THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)
AT IRINGA

LAND APPEAL NO. 24 OF 2022

1. ANTHONI MSIGWA
2. ZABRON MSIGWA ..... **APPELLANTS**

VERSUS

ROJAS CHUNGU ..... **RESPONDENT**

(Being an appeal from the Judgment and Decree of the District Land and Housing Tribunal for Njombe District at Njombe)

(Hon. G.F. Ng'humba (Chairperson))

Dated the 23rd day of February, 2022

in

Land Appeal No. 87 of 2020

JUDGMENT

Date of last order: 19.07.2023
Date of Judgement: 18.08.2023

S.M. KALUNDE, J.:

This is a second appeal; it being an appeal against the decision of the District Land and Housing Tribunal for Njombe District sitting at Njombe (hereinafter referred to as "the DLHT") in exercise of its appellate jurisdiction in **Land Appeal No. 87 of 2020** which arose from the decision of the Imalinyi Ward Tribunal (hereinafter referred to as "the trial tribunal") in **Land Application No. 06 of 2020**. In its

judgment the DLHT upheld the decision of the trial tribunal which had ordered the suit property to be redistributed equally between the appellants on one hand and the respondent on the other.

From the pleadings, petition of appeal and the records of appeal, it is evident that sometimes in the year 2020 the respondent filed Land Application No. 06 of 2020 at the Imalinyi Ward Tribunal against the appellants. The suit at the trial tribunal concerned a piece of land measuring six (6) acres located at Loga Chini Area, Ilulu Village, Imalinyi Ward and Division, Wanging'ombe District in Njombe Region (hereinafter referred to as "the suit property"). The story goes that: the respondent's father, Lukelo Chungu, and the appellants father Nzeya used to live and do farm work together. The relationship between the two wise gentlemen began when Nzeya requested Lukelo Chungu for a piece of land to build a house and for cultivation. Lukelo Chungu agree and allocated Nzeya a piece of land. They continued to stay together harmoniously. However, things changed with their demise. It would appear that after the demise of their parents the respective areas were ultimately inherited by the respondent and his relatives on the one hand, and the appellants on the other. Unfortunately, we are not told of the timelines for their passing.

Pursuant to the issues of ownership over the suit property, in 2020 the respondent filed the above cited suit alleging that the appellants had encroached into his property which was beyond the area which had been granted to them by his late father. The respondent contended that the area invaded by the appellants constituted his ancestral land that had been used for residence and burial purposes. The appellants on the other hand argued that the suit property was granted to them by their respective father, Nzeya. They claimed that they have been cultivating on the area for years before being intervened by the respondent.

The brief evidence presented at the trial court was as follows: the respondent, **Rojas Chungu (Aw1)** contended that the appellants invaded an area which is distinct from what had been granted to them by his late father, Lukelo Chungu. He contended that, he reported the matter to the village government during which the appellants conceded that the area they occupied contained a damaged house **"Pagale"** and three ancestral graves of the **"Chungus"**. The respondent stated:

> *"Mimi ninamlalamikia/ninawalalamikia wafuatao: 1. Antoni Msigwa na Zabroni Msigwa kwa kosa la kuingia kwenye eneo lisilo husika wameiingilia kwa kulima ekari sita tofauti na alizopewa na marehemu baba yangu Lukelo Chungu sasa ninapo wauliza wanakuwa wakali, sasa mimi niliamua kupeleka kwenye Uongozi wa Kijiji na Uongozi wa Kijiji*

umesuluhisha mara mbili, kwa mara ya kwanza walikubali kwamba ni kweli ni makosa kwani pagali lilikuwepo lakini tumelibomoa pia hata makaburi yapo kwenye eneo hilo ninalolalamikia makaburi hayo ni ya kwetu akina Chungu sasa mara ya pili wao mbele ya ofisi ya Kijiji walikanusha kuwa huo ni uwongo tu. Kwani hapakuwa na pagale letu sisi akina Chungu. Kwani hadi sasa makaburi hayo bado yapo matatu (3)."

