. He recalled that, that was about 9 years ago. Having assessed this evidence, the trial tribunal held that the appellant had not proved ownership of the suit land after it doubted the testimony of PW2 which appears to contradict PW1's evidence.

With this background, I will now turn to the grounds of appeal starting with the 2nd ground of appeal. In this ground which was not amplified during the hearing, the appellant has lamented that the chairman erred in law and fact to ignore the appellant's witness testimony by putting facts that witness never testified. It would appear to me that the appellant is raising two issues, the first being that the testimony of his witness was ignored and the second is that the tribunal record is incorrect as it does not correctly depict the testimony of his witness.

Much as no details were provided in clarification, going through the judgment and the proceedings, I do not see merit in his first lamentation as his testimony and that of PW2 were all assessed and considered as demonstrated in page 2 and 3 of the judgment. As for the second point, it is a cardinal rule that a court record should not be easily impeached as it is always presumed to accurately represent what actually transpired in court (see **Halfan Sudi vs. Abieza Chichili** [1998] T.L.R 527, **Shabiri F. A Jessa vs. Rajku mar Deogra**, Civil Reference No. 12 of 1994 (unreported) and **Alex Ndendya vs. R** [2020] 2 T.L.R 79. A litigant seeking to impeach court or tribunal's record must substantiate his assertion. It is not sufficient to just lament that the record is incorrect. As no facts or explanation was rendered by the appellant to substantiate his lamentation as to the incorrectness of the tribunal's record, there is no basis for this court to question let alone to fault the trial tribunal's record. Accordingly, the 2nd ground of appeal is found with no merit and fails in entirety.

On the first ground of appeal to which I now turn, the appellant has asserted that he ably proved his case but the trial tribunal decided in favour of the respondents irrespective of the fact that they all did not show up to defend the case. It is a trite law that the burden of proof rests on the person who alleges existence of certain facts (section 110 and 111 of the Evidence Act, Cap. 6 R.E 2019). Where a matter is of civil nature such as the present one, the standard of proof is on the balance/preponderance of probabilities which simply means that the court will accept evidence which is more credible and probable (see Al-**Karim Shamshudin Habib v Equity Bank Tanzania**

Limited & Viovena Company Limited Commercial Case No. 60 of 2016) and **Antony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014, [2015] TZCA 556 CAT (TANZLII). This cardinal rule extends to cases heard *ex parte* as it does to cases heard inter parties. A plaintiff or applicant in a matter heard *ex parte* just like his counterpart in an inter parties hearing, is not discharged from the burden to prove her case. Therefore, in the present case, the respondents' default appearance and the *ex parte* order against them did not discharge the appellant from his burden of proof. He was still obliged to prove that he was the lawful owner of the land allegedly trespassed into by the respondent. Whether or not he discharged this duty, is the immediate question for determination by this court.

The trial tribunal's conclusion that the appellant did not prove his ownership of the suit land was based on the observation that the testimony of PW2 who was the sole witness in support of the appellant's case was doubtful on two main fronts. First, his testimony that he was paid in two notes of Tshs 10,000/= and Tshs 5,000/=, respectively, was doubtful as these two notes or denomination were not existent in 1980, the year when the appellant allegedly cleared the virgin land, and presumably hired PW2 to clear it and paid him the above sum in consideration. Second, the land cleared by PW2 was different in size with the suit land as this witness testified that the land he cleared was about three (3) acres whereas the suit land is four (4) acres.

In my scrutiny of the record, I have observed that in addition to the doubts ironed out by the trial tribunal to which I subscribe, there are more doubts and inconsistencies on record. The first of such inconsistence is on the description of the boundaries and size of the suit land. Whereas PW1 deponed that the suit land comprises of four (4) acres and is boarded by Ibrahim Njowu to the North, Abdul Juma to the South, Hamis Athuman to the East and Ibrahim Njowu to the West, PW2 testified that the virgin land he cleared was about three (3) acres and it bordered Hassan Ramadhan to the North, Abdul Juma to the South, Muna Mangi to the East and Ibrahim Njowu to the West. The discrepancies in the description raised a serious doubt not only on the actual size but the location of the suit land such that it was uncertain whether the suit land described by PW1 was similar to the one described by PW2. Needless to emphasize, in matters involving unsurveyed land, ascertainment of the description of the suit land and its size is very crucial else the tribunal would risk making orders in respect of a land other than the suit land. As held by this court in **Daniel Dagala Kanuda (As Administrator of the estate of the Late Mbalu Kushhaha Buluda) vs. Masaka Ibeho and others,** Land Appeal No. 26 of 2015, HC at Dar es Salaam (unreported) such description is very crucial for purposes of identifying the land from other pieces of land neighbouring it.

