

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 169 OF 2019

HADIJA ALLY KIGONILE APPELLANT

VERSUS

HALIFA ISSA BURUTI RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for
Kibaha District at Kibaha)

Dated the 17th day of October, 2018

in

Land Appeal No. 53 of 2018

JUDGMENT

S.M. KALUNDE, J.:

In 2018 the appellant filed Land Case No. 02 of 2018 against the respondent for ownership of a piece of Land equivalent to ½ acre (**Disputed land**). The appellant alleged that she was the lawful owner of the disputed land having acquired it from cleaning a forest in 2004. The appellant claimed that she has been in possession of the area for 14 years since 2004 to 2018 when the respondents' father **Mzee Issa Baruti** passed away. Upon the demise of their father the respondent and his siblings started disturbing the appellant. She reported the matter to Ward Office, the respondent refuse to attend

the settlement meeting hence a suit was filed at Mbwewe Ward Tribunal (**"the ward tribunal"**).

Upon hearing the parties and deliberation the ward tribunal reasoned that the appellant was the lawful owner of the disputed property having acquired it in 2004 by cleaning a forest. The respondent was aggrieved by the decision of the ward Tribunal, he filed **Land Appeal No. 53 of 2018** before the District Land and Housing Tribunal for Kibaha District at Kibaha (**"The DLHT"**).

Before the DLHT the respondent preferred three (3) grounds of appeal, namely: -

1. That the Ward Tribunal erred by relying on assumptions, improper and in founded evidence in favor of the Respondent as against the appellant thus no proof was availed beyond balance of probabilities to reach the said decision.
2. That the Ward Tribunal erred in law and fact by not take into consideration that, the appellant is not legal owner of the dispute land.

3. That the Ward Tribunal erred in law and fact by not take into consideration that, the appellant is not administrator for deceased estate.

The respondent argument at DLHT was that the ward tribunal was wrong in its decision as the appellant was only given the disputed land temporarily by his father. He added that the tribunal should have considered the fact that the disputed land belonged to his father.

In response the appellant argued that ward tribunal was correct in its evaluation of evidence and in its conclusion. She alleged that the trial tribunal considered that she cleared a forest and declared her a lawful owner of the disputed land. She argued that the respondent was a trespasser into her land.

In rejoining the respondent insisted that the appellant was lying as she knew she was given the suit land temporarily and upon their father's death, the heirs wanted the land back to them.

In its judgment, the DLHT acknowledged its role in re-evaluating and re-assessing the entire evidence and testimony before

the trial tribunal and came up with its own findings bearing in mind that it did not have a chance to study the demeanor of the witnesses. In doing that duty the DLHT cited the case of **Materu Leison and J. Foya Vs. R. Sospeter (1988) TLR 102**. Upon deliberation the DLHT concluded that the Ward Tribunal omitted to consider and misconstrued some material evidence based on the on the argument that there were contradictions between the appellant's testimony and that of her witnesses. The learned Chairman reasoned further that the appellant admitted that she was given the plot by the late Issa Baruti and therefore she was the owner of the suit property. On the basis of the above reasoning the learned Chairperson overturned the decision of the trial tribunal.

Based on the above findings the Chairman of the DLHT concluded that the appellant was only allowed to use the land of the late Issa Baruti. He went on to say that, now that their father has passed away, they have a right to redeem back the land. The chairman differed with the two assessors who had sat with her and opined in favour of the appellant. The Chairman allowed the respondents appeal and made the following orders: -

- "(i) The judgment of the Ward Tribunal is hereby nullified and set aside. It is replaced with orders that the respondent is not declared the lawful owner rather from the evidence adduced the suit land is the estate of the late Issa Baruti.*
- (ii) The respondent is restrained from further trespass in the suit land and is ordered to vacate thereof immediately and handle the same to the family of the late Issa Baruti.*
- (iii) The respondent to pay the appellant costs of this appeal."*

Aggrieved by the above decision of the DLHT, the appellant filed the present appeal in which she preferred three (3) grounds of appeal, that is: -

- "1. That the first appellant Tribunal erred in law and in fact by failure to consider evidence of the Appellant and her witnesses as a whole, which centers on the Appellant and the deceased Issa Baruti's acquisition of their neighboring lands that they acquire separately from each other by cleaning virgin forest, and started cultivation independent from each other's ownership, for more than thirty (30) years.*

2. *That, the first appellant Tribunal erred in law and in fact to consider very weak evidence of the Respondent who testified on acquisition of the disputed land but was not present during acquisition of the disputed land by the Appellant and acquisition of the Appellant's neighboring land by the deceased Issa Baruti.*

3. *That, the first Appellate Tribunal erred in law and in fact to enter judgment in favour of the Respondent without weighing the evidence for both sides in the case and not testing the finding of the trial tribunal against the evidence."*

The present appeal was filed on 21st October 2019, and subsequent to that the respondents were served on 8th April, 2020 but refused to be served on 9th September, 2020 it was ordered that hearing proceed ex-parte against the respondent. Hearing of the appeal proceeded by way of written submissions.

