THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

LAND APPEAL NO. 72 OF 2022

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 189 of 2020, the Judgment Dated at 12th July 2022 (Hon. Munzerere, Chairman))

TWITIKE MWAKIJALE.....APPELLANT

VERSUS

FELESIA KAYOMBO.....1ST RESPONDENT

FELESIA KAYOMBO (as Administratrix of the Estates of the late Clemence J. Kayombo).....**2ND RESPONDENT**

JUDGMENT

Date of Last Order: 26.07.2023
Date of Judgment: 19.09.2023

NDUNGURU, J.

In this appeal, Twitike Mwakijale (the appellant) is challenging the decision of the District Land and Housing Tribunal for Mbeya (the DLHT) in Land Application No. 189 of 2020. In that case the appellant instituted a land suit against the respondents claiming that in 2018 they trespassed into her land measuring 1.5 acre situated at Igurusi in

Mbarali District within Mbeya Region (henceforth the suit land). She prayed for a declaratory order that she is the lawful owner of the suit land, a permanent injunction order restraining the respondents or their agents to use in whatsoever manner of the suit land, payment of general damages, costs of the suit and any other order the DLHT might deemed fit to grant.

The appellant stated in her evidence that she was given the suit land by a clan member as a gift way back in 1966 and she used it without interruption or any dispute until 2011 where she engaged in a case with her mother, one NAMBILIHUMI NSYANI through Land Case No. 9 of 2011 in Igurusi Ward Tribunal in which she was declared a lawful owner of the same suit land and thereafter the respondents trespassed into it in 2018. She therefore pressed the DLHT to grant the prayers.

In turn the respondents resisted the application, they maintained that the suit land is theirs. That they purchased it from the appellant's mother, one NAMBILIHUMI NSYANI. They claimed that the appellant's son, one AMBOKILE PAULO had once instituted a land case in respect of the same suit land through Land Case No. 10 of 2019 in Igurusi Ward

Tribunal and they won it. They thus urged the DLHT to dismiss the claim with costs.

Having evaluated the evidence of both sides, the DLHT found in favour of the respondents. It held that the appellant had failed to prove her claims, it therefore dismissed the application with costs. Dissatisfied, the appellant approached this court armed with five (5) grounds of appeal as follows:

1. That the Tribunal Chairman erred in law and facts when held that the appellant is not the owner of the land in dispute while she was dully declared as the owner by Igurusi Ward Tribunal on the same disputed land.
2. That the Tribunal Chairman erred in law and facts when held that the only witness to prove ownership of disputed land is neighbour boarded to the land in dispute.
3. That the Chairman erred in law when delivered the judgment to the new issue which was not framed on the hearing of the case.
4. That the Chairman erred in law when in absence of evidence and on failure to follow the laid procedure held that the area specified

in the judgment of Igurusi ward tribunal document which the appellant tendered as evidence did not relate to the disputed land.

5. That the Tribunal Chairman erred in law when failed to evaluate the evidence stated by the appellant's witness hence reached to unfounded and problematic judgment.

Based on these grounds she prayed this court to allow the appeal and grant all the reliefs she prayed before the DLHT.

The appeal was heard by way of written submissions. The appellant was represented by Mr. Amani Angolyisye, learned advocate whereas the respondents enjoyed the service of Mr. Pacience Maumba, learned advocate.

Supporting the appeal counsel for the appellant abandoned the 3rd ground. He thus, expounded on the rest of the grounds. Unfortunately, other arguments and authorities cited by the counsel were out of context, I will therefore neither recapitulate nor refer to them.

Submitting on the first ground counsel for the appellant argued that the DLHT erred when it abducted to consider the judgment (exhibit P1) in land case No. 9 of 2011 of Igurus Ward Tribunal in which the appellant was declared a lawful owner of the suit land. According to the

counsel the DLHT was supposed to recognize it as it had never been nullified or overturned by another competent court. He further contended that the DLHT sailed into errors when it reasoned that the disputed land in exhibit P1 was ½ acre different from the suit land which is 1.5 acre. According to the counsel the DLHT was supposed to look at the description of the land in exhibit P1 and in the suit land as they were the same hence rejecting exhibit P1 on the reason of measurements was incorrect.

In addition, he submitted that the DLHT would have not considered the judgment in land case No. 10 of 2019 because there was evidence from the appellant that it was nullified by the DLHT hence it was inexistent.

As regards the second ground counsel submitted that the DLHT erred when it held that the appellant failed to prove his case as he did not call any neighbour to testify. He stated that there was no dispute regarding boundaries hence neighbours were immaterial witnesses. According to him the framed issues were the only determinant of who should be called as a witness therefore, that the appellant proved the case at the required standard through her own evidence and that of PW2 and exhibit P1. Counsel added that quality of evidence matters

than numerical number of witnesses. He buttressed his argument with the case of **Hamed Said vs Mohamed Mbilu** (1984) TLR 113.

