THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

LAND APPEAL NO 795 OF 2024

(Arising from the decision of the District Land and Housing Tribunal for Mbeya at Mbeya in Application No. 33 of 2023)

RESTUTA STEVEN MKOMA.....APPELLANT

VERSUS

SAMWEL MKANA.....RESPONDENT

JUDGMENT

Date: 3 May 2024 & 30 May 2024

SINDA, J.:

The appellant is aggrieved by the decision of the District Land and Housing Tribunal for Mbeya at Mbeya (the **DLHT**).

The brief facts of the case are as follows: the appellant claims ownership over two (2) acres of land located in Iyawaya village (the **Disputed Land**), allegedly given to her by her father. The appellant claimed that the respondent unlawfully entered the Disputed Land leading to this dispute. The

appellant unsuccessfully sued the respondent at the DLHT, hence this appeal.

The appellant appeals on five grounds as follows:

1. *That the Trial Tribunal erred in law and facts to give its judgment in favour of the Respondent based on weak and false evidence of the respondents and his witnesses.*
2. *That the Trial Tribunal erred in law and facts in its evaluation and analysis of evidence adduced by parties, hence reaching an unfair decision.*
3. *That the Trial Tribunal erred in law and facts to give its judgment in favour of the Respondent based on the evidence of the Respondent himself before the trial Tribunal and before the locus as well as contradictory evidence by his witness.*
4. *That the Trial Tribunal erred in law and facts to decide in favour of the Respondent without considering the weighted evidence adduced by the Appellant.*
5. *That the Trial Tribunal erred in law and facts to decide the case in favour of the Respondent whereas ignored the relevant evidence of the Appellant herein.*

The hearing was conducted through written submissions. The appellant was unrepresented, and the respondent was represented by Ms. Joyce Kasebwa, learned counsel.

Submitting on the first, third and fifth grounds of appeal, the appellant argued that the DLHT chairman, the assessors and the parties and their advocates visited the locus in quo purposely to clarify contradictions. However, the Chairman and his assessors failed to determine the real owner of the Disputed Land by considering the nature of the land and relied on weak, false and contradictory evidence that led to an unfair decision against the appellant.

She cited the case of ***Martin Mgando versus Michael F. Mayanga***, Land Appeal No. 93 of 2019, which cited and approved the Nigerian case of ***Evelyn Even Gardens NIC LTD and Hon. Minister, Federal Capital Territory & Two others***, suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 and also the case of ***Masoya Mahembe versus Nyasuma Kihanga***, Land Appeal No. 41 of 2021 to support her argument.

The appellant argued that the procedure for visiting locus in quo was flouted as the DLHT did not read the records of evidence as it was exemplified in

the case of ***Nshinga Liangwa versus Joseph Mpori Mwalawa***, Land Appeal No. 49/2022 (Unreported).

The appellant further argued that the DLHT Chairperson and his assessors failed to determine the remaining physical features of maize cultivated by the appellant prior to the conflict with the respondent before the Village and Ward Tribunals.

The appellant contended that the DLHT Chairperson and his assessors failed to determine the boundaries and boundary neighbours to clear doubts about the evidence adduced by the respondent and his witnesses. She added that the evidence adduced during the trial was contradictory to that found in the locus in quo.

Arguing on the second and fourth grounds, the appellant submitted that the DLHT failed to determine the evidence adduced before it and held that the Disputed Land belongs to the respondent. She added that during the trial and when they visited the locus in quo, the appellant submitted to have acquired the Disputed Land from her late father as a gift in 2004. The evidence was never disputed by the respondent. She stated that she didn't

use the land up until 2020 because of some family problems, a fact that the DLHT failed to consider and reached an unjust decision.

The appellant urged this court to reevaluate the DLHT's evidence and make its own findings. She referred to the case of ***Salum Mhando vs Republic (1993) TLR 170***. She asked the court to analyse the fact that the appellant was given the disputed property by her father in 2004 and cemented by her mother (**PW2**).

Ms. Kasebwa, in her reply submission, also argued together on the first, third and fifth grounds. She submitted that it is undisputed that the DLHT visited the locus in quo to clarify the contradictions. As discussed in the case of ***Martin Mgando versus Michael F. Mayanga*** (**Supra**) that cited in approval the case of ***Evelyn Even Gardens NIC LTD and Hon. Minister, Federal Capital Territory & Two others*** **(supra)** also the case of ***Akosile versus Adeyeye*** (2011) 17 NWLR (Pt. 1276) page. 263.

She argued that the above cases clarify the purpose of the court's visit to the locus in quo. However, the cases do not state that the purpose of the visit to the locus in quo is to ascertain who the owner of the suit property is, as the appellant submitted. She added that ownership of the Disputed Land

could not be determined solely on the nature and features found in the locus in quo visit without considering the evidence of the other party, as the appellant tries to fault the DLHT.

The counsel contended that the appellant submitted the DLHT based on weak, false, and contradictory evidence, which led to an unfair decision. However, the appellant failed to show how the respondent's evidence was weak, false, and contradictory. She argued that the person alleging the allegations must prove the allegations, a duty that the appellant failed to fulfil. To cement her argument, she cited Section 110 of the Evidence Act CAP 6 R.E. 2022.

