IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

LAND APPEAL NO. 42 OF 2022

(Originating from Land Application No. 217 of 2019 by the District Land and Housing Tribunal for Dodoma at Dodoma)

HEZEKIAH NDAHANI CHIBULUNJE ..... APPELLANT

VERSUS

SHABANI MATANDILA.....RESPONDENT

JUDGMENT

Date of last order: 10/10/2023
Date of judgment: 11/12/2023

KHALFAN, J.

The appellant has filed this appeal to challenge the decision of the District Land and Housing Tribunal of Dodoma at Dodoma ("trial tribunal") which was made in favour of the respondent. The appeal is constitutes two grounds as follows:

1. *That, the trial Chairman erred in law and fact for finding that the appellant failed to prove his case.*
2. *That, the trial Chairman erred in law and fact for declaring the respondent as the lawful owner of the suit land and consequently ordering eviction and permanent restriction against the appellant.*

The brief background of this matter is that before the trial tribunal, the appellant sued the respondent for ownership of the suit land located at Gwandi village, Zajilwa ward within Chamwino district in Dodoma city.

Having heard the evidence from both sides, the trial tribunal found that the appellant failed to satisfy the tribunal that the suit land was allocated to him by the village council. The trial tribunal was satisfied that there was on the part of the appellant's evidence, absence of proof of compliance with the dictates of the law under section 8 of the Village Land Act [Cap 114 R.E 2019] ("VLA") governing allocation of village land. Pursuant to the dictates of the said section, the village council has to obtain the approval of the village assembly before allocating the land to any person.

This court ordered the matter to be heard by way of filing written submissions. The appellant's submission and rejoinder were drawn up and filed by Mr. Francis Steven, learned advocate, whereas the respondent's reply was drawn and filed by Mr. Charles Mabula Charles, learned advocate.

It is the appellant's contention that the trial tribunal erred by deciding the case against him while he proved the case on the standard required in civil cases. He averred that the trial tribunal misconstrued the provision of section 8(5) of VLA considering that the testimony of PW1, PW2 and PW3

produced evidence which shows that the land was allocated to the appellant prior to the village meeting.

He further contended that the trial tribunal did not observe the position of the law which excludes the consideration of oral testimony where there is documentary evidence while referring to the provision of section 101 of the Evidence Act [Cap 6 R.E 2022] and the case of **Simon s/o Shuri Awaki @ Dawi vs. Republic**, Criminal Appeal No. 62 of 2020 (unreported). It is his submission that the trial tribunal was supposed to give weight to exhibits P1 and P2 beyond the oral evidence adduced by the respondent.

The appellant also argued that the trial tribunal was not supposed to accord weight to the testimony of DW2 since he had interest to serve as he stated clearly that he was given a piece of the suit land by the respondent. Having submitted as such, the appellant urged the court to re-evaluate the evidence and come up with its conclusion or otherwise take additional evidence as empowered by the provision of section 42 of the Land Disputes Courts Act [Cap 216 R.E 2019] (hereinafter referred to as the LDCA).

The reply by the respondent countered the appellant's arguments by submitting that the appellant did not prove his case on the balance of probability which is the standard of proof in civil matters. He acknowledged

the principle of law that he who alleges a fact is duty bound to prove that fact by citing the provisions of sections 110(1) & (2) and 111 of the Evidence Act as demonstrated in the case of **Lamshore Limited and J.S Kinyanjui vs. Bizanje K.U.D.K** [1999] TLR 330 and the case of **Mwalimu Paul John Mhozya vs. Attorney General** [1996] TLR 229.

The respondent joined hands with the trial tribunal that the appellant failed to prove if the allocation of the suit land was approved by the village assembly as there were no minutes produced to such effect. He went on to challenge exhibit P2 which was the letter from the village executive officer approving the allocation of the alleged land of 100 acres that it was not addressed to the appellant but to a member of parliament for Chilonwa constituent while at the same time, the village executive officer had no such power of allocating land to any person as per section 8 (5) of the VLA.

He also challenged the evidence of the appellant with regard to the size of the land, as the exhibit P2 entails that the land is of 100 acres while other testimony entails that the land is of 68 acres. It is thus his argument that the appellant's evidence, during trial, was contradictory and ambiguous.

The respondent also argued that it was wrong, against equity and common sense for the village government to allocate the suit land to another

person while the same land was under the ownership of another person who was developing the same.

