

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

LAND APPEAL NO. 18 OF 2023

(Originating from Land Application No. 18 of 2018 of the District Land and Housing
Tribunal of Same)

ELIZABETH ANDREA KAHULULE APPELLANT

VERSUS

LILIAN MASONGA MTEI (As Administratrix of the estate of the late
Hadija Msomba) **RESPONDENT**

JUDGMENT

24/01/2024 & 05/03/2024

SIMFUKWE, J.

This appeal is against the decision of the District Land and Housing Tribunal of Same (the trial tribunal) which dismissed the appellant's application and declared the respondent as the lawful owner of the

disputed land located at Kifaru village, Kileo Ward within Mwanga District in Kilimanjaro Region (hereinafter referred to as the disputed land). It is on record that the appellant sued the respondent claiming that she invaded her suit land by breaking the fence and damaged crops therein in 2013. She alleged that the land belonged to her grandfather one Kahulule who gave it to her father Andrea Kahulule. It was further pleaded that, in 2000 the appellant's father allocated the said land to the appellant for agricultural activities. That, she possessed the same for 15 years before the alleged encroachment.

On the other side, the respondent claimed to have derived her ownership of the disputed land from her mother one Maria Kitalila who passed it via a WILL (Exhibit D1) to one Tito Masonga (the respondent's brother). The said Tito Masonga built the house therein. It was the respondent's argument that, it was the appellant's mother and Tito's sister who were residing there at the disputed land.

After considering evidence of both parties, the trial tribunal dismissed the appellant's application on the ground that she had failed to prove ownership of the disputed land. Thus, it declared the respondent as the

lawful owner. The appellant was aggrieved, he resorted to this court appealing on the following grounds:

- 1. That, the trial tribunal erred in point of law and fact for deciding the case on extraneously (sic) matters without considering the matter which was filed before him.*
- 2. That, the tribunal erred in point of law and fact for failure to analyse the evidence that the appellant filed a suit on the capacity of Administratrix of estate of her late father and not the owner of the land in dispute.*
- 3. That, the trial tribunal erred in point of law and fact by hearing the dispute and ruled out in favor of the respondent while the appellant's family has resided over that suit land for more than fifteen years (15).*
- 4. That, the trial tribunal erred in point of law and fact by failing to evaluate and analyse the evidence on record hence, reached at an erroneous decision.*

At the hearing of this appeal both parties were unrepresented. The parties prayed this appeal to be argued by way of filing written submissions, whereas the respondent's submission was drawn and filed by Ms. Lilian Mushemba Justus, learned counsel.

Supporting the first ground of appeal that the trial Tribunal relied on extraneous matters, the appellant submitted that she filed the case before the trial tribunal against Hadija Msomba who trespassed into her land, broke the fence, destructed banana trees, potatoes, cassava and vegetables. She contended further that, the trial Tribunal misdirected itself by asserting that the appellant was supposed to sue one Tito Masonga for the reason that the respondent's witness testified that the disputed land belonged to the said Tito and he had built a house at that area. She continued to elaborate that, in her evidence she never mentioned Tito Masonga as he built a house on a different land far from the appellant. She insisted that her land was invaded by the respondent herein, who destroyed her properties and declared that the land belonged to her.

The appellant recommended that; it would be better if the Trial Tribunal visited the disputed land to ascertain the area where the said Tito built his house. Expanding her argument, the appellant averred that, during the trial she prayed before the trial Tribunal to visit the *locus quo* but her prayer was denied. The appellant lamented that the trial Tribunal cannot rely on evidence of one side.

Furthermore, the appellant claimed that she is an Administratrix of the estates of her deceased father who was buried at the disputed land. She insisted that, the trial Tribunal erred to decide contrary to the gist of her application since she sued the respondent and not Tito Masonga as stated by witnesses before the Tribunal.

On the second ground; the appellant faulted the trial Tribunal for failure to note that, she instituted the suit as Administratrix of her deceased father's estate and not in her capacity. She explained further that, in her evidence, she said the disputed land belonged to her late grandfather Kahulule Masimba who passed the same to her father, Andrea Kahulule Masimba. That, even her witness one Jane Andrea at page 3 of the typed proceedings of the trial tribunal testified that the appellant is the Administratrix of her deceased father but the trial Tribunal failed to consider such evidence and ended up deciding contrary to what she testified that, she is not the owner of the disputed land. Moreover, she maintained that, she instituted a matter as Administratrix of the deceased's estate from the time of institution of this matter, and not in her own capacity as she attached the letter of administration.

