**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT SONGEA**

**(APPELLATE JURISDICTION)**

**LAND CASE APPEAL NO 55 OF 2015**

**(Arising From Land Application No. 09 of 2015 of the District Land and Housing Tribunal for Ruvuma at Songea)**

**DISMAS SOKO (SUING AS LEGAL REPRESENTATIVE OF SERAPION PETRO SOKO)..... APPELLANT**

**VERSUS**

**CORODUIKI NDAUKA .....RESPONDENT**

**JUDGMENT**

**1st & 18th March, 2016**

**MGETTA, J.**

Before the District Land and Housing Tribunal for Ruvuma at Songea the appellant herein unsuccessfully sued the respondent herein over trespass into the Suitland measuring two (2) acres situated at mwanamonga village which was located to his late father by the village council. On being aggrieved by that decision the appellant through Maleta

and Ndumbaro Advocates, filed this appeal upon the following three grounds of appeal:

1. *That, the District Tribunal erred in law and in fact in holding that the Respondent is lawful owner of the disputed land.*

2. *That, the District Tribunal wrongly evaluated the evidence adduced by the appellant witnesses during the hearing of the suit as a result it ended up with wrong decision.*

3. *That, the District Tribunal misconceived the evidence of both sides and therefore wrongly held that the suit premises belong to the respondent.*

A brief facts leading to this appeal is that, prior the appellant's late father owned customarily an area measuring thirty (30) acres in approximation at Mwanamonga village. Later on the village council decided to allocate part of that thirty acres to other people in two (2) acres each among of whom

was one late SEBASTIAN, the respondent's father. The respondent's father practically used only an acre until he passed away. The appellant claim the two acres land of his father as administrator which are now used by the respondent upon his father's death. On the other hand, the respondent claimed first that, his late father was allocated the land in 1980 by the village government together with others a land measuring 4 acres and later bequeathed it to him and went on to use it until in 2014 when the appellant started fracas over it.

During hearing, the appellant enjoyed the service of Mr. Ngilangwa Learned Advocate while the respondent appeared in person. Mr. Ngilangwa in arguing this appeal consolidated first and second ground and submitted that the evidence of the appellant, Emilian Ndauka the respondent's blood brother and Polycarp Mbeya who testified as PW1, 2 and PW3 respectively their evidence was to the effect that the appellant's father owned the land in dispute measuring two acres which was allocate to him by the village council of Mwanamonga and so was the respondent deceased's father. Hence disputing that the respondent's deceased father was allocated four acres as claimed by the respondent. Mr. Ngilangwa added further that even the respondent did not deny that appellant's deceased father was allocated

two acres but is now claiming four acres from the appellant's deceased father's land and that allocated to his father. Besides, it was his submission that the trial tribunal did not visit the locus in quo while it was supposed to do so, in order to gather evidence from the neighbors to the disputed land. That the trial tribunal addressed itself on the issue of contradictions of appellant's evidence in respect of years which was according to him not fatal and that it had less weight for failure to bring those who made the allocation to his deceased father and the respondents'. Reference was made to s.119 of Law of Evidence Act and the case of **Hemedi Saidi V. Mohamed Mbilu [1984] TLR 113** by the tribunal. At the end, the third ground was engulfed in the submission of herein above hence he prayed to this court to allow the appeal and the respondent to remain with his two acres.

In replying to the first ground of appeal, the respondent was of the view that the district tribunal correctly decided the case in the respondent's favour as both their fathers were located 4 acres each by the village council, Mwanamonga in 1980. That the said four acres were given to him for the reason of old age in 1984 for agricultural purposes to date. He invited this court declare him as a lawful owner and costs of the suit. In

rejoinder, Mr. Ngilangwa submitted that the respondent was not present when the village land council allocated the land and no any witness who came to state that his late father was allocated the disputed land. He insisted that the evidence of PW2, the respondent's brother is credible that the acres allocated were two acres each as per page 5 of the judgment.

Following the parties rival submissions the germane issue that need to be decided by this court is whether this appeal has merit.

In the circumstance of this case the posed issue will be answered by considering grounds of appeal together as follows: **Firstly,** the pleadings referred at the trial tribunal by the appellant invaded two acres of land which was formerly owned by the appellant's father. This is as per paragraph 6(a) 3 of the application. Again PW1, the appellant, he said in evidence that he is an administrator and claimed 2 acres which belong to Soko's family which has been invaded by the respondent by cultivating and cutting down trees. It was his further testimony that in that land the respondent's father was allocated two acres by the village government which are not in dispute and he has no problem with that. His only dispute is the action by the respondent of expanding the land beyond as from 2013. On cross examination by the respondent, the appellant said that he

was not there when the respondent's father was allocated the two acres and knew nothing about allocation of land made in 1980 to the respondent's late father but he insisted that the allocation was done for two acres and not 4 acres as claimed by the respondent. However, when he was asked by assessors he said that his father sent him to their customary land to see people who were allocated pieces of lands. A further inquiry by the chair man to the appellant revealed that the appellant got information in 1990 that the respondent's father was allocated 2 acres of land from the one Menas Halla a secretary to the office of village of Manamonga. That the boundaries were ditches and a road.

