IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI

LAND APPEAL NO.55 OF 2023

(Arising from Land Application No. 03 0/2022 of the District Land and Housing Tribunal of Mwanga at Mwanga)

KIHARA ELIAMINI MSHANA .....APPELLANT

Versus

SWAINA ATHUMANI MSHENGELI..... RESPONDENT

JUDGMENT

7th December 2023 & 15th February, 2024

A.P.KILIMI, J.:

The Respondent mentioned above sued the appellant above at Mwanga District Land and Housing Tribunal claiming a piece of land situated at Kagongo Village, Lang'ata Ward within Mwanga District whereat alleging that she enjoyed a quiet occupation and usage of the said land since 1996. Upon being heard on merit, the appellant lost the case and was declared a trespasser by the above Land Tribunal hence this appeal.

Before I proceed with the merit of this appeal, I find suitable to state the background facts giving rise to this appeal briefly stated as follows: on divers dates in 2013, unknowingly to the respondent, the appellant informed the Lang'ata local authority that he is the owner of the suitland, consequently the said authority issued with him the Customary Title Deed. The appellant

having the said title, leased the suit land to HTT Infraco Ltd. to build and operate a Telecommunication Tower of Vodacom.

Upon realise of the said transaction, the respondent who claimed to be the real owner of the suitland complained to the authority of the said area. After inquiry conducted on the ownership of the said land in dispute, on 01/12/2021 the Lang'ata Village Council affirmed the land to belong to the respondent and subsequently revoked the title issued to the Appellant and duly notified him. The appellant did not honour the decision by the said village council hence the matter was referred for reconciliation to the Lang'ata Ward Tribunal where it went futile, hence the respondent opted successful for the suit filed at the District Tribunal stated above.

The appellant aggrieved by the decision and orders of the tribunal has preferred this appeal in this court basing on the following grounds;

1. That the honourable chairman erred in law and fact as he failed to properly analyse the parties evidence as he arrived at erroneous decision against the appellant
2. That the trial tribunal erred in law when it maliciously dismissed the appellant request for visiting the locus in quo, as finally reached at unfair and unjust findings.
3. That the honourable Chairman erred in law and fact in holding that the village authority was right in proposing the respondent the lawful owner of the disputed land without warning himself about the legality of the tendered documentary evidence by the respondent.

4. And that, the trial tribunal erred in law and fact for entertaining a matter without being vested with proper jurisdiction.

At the hearing of the appeal, the appellant appeared and was represented by Deusderius Hekwe while the respondent was represented by Mr. Martin Kilasara, learned advocate. With the leave of the court, both opted the appeal be argued by way of written submissions.

Submitting in support ground number one above, the appellant argued that the trial tribunal did not analyse the evidence as per principle in **Amiri Mohamed v. Republic** [1994] T.L.R. 138 as PWI testimony proceeded on how she acquired ownership over the suit land by way of gift from her late father, namely Athumani Mshengeli in the year 1996, but did not go further to tell the tribunal on how did his father got principal ownership over the same land and when. Also added neighbours to the suit land mentioned by PW1 differs from the one stated by PW2 and the tendered documentary exhibits AI, A2 and A3, thus claimed the tribunal ought to have drawn adverse inference from PWI and PW2 testimonies.

Counsel for the appellant further submitted that the appellant testimonies shows that he acquired ownership of the suit land long before the year 1996 when the respondent father was still alive, and that he used

part of the land by constructing his father a house before it was accidentally demolished in 1996. He also added that, the tribunal did not evaluate the testimony of PW2 one David Dogras Kiwia which was not credible because as a leader (VEO) of the said locality since 2009 to 2016 he knew the suit land better, thus could have not endorsed verification letter to the appellant. He further added the tribunal failed to evaluate and consider that the mentioned respondent's brother or any other family member were never summoned by the respondent during trial to support her claims. To support his assertions the counsel invited me to consider the case of **Paschal Mwinuka vs Republic,** Criminal Appeal No. 258 of 2019, Court of Appeal of Tanzania (Unreported) and **Hemedi Saidi vs Mohamed Mbilu** [1984) TLR 113.

Advancing further the appellant argued that counting from when the tower was installed by the said company since 2013 it is eleven years, but respondent remained silent while she knew it was trespass to her land until 2022 when she has emerged without no reasons for such delay.

