

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

LAND APPEAL NO. 126 OF 2023

(Appeal from the Decision of the District Land and Housing Tribunal for Kilombero at Ifakara in Land Application No 18 of 2016 before I. J. Ayo, Esq Learned Chairman)

BETWEEN

SAKINA MPWIKE.....APPELLANT

VERSUS

GRACE RAPHAEL.....RESPONDENT

JUDGMENT

MRUMA, J

Grace Raphael, the Respondent herein successfully sued **Sakina Mpwike**, the Appellant herein before the District Land and Housing Tribunal for Kilombero District at Ulanga for a piece of land measuring three acres located at Mofu Namiwowo within Kilombero District. After hearing evidence from both sides the trial tribunal declared the present Respondent lawful owner of the suit land and ordered for eviction of the present Appellant from the suit land. The Appellant was aggrieved by the

decision of the trial tribunal and has appealed to this court on the following grounds;

1. That, the trial tribunal erred in law and fact for failure to appreciate that the Respondent failed to prove her case as she departed from her own pleading in that while she pleaded to have been allocated the suit land by Mofu Village Council , she gave evidence to the effect that she got the land through Mbingu Village Council.
2. That, the trial Chairman failed to properly evaluate, analyse and assess the evidence on record and thereby erroneously decided in favour of the Respondent leading to unjust decision.

At the hearing of this appeal parties were represented. While the Appellant was represented by Ms. Charity Mzinga, learned advocate, the Respondent enjoyed legal service of Ms Josephine Mbena also learned advocate.

Submitting in support of the first ground, Ms Charity Mzinga contended that the trial tribunal erred in law for its failure to find and hold that the Respondent's evidence and her pleadings were at variance. The learned counsel contende that in the application filed the Applicant (now the Respondent) stated that the suit land which is measuring three (3) acres was located at Mofu Namiwowo village within Kilombero District in

Morogoro Region while in her evidence she stated that the suit land was located at Sanji Mgambo Namihoho at Vigaini Village, which was also contrary to what was stated by her witnesses Bonaventura Maziku (PW2) and Charles Makula Nassoro (PW3) who told the trial tribunal that the suit land was located at Sanje Mamba neighbourhood (i.e. Kitongoji) at Vigaini Village. It was Ms Charity's contention that looking at the Application as presented and the evidence adduced it is clear that the Respondent departed from her pleadings. To substantiate her submission learned advocate cited the case of **Barclays Bank (T) Ltd Versus Jacob Muro Civil Appeal No 357 of 2019** and **Salim Said Mtomekela Vrs Mohamed Abdalah Mohamed Civil Appeal No 149 of 2019**, where the Court of Appeal restated the principle that parties are bound by their pleadings and that any evidence which varies should be ignored. Thus, according to the learned counsel, it is clear that the trial tribunal ought to have been bound by the facts pleaded and find that failure to observe that was an error.

On the second ground of the appeal, the learned counsel submitted that the Respondent did not give sufficient evidence of how she acquired the suit land instead she simply told the trial tribunal that she acquired it after being allocated by the Village Council without producing any documents

to prove the alleged allocation or even mention a single village leader who was involved in the alleged allocation. The learned counsel submitted that the Respondent had a burden of proving her ownership of the suit land as required by sections 110, 112 and 115 of the Evidence Act. She cited as authority the case of **Ramadhani Rashid Kaluka Versus Jela Maiko Meja and 44 Others Land Case No 25 of 2022**, where this court held that ownership of land must be proved strictly. On those reasons she prayed that the appeal be allowed with costs.

Replying to the submission by the counsel for the Appellant, Ms Josephine Mbena, counsel for the Respondent submitted that there was no variance between the pleadings and the evidence adduced. She said that pleadings were clear that the suit land is located at Vigaeni Village in Mbingu Ward at Sanji Mgambo neighbourhood which is also called Namiwowo. The name Sanji Mgambo is of the neighbourhood (Kitongoji) which is interchangeably used as Namiwowo or sometimes it is pronounced as Namio as clearly shown at page 7 of the typed judgment of the trial tribunal.

