UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 33 OF 2023

(Arising from Misc. Land Application no. 27 of 2020, DLHT Morogoro)

MAIKO MLEMIGWA..... APPELLANT

VERSUS

SHABANI MKALA..... RESPONDENT

JUDGEMENT

Date of last order: 01/12/2023

Date of judgement: 09/02/2024

BEFORE: G. P. MALATA, J

At the District Land and Housing Tribunal, the applicant Shabani Mkala (the respondent herein) instituted Land Application No. 27 of 2020 against Maiko Mlengwa (the appellant). The respondent was claiming that his land (the suit land) was trespassed by the appellant.

The factual background of this appeal as can be gleaned from record of this appeal is that, the applicant at DLHT instituted a claim of land measuring four (4) acres against the respondent. The respondent (SM1) testified before the DLHT that; he acquired land in dispute from his mother. This was supported by the evidence by SM2, Tausi Philip, (the applicant's mother) the previous owner of the land in dispute. This means the respondent was given the said land by SM2 as gift, thus gift was way through which the respondent acquired ownership and title over the land in dispute.

The appellant denied to know the respondent however, he testified that, the suit land was used by his late father since colonial regime and that he was given the same land in 1952. He further testified that, he had a conflict regarding the land with SM2 and they decided to split the farm. This means that the appellant acquired the land in dispute by way gift from the late father since 1952.

There was no other documentary evidence from either party supporting their oral testimonies.

Having received evidence from both parties, the DLHT decided in favour of the respondent herein which act aggrieved the appellant, thence the

present appeal. The appellant is before this court armed with the following grounds of appeal;

1. That, considering the nature of the dispute and disputed premise itself, the trial tribunal erred in law and in fact by determining the matter and delivering an impugned judgement in favour of the respondent without paying visit locus in quo.
2. That, the trial tribunal erred in law and fact by delivering the judgement in favour of the respondent herein by relying only on weak evidence of the respondent and his witness tendered during trial.
3. That, the trial tribunal erred in law and fact by unjustifiably holding that, the appellant cannot be declared as the lawful owner of the disputed landed property in as much as he has not filed a counter claim as against the respondent herein.

The appellant prayed for the judgment of the trial tribunal be reversed, declared that the appellant is the lawful owner of the disputed land, that for the best interest of justice this court should pay visit to the locus in quo, the respondent, his assignees, agents or any privy be declared trespassers, permanently restraint from interfering into the disputed land

and evicted of the respondent, cost of this suit to be borne by the respondent and any other relief deem just and fit by this court to grant.

On the hearing date the parties appeared represented. The appellant through Mr. Hassan Nchimbi and Ms. Upendo Mtebe learned counsels whereas, the respondent enjoyed the service of Mr. Jackson Mashankara learned counsel.

At the beginning, Mr. Nchimbi prayed to withdraw the third ground of appeal; the prayer was granted thus proceeded to argue only the remaining two grounds.

Submitting in support of the first ground, Mr. Nchimbi learned counsel argued that, it was necessary for DLHT to visit locus in quo. It is on record that, the respondent testified before Tribunal that, the land is situated at Kisaki village, particularly Tini hamlet while the appellant herein testified that, the land in dispute is situated at Vigolegole village at Tini hamlet. As such, he opined that given that confusion the Tribunal ought to have visited locus in quo to vacate the difference.

He further acknowledged that, visit of locus in quo is not a legal requirement but in the circumstances of this case it was necessary to do so. He supported his submission by citing the case of **Kimoni Dimitri Mantheakis vs. Ally Azim Dewji & 7 others**, Civil Appeal No. 4 of

2018 and **Chiku Ramadhani Issa vs. Christian Kagunia**, Land Appeal No. 7 of 2023 (High Court). Mr. Nchimbi submitted that there is variation on the whereabouts the land in dispute.

He thus rested the submission by praying that, the appeal be reversed on that ground.

