

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 10 OF 2023

(C/F Application No. 57 of 2018 District Land and Housing Tribunal for Moshi at Moshi)

**FATUMA JUMANNE MVUNGI (As Administrator of the
Estate of the late JUMANNE ALLY MVUNGI) APPELLANT**

VERSUS

JUMANNE HAMAD MTUNDURU RESPONDENT

JUDGEMENT

Date of Last Order: 17.08.2023

Date of Judgment: 18.09.2023

MONGELLA, J.

The appellant herein filed Application No. 57 of 2018 before the District Land and Housing Tribunal for Moshi at Moshi (the Tribunal, hereinafter) against the respondent over a house with two business frames (the suit property, hereinafter). The suit property is in a plot measuring 91 paces on North, 87 paces on the South, 64 paces on the East and 63 paces on the West. It is situated at Kahe Sokoni, within Kahe Oria Ward, in Moshi Rural District. She sought for the Tribunal to: declare the property as belonging to the late Jumanne Ally Mvungi; declare the respondent a trespasser to suit property; restrain the respondent and/or his agents from further trespassing

the suit property; grant her costs for the application and any relief it may deem fit and just.

The Tribunal found in favour of the respondent and declared him the owner of the suit property. Aggrieved, the appellant has preferred this appeal on the following grounds:

- 1. That, the trial Tribunal erred in law and facts in holding that the suit property belongs to the respondent.*
- 2. That, the trial Tribunal erred in law and fact in reaching its decision by declaring the respondent the lawful owner of the suit property regardless of the contradicting evidence given by respondent's witnesses during trial.*
- 3. That, the trial Tribunal erred in law and facts by not considering the strong evidence given by the appellant's witnesses in particular SM2 who was the wife of the late Jumanne Ally Mvungi.*

The appellant appeared in person while the respondent engaged legal services of Kipoko E. G. Advocates. In that respect, for interest of justice and as agreed by both parties, the application was heard by written submissions. It was Ms. Lilian Filemoni Mushi, learned advocate, who drafted the reply submission for the respondent.

Submitting on the 1st ground, the appellant faulted the trial Tribunal for declaring the suit property as belonging to the respondent. She had that stance on the argument that her witnesses, particularly PW1 (SM1), testified that the suit land belonged to the Late Jumanne Ally Mvungi since 1957 and that he constructed two houses on the plot, that is, a house made from mud and the suit property. She contended that the suit property was given to the respondent for business purposes only and he was to leave after acquiring his own land. She added that PW1's testimony was corroborated by PW2 (SM2), the wife of the late Jumanne Ally, who told the Tribunal that the respondent was only given the suit land to conduct his business and not to occupy the same.

She further challenged the respondent's evidence on the argument that no documentary evidence was produced by the respondent to show that the late Jumanne Ally Mvungi allocated the suit land to him. That there was only oral evidence adduced which was also contradictory. She had the firm view that the use of the suit land by the respondent while the late Jumanne Ally Mvungi was alive does not make him a lawful owner of the suit property.

Addressing the 2nd ground, the appellant averred that the respondent's evidence was contradictory. Explaining the contradictions, she contended that the respondent testified that the suit land measures 8x4 paces while in cross examination SU2 stated that it measures 8x11 paces indicating that SU2 was not aware of the size of the suit land he was testifying on. She

considered the contradiction as raising doubts on the respondent's alleged ownership of the suit property.

On the 3rd ground, the appellant maintained similar averment she made on the 1st ground. She said that the trial Chairman did not consider the evidence of his witnesses in particular, SM2 who was the wife of the late Jumanne Ally Mvungi. She had the view that since SM2 lived with the late Jumanne Ally Mvungi, she was more informed pertaining the deceased's properties. That, SM2 testified that the suit land belonged to the appellant who constructed the suit property and a mud house and the respondent was only allocated the same to stay and he was to leave afterwards. She reiterated her argument that the respondent's stay at the suit land while the late Jumanne Ally Mvungi was still alive did not make him the owner of the suit land.

In conclusion, she averred that the trial Tribunal was wrong in declaring the respondent the lawful owner of the suit property. She therefore prayed for this court to allow her appeal, quash the decision of the trial Tribunal and declare the late Jumanne Ally Mvungi the lawful owner of the suit land.

The respondent opposed the appeal. In reply to the 1st ground, Ms. Mushi had the argument that the Tribunal justly reached its decision by finding that the suit land belongs to the respondent whereby it was given to him in 2002 by the appellant's father, who was also the respondent's maternal grandfather. That, the land was given to

the respondent after he was deserted by the appellant, who is his mother. That, he built the suit property for business and such evidence was supported by SU2, who was the local leader at the time the late Jumanne Ally Mvungi gave the disputed land to the respondent and SU3, the appellants brother who witnessed the hand over.