The learned counsel contended that in her evidence the Respondent mentioned Mofu Village, when she was explaining that in 2009 there was a dispute over boundaries between Mbingu and Mofu Villages whereof

Mofu Village council was claiming that the suit land was within its boundaries and went ahead and approved the suit land for purposes of compensation. She said that there was evidence of Kayusi Mustafa Mpumu (DW2) who stated that he was given the land he was occupying by Mofu Village council and that his land is adjacent to that of the Respondent. The learned counsel contended that the Respondent did not say that the disputed land was located at Mofu Village as alleged by the Appellant and added that location of the suit land cannot be an issue because parties identified it.

Submitting against the second ground, the learned counsel submitted that the trial tribunal properly evaluated the evidence on record and came to a right decision. She said that there was no contradiction in the Respondent's evidence as alleged by the Appellant and instead the proceedings are clear that all witnesses stated that the suit land is located at Sanji Mgambo area which is also known as Samiwowo. The learned counsel submitted that there was evidence from Bonaventura Maziku Bundala (PW2) who stated clearly that the Respondent was given the suit land by Mbingu Village Council and mentioned the Village Chairman at that time as one Dunduwala. On the other hand, there was evidence of Charles Makula Nasoro (PW3), who is the Respondent's neighbour in the

suit land who testified that the Respondent was the lawful owner of the suit land. Ms. Josephine went on to submit that the Appellant's evidence was weak. For instance, she stated that her land was bordering that of Kayusi Mustafa Mpumu (DW2) but in cross-examination DW2 denied to have common boundaries with the Appellant (i.e. DW1), instead he told the trial tribunal that he was aware that Bundala (PW2) owns a land there and Bundala's land borders his land on one side while on the other side Bundala shares boundaries with the suit land. The learned counsel contended that DW2 also told the trial tribunal that the dispute erupted in 2017 while the Appellant said that it erupted in 2016. The learned counsel submitted that if the Appellant was sharing boundaries with Kayusi Mustafa Mpumu (DW2) they would have been consistent as to when the dispute arose. According to Ms Josephine another contradiction can be traced in the testimony of Omari Omari Kanoko (DW3) who testified that the Appellant acquired the suit land 1969 and abandoned it 2004 and that the suit land was four acres and not three acres as stated by the Appellant. The learned counsel contended that DW3 also told the trial tribunal that the Appellant used the suit and for five years only which defeats the explanation that the land was acquired in 1969 because from 1969 to 2004 is not four years only. For those reasons the learned counsel submitted that the Appellant's evidence was very weak to warrant the

tribunal to declare her lawful owner of the suit land. For those reasons she prayed the appeal be dismissed with cost.

In her brief rejoinder, Ms. Mzinga stated that there was no interchangeable use of the names where the suit land was located because by the time the dispute was instituted in 2018 there was clarity as to the location of the suit land. She said that in order to have the issue of location of the suit land reconciled the Respondent ought to have applied to the trial tribunal for rectification of the location of the suit land under **Order VI Rule 17 of the Civil Procedure Code** [Cap 33 R.E. 2019] which gives a party room to amend its pleadings.

I have carefully gone through the records of the lower tribunal and particularly the pleadings evidence and its judgment.

At page three of the typed judgment of the trial tribunal it is clearly shown that Appellant acquired the suit land in 1999 from One Valeri Dunduwala. Similar evidence came from Kayusi Musatfa Mpumu (DW2) to the effect that they acquired the suit land from the same person in 1999. According to all these witnesses Sakina Mpwike (Appellant) used her land up to 2004 when he fell sick and left it under the supervision of one Andrea Kisoki who is Appellant's brother. In 2017 when Andrea Kisoki returned it to the

Appellant and that is when the dispute arose. The trial tribunal is faulted in ground one of the appeal in that the Respondent's pleadings are at variance with the evidence adduced to support her claims. Records of the trial tribunal's show under paragraph three that the suit land which is measured three(3) acres is located at Mofu Namiwowo in Kilombero District. For better understanding/ I propose to reproduce the whole paragraphs as hereunder:

3. Location and Address of the suit/premise land: Land measuring 03 acres located at Mofu Namiwowo within Kilombero District.

