IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO.55 OF 2022

(Arising out of Land Application No. 25 of 2021 before the District Land & Housing Tribunal for Mbulu at Mbulu)

BOAY UMBULA _____ **APPELLANT**

VERSUS

MAGANGA BOAY _____ **1ST RESPONDENT**

ALFONCE POLIKADI _____ **2ND RESPONDENT**

JUDGMENT

27/09/2023 ***&*** *01/11/2023*

BADE, J.

This Appeal originated from Application No 25 of 2013 of District Land and Housing Tribunal of Mbulu sitting at Dongobesh. The Appellant had sued both Respondents claiming that the 1st respondent had sold the disputed land measuring 8.5 acres located at Endalat Village, Endamilay Ward within Mbulu district which belonged to him, to the 2nd respondent without his consent.

Aggrieved by the judgment of the District Land and Housing Tribunal (Henceforth "The Land Tribunal"), the appellant lodged this appeal to challenge it. The grounds of appeal are reproduced verbatim hereunder:

i. *That, the trial tribunal erred in law and in fact for failure to properly evaluate the evidence adduced by the appellant thereby arriving at a wrong decision in the face of the law.*

ii. *That, in the alternative to ground no. 1, the trial tribunal erred both in law and fact when it held that the 1st respondent had a good case and proved it on balance of probability despite the fact that there were contradictions in the testimony of the respondent's witnesses.*

iii. *That, the trial tribunal's decision is bad in law as it was passed based on irrelevant documentary evidence (exhibit U1) tendered by the 1st respondent.*

Before going to the merits of this appeal I shall look at the background, albeit briefly to bring in some context. The appellant and 1st respondent are father and son. The appellant testified before the Land Tribunal that he was given the disputed land by his father in 2003. After he was given the said land, he entrusted the 1st respondent to use and take care of the land while he was away. The said land which measures 8 ½ acres is located at Endalat village within Mbulu District, while he was working and living in Oldian Ward in Karatu District.

The appellant further testified that when he came back, he found that the 1st respondent sold the disputed land to the 2nd respondent without his consent.

On the other hand, the 1st respondent testified that he was given the disputed land by his late grandfather (appellant's father) in 1994 as he had lived with him since he was little from 1979 when his grandfather took him in. That his grandfather first gave him 8 ½ acres, and later on he gave him another 8 ½ acres making a total of 17 acres.

He further testified that in 2003 he had a conflict with his uncle over the disputed land, a meeting was held and his grandfather confirmed in the said meeting that the land was originally owned by him but he gave it to him and no one should disturb him over the said land. In 2019 he sold 8 ½ acres to the 2nd respondent.

After receiving the evidence from both sides the Land Tribunal ruled in favor of the respondents ordering that the 1st respondent should legally transfer his title on the land to the 2nd respondent as he was the owner of the disputed land. It is that decision that has aggrieved the appellant and propelled him to lodge the instant appeal on the above-mentioned grounds.

The appellant was represented by Mr. Omary Gyunda, learned counsel while respondents were represented by Mr. Basil Boay, also learned counsel.

In support of the 1st ground of appeal, the appellant's counsel argues that it has been a long-established principle of law that the first appellate court is empowered to reevaluate and reassess evidence on record and come up with its own conclusion and findings, pointing to the decision in the case of **Suzan Peter Mbaria vs Barikiel Joseph Bee,** Civil Appeal No. 6 of 2022**.** Mr. Gyunda contends that there is no dispute that the 1st respondent is the appellant's son and he was not only raised by the appellant's father Umbula Gwandu, but he was residing with him while the appellant was residing away from the disputed land. That Umbula Gwandu divided his land to his sons in 2003.

Moreover, the counsel submitted this evidence of the appellant was supported by the evidence of Karani Umbula (PW2) who is the appellant's brother, Tlehema Maderai (PW3) a neighbor to the disputed land who witnessed when Umbula Gwandu transferred the disputed land to the appellant and Faustini Karani (PW4) who is neighbor to the disputed land. In his view, despite this unchallenged evidence of the appellant the trial chairman proceeded to rule in favor of the

respondents while their evidence was weak. Mr. Gyunda added that it is trite law that the one with strong evidence must win, citing the case of **Hemedi Said vs Mohamed Mbilu, (1984) TLR 113** that:

> *"According to the law both parties to the suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of evidence".*

In his views, the appellant has strong evidence compared to that of the respondents and he should have been declared the winner.