For his part, **Ephrem Ndendya (Aw2)** recounted that he attempted to mediate the two families over the dispute. He stated that a meeting was convened on the property where he himself saw the "pagale" and the graves. The witness added that the "Msigwas" conceded that there was a "pagale" and the graves. Thereafter, parties agreed to convene a meeting to sort the boundaries. However, Aw2 was surprised that the meeting was not convened to resolve the differences and instead a case was filed in court. The witness stated:

"Mimi niliwaita pande zote 2 (akina Chungu na akina Msigwa) nilifanyia kikao hicho hukohuko kwenye shamba lenye mgogoro huko nilikuta kaburi na pagale nalo likiwa limevunjwa na kuunganishwa kwenye shamba. Ukoo wa Msigwa kupitia mkubwa wao Hebeli Msigwa ulikiri na kuniomba wanaomba familia yao iendelee kuungana na Rojas Chungu wasitengane ndipo nilipo agiza akina Chungu na akina Msigwa wahakikishe wanapitia mipaka yao yote, wakishirikiana na wale wanaopakana, wakilikuta eneo lao lipo sawa ndipo waazimie tulikubaliana na nilitegemea mgogoro umeishia pale kwani wazee

wote waliondoka na amani. Kwa mimi nashangaa kama mgogoro bado unaendelea."

During cross-examination, Aw2 was questioned on whether there was a written agreement or minutes executed to witness the agreement between the families, he responded that there was no agreement or minutes executed by the parties. **Lunodzo Chungu (Aw3)** testimony was brief. She stated that the disputed property belongs to the respondent because it contained a "pagale" and the respondent's grandparents' graves.

In defence, the first appellant, **Antony Msigwa (Rw1)**, stated that the suit property was given to him by his late father. He also maintained that there were two "pagale" constructed by his father. The witness added that had he grown fruits and pines on the disputed property. For his part, the second appellant, **Zabron Msigwa (Rw2)**, argued that the area was given to him by his parents who were still living. He was surprised to be sued in his name while his parents, who gave him the property, were still alive. The witness stated:

"... mimi maeneo sijavamia. Kwani eneo ninalolilima nilionyeshwa na wazazi wangu. Kwanza nashangaa kuona nimeandikwa mimi jina wakati mzazi wangu yupo."

The other witness was an eighty years old woman, one **Tumaini Kihangile (Rw3)**, he gave a historical background to the area by stating that the first to the area was Lunogelo Mhando and thereafter Elieza Mhando, her husband. Later came Nzeya (Msigwa) whom the appellants claim their ownership from. She stated that the parties have been living in harmony since the 1960's. When she was cross-examined by the respondent about the "pagale" and the two graves, Rw3 stated that the graves were there and they did not know the person who owned the graves. The witness is recorded to have stated:

> *"... yale makaburi hata wakati anapewa Nzeya (Msigwa) eneo hilo tuliyaonaga makaburi na hatujui ni ya nani."*

The defence testimony was concluded by **Fedi Mhando (Rw4)** whose testimony was very brief. He recounted that the suit property was bordered by Zabron Msigwa. That concluded the evidence presented by the parties at the trial tribunal.

In addition to the above testimony, on the 06th day of June, 2020, the members of the trial tribunal had an opportunity to visit the *locus in quo*. During the visit the members of the tribunal were accompanied by the respondent and all the appellants. Also present were Rebeca Komba, the village executive officer; Luganga, the village chairman; and Fanuel

Mgaya, the chairman of the village social welfare committee. The records show further that, at the *locus in quo*, the members had an opportunity to visit and see the "pagale" and the two graves.