I have carefully gone through the records of this case before the trial tribunal and those before the DLHT. I have also given due consideration of the grounds of appeal filed by the appellant. Upon such consideration, I think the impending question for my determination is whether the appeal has merits.

Upon a careful consideration of the grounds of appeal, I am convinced that, the grounds are founded one major complaint, that the first appellate court failed to properly re-evaluate and analyze the totality of the evidence presented before the trial tribunal. In acknowledgement of this main complaint, the appellant himself argued the three grounds jointly.

In support of the appeal, the appellant argued that the first appellate tribunal failed to consider that the totality of evidence before the trial court demonstrated that the appellant managed to prove her title over the suit property. It was the appellants submissions that through her testimony and that of her witnesses she was able to demonstrate that when she arrived at the village, she requested the late Mzee Baruti to show the demarcations of his land so that the appellant and other people would also clear their own land. On being shown the available space, the appellant cleared the forest and started cultivating on the suit property. She continued to be occupation of the house until the demise of Mzee Baruti.

The appellant argued that the DLHT failed to consider that, before the trial tribunal, the respondent failed to tender any evidence

or testimony to support his claim of ownership over the suit property. She added that, the respondent failed to prove his late fathers' ownership over the suit property. by way of conclusion, the appellant prayed that the decision of the DLHT be quashed and set aside, and the decision of the ward tribunal be upheld.

It is on record that in allowing the appeal the learned Chairman of the DLHT reasoned that the trial tribunal omitted to consider and misconstrued some material evidence based on the following observations: -

- "(i) The respondent had contradictory evidence that on her chief examination, she allegedly to be the founder of the suit land by cleaning a forest but during the cross examination clearly she said, she was given the suit land by Mzee Issa Baruti who is the appellant's father. It is this testimony by the respondent during the cross examination which are in the line of the appellant and his witnesses testified.*

- (ii) The appellant and his witnesses clearly stated that late Issa Baruti allowed the respondent to use the suit land and she never been the owner of it. It is the trite law that one cannot claim long or adverse possession of the suit land*

where she was allowed to use it. That means the possession was subject of the will of the owner.

- (iii) The respondent's witnesses only know that the respondent was there cultivating that they found her thereof, no dispute on that but she was only allowed to do so by Issa Baruti.*
- (iv) Even though the appellant defended himself that the land belonged to his late father Issa Baruti and he is not the administrator of estate, I agree with him taking to the fact he has sued in his individual capacity."*

I will now consider the merits of the above findings based on the available evidence.

As may be glanced from the findings of the learned Chairman, in arriving at the conclusion that there were contradictions in the appellant testimony the Chairman was inspired by the appellants testimony during cross examination. The substantive part of the questions is reproduced at page two of the typed judgment of the DLHT. I will not reproduce the questions; however, I think it would be prudent to discuss the substance of the cross examination.

It is on record that, when she was being cross examined the appellant was asked who started cultivating on the suit property, she responded that it was the late Mzee Baruti. She also stated that she requested Mzee Baruti for a place to cultivate and she was told to occupy the area starting from down going upward. This narration is also found in the testimony of **Athumani Mohamed Abdallah** and **Athumani Shabani Mbilu**, the two witness who testified for the appellant.

Upon consideration of the totality of all the available record, I have no doubt in my mind that there was no contradiction in the testimony of adduced by the appellant and his testimony. In fact, if anything, the responses during cross examination complemented the appellant's case. I will illustrate hereunder.

The appellant evidence before the tribunal was that she started cultivating on the suit property in 2004 after clearing a bush ("**Pori**"). It was her testimony that, before commencing clearance she asked the respondent's father, Mzee Issa Baruti to show him a place to clear and cultivate. The appellant stated that Mzee Baruti told "*... anzia chini kwenda juu...*". In addition to that, when she

was asked whether there was a demarcation or mark between her farm and Mzee Baruti's farm, she said "***Ndio ipo alama kuna mtonga***". On the issue whether the farm had been cultivated or not the appellant said "***Nilikuta pori***".