He insisted that by the use of the term "shall" under the provision of section 8 (5) of the VLA, it means that it is a mandatory requirement for a village council to obtain a prior approval of the village assembly in effecting the allocation of land. He recited the provision of section 53 (2) of the Law of Interpretation Act [Cap 1 R.E 2019] which interprets the term "shall" to mean that the function so conferred must be performed. Therefore, it is his argument that failure to produce the minutes to such effect means that there was no any prior approval of the village assembly.

The respondent went further to argue that the appellant failed totally to prove his case because his evidence was weak compared to his. He cited the case of **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 113 which illustrated that the one whose evidence is heavier than the other, is the one who must win the case.

Besides, the respondent replied that the appellant contravened himself by urging the court to disregard the evidence of DW2 that he had interest to serve while the evidence adduced by him was crucial and credible. To concretise his contention, he cited the case of **Abraham Saigunran vs.**

The Republic [1981] TLR 265 and the case of **Simon Shuri Awaki @ Dawi vs. The Republic**, Criminal Appeal No. 62 of 2020 (unreported). He also cited the provision of section 127(1) of the Evidence Act, which considers every person to be competent witness to testify unless he is incapable of understanding the questions put to him or giving rational answers to those questions by reason of tender age, disease or any similar cause.

The respondent, on the other side, countered the prayer advanced by the appellant for the court to re-evaluate the evidence contending that the trial tribunal properly evaluated the evidence then decided in his favour. Also, he countered the prayer for taking additional evidence because the case was properly adjudicated in the trial tribunal.

The respondent concluded his reply by praying the court to dismiss the appeal with costs.

The appellant, in his rejoinder, reiterated his submission in chief. He insisted that the appellant's evidence was credible compared to that of the respondent and accordingly, did prove the case on the balance of probabilities being the required standard of proof in civil cases.

He also insisted on his prayer that this court should take additional evidence in terms of section 42 of the LDCA, while citing the case of **Phoenix of Tanzania Assurance Company Ltd and Another vs. Panache Ltd**, Civil Appeal No. 111 of 2020. He argued that the reason for this court to take additional evidence is because exhibit P2 would not have been issued without the village assembly's approval hence by taking additional evidence, the court shall be able to satisfy itself the existence of the minutes to such effect. At the end, the appellant prayed the court to find merit in the appeal and accordingly allow it with costs.

In the light of the above summary of submissions made by both parties and upon the perusal of trial tribunal's records, the issue for my determination is whether the appeal is meritorious. It is trite law that whoever alleges must prove and such proof as far as civil case is concerned, must be on the balance of probabilities. See sections 110 and 3(2) (b) of the Evidence Act. Thus, this court, being the first appellate court, shall re-evaluate the available evidence and proceed to determine which party has successfully proved the ownership of the suit land as rightly invited by the learned advocate for the appellant.

It is revealed in records that in the bid to prove his ownership, the appellant had a total of four (4) witnesses including the appellant himself.

The appellant testified as PW4 while other witnesses were PW1, PW2 and PW3. The appellant's testimony was based on the fact that he was the legal owner of the suit land which was allocated to him by the village council in 2015 in his capacity as a member of parliament for Chilonwa constituent. It was his further testimony that the suit land initially had 100 acres which were divided to him and his wife with 50 acres each but having surveyed the same pursuant to exhibit P4 which is the sketch map, the same was found to be of 68 acres.

PW1 supported the appellant's ownership of the suit land by stating that while in his duties as the ward executive officer, he received an application from the appellant who was the Member of Parliament for Chilonwa constituent to be issued with 100 acres for himself and his wife. Accordingly, the village assembly accepted his application and a piece of land sized 100 acres was allocated to the appellant with 50 acres for the appellant himself and 50 acres for his wife.

PW2 as a village chairman of Gwandi village told the trial tribunal that upon the appellant's application for allocation of the land, the village committee sat and accepted the application and allocated the appellant a total of 100 acres which after being surveyed, turned out to be 68 acres and therefore the environmental committee marked the boundaries to the same.

He also averred that he was among the people who assisted the appellant to clear the suit land after being allocated and he tendered exhibit P1 which had names of the persons who cleared the suit land for the appellant including himself.

PW3 testified that while in his duties as the village executive officer of Gwandi village, the appellant applied for the allocation of land and accordingly was allocated a suit land with 100 acres. He tendered exhibit P2 which is the letter notifying the appellant of the said allocation.