Arguing the third ground of appeal, the appellant complained that the trial Tribunal did not consider the fact that the appellant and her family resided at the disputed land for 15 years. She contended that, according to land laws, 12 years is the limitation of suing for the recovery of land. She explained that she was born and raised at the disputed land, now she is 45 years and she has never heard the dispute over the said land. She implored the court to quash the decision of the trial tribunal and to declare her the lawful owner of the disputed land which belonged to her father.

On the fourth ground of appeal, the appellant faulted the trial Tribunal for failure to evaluate and analyse the evidence on record. She stressed that; her evidence was credible/enough to establish that the disputed land belonged to her late father.

The appellant informed this court that the late Kahulule Masimba cohabited with one Maria Kilatila as his girlfriend who was also a mother of the respondent and was Kenyan. She stated that her late father used to take care of her father at Dodoma. She blamed the trial Tribunal for failure to evaluate the evidence and ruled against her as Hadija was Kenyan and upon her demise she was buried in Kenya.

She prayed this court to allow this appeal by quashing and setting aside the decision of the trial Tribunal and declare her as the lawful owner of the disputed land.

Opposing the appeal, the respondent started with the 1st ground of appeal by submitting that, the respondent in this dispute is one Hadija Msomba not Tito Masonga but the learned trial chairman mentioned Tito Masonga who was not a party at the trial tribunal but he is the owner of the disputed land hence a necessary party in this matter. In support of her argument, the respondent cited the case of **Suryakant D. Ramji v. Savings and Finance Limited and others [2002] T.L.R 122**, which discussed the difference between the proper party and necessary party. She further insisted that one Tito Masonga was a necessary party and the learned chairman was right to hold that.

Responding to the 2nd ground of appeal, the respondent stated that, it is a trite principle of law that, the one who alleges must prove as per section **110 of the Evidence Act, Cap 16 R.E 2002**. Meaning that the court will sustain the evidence which is more credible than the other.

Arguing against the 3rd ground of appeal the respondent averred that, evidence adduced by the respondent showed clearly that the respondent

was the legal owner of the disputed land and the allegation by the appellant are baseless and unfounded in the eyes of the law.

Lastly, on the 4th grounds of appeal, the respondent submitted that the argument by the appellant that, the trial tribunal erred in law and fact by deciding in favor of the respondent was baseless since the trial tribunal findings were correct.

On the strength of the above submission, the respondent beckoned upon this court to dismiss the appeal for being meritless and uphold the decision of the trial tribunal.

I have considered the rival arguments by the parties; the issue is ***whether this appeal has merit.***

Starting with the first ground of appeal, the appellant protested that the trial tribunal relied on extraneous matters and misdirected itself by stating that, the appellant was supposed to sue one Tito Masonga instead of the respondent herein. Her assentation, was contested by Advocate Lilian who submitted that, Tito Masonga was not a necessary party and the learned Chairperson never mentioned anything about Tito Masonga.

I have thoroughly examined the entire evidence as well as the trial Tribunal's judgment, the name Tito Masonga was mentioned by the respondent's witnesses who were DW2 Sophia Abdallah Seushi, DW3 Ally Matomoki Salolo. These witnesses testified that one Maria Kilatila wrote a Will (exhibit D1) at the Village Executive Officer's office (DW2) in favour of her son Tito Masomba. It was alleged that Tito and his sisters have built a house at the disputed land where they reside. I am of settled opinion that the issue of Tito was not extraneous as it was introduced by witnesses of the respondent. Therefore, it was correct for the learned trial Chairman to discuss it.

Based on that evidence, the trial chairman at page 4, 3rd paragraph of the judgment stated that:

"I do not understand why the applicant sued the respondent while TITO who resides there is of the age of majority. If the applicant thinks that has cause of action against the respondent had to join one TITO who built in the suit land and reside."