The appellant's testimony is supported by ATHUMANI MOHAMED ABDALLAH, who testified that "***Mdai hakwenda kuomba kwa baba yako bali alikata msitu na kuanza kulima***". When the respondent asked the witness for a demarcation or mark between the appellant's farm and Mzee Baruti's farm, the witness said "***Kuna mti unaitwa mnyinga***". It was also testified that during the life of the late Mzee Baruti no complaint or claim over the disputed land was raised.

From the above set of facts, it is clear that there was no contradiction in the appellants testimony. All the appellants did during cross-examination was to respond to the leading questions by raised by the respondent. In my view, her response did not controvert her testimony in chief as supported by her witnesses. In the end the conclusion that may be deduced from her testimony is that Mzee Baruti did not give her the land he was previously

cultivating, instead he showed her the area which available for her to clear and start cultivating. Knowing that the forest was not his, Mzee Baruti did not claim the disputed area. Based on that understanding, it cannot be said that the appellant was only given the right to cultivate over the suit property.

In his defence, the respondent said his father started to cultivate over the farm in 1980. When he was asked whether there was any proof that the farm was leased to the appellant for cultivation the respondent responded that there was no evidence. He said **"Hakuna ushahidi wowote"**. During cross-examination of Hawa Issa Baruti, the respondents' sibling, said she was not present when her father gave the farm to the appellant, she only became aware after being told by her father (**"Mimi sikuwepo ila baba katuambia"**). From the above testimony it is clear that the respondent and his siblings' testimonies were based on what they claimed to have been told by their father. That claim only came to light upon the demise of their father. There was no other evidence to support their claim.

In consideration of the above testimony the trial tribunal was satisfied that the appellant was able to establish her ownership over the suit property. In summarizing its decision, the trial tribunal made the following observation:

"Mdai katika eneo hilo amepanda miti za kudum wakati mdai anapanda miti hiyo Baba wa mdaiwa alikuwa anamwagilia hakusema kitu pia watoto walikuwa na umri wa kujua mambo wakati mdai anapanda miti walikuwa wanamwona hawakusema kitu kuhusu kupanda miti hiyo Nikwanini hawakusema kumwambia Baba yao kuhusu mdai kupanda miti kwenye eneo lao Kutokana na Ushahidi uliyotolewa upande wa mdai ndugu Hadija Ali Kigonile na mashahidi wake wote wamelithibitishia balaza kuwa mwaka 2004 ndiyo mwaka walioanzisha Kulima kwenye eneo hilo na wamelikuta eneo hilo ni poli walimkuta bwana Dabo na kumwomba awaonyeshe pale anapoishia kulima akamwonyesha wakaanzia bondeni kupanda juu kama balabala ya mawe ndiko wanakoishia kila mmoja Hivyo mdai kwenye eneo hilo anamiaka 14 yupo kwenye eneo hilo. Swala la mdai kuambiwa na mdaiwa kuwa ameazimwa eneo na Baba yake swala hili halina ukweli. Baada ya uchambuzi huo balaza limetosheka kabisa bila ya kutia shaka yeyote katika dai hili. Mdaiwa ndugu Halifa Issa Baruti katika dai hili

ameshindwa. Eneo lenye mgogolo sio mali yako ni mali za mdai ndugu Hadija Ali Kigonile

Hivyo mmiliki halali wa eneo lenye mgogolo ni mdai ndugu Hadija Ali Kigonile"

Upon consideration of the available evidence, I agree with the appellant that the trial tribunal was correct in its analysis and finding that the appellant was the lawful owner of the suit land. As for contradictions, the law is clear that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. See **Armand Guehi vs. Republic**, Criminal Appeal No. 242 of 2010 (Unreported).

In **Dickson Elia Nsamba Shapwata & Another vs. Republic**, Criminal Appeal No 92 of 2007 (Unreported), cited in **Armand Guehi** (supra), the Court Appeal held:

"In evaluating discrepancies, contradictions, and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter. "

After a careful consideration of the available record, I am of the firm view that the contradictions raised in the present case are minor and do not go to the root of the matter.

On the basis of the foregoing, I allow the appeal to the extent that I set aside the decision of the District Land and Housing Tribunal for Kibaha District at Kibaha in Land Appeal No. 53 of 2018 thereby upholding the decision of the Mbwewe Ward Tribunal.

Consequently, the appellant is declared to be the lawful owner of the suit property. Now that the matter proceeded *ex-parte*, no order for costs is made.

Order accordingly.

DATED at DAR ES SALAAM this 25th day of JUNE, 2021.

A handwritten signature in blue ink, appearing to be 'S.M. Kalunde'.

S.M. KALUNDE

JUDGE