

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 838 OF 2024

(Arising from judgment and decree of the District Land and Housing Tribunal for Mbulu at Dongobesh, in Land Application No. 31 of 2023)

DAWITE MAYEGA MAYO..... APPELLANT

VERSUS

MODESTI AVELINI MAYEGA.....RESPONDENT

JUDGEMENT

7th & 12th June, 2024

Kahyoza, J.:

Modest Avelini Mayega (the respondent) sued **Dawite Mayega Mayo** (the appellant), for trespass. He claimed the appellant to have trespassed to his land measuring 100 metres (length) and 56 by 35 metres (width) situated at Murray village, within Mbulu Township Council. The appellant vehemently opposed the claim. The District Land and Housing Tribunal for Mbulu at Dongobesh (the tribunal) declared the respondent the lawful owner of the suit land and ordered the appellant to vacate the suit land and demolish structures onto the land. The DLHT also issued a permanent injunction against the appellant and Costs.

Aggrieved, **Dawite Mayega Mayo**, (the appellant) appealed to this court raising five grounds of complaint which precipitated into the following issues-

1. Did the DLHT properly evaluate the evidence?
2. Did the respondent prove ownership of the disputed land?
3. Did the respondent acquire title?
4. Was the disputed land transferred to SM2 in 1973?

A background as to what transpired at the trial, **Modest Avelini Mayega (Pw1)** stated that the suit land was initially owned by their fathers, Later, he acquired the suit land as a gift *inter vivos* from his father, one Avelini Mayega in 2019 thereafter his father executed a deed of gift on 01.04.2021 (**exhibit M3**).

On 28.11.2020 a dispute on the suit land ensued and an amicable settlement was reached via **exhibit M1**, where the minutes provided that the suit land had to be divided to four families, namely; Kwaangu Ami, Mayega Mayo, Akonaay Afyaay (Afnay) and Lagwen Ari. And the actual split was actuated by minutes on 23.01.2021, **exhibit M2**. Both parties do agree that there was a meeting that resolved the dispute amicably.

Following the amicable settlement of the dispute, on 23.1.2021, they demarcated the disputed land as per the boundaries discussed at the meeting on 28.11.2020 as exhibited by Exh P2. They set aside a piece of land for pasture and cattle pass. Minutes were prepared and representatives of the respective families signed to accept the distribution.

After one year of amicable settlement, the dispute arose where **Modest Avelini Mayega** (the respondent) sued **Dawite Mayega Mayo** (the appellant). The record shows that the dispute was between Mayega Mayo's family. In addition, the record depicted that, Mayega Mayo had among others two sons; **one**, Avelini Mayega, (**Pw2**), the respondent's father; and **two**, Gwandu Mayega, the appellant's father.

The respondent's case was that he acquired the land in dispute from Avelini Mayega, (**Pw2**) and tendered a transfer deed executed on 1.4.2021. In turn, Avelini Mayega, (**Pw2**) deposed that he acquired the suit land *inter vivos* from Mayega Mayo, his late father, in 1973.

The appellant's claim is that being one Mayega Mayo's family, they had title to the land allocated to Mayega Mayo. Gwandu Kwaang (**Dw2**), deposed that after the dispute ensued between the appellant and respondent, the

clan or elders resolved that the disputed land be divided equally between Avelini Mayega, (**Pw2**) and Gwandu Mayega families. The respondent, who belonged to Avelini Mayega, (**Pw2**)'s family was dissatisfied and referred the matter to the ward tribunal. The ward tribunal was unable to mediate the parties. The respondent instituted an application to DLHT seeking a declaration that he was the lawful owner.

Given the above back ground, I will proceed to determine issues raised by the grounds of appeal. I will not reproduce the submissions but will refer to the submissions while replying to the issues raised. This is a first appellate court with a duty to re-appraise the whole evidence, thus, while replying to the issues, I will as well review the whole evidence.

Did the DLHT properly evaluate the evidence?

The DLHT gave credence to the evidence of the respondent and his witness **Avelini Mayega, (Pw2)**. **Avelini Mayega, (Pw2)** is the respondent's father who deposed that he acquired the suit land from his father and transferred it to Modesti Avelini Mayega, the respondent. He deposed that Mayega Mayo, his late father gave him [**Avelini Mayega, (Pw2)**] the disputed land in 1973 together with his brother Gwandu Mayega. He added that Mayega Mayo co-owned land with Akonaay Afaaya, Qangw

Ami and Lagwen Ari. After the suit arose on 28.11.2020, **Avelini Mayega**, (**Pw2**) deposed that the land was divided among Paulo Sulle, Modest Avelini, Marseli Tarmo and Sanka Mattle. His testimony was supported by **Marceli Tarmo (Pw3)**, testified that the suit land was used by him, Safari Qwang', Modesti Avelin and Sanka Mattle. The respondent tendered the minutes dated 29.11.2020 and the minutes dated 23.1.2021 as exhibits M1 and M2, respectively.

The appellant's side from the evidence of **Dawite Gwandu Mayega**, (**Dw1**) and **Gwandu Kwaang** (Dw2), agreed that there was a dispute over land, which was resolved on 28.11.2020 by dividing the land among four families who were Mayega Mayo, Kwaang Ami, Akonaay Afaaya and Lagwen Ari. They also concurred with the respondent's evidence that after the meeting on 28.11.2020, the land was demarcated on 21.1.2021.