On the second ground of appeal, the appellant argument was that, the trial Tribunal failed to take into account the fact that she filed the suit in

her capacity of Administratrix of her late father's estate and not on her own capacity. She argued that the document to support that she was Administratrix was attached to her application. In reply, the learned advocate for the respondent submitted that it is trite principle of law that the one who alleges has the burden of proof and that the standard of proof is on preponderance of probabilities. Meaning that the court will sustain such evidence that is more credible than the other. She insisted that the respondent is the legal owner of the disputed land.

I have revisited the issues raised before the trial Tribunal, at page 5 of the proceedings the following issues which were raised:

a. Who is the legal owner of the suit land.

b. To what relief(s) parties are entitled to.

With due respect to the appellant, whether she was Administratrix or not was not an issue before the trial Tribunal. Even in her application, she did not mention that she was Administratrix of her late father. Also, the letter of administration of estate was not attached to the application as alleged by the appellant. Further, the learned Tribunal Chairman did not discuss the issue of administration of the deceased's estate. I am of the opinion

that the appellant is trying to raise an issue which never transpired during the trial. Therefore, this ground of appeal has no merit.

I will discuss the third and fourth grounds of appeal jointly as both grounds are in respect of evaluation of evidence.

On the third ground of appeal, it was argued by the appellant that the trial Tribunal failed to consider the evidence that the appellant and her family has resided at the disputed land for 15 years. On the fourth ground of appeal, the appellant alleged that the late Kahulule Masimba cohabited with one Maria Kilatila as his girlfriend who was also a mother of the respondent and was Kenyan.

The respondent's advocate replied that the appellant's argument is baseless and unfounded. She supported the findings by the trial Tribunal.

In civil cases, the law is settled that the one who alleges must prove and the standard of proof is on balance of probabilities. This is provided for under **section 110 of the Evidence Act**, (supra). There is a plethora of authorities to that effect. In the case of **Mary Agnes v. Shekha Nasser Hamad**, Civil Appeal No. 136 of 2021 it was held that:

"We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019. (ii) Standard of proof in a civil case is on a preponderance of probabilities, meaning that the Court will sustain such evidence that is more credible than the other on a particular fact to be proved. (iii). The burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

Before the trial tribunal, the appellant called three witnesses whose evidence was to the effect that the disputed land belonged to the appellant's father one Andrew Kahulule. The appellant explained further that the said land was given to her father by her grandfather.

On the other hand, the respondent also summoned three witnesses. Briefly, her evidence was to the effect that the disputed land belonged to her mother who gave the said land to her son Tito Masonga.

From the foregoing observation, as the first appellate court, I have the duty is to re-evaluate the entire evidence of the trial tribunal and where

necessary come up with my own findings. In the case of **Future Century L.T.D v. Tanesco, Civil Appeal No.5/2009** the Court of Appeal held that:

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

In the present matter, since it is the appellant who instituted the case before the trial Tribunal, she was required to prove her case on balance of probabilities. It is elementary principle of law that in civil cases the parties' evidence cannot tie. This principle was restated in the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** where Hon. Sisya J (as he then was) held that:

"According to law, both parties to the suit cannot tie. But the person whose evidence is heavier than that of the other is the one who must win."

The burden of proof never shifts to the respondent until the applicant proves/discharges that burden of proof. This position was restated in the

case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021) [Tanzlii]** at page 14 the Court of Appeal held that:

"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

Guided by the above authorities the issue is whether the appellant herein discharged her burden of proof. Without further ado, I don't hesitate to say that the appellant failed to prove that she was the lawful owner of the said land as her argument is not supported with evidence on record. During the trial, the appellant testified that she was given the said land by her father but there is no evidence to that effect. Moreover, during cross examination, the appellant said that she did not know when she was given the same. Also, there is no any documentary evidence to prove that the appellant was given the said land by her father as rightly decided by the Trial Chairman. She did not know even the neighbours. The fact that she stated that the land belonged to her father does not necessarily mean that

she automatically owns the same. In the circumstances, I do not agree with the appellant's contention that her evidence was strong to establish ownership. Therefore, the Tribunal's decision was justifiable.

In the upshot, I hereby dismiss this appeal with costs.

It is so ordered.

Dated and delivered at Moshi this 5th day of March 2024.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

05/03/2024