IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL NO. 36 OF 2023

(Arising from Land Application No. 46 of 2022 District Land and Housing Tribunal for Karagwe)

EVARISTA JERADI..... APPELLANT

VERSUS

JERADI JOSEPH..... RESPONDENT

JUDGMENT

16th and 20th October, 2023

BANZI, J.:

In the District Land and Housing Tribunal of Karagwe ("the DLHT"), the respondent instituted a land suit against his son, the appellant complaining that, the appellant encroached his land situated at Kanoni ward in Karagwe District (the suit land) valued at Tshs.5,000,000/=. He prayed for the DLHT to declare him as a legal owner of the suit land and restrict the appellant and his agents to enter and do anything therein. The appellant denied the claim contending that, the suit land belongs to him since 2000 after being given by the respondent.

The record of the DLHT reveals that, the respondent relocated from Ngara to Karagwe in 1997 and upon reaching in Nyagahika village within Kanoni ward, he bought three farms including the suit land, measuring ten

acres. When the appellant grew up, he gave him a portion of land within the suit land measuring one acre for the appellant to learn how to cultivate. However, the appellant exceeded boundaries and took over the whole land. Thereafter, he started to partition that land and sell to other people. By 2018 it remained only one acre, whereby the respondent decided to take the matter before the ward tribunal for reconciliation but the appellant did not show up. Thereafter, he decided to give the remained land to his daughter, Martha Jerald (DW2). The respondent contended that he has other eight children who deserve to be given their share from the suit land.

In his defence, the appellant contended that, the respondent had three farms and in 2000, he showed him one of the three farms measuring approximately five acres. The respondent asked him to give him pombe as '*Obuhaisa'* (consideration) so that, he could show him the boundaries with the aim of avoiding conflicts among his children in the future. Later on, the appellant told him that, pombe was ready, and asked him to summon elders to participate in the handing over of the land. However, the appellant told him that, there was no need to call the elders while he bought the land by his own money. He gave him that pombe in terms of money and he showed him the boundaries. They were only two and the handing over was done orally without writings. Thereafter, he continued developing it by planting

bananas trees, coffee trees and normal trees. He further testified that, sometimes later, the two engaged into misunderstandings after he decided to change his name during voters' registration period because their family was prohibited to be registered. Thus, he schanged his surname to Mugisha in order to secure the card. As a result, the respondent disowned him for changing the name. He claimed to be the legal owner of the suit land that is why he was partitioning that area and selling to various people including the appellant himself who took his servant to buy one part on his behalf. His evidence was supported by his sister, DW3 who told the DLHT that, she refused to receive the land she was given by the respondent because the respondent had already given the whole land to the appellant.

After receiving the evidence of both sides, the DLHT decided in favour of the respondent by declaring him as the lawful owner of the suit land on the reason that, there was no evidence proving that, the respondent had ever given the suit land to the appellant permanently. Aggrieved by that decision, the appellant has approached this Court challenging the findings of the DLHT with two grounds as hereunder:

1. *THAT, the learned Chairman of the District Land and Housing Tribunal grossly erred in law for awarding victory to the respondent who never described the land he claimed, in terms of size, proper location, neighbours*

or any other features that could help identify (sic) the Suitland from other people's land, having the said land in the applicant's pleading and testimonies only to be in Kanoni Ward;

2. *THAT, the learned Chairman of the District Land and Housing Tribunal grossly erred in law; when failed to know the appellant discharged his evidential Burden and proved that he legally owns the Suitland.*

At the hearing, the appellant was represented by Mr. Rogate Assey, learned counsel whereas, the respondent enjoyed the services of Mr. Ibrahim Mswadick, learned counsel.

Arguing in support of the first ground, Mr. Assey stated that, Order VII Rule 3 of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") imposes an obligation to the applicant to describe the suit land properly. However, the respondent in his pleadings before the DLHT mentioned the location by stating the ward within which the land is located which was not satisfactory. He supported his argument with the case of **Omary Rajabu v. Mana Company Limited and 3 Others** [2021] TZHCLandD 182 TanzLII. He added that, there was contradiction on the size of the suit land because, initially, the respondent contended that, the suit land is measuring eight acres but later he mentioned ten acres. According to him, the suit land was not properly described.

