THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

LAND APPEAL NO. 46 OF 2023

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 11 of 2022, the Judgment Dated at 4th April 2023)

GLORIA MBILINYI.....APPELLANT

VERSUS

ANGUMBWIKE SAMILE.....RESPONDENT

JUDGMENT

26th October & 16th November, 2023

MPAZE, J.:

The appellant, GLORIA MBILINYI has instituted the instant appeal challenging the decision of the District Land and Housing Tribunal for Mbeya (the trial Tribunal) made in Land Application No. 11 of 2022 the judgment dated 4th April 2023.

In that case, the appellant who was the applicant instituted a suit against the respondent ANGUMBWIKE SAMILE claiming that he trespassed on her land in 2020. The measures of the said land were not

described but it was said that it is a piece of land situated at Ilolo ward, Sinde area within the City of Mbeya (henceforth to be referred to as the suit land).

The appellant testified before the trial tribunal that she had been given the suit land by her late father, Daudi Masumbuko Mbilinyi, in 2015. In contrast, the respondent contested this claim, asserting that he had acquired the suit land from the appellant's father in 2011. The trial Tribunal was not convinced by the appellant's testimony.

In deciding in the favour of the respondent, the trial Tribunal observed that the appellant failed to substantiate her claim of being given the suit property by his father. The tribunal further justified its decision by noting that there is no legal requirement for the seller to involve his children in selling of his property.

Dissatisfied with the decision, the appellant preferred the present appeal raising four (4) grounds of appeal as follows:

1. The Chairman of the trial Tribunal erred in law and facts by disregarding strong evidence produced by the Appellant on the ownership of the suit land.
2. That the trial Tribunal erred in law and facts give(sic) judgment in favour of the respondent on the ground that the Appellant

gave evidence which varied from the evidence produced early(sic) when the matter was heard exparte where the tribunal declared the Appellant a lawful owner of the suit land.

3. That the chairman of the trial Tribunal erred in law and facts to admit a document tendered by the Respondent regarded as a sale agreement (Exhibit D1) which was not given by the Respondent when produced a written statement of defence (WSD).

4. That the chairman of the trial Tribunal erred in law and facts to give judgment in favour of the Respondent declaring him the lawful owner of the disputed land despite that the Respondent failed to give sufficient evidence to prove the same.

Owing to the above grounds the appellant prayed this court to quash the decision of the trial Tribunal and declare the respondent a lawful owner of the suit land.

I should pose here and highlight an apparent inconsistency in the appellant's prayer. The appellant prayed this court to declare the respondent as the lawful owner, this contradicts the primary objective of challenging the trial tribunal's decision. It is noted, with understanding, that there might be a typographical error, and the intended word could be 'appellant' instead of 'respondent.'

At the hearing of the appeal, both parties appeared in person, unrepresented. It was orally argued.

The appellant commenced by adopting her grounds of appeal. Subsequently, she argued that the respondent failed to substantiate his case since he did not summon any neighbours to testify. Instead, he relied solely on the testimony of his wife and daughter, who asserted that he acquired the disputed land from the appellant's father.

The appellant pointed out the absence of documentary evidence supporting this purchase and failure to call the village chairman or any leader to corroborate the respondent's claim, it cannot be said the respondent managed to prove ownership of the suit land. She maintained that if the respondent had indeed purchased the land, she would not have contested the matter.

In his rebuttal, the respondent countered that besides the testimonies from his family members, he called upon a street chairman, Ngambi Kalaba Ngambi, as a witness. He further explained that during the land purchase, the appellant's father, who was the vendor, informed him that he had divorced his wife, and his daughter was already married at that time. The respondent also claimed to have substantiated the purchase by providing a sale agreement as evidence.

The respondent went further that the appellant has not provided evidence regarding the capacity in which she initiated this suit, as she has not tendered a letter of administration. He also pointed out that the appellant neither holds ownership of the disputed land nor has any of her relatives testified in her favour. The respondent concluded that the appellant is not a proper person to claim ownership of her late father's land.

In her rejoinder, the appellant reiterated her earlier submission, she stressed that she is a rightful claimant of the suit property, contending that the disputed land was given to her by her late father before his demise. She urged the court to thoroughly review the records and independently arrive at a conclusion in her favour.

I have considered the grounds of appeal, the rival submissions by the parties, the record and the law. I will address the grounds of appeal in the manner they were presented. It is noted that the parties involved are laypersons and were not legally represented during the hearing. In the interest of fairness and to ensure a just resolution, I will address the grounds of appeal based on their original presentation, acknowledging the lack of specific legal explication during the hearing due to the parties' non-legal representation.

In addressing the grounds of appeal, I will begin with the 3rd ground, followed by the 2nd ground and conclude with the 1st and 4th grounds, which I will consider together given their interrelated nature. This sequence has been chosen for a more systematic and coherent examination of the issues at hand.

In the 3rd ground of appeal, the appellant contends that the trial tribunal erred in admitting Exhibit D1, as it was not attached to the respondent's written statement of defence.

