

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

LAND APPEAL NO. 64 OF 2023

(Originating from the Application No. 24 of 2023 at District Land and Housing Tribunal of Mbulu at Mbulu)

SELESTINI ELIAS.....APPELLANT

VERSUS

EMMANUEL EVARIST.....1ST RESPONDENT

GILBERT EVARIST.....2ND RESPONDENT

FULGENCE EVARIST.....3RD RESPONDENT

MARTIN EVARIST.....4TH RESPONDENT

ALEX EVARIST.....5TH RESPONDENT

JOHN EVARIST.....6TH RESPONDENT

SALI MOMOY.....7TH RESPONDENT

KASTULI SALI.....8TH RESPONDENT

JUDGMENT

29th April, & 18th June, 2024

Kahyoza, J.:

Selestini Elias (the appellant) sued **Emmanuel Evarist, Gilbert Evarist, Fulgence Evarist, Martin Evarist, Alex Evarist, John Evarist, John Evarist, Sali Momoy** and **Kastuli Sali** (the respondents) for trespass. He alleged that respondents trespassed onto his land measuring one acre situated within Murray village, Mbulu District. He alleged to have acquired the suit land from his late grandfather who transferred title *inter*

vivos. The respondents refuted the allegations contending that the suit land belonged to them and that they inherited it from their parents.

The District Land and Housing Tribunal (the tribunal) found in favour of the respondents. Aggrieved, **Selestini Elias** appealed to this Court raising eight (8) grounds of appeal complaining that the tribunal erred to decide in favour of the respondents who had no evidence to prove ownership. The grounds of appeal raised the following issues-

1. Was the appellant's evidence credible and out weighted the respondents' evidence?
2. Did the respondents prove ownership to the required standard?
3. Was the tribunal justified to admit the unsigned and stamped documents as exhibit?
4. Did the respondents prove that they inherit the disputed land?

The appeal was heard orally and both sides were represented. The appellant enjoyed the service of Mr. Shirima advocate and Mr. Basil, advocate represented the respondents. I am grateful to the learned advocates for their in-depth submissions. I will not be produce them here but will refer to them while replying to the issues raised.

Was the appellant's evidence credible and out weighted the respondents' evidence?

The appellant contended that he owned the disputed piece of land located at Maheri village, Murray within Mbulu District. He acquired the land as gift from his grandfather in 1982. The appellant's grandfather convened a family meeting at Oladmini within Karatu District and allocated the disputed land within Mbulu District to the appellant. The appellant contended that his grandfather, the donor, did not point out the boundaries as the boundaries were well known.

The appellant pleaded in his application that the boundaries of the suit land are on the **East** – Batana Elias, Josephat Elias and Iskari Bilauri, **West** – Boay Mayo, Bilo Mayo and Nunugha Matai, **South**- Boay Mayo, Bilo Mayo and Nunugha Matai and **North** – Josephat Elias and Shauri Germoy. While giving evidence the appellant testified that the boundaries of his suit land were on the; **East**- Batana Elias, Josephat Elias and Iskari Elias; **West** – Shauri Germoy; **South** – Shauri Germoy; and **North** – Shauri Germoy, Josephat Elias and Kastuii Sali. As the record bears testimony, the appellant's testimony regarding the boundaries differed from his pleadings.

The West boundary according to his pleading is *Boay Mayo, Bilo Mayo and Nunugha Matai*, whereas in his evidence he deposed that the West boundary is *Shauri Germoy*. In his pleading, he indicated that the North boundary was marked by *Josephat Elias and Shauri Germoy* while his in evidence he stated that on the North border there were *Shauri Germoy, Josephat Elias and Kastuli Sali*. As that is not worse enough, the appellant stated in his application that the South boundary was marked by *Boay Mayo, Bilo Mayo and Nunugha Matai* while his testimony depicted that the South boundary is marked by *Shauri Germoy*.