Based on the above testimony and visitation to the *locus in quo*, the trial court was convinced that both parties had established, in evidence, that they were lawful owners of the suit property. The trial court believed that both parties had established that their parents had worked together over the suit property. The members of the trial tribunal unanimously resolved that the suit property, which measured eleven (11) acres, ought to be equally allocated between the appellants on one hand and the respondent on the other. That is five and a half acres for the respondent and five and a half acres for the first and second appellants. In its decision dated the 15th day of July, 2020, the trial court stated:

> *"Baada ya kusikiliza mdai na wadaiwa na mashahidi wao na baada ya kutembelea eneo lenye mgogoro Wajumbe wa Baraza hili la Kata wote 5 wameona eneo hilo lenye mgogoro wagawane pande zote mbili (2) (Mdai na wadaiwa wawili 2).* ***Wajumbe wameamua hivyo baada ya maelezo yao yanayoonyesha wazee wa zamani walikuwa wanashirikiana kwa kuazimana maeneo hayo ya mashamba. Kwa hiyo kwa wajumbe wote watano (5) wa Baraza la Kata wameamua kuwa, kwa kuwa eneo hilo lina ukubwa wa ekari II sasa litagawanywa kwa mbili***

yaani mlalamikaji Rojas Chungu atachukua ekari $5^{1}/_{2}$ na walalamikiwa, Antoni Msigwa na Zabroni Msigwa wote wawili (2) watagawiwa ekari $5^{1}/_{2}$."

[Emphasis is mine]

The appellants were not happy with the findings and decision of the trial tribunal. They appealed to the DLHT. The appeal at the DLHT was predicated on the following grounds of appeal:

> *"1. That, the trial Ward Tribunal erred in law and fact in holding that the Respondent is the owner of the disputed land without any proof of ownership.*
>
> *2. That the Ward Tribunal erred in law and fact by deciding the matter in favour of the Respondent without considering the evidence adduced by the Appellants.*
>
> *3. That the Ward Tribunal erred in law and fact by deciding the matter in favour of the Respondent without considering the fact that, the evidence adduced by the Respondent was weak.*
>
> *4. That the Ward Tribunal erred in law and facts since reached its decision without proper procedural of the law.*
>
> *5. That the trial Ward Tribunal erred in point of law and facts since it failed to analyze the evidence on record that resulted to unfair decision."*

In view of the above grounds, the appellants pleaded with the DLHT to quash the proceedings of the trial court and set aside the

resultant decision and decree. They also prayed that the DLHT declares them as lawful owners of the suit property, costs of the suit and any other relief as the tribunal may deem necessary to meet the ends of justice.

The DLHT dealt with the appeal generally by consolidating the first, second, third and fifth grounds of appeal; and dealt with the fourth issue separately. The tribunal believed that the first, second, third and fifth grounds all related to evidence. In its decision dated the 23rd February, 2022, like the trial tribunal, the DLHT believed that both parties had established their ownership over the suit property in accordance with section 110 of **the Evidence Act [Cap. 6 R.E. 2019]**. Regarding procedural irregularities in the records of the trial tribunal, the DLHT was satisfied that the proceedings at the trial court complied with all the procedures required by law. The DLHT was convinced that there were no procedural irregularities that were so fatal sufficient to nullify the proceedings, decision and orders of the trial tribunal. Consequently, the DLHT upheld the decision of the trial tribunal thereby dismissing the appeal with costs.

Not to be outdone, the appellant had preferred the present appeal which is predicated on the following grounds of appeal:

"1. *That, the Appellate District Tribunal erred in law and fact by failing to evaluate evidence on record.*

2. *That, the Appellate District Tribunal erred in law and fact for failing to determine ownership of the suit premise and hence judging in favour of the Respondent who has no locus standi.*

3. *That, the Appellate Tribunal erred in law and fact for awarding costs of the case to an intruder."*

In view of the above grounds of appeal, the appellants urged this court to allow the appeal; quash the proceedings; and nullify and set aside the judgment and orders of the trial tribunal and DLHT. They also prayed for costs of the appeal.

Upon completion of lodging the appeal, orders for service of summons to the respondent were issued. Subsequently, the respondent was served with summons, however, he declined to be served. On 05th September, 2022, the court received a letter from the village Chairman of Imalinyi village indicating that the respondent has refused to sign the summons. Subsequently, on 08th September, 2022, orders for reservice were issued. The respondent refused to be served for the second time and summons to that effect were returned to the court. Following a prayer from the appellants, the matter was ordered to proceed ex-parte against the respondent.

