IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB – REGISTRY OF MOSHI

AT MOSHI

LAND APPEAL NO. 60 OF 2023

(Appeal from the decision of the District Land and Housing Tribunal of Same at Same in Land Application No. 21 of 2020 dated 26th day of July, 2023 before Hon. T. J. Wagine)

MARIAM HOZA ..... APPELLANT

VERSUS

MUSTAPHA SAID MSEMO @ MUSA MACHORONGO.....1ST RESPONDENT
ZAINA JUMA NANGELEKI .....2ND RESPONDENT
VITA SAID.....3RD RESPONDENT
ABRAHAMANI FUNGO ....4TH RESPONDENT

JUDGMENT

18th March & 25th April,2024.

A.P. KILIMI, J.:

This appeal emanates from the decision of the District Land and Housing Tribunal of Same which was delivered on 26th July 2023 against the appellant but in favour of the respondents.

In order to appreciate the context in which this appeal was lodged, I find it necessary to begin the brief background that gave rise to parties' dispute. It was the appellant's claim at the tribunal that the suit land was given to her as a gift by her late grandmother known as Luice Jonathan Mameruti who died in 1993. She also claimed that in 1993 she entrusted

the possession of the disputed land to her maternal aunt as she left the village to Dar es Salaam which is her matrimonial home.

She further alleged that the 1st respondent trespassed on the disputed land and stopped the appellant's aunt from using that land and claiming that the land in dispute belonged to him. Soon as she became aware of the matter, she visited the suit land where she found the 2nd and 3rd respondents who told her that the land had been sold to them by the 1st respondent. After trying in vain to amicably resolve the matter, the applicant resorted to filing an application before the tribunal praying to be declared the rightful owner of the disputed land and an order for injunction against the respondents.

The respondents on the other hand refuted the applicant's claim and the 1st respondent alleged that the disputed land belonged to him since 1959 when he inherited it from his father. He further alleged that, he was using the land for agriculture since then until the year 2000 when he divided it in two pieces and sold 2 acres to the 4th respondent and one and half acres to the 3rd respondent. The 2nd respondent declined to have trespassed on the disputed land and also denied being the owner thereof. The 3rd and 4th respondents both confirmed what the 1st respondent stated.

After the hearing of the case the tribunal decided that the appellant had failed to prove her claim hence the application was dismissed. It was further declared that the 3rd and the 4th respondents were the rightful owners of the disputed land.

Now, aggrieved by the decision of the District Land and Housing Tribunal the appellant has appealed against the whole decision and orders on 6 grounds as hereunder:-

1. That, the trial chairman erred in law and fact by basing the findings of the tribunal solely on the source of documentary evidence literally Annexure A1 without considering evidence from the respondents which was skimp and un-persuasive on their legal ownership of the disputed land.
2. That, the trial chairman erred in law and fact by entering judgment in favour of the respondent while avoiding the necessary task of visiting locus in quo.
3. That, the trial chairman erred in law and fact by failure to evaluate evidence properly hence decided in favour of the respondents.
4. That the trial tribunal erred in law and fact by reaching to a decision basing on contradictory evidence.
5. That, the trial tribunal erred in law by failure to consider the doctrine of Adverse Possession.
6. That, the trial chairman erred in law and fact for denying the appellant her constitutional right pursuant to Article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977.

At the hearing of this appeal, appellant was represented by Mr. Mandera Mziray learned advocate whereas all respondents were represented by Ms. Nabera Warema learned advocate.

Mr. Mandera before submission prayed to abandon the 5th and 6th grounds of appeal and preferred that the 3rd and 4th grounds will be argued jointly while the 1st and 2nd grounds will be argued separately.

On the 1st ground regarding the chairman relying on exhibit A1 instead of oral evidence, it was Mr. Mandera's submission that at the time when the appellant was given the land in dispute the writing of a deed of gift was not a practice hence, she was given orally. He further argued that the chairman had wrongly used exhibit A1 which was the minutes of a meeting called by the appellant with an intention of identifying the boundaries of the land since she was away for a long time and not to identify the land in dispute as the chairman interpreted.