The appellant was bound to prove the allegation in his application including boundaries of his land. He gave evidence different from what he had pleaded. During cross-examination, the appellant (the applicant) contended that he wrongly stated the boundaries in the application. If it is true that, he wrongly stated the boundaries, the appellant (the applicant) was required to amend the application to re-state the boundaries, then tender evidence to prove that.

It is a settled principle of law that parties are bound by their pleadings and that where evidence adduced does not support the pleading, the same ought to be ignored. See the Court of Appeal holding in **Ren International**

Company Limited vs Geita Gold Mine Limited, tanzlii [2022] TZCA 245

(6 May 2022). The appellant could only succeed by proving his allegations in the application. Thus, I find that the appellant not only did he fail to prove the boundaries of his land, but also, he failed to establish his claim regarding the size of the land. To that extent, I do not find his evidence as to boundaries and size of the land credible.

I reviewed the evidence by both sides. The appellant testified how he acquired the disputed land. His evidence was supported by Shauri Germoy (**Pw2**) that it was the appellant's father who transferred his title on disputed land to the appellant in 1982. They shared the views that the conflict commenced in 2022 after the respondents planted sisals to mark the boundaries of their land. He was present at the meeting when the appellant's grandfather gave the disputed land to the appellant.

I had a cursory review of the evidence of Modest Khaday (**Pw3**) who deposed that he knew the suit land as the appellant's property and that in 1993 he cut grasses for thatching houses. During cross-examination he testified that, on 08.09.2023 there was a dispute over the same land between Batana Elias and Emmanuel Evarist. He added that he did not know

who was using the land. His evidence could not be relied upon. He testified

I quote-

“kwenye kikao cha tarehe 8.9.2013/23 mgogoro ulikuwa kati ya Batna Elias na Emmanuel Evarist na nilihudhuria kikao hicho lakini siku.... muafaka wa kikao hicho. Nilisikia mdaiwa na ... ndiye aliyevamia eneo hilo. sikuwepo wakati mdaiwa na ... alipovamia eneo hilo.”

During the re-examination, Modest Khaday (**Pw3**) deposed that the dispute on 8/9/2023 over the suit land was between Batna Elias and Emmanuel Evaristi and that he did not know who was occupying the land. The witness had limited knowledge. He did not explain how was the appellant related to either Batna Elias or Emmanuel Evaristi who disputed over the same land. I find his evidence wanting.

Respondents' evidence was that the disputed land belonged to their grandfathers who they mentioned as Varesti Giturda, Momoy Marsay and Sali Giturda. They described the boundaries as on the North- Cattle's pass, South- Shauri Germoy, East – Cattle's pass and West- Cattle's pass. They deposed that the disputed land grows grasses for thatching house and pastures during the dry season.

I find that appellant's evidence weak. The dispute is one on boundaries. The appellant's evidence on boundaries cannot be relied upon as his testimony regarding the boundaries varied with his pleadings. I cannot fault the tribunal for giving credence to the respondents' evidence. The appellant complained that the respondents did not call a witness to support their claims. It is true that the respondents testified without calling any witness apart from themselves. I do not think the respondents had that duty. It is a settled principle of law that in a civil case, he who alleges must prove his allegations. A duty to prove cannot shift to the defendant before the plaintiff discharges the obligation to prove his claim to the required standard, as provided for under sections 110 and 111 of **the Evidence Act**, [Cap. 6 R.E 2022].

The Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others**, Civil Appeal No. 226/ 2020, took a stand that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. However, the burden does not shift from the plaintiff (applicant in land cases) to the defendant (respondent in land cases) to refute or counter the plaintiff's evidence, unless the plaintiff's evidence

established the *prima facie* case. The Court of Appeal in **Yusufu Selemani Kimaro** (supra) stated-

*"....Going by the above exposition of the law, it would be insincere if not a misapprehension of the law on the part of Mr, Halfani to complain as he did that the trial Judge had shifted the onus of proof onto the second respondent. **For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary.** This is so because as per the case of **Raghramma v. Chenchamma**, A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence."*

The plaintiff's [applicant's burden in land case] burden is not lessened by the weakness of the defendant's (respondent in land case) evidence. That is, the plaintiff or applicant has to discharge his burden of proof notwithstanding the defendant's evidential weight. The Court of Appeal, in **Paulina Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 53/2017 (TCA unreported) held that-

*"the **burden of proof never shifts to the adverse party until the party on whom onus lies discharges his** and the burden of*

proof is not diluted on account of the weakness of the opposite party's case.” (emphasis is mine)

Even though the respondents did not call witness to support their allegation that does not dilute the duty of the appellant, who was the applicant, to prove his claim of the suit land on the required standard. The appellant did not discharge his duty. His evidence is wanting as shown above.