In respect of the second ground, Mr. Assey argued that, the appellant proved the ownership of the suit land by proving how he was given that land by paying *Obuhaisa* to the respondent in terms of money instead of pombe which is the consideration in Nyambo tribe and he has been using that farm since 2000 by planting banana trees and coffee trees. He added that, the dispute arose in 2018 which is more than twelve years prescribed by law for claim of land and the same was instigated by personal reasons after the appellant changed his surname to Mugisha. According to Mr. Assey, the respondent was not justified to revoke his gift to the appellant as he had already received *Obuhaisa*. As the appellant used his energy, time and resources in developing it, taking back the land, will cause him to be landless. With regard to the issue of failure to cross-examine which was relied by learned chairman in his findings, Mr. Assey contended that, it is a mere technicality and the Chairman was supposed to embrace substantive justice. He urged this Court to allow the appeal with costs.

In response, Mr. Mswadick argued that, the respondent gave one acre to the appellant but in the course of using it, he expanded to other areas. He refuted the contentions of Mr. Assey concerning the description of the suit land arguing that, institution of the suit in the DLHT is governed by the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003

GN No. 173 of 2003 ("the Regulations") whereby, in the Second Schedule, there is Form No. 1 and under paragraph 3, the applicant is required to mention location and address of the suit land. In our case, the respondent in his application complied with such requirement. He added that, in his testimony, the respondent mentioned the location, size and neighbours of the suit land. Besides, the size was not in dispute between the parties because the area was known to both parties. He supported his submission with the case of **Lupembe Village Government Ikolo Ward Kyela District and Another v. Bethelehamu Mwandafwa and 5 Others** [2023] TZCA 17313 TanzLII. According to him, there was no dispute over description of the suit land as the parties are knowledgeable with such description and therefore, failure to mention its description properly did not prejudice the appellant.

Reverting to the second ground, Mr. Mswadick contended that, the appellant did not prove that he was given ten acres by the respondent. Since the respondent said that he gave the appellant only one acre, it was the duty of the appellant to prove that he was given ten acres. He further stated that, the appellant did not state the amount he gave the respondent as *Obuhaisa* in lieu of pombe as the same was not witnessed as required. Responding to the issue of time limit, Mr. Mswadick submitted that, the respondent

instituted the matter in 2022 after the appellant exceeded the boundaries. Before that, he could not have filed the suit because the appellant had not exceeded the boundaries. Thus, the issue of time limit is not applicable in this matter. Furthermore, he argued that, after the respondent had testified, the appellant was expected to question him on basic issues touches his right. Nonetheless, the appellant did not ask him any question, meaning that, he accepted what was stated by his father. He argued that, failure to cross-examine is not the matter of technicality as it was suggested by Mr. Assey. He urged this Court to believe that testimony like it was believed by the DLHT. He did not press for costs on reason that, the parties are father and son.

In his rejoinder, Mr. Assey reiterated that, it is not clear how many acres the respondent is claiming. He further insisted that, the respondent in his application did not disclose the size and boundaries of the land and even his testimony did not cure that irregularity. Apart from that, it was his argument that, both parties did not know the size of the area in dispute. Therefore, the case of **Lupembe Village Government** (*supra*) is distinguishable because, unlike in the instant matter, in that case, the issue of size and location was not in dispute. According to him, the appellant was prejudiced as there was contradiction on the size of suit land. He added that,

the respondent received *Obuhaisa* and he did not deny that. As the appellant after being given that land planted permanent crops, it means that, he was given that land permanently.

Having considered the records of the DLHT, the grounds of appeal and the submissions of learned counsel for both parties, the main issue for determination is whether the appeal has merit.

It should be noted that, there is no dispute that the respondent was the owner of the suit land and he allocated the appellant the land for cultivation. The dispute was on the extent of land the respondent allocated to the appellant and whether he gave him that land permanently. While the respondent contended that he allocated the appellant only one acre within the suit land measuring between eight to ten acres, the appellant argued that he was given the whole land measuring five acres.

Starting with the first ground, it is well known that, section 51 (2) of the Land Disputes Courts Act [Cap. 216 R.E.2019] ("the Act"), restricts applicability of the CPC before the District Land and Housing Tribunals unless there is lacuna in the applicable law *i.e.,* the Regulations. Speaking of description of the suit land in the pleadings, regulation 3 (2) of the Regulations requires the application before the tribunal to contain among other things, the address of the suit premises or location of the land involved

in the dispute to which the application relates. In the matter at hand, the respondent in paragraph 3 of his application stated that, the suit land is situated at Kanoni Ward in Karagwe District. Although Mr. Assey contended that, the description made by the respondent was unsatisfactory, there is no hard and fast rule on what should contain in the description of the suit land in order to make it satisfactory. Each case should be adjudged on its own circumstances. Besides, the rationale behind description of the suit land is to make it properly identifiable in order to make the decree executable. The respondent apart from describing the suit land by mentioning the ward and district where it is located, in his testimony, the respondent went further by stating that, the suit land is located at Omukigangu hamlet, Nyagahika village, Kanoni ward within Karagwe District. In addition, he mentioned its size as ten acres and neighbours bordering it.

