IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 4 OF 2023

(C/F Land Application No. 65 of 2018 District Land and Housing Tribunal of Karatu at Karatu)

ELIKANA GADIYE ..... APPELLANT

VERSUS

BURA NADE ..... RESPONDENT

JUDGMENT

11th July & 25th September, 2023

TIGANGA, J.

The appellant herein filed Land Application No. 65 of 2018 before District Land and Housing Tribunal of Karatu, at Karatu (the trial tribunal) against the respondent herein. At the trial tribunal the appellant claimed that, the respondent had trespassed into his piece of land measuring three quarter (3/4) of an acre located at Ngaibara Village in Barakta Hamlet, Kansayv Ward within Karatu District in Arusha Region (the suit land). He prayed among others to be declared a lawful owner of the suit land.

According to the trial tribunal's records, the appellant claimed that, he was allocated a piece of land measuring two acres with the suit land inclusive way back in the year 1977 by *Operesheni Vijiji, 1977*. That, he had been enjoying the use of the suit land and he has developed the same by planting trees such as Eucalyptus, Misesewe, Eloyi and Coffee plants.

However, on 14th July 2015, the respondent herein invaded the suit land which is in the southern part of his two acres claiming ownership of the same, and that despite several meeting done for reconciliation, they have not resolved the issue hence he filed the dispute at the trial tribunal.

The respondent on the other side claimed that, he was given the suit land by his brother who also got the same from *Operesheni vijiji, 1977*. According to him, he has also been enjoying the suit land until 2014 when the appellant claimed that, he has trespassed into his land. That, On 14th July 2015, a date which the appellant claimed to have been invaded, it was the day when the village government made boundaries as there were no boundaries prior to that day. The appellant uprooted them, the matter was taken to Karatu Primary Court and they were advised to file their complaints in the Land Tribunal. From then, the matter escalated leading to the present appeal.

After such evidence, the trial tribunal decided in favour of the respondent herein and declared him as the legal owner of the suit land on the ground that, the latter inherited it from his brother who had been living there for long time without interference. It has to be noted that, this matter was initially decided to its finality and the appellant was declared as the lawful owner of the suit land. However, through Land

Appeal No. 41 of 2020, this Court ordered the trial tribunal to read the assessors' opinion and compose another judgment. As such, after the opinion were read, the trial tribunal decided in favour of the respondent herein. Aggrieved, the appellant preferred this appeal with the following five grounds;

1. That, the trial tribunal erred in law and in fact in not considering the strong evidence of the appellant who was given the land in dispute since 1977.
2. That, the trial tribunal erred in law and in fact in failing to invite crucial witnesses i.e. Imbori Manye Nade who gave the suit land.
3. That, the trial chairman erred in law and in fact in maliciously miscarriage the truth.
4. That, the trial tribunal erred in law and in fact in failing to visit the *locus in quo* according to the available evidence on record from the parties.
5. That, the trial chairman erred in law and in fact in holding that, the suit land was defeated by the law of limitation in absence of the preliminary objection in the initial stage of the pleadings.

During the hearing which was by way of written submissions, the appellant appeared himself and unrepresented whereas the respondent was represented by Mr. Samwel Welwel, learned Advocate.

Supporting the appeal, the appellant abandoned the 3rd, 4th and 5th grounds and submitted on the 1st and 2nd grounds of appeal only, In

support of these two grounds he said he was given the suit land on 01st April, 1977 by the Village Council during *Operesheni Vijiji, 1977*. That, the respondent invaded the suit land on 14th July, 2015 claiming to have been given the same by his brother, Imbori Mage Nade, however, the latter was never summoned to testify without any reason given. Furthermore, the assessor's opinion was clear that the suit land belongs to the appellant and even appellant's witnesses managed to prove that, the suit land belongs to the appellant herein as he managed to prove that he was re-allocated the same since 1977. He prayed that, this appla be allowed with cost.

Opposing the appeal, Mr. Welwel submitted on the 1st and 2nd grounds of appeal that, there is no strong evidence to support the appellant's contention that, he was allocated the suit land in 1977. That, the evidence of the respondent was strong enough for the trial tribunal to give judgment in his favour. He argued that, according to section 110 (1) of the **Law of Evidence Act**, [Cap 6 R.E. 2022] A party requiring the court to Rule in his favour had the duty to prove the case at the required standard and the appellant herein miserably failed to establish his ownership of the suit land. More so, AW2 who introduced himself as secretary of the Committee present during the alleged allocation in 1977

did not tender any evidence such as minutes showing the said re-allocation while logically he is the custodian of such documents.

Learned counsel referred the Court to the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 where it was held that, failure of a party to call material witnesses draws adverse inference against that party. He also argued that, there is a contradiction on the year of allocation of the suit land by the appellant and his witnesses. That, while AW1 testified on the 1977 re-allocation, AW2 testified on 1974's allocation.

He further submitted that, according to section 8 (a) and (2) of the **Village Land Act**, [Cap 114 R.E. 2019], it is the Village Council which is responsible for the management of the village land. And that, according to DW3 and DW4 who are members of the Village Council, they testified that the suit land belongs to the respondent as decided in 2015. He prayed that, this appeal be dismissed with cost for want of merit.

In his rejoinder, the appellant insisted that, the suit land belongs to him as he was allocated the same by the Village Authority during *Operesheni Vijiji, 1977* in terms of section 5 (15) (1) of the **Village Land Act**, Cap 115, R.E. 2002.

Having gone through the trial court's records as well as both parties submissions, I now proceed to determine the grounds of appeal which are to prove only one issues. Whether the trial tribunal was justified to hold that the suit land belongs to the respondent.

I will determine both the 1st and 2nd grounds jointly in which the appellant challenges the trial tribunal for holding that the suit land belongs to the respondent. Under section 110 of the Evidence Act, the law is settled and the Court of Appeal decision are at one that in civil proceedings, the party with legal burden of proof also bears the evidential burden and the standard in each case is on a balance of probabilities. In discharging this burden, the weight/quality and not quantity of evidence adduced is considered. In **Miller vs. Minister of Pensions** [1937] 2 ALL. ER 372 as quoted with approval in the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017, CAT at Mwanza (Unreported) where Lord Denning had this to say;

> *"If at the end of the case the evidence turns the scale definitely one way or other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determine conclusion one way or other, then the man must be given the benefit of a doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry*

a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say –We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

Applying the above principle in the appeal at hand, from the outset I find the appellant to have failed to prove that, the suit land belonged to him. He told the trial court that, he was allocate the suit land in 1977 and AW2 was present, however as rightly argued by the respondent's counsel AW2 being a secretary of the Village Council did not tender any proof to prove the same. More so, as rightly argued by Mr. Welwel the Village Council manages the village land and according to DW3 and DW4 they reconciled the dispute between the parties herein and planted sisal as demarcation/boundaries in 14th July, 2015 and that is what give birth to the current dispute.

In the circumstances, It is my considered opinion that, what give birth to the dispute is the decision of the Village Council and not the alleged respondent's trespass. However, since the appellant was well aware that the respondent was given the suit land by his brother, he ought to have either joined him as a party or summoned him to testify and not flip such duty to the trial tribunal or to the respondent. Failure of which draws inference against him as a result did not prove ownership to the required standard.

In light of the above, this appeal lacks merit and the same is dismissed. Taking into account the fact that parties are neighbours, I give no order as to the costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 26th of September, 2023

J.C. TIGANGA

JUDGE