The Appellant first point of grievance is found on the location of the suit land in that from what was pleaded in the application is different from the evidence adduced by the Applicant/Respondent in support of her claims. According to the Appellant's evidence the suit land is located at Sanji Mgambo Namihoho area in Vigaini Village. There is also evidence of Bonaventura Maziku (PW2) who told the trial tribunal that the suit land was located at Sanje Mamba neighbourhood (i.e. Kitongoji) in Vigaini Village. There was also evidence of Charles Makula Nasoro who stated that the suit land was located at Namihoho at Sanje Mgambo Village. Thus, as regards to the location of suit land there can be no doubt that witnesses gave different version of names of the place where the suit land

is located. In my view given the fact that parties understood and recognized physical location of the suit land, mentioning different names of the place where the suit land is located cannot be an issue if physical location of the land is known to the parties involved. It is very common that people in the village and even town dwellers sometimes confuse administrative names of their locations and neighbourhoods (i.e. vitongoji) and very commonly they interchangeably use names of their neighbourhood and that of their respective villages and/or wards. That alone does not change the physical location of the suit land.

As correctly submitted by Ms Charity, section **110 of the Evidence Act** [Cap 6 R.E. 2019], vests obligation to the alleging party to prove what he/she asserts. That, however does not mean that the Appellant had no obligation to adduce evidence disproving the Respondent's claims. In this case appellant did not produce any evidence to shake the Respondent's evidence regarding her ownership of the suit land. In the case of **Said Hemedi Versus Mohamed Mbilu [1984] TLR 113** this court (Sisya J as he then was), held that according to law the person whose evidence is heavier than that of the other is the one who must win. In the present case, the evidence of the Respondent was straightforward. She explained how she acquired the suit and land who were her neighbours. She called

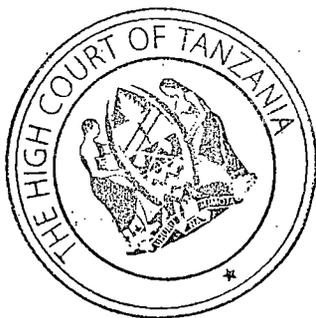
her neighbours Bonaventura Maziku Bundala (PW2), Charles Makula Nasoro (PW3) and Ayubu Mohamed Nyanyali (PW4) with whom they share borders. All these witnesses supported the testimony of the Respondent on the location and ownership of the suit land.

On the other hand, the Appellant gave her evidence and called her witnesses to support her claims. However, her evidence of that of her witnesses Kayusi Mustafa Mpumu (DW2) and Omary Omary Kanoko (DW3), contradicted themselves regarding boundaries of the suit land and the year of acquisition. But even if we assume that the Appellant acquired the suit land from one Valeri Dunduwala in 1999 as she claimed, there is evidence to the effect that she abandoned it in 2004 and went back to the land in 2016 and found the Respondent using it. Under **item 22 of Part 1 of the Schedule to the Law of Limitation Act** [Cap 89 R.E. 2019], an action or suit to recover land has to be instituted within a period of twelve years. From 2004 when the Appellant left the suit land to 2017 when she came back and claimed ownership thereof is a period of 13 years, thus the appellant was time bared to institute these proceedings.

Based on the cumulative evidence adduced by the Respondent and her witnesses I am of the view that the trial tribunal properly evaluated the evidence before it and reached a just conclusion. I

therefore find no reason to fault trial tribunal. In the event this court is satisfied that the Respondent did prove he case on the balance of probability which is the standard required in all civil cases, land cases inclusive. Consequently, I hereby find that the appellant's appeal has no merits and it is dismissed with costs.

It is so ordered.




A.R. MRUMA

JUDGE

27/06/2024