In respect to the need to visit locus in quo, the appellant submitted that parties are bound by the pleading, according to the pleading what the respondent alleges to be the suitland according to the given demarcation are

quite different location with the suit land. The appellant pleaded under paragraph 2 to his written statement of defence, therefore he urges the proper resolution of that controversies was for the trial tribunal to conduct the visiting on the locus. To buttress his point the appellant has referred the case of **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal 197 0(2018) [2019] TZCA 322.

In respect to prove of the ownership of the suit land, the appellant argued that neither the respondent herself nor her other witnesses to include PW2 and PW3 had testified to prove existence of the late Athumani over the suit land, nor she had brought in court someone credible to prove the grant of the gift. Taking regard PW2 was within the said village since 1989 and became a leader since 2009 to 2016.

In respect to the legality of the tendered documentary evidence by the respondent, the appellant argued that the trial chairman did not warn himself on reliance to such documentary evidence when he completely failed to consider and seriously evaluate the authenticity of such documents. He did not consider the members who were convened to hear and finally resolve determination of the appellant land were just elders summoned by the same PW2 himself, and not constituted legally as per Section 60(1) and (2) of the

Village Land Act [Cap. 114 R.E 2019] which provides for the organ responsible in resolving any dispute over the village land, is the village land council properly constituted. The appellant further added that the said documentary evidence called as 'Hati Miliki ya Kimila' and revocation of the said 'Hati Miliki ya Kimila' is purely something that is non recognizable under the laws of the land and should have not used as evidence by the trial tribunal, taking regard the appellant was not invited at the said meeting and members were different.

Responding to the above, the respondent's counsel started by submitting that the appellant abandoned the second and fourth grounds of appeal. In my view, only the fourth ground falls within that ambit but the second one was argued and case cited to such regard. Responding further to ground number one the counsel for the respondent contended that it is not true that analysis was not made, the trial tribunal in answering three issues made critically and thoroughly analyzed the evidence of the parties as a whole and made impartial findings that indeed the Appellant is a trespasser to the suit land and that the Respondent is the lawful owner of the suit land.

The counsel further argued that the acquisition of the suit land evidenced when the respondent testified, she acquired the suit land from her late father one Athumani Mshengeli in 1996 prior to his death. Gervas Kasiani Ngongi (SM3) also testified that the late Athumani Mshengeli was allocated 20 acres by the village authority and himself was present during the allocation by then as a Village Executive Officer, also the same was evidenced by Rajabu Athumai Magaro (SM4), who is also a neighbor and amongst the person allocated land at the same time. Also, in respect to the place the telecom tower was built is within the respondent's land and proved by demarcations as per application.

In respect to cancellation of the earlier allocation done by the village authority, the respondent's counsel argued that, as testified by David Kawia (SM2), he was misled by the Appellant's sister who was also a member of the Langata Kagongo village committee, but later after discovery of the deceit to the said allocation, reconciliation meetings were held, and both parties accorded right to be heard. Then it was resolved that indeed the Appellant had trespassed into Respondent's land; consequently, the earlier ownership given to the appellant was cancelled. He further added since the testimonies of SM3, SM4 and SM5 who knows better the suit land where the

telecom tower is built is the land of the respondent. Therefore, it was thus unnecessary to visit locus in quo.

In respect to the delay to prosecute the intrusion to respondent's land, the counsel argued that the Respondent complained to the Village Council about the Suitland since 2015, but later her mother was sick and became busy attending her until he passed away, and he added the same was not crossed by the appellant that cannot be denied at this stage. To fortify his view the counsel urged me to consider the case of **Paul Yustus Nchia vs. National Executive Secretary Chama cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 at Dar es Salaam and **Martin Misara vs the Republic**, Criminal Appeal No. 428 of 2016.

In respect to the exhibits tendered, the counsel for respondent argued that the same were admitted without any objection from the Appellant, also shows that the dispute over ownership of the suit land was duly reconciled by Langata Kagongo Village council via its members, and the appellant was involved on that reconciliation and signed.

Having appropriately considered the rival submissions and examined the record, it is desirable for to check out whether the grounds raised have merit, and be before I proceed it must be noted that this being the first

appellate court in this matter, it has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. (See the decisions of the Court of Appeal in **Future Century Ltd vs TANESCO**, Civil Appeal No. 5 of 2009, and **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported). In **Future Century Ltd vs TANESCO**, (supra) the court had this to say;

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

To start with the first and third grounds of appeal, which I have seen in my view their crux is whether the trial tribunal analysed evidence be it oral or documentary tendered to reach its decision, in that regard the same will be dispensed together.