Being lay persons, the appellants prayed that the appeal be argued in writing so that they may obtain legal assistant to argue in support of their appeal. The basis of the appellants prayer was that they could not understand English. On the 16th day of June, 2023, leave was granted that the matter be heard in writing. Subsequently, on the 10th day of July, 2023, the joint submissions of the appellants were duly filed hence this decision.

In their submissions, the appellants elected to argued the appeal generally. They contended that, before the trial tribunal, they managed to prove how they acquired the suit property after being granted from the Mhando family who inurn handed the same to the Msigwa family. On the other hand, the appellants contended that the respondent failed to produce evidence on how he came into possession of the suit property. The appellants contended further that, since, at the trial tribunal, the respondent claimed to be the lawful owner of the suit property, the duty was upon him to prove his case on the balance of probabilities. To buttress their argument the appellants cited the case of **Barelia Karangirangi vs Asteria Nyalambwa** [2019] TZCA 51 (TANZLII).

The appellants argued further that, the evidence on record tilted in their favour and not in favour of the respondent. They believed that

their evidence was heavier than that of the respondent. To support this, they cited the case of **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 113. The appellants concluded with a prayer that the appeal be allowed and the decision of the trial tribunal and that of the DLHT be quashed and set aside, and costs be provided.

Having presented a brief background to the case as well as the summary of evidence and submission of the parties, I think I am in a better position to delve into determination of the merits of the appeal.

This being a second appeal, I consider it prudent to restate the scope of duty of a second appellate court in matters such as the present one. **Firstly**, it is trite that a second appellate court will not have jurisdiction to deal with grounds of appeal not canvassed by the first appellate court. The Court of Appeal took this stance in **Julius Josephat vs Republic** [2020] TZCA 1729; (TANZLII) where the Court, having noted that some of the grounds of appeal raised were not raised before the first appellate court, the Court stated:

> *"We checked the memorandum of appeal featuring at page 60 of the Record of Appeal and satisfied ourselves that sincerely, those three grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction - See the cases of* ***Abdul Athuman v. Republic*** *[2004] T.L.R.151*

*and **Juma Manjano v. The DPP**, Criminal Appeal No. 211 of 2009, CAT (unreported). In the circumstances, except for the third ground which we are duty bound to address because it is based on a point of law, we are constrained to ignore grounds 2 and 5 as requested by Mr. Njau."*

Secondly, it is common knowledge that, in a second appeal, an appellate court should, for all purposes and intent, refrain from interfering with lower courts' concurrent findings of fact unless the two courts below clearly misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been mis-directions or non-directions on the evidence. This view was stated by the Court of Appeal in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L. R 31 where at page 32 the Court said:

"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."

See also **Salum Said Matangwa @ Pangadufu vs Republic** [2020] TZCA 1814; (TANZLII) and **Daniel Kivati Monyalu vs Republic** [2021] TZCA 561; (TANZLII).

Guided by the above principles I will proceed to resolve the present appeal. I propose to start with the second ground of appeal. I have stated above that a second appellate court will not have jurisdiction to deal with grounds of appeal not canvassed by the first appellate court. Having carefully considered the grounds of appeal raised in the first appeal and the appeal before this court, I have noted that the second ground of appeal was neither raised or determined upon by the first appellate court. I have also noted that the same is factual and not a point of law which would be raised at any stage. That said, in the authority of **Julius Josephat** (supra), I shall not deal or entertain the second ground of appeal for lack of jurisdiction.

The next, and perhaps the most crucial, complaint is contained under the first ground of appeal in which the appellants maintains that the trial tribunal and the DLHT failed to properly evaluate the evidence on record and thereby arrived at an erroneous conclusion. The appellants believe that, had the two lower tribunals exercised their minds properly in evaluating the evidence on record, they would have resolved that their case was weightier than that of the respondent.

Undeniably, failure of the first appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal. I

must also acknowledge, at this juncture that, as a matter of practice, this court, as the second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to, except where it is clearly necessary and more so when it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.

