IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPEAL NO. 24 OF 2020

(C/O Land Appeal No. 48/2019 District Land and Housing Tribunal for Katavi, originating from Civil Case No. 13 of 2019 of Misunkumilo Ward Tribunal)

ADAM PASCAL MLANGI ..... APPELLANT

VERSUS

MARIA JULIUS ..... RESPONDENT

Date: 30/08 & 27/09/2021

JUDGMENT

Nkwabi, J.:

The appellant was peeved by the decision of the District Land and Housing Tribunal, consequently he lodged a petition of appeal to this court. He had earlier lost the case in the trial tribunal as the respondent who was the plaintiff/applicant emerged the winner.

The respondent sued the appellant in the trial tribunal in order to get her rights. He had proceeded to do developments in the disputed piece of land. The respondent told him to stop the development on the disputed piece of

land, but he would not heed. Definitely, her rights she was seeking in the trial tribunal were declaration that she is the lawful owner of the piece of land and eventually the appellant be evicted from the disputed piece of land. She got her right whereas the trial tribunal ordered the appellant vacant possession as he had usurped the pieced of land the property of the respondent in this appeal. It ordered the appellant to immediately demolish his structures. It ordered for costs to the respondent as well. As I have indicated above, the appellant unsuccessfully appealed to the District Land and Housing Tribunal, hence this appeal to this court. The appellant lodged a petition of appeal which consists of four grounds of appeal as hereunder:

1. *That the appellate tribunal erred in law and fact by declaring the documents evidencing ownership of the suit land have been obtained fraudulently without any proof whatsoever. The appellant prays this Appeal Court to admit the said documents so as to enable it determine the issue.*
2. *That the Appellate Tribunal erred in law by failure to recognize adverse possession of the appellant over the suit land despite clear evidence proving the same.*

3. *That the appellate tribunal erred at law by its failure to recognize that non-joinder of Mpanda Municipal Council which allocated the suit land (plot 393 Block "V" (HD) to the appellant as a necessary party was fatal to the whole proceeding and decision.*
4. *That the appellate tribunal misdirected itself to hold that the evidence adduced by the respondent and her witnesses was not shallow and weak. While in fact it was too shallow and weak to prove her case as required at law.*

The appellant prayed for judgment in his favor and for the following orders:

i. Declaration that the suit land is the property of the appellant.

ii. Vacant possession.

iii. Costs of the appeal.

The respondent strongly resisted the appeal in her reply to the petition of appeal. She prayed the appeal be dismissed, the decision of the lower tribunals be "withheld" (upheld) and costs be borne by the appellant.

When the appeal was called up for hearing both parties appeared in person, unrepresented. In their submissions, both parties kept their stance.

This being a second appeal, I should be guided by **Salum Mhando v. Republic [1993] TLR 170** and **Deemay Daati & 2 Others v, Republic, Criminal Appeal No. 80 of 1994** (CAT), (unreported):

> *It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of evidence, an appellate court is entitled to look at the evidence and make its own findings of fact.*

This court, therefore, will be entitled to interfere with the concurrent finding of the lower tribunals only if in line with the above decision.

I start with handling the 2nd and 4th which are *that the Appellate Tribunal erred in law by failure to recognize adverse possession of the appellant over the suit land despite clear evidence proving the same and that the appellate*

tribunal misdirected itself to hold that the evidence adduced by the respondent and his witnesses was not shallow and weak. While in fact it was too shallow and weak to prove her case as required at law.

In submission, the appellant argued that the trial court erred in law as he has been residing at the suit land since the year 2002. The trial tribunal was not persuaded so as the first appellate tribunal. The appellant is pleading adverse possession. Though he is claiming adverse possession, he claims too that the suit land was allocated to him by the District Land officer, yet he claims that he bought it from Baba Titus. With the above state of conflicting evidence, I am persuaded as the two lower tribunals that the appellant had not only shallow but also contradictory unreliable evidence. In this case, adverse possession cannot be inferred. I am fortified in my decision by the case of **Registered Trustees of Holy Spirit Sisters Tanzania v January Kamili Shayo and 136 Others Civil Appeal No. 193 of 2016**, CAT (unreported):

> *In the situation at hand, the respondents sought to establish that their right to adverse occupation is derived from the original owner in the form of permission or agreement or grant. Such is,*

so to speak, not adverse possession: Possession could never be adverse if it could be referred to a lawful title, such as the present situation which was based on alleged grant. It has always been the law that permissive or consensual occupation is not adverse possession. Adverse possession is occupation inconsistent with the title of the true owner, that is, inconsistent with and in denial of the right of the true owner of the premises ...

On other hand, there is strong evidence from the respondent that when the appellant trespassed into her land, she resisted it, and without inordinate delay she referred the matter to the ward tribunal. I accept her version of events in respect of the land dispute. The 2nd and 4th warrants of appeal are ill reputed and have to go down swinging.

After determining the 2nd and 4th lamentations in this appeal, I go back to discuss the 1st ground of appeal which is to the effect *that the appellate tribunal erred in law and fact by declaring the documents evidencing ownership of the suit land have been obtained fraudulently without any proof*

whatsoever. The appellant prays this Appeal Court to admit the said documents so as to enable it determine the issue.

