IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 27676 OF 2023

(Originating from Land Application No. 12/2023 of the District Land and Housing Tribunal for Mtwara at Mtwara)

ABDALLAH BAKARI MKALYANGA.....APPELLANT

VERSUS

ISSA ABDALLAH KUDULA..... RESPONDENT

JUDGEMENT

13th February & 21 March, 2024

MPAZE, J:.

The appeal stems from the judgement of the District Land and Housing Tribunal for Mtwara (referred to herein as the 'DLHT') in Land Application No. 12 of 2023, whereas the respondent was declared the rightful owner of the land situated in Arusha Chini village, Chawi ward, Nanyamba Town Council (the suit property). Dissatisfied with the decision, the appellant has sought recourse by bringing this appeal.

A brief background of the appeal as revealed during the hearing at the DLHT, alleges that the applicant (respondent) is the rightful owner of the suit property, which measures a quarter acre, obtained from his

mother Zainabu Abdallah Ngwalu in 1998. It was stated that upon being assigned the land, the respondent has been utilizing it for rice cultivation, occasionally leasing it out for other activities.

In the year 2018, it was asserted that the appellant trespassed onto the suit property, sparking this dispute. Despite the respondent's attempts to resolve the matter, including seeking mediation at the Ward Land Tribunal, it remained unresolved. Consequently, the respondent filed Land Application No 12 of 2023 which is the subject of this appeal claiming the appellant's actions as trespassing.

In his defence before the DLHT, the appellant asserted that the suit property is part of his 8-acre land, which he has owned for the past seven years. He tendered a sale agreement dated 30/12/2021 as evidence, showing that he purchased 4 acres of land from Issa Aly Msumbuka. This document was admitted as Exhibit D1, he also tendered a document from the Ward Tribunal of Chawi showing he is the owner of $8^1/_2$ acres which was admitted as Exhibit D2.

After hearing evidence from both parties, the DLHT decided the matter in favour of the respondent by declaring him the rightful owner of the suit property. Further, the DLHT pronounced that the appellant was a trespasser on the suit property and ordered him to vacate.

The appellant was dissatisfied with the findings and thus decided to present six grounds of appeal in this court. Upon examining them, I observed that the first three grounds of appeal are intertwined and therefore, they will be discussed collectively. However, grounds four, five, and six will be addressed separately. The grounds of appeal as presented by the appellant are as follows;

1. That the trial chairman erred in law and fact by failing to consider that the appellant occupied and developed the disputed land by cultivating permanent crops and season crops for almost eight (8) years without any disturbance.
2. That the trial chairman erred in law and fact by neglecting to consider credible and justifiable evidence which was adduced by the appellant and opted to rely on weak evidence of the respondent regarding ownership of the disputed land.
3. That, the tribunal chairman erred in law and fact by pressing the burden of proof on the appellant while in law the burden of proving ownership of the disputed piece of land was on the respondent.
4. That the learned tribunal chairman grossly erred in law and fact for failure to receive and consider the sale agreement as an exhibit which was referred and tendered by the appellant.

5. That the trial chairman erred in law and fact to disregard a just and correct opinion of the gentlemen assessors without giving sufficient reason for departing from their opinion.
6. That trial chairman erred in law and fact by ordering the appellant to pay costs to the respondent which both parties incurred costs in prosecuting their case.

During the hearing of this appeal on 26th February 2024 neither party had legal representation, and they both argued their appeal personally. The appellant on his part prayed the grounds of appeal be adopted and considered as part of his submission, emphasizing his plea for the appeal to be allowed. Conversely, the respondent prayed for the dismissal of the appeal and the upholding of the DLHT's decision.

Based on the prayers made by both parties, I proceeded to evaluate this appeal, guided by the question of its merit.

At the outset, I indicated that I would address the first three grounds of appeal collectively, as they all contend that the tribunal erred in law and fact in reaching its decision in favour of the respondent despite insufficient evidence to establish his ownership of the suit property while the respondent stays in the suit property over eight years was not taken into account.