To start with the evaluating the documents tendered, I have scanned the entire documents, as correctly submitted by the parties there two letters from Kagongo Village Council one certifying to the Managing Director of HTT INFRCO LTD that the suitland belonged to the appellant dated 5th June 2013 and the second one also from Kagongo Village Executive Officer (VEO)

nullifying the ownership of the suitland from the appellant but now stating that the said land belong to the respondent.

I have considered the validity of these documents, I have seen both have attached the minutes showing the compositions of members sat to decide as above, the first meeting as said sat on 5/6/2013. In fact, despite of being improperly legally constituted, the alleged council although sat as the village council did not sit as village council for the purpose of settling dispute since there was no dispute to the ownership, but as I observed, the same merely sat for confirming the appellant to be the owner of the land wherein the investor wanted to erect a telecommunication tower. Therefore, it is my considered opinion, the said meeting cannot be said that legally settled that the appellant has a better title to the said land than anybody else.

Later after 8 years, according to the document tendered at the tribunal dated on 1st and 2nd December 2021, the same village council sat to settle the dispute filed by the respondent claiming that the said telecommunication tower was erected in her land, the same tribunal resolved it belong to the respondent and nullified the ownership of the appellant to the said land. As

rightly submitted by the appellant counsel, since the council sat as land dispute resolution agency, ought to have complied with the law, where its functions are provided under section 7 of Land Dispute Act Cap. 216 R.E. 2019 and its composition provided for under section 5 of the same act which provides that;

> *"(1)The Village Land Council shall consist of seven members of whom three shall be women, and each member shall be nominated by the Village Council and approved by the Village Assembly.*
>
> *(2)Qualification for nomination and appointment of members to the Village Land Council shall be as stipulated under section 60 of the Village Land Act. [Cap. 114]"*

According to what transpired as evidenced on the document tendered, I subscribe with the appellant's counsel that the above meeting for settling the said dispute, its composition did not comply with the law of the land. For the foregoing the trial tribunal was flawed to consider the resolution on the said meeting.

Be that as it may, the tribunal judgment depicted that same merely corroborated the evidence of the respondent (SM1), thus, this has caused me to evaluate the remaining oral evidence tendered at the tribunal to see whether the respondent had enough evidence to have a better title to the suitland than the appellant.

The appellant defended that he owned the said land, and since then respondent did not emerge to claim the said land whereon it was erected Telecom tower on 2013,it is true the respondent claimed the land on 2021 almost over 8 years since the erection of the tower, but in my view such delay and the period the appellant possessed the disputed land does not entitle him to ownership of the said land either by long possession or by virtue of an adverse possession as he tried to depict. (**Amina Maulid Ambali & Others vs Ramadhani Juma** [2020] TZCA 19 (Tanzlii) and **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others,** Civil Appeal No. 193 of 2016 (unreported)

According to the evidence on record, the claims by the respondent was supported by the following witnesses; Gervas Kasian Ngingo (SM3) said he was village secretary at the time the said land was allocated to the respondent's father, he further testified at page 16 that;

"Eneo hili ni la mtoto wa Athumani ambayo ndiye Swaina Athumani Mshengeli. Eneo la mgogoro lipo ndani ya ekari 20 na hatukumpa mtu mwingine yoyote zaidi ya Athumani Mshengeli. Eneo hilo linatenganishwa na barabara ya kupitisha mifugo na eneo la Kihara liko nje yo eneo la mgogoro"

Another witness is Rajabu Athumani Magaro (SM4) who told the trial tribunal that he knew the respondent's father because they married from one family and both owned land which are close at Mabomani. He further said he knew the land belonged to the respondent's father and currently therein there is erected telecommunication tower, and insisted that the said erection is on the land of the respondent.

Another witness is one Athumani Mwinjuna Kahuu (SM5) who for easy of reference I quote him what he testified as recorded at page 19 of the typed tribunal proceeding;

"Eneo la Mwajuma na Athumani limetenganishwa na njia ya ng'ombe. Nalifahamu eneo la mgogoro mnara ulipojengwa lipo katika eneo la Nguto (Athumani Mshengeli). Namfahamu Swaina Athumani Mshengeli ni mtoto wa Nguto,.....lililojengwa mnara ni la Nguto na si la Kihara."