The law requires that documents relied upon by the parties should be annexed to the pleadings. Nevertheless, the District Land and Housing Tribunals are empowered to admit documents even if not initially annexed under certain conditions.

According to Regulation 10 of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003, the tribunals may accept such documents if they were produced at the first hearing or at any stage of proceedings before the conclusion of the hearing. The Regulation provides;

> *'10-(1) The Tribunal may* ***at the first hearing, receive documents which were not annexed to the pleadings*** *without necessarily following the*

practice and procedure under the Civil Procedure Code, 1966 or Evidence Act, 1967 as regards documents.

(2) Notwithstanding sub-regulation (1) the Tribunal may, ***at any -stage of proceedings before the conclusion of the hearing allow any party to proceed to produce any material documents which were not annexed or produced earlier at the first hearing.***

(3) ***The Tribunal shall before admitting any document under sub-regulation (2)-***

(a) ensure that a copy of the document is served to the other party;

(b) have regard to the authenticity of the document.'
(Emphasis added)

It can be observed from the cited provision that a copy of the document must be served to the other party, ensuring transparency and fairness in the proceedings.

After a thorough examination of the case record, it is evident that the appellant's complaint in the 3rd ground of appeal is valid. Exhibit D1 was not annexed to the Written Statement of Defence (WSD), and it was introduced by the respondent during the defence hearing without following the prescribed procedure of serving a copy to the appellant, as

required by Regulation 10 of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, 2003. Likewise, it is noted that the respondent did not include Exhibit D1 in their WSD.

Given these findings, I am inclined to agree with the appellant that the trial tribunal committed a significant irregularity, violating both the aforementioned regulation and the principle against relying on documents not attached to the pleadings. This inconsistency constitutes a fatal anomaly, as established in the case of **Airtel Tanzania Limited vs OSE Power Solutions Limited** (Civil Appeal No. 206 of 2017, Court of Appeal of Tanzania at Dar es Salaam, unpublished).

Consequently, Exhibit D1 being admitted in violation of the required procedure , I hereby expunge it from the record.

In the second ground of appeal, the appellant contends that the trial tribunal made an error in deciding in favour of the respondent based on the alleged variance of evidence presented by the appellant during the *ex-parte* hearing. It is crucial to briefly outline the facts leading to this complaint to better understand the appellant's concern

It is in the record that initially, the trial tribunal heard the appellant's case *ex-parte*. In the *ex-parte* judgment, the appellant was

declared the winner of the suit land. However, subsequently, the respondent appeared and applied for the setting aside of the ex-parte judgment, and this application was granted. This led to *inter-parties* hearing, and the decision reached during this hearing is the subject of the current appeal.

It is also in the record that in the subsequent judgment, which is the centre of this appeal, the trial tribunal cited the variance in the appellant's evidence between the *ex-parte* and *inter-parties* hearings as one of the reasons for its decision. However, it is my considered opinion that the analysis conducted by the learned trial Chairman in this regard was legally improper.

In my view, after the *ex-parte* judgment was set aside, the proceedings leading up to it were also affected by the same order. Consequently, any comparison between the evidence presented in the *ex-parte* hearing and the subsequent *inter-partis* hearing may not be legally sound.

Given the circumstances, it can be argued that the evidence given by the appellant during the ex-parte hearing, should not have been considered in the subsequent matter. The setting aside of the *ex-parte*

judgment implies that the proceedings leading to that judgment were also nullified.

Therefore, any reference to the evidence from the previous proceedings could be seen as introducing extraneous matter, as it did not contribute to either the appellant's or the respondent's case in the current *inter parties* hearing. The trial Chairman, having set aside the ex-parte judgment, should have based the decision solely on the evidence presented during the *inter-parties* hearing.

In light of the foregoing analysis, the appellant's argument that being declared a lawful owner in the *ex-parties* judgment should not serve as proof of ownership in the subsequent proceedings is well-founded. The evidence presented during the *ex-parte* hearing, being nullified by the setting aside of the *ex-parte* judgment, should not have influenced the determination of the subsequent case.

In consideration of these factors, the ground of complaint raised by the appellant is deemed valid, and consequently, the dismissal of the appellant's claim in the subsequent proceedings based on a comparison with the *ex-parte* judgment is unwarranted. Therefore, the second ground of appeal is upheld.

Considering the 1st and 4th grounds of appeal, which highlight the appellant's contention that the trial tribunal failed to adequately analyze the evidence presented by both parties, it is essential to recognize the responsibility of a first appellate court. In this capacity, I must thoroughly re-evaluate the evidence and independently arrive at my own conclusions.

To effectively address these grounds, a pivotal issue to determine is whether the appellant successfully substantiated her claims. Conducting a comprehensive examination of the evidence will provide a fair and just resolution to the concerns raised in the 1st and 4th grounds of appeal.

In resolving the aforementioned issue, I will adhere to the fundamental principle that the party making an allegation must substantiate it, as stipulated in section 110 of the Evidence Act [Cap 6 R.E 2022], supported by the case of **Kwiga Masa v. Samwel Mtubatwa** [1989] TLR 103. In civil cases, the standard of proof is based on the balance of probability, as outlined in section 3(2)(b) of the Evidence Act.