There is no gainsaying that, being a first appellate court, the DLHT had a duty to put the evidence on record to a fresh scrutiny and make its own findings and arrive at its own conclusions from the evidence on record. The DLHT was also expected to assess which witnesses are to be believe and why. It was also its duty to be mindful that when the question arises on which witness is to be believed rather than another and that question turns on the manner and demeanor, then the DLHT was to be guided by the impression made on the trial magistrate who saw the witness. See **Pandva vs R** (1957) EA and **Okono vs Republic** (1972) EA. The issue here is whether the DLHT discharged this obligation.

A closer scrutiny of the records of appeal demonstrates that the DLHT abdicated its duty to conduct a sort of re-hearing of the case by review and re-evaluation of the evidence and come to its own

conclusion. The position of law in the circumstances like this is that where the first appellate court has abdicated its responsibility in analyzing and re-evaluating the evidence on record and reaching at its own reasoned conclusions, this court, as a second appellate court, has the power and duty to review the evidence before the trial tribunal and reach its own conclusions. The Court of Appeal took this view in the case of **Shabani Amiri vs. The Republic**, Criminal Appeal No. 18 of 2007, CAT at Arusha (unreported), where the Court (Rutakangwa, J.A) observed as follows:

> *"This appeal presents us with one of those very rare cases in which this Court, on a second appeal, has to step into the shoes of the High Court and make a proper evaluation of the entire evidence in order to satisfy itself on whether or not the conviction of the appellant was justified or right. That this is permissible was clearly spelt out in the case of* ***D. R. PANDYA v. R*** *[1957] E.A. 336 (Court of Appeal). It was held therein that* ***on a first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny, (which was not done here) and that failure to do that is an error of law, which can be remedied on a second appeal.*** *That has been the stance of the law since then."*
>
> [Emphasis is mine]

For this reason, I will proceed to consider the grounds of appeal and the written arguments by the parities, and make my own conclusions, based on the evidence before the trial tribunal.

It is elementary that in civil proceedings, including land matters, 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. See **Paulina Samson Ndawanya vs Theresia Thomas Madaha** [2018] TZCA 218 (TANZLII). It is also common knowledge that he who alleges bears the evidential burden of proving his allegations.

There is no dispute that, it was the respondent who instituted the application at the trial tribunal alleging that the appellants have encroached into the suit property having extended the boundaries of the land allocated to their parents by his father. As quoted above part of his testimony reads:

> *"Mimi ninamlalamikia/ninawalalamikia wafuatao: 1. Antoni Msigwa na Zabroni Msigwa kwa kosa la kuingia kwenye eneo lisilo husika wameiingilia kwa kulima ekari sita tofauti na alizopewa na marehemu baba yangu Lukelo Chungu sasa ninapo wauliza wanakuwa wakali ..."*

It therefore goes without saying that, in terms of section 110 of the Evidence Act, it was the respondent who had the duty to prove the above allegations. To discharge this burden, the respondent relied in his own testimony and that of Aw2 and Aw3.

In his testimony, the respondent acknowledged that the appellants parents were allocated land by his late father, Lukelo Chungu. He also stated that the disputed property comprised a damaged house **"Pagale"** and three ancestral graves of the **"Chungus".** However, in his testimony, the witness failed to provide credible evidence that the damaged houses were constructed by his father or that they were not part of the suit property when it was handed to the appellants parents. In addition to that, besides his mere allegations, there was no evidence that the graves in the area were those of his relatives. It is also important to note that in her testimony Tumaini Kihangile (Rw3), who was present when the area was being given to the appellants parents, stated that the graves were there when the appellants parents were being allocated the land and no one knew who owned the graves.

Ephrem Ndendya (Aw2) and **Lunodzo Chungu (Aw3)** testimony was not directly linked to the issue of ownership of the suit property. Aw2 stated that he was involved in mediating a dispute

between "the Msigwa and Chungu" families. He stated that in the mediation the Msigwas (appellants) conceded that there was a "pagale" and the graves. However, when he was cross-examined as to proof on what was agreed, the witness concede that there was no written agreement or minutes executed to witness the agreement between the two families. Aw2 testimony therefore contained mere statements which were not supported. On top of that, even assuming without deciding here that he was saying the truth, he only testified of a concession by the Msigwas that there was a pagale and graves. That statement, in my view, was not a concession that the suit property was not allocated to the appellants parents or that the suit property was the property of the respondent.