About the fourth ground of appeal counsel for the appellant essentially expounded that courts are enjoined to decide the case according to the framed issues and not on extraneous matters or anything which was neither pleaded nor adduced in the evidence of the parties. According to the counsel the issue reflected at page 6 of the impugned judgment about whether the suit land is different from the one purchased by the respondents did neither feature in the parties' pleadings nor their evidence. Thus, that the parties were denied their right to be heard. He referred me to the case of **Lupembe Village Government & 2 others vs Bethelehamu Mwandafya and 5 others**, Civil Appeal No. 377 of 2020 Court of Appeal of Tanzania at Mbeya (unreported).

As to the 5th ground of appeal counsel for the appellant contended that the DLHT improperly reasoned to its decision and failed to evaluate evidence. It was the counsel's argument that the appellant won the case about the same suit land in 2011 but in 2013 the respondents purchased the same land from a person the appellant won against. He maintained the view that having lost the case the vendor had not title to pass to the

respondents. He argued alternatively that this Court may wish to revisit the evidence on record and come out with its own conclusion. In concluding, he urged this court to allow the appeal and grant costs.

In reply, counsel for the respondents made a general reply that the appellant did not prove her case as she gave evidence that the suit land was apportioned by her father decades ago while in the pleadings she claimed that she was given the land by clan members. It was his argument that the said exhibit P1 no witness than the appellant herself to prove that it related to the suit land. That since the suit land is the farm for cultivation it was on the detriment of the appellant that no one like neighbours proved that it was cultivated by the appellant.

It was the counsel's argument that there was ample evidence that the suit land was purchased by one Clemence Kayombo (2nd respondent) the husband of the 1st respondent. The land purchased was 1.5 acre according to the evidence of DW3, DW2 DW4 and exhibit D1 proved the measurement of the suit land to be 1.5 acre. Further that no contradicting evidence that the respondents had been using the suit land from 2013 to 2019 when the dispute arose.

Further the counsel conceded to the argument that in order to prove certain fact it does not need a certain number of witnesses than

the quality of the evidence which in his view the respondent's evidence was heavier than that of the appellant. Thus the DLHT was proper to decide on the respondent's favour. He also said that the case of **Lupembe Village Council** (supra) cited by the appellant's counsel is distinguishable since the circumstances and facts in that case are different from the current one.

He also faulted the appellant's counsel argument that the judgment in land case No. 10 of 2019 was nullified on the reason that it is relevant to the instant matter as PW2 claimed a title over the same land which he is now the witness while in the previous he was the applicant.

According to the respondent's counsel the DLHT was proper to ignore the decision in land case No. 9 of 2011 (exhibit P1) since it was found the land in dispute to be different regarding size as in the previous was ½ acre while in the current is 1.5 acre. He argued that had the suit land been the same as in the land case No. 9 of 2011 the appellant would have not instituted the current one which is the evidence that they are different.

In the strength of the submissions as illuded, counsel for the respondent prayed for this court to dismiss the appeal and uphold the decision of the DLHT.

I have dispassionately followed the rival submissions by counsel for the parties. I have also gone through the record of the DLHT. I think the grounds of appeal can be conveniently resolved through two issues; **one**, whether the DLHT framed and decided on a new issue and **two**, whether the DLHT properly evaluated the evidence before it.

Before I indulge into resolving the above issues, there was a complaint by the appellant that in the impugned judgment the trial Chairman referred to the sale agreement (exhibit of the respondent) as exhibit P1 while exhibit P1 was the judgment of Igurus Ward Tribunal in land case No. 9 of 2011. He argued that the flaw prejudiced the judgement. Counsel for the respondent challenged this complaint on the account that it was clerical error which is rectifiable under section 96 of the CPC and that it was not indicated how the appellant was prejudiced. It is true that, according to the proceedings, the sale agreement tendered by the respondents was admitted as exhibit D1, however in the impugned judgement it was mistakenly referred to as exhibit P1. I say it was mistakenly referred so since reading the judgment as a whole the

same have been introduced as exhibit D1. Under the circumstance I concur with counsel for the respondent that the mistake did not occasion any miscarriage of justice since the appellant lost a case not because exhibit D1 was in certain time referred to as exhibit P1. In the event, I dismiss the complaint.

Turning to the issues as above framed, in the first place the appellant's counsel abandoned the 3rd ground of appeal which was to the effect that the DLHT decided on a new issue. He however raised the same complaint while arguing the 2nd and 4th grounds. He was of the view that the issue whether the suit land was the same land in land case No. 9 of 2011 was a new one. That it did not feature in the parties' pleadings nor in their evidence. According to the counsel the course prejudiced the parties as they were not called to address it. On his part counsel for the respondents parted the stance, he argued that the issue was not new but was important to be resolved in relation to the main issue which was about ownership of land.