Arguing the 2nd ground of appeal, Mr. Gyunda submitted that the respondent's evidence was tainted with contradictions but surprisingly the trial tribunal discarded the same and ruled in their favor. He pointed out those contradictions including that in his written statement of defense the 1st respondent claimed that he was given a total of 17 acres by his grandfather in 1994 while during hearing, he testified that in 1994 he was given a total of 8 ½ acres and another 8 ½ acres he was given in 2003, arguing that parties are bound by their pleadings. To support his proposition, he cited the case of **Martin**

Fredrick Rajab vs Ilemela Municipal Council and Another, Civil Appeal No. 197 of 2019**,** where it was held:

> *"It is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus no party is allowed to present a case contrary to the pleadings".*

He submitted that since the 1st respondent pleaded that he was given 17 acres of land since 1994 he was obliged to testify in support of the pleading. He argues that while Exhibit D1 was prepared in 2003, according to his testimony he was given 17 acres of land since 1994. Furthermore, Mr. Gyunda argues that the boundaries of the suit land mentioned by the 1st respondent on page 21 of the typed proceedings are different from the boundaries mentioned by PW2, one Bakhari Bura under page 23 of the typed proceedings.

On the 3rd ground of appeal, the counsel submitted that documentary evidence tendered as U1 (D1) (sic) by the 1st respondent during the hearing of the suit is irrelevant to the issue at hand since the said exhibit is about 17 acres of land between 1st respondent and one Karani Umbula who is not a party to the present dispute. That the said exhibit is about 17 acres of land with no description of the same land such as

boundaries or even neighboring land while the suit at hand is about 8 ½ acres only as described by the appellant. The counsel further added that the trial tribunal erred in ruling in favor of the respondents based on the said illegal exhibit which was full of doubts. He contends that the contents of documentary evidence can be proved by the document itself not oral evidence, citing section 100 of the Evidence Act, Cap 6 R.E 2019 to buttress his position. He charges further that Section 101 of the Evidence Act excludes oral evidence in proving the contents of documentary evidence arguing that he strongly believes that the chairperson of the tribunal did not scrutinize and properly evaluate the evidence adduced before him as there was misdirection and non-direction of the evidence in his findings. Mr. Gyunda invited this Court to look at the evidence adduced before the trial tribunal and come up with its own findings, supporting his plea with the cases of **Peters vs Sunday Post Ltd** (1958) E.A 424, and **Salum Mhando vs Republic** (1993) TLR 170 where it was held:

> *"Where there are misdirection and non-directions on the evidence a court of a second appeal is entitled to look at the relevant evidence and make its own findings".*

Responding, the counsel for the respondents submitted against the 1st ground maintaining that the authorities cited by the appellant's counsel are distinguishable from this case since according to the evidence on the record the trial tribunal properly evaluated the evidence adduced before it by both parties. The 1st respondent clearly indicated the source of his ownership, and how and when he acquired the disputed land.

He argues that the disputed land was officially verified in 2003 when the same was invaded by the appellant's brother one Karani Umbula when it was measured and obtained a total of 17 acres. Exhibit U1 indicated the elders and local leaders who were present when 1st respondent was given the disputed land.

In his view, the chairman of the tribunal was accurate in the way he treated the evidence of both parties, referring this court to pages 2-7 of the judgment, arguing that after careful evaluation of the evidence the chairperson of the tribunal ruled out that the appellant's evidence was weaker as he failed to recognize even the size of the land given by his father in 2003. He argues that the appellant's own witnesses including Karani Umbula were present when the 1st respondent was given the disputed land and signed exhibit U1, the same person who appeared as

key witness for the appellant, and did not impeach the truthfulness of the tendered exhibit.

He maintains that the chairperson of the tribunal rightly considered the evidence of the respondents as weightier as testified by Maganga Boay, (SU1) and corroborated with the evidence of Bakhari Bura (SU2) the hamlet and cell leader of the location where the disputed land is, Zawadiel Nade (SU3) who was present when the size of the land was authenticated and handed to the 1st respondent and participated in clearing the bush in 1994; as well as Qamare Tahan (SU4) who was also the village chairman. He supported his contention with the case of **Ally Rajabu vs Saada Abdallah Rajabu and Others,** (1994) TLR 132 that based on the evaluation of evidence, it is the trial court that is in a better place to evaluate the evidence.

The counsel for the Respondents further argues that the appellate court may, in rare circumstances, interfere with the trial court's findings of fact, it may only do so in the instances where the trial courts had omitted to consider or have misconstrued some material evidence or acted on a wrong principle or erred in its approach to evaluate evidence as it was held in the case of **Matem Leison & Another vs Republic,** (1998) TLR 102.

Concerning the 2nd ground of appeal, Mr. Boay submitted that the evidence adduced by 1st respondent was elaborate on how and when he acquired the disputed land, how long he possessed the same and used it, and his evidence was corroborated by the evidence of SU2, SU3 and SU4 as well as exhibit U1. Based on section 110 (1) and (2) of the Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts that person must prove those facts exists.