In support the second ground of appeal, Mr. Nchimbi opined that, the respondent's evidence used to prove ownership was so weak. The record depicts that, the respondent was gifted the land in dispute by his mother in 1998, the evidence which was confirmed by Tausi Philip and Said Joka, however, there is no document supporting the version. Further SM2 testified that, she acquired the land subject of this appeal from her late father, there was no evidence to prove such ownership of land that she acquired during life time of his father or after his demise.

In view thereof, the respondent herein did not discharge his duty of proving the case. He thus prayed that, the judgement of DLHT be set aside and the appeal be allowed based on the two grounds.

In reply thereof, Mr. Mashankara submitted in opposition of the first ground that, At the trial neither party as per record requested DLHT to visit locus in quo. He thus submitted that, the version was just an afterthought and prayed to be disregarded.

Additionally, he submitted that, the story given by SU1 that, the area is at Vigolegole or Kichangani Village.is an assertion by the appellant and not the respondent. Mr. Mashankara stated that, this is a weak point as parties and courts are bound by pleadings.

In the pleadings the appellant did not raise any dispute on the same. He prayed this court to be guided by section 45 of the Land Disputes Court Act, which insists on the duty to achieve substantive justice, and there was no failure of justice based on the same. Replying to the cited case of Kimonidimitri (supra), he stated that at page 6 paragraph 3 of judgement the court held that, visiting of locus in quo is not mandatory.

As to the second ground of appeal, Mr. Mashankara learned counsel submitted that, it is on record that the respondent was gifted the land in 1998 in the presence of Said Joka, the issue of non-production of document proving the fact on allocation is well covered in the cited case of **Chiku Ramadhani Issa** (supra) at page 8 in which the court echoed the position in the case of **Joachim Ndelembi vs. Maulid M. Mshindo,** Civil Appeal No. 106 of 2020, that land ownership can be proved without production of documentary evidence.

He further submitted that, Tausi Philip was a star witness as opposed to Said Joka who just witnessed the transfer and that his evidence was just

additional but not primary one, he prayed this court to be guided by Section 143 of the Evidence Act, Cap 6 R.E 2022.

Mr. Mashankara further stated that, at the DLHT the appellant had weak evidence, at page 5 of the DLHT judgement, 1st paragraph detailed how the appellants evidence was weak, the entire evidence by the respondent was heavier than that of the appellant. By way of closing his submission he stated that, the respondent proved the case on balance of probabilities on the ownership of land. **Hemed Said vs. Mohamed Mbilu** (1994) TLR 113, the respondent won because his evidence was heavier. The appeal is devoid of merits and be guided by section 42 of the LDCA.

By way of rejoinder, the appellant's counsels reiterated in the submission in chief that this appeal be allowed based on the grounds raised.

This marked the end of submission for and against the appeal.

This court is called to determine two pertinent issues, that is say;

1. Whether there was need to visit locus in quo and if that failure occasioned injustice to either party.
2. Whether there was enough evidence to prove ownership of land in dispute.

Undeniably, proving cases in civil litigation lies on the party who alleges. Such proof is on the balance of probability save for where the law requires otherwise, like in cases of special damages where proof is strictly.

The above legal position is gathered by Acts of Parliament and court decisions. In support thereof, I, am fortified by the provision of sections 110, 112 and 115 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2022 which state, inter alia that

Section 110.-

> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

section 112 provides that

> *'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 He oh any other person*

Section 115 provides that;

> *In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

The burden of proof does not shift unless stated by the law to that, effect. In the case of **Paulina Samson Ndawavya vs. Theresla Thomas Madaha**, Civil Appeal No. 45 of 2017, unreported the court of appeal held that;

> *"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge is burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.'*

This position was repeated in the case of **Lamshore Limited & another vs. Bazanje K.U.D K, [1999] T.L.R 330,** the court held:-

"The duty to prove the alleged facts is on the party alleging its existence"

This court has in a number of cases held that, proof of ownership of land must be strict. The rationale behind has been stated in numerous cases including,