The appellant's counsel further submitted that the trial tribunal misdirected itself when reasoned that in the meeting the appellant did not say to have been given the land by her grandmother as proof of ownership. The learned counsel argued that proof of ownership cannot be based on a

clan meeting rather it is by bringing title that shows ownership. He referred to the case of **Bilali Ally Kinguti vs. Ahadi Lulela Said & 4 Others** Civil Appeal no. 500 of 2021 CAT at Kigoma as an authority for his argument and submitted that it was therefore not proper for the tribunal to rely on the minutes of that meeting to decide on ownership of the land in dispute.

Arguing in respect to the 2nd ground of appeal which challenged the tribunal for not visiting the *locus in quo,* Mr. Mandera submitted that the tribunal was required to visit the *locus in quo* to ascertain the ownership because there was a dispute as to the size of the land, the appellant said it was 4 acres while according to the respondents it was 3.5 acres. Relying on the case of **William Mukasa vs. Ugunda (1964) EA 698, the** learned counsel submitted that failure by the tribunal to visit the locus in quo to ascertain the size of the suit land left uncertainty as to the size of the land, so he prayed for this ground to be allowed.

In respect to the 3rd and 4th grounds which challenged the tribunal for failure to evaluate evidence and basing its decision on contradictory evidence, it was Mr. Mandera's submission that according to evidence of Respondents they never proved as to how they acquired the land in dispute. He further submitted that the 1st respondent used a lot of energy

explaining how he leased and disposed the said land but did not prove how he acquired it. The learned counsel argued that the issue at the tribunal was who was the owner of the land in dispute but the evidence from the respondents did not prove it and the tribunal did not analyze evidence to reach the said decision. He supported his submission with the case of **Lutter Nelson vs. AG and Others** (2000) TLR 419.

Concerning contradiction in evidence Mr. Mandera submitted that according to the evidence of the 1st respondent said that he sold the land to the 3rd respondent, he argued that this was untrue based on the sale deed date 8/10/2018. Also, he submitted that the said sale deed stated consideration was Tshs. 2,000,000/= and that on the same date he was given Tshs. 1,000,000/=, and agreed to pay the remaining sum on 1/1/2019 but on the next paragraph says they have already paid all the money, he argued that the deed of sale contradicted itself. He further contended that due to the contradiction it affects the entire evidence hence it was his prayer that the appeal be allowed with costs.

Responding to the 1st ground of appeal, it was Ms. Warema's submission that it was proper for the tribunal to admit and use both oral and documentary evidence. She further submitted that the appellant was

the one who tendered-exhibit A1 and the purpose was to prove a legal ownership while the 1st respondent proved his acquisition by inheritance from his parent through oral evidence. She further argued that, the appellant intends to shift the burden of proof to the respondent instead of adducing sufficient evidence to prove ownership. The learned counsel was of the view that the reliance by the trial tribunal on both appellant and respondent evidence including the annexures therein was justifiable. She therefore prayed for this ground to be dismissed with cost.

Contending in respect to the second ground concerning visit of the *locus in quo* Ms. Warema submitted that the visit was not mandatory. She argued that the visit to *locus in quo* is only done on exceptional circumstances as it was stated in the case of **Malela Bakari vs. Manoni Bakari and Another** Land Appeal No. 23 of 2021 at page 6 where the High Court quoted **Nizar M. H. vs. Gulamale Fazal Tarimohamed** (1980) TLR 29. Ms. Warema further argued that in this matter there was no dispute as to the size, location or state but the dispute was on the legal ownership. She contended that there was nothing to be verified at the *locus in quo* and that even the appellant herself did not pray to visit since she had no interest of size or location.

Finally, responding to the 3rd and 4th grounds of appeal Ms. Warema submitted that, there was no contradictions in evidence rather parties were required to submit their evidence and the tribunal weighed it on balance of probabilities. She was of the view that the appellant had failed to prove the case on balance of probabilities. Referring to the evidence on record Ms. Warema submitted that the appellant had claimed ownership of the land in dispute by saying that it was gifted to her by her grandmother and that to prove her claim she tendered exhibit A1. Disproving the exhibit Ms. Warema argued that the exhibit A1 was silent in so far as explaining how the appellant acquired her title to the land, it was her view therefore that the exhibit was immaterial in proving ownership. The learned counsel concluded her submission by stating that the appellant had failed to prove the case on balance of probabilities thus she prayed for the appeal to be dismissed.