On the other hand, the appellant in his WSD did not dispute about the location of the suit land. Also, during the trial, neither the appellant nor the respondent has raised any issue challenging the description or location of the suit land. That means, both parties had knowledge of the land in dispute and its demarcations. In the case of **Lupembe Village Government** (*supra*) the Court of Appeal was faced with akin situation where there was an argument that, the plaint did not describe the suit land but on the other

hand the appellant's side did not raise any concern on the insufficiency of description of the land, the Court stated that;

> *"...the suit land details were known and acknowledged by the parties and hence it was not an issue raised during the trial as a concern. We are thus convinced that all the parties were fully versed with the details and description of the suit land and the appellant was not in any way prejudiced. Therefore, the complaint lacks substance."*

From the above explanation and according to what was stated in the cited case, it is the considered view of this Court that, the description of suit land was satisfactory as both parties are knowledgeable with its location and demarcation. For that matter, the argument by Mr. Assey about the description of the suit land to be unsatisfactory is misplaced. Thus, the first ground has no substance and is dismissed.

Returning to the second ground, the respondent in his testimony stated that, he allocated one acre out of ten acres to the appellant but the appellant exceeded the boundaries and started to sell that land in portions. When the appellant was given the chance to cross-examine him, he said *"Sina swali la kumuuliza."* The learned Chairman in his judgment was of the firm view that, the appellant did not cross-examine the respondent which connoted that, he accepted what was stated by the respondent in his

testimony. It was further decided by the Chairman that, there was no substantial evidence to prove that the appellant was allocated the suit land by the respondent permanently. He was of the view that, the respondent allocated to the appellant one acre temporarily for purpose of learning how to cultivate but he encroached the whole land.

Looking closely at page 8 of the proceedings, it is apparent that, the appellant did not cross-examine the respondent on what he testified before the tribunal which means that, he accepted the truthfulness of the whole testimony of the respondent. It is a well-established principle that failure to cross-examine a witness means acceptance of his testimony. In the case of **Patrick William Magubo v. Lilian Peter Kitali** [2022] TZCA 441 TanzLII, it was stated that:

> *"It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."*

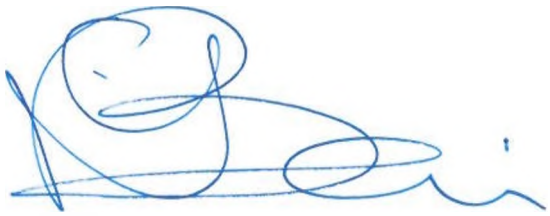
The same principle was stated in the cases of **Bomu Mohamedi v. Hamisi Amiri** [2020] 2 T.L.R. 144 [CA] and **Paulina Samson Ndawavya v. Theresia Thomas Madaha** [2019] TZCA 453 TanzLII. Since the appellant did not cross-examine the respondent at all, it means that, he

accepted the whole testimony of his father and he is estopped to ask this Court to disbelieve that testimony. Thus, the argument of Mr. Assey that failure to cross-examine is a mere technicality is misplaced because failure to cross-examine is the principle of law established through case laws.

Apart from that, the appellant's contention that he gave the respondent some money in lieu of pombe as consideration *(Obuhaisa)* for the land he was given and that was done between him and the respondent alone, is far-fetched. The respondent has eight children and if he intended to give that land to the appellant, it was expected that, he would have summoned other children to witness the handing over so as to avoid future chaos over the suit land. Besides, it is unbelievable if the respondent would hand over about ten acres orally to the appellant without involving his other children. Therefore, absence of other children and/or near relatives to witness the handing over of that land, creates doubts if the land was really handed over to the appellant. Moreover, the argument raised by the appellant that, the respondent wanted to take back the land because he changed his surname in order to secure the voters' registration card has no basis. Had he given him that land, he could not have taken it back on flimsy reasons. More importantly, as the appellant failed to cross-examine the

respondent on important matters, the tribunal was justifiable to find that the respondent is still the owner of that land.

That being said, I am satisfied that the respondent is still the owner of the suit land, and the appellant was just using it under the pleasure of his father. Thus, I find nothing to fault the decision of the DLHT and consequently, I dismiss the appeal for want of merit. Considering that the respondent and the appellant are father and son, I make no order as costs.



I. K. BANZI
JUDGE
20/10/2023

Delivered this 20th day of October, 2023 in the presence of Mr. Ibrahim Mswadick, learned counsel for the respondent who is also holding brief of Mr. Rogate Assey, learned counsel for the appellant.

I. K. BANZI
JUDGE
20/10/2023