I have weighed the above evidence as compared by the evidence of the appellant at the tribunal, what the appellant testified did not got support from his witnesses as compared to the evidence of the respondent above. For instance, his witness Peter Kenani Sinyangwe (SU2) at page 28 had this to say;

> *"Nimekuwa mwenyekiti wa kijiji cha Lang'ata boro tangu 2005 hadi 2010; Sijaeleza Kihara amepataje eneo hilo. Sikueleza mipaka ya eneo hilo, Sijashiriki kutatua mgogoro wowote juu ya eneo hilo; Sikusaini nyaraka yoyote juu ya mgogoro huu."*

Another appellant witness at the tribunal was Batuli Mohamed (SU3) at page 29 and 30 vehemently had this to say;

> *"-Siwafahamu majirani wa eneo la mgogoro.*
> *- Sitafahamu jinsi Kihara alivyopata eneo hilo na ukubwa wake.*
> *- Sijawahi kuwa na mgogoro wa ardhi na Swaina.*
> *- Nilimkuta kaka yake yupo jirani pale.*
>
> *-Nilisikia kulikuwa na mgogoro kijijini kati ya wadaawa ila sijui."*

Another witness of the respondent was Mwanaamina Ramadhani (SU4) according to his testimony at page 31 of the tribunal proceeding, is also of no help to the appellant because what she testified in my view did not prove how the respondent owned the suitland. For example, at page 32 when crossed by the counsel for the respondent, she said that nobody gave the land to the appellant, this is because by then if anybody saw the place suitable to him may build. In my opinion considering the circumstances of the suitland evidenced above, her evidence is untrue because she did not stated further the status of the suitland by then if it was vacant possessed as she knew the same before owned by the appellant.

I have considered the above evidence in comparison, I am settled that the respondent proved her case at the trial tribunal because she proved what she claimed thereat as per requirement of section 110 of the Tanzania Evidence Act, Cap 6, R.E. 2022 that who alleges must prove. As postulated above the evidence of the appellant part at the tribunal proved nothing in respect to how he acquired or own the said land. I therefore found the evidence by the respondent is more credible than that of the appellant. I thus subscribe to the position of the Court of Appeal in In **Paulina Samson**

Ndawanya vs Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported), when the Court stated that;

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved"*

From the foregoing, the above answers the earlier question asked hereinabove, that even, the affirmation done by the village council to the appellant that the land belong him, in my considered of the above was null and void, thus, the transaction the appellant entered with the investor through HTT Infraco Ltd. to build and operate a Telecommunication Tower of Vodacom was also null and void because the appellant was not having a good title to the said land in dispute, this is boomed by the Legal maxim of Latin origin which says "***nemo dat quod non habet***" meaning *"**no one can give what he doesn't have**".*

Basing on the above reasoning, I am satisfied that according to the evidence of witnesses of the respondent at the trial tribunal, themselves in their oral evidence without any documentary evidence, proved to the balance

of probabilities as depicted above that the said land in dispute belonged to the respondent. Thus, I find the two grounds discussed above lacks merit hence dismissed.

In respect to the second ground which is respect to the requirement of the tribunal to visit the locus in quo, it is well settled that visiting the *locus in quo* is not a mandatory procedure. This position was well settled by the Court of Appeal in the case of **Sikuzani Saidi Magambo & Another vs. Mohamed Roble** Civil Appeal No. 197 of 2018) [2019] TZCA 322 TANZLII whereby it held:

> *"As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quo, as the same is done* ***at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial."***
>
> [Emphasis added]

As evaluated above, I have considered the evidence of witnesses above, the respondent witnesses depicted the palace the suitland is situated

while the other party in my view did not establish its inverse to cause the trial tribunal ascertain the boundaries. In that regard it is my settled opinion the tribunal exercised its discretion legally not to order *visiting locus in quo.* Consequently, also this ground fails forthwith.

In respect to the fourth ground, as correctly submitted by the respondent's the same was not argued by the appellant, thus marked abandoned.

In the event, I find that the appeal is lacking in merit and the same is thus hereby dismissed forthwith.

Given the circumstances of this matter which sometime the local authority was involved, I make no order as to costs.

It is so ordered.

DATED at **MOSHI** this 15TH day of January, 2024

A. P. KILIMI

JUDGE

Court: - Judgment delivered today on 15th day of February, 2024 in the presence of Ms. Hellen Mahuna for appellant. Mr. Martin Kilasara for Respondent. Appellant and Respondent also present.

Sgd: A. P. KILIMI
JUDGE
15/02/2024

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
15/02/2024