IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 32 OF 2023

(Originating from the Judgment and decree of the District Land and Housing Tribunal for Mtwara at Mtwara in Land Application No. 19 of 2022)

ISMAIL SELEMANI NAMTUPULA.....APPELLANT

VERSUS

ALI BUSHIRI CHENGO .....RESPONDENT

JUDGMENT

15th February 2024 & 12th March 2024

DING'OHI, J;

The Appellant, **Ismail Selemani Namtupula,** is aggrieved with the judgment and decree of the District Land and Housing Tribunal for Mtwara (the trial tribunal) which declared the Respondent herein, **Ali Bushiri Chengo,** the rightful owner of the parcel of land measuring 1.5 acres situated at Mbulu, Jangwani ward, Mikindani within Mtwara municipality. That decision was made in Land Application No. 19 of 2022 on 23rd August, 2023.

The factual background of the case taken from the trial court's record reveals that the appellant claims to have purchased the disputed land in 1992 from one Ally Ismail Shariff. The sale/purchase agreement was made in writing

(exhibit D1). It is alleged, the appellant made development to the land he so purchased by erecting a small house. On his part, the respondent claimed to have got the suit land in 1987. He cultivates different crops like sorghum, cassava, maize, and pawpaw trees. Though the respondent does not state how he acquired the said land, it is alleged he occupied the same without interruption till the year 2000 when the appellant maliciously entered and destroyed crops.

After the mediation in the ward tribunal became unsuccessful the respondent initiated the land dispute, subject to this appeal, in the trial tribunal. At the end of the day, the trial tribunal found that the respondent was the rightful owner of the land in dispute. The reason for the decision given by the learned chairman of the trial tribunal is that though he agreed with the opinion of assessors that all parties herein were trespassers to the land since the respondent was the first one to occupy the land that way (as the trespasser), he becomes the rightful owner. For the avoidance of doubts let the relevant part of the trial tribunal's judgment to that effect, speak for itself, in Kiswahili;

> *"kwenye shauri hili Wajumbe wa baraza wote wawili walishauri kuwa wadaawa kwenye shauri hili*

wagawane eneo lenye mgogoro kwa kuwa wote ni wavamizi. ***Nimekubaliana nao kuhusu wadaawa kuwa wavamizi kwenye eneo lenye mgogoro*** *lakini nimetofautiana nao kuhusu kugawana eneo hilo. Nimetofautiana na wajumbe wa baraza kuhusu wadaawa kugawana eneo lenye mgogoro kwa sababu kwa Ushahidi uliotolewa hapa barazani inaonesha mleta maombi ndio wa kwanza kumiliki eneo lenye mgogoro.* ***Na kwa kuwa mleta maombi ndio wa kwanza kumiliki eneo la mgogoro sheria inamtambua kuwa ni mmiliki halali.*** *Lakini pia ukiangalia Ushahidi uliotolewa na mleta maombi ukilinganisha na ule wa mjibu maombi ushahiudi wa mleta maombi ni mzito hivyo anastahili kushinda kesi. Huo ukiwa ndio msimamo wangu nayaruhusu maombi haya kwa gharama (application allowed with costs). Mleta maombi ni mmiliki halali wa eneo lenye mgogoro lenye ukubwa wa ekari moja na nusu (1.5 acres) lililopo Mbulu, Kata ya Jangwani – Mikindani ndani ya*

Manispaa ya Mtwara. Mjibu maombi ni mvamizi wa eneo hilo la mgogoro lenye ukubwa wa ekari moja na nusu (1.5 acres) lililopo Mbulu, Kata ya Jangawani – Mikindani ndani ya Manispaa ya Mtwara na anaamriwa kuondoka kwenye eneo hilo la mgogoro haraka iwezekanavyo."

(Emphasis supplied).