This standard requires the court to give preference to the evidence that is more convincing, and a decision will be rendered in favour of the

party whose evidence carries more weight. This approach is consistent with legal principles established in cases such as **Hemed Said v. Mohamedi Mbilu** [1986] TLR 113, **Ikizu Secondary School v. Sarawe Village Council**, Civil Appeal No. 163 of 2016 (unreported), and the case of **Scania Tanzania Limited vs. Gilbert Wilson Mapanda**, Commercial Case No. 180 of 2002 (unreported), where the concept of 'balance of probabilities' was elucidated as follows:

> *'A court is satisfied an event occurred if it considers that on evidence, the occurrence of the event is more likely than not.'*

For that, I will subject the entire evidence to scrutiny. The evidence of parties on the record is not hard to comprehend. On the appellant's side, three witnesses (PW1, PW2, PW3) provided evidence. PW1, the appellant herself, stated that she was given the suit land in 2014 by her father before his demise. PW2 testified that the suit land originally belonged to the father of PW1 and, after his passing, became the property of PW1. PW3, identifying himself as a neighbour to the suit land, affirmed that he knew the land belonged to the father of PW1.

On the respondent's side, the assertion was that he purchased the suit land from the appellant's father, who approached him along with

Japhet Mwaijala (who was the owner of the suit plot before he sold the land to the appellant's father). The respondent claimed to have paid Tshs. 600,000 for the land and submitted a sale agreement, Exhibit D1 (which has been expunged). According to the respondent, the children of the seller, including the appellant, were informed about the sale. This testimony was corroborated by both DW3 and DW4, who provided similar accounts.

Examining the testimony of DW2, who identified himself as the chairman of the street for 25 years, he claimed to have been approached to draft a sale agreement. When questioned about the seller's family, he reported that the appellant had married, her dowry was taken by her uncle, and the seller had informed him about divorcing his wife.

In contrast, the appellant's evidence primarily asserted that she was given the suit land by her late father, and her witnesses, PW2 and PW3, reiterated that the land originally belonged to the deceased. Notably, none of the witnesses testified to witnessing the specific event of the appellant being given the suit land by her late father, nor did they provide information suggesting that the deceased had conveyed the land to the appellant, especially according to PW3, who is a neighbour.

Examining the evidence in the record, it is apparent that the appellant's story lacks specific details regarding how her father transferred the suit land, whether as a gift, in a custodial capacity, or through other means. Additionally, the appellant did not specify if there were any witnesses to this transaction, such as relatives, area leaders, friends of either party or friends of the deceased.

On the other hand, even though the respondent's purported sale agreement has been expunged, both the respondent and his witnesses provided an account of how the appellant's father approached him to sell the suit land. They testified that this approach took place due to the proximity of the suit land to the respondent's home, a fact that remains undisputed.

Again, the respondent provided evidence that the sale was witnessed by one Japhet Mwaijala, who, as they claimed, is now deceased. It was asserted that Mwaijala was the one who had sold the suit land to the appellant's father, a fact that was not contested. DW2 testified that he is a leader in that area the position which he held both at the time of the sale and presently.

DW2 provided an account of how the appellant's father sold the suit land to the respondent, mentioning that the appellant's father had

informed them about divorcing his wife and the appellant's marriage at that time. Notably, this evidence was not contradicted, and the appellant did not raise any questions regarding these aspects during the hearing

Having considered the entirety of the evidence, it appears that the appellant did not fulfil her duty to meet the required standard of proof as there is an inconsistency in the appellant's account: she initially stated in her application to the trial tribunal that she was given the suit land in 2015, but during her testimony, she contradicted this by asserting it was given in 2014.

Moreover, the appellant's contention that the respondent did not present any neighbours as witnesses is deemed irrelevant, as there is no legal requirement for such a provision. Even if one were to assume that the law mandates the involvement of neighbours, their absence in this case does not substantiate the appellant's claim that she was given the suit land by her late father.

Furthermore, a concerning aspect is the lack of testimony from the appellant's siblings regarding how the appellant's father decided to give her the suit land without their knowledge, considering the evidence that the appellant is not the only child of the deceased. This omission raises

questions about the completeness and credibility of the appellant's account, as her siblings were not called to testify.

Given these considerations, it is my considered view that the evidence presented by the respondent is more plausible than that of the appellant. Consequently, I find the 1st and 4th grounds of appeal to lack merit.

In conclusion, having thoroughly examined the appeal, I am of the opinion that it lacks merit in its entirety. Therefore, I hereby dismiss the appeal and order the appellant to bear the costs.

It is so ordered.

Dated at **Mbeya** this 16th November, 2023.

M.B. MPAZE

JUDGE

Court: Judgment delivered in the presence of both the appellant and respondent in person.

THE HIGH COURT OF TANZANIA

M.B. MPAZE

JUDGE

16/11/2023