He contended that the standard of proof in civil cases is on balance of probabilities thereby citing the case of **Daniel Apael Urio vs. Exim (T) Bank** (Civil Appeal No. 185 of 2019) [2020] TZCA 163 and **Hemedi Said vs. Mohamed Mbilu** [1984] T.L.R 113. He contended that his evidence before the trial Tribunal sufficed to prove on balance of probabilities that the suit property belongs to him.

With regard to the 2nd ground, he submitted that the contradiction on his evidence did not affect the genuineness or validity of his evidence as the same was resolved during re-examination.

As to the 3rd ground, the respondent maintained that the allegation that SM2 was in better position to know various information on the deceased's estate, hence more reliable was unfounded and frivolous. He finalized his submissions by praying that the court dismisses the appeal with costs and uphold the decision of the trial Tribunal.

Upon observing the grounds of appeal and submissions thereto, I am of the view that the appellant appears to be challenging the decision of the trial Tribunal on two issues, being: **one**, that the trial Tribunal relied on contradictory evidence of the respondent. This is drawn from the 2nd ground of appeal. **Two**, that the trial Tribunal did not consider the evidence adduced by her witness. This is drawn from the 3rd ground. The 1st ground of appeal is rather a general issue accommodating the two grounds of appeal and thus dissipates within the two issues.

Given the nature of the arguments raised by the appellant and this being the first appellate court, I shall herein re-evaluate and re-consider the evidence of the parties before the tribunal and decide accordingly.

The appellant led her case as SM1. She called 3 witnesses: one, SM2, Mwamini Mfaume; SM3, Ally Mfaume Mvungi and; SM4, Juma Idd Msangi. In her testimony, the appellant stated that she is the daughter and administrator of the estate of the late Jumanne Ally Mvungi, an allegation she supported with her letters of administration, admitted as “exhibit P1.” She averred that the late Jumanne Ally Mvungi acquired the suit land in 1957 and used the same to farm cotton. Sometime later, he built a stalk house and later a four roomed mud house. In 2005, he built two roomed block house.

Regarding the respondent's presence in the suit property, she contended that sometime later, the respondent was allowed by the late Jumanne Ally Mvungi to do his business in the area until when he got his own place of business. However, on 15.06.2015, the respondent sold the shop to some other person for a period of 5 years and rented the other room which was used as a mill. That, she discovered all these facts upon following up on the estate of the late Jumanne Ally Mvungi. She added that the respondent was called by the family, but the problem could not be resolved leading to the respondent filing a claim before the Ward Tribunal whereby they were told to file the matter before the District Land and Housing Tribunal.

SM2, the appellant's mother and wife of the late Jumanne Ally Mvungi, testified that the suit land belonged to her and her husband. That, in 1957, a mud house was built in the suit land and prior to 2005, the property was used for cotton farming. That, in 2005, her husband worked at railways and went with the appellant to Dar es Salaam to take money. That, afterwards he built a two roomed block house. That the respondent asked the Late Jumanne Ally Mvungi to use the house and they agreed that he shall leave after getting his own place. However, she said, the respondent has refused to leave the area and instead has rented out the place and is collecting the rent therein without giving anything to her.

On cross examination, she admitted that the respondent used the suit land for a long time while the late Jumanne Ally Mvungi was

alive and he never sued him. She also stated that she was unaware of when the respondent trespassed to the suit land and that the respondent was only sued after the death of the late Jumanne Ally Mvungi.

SM3, a neighbour of the late Jumanne Ally Mvungi at the South and West borders of the suit land, testified to have known the suit land since 1957. He stated that the late Jumanne Ally Mvungi worked at Railways, purchased the land, developed it by building the suit property and resided therein, whereby initially, there was a hut. On cross examination, he admitted to being absent when the house was constructed. He also stated that he was unaware of the handover between the late Jumanne Ally Mvungi and the respondent.

SM4, a neighbour of the late Jumanne Ally at the North, testified to have known him since 1984 after moving to Kahe. He said that the late Jumaane Ally Mvungi was also a witness to the purchase of his land and he lived in harmony with him till his demise. He added that the late Jumanne Ally Mvungi lived elsewhere, but rented out the suit property.