Did the respondents prove ownership to the required standard?

The respondents before this Court were also respondents before the tribunal, as the law of evidence stands, they had no duty to prove their title to the disputed land after the appellant discharged his duty. As depicted above, the appellant's evidence was weak. He did not know even the boundary of the land he claimed. The respondents did not have the duty to prove their ownership and they did not prove that. The respondents' contention that they inherited the land was not enough to prove their ownership.

All in all, the respondents' failure to prove their ownership does not mean the appellant is the owner of the suit land. It implies that the *status*

quo ante will prevail. The person in possession before the suit was instituted will remain in occupation as if no suit was ever instituted.

Was the tribunal justified to admit the unsigned and stamped documents as exhibit?

The appellant complained that the tribunal admitted unsigned and unstamped documents as exhibit.

I had an opportunity to examine the documents. To say, the least, the respondents exhibits, U1 and U2 were minutes of the meetings. Exhibit U2 was signed. Exhibit U1 was handwritten but not signed. However, looking at Exhibit U1, it is very old as it was executed on 9.4.2002 at 10.05 am and authentic document. I do not find any harm to admit the documents. As to the complaint that they were not stamped, I find no merit. Not every document is required to be stamped.

Section 47(1)(a) of the Stamp Duty Act, [Cap. 189 Revised Laws] implies that not every document is required to be stamped. It reads-

*"47.-(1) No instrument chargeable with **duty shall be admitted in evidence for any purpose** by any person having by law or consent of parties authority to receive the evidence or shall be acted upon,*

*registered in evidence authenticated by any such person or by any public officer, **unless such instrument is duly stamped:...***"

Minutes of the meetings are not documents chargeable with stamp duty under section 5 read together with the Schedule to the of the Stamp Duty Act. I therefore, find no merit in the ground of appeal that the tribunal erred to admit the unstamped documents. I dismiss the ground of appeal.

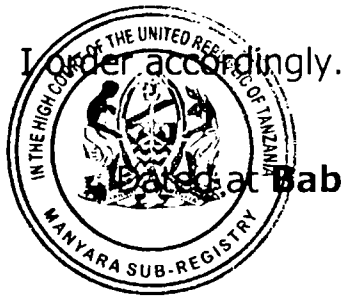
Did the respondents prove that they inherited the disputed land?

The appellant complained that the respondents did not tender evidence to prove that they inherited the suit land. I totally agree that there is no evidence that the respondents inherited the suit land apart from their mere allegations. That notwithstanding, I wish to re-state that the respondents had a duty to counter the appellant's evidence after the appellant had discharged his duty to prove the allegations on the balance of probability.

It is settled that the burden of proof in civil case is not static, it shifts from the plaintiff or applicant in land cases before the tribunal to defendant or respondent in land cases before the tribunal, after the plaintiff has discharged his duty. The respondents would not be condemned for failure to

prove that they inherited the suit land when the appellant (the applicant before the tribunal) had not proved his title to the suit land to the required standard. I find no merit in the appellant's complaint.

In fine, this appeal fails with an order that the decision of the tribunal upheld. The respondents are awarded costs.



I order accordingly.

Dated at **Babati** this 18th day of **June**, 2024.

J. R. Kahyoza, J.

Court: Judgment delivered in presence of the appellant and 1st, 2nd, 3rd, 5th and 6th respondents and in the absence of the 4th, 7th and 8th respondents. B/C Fatina (RMA) present.

J. R. Kahyoza, J.

18/06/2024