Sequel to this, the year on which the appellant acquired the suit land also remained unproved because, whereas PW1 asserted that he acquired the suit land by clearing it while it was virgin in 1980, PW2 suggested otherwise. At first, he told the tribunal that he does not recall the exact year when the

appellant hired him to clear the virgin land but later on, he recalled that it was about 9 years ago. As this testimony was recorded on 11/5/2022, it follows that he cleared the virgin land in the year 2013 or thereabout, which is approximately 33 years from 1980, the year when the appellant allegedly acquired the suit land. Certainly, these must have been two different parcels of land.

Before winding up on this point, let me just add that, it is very crucial for the claimant in an ex-pate hearing to discharge his burden of proof as to assists the court to make a just decision. The reason for this is not farfetched. As stated by this court while underscoring the importance of *ex parte* proof of suit in **Mohamed Juma vs Halima Athumani** Civil Appeal No. 306/04 HC at Dar es Salaam (Kalegeya J as he then was):

> "Court decisions should be based on established facts by evidence. It is not uncommon, during and after trial, for courts to discover that what was put up in a pleading was excessively exaggerated or never was in existence, and a party may end up abandoning it altogether or calling no evidence in support thereof. In drawing up a pleading, a party may have been driven by ill-- feelings; wrong and schemed advice, ignorance, and even vendetta. ...

With this in mind, I join hands with the trial tribunal that the material discrepancies and doubts above should be resolved in favour of the respondents. Accordingly, I see no reason to fault the trial chairman's finding that the appellant did not prove his case to the required standards. This ground of appeal fails for want of merit.

Lastly, with regard to costs which is the subject of the 3rd ground of appeal, it should be understood that, much as the awarding of costs is in the discretion of the court/tribunal and the discretion being judicial need be exercised judiciously, invariably, the costs follow the event. There is a plenty of authorities to this. In the case of **Mohamed Salmini vs. Jumanne Omary Mapesa**, Civil Application No. 04 of 2014 CAT at Dodoma (unreported), it was held that:

> As a general rule, costs are awarded at the discretion of the court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. (Emphasis added).

In the present case, the appellant has argued that the costs should not have been granted as the hearing proceeded *ex parte*. Much as it is true that the hearing proceeded *ex parte*, this did not waive the appellant's obligation to pay costs considering that the record speaks loudly that, the respondents were appearing in tribunal and on top of that, the first and the second respondent filed written statement of defence in the tribunal. That alone suffices to prove that the respondents incurred costs and deserves compensation for such costs as they would not have incurred such costs had the appellant not instituted the application. As stated in **The Registered Trustees of Moravian Church in Southern Tanzania Vs Tanzania Zambia Railways Authority and 3 Others**, (Misc. Land Application 15 of 2021) [2021] TZHC 3602 (18 May 2021) (Tanzilii);

"Generally, for all what the Respondents' Counsels have done, they deserve to be awarded costs. Even if the Applicant had not intended this to happen as alleged by her Counsel, the fact that she is one who instituted the application there is no way she can waive the costs liability."

As the appellant had not demonstrated why he should not be exempted from paying costs, the order for costs was in good order save for the 3rd respondent who did not file his defence. The complaint in the third is partially successful to this extent.

In the foregoing, this appeal partially succeeds to the extent that costs in respect of the 3rd respondent was wrongly awarded. The rest of the complaints are dismissed. The orders of the trial tribunal are upheld save for the order for payment of costs to the 3rd respondent which is quashed and set aside. For purposes of clarity, the trial tribunal's dismissal order and the order for costs in respect of the 1st and 2nd respondents remain intact. The 1st respondent shall be compensated for his costs in respect of this appeal.

DATED and **DELIVERED** at Dodoma this 11th day of August 2023

J. L. MASABO

JUDGE