It is a well-established legal principle that the burden of proof in civil cases lies with the party seeking a favourable verdict from the court based on specific rights or liabilities contingent upon the existence of certain facts. Therefore, the onus rests upon the party making the allegations to prove the existence of such facts see sections 110 and 111 of the Tanzania Evidence Act Cap 6 R.E 2022.

In the case of **Barelia Karangirangi Versus Asteria Nyalwamba**, Civil Appeal No.237 of 2017, CAT (Unreported) the Court held inter alia that;

> *'... It is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove.'*

Again, in the case of **Crescent Impex v. Mtibwa Sugar Estates Limited**, Civil Appeal No. 455 OF 2020, the Court had this to say;

> *'It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the*

said burden is not discharged or diluted on account of the weakness of the opposite party's case.'

Drawing from the cited cases in addressing the first three grounds of appeal, the pivotal question is whether the respondent adequately substantiated his case to meet the requisite standard of proof before the matter was decided in his favour.

The appellant in this case contested the tribunal's decision to declare the respondent as the rightful owner of the suit property, arguing that there was insufficient evidence.

Upon examining the evidence as adduced during the trial, the respondent provided testimony asserting his ownership of the suit property, which he purportedly acquired from his mother. The respondent's mother appeared before the DLHT and confirmed that the suit property belonged to the respondent, she said before she assigned it to the respondent the same was her property claiming to have possessed it since 1978, inheriting it from her parents.

On the appellant's part, he claimed that the suit property is part of his 8 acres. However, during his oral testimony, he did not specify the origin or acquisition of this particular piece of land. Nonetheless, upon

concluding his oral testimony, he tendered two documentary evidence, which were admitted and marked as Exhibit D1 and Exhibit D2.

I have studied these Exhibits, Exhibit D1 is a Sale Agreement for a 4-hectare farm located in the Mkala area, dated 30/12/2021. This document indicates that the seller of the land is Issa Aly Msumbuka and the buyer is Abdala Bakari Mkalyanga.

Exhibit D2 is a document from the Ward Tribunal of Chawi showing the appellant owns a farm measuring $8^1/_2$ hectares, issued on 7/1/2023. Upon examining Exhibit D1, it states the appellant purchased a farm from Issa Aly Msumbuka. By tendering this Exhibit, the appellant implies that he acquired the suit property from Issa Aly Msumbuka.

However, it is worth noting that Issa Aly Msumbuka appeared before the DLHT and provided his testimony as PW3. During his testimony, he stated;

> *...eneo langu kiasi cha ekari tatu nilikata nilimuuzia mjibu maombi miaka 6 iliyopita.*
>
> *Baadae mleta maombi alikuja kunilalamikia sehemu yake imepandwa mikorosho. Kabla sijachukua viongozi nilienda mimi mwenyewe kuangalia. Nikakuta kweli mjibu maombi ameingia* ***sehemu ambayo mimi sikumuuzia****.*

Uongozi wa Kijiji ulimwambia mjibu maombi sehemu aliyo panda mikorosho siyo yake hivyo atoe mikorosho yake na aache eneo kwa mleta maombi. Mleta maombi alikubali kutoa mikorosho. Leo hii naona ajabu kuitwa hapa nilijua wameisha elewana.'

Based on this piece of evidence, the appellant himself, through Exhibit D1, claims to have purchased the suit property from PW3, and PW3 testified that although he sold some land to the appellant, he did not sell the disputed portion.

In this regard, the respondent's evidence appears more substantial than that of the appellant.

In addition to that, the appellant also criticized the DLHT for not taking into account his uninterrupted occupancy of the suit property for over 8 years. Here, the appellant may have sought to invoke the doctrine of adverse possession. However, looking at the evidence as adduced in the DLHT it can be noted that the criteria required for someone to be declared a lawful owner through adverse possession have not been met.