Mr. Boay contends that the appellant having instituted the case against the respondents and having been required by law to prove his case, did not do so sufficiently, and left gaps in his case, without evidence to support the claim that the disputed land belonged to him or establish how he was given the same by his late father when he instituted the case against the respondents. The counsel further argues that the appellant adduced insufficient, unclear, and contradictory evidence that did not prove anything contrary to the provisions of section 112 of the Evidence Act which requires that the burden of proof as to any fact lies on the person who wishes the court to believe in its existence.

Arguing against the 3rd ground of appeal, Mr. Boay argues that the relevance of exhibit U1 is to prove the size of the disputed land,

secondly to show the original owner of the disputed land, thirdly, to show steps taken by 1st respondent when the appellant's brother tried to dispose of the suit land in 2003 and lastly is to prove that 1st respondent is the legal owner of the disputed land. That appellant was unable to even recognize the size of the suit land given to him by his father in 2003. He further argues that the appellant has neither sufficient oral evidence nor documentary one to prove how he acquired the land besides mentioning that he inherited it from his father in 2003.

That the evidence from records shows that 1st respondent was given a total of 17 acres of which 8 ½ is a farm and the remaining 8 ½ acres is a grazing area. The counsel further maintains that exhibit U2 indicated that 1st respondent sold 8 ½ acres out of 17 acres, citing the case of **Godfrey Sayi vs Anna Siame as Legal representative of late Mary Mndolwe,** Civil Appeal No. 14 of 2012 to support the position that in civil proceedings the party with legal burden also bears the evidential burden, and the standard in each case is on the balance of probability. Since 1994 when 1st respondent was given a suit land by his grandfather there was no dispute up to 2003 when the appellant's brother Karani Umbula tried to invade the land, where a dispute arose.

Moreover, he submitted that the court's record reveals that from 2003 to 2021 there was no dispute over the suit land until when the 1st respondent sold the portion of his land to the 2nd respondent. That the appellant did not object to the admission of Exhibit U1 when it was tendered and admitted by the tribunal, so he cannot now come to this Court to challenge the same document, adding that section 45 of the Land Disputes Courts Act, Cap 216 provides that no decision of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such a decision or order or on account of the improper admission or rejection of the evidence unless such error, omission, irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.

Rejoining, the counsel for the appellant reiterated his submission in chief adding that counsel for the respondents only attacked PW2's evidence by referring to exhibit U1 whilst they have never alleged the issue of forgery of PW2's signature in the said exhibit. Mr. Gyunda further submitted that looking at the evidence of respondents, all witnesses are strangers, and there was no single member from the family of late

Umbula Gwandu who came to testify to support their story compared to the witnesses who came to testify for the appellant.

Defending his choices of the cases that were cited in the submission in chief, he contends that they are based on principles of law, therefore it cannot be said that the facts in those cases are distinguishable as he did not rely on the facts of those authorities as alleged by the respondents' counsel; but rather the principles of law enunciated in those cases.

He also insists that the appellant was not bound by the contents in Exhibit U1 as he was not a party to that dispute, adding that the fact that the appellant was living in Oldian Karatu cannot be a basis for him not to inherit from his father. He insisted that the trial tribunal did not consider the fact that the land measuring 8 ½ acres had boundaries differing from the land measuring 17 acres. That description of the suit land including the boundaries as pleaded in the application was not disputed by the respondents and still, the chairman of the tribunal did not consider it, insisting that the chairperson of the tribunal was wrong to rely on exhibit U1 since Exhibit U1 is referring to 17 acres of land while the disputed land is 8 ½ acres. Exhibit U1 does not describe disputed land in terms of location and its borders.

Mr. Gyunda asserts further that the village /hamlet chair is not a custodian of the village land, referring to section 8 of the Village Land Act, Cap 114. That even if what was done in 2003 was done in compliance with the provisions of section 8 of the Village Land Act, the same could not serve the purpose of this suit since the appellant was not a party of that dispute and the said Karani Umbula is not a party to this suit, submitting further that section 45 of Land Disputes Courts Act, Cap 216 as referred by respondents' counsel is inapplicable since this appeal is based on substantive issues.

Going through the rival submission by the parties and the court's record, I think this court is tasked to determine whether the District Land & Housing Tribunal properly evaluated the evidence placed before it. In answering this issue, I shall have addressed myself to the grounds of appeal and determine the said grounds of appeal as raised by the appellant as a result.