On the other hand PW2 evidence, who is a blood brother of the respondent, was to the effect that he was present 1970 when his father was allocated a piece of land measuring 2 acres by the village government from the portion of land which was owned by the appellant's parents. He added that even himself was allocated two and a half (2½) acres nearby that land hence know the disputed land very well., After testifying so he said the following and because it is crucial I quote it for the sake of clarity

> "-*The* ***disputed land is the same which was allocated to our father***

*- The applicant* ***is claiming that land since his father was the pioneer there.***

*-The* ***disputed land is the two acres*****.....**

*-It* ***is not true that our father was allocated 4 acres***

***-The two acres are now owned by the respondent***

***-The dispute is due to the expansion of the land into the applicant's land"***

After that he testified that the expanded land belongs to the appellant. Although he did not say the extent of expansion when was asked by the assessors he said the following

***"-The respondent has invaded two acres.....***

***-Those two acres that were allocated to our father had no dispute***

***- Since 2014 the respondent stated invaded into the suit land"***

PW3 one **Polycrp Mbeya** intimated that, the respondent actually crossed the road, the boundary and started using the land of the applicant's late father. As to how did he knew, he answered the following.

*"The invention I came to know it when the* ***matter reached the ward tribunal***

*-I was the* ***witness at the W/T***

*The dispute here is about* ***the boundary***

*The* ***disputed land belongs to the applicant with an exception to the land that was allocated to the respondent's late father"***

On that note, it is clear that this case was heard at the Ward tribunal the question here is what the result was. When PW3 was asked by the wise assessors he provided an answer in the following words:

***"- there was a case at the W/T***

***-Its proceedings were nullified by this tribunal"***

The respondent in his evidence insisted that the allocation was done as said by the appellant but not for two 2 but 4 acres in 1980. That he has been in use until 2014. On cross examination by Mr. Mhelela for the applicant his answer changed from 4 acres to 4 hectares and when he was asked whether he was there during such allocation he said he was not there as he was in war in Uganda. His first witness ODWINA NJOVU said the allocation was 4 acres when testifying but again when cross examined by Mr. Mhelela for the appellant he said they were allocated 4 hectares and agreed that PW2 EMILIAN NDAUKA was there when the land was allocated to his father. But again, to assessors he answered that the allocation was 4 acres and that she saw a handing over from respondent and his late father from a distant and the father told her so. His last witness JOHN ALEX

NDAUKA said that the land allocated was 4 acres but again he said they were allocated 4 acres hence his evidence was a hear say. Before the assessors he insisted that the allocation was in terms of hectares.

I have sailed through the evidence of both parties and came up with the following findings.

**First**, the appellant's father had a land which later on was taken by the village and allocated to other people including the respondent's father. The land in dispute is not in respect of the two acres allocated by the village government but beyond that land. This is justified by the respondent himself whose testimony show that he vigorously denies that the land allocated was 2 acres.

Second, the law of evidence is settled that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he must prove that those facts exist and the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. See sections **110 and 111 of the Evidence Act Cap. 6 R.E 2002**. In this case the evidence show that the respondent and his last witness were in fact not present when the allocation was done. Besides the defense evidence show that there is no

clear cut as to whether the allocation was done in terms of acres or hectares. This is because arithmetically these are two different units of measurements. On the other hand the evidence of the appellant especially that of PW2, the respondent's brother is more reliable because he was present when the allocation was made and testified to know the boundaries very well. Besides even DW2 agreed that PW2 was present during the allocation.

Again the appellant testified that he had no problem with the two acres of land allocated but the other two acres which have been snatched from him by the respondent. I learn that there is a color of truth in it since the respondent sometimes testified if I had to do away with the mixing of measurement units, he said it was 4 acres a sum of two plus two acres.

At this juncture I have no reason to disbelieve the evidence of PW2 because first he is the brother of the respondent, two he was present during the allocation of land and three he testified to know very well the area since then. And since in civil cases the proof is on the balance of probability, I find the evidence of the appellant carries more weight than that of the respondent. The respondent has failed to prove that his father

was allocated four acres since he was not present during allocation and even DW2 was contradicting herself as to whether the allocation was in terms of acres or hectares which is a grave contradiction. The trial tribunal wrongly evaluated the evidence of the appellant and misconceived the same hence wrongly ruled in favour of the respondent.

In fine, the proceedings of the trial tribunal are quashed and the judgment is set aside. The appellant is declared a lawful owner of the two acres which were trespassed by the respondent in exclusion of the two acres once allocated to the respondent's late father by the village government.

This appeal has merit and therefore it is allowed with costs.

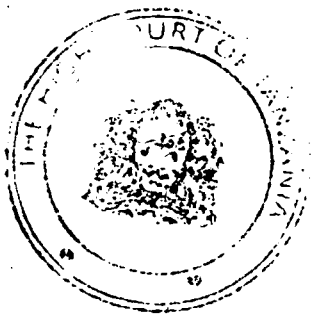
**J. S. MGETTA**

**JUDGE**

**18/03/2016**

**Court:** This judgment is delivered today this 18th March, 2016 by the Deputy Registrar with the permission of presiding judge, Hon. J. S. Mgetta, J in the chambers of the Deputy Register in the presence of Mr. Abel Ngilangwa, the learned advocate for the

appellant who was also present and in the presence of the respondent in person.



**G. H. HERBERT**

**DEPUTY REGISTRAR**

**18/3/2016**