IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 25437 OF 2023

(Originating from the District Land and Housing Tribunal for Tandahimba at Tandahimba in Land Application No. 68/2022o dated 25th October, 2023)

SAIDI BAKARI NANNOWA ---------- APPELLANT

VERSUS

FATUMA MOHAMEDI NJUDI ---------- RESPONDENT

JUDGMENT

18th April & 30th May, 2024.

DING'OHI, J.:

Having been unsuccessful in the District Land and Housing Tribunal for Tandahimba at Tandahimba, the appellant herein has instituted the instant appeal raising three grounds of appeal as follows:

1. That the trial Tribunal grossly erred in law and fact by failing to consider that the appellant has been in long possession of the suit land since 1997.
2. That the trial Tribunal grossly erred in law and fact by holding that the

appellant was an invitee to the disputed land without any proof.

3. That the trial Tribunal grossly erred in law and fact by failing to consider, analyze, and weigh the appellant's evidence.

The genesis of the dispute is the ownership of the parcel of land measuring approximately 1 acre situated at Mchangani Village at Mkoreha Ward in Tandahimba District Council within Mtwara Region. The appellant claims that the suit land was part of his deceased father's estate. After the demise of the said father, the properties were distributed to the heirs including the appellant herein. That was in 1997. According to the appellant, in 2002 he started to work on the land he was given by planting cashew nut trees. That, in 2022 the Appellant was summoned to appear in Mkoreha Ward Tribunal for mediation which, after it failed the appellant initiated the Land Application before the trial tribunal.

PW2 **SUWABU ATHUMANI LUPILA** who is the widow of the late father of the appellant testified that they had been using the suit land with her late husband (the late father of the appellant) and after the death of the deceased husband, it was bequeathed to the Appellant. It was the PW2's testimony that the appellant has planted cashew nut trees and it has been a long time since he has been using it without any disturbances.

The PW3 **FATU BAKARI NANNOWA** told the trial tribunal that the land in dispute was the property of the father of the appellant who died in 1996. The distribution of the properties of the estate of the deceased father was successfully done in 1997. There was no dispute. According to the PW3 in 2002 the appellant started cultivating a piece of the suit land. That was after he completed school in 1998. PW3 further stated that she was surprised to be called to the Ward Tribunal to testify over the land dispute involving parties herein.

In responding to the cross-examined question PW3 told the trial Tribunal that in the distribution of the estate of their late father, women were given six (6) cashew nuts trees each. The appellant was given a bushland with no cashew nuts trees. She further revealed that at the time the appellant was cultivating the suit land the respondent was in Mozambique, she came back in 2020. As to the evidence by the respondent's side that the shamba in dispute was the property of his deceased father, PW3 stated that the respondent's parents had no farm in that village.

PW4 **SOFIA BAKARI NAMMNOWA** is the appellant's sister. She told the trial tribunal that their late father died in 1996. His estate was distributed in 1997 to six (6) children. She testified that at the time their late father passed

away, the appellant was still young. After he completed his schooling the appellant started cultivating in the suit land. Later, in 2022 the PW3 was surprised to be called at the Ward Tribunal to give evidence on allegation by the respondent that the appellant is cultivating the land which is not his. But, according to the PW4, the respondent's late father died a long time ago. The appellant was using the suit land for a long.

In responding to the cross-examined question PW4 told the trial Tribunal that they did not distribute the cashew nuts trees but the piece of land. That at the time the respondent went to Mozambique, the appellant was not yet born. It was her view that the trial tribunal was wrong when it declared the respondent to be the owner of the land in dispute.

On the other hand, DW1 **HAWA SELEMANI MKWAYAYA** who stood from the trial tribunal for and on behalf of the respondent (FATUMA MOHAMEDI NJUDI) her evidence was very brief. She simply told the trial tribunal that the shamba land in dispute is the property of his mother who got it from her mother. She further told the trial tribunal that the appellant did not hand over the shamba. Responding to the cross-examined question DW1 told the trial Tribunal that in 2018 the appellant went to request the suit land from

her mother. The mother is unable even to talk. She has three children; the DW1 being the firstborn.

The DW2 **RUKIA BAKARI NANNOWA** testified that her aunt (the respondent) left the suit land and went to be married. The appellant who requested and given that land to cultivate eating crops graffitied the cashew nut trees that were earlier planted. When the respondent wanted back the suit land the appellant refused. It was the DW2's evidence that the appellant is her young brother, they share the same father. According to her, their late father was not the owner of the suit land.

After a full trial, the trial tribunal found that the appellant was just an invitee to the land in dispute. It declared the respondent the rightful owner of the suit land.

Discontented by the decision, the appellant filed the instant appeal before this court raising three grounds of appeal. In essence, it raises one crucial issue for determination: whether this appeal is meritorious.

When the case was called for a hearing, both parties appeared in person unrepresented.

Submitting in support of the appeal, the appellant contended that the suit land is his property as he bequeathed it from his late father in 1997. He further stated that he did not borrow the suit land from the respondent.

In reply, the respondent submitted that the suit land does not belong to the appellant rather it is the property of her late grandmother who bequeathed it to her mother who is now very old and unable to walk. She added that the land of the appellant's father is beside her "shamba".

She further testified that she stood for and on behalf of her mother (the respondent) from the trial Tribunal.

In rejoinder, the appellant stated that since he was born, he had not seen any other person using the suit land.