On my part, I agree with the stance of the law that raising a new issue for determination without according parties the right to address the court is a fatal irregularity which vitiates a judgment. See the cases of **Charles Christopher Humphrey Kombe vs Kinondoni**

Municipal Council, Civil Appeal No. 81 of 2017 and **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No. 161 of 2016 and in **Oriental Insurance Brokers Limited v. Transocean (Uganda) Limited** [1992] EA 260, in the latter case, it was guided as follows:

> *"Under the provisions of Order 13 of the Civil Procedure Rules, a trial court has the jurisdiction to frame, settle and determine issues in a suit.* ***A trial court may frame issues based on the evidence of the parties or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed.***" (Bold emphasis added).

In the matter at hand the appellant had pleaded in her application filed before the DLHT, she also adduced evidence that the suit land had been declared hers through exhibit P1 by Igurusi Ward Tribunal. The claim by the appellant was refuted by the respondent through WSD that she does not know about the judgment of the Ward Tribunal she went ahead stating that the same was manipulated and pressed the appellant to the strict proof. That being the case there was no any other evidence

to the contrary about the existence of the said judgment. It would not however, make it sound decision without finding if the suit land and the land in exhibit P1 was one and the same. The appellant having made no other proof on the relationship between the suit land and the land referred in the Ward Tribunal's Judgment, the DLHT cannot be held to have raised a new issue as the counsel for the appellant wanted this court to believe. In the circumstance I find the appellant's complaint unmaintainable, I therefore dismiss it.

As I have hinted earlier the remaining grounds of appeal relates to the evaluation of evidence. Thus, this Court is confronted by the issue whether the DLHT properly evaluated it. In resolving this issue, I will subject the entire evidence into scrutiny and if necessary, reach to my own conclusion. In resolving the issue I will be guided by the general principle that he who alleges has a burden of proof as per **section 110 of the Evidence Act**. It is equally the principle that in civil case the standard of proof is on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

In **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported), the Court of Appeal of

Tanzania quoted comments from **Sarkar's Laws of Evidence**, 18th Edition **M.C. Sarkar**, **S.C. Sarkar** and **P. C. Sarkar**, published by Lexis Nexis as below:

> "***...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies 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 discharged the other party is not required to be called 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....***"

In the instant case, as correctly put by the respondents counsel the evidence of the appellant was premised on PW2 and exhibit P1. The appellant stated that she was given the land by her father one, Kitabila Mwakijale she did not remember the year and that she was using the land to cultivate. Also, that she built a house. That there was a dispute between her and her mother where she was declared winner. I had time to thoroughly read exhibit P1 it was indicated that the source of dispute in that case was the act of one Nambibuni Msyani who wanted to disown the appellant's land which that Nambibuni had previously given to the appellant to cultivate and build a house. At the end the Ward

Tribunal found that ½ should remain the property of the appellant. In the suit land the subject of this appeal the appellant did not lead evidence to prove that it was that ½ acre land which the Ward Tribunal declared her to be lawful owner. Faulting the DLHT tribunal that would have looked to the description of the land that they were the same. With due respect there is no description indicated in exhibit P1 it was only showed that the land is in Lumwa Village and Kana sub-hub and no more. Unless the appellant wanted to tell this Court that in Lumwa village and Kana Sub-hub is comprised of the suit land only. In the circumstance this court like the DLHT could not with certainty hold that the suit land is the same which was a subject of dispute in land case No. 9 of 2011.

There was argument by the appellant's counsel that the appellant had led evidence that the decision in respect of land Case No. 10 of 2019 was nullified by the DLHT but there was no contradicting evidence that PW2 claimed the same land against the same person (the respondents herein) in my view the act of PW2 may be considered as trial and error or as forum shopping which this court may draw adverse inference against the appellant that she claimed the land which she had no title and the credibility of PW2 is put at jeopardy.

Again, the appellant claimed that she used the land uninterrupted but DW3, DW4 said that they have never seen the appellant using the suit land. There was no evidence to challenge that DW2 lived with the deceased who sold the land to the respondent's husband. There was also no evidence disproving that DW4 is the neighbour to the suit land. DW4 said that he knew well the suit land as it belonged to the deceased before it passed to the respondent by disposition and that he witnessed the sale and from 2013 it was used by the respondents. Therefore, DW2 and DW4's evidence that the appellant never used the suit land have been left unshaken. This also makes this court believe that the suit land is different from that in exhibit P1.

Moreover, the respondent had the evidence of DW3 who wrote a sale agreement between the respondent's husband and the late Nambibuni Nsyani. It is not imaginable that the appellant owned the suit land without being seen by the neighbour whom she said that they were not material witnesses as there was not dispute about boundaries.

Furthermore, the evidence of the appellant was not straight? while she pleaded that the suit land was given by the clan member, in her evidence she claimed that the same was given by her father then

tendered exhibit P1 in which it was indicated that she was given by her mother (the deceased) a ½ acre land.

In the pinpointed above circumstances, the appellant did not prove her case. The evidence by the respondents was cogent to the preponderance of probability. In the result, I find the DLHT properly analysed the evidence adduced by the parties and reached to the just decision. Nothing can be faulted by this court. I hereby dismiss the appeal with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

D.B. NDUNGURU

JUDGE

19/09/2023