1. **Ramadhani Rashidi Kuhuka Vs Jela Maiko Meja And 44 Others** Land Case No. 25/2022 and,
2. **Hadija Adam Said Maliwata Vs Asiga Abas and 4 others,** Land Appeal No. 101 Of 2022

In the case of **Hadija Adam Said Maliwata Vs Asiga Abas and 4 others,** Land Appeal No. 101 Of 2022, this court had these to say;

> *"Land as an utmost object to the eyes of God. Spiritually God's first fundamental work of creation started with "Heaven and Earth". This is gathered from the Holy Bible in the Book of Genesis, verse 1:1-3 and 1:9-10 state what God created first, I quote;*
>
> > *1. In the beginning God created Heaven and* ***Earth.*** *Based on the above reference, one can agree without hesitation that, God valued land (Earth) as the first and most important item as without it, there could be no*

place for living and non-living organism, human being inclusive. As the Earth was empty and unoccupied, God continued placing on the Earth all what he created from time to time. The confirmation comes from the Holy Bible in the Book of Genesis 1:2,3, 9 and 10 which provide that;

2. But the Earth was ***empty and unoccupied*** *and darkness were over the face of the abyss; and so, the spirit of God was brought over the waters*

3. And God said, "let there be light" And light became.

Further, in Genesis 1:9-10 it is stated that;

9. Truly God said "let the waters that are under heaven be gathered together into one place; and let the land appear" And so it became.

10. And God called the dry land, ***'Earth,'*** *and he called the gathering of the waters,* ***'Seas'****, And God saw that it was good."*

The above cited verses from the Book of Genesis proves how God proceeded after creation of Earth and what he placed thereon. In other words, who we are, what we

see and use is reflection of God's accomplishment of mission towards creation.

This makes land as first and most important item, God created for the holy work on the Earth as without it, there could be no place to lay the God's work of creation. Therefore, Land is a sensitive and valuable item even in the God's eyes.

In that regard, since the issue of land touches all living and non-living organisms, human being inclusive regardless of their wealth, status or impoverishment and that, no development can be effected without land, thus, land has become nothing but the first and most important thing to any living and non-living creature and human development. In other words, no Earth no living and non-living organism, and therefore no life.

Given the afore stated position from the Bible, Tanzania as country has taken such sensitivity and put land as special thing in which its ownership, use, management and conservation are Constitutionally and legally regulated."

It is on that basis, courts have also taken similar root of ensuring that, all issues pertaining to land dispute have to be given special attention. This is due to its sensitivity and unbecoming behaviour of some of the people pampering into fraud, forgery, trespassing and encroaching one's land or reserved lands.

Thence, courts have called upon disputes on ownership of land to be proved strictly. The above position is intended to satisfy the court beyond sane of doubt as to who is really owner of land in dispute. Placing such proof to the balance of probability alike any other normal civil suit leaves unscrupulous people to win cases through cooked evidence.

In the absence of such standards, the inferior one's or poorer will be whipped out and left landless by haves and dishonest men. The sensitivity of land led to this court's legal position that; proof of ownership shares similar legal position with cases involving special damages.

In the case of **Bamprass Star Service Station Limited vs. Mrs Fatuma Mwale**, [2000] T.L.R 390 **Hon. Rutakangwa J,** as he then was a High Court Judge, had these to say.

> *"It is trite law that special damages being "exceptional in their character" and which may consist of "off-pocket expenses and loss of earnings incurred down to the date*

of trial" ***must not only be claimed specifically but also "strictly proved".***

The above legal position sounds similar with that of the England which demonstrated via the case of **British Transport Commission v. Courley** [1956] AC 185 at 206 where it was held:

> *"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as* ***special damages, which has to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial and is generally capable of substantially exact calculation****. Secondly there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead continuing or permanent disability, compensation for loss of earning power in the future."*

Based on the afore cited cases, this court has developed seven ways through which one can prove ownership of land. These are; ***one***, by

purchase, ***two***, gift, ***three***, allocation by Government authority, ***four***, inheritance, ***five***, clearing of unowned bush, ***six***, adverse possession and ***seven***, division of matrimonial property.