The evidence of Aw3 was even more vague. He only stated that the respondent was the lawful owner of the disputed property because it contained a "pagale" and the respondent's grandparents' graves.

The question now is whether, on the weight of the above evidence, the respondent managed to prove his allegations on the balance of probabilities. Having carefully examined his allegations and evidence before the trial tribunal, I am satisfied that the respondent failed to discharge his obligation under section 110 of the Evidence Act. Firstly, the respondent conceded that the appellants parents were

allocated land by his late father, one Lukelo Chungu. Secondly, the respondent failed to establish in evidence the exact land which the appellants were allocated and that which they had invaded. He could not tender any evidence or witness to testify that the suit property was not allocated to the appellants parents. Thirdly, he alleged that the destroyed house and the graves belonged to his grandparents. However, no evidence or witness was procured to support this contention. As I have stated above, even assuming that the said pagale and graves were his grandparents, that would not *ipso facto* mean that the area surrounding the pagale and graves or the entire six acres was his or that the suit property was not the property of the appellants.

The law in our jurisdiction is settled that he who alleges must prove and that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden. It is also common ground that the burden of proof is not diluted on account of the weakness of the opposite party's case. See **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** [2021] TZCA 699 (TANZLII).

That notwithstanding, the two lower tribunals made a concurrent finding and conclusion that the disputed property should be equally divided between the parties. Having carefully examined and evaluated

the evidence on record, I am of a decided view that, the findings and conclusions of the two lower tribunals were not supported in evidence. As I have pointed out above, the respondent did not establish, in evidence, that he owned any part of the disputed property let alone half of the said property. In my considered view, since the respondent had not established his case on a required scale, he was not entitled to any portion of the suit property.

At this juncture, I wish to remark that, as judicial officers, our duty is to look into the available evidence and apply the law in resolving disputes between the parties. A judicial officer can only decide in favour of a party where there is sufficient material on record to support a conclusion that the respective party is entitled to a particular right or remedy. It is not a duty of a judicial officer to appease the parties. Much less when that particular party has failed to discharge his/her legal obligation. As judicial officers we always have to make up our mind and decide a dispute, one way or the other. For lack of better explanation, a judicial officer cannot endeavor to strike equality where there is none.

The case of **Re B [2008] UKHL 35**, which has been referred in various decisions of the Apex Court in our jurisdiction is relevant on this subject. This case was cited by the Court of Appeal in the case of

Anthony M. Masanga vs Penina (Mama Mgesi) and Another [2015] TZCA 556 (TANZLII) and **Barelia Karangirangi vs Asteria Nyalambwa** [2019] TZCA 51 (TANZLII). For ease of appreciating the relevance of this case in understanding the degree of "the balance of probabilities" required in civil cases, I think it is important to highlight the factual background of the said case. In a historical version presented by **Baroness Hale of Richmond**, the case concerned the future of two children, a nine-year-old girl (NB), and a six-year-old boy (AB). Their parents are Mr. B and Mrs. B, who began their relationship in 1996 and married in 1999. Mrs. B has two children by her previous marriage, a 16-year-old girl, R, and a 17-year-old boy, S. The family lived together until April 2006, when Mr. B left the family home, although he later visited from time to time.

Evidently, Social services and the police became involved with the family shortly afterwards. N's school became concerned about her possibly sexualized behavior. In July 2006, Mrs. B indisputably assaulted S in the street. Following that S left the family home and has not returned. Mrs. B threatened to allege that S had sexually assaulted N if he persisted in an assault charge against her. Mrs. B and R then both made false allegations of sexual abuse and assault against S. The police and social services began their inquiries.