The main argument by the appellant's counsel is that the chairperson of the District Land & Housing Tribunal failed to evaluate evidence properly and hence reached into erroneous decision. Going through the judgment of the land tribunal I have realized that I cannot find merits in the allegation by the appellant's counsel as the chairperson of the trial

Tribunal properly evaluated the evidence and came to the finding that the appellant's evidence was weaker compared to that of 1st respondent. This Court sees no need and there is no justification to interfere with such findings. My saying so is based on the reevaluation of the evidence as found on record that the appellant's evidence shows that it is only SM3 who testified that he was present when the appellant was given disputed land; whereas on the respondent's side, the testimony of SU1 was corroborated by the evidence of SU2, SU3 as well as Exhibit U1. SU2 and SU3 testified that they were present at the family meeting whereby the original owner of the disputed land, one Umbula Gwandu who was the 1st respondent's grandfather declared that he gave the said land to SU1. SU3 added that he was hired by SU1 to clear the bush in the disputed land in 1994. It is my view that on the balance of probability, the analyzed evidence above is enough testimony to strongly support the respondents' side of the story.

The question of what is the balance of probability, has been answered by Lord Hoffman in a well celebrated case of (Re B [2008] UKHL 35) explaining it using a mathematical analogy:

> *"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."

On the evidence adduced and found on record, the Land Tribunal cannot be faulted by holding as it did that it was more probable than not that the Respondent was given the land by his grandfather, particularly because the burden of proof by the Appellant who was the claimant at the Land Tribunal was not at all discharged.

Addressing the second ground of appeal, the appellant's counsel alleged that the respondent's evidence was tainted with contradictions, as the Written Statement of Defense, claimed that the 1st Respondent was given the disputed land and some extra acreage by his grandfather, making a total of 17 acres of land in 1994, while in his oral testimony he claimed that in 1994 he was given 8 ½ acres of land, and then again in 2003 he was given another 8 ½ acres which makes a total of 17 acres.

While I admit having read in the Written Statement of Defense that the 1st appellant stated that he was given 17 acres of land by his grandfather in 1994; Indeed in the oral testimony he testified that he was given 8 ½ acres in 1994 and another 8 ½ in 2003. Despite this pointed contradiction, I am not convinced that this contradiction can faint or erase the truth that the disputed land was given to the 1st respondent by his grandfather, one Umbula Gwandu. In my view, Exhibit U1 is pivotal and quite decisive, as it was supported by persons who attended the conciliation meeting, it was tendered before the Land & Housing Tribunal, and the appellant did not object to its admission or controvert its contents as was put on evidence.

Another contradiction alleged by the counsel for the appellant is about boundaries. He argues that the boundaries of the disputed land mentioned by SU1 are different from those mentioned by SU2. I had taken time to appraise myself of this piece of evidence regarding the boundaries as testified by SU1 and SU2. I am of the firm view that there is no major difference as alleged by the counsel for the appellant, apart from a slight difference on the western part of the land which is inconsequential to alter the finding of the trial Tribunal, particularly because there is no any other cogent evidence to controvert the same.

The boundaries mentioned by SU1 are materially similar to the boundaries mentioned by the other witnesses including the appellant. I thus found this ground to be without any merit.

Concerning the 3rd ground of appeal, counsel for the appellant alleges that Exhibit U1 over which the chairperson of the trial Tribunal based his decision is irrelevant as the disputed land is 8 ½ acres while Exhibit U1 speaks of about 17 acres, as well as the fact that Exhibit U1 is about 1st respondent and one Karani Umbula who is not part of this suit. He further added that the said Exhibit refers to 17 acres with no description of boundaries. I commend the industry by the counsel for the Appellant for trying, but with dismay, I think these allegations are nothing but a desperate afterthought that cannot swing the pendulum. In my considered view, the counsel for the Appellant cannot restrict the court from making a deduction of the logical facts from the old presented facts that form the body of evidence which had been adduced before the Land Tribunal and is now before this Court.

It is clear from the evidence that the disputed land is within those 17 acres of land, which according to exhibit U1, was given to the first respondent by his grandfather. The appellant not being a party to the contents that form the body of Exhibit U1 does not make Exhibit U1 an

irrelevance because the disputed land is the same parcel land that is contained in the parcel of land mentioned in Exhibit U1. Then again, just because Exhibit U1 does not state the boundaries of the disputed land does not make it irrelevant as the appellant neither objected to its admission nor did he cross-examined on the aspect of boundaries or in any way controverted its content. To wait until this stage to complain that the disputed land is different from the one mentioned in Exhibit U1 is purely an afterthought. I do not find any fault in the way the Land Tribunal evaluated the evidence to arrive at its decision. I reject the said ground of appeal.

Having said so this appeal is wholly dismissed for want of merit.

The Respondents must have their costs.

It is so ordered.

DATED at **ARUSHA** this **01st** day of **November 2023.**

A. Z. Bade
Judge
01/11/2023

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **01st** day of **November 2023**

A. Z. BADE
JUDGE
01/11/2023