That decision by the trial tribunal did not please the appellant, hence the present appeal. In his memorandum of appeal, the appellant had the following grounds for his grievances;

1. *That, the trial chairman erred in law and fact by entering its decision in favour of the respondent without joining the necessary part one called Sharo who seems to be the one who entered into disputed land.*
2. *That, the trial chairman erred in law and fact by entering its decision in favour of the respondent without considering and evaluate properly the evidence of the appellant adduced during the trial including Exhibits D1 tendered during trial which was properly admitted.*

3. *That, the trial chairman erred in law and fact by entering its decision in favaour of the Respondent while he failed to prove his case on the required standard be required by law.*
4. *That, That, the trial chairman erred in law and fact by entering its decision in favaour of the Respondent without visiting at the locus in quo as each party claims the other party to trespass over his land.*
5. *That, the trial chairman erred in law and fact by entering its decision in favaour of the Respondent by wrongly applying the principle of first trespasser while the Appellant herein was bought the same on sometimes 1992 and not a trespasser like the Respondent who trespassed the same sometimes on 2004.*

He prayed that this appeal be allowed with costs.

At the hearing of this appeal, parties appeared in person unrepresented. In the brief submissions, they were not systematic in arguing grounds of appeal. They, respectively, argued for and against the appeal generally. The appellant complained that the person mentioned by the appellant as the one who purchased the disputed land was not summoned to testify before the court. He also argued that the learned chairman of the trial tribunal did not visit the *locus in quo*. It was also his submission that though he tendered

the sale agreement and other relevant documents as exhibits and part of his evidence, the trial tribunal did not consider them in his judgment.

On his part, the respondent maintained that he is the rightful owner of the disputed land. He stressed that the appellant was the one who trespassed into his land and started cultivating. According to the respondent, that is why he was the first to file the land case against the appellant in the trial tribunal to claim back his right over that particular land.

In a nutshell, that was the submissions by both sides for this appeal. Having examined the evidence in the record together with the submissions by the parties; I think the relevant issue to be resolved is whether the appeal has merit.

Under the circumstances of this case, the merit of the appeal will depend on whether, or not, in reaching the decision the trial tribunal properly evaluated the evidence of both sides. I am of that view because the appellant has complained under the second ground of his appeal that "the trial tribunal erred in entering the decision in favour of the respondent without considering and evaluating properly his evidence adduced at the trial including Exhibit D1 which was properly admitted". Under the circumstances

of this case, and for the reason which will be apparent herein, I will start to consider that second ground of appeal.

The second ground of appeal as hinted herein above calls for this court's exercise of powers of re-evaluation of the evidence in the trial court's record. Admittedly, this being the first appellate court it may re-evaluate afresh the evidence of the lower court and come to its conclusion on the outcome of the subject matter. I am entitled to do the same in this appeal. That position was shown in the case of **Future Century Limited vs TANESCO** (Civil Appeal 5 of 2009) [2016] TZCA 730, The Court of Appeal of Tanzania stated that:

> *"This is a first appeal. The principle of law established by the Court is that the appellant is entitled to have the evidence re-evaluated by the first appellant court and give its own findings. See the case of Pandya V R (1957) E.A, cited with approval in the case of Maramo Slaa Hofu and others V R Criminal Appeal No. 46 of 2011 (unreported) and also that of Deemay Daati and two others V R Criminal Appeal No. 80 of 1994 (unreported). The cases cited are criminal in nature*

but the principle enunciated applies to both civil and criminal cases."

In this case, the record is clear that it was the appellant who tendered the sale agreement (exhibit D1) in the trial tribunal in an attempt to prove how he got the land in dispute. He was the one who also attached the minutes of the meeting of the land owners at the area of the locality of parties herein declaring the appellant as the owner of the land in dispute. The sale agreement available in the trial court records (Exhibit D1) and which was admitted without objection from the respondent reads as follows;

"Ofisi ya Tawi

Jangwani

26/09/1992

YOYOTE MHUSIKA

FAMILIA YA ALLY I. SHARIF

YAH: HATI YA KUUZA SHAMBA

Mnamo Tarehe 24/02/1992 Nd Ally Ismail Sharif akiwa na akili timamu aliamua kuuza shamba lake lenye migomba, mitembo ndani yake kwa Nd Ismail Selemani Namtupula bei ya Sh 70,000/-. (Sabini elfu tu) Nd Namtupula ametoa fedha yote wala hadaiwi mbele ya mashahidi wafuatao.