In his rejoinder Mr. Mandera reiterated his submission in chief and insisted that just as it was held in the case of **Malela Bakari,** the visit to a locus in quo is only done on exceptional circumstances and in the present matter there was that exceptional circumstance which is the dispute as to the size of the land in dispute.

I have entirely examined the rival submissions by the learned counsels in light of the grounds of appeal. Before I discuss the merits of this appeal, I wish to make a few remarks. My examination of the application shows plainly that the appellant's cause of action against the respondents was founded on trespass. This is why the appellant sought for the tribunal to declare her as the rightful owner of the suit land and also prayed for the issuance of injunction orders against the respondents. That means the determination of the suit in appellant's favour was conditional upon her proving ownership of the suit land. This also explains the tribunal's reasons for the framed issues which included determination as to who the owner of the suit land was. Having observed so, I will now proceed to determine the appeal based on the grounds as submitted by the appellant.

On the 1st ground of appeal, it was Mr. Mandera's submission that the tribunal only based its decision on Annexure A1 while ignoring the evidence from the respondents which was unpersuasive on the legal ownership of the land in dispute. Now, as I have already pointed out earlier considering that appellant's claim against the respondents was of trespassing on her farm measuring 4 acres, this claim requires as a principle for the appellant

to establish and prove ownership of the land she was claiming before the tribunal. This duty has been derived from the known legal principle that he who alleges must proof. The principle is enshrined in the provision of section 110(1) of the Evidence Act, Cap 6 R.E. 2022 which states;

> *"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.* "

Based on the above legal principle, in the present case the appellant was the one with the burden of proof. In my view the trial chairman rightly evaluated the evidence before him which was appellant's testimony supported by testimony from other two witnesses (SM2 & SM3) and exhibit A1. This being the only evidence given by the appellant to prove her claim the tribunal when evaluating the evidence was of the view that the appellant failed to prove how she acquired the land in dispute because the exhibit A1 which she relied upon did not support her testimony or the testimony from her witnesses. After analysing the evidence from the

respondent, the tribunal was of the view that the respondent's evidence was stronger than that of the appellant. Looking at the tribunal's decision and the findings thereof, I am settled that the Chairman of the tribunal did consider evidence from both sides and not only that of appellant as she alleged, although even if the that was the only evidence considered, in my opinion it would suffice since she was the one with the legal burden of proof. In the circumstance I find this ground meritless.

On the 2nd ground of appeal, the appellant faulted the tribunal for not visiting the *locus in quo*, I have considered the evidence on record, I subscribe with the submission by the respondents' counsel that the same is not mandatory but only necessary on exceptional cases as it was observed in the case of Nizar **M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29. It is a settled position that a visit to the locus in quo is conducted at the discretion of the trial court when necessary. It is my considered opinion that since this case was one of trespass and both parties were claiming to be owners of the same land in dispute, I think the important aspect to be established by evidence was ownership rather than the size of the land. This is because the first respondent who is alleged to trespass on the said

land in dispute auspiciously said he know the land the appellant is claiming and belong to him, so the issue of demarcation does not arise.

Nonetheless, without prejudice of the above, in the trial of this case, none of the parties raised the issue of visiting the locus in quo during trial, not even the appellant requested the tribunal to visit the locus in quo. This alone shows that it was not an issue that is why even the tribunal did not find it necessary. If the appellant found it necessary for the tribunal to visit the locus in quo in proving his case he would have said so during hearing of the matter otherwise I am inclined to hold that bringing the issue at this appellate stage is an afterthought on her part which cannot be entertained. This ground also fails for lacking merit.

Next in respect with the 3rd and 4th grounds of appeal which were argued above jointly, the appellant challenged the tribunal for failure to evaluate the evidence properly and also contended that the evidence was contradictory. It must be noted that the evaluation and analysis of evidence is purely based on what has been adduced before the tribunal. Since the appellant's claim was that her 4 acres have been trespassed on by the respondents, her evidence and that of her witnesses should have reflected so.