It was established in the case of **Moses v. Lovegrove** (1952) and **Hughes v. Griffin** (1969) 1 All ER 460, as quoted and approved in the case of **Bhoke Kitangita v. Makuru Mahemba**, Civil Appeal No. 222 of

2017 CAT, that a person claiming ownership of land under the doctrine of adverse possession must cumulatively prove the following;

> *'(a)* ***That there had been the absence of possession by the true owner through abandonment;***
>
> *(b) That the adverse possessor had been in actual possession of the piece of land;*
>
> *(c) That the adverse possessor had no colour of right to be there other than his entry and occupation;*
>
> *(d)* ***That the adverse possessor had openly and without the consent of the true owner do*** *acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
>
> *(e) That there was a sufficient animus to dispossess and an animal possidendi;*
>
> *(f)* ***That the statutory period, in this case, twelve 12 years, had elapsed;***
>
> *(g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
>
> *(h) That the nature of the property was such that in the light of the foregoing/adverse possession would result.'*
> [Emphasis added]

From the circumstances described above, it is evident that to establish ownership of land by way of adverse possession, it is necessary among other conditions to demonstrate the absence of the true owner through abandonment and that 12 years have passed since occupying the land.

Despite the appellant's complaint about the tribunal's failure to consider his eight-year presence on the suit property without interference, he did not provide any evidence to demonstrate that the land was abandoned by the true owner. Moreover, he presented Exhibit D1, proving that he purchased the land from PW3. This undermines the application of the doctrine of adverse possession as it shows the land was not abandoned.

Furthermore, apart from the lack of evidence showing abandonment by the true owner, the requirement of 12 years of uninterrupted possession has not been met. The appellant himself stated that his presence on the land was for eight years, not 12 years. Therefore, even if the appellant had been present for eight years without disturbance, which is not supported by evidence, it does not negate the rightful ownership of the respondent.

In light of these factors, I conclude that this argument lacks support.

From all that has been discussed regarding the first three grounds of appeal, it is evident that the respondent did indeed have sufficient evidence to support his claims. The evidence provided was substantial, outweighing that of the appellant. Therefore, the complaints raised in the first three grounds of appeal are unfounded.

The appellant's complaint in ground four of the appeal faults the trial tribunal for allegedly failing to consider the sale agreement tendered by the appellant during the trial. Upon examining the judgment of the DLHT, I have observed that on page 7, in the last paragraph, the trial chairman did consider the sale agreement, which is Exhibit D1. He stated;

> *'...ushahidi hapa unaonyesha mara ya kwanza mjibu maombi alilima eneo lenye ukubwa wa ekari nne ambalo halikuwa na mgogoro wowote. Na baada ya kulima eneo hilo la ekari nne baadae siku ya tarehe 30/12/2021 mjibu maombi alinunua eneo jingine kutoka kwa Issa Ally Msimbuka kuongeza eneo lake kama inavyothibitishwa na* ***kielelezo D1*** *ambayo ni hati ya kununulia shamba na maelezo ya Issa Ally Msimbuka mwenyewe (PW3) ...PW3 amelithibitishia baraza hili kuwa mjibu maombi amejiongezea eneo lenye mgogoro kwa ukubwa wa robo ekari..'*

By looking at what has been stated by the trial chairman in this paragraph, it is evident that the tribunal did consider the sale agreement,

Exhibit D1. And, it is not true that the tribunal failed to consider it; rather, it deliberated on it, which is why, in the end, the tribunal reached the decisions it did. Therefore, I also find that this ground lacks merit.

On the 5th ground of appeal, the appellant is faulting the trial tribunal for disregarding the assessors' opinion without giving reason for departing with them.

In resolving this ground, I directly referred to the Land Disputes Courts Act, Cap. 216, RE 2019 (herein referred to as 'the LDCA') and its regulations, specifically the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, to ascertain their provisions regarding the opinion of assessors.