Mashahidi wa Muuzaji

1. Ally Sharifu (Sgd)
2. Ismail S. Namtupula (Sgd)
3. Mwinyimanzi Ahmadi (Sgd)

Mashahidi wa mnunuzi

1. Ismail S. Namtupula (sgd)
2. Hamisi A. Mbalaka (sgd)
3. Mohamedi Selemani"

The appellant also attached in his application the minutes of the meeting dated 6/08/2017 by the citizens who own Shambas at Mahuta Street, Jangwani ward which also mentioned and recognized the appellant as the owner of the shamba land in dispute.

The respondent has tendered no material evidence showing as to how he got the land in dispute. His case document (application) and evidence at the trial tribunal are silent on that important issue. In the absence of tangible evidence on how the respondent got the land, this court will not believe mere words on a serious matter that touches the rights of parties in the acquisition and ownership of real property (land).

I have heard and considered the reply by the respondent against the appeal. He contended that the trial tribunal, in its decision, considered the exhibits which were tendered by the appellant at the trial court but those exhibits do not concern this case. On perusal of the trial court record, and as I have

observed herein above, the trial tribunal did not consider the documentary evidence made by the appellant. I may add that, those exhibits that were admitted without objection concern the land, the subject matter in the case. Had the trial tribunal considered those documents together with other available evidence by the appellant's side at the trial, it would have arrived at a different view. I am aware that the respondent has consistently insisted that he was the first to file the land dispute case in the trial tribunal. I may agree with him. However, I have to make it very clear here that, being the first person to bring an action in a court of law is not the criterion to be taken by the courts of law to declare the winners after the trial. What is required is the evidence *to prove* the case depending on the standard set by the law. In cases of a civil nature like the present one, the required standard is the proof on a balance of probability. Section 110 of the Evidence Act, Cap. 6 RE 2022 mandates that who alleges must prove. In the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 it was stated that;

> *"Be it as it may, we think the success of the appellant's case did not depend on the respondent's credibility. It depended on the appellant discharging her burden of*

proof on the required standard in civil cases relative to the issue to be proved..... It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

The records revealed that, despite his oral account, the Respondent fell short of proving to be the owner of the disputed land measuring 1.5 acres. Since the appellant has produced his written evidence proving how he acquired the ownership of the suit land, as aforesaid, that documentary evidence can not be overridden by an oral account. That is per the dictates of section 100 (1) of the Law of Evidence Act which provides that;

"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of

property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

In the case of **Barreto Hauliers T. Ltd & Another vs Mohamood Mohamed Duale** (Civil Appeal 7 of 2018) [2022] TZ CA 829, the Court of Appeal observed as follows;

"The disposition of the disputed property in the present appeal was reduced in writing and admitted in evidence as exhibit PI. That exhibit clearly shows that PW3 sold the property to the respondent. Since the sale agreement was reduced in writing and expressly shows that PW3 sold the disputed property to the respondent, we agree with Mr. Lamwai that ***the oral account of PW3 cannot supersede the documentary evidence.***"

(Emphasis supplied)

I thus agree with the appellant that the chairman of the trial tribunal failed to analyze and consider the appellant's evidence, particularly the wording of exhibit D1. Had the trial tribunal carefully and properly analyzed the evidence of the appellant party, it would have rightly found that the Respondent had failed to prove his case to the required standard. The 2nd ground of appeal which has the effect of disposing of this appeal wholly, is meritorious.

The appeal is therefore allowed. Judgment and decree made against the appellant in the trial tribunal are hereby quashed and set aside. The appellant is declared the rightful owner of the land in dispute. He shall also have the costs of this appeal.

Dated at **MTWARA** this 12th day of March 2024.

S. R. DING'OHI

JUDGE

12/03/2024

Judgment delivered on this 12th day of March 2024 in the presence of parties in person.

S. R. DING'OHI

JUDGE

12/03/2024.