The respondent on his party testified as DW1 and brought one witness, DW2 to support his testimony. The respondent adduced his evidence to the effect that the suit land belonged to him after having obtained a permission from the village authority to clear the same. It was his testimony that the land was of 50 acres and he paid a total of TZS. 500,000/= to the village authority to obtain such permit.

DW2 supported the respondent's testimony by stating that the suit land belonged to the respondent as he was also given a part of it to use. In addition, during cross examination, he contended that the suit land was located at Gwandi village sized 50 acres and that the respondent obtained permission to clear the same.

In the light of the above set of evidence, it is my firm opinion that the respondent's evidence carries more weight compared to that of the appellant as per the findings of the trial tribunal. The VLA is clear on the issue of allocation of the land by the village authority by setting the procedures to be followed prior to allocation. This means that the appellant was supposed to prove his allocation by showing the procedures adopted by the village authority subject to section 8(5) of the VLA which stipulates that:

> *"A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly."*

Having keenly examined the appellant's evidence, it is apparent that in the entire evidence, there is no proof if the village assembly approved the allocation despite the presence of mere words that the village assembly approved the allocation without any tangible evidence. What is surprising is that the exhibit P2 was written by PW3 in his capacity as a village executive officer notifying the appellant that his application to be allocated a piece of land had been accepted, which in its literal interpretation, it means that it was the village executive officer who had accepted the allocation of the land to the appellant who at the material time, was the member of parliament for Chilonwa constituency.

However, I find the evidence on the part of the appellant to contradict itself. This is because; by reading exhibit P2, it is stated that the land was allocated to the appellant. The assertion that that the land was allocated to the appellant and his wife as alleged by the appellant and his witnesses remained unfounded.

Further, there is contradiction as to whether the suit land was allocated to the appellant alone or it was divided to him and his wife. It is a clear fact that if the said 100 acres of the suit land were divided 50 acres to the appellant and 50 acres to his wife, then it would be expected that even the survey would be conducted separately, it is likely that, the appellant would not have filed this suit for the whole 100 acres which turned to be 68 as per exhibit P4.

Henceforth, with these contradictions and in the absence of approval by the village assembly, I find the evidence on the part of the appellant not watertight enough to prove his case on the balance of probability. Therefore, his claim of ownership is not supported by his evidence. I have considered the respondent's evidence that he owned the suit land by clearing the same after obtaining the permission from the village authority. Basically, this piece of evidence is not contradicted. Thus, this court is prevented from disregarding the oral testimony adduced on the part of the respondent.

In addition, the respondent's evidence reveals that he has been in the suit land from the age of 25 years which means that he has occupied the suit land for a number of years. This is because by the year 2021, when he was giving his evidence, he was 60 years of age. This means, the disputed land still belongs to the respondent.

The appellant on the other hand has attacked the evidence of DW2 saying that he had interest to serve. I find this argument immaterial as rightly argued by the respondent since section 127(1) of the Evidence Act recognises every person to be competent witness; the same provides that:

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

See the case of **Goodluck Kyando vs. The Republic**, [2006] TLR 363 where it was held that:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"*

In this respect, DW2's evidence cannot be disregarded only because it seems he has interest to serve for being given a piece of suit land by the respondent for his personal use save that his evidence should be considered with caution as per the holding of the Court of Appeal in the case of **Godfrey Elisalia and Others vs. Republic**, Criminal Appeal No. 39 of 2022, CAT, Kigoma (unreported) where it was stated that:

> *"..., we find PW11 was a witness with his own interest to serve and his evidence ought to have acted upon with great caution."*

Consequently, with a close scrutiny to the evidence adduced by DW2, I find the same to be credible for this court to rely upon considering that DW2 has adduced his evidence to corroborate the evidence of the respondent which carries enough weight to justify his ownership of the suit land.

Based on the foregoing, this court refrained from taking additional evidence as invited by the appellant. This is because the court finds that there is no any set of evidence which is required to be taken in order to arrive at a proper decision. See the case of **Ismail Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015, CAT, Dar es Salaam where the Court of

Appeal whilst referring to SARKAR LAW OF EVIDENCE 16th EDITION 2007 at page 2512 stated that:

> *"The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision o f a case. The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where discovery is made outside the court, of the fresh evidence and the application is made to import it...The rule is not intended to allow a litigant who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal."*

In the upshot, I find no merit in the appeal. Accordingly, the same is dismissed with costs.

It is so ordered.

Dated at **Dodoma** this 11th day of December 2023.

F. R. KHALFAN

JUDGE