In the event therefore, this court tackles the first ground, the appellant faults the trial tribunal chairman for failure to visit the locus in quo, this court has gone through both submission for and against, it is this court's position based on the precedents that, the issue of visiting a locus in quo is on the discretion of the court, parties can pray for however, it is upon the court to see that there is really an issue warranting visiting locus in quo. This legal position is echoed from the decisions of the cases of **Dar Es Salaam Water and Sewarage Authority. vs Didas Kameka & 17 others**, Civil Appeal no. 233 of 2019

> *"We are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to inspect a locus in quo, as the same is done* ***at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial."***

Nizar M.H. Ladak v. Gulamali Fazal Janmohamed [1980] TLR 29, in which the Court inter alia held that:

"It is only in exceptional circumstances that a court should inspect a locus in quo, *as by doing so a court may unconsciously take the role of a witness rather than adjudicator."*

The circumstances which may lead to visiting locus in quo include; ***one***, lack of proper description, ***two***, unascertained demarcation, ***three***, existence of variations, ***four***, for any other reasons the tribunal or court find necessary. The question which follows next is whether it was important to visit the locus in quo in the circumstances of this case.

The appellant point on this ground is based on the location of the land in dispute that, at the DLHT the respondent testified that, the land in dispute is located at Kisaki village, particularly in Tini Hamlet while the appellant testified that, the land in dispute is located at Vigolegole village at Tini Hamlet.

For purposes of ascertaining who is the owner of the land in dispute therefore, the appellant and the respondent must be litigating over the same piece of land, when it is not clear or there is ambiguity over the suit land the tribunal or court has the duty to ascertain if the land described in court records is the land which physically exists, to the measurement described in the suit or application.

The suit land, according to the application at the DLHT, the applicant stated that, the landed is measured four (4) acres bordering by other pieces of land, on the west there is Msufi and Msegese, on the East the appellant herein and on the North, there is river and south the road, the land is located at Tini Hamlet though the parties are mentioning different villages. This is because the Government came with new village demarcation of the land of Kisaka Village but it did not remove the fact that the land is at Tini Hamlet as testified by both parties. Further in the parties' pleading there is no dispute that, the land in dispute is at Tini hamlet, thus, the naming of village is non-starter in this case.

At the same time the appellant at the DLHT testified that, and I hereby quote;

> *"Namiliki eneo la hekari kumi na moja, kuna jiwe limewekwa katikati ya shamba ambapo lipo Kijiji cha kichangani jingine lipo kijii cha Vigolegole.*
>
> ***Tausi Philip nilikuwa na mgogoro naye tuliamuriwa kugawa kila mmoja sehemu yake mwaka 2011"***

In nutshell, the appellant testimony at the DLHT shows that, **first**, the appellant knows the land in dispute, **second**, the appellant and

respondent land are neighboring, **three**, the eleven acres owned by the appellant comprised of the four acres which are in dispute in this appeal.

The assertion by the appellant that it was necessary for the trial tribunal to visit the locus in quo doesn't holds water in the circumstances of this case as there was no any ambiguity to be resolved by the trial tribunal by visiting the land and no injustice occasioned to either party to the case.

This court therefore finds that, the first ground of appeal lacks merits, thus, I am inclined to agree with the respondent's legal opinion but in way this court categorically stated herein above. As such, the first ground of appeal is hereby found to have no merits.

This marks the end of discussion of the first ground of appeal and issue raised therefrom.

Reverting to the second ground of appeal, the appellant faults the trial tribunal for relying on weak evidence of the respondent which did not prove the ownership. This is the first appellate court and in the course of determining this ground, it is required to re-evaluate the evidence of the trial tribunal to see if the decision was arrived correctly based on the evidence and laws applicable.

It is undisputed that, the appellant and respondent each owns the land in the premises, whereby each party claimed to have been acquired ownership through gift from their parents. The respondent brought SM2 (his mother) who gave him such land. It was the duty of the respondent at the trial tribunal to prove that he owned the land.