I have carefully examined the rival parties' submissions for and against this appeal. The bone of contention in this appeal is pegged on the issue of land ownership. In the case of **Stanislaus Rugaba Kasusula and AG V Falesi Kabuye** [1982] TLR, 388 it was observed that the trial court has to evaluate the evidence of each witness as well as their credibility and make a finding on the contested facts in issue. The contested fact in issue in this case is the ownership of the suit land. I have carefully gone through the judgment of

the trial Tribunal. The trial Chairman generally based on the evidence adduced by the respondent and concluded that;

> *"Kwa kuwa mleta maombi alikuwa ni mkaribishwaji kwenye eneo lenye mgogoro kiini cha kwanza kimejibiwa kinyume kuwa mleta maombi sio mmiliki halali wa eneo lenye mgogoro bali eneo hilo linamilikiwa na mjibu maombi. Kwa kuwa kiini cha kwanza kimejibiwa kinyume na kiini cha pili kimejibiwa kinyume kuwa mjibu maombi sio mvamizi wa eneo mgogoro bali ni mmiliki halali wa eneo hilo la mgogoro."* (Pages 7 & 8 of the impugned judgment.)

Sitting as a first appellate court, this Court has to subject the entire evidence to re-evaluation and come to its conclusion; aware of the necessity to do this cautiously acknowledging that the trial tribunal was in a better position to see, hear, and appreciate the evidence; see **Tanzania Sewing Machine vs Njake Enterprises Ltd** (Civil Appeal No 15 of 2016) [2016] TZCA 2041 (27 October 2016).

I find it apt to re-visit the evidence on record on the proof of ownership of the suit land. The aim is to capture the requirement of the law that he who alleges must prove (see **Section 110 of the Evidence Act CAP 6 RE**

2019). The appellant testified as **PW1** at the trial tribunal that the respondent unlawfully invaded the suit land which he bequeathed from his late father in 1997. He testified that he started using the suit land in 2002. He planted cashew nuts trees. Since the suit land was distributed there has been no dispute, the dispute arose in 2022. PW2 testified that they had been using the suit land with the appellant's late father. Later they left it to the appellant, after the death of the original owner (father). PW1 has planted cashew nut trees and it has been a long time since he has been using it without any disturbances. In 2021, the respondent went back to claim for the suit land to be hers. PW3, the appellant's sister also testified that they were given the suit land as their inheritance from their late father's estate. The appellant bequeathed a piece of a suit land in 1997 from his late father who died in 1996. There was no dispute. In 2002 it's when the appellant started cultivating a piece of the suit land. She further testified that in the distribution women were given six (6) cashew nuts trees, and the appellant was given a virgin land with no cashew nuts trees. She stated, that at the time the appellant was cultivating the suit land the respondent was in Mozambique where she went back in 2020. She said that the respondent's parents had no farm in that village. PW4, the appellant's sister testified that their late father died in 1996, and the distribution of his estate was done in

1997. The distribution was done to six (6) children. She further stated that at the time their late father passed away, the appellant was still young, after finishing his schooling he started cultivating the suit land. In 2022 she was surprised to be called at the Ward Tribunal that the appellant is cultivating the land which is not his. But their late father died a long time ago and the appellant was using the suit land for a long time.

On the other hand, **DW1** at the trial Tribunal testified that the suit land is of her mother (the respondent) and grandmother. They were given the suit land but the appellant did not hand it to them. She further testified that in 2018 the appellant went to request her mother to use the suit land. DW2 testified that her aunt (the respondent) left the suit land and went to be married. The appellant asked for the land to cultivate eating crops. When the respondent wanted back the suit land the appellant refused. She further alleged that the appellant is her brother from her father, and their late father was not the owner of the suit land.

It is the position of the law that he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence at all was given on the other side. It is equally the principle of the law in civil cases that the standard of proof is on the balance of probabilities (section 110 (1)

and 111 of the Law of Evidence Act, Cap. 6 R.E 2022). This simply means that the court shall sustain such evidence which is more credible than the other on a particular fact to be proved. Again, **Section 112 of the Evidence Act [Cap 6 R.E 2022]** provides that where a person claims the existence of a particular fact, the proof of such fact lies on that person. Based on the above stances of the law concerning the matter at issue, the respondent had a duty to prove her claim that she was given the suit land by her mother because the question is how she acquired the said property. What was required was the heavier evidence as compared to that provided by the appellant. The evidence by the appellant at the trial was well corroborated with the evidence of the PW2, PW3, and PW4.

All in all, what is seen by this court is that while the appellant managed to prove his claim that his late father was the owner of the suit land by calling witnesses; the respondent could not prove how she acquired the suit land.

The appellant's evidence had no contradiction with the application made in the trial tribunal. The respondent had not given the trial tribunal any cogent reason to discredit the appellant's testimonies. There is nowhere it has been shown that the appellant and her witnesses' testimonies were contradictory. The evidence by the respondent at the trial tribunal was very shallow. In the

examination in chief she shortly stated that;

"Shamba ni la mama na mama ni la mama yake mzazi. Sisi tulikabidhiwa shamba. Mleta maombi hajakabidhi shamba."

From the above observation, I find that the trial tribunal was not correct in considering and giving weight to the testimonies of the respondent. The evidence over ownership of the suit land by the appellant at the trial tribunal which was supported by the evidence of the PW1, PW2, PW3, and PW4 was heavier than the evidence by the respondent's side.

It follows therefore that the judgment of the trial tribunal and its decree will not remain safe; they are hereby quashed and set aside. The appellant is now declared the rightful owner of the land in dispute.

In the upshot, the appeal is allowed. The appellant is to have his costs.

It is so ordered.

Dated at Mtwara this 30th May 2024.

S.R. DING'OHI

JUDGE

30/05/2024

COURT: Judgment delivered this 30th day of May 2024 in the presence of parties in person.

S. R. DING'OHI

JUDGE

30/05/2024