Section 23(1) and (2) of the LDCA states that the District Land and Housing Tribunal must be presided over by a chairman who sits with not less than two assessors. The section reads as follows;

> '*The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors*; and
>
> (2) *The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment.*'

Likewise, Regulation 19 (2) states that;

> '19.-(2) *'Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili after the assessors' opinions, the chairman is obliged to consider them.'*

However, it is important to note that the chairman is not bound by the opinion of the assessors. This is as per Section 24 of the LDCA, which stipulates;

> *'In reaching decisions, the chairman shall take into account the opinion of assessors but shall not be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion'*

Upon examining what the law stipulates, I revisited the instant case to ascertain whether the DLHT adhered to the legal requirement. I noted from the typed proceedings dated 13th September, 2023 that the opinion of the assessors was read out and explained to the parties.

On page 10 of the typed judgment, the trial chairman provided reasons why he did not agree with the opinion of the assessors. He stated;

> *'Kwa kuwa muuzaji wa eneo lenye mgogoro amethibitisha baraza hii kuwa mjibu maombi*

amejiongezea eneo lenye mgogoro kwa ukubwa wa robo ekari natofautiana na maoni ya wajumbe wa baraza wote wawili waliokuwa upande wa mjibu maombi..'

It is clear from the passage that the trial tribunal provided reasons for deviating from the assessors' opinions, as mandated by the law outlined in section 24.

Generally, the trial chairman is not obligated to adhere to the opinions of assessors; rather, he is only required to offer reasons for disagreeing with them, which is precisely what the trial chairman did. Based on these explanations, I also find that this ground is unfounded.

Lastly, the appellant complained that the trial tribunal ordered him to pay the costs of the suit without considering that both parties incurred expenses.

In addressing this ground of appeal, I was guided by sections 30(1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019, and section 21(1) of the Land Dispute Courts (District Land and Housing Tribunal) Regulations, 2003, which state;

30.-(1) '*Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to,*

all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) *Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.'*

While that of the Land Dispute Courts (District Land and Housing Tribunal Regulations, 2003 provides;

21.-(1) ' *The Tribunal may make such orders as to costs in respect of the case as it deems just.'*

From the wording of the above provisions of law, it is clear that, as the general rule costs shall follow the event unless the court for good reasons, order otherwise. This means that the successful party is entitled to costs unless there is some good cause for not awarding costs to him.

In the case of **Mohamed Salmini v. Jumanne Omary Mapesa**, Civil Application No. 04 of 2014 CAT at Dodoma (Unreported), it was held that;

'As a general rule, costs are awarded at the discretion of the court. However, the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that costs would usually follow the event unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by die misconduct of the party or his advocate.'

Again, in the case of **Registered Trustee of the Roman Catholic Archdiocese of Dar es Salaam versus Sophia Kamani**, Civil Appeal No. 158 of 2015 CAT at Dar es Salaam (Unreported) it was held that:-

'Finally, the order of costs. It is the well-known principle that a winner is an end tied to cost unless there are exceptional circumstances which were shown to exist. So, the appellant is end tied to costs.'

In the instant case, the trial Chairman awarded costs to the respondent. The cited cases indicated that awarding costs is a requirement of the law, where the law mandates costs to follow the events unless good cause is shown.

Upon examining the records of the DLHT, it is evident that the respondent attended the DLHT from 27th March 2023 to 20th October 2023 when the decision of this case was made.

In light of this, the respondent was entitled to be awarded costs to compensate for the expenses incurred in prosecuting his case. Consequently, I find no reason to differ from the trial chairman's findings on this aspect as he exercised his discretionary power to award the costs. This ground of appeal is unmertious as well.

In Upshot, I find that this appeal lacks merit, and as such, it is dismissed in its entirety with costs.

It is so ordered.

Dated at Mtwara this 21st day of March 2024.

M.B. MPAZE

JUDGE

Court: Judgment delivered in Mtwara on this 21st day of March, 2024 in the presence of the appellant Abdallah Bakari Mkalyanga and Issa Abdallah Kudula respondent.

M.B. MPAZE

JUDGE

21/3/2024