In present case, the respondent (applicant at the DLHT) claimed to have acquired land as gift from her mother. This means that, he acquired good title through gift as one of the ways of acquiring land under the land laws of Tanzania. The burden of proving such facts lied on the respondent who alleged that he is a lawful owner of the land in dispute which he acquired through gift from the SM2, his mother.

The property involved being land which in its nature is peculiar and sensitive one and as principled herein above that, the proof of the same must be strict. The respondent testified before the trial tribunal that; he obtained the land from her mother one Tausi Philip. Such evidence was not heavily counted by the appellant to the extent of finding that, SM2 had no good title before transferring title to SM1. What the appellant attacked is that there was no documentary

evidence to prove it. This court found that oral evidence can suffice to prove ownership of land. Sometimes even the documentary evidence can fail to prove ownership due to various factor, such as double allocation, existence of deemed/customary right of occupancy over newly granted right of occupancy. The grantor one SM2, Tausi Philip gave evidence in support thereof. The same stance was taken in the case of **Joachim Shelembi vs. Maulid M. Mshindo** (supra) the Court of Appeal had this to say;

> *We do not think that proof of PW2 acquisition of the land from his late father way back in 1980's must be documentary, because in the ordinary course of things such transaction is improbable. Nor would there be any reason to doubt PW2's oral account that he passed over the land to the third respondent who was his in law. All this however was confirmed by PW3 and PW4 whose testimonies the DLHT and High Court believed.*

I have observed that, the respondent's own evidence at the DLHT supported by that of SM2, sufficiently proved beyond shadow of doubt that, the land belonged to the respondent, the DLHT had no reason to doubt the evidence adduced by the respondent and SM2. I

am in line with the DLHT evaluation of evidence, and this court has no reason to doubt it and rule otherwise.

On the other hand, Mr. Nchimbi learned counsel for the appellant was of the view that, SM2 Tausi Philip didn't prove how the title passed from her late father to her, this issue shouldn't detain me much. The original application at DLHT was between the appellant and respondent, not against the SM2, thus meaningless. It was the duty of the respondent at DLHT to prove ownership and not SM2.

It is evident that, much as the law via sections 110,112 and 115 of the Evidence Act, vests obligation to the alleging party to prove the case, that does mean that the appellant had no obligation to table evidence disproving evidence by the respondent who was the applicant/claimant. This takes me to the fact that, appellant did not table strong evidence watering down the respondent's evidence on the ownership of land. There was neither sufficient oral nor written evidence countering the respondent's version of evidence.

As such, this court bears no reason to fault the trial tribunal's decision. I, therefore rule that, the second ground of appeal lacks merits.

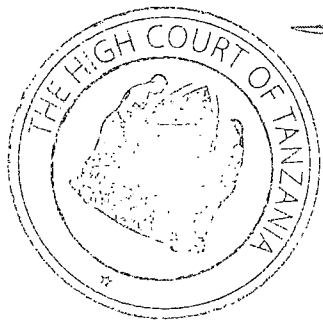
This marks the end of discussion in respect of the second ground of appeal with its issue.

In the event therefore, this court is satisfied beyond shadow of doubt that, the respondent did provide proof to the standard required by law as stated herein above.

Consequently, I hereby hold that, the appellant's appeal has no merits as such it is accordingly dismissed. Costs to follow the event.

It is so ordered.

DATED at **MOROGORO** this 09th February 2024



G. P. MALATA

JUDGE

09/02/2024

JUDGEMENT delivered at **MOROGORO** in chambers this 09th February 2024 in the presence of Advocate Jackson Mashankara who appeared for the respondent and holding brief of Advocate Hassan Nchimbi for the appellant.

S. P. KIHAWA

DEPUTY REGISTRAR

09/02/2024

Right of appeal explained to the parties.

S. P. KIHAWA

DEPUTY REGISTRAR

09/02/2024