While the police inquiries were still continuing on the 30th October 2006, when Mr. B applied, with the support of the local authority, for residence orders in respect of N and A. Instead, the district judge made interim care orders in respect of R as well as N and A, on the basis of a plan to remove them all from Mrs. B and place them with Mr. B at his parents' home. However, while they were being removed from home that evening, R alleged that Mr. B had sexually abused her and had also assaulted her and S with a belt. R was placed with foster carers and has since returned to her mother's care. N and A were placed with Mr. B's parents and Mr. B moved out. In September 2007 they were moved to foster carers.

The care proceedings were transferred to the High Court. A fact-finding hearing took place before Charles, J over 29 days in June and July 2007. Subsequently, on 19th October 2007, Charles, J handed down a judgment. However, despite an elaborate and meticulous analysis of all the evidence, the learned judge was unable to make a finding that, on the balance of probabilities, any abuse had happened or that it had not happened. All that the learned judge felt he could safely conclude was that there was a real possibility that abuse had occurred.

The case went to the House of Lords. In its judgment the House of Lords attempted to provide an answer to the question ***"what does proof on the balance of probabilities means in practice"***. In response Lord Hoffman (At para 2) answered that question using a mathematical analogy:

> *"2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

For ease of understanding I will illustrate the above findings in percentage terms; It means that a claimant in a particular civil suit must prove that his facts in support of the case tip the scale in his favor even if it is only by a 1% probability that he is more correct. That is to say, if a court concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win. One may as well ask ***"how is a judge is expected to measure the***

probabilities of a case by 1% probability." That is a subject for another day.

Lest I am miss understood, I am not saying here that, judicial officers should always cling and insist upon rules of evidence or legal technicalities in resolving disputes. All I am saying here is that, when adjudicating disputes and a point come when a judicial officer has to decide, on for example who is entitled to a right or remedy between the parties, (s)he must decide; and do so on the basis of the available evidence. (S)he cannot sit on a fence and decide that parties have equally discharged their obligations. Obviously, each case has to be determined based on its own circumstances. To illustrate this more, I could not find better words than those expressed by **Baroness Hale of Richmond**, in **Re B** (supra). In the course of her speech (at paras 31 and 32), Baroness Hale held this:

> *"31. My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place.* ***Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent***

probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

32. ***In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue:*** *the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking, a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."*

I fully subscribe to the above views. As was stated in the above case, in the end a court is expected to determine which account of events is supported by more probative evidence in accordance with the standard of proof.

I must add that, a rule that civil cases must be proved on the balance of probabilities should not be considered as merely a judicial function in which judges or magistrates exercise their qualitative

assessment of the truth or inherent probabilities in light of the evidence from the witnesses. To the contrary, I firmly believe that, if litigants and advocates, as officers of the court, understand this rule and how it applies in civil cases, they will always strive to present relevant facts and evidence which will in turn tilt the scale in their favour. That way, justice will be seen to be done.

In the instant case, the records clearly demonstrate that the trial tribunal abandoned its duty and obligation to adjudicate on the dispute presented before it on the basis of evidence and law. Instead, it decided to apply its wisdom. It is also unfortunate that the DLHT skidded into the same error when it failed to re-appraise the evidence on record and come to its own impressions and conclusions. I am satisfied that the two lower tribunals seriously misapprehended the evidence on record resulting into wrong conclusions and a serious miscarriage of justice.

For my part, having carefully examined the records, I am of a decided view that, had the two lower tribunal properly exercised their minds in evaluating the evidence, they would have, as I here do, find that the respondent failed to prove the allegations in his application on the balance of probabilities.

For the above cited reasons, I would allow the appeal. Consequently, I quash and set aside the judgment and decree of the Imalinyi Ward Tribunal in Land Application No. 06 of 2020. Having said that, the judgment and decree of the District Land and Housing Tribunal for Njombe District sitting at Njombe in Land Appeal No. 87 of 2020 are not spared, they are also quashed and set aside. Given the circumstances of the present case, I make no order for costs.

It is so ordered

DATED at **IRINGA** this **18TH** day of **AUGUST, 2023.**

S.M. KALUNDE

JUDGE