I begin with his prayer this court admits the alleged documents at this stage. In my firm conviction that, the law precludes this court from doing what he wants to do. On this matter, I seek guidance from **Buskined Fufula v. Nswanzi Fufula [1970] H.C.D. no. 107.** (PC):

> *appellate court should not, without good reasons, take additional evidence when the parties have had ample opportunity to call witnesses in the trial court. Otherwise, litigation will be endless. Where good reasons exist for calling additional evidence, they should be noted in the record. In the present case, no reasons were recorded and it is difficult to see if they existed. It seems to me to be unfair to allow the defendant, who chose to remain silent during the trial, to come before an appellate court and adduce his own testimony and that of his witnesses in rebuttal of a case made out by the plaintiff in the court of first instance. Different considerations would arise if the defendant was prevented, through no fault of his*

own, in calling his witnesses at the trial or if the evidence came to the defendant's notice for the first time after the trial."

The appellant has failed to meet the requirements for this court to admit additional evidence at this stage. I have therefore to look at the evidence that is in the court record. I have said that he has week evidence to prove ownership of the land in dispute. I have already decided that his evidence is contradictory and unreliable, I do not need to repeat myself. The first appellate tribunal and the trial tribunal cannot be faulted to deny him to tender his documentary evidence. This first basis of appeal does not move me, I kick it out.

Eventually, I consider the 3rd motive by the appellant for this appeal. On this he said *that the appellate tribunal erred at law by its failure to recognize that non-joinder of Mpanda Municipal Council which allocated the suit land (plot 393 Block "V" (HD) to the appellant as a necessary party was fatal to the whole proceeding and decision.*

With the contradictory defence of the appellant, this 3rd foundation of appeal is definitely marred, to say the least. I am aware that a primary court had no jurisdiction on registered land, see **Mohamed Yusufu v Tunda [1968] HCD no. 447** Georges C.J.

Held inter alia:

(i) *The magistrates' Courts Act Cap 537 s. 14(1) inter alia provides that: "No primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Regulation Ordinance." Once the land is registered, the primary court has no jurisdiction and advise her to pursue her remedy in the District Court or High Court depending on the value of the property involved in this case the District Court.*

By analogy a ward tribunal cannot have jurisdiction on a registered land. The respondent claimed in her evidence that the land has not been registered, I have no justification to have a different view, since I have already decided that the evidence of the appellant is unreliable. The ward tribunal therefore had the jurisdiction to entertain the matter, therefore, the District Council could not be sued in a ward tribunal leave alone on an unregistered land.

It is not a duty of the court to prove or call witnesses to prove the case, but it is a party who has to prove his case, in civil cases on the balance of probabilities, see **Barka Saidi Salumu v. Mohamedi Saidi. [1970] HCD No. 95** Hamlyn, J.

> Held: *(1) "I fully agree with the opinion of the District Magistrate that it is for a party to present his or her own case to the Court and not for the Court to make a case for the litigant. In the instant case, the woman made certain allegations against her husband, merely relying upon the evidence which she herself gave; she called no witnesses to support her complaints, and thereafter, because the trial court found such evidence did not suffice to establish the facts which she alleged, the woman on appeal contended that it was the duty of the court to call corroboratory evidence. This clearly is not so, and the litigant should produce what evidence there is to establish her case. It is only rarely that a court will, of its own motion, in cases such as this seek to clarify an issue by requiring an additional witness."*

The 3rd complaint of the appellant too squarely fits what was said in the case of **Hemedi Saidi v Mohamedi Mbilu [1984] TLR 113 (**HC):

Starting with the respondent's side, as aforesaid he, i.e the respondent, alleged that he bought the disputed piece of land from his grandfather, Mmasa Tumbatu. One would, naturally, have expected the respondent to call the said Mmasa Tumbatu to give evidence. He, however, did not do so nor did he give any reason why the said Mmasa Tumbatu could not be called as a witness. Again, the respondent stated in his evidence that at one stage he lent the same piece of land in dispute to one Almasi Sebarua for cultivation purposes. The said Almasi Sebarua used it for one year and returned it to the respondent. Like Mmasa Tumbatu, Almasi Sebarua was another material witness whom, for undisclosed reasons, the respondent failed to call as a witness on his side. In such cases the Courts are entitled in law to draw an inference that if these witnesses were called they would have given evidence contrary to the respondent's interests. The witnesses is not the Courts but it is for the party who wants to be believed in his duty to call story and win the case.

He claimed in in submission in chief, though illegally, that the trial tribunal had no pecuniary jurisdiction since the land in dispute is valued at T.shs

14,000,000/=. That claim was dismissed in the first appellate court on the ground that there was no proof that the piece of land has such value. I support the decision of the first appellate court on its finding on the jurisdiction of the trial tribunal.

The culmination of the above discussion, the appeal is dismissed. The judgment and orders of the lower tribunals are upheld. In the circumstances of this case, the appellant has to bear the costs of the respondent.

It is so ordered.

DATED and **SIGNED** at MPANDA this 27th day of September, 2021

J. F. Nkwabi
JUDGE