Again, as already pointed out above the burden of proof lies on the person who alleges and it does not shift to another person much less the court unless the law requires. This is provided for under section 112 of the Evidence Act. The provision states that;

> *"112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

Instead of adducing evidence on the way she acquired the 4 acres and how the same was trespassed upon as reflected on the pleadings, there was no cogent evidence showing how she acquired the land and at what time the title of that land was transferred to her. She led evidence to show that she had entrusted her land to her aunt (SM2), however, I have assessed her weight of evidence, in my view, the same contradicted itself hence became untrustworthy.

For instance, I have considered exhibit A1, it shows the minutes of the meeting of members of the society who lived with appellant's grandmother who was commonly known as Mameruthi. Number of elders attended, in fact some said to know the said land that was given to

appellant's grandmother was a forest and cleared by her, but as said above who alleges must prove, others were not procured as witnesses before the tribunal to testify under oath what they know in respect to the said land in dispute.

However, in that meeting Mwanahawa Athmani (SM2) who testified under oath that she was the one invited to cultivate the land by the appellant and later confiscated the said land by the first respondent, I have discovered that this SM2 was present at the said meeting, and at page 9 and 10 of exhibit A1, what she was recorded saying on that meeting is not the same as what she testified at the tribunal, on that pages she was recorded saying that she was married by the son of Mameruthi and continue to cultivate her land and after demise of her mother in law the said land was invaded, and thereat she did not mentioned anybody.

But in her testimony under oath before this court said that appellant left her to take care of the land and later in 2017 the same was confiscated by the first respondent. I have considered that exhibit A1 was admitted as evidence but what was recorded therein contradicted what this witness (SM2) stated under oath at the tribunal. In the circumstances I am of the

considered opinion that her evidence cannot be trustworthy, thus in my opinion becomes flimsy to prove this case under the above circumstances.

Another witness brought by the appellant is SM3 one Athumani Juma Mbaga at page 38 of the typed proceeding testified that the dispute in respect to the alleged land gave rise in 1992 after the one who was cultivating it was removed. While at page 33 of the typed proceeding SM2 said she was removed on the said land in 2017 and not 1992 as SM2 said above.

In view thereof, the above contradictions in evidence shows the appellant didn't know the land in dispute and even the person she claims to have entrusted to did not support her, her evidence as shown above is not of value therefore adverse inference should be drawn to her, because she did not inform the appellant about the trespass earlier until the appellant visited the village. With such unsteady evidence as to which exactly happen in respect to the appellant's case, I am settled anybody cannot complain that the tribunal failed to make a proper evaluation and analysis of evidence. Actually, with the evidence presented to the tribunal it was not even clear if the claimed disputed land was indeed under the appellant's mandate. I think the tribunal did properly evaluate the evidence that was

brought before it and arrived at the decision that the appellant failed to prove her claim and dismissed the application as it did.

Having considered the above, I am settled, the 1st respondent has been able to establish and prove how he acquired, owned and later disposed it to the 2nd and 4th respondents as evidenced by the sale agreement which was received in evidence as exhibit R1. On this account, I am of the considered opinion that on balance of probabilities the evidence of the respondents was much stable compared to the appellant. Therefore, on that basis I find that the tribunal chairman did correctly evaluate and analysed the evidence hence reached a just decision.

On the issue of contradictory evidence, the counsel for the appellant referred to exhibit R1 which was the sale agreement and said that there was contradiction in the contract itself. This issue was never raised during the hearing at the tribunal and even when the same was tendered there was no objection from the appellant and the same was admitted into evidence. In the circumstance I find the objection of the appellant as an afterthought which cannot be entertained at this point. For those reasons these grounds also fail for want of merit.

In the final analysis, having discussed as above, I find this appeal without any merit and I proceed to dismiss it with cost.

DATED at **MOSHI** this 25th day of April, 2024.

X

JUDGE
Signed by: A. P. KILIMI

Court: Judgment delivered in chamber by the Deputy Registrar today on 25th day of April, 2024 in the presence of the Appellant, 1st, 3rd, 4th Respondents and in the absence of the 2nd Respondent.

Sgd; **S. MWAISEJE**
DEPUTY REGISTRAR
25/04/2024

Court: Right of Appeal explained.

Sgd; **S. MWAISEJE**
DEPUTY REGISTRAR
25/04/2024