The respondent led his case as SU1 and called two witnesses: one, SU2, Leah Wilson Mosha and SU3, Abdallah Jumanne Mvungi. The respondent testified that he had been in possession of the suit land since 2002 when the same was given to him by his grandfather, the late Jumanne Ally Mvungi. He said that the hand over of the suit

property to him was witnessed by witnesses including his uncle, Abdallah Jumanne Mvungi and one Leah Masha, the Chairman of the hamlet. He said that, he built the suit property in 2002 and the same still survives and is being used by him. He mentioned the builder he engaged stating that it was one named Kamanda. In cross examination, the respondent admitted that the mud house was built by the late Jumanne Ally Mvungi. Upon being questioned by the Tribunal, he mentioned the area on which the suit property is said to measure 8x4 paces.

SU2, testified that she was the Chairman of Madukani, Sokoni hamlet within Oria Village and Kahe Ward from 2000 to 2020. That, during her term, the respondent was given an area to build a shop and store by the late Jumanne Ally Mvungi who was accompanied with his two sons. That the respondent built a two-roomed house therein and she witnessed him building the same. On cross examination, she mentioned the suit land to measure 8x11 paces. She also admitted that there was a mud house built by the late Jumanne Mvungi, but he did not reside in the area. She said that there was also no document signifying the hand over. When questioned by one of the assessors, she stated that the late Jumanne Ally Mvungi collected rent over the mud house and not the block house.

SU3, the respondent's uncle, testified that the suit property which is a two-room house, belongs to the respondent who was handed the land to build upon in 2002 by the late Jumanne Ally Mvungi. The

late Jumanne Ally Mvungi is his father. He added that, the respondent has been using the same since then. On cross examination, he asserted that the land measures 8x4 paces. He admitted the mud house being built by the late Jumanne Ally Mvungi. He also admitted that he was one of the witnesses to the handover of the suit property to the respondent saying he witnessed together with the late Ally Ramadhani Mvungi.

After analyzing the evidence on record, I now move to examine the same in relation to the issues to be determined in this appeal. Regarding the first issue in which the appellant faults the Tribunal for relying on contradictory evidence by the respondent; the appellant has referred this court to the evidence of the respondent and SU2 pertaining to the size of the suit land. As evident from the summary of the evidence of the defense, indeed the respondent stated that the suit land measures 8x4 paces while SU2 stated it measures 8x11 paces. This was indeed a contradiction.

Where there exists a contradiction in the witnesses' evidence, it becomes the duty of the court to weigh whether the contradiction is material. That is, whether it goes to the root of the case or whether the same is minor/normal such that it can be ignored. This position has been well explained in the case of **Dickson Elia Nsamba Shapwata and Another vs. Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17 TANZLII, in which the Court of Appeal cited a passage from Sarkar, *The Law of Evidence* 16th edition, 2007 where it was stated:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case, material discrepancies don't."

Upon considering the evidence adduced by all parties, I am confident that the contradiction was a rather minor one. This is because SU2 being a mere witness to the handover which took place more than 10 years ago could have easily forgot the size of the area given to the respondent. Further, there was more reliable evidence from SU3, a family member who affirmed the area to be 8x4 paces thus corroborating the evidence of the respondent. This shows that the contradiction was very minor and the same had been resolved as the respondent contended in his submissions.

The 2nd issue is on whether the trial Tribunal never considered the evidence of the appellant's witnesses. The appellant averred that the testimony of her witnesses, especially SM2, who is the wife of the late Jumanne Ally Mvungi, was not considered.

I have observed the judgment of the trial Tribunal and on the face of it, the trial Chairman appears to have summarized the evidence

of all witnesses and proceeded to answer the issues. He did not probe into the evidence of the appellant's witnesses, but generally faulted the same by referring to the evidence of the defense alone. That was erroneous on his part. Apart from analyzing the evidence of both sides, he ought to have examined and considered the evidence of both parties. this was well emphasized in **Mkaima Mabagala vs. Republic** (Criminal Appeal No. 267 of 2006) [2011] TZCA 181 TANZLII:

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. **This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent.** In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at."*

Though the above holding refers to defence evidence, I am of the view that the same principle is applicable in dealing with the evidence of both sides of the case. In examining the appellant's evidence, I find it clear from both parties that: **one**, the appellant is the mother of the respondent and daughter of the late Jumanne Ally Mvungi; **two**, that the late Jumanne Ally Mvungi obtained the suit land in 1957; **three**, that the late Jumanne Ally Mvungi did not reside in the suit land; **four**, that, Jumanne Ally Mvungi built a mud

house in the suit land before 2002; **five**, that the respondent was raised by Jumanne Ally Mvungi, his grandfather; **six**, that Jumanne Ally Mvungi gave the respondent access to the suit land for business purposes; **seven**, that the respondent used the suit land for business while the late Jumanne Ally Mvungi was alive; and **eight**, that, the late Jumanne Ally Mvungi never collected rent from the respondent.