The record bear testimony that the appellant and the respondent agree that ownership of the suit land traces way back to Mayega Mayo, who happened to be the father of Avelini Mayega and Gwandu Mayega. It is also on record, **Avelini Mayega (Pw2)** advanced in his testimony that four co-owners previously owned the suit land; namely Akonaay Afaaya, Qangw Ami, Mayega Mayo and Lagwen Ari. And that as sons to Mayega Mayo, Avelini

Mayega and Gwandu Mayega were given the suit land. And later on, Mayega Mayo gave the said land to Avelini Mayega in 1973. I find Avelini Mayega not whole trustworthy witness. He gave true evidence that there was a meeting to resolve the dispute on 20.11.2020, however, he lied that the meeting resolved that land should be divided among Paulo Sulle, Modest Avelini, Marseli Tarmo and Sanka Mattle. This testimony contradicted their [**Modest Avelini Mayega (Pw1)** and **Avelini Mayega (Pw2)**] exhibits M1 and M2. The exhibits spoke loud that, it was resolved at the meeting that the land be distributed among the four families which were, Akonaay Afaaya, Qangw Ami, Mayega Mayo and Lagwen Ari.

The DLHT was required to treat the evidence of **Avelini Mayega (Pw2)** and **Marceli Tarmo (Pw3)** with caution. **Marceli Tarmo (Pw3)** was also a witness who preferred not to tell the truth. Like **Avelini Mayega (Pw2)**, **Marceli Tarmo (Pw3)** testified that the suit land was used by him {**Marceli Tarmo (Pw3)**}, Safari Qwang', Modesti Avelin and Sanka Mattle. I find the appellant's evidence more reliable than the respondent's side. I am alive of the position of the law that the trial court or tribunal is better position to assess the credibility of a witness. That principle does not close doors for the appellate court to determine the credibility.

It is trite law that the credibility of a witness is a domain of the trial court only in so far as the demeanour is concerned and a first or second appellate court may determine credibility of the witnesses when assessing the coherence of the testimony of that witness and when the testimony of that witness is compared the evidence of other witnesses. See **Sha bani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal propounded the manner of assessing or determining credibility of witnesses. It stated -

*"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways; **one, when assessing the coherence of the testimony of that witness. Two**, when the testimony of that witness is considered in relation with the evidence of other witnesses or including that of the accused person. In these occasions the **credibility of a** witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

It is my humble finding that, if at all, the genesis of the ownership was that it was owned by four families, then Mayega Mayo had no good title to the suit land to pass to Avelini Mayega. The land was co-owned by four

families and the evidence provides nothing as to how Mayega Mayo become the sole owner so as to have the capacity to give the suit land to Avelini Mayo. For that reason, Avelini Mayo did not acquire title to the land.

Again, it was alleged by Avelini Mayega (**Pw2**) that his father gave the suit land to him and his brother one Gwandu Mayenga, a fact that is shared by Dawite Gwandu Mayenga (**Dw1**) and Gwandu Kwaang (**Dw2**). In the circumstances, it is utterly inconceivable to assume that the title also passed from two co-owners to sole owner, Aveline Mayega, without any proof to that effect. Thus, Avelini Mayega had no good land title to pass to Modesti Avelini Mayega.

It is obvious that the distribution on 28.11.2020 followed by the demarcation of the land on 23.1.2021, allocated land to four families; namely Akonaay Afaaya, Qangw Ami, Mayega Mayo, and Lagwen Ari. Subsequent to the distribution, it was fair enough for the members of the family of Mayega Mayo, which are the family of Avelini Mayega (**Pw2**) and Gwandu Mayega to distribute the disputed land between them. After the distribution of the land among four families, there is no evidence on how the respondent acquired title over Mayega Mayo family's land, in isolation of the family of Gwandu Mayega.

From the above evidential inadequacies, it follows that the respondent's evidence did not prove his title to the disputed land on the balance of probability. It is settled in law that he who alleges must prove. The respondent alleged that he was the owner of the suit land so he had evidential burden to prove how he acquired the suit land. The Court of Appeal in **Rock Beach Hotel Limited v. Tanzania Revenue Authority**, Civil Appeal No. 52 of 2003 (unreported), restated that the burden of proof in terms of section 110 of the Evidence Act, Cap. 6 RE 2002 [now RE 2019] ("the EA") is that he who alleges must prove. The respondent, the applicant did not prove his title on the balance of probability.

I see no need to discuss the other issues raised by the appeal as in the course of answering the first issue, I replied to all issues. I have answered that the respondent did not prove his ownership of the disputed land; that the respondent did not acquire title to the disputed land as Avelini Mayega (**Pw2**), his father, had no title to pass to him; and lastly, that Avelini Mayega (**Pw2**) did not acquire title in 1973 as his father Mayega Mayo had no capacity to allocate the land, which was co-owned by four families; namely; Akonaay Afaaya, Qangw Ami, Mayega Mayo, and Lagwen Ari.

In the upshot, I allow the appeal set aside the decree and the judgment of the DLHT. The appellant prayed in the memorandum of appeal to be declared the lawful owner. I hesitate to do so given the evidence on record. Since the appellant had prayed in the Written Statement of defence for the declaration that the suit is the property of the two families, I so declare that the suit land is co-owned by family of Avelini Mayega (**Pw2**) and that of Gwandu Mayega. I grant the appeal costs of this appeal.

It is ordered accordingly.

Dated at Mbulu this **12th** day of **June**, 2024.



J. R. Kahyoza
JUDGE

Court: Judgment delivered in the presence of the parties, Ms Fatina (RMA) is present.

J. R. Kahyoza
JUDGE

12/06/2024