Additionally, she submitted that the DLHT was correct in reaching its decision because the respondent proved his case on the balance of probabilities, and his evidence was more cogent than that of the appellant. In support of her argument, she cited the case of ***Peter versus Sunday Post LTD*** (1958) E.A 424 and the case of ***Stanislaus Rugaba Kasusura and Another versus Phrase Kabuye*** (1982) TLR 338, also the case of ***Hemedi Saidi versus Mohamed Mbilu*** (1984) TLR 133. She also cited **Section 3(2)(b)** of the Evidence Act (**supra**).

Furthermore, on the fifth ground, Ms. Kasebwa submitted that the appellant could not fault the DLHT while the respondent failed to show at which angle her evidence was ignored.

On the second and fourth grounds, counsel for the respondent submitted that the DLHT took time to analyse and evaluate the evidence adduced by both parties before it. She further invited this court to read pages 5, 6 and 7 of the DLHT's typed judgment, which proved the DLHT exercised that duty.

In her rejoinder, the appellant, on the first, third, and fifth grounds, insisted the DLHT's intentions should be to clear doubts about the parties' evidence. She added that in the circumstances of this case, after visiting the locus in quo, all evidence showed the land in dispute belongs to the appellant. Through the rest of her rejoinder, the appellant simply reiterated what she submitted during her submission in chief.

I have considered the grounds of appeal, the parties' written submissions,

and the evidence on record.

After carefully reviewing the grounds of appeal, I found that they all centre around the DLHT's evaluation of evidence. For that reason, I will discuss them together.

It is not clear that Disputed Land is a two (2) acre farm. Both the appellant and respondent are aware of the existence of the Disputed Land and its location.

During the trial and at this appeal, the appellant claimed the Disputed Land was given to her by her father way back in 2004. She did not utilise it up until 2020 because of some family problems. She added that she went to the village office, paid fees then continued with farming activities after being permitted by the village office. The respondent refuted the claims by saying that the land was not occupied when he started cultivating back in 1974. In fact, he started by clearing the bushes in the said land so as to cultivate and has been using the land without interference up until the conflict arose with the appellant.

Both parties were accompanied by witnesses in proving their allegations. The appellant's evidence was corroborated by PW2, PW3, PW3, and PW4, who were apparently employed by the appellant to clear the land for agricultural purposes. The respondent's evidence, on the other hand, was corroborated by DW2 and DW3, both claiming to be neighbours with the respondent.

To start, I believe it's worth noting that the law recognises ownership of land that was given as a gift or transferred from a parent to a child. The same was explained in the case of **Joachim Ndelembi versus Maulid M. Mshindo & 2 Others**, Civil Appeal No. 106 of 2020 stated;

> *"Similarly, in the instant case, we have no reason of faulting the DLHT and the High Court in their concurrent findings that the land originally belonged to PW2 having acquired it from his late father and that it is from him that the transfers of that piece of land began till it reached the first respondent."*

The law, especially under customary laws, recognises ownership of land through the clearing of virgin land, as the case for the respondent.

The appellant submitted that she started cultivating the land soon after being allowed and given it by the Village council. However, during the trial, she failed to bring members of the village council to testify to that effect.

Additionally, the appellant claims to have been given the land in 2004, but she did not make any development to the land until 2020 because she was taking care of her sick relative. The appellant did not give a clear account as to why she abandoned the Disputed Land. Section 110 (1) of The Evidence Act, Cap. 6, R.E 2022 states that:

"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."

The respondent, however, used the Disputed Land long before it was supposedly given to the appellant by her father. He even brought neighbours as witnesses who testified that he had been using the Disputed Land for a long time. They went further by saying neither the appellant nor her family ever owned land in that area.

Upon reviewing the records, the DLHT considered the evidence from both sides, as reflected on pages five (5), six (6) and seven (7) of the DLHT Judgment and decided in favour of the respondent because his arguments were more convincing.

With regards to locus in quo, in the case of ***Evelyn Even Gardens NIC LTD and Hon. Minister, Federal Capital Territory & Two others*** (**Supra**), various factors were put forth to be considered before the Courts decide to visit the locus in quo. These factors include:

"1. Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of piece of evidence when such evidence is in conflict with another evidence,

2. The essence of a visit to locus in quo in land matters include location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land,

3. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute."

Based on the above provision, I agree with the counsel for the respondent that the sole purpose of visiting locus in quo is not to determine ownership of the land as purported by the appellant, but rather to clear doubts and obtain additional evidence that would assist the court in reaching its decision.

Consequently, the facts argued by the parties before the DLHT are more or less the same as what was presented during the visit at the locus in quo. The facts and most of the witnesses at the trial were the same during the visit. However, the appellant's witnesses gave contradictory evidence, and some didn't even know the boundaries of the Disputed Land supposedly owned by the appellant, see Denis Mkoma (**L2**) on page 27 of the DLHT proceedings.

Moreover, during her submissions, the appellant argued that the procedures for visiting locus in quo were flouted as the DLHT did not read the records of evidence. It is clear on page 31 of the DLHT proceedings that the records of the visit were not read because the appellant's counsel was not present. The matter was adjourned, and the records were read on a future date in

the presence of the appellant's counsel, who added more facts, and the DLHT recorded. Therefore, it is settled that the procedure of visiting locus in quo was adhered to.

In conclusion, I agree with the DLHT's findings. The appeal is devoid of merit and is hereby dismissed with costs.

Dated at Mbeya on this 30 day of May 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MBEYA DISTRICT REGISTRY

A. 2in

A. A. SINDA

JUDGE