The evidence of the appellant and SM2 was to the effect that the late Jumanne Ally Mvungi built both the mud house sometime in or after 1957 and the block house sometime in 2005. They also contended that the late Jumanne Ally Mvungi rented the block house to the respondent for business with an agreement that he would leave when he found his own place of business. Further, that, the same was used for a shop and in 2015, the respondent sold the shop or rather rented the shop space and the other place as a mill and collected rent therefrom. The appellant and SM2 had no further proof on the alleged agreement between the late Jumanne Ally Mvungi and the respondent.

The evidence of SM3 and SM4 was rather on the fact that the late Jumanne Ally Mvungi purchased the suit land and the same belonged to him until his demise. However, the two as well had no idea as to the terms behind the respondent's use of the suit land for business. I say so because, SM3 stated that the late Jumanne Ally Mvungi developed the area by also erecting the two-roomed block house but he was not only absent when the house was being

built, but was also unaware of how the respondent came to use the suit land. Meanwhile, SM4 admitted that the respondent had been using the suit land, but he also was unaware of the agreement between the respondent and the late Jumanne Ally Mvungi.

On the other hand, defense witnesses SU2 and SU3, proved to have been present when the respondent was handed a piece of the suit land in which he built the two-roomed house he used for business. The witnesses were not only present in the hand over, but also witnessed the construction. They also admitted the mud house to have been built by the late Jumanne Ally Mvungi.

What I gathered from the evidence of both parties is that; in 2002, the late Jumanne Ally Mvungi gave part of his piece of land to the respondent whom he had raised, in the presence of SU2, a hamlet Chairman, SU3 his son and one, Ally Ramadhani Mvungi, his other son. The respondent built a two-roomed block house therein which he used for business since then. The respondent never paid rent to the late Jumanne Ally Mvungi nor was he ever sued for any claims pertaining his occupation. This fact was as well admitted by SM2. The evidence further shows that when all these transpired, the appellant was absent.

As stated earlier, the standard of proof in civil cases is on balance of probabilities whereby the court weighs the evidence of the parties and the one with heavier evidence is considered to have

won his claim or defense. See, **Hemedi Said vs. Mohamed Mbilu** (supra); **Godfrey Sayi vs. Anna Siame Legal Representative of the Late Mary Mndolwa** (Civil Application 190 of 2017) [2021] TZCA 361 TANZLII; **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama** (Civil Appeal No. 305 of 2020) [2021] TZCA 699; **Peter Tabu Massawe T/A Kagera Pharmacy vs. Pharmacy Council & Another** (Civil Case 205 of 2018) [2023] TZCA 17391 and; **Malaki Mmari & Others vs. Moshi Municipal Council** (Civil Appeal No.200 of 2020) [2023] TZCA 17383. In **Malaki Mmari & Others vs Moshi Municipal Council** (supra) the Court held:

“Ordinarily, in civil proceedings a party who alleges anything in his favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved.”

The law as well prohibits shifting of the burden of proof to the adverse party until when the claiming party has discharged his/her duty in proving his/her assertions. In that respect, the appellant herein, as the claimant, shouldered the burden of proving her allegations before the same could be shifted to the respondent. The Court of Appeal in the case of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura** (Civil Appeal No. 149 of 2017) [2021] TZCA 139 TANZLII, while revisiting its previous decision in **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) held:

“It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies

discharges his, and that the burden of proof is not diluted on account of weaknesses of the opposite party's case."

In explaining the point further, the Court quoted in approval an extract from the **book by M.C. Sarkar, S.C. Sarkar, and P.C. Sarkar** titled "**Sarkar's Law of Evidence**" **18th Edition, published by Nexix Lexis, at page 1896**, whereby it was stated:

"... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who derives 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 ..."

The appellant and his witnesses, in my considered view, failed to substantiate their assertion that the late Jumanne Ally Mvungi built the other buildings apart from the mud house and that the same were given to the respondent for usufructuary right on the agreement to be returned upon him getting his own place. I am however, of the considered view that the evidence of the respondent before the trial Tribunal carried more weight than that of the appellant as he proved through eye witnesses to have been given the land in dispute and to have built the block houses therein. In the premises, I find nothing to fault the Tribunal decision and I uphold it accordingly. The appeal is found to lack merit and is

dismissed. Considering the relation between the parties, that is, of mother and son, and the chaos that shall arise, I make no orders as to costs.

Dated and delivered at Moshi on this 18th day of September 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA