IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.108 OF 2021

(Arising from the District Land and Housing Tribunal for Ilala at Ilala in Land Appeal No.74 of 2020, originating from Ward Tribunal for Zingiziwa in Land Case No.217 of 2020)

HADIJA JUMA ABRAHAMAN ..... APPELLANT

VERSUS

ANOLD MWEUSI ..... RESPONDENT

JUDGMENT

Date of Last order: 09.11.2021

Date of Judgment: 15.11 2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Zingiziwa in Land Dispute No.217 of 2020 and arising from the District Land and Housing Tribunal for Ilala in Land Appeal No. 74 of 2020. The material background facts to the dispute are briefly as follows; Hadija Juma Abrahaman, the appellant instituted a case at the trial tribunal to recover his land which is alleged to have been taken and developed by Anold Mweusi, the respondent.

The appellant claimed that in 2011, he left the suit land unattended until 2017, she saw some blocks were placed in her site, then she was informed that there is one person who has placed his blocks for a while. In 2018, the appellant decided to build a house and in 2019 the respondent also build a house in the suit land. The appellant decided to report the matter to the Executive Officer without success then she lodged a case at the trial tribunal. The respondent on his side claimed that he bought the suit land in 2012 and in 2015 he build a foundation. In 2018, he build a house. The respondent claimed that the appellant is his neighbour and did not disturb him until 2019 when the appellant constructed a foundation in the respondent's plot. The trial tribunal decided in favour of the respondent.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Ilala vide Land Appeal No.74 of 2020 complaining that the trial tribunal did not consider the appellant's evidence. She lamented that the trial tribunal erred in law and fact in confirming the boundaries of the suit land. The appellate tribunal upheld the decision of the trial tribunal and maintained that the respondent is the lawful owner of the suit land. The first appeal irritated the appellant. He thus appealed to this court through Land Appeal No. 108 of 2021 on two grounds of grievance, namely:-

1. *That, the appellant tribunal erred in law and fact to determine the case by considering the evidence of the evidence trial tribunal while the witness who purported to be the seller did not establish the boundaries and the measurement.*
2. *That, generally the Honourable trial Ward Tribunal failed to analyse, evaluate and examine the evidence adduced by the parties as a result delivered unfair decision against the appellant.*

When the matter came up for hearing on 21st October, 2020, the Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his submission, on the first ground of appeal, the appellant contended that the trial tribunal erred in law and fact to determine the case by considering the evidence of the trial tribunal while the witness who purported to be available on the date of selling did not establish the boundary and the measurement that in its judgment the trial tribunal the person who purported to be available on the date the appellant bought the land. She went on to argue that the respondent failed to identify and elaborate the size of the land. The appellant complained that the trial tribunal decided in favour of the respondent because his certificate was complete and the size of the suit land was identified while the records are

silent whether the size was shown. The respondent insisted that the tribunal decision was based on weak evidence, as a result, the trial tribunal reached an unfair and unjust decision.

On the second ground, the appellant complained that the trial tribunal failed to analyse, evaluate and examine the evidence adduced by the parties, as a result, he reached an unfair decision against the appellant. To cement her submission, she referred this court to paragraph (iv) of the trial tribunal judgment thus the trial tribunal ended up deciding that the appellant has not stated the truth y saying that all witnesses passed away. stressing, she contended that there is no evidence that the appellant in the proceeding revealed since she brought one witness to testify at the trial tribunal. She added that the appellate tribunal did not observe the requirement of the law as stated under section 110 of the Evidence Act, Cap. 6 [R.E 2019]. She insisted that her document showed all the measurements but the trial tribunal relied upon the respondent to reach its decision.

In conclusion, the appellant urged this court to allow the appeal and quash the decisions of both tribunals.

Opposing the appeal, Mr. Mahay confutation was vigorous. The learned counsel for the respondent came out forcefully and defended both trial

tribunals' decision as sound and reasoned. Mr. Mahay contended that the grounds are concerning one form of ground and her submission is repetition as she calls the second appellate court to analyse and or evaluate the whole evidence adduced by both parties and their respective witnesses before the trial tribunal.

Stressing, the learned counsel for the respondent stated that there is no any legal point of law raised by the appellant for determination before the second appellate court. He added that it is trite law that the trial tribunal is better placed to assess the credibility of witnesses or evidence than the second appellate tribunal which merely reads the transcript of the record and in law the second appellate court cannot interfere with such assessment of the trial tribunal. Mr. Mahay placed reliance in the case of **Abdallah Rajab v Saada Abdallah Rajab** (1994) TLR 132.

Submitting on the first ground, Mr. Mahay submitted that the appellant's submission corroborates that of the seller who also according to the appellant herself, the seller testified that he is the respondent's witness and the one who sold the suit plot to the respondent. Insisting, he argued that the record is very clear as to who is the lawful owner of the suit land and that the suit land is well demarcated in its boundaries. Stressing, Mr. Mahay contended that the appellant's submission that the trial tribunal did not evaluate the evidence on record is a misconception of the law and

intended to mislead the court. He added that the dispute revolves around the boundaries of the suit land. To support his position he referred this court to page 3 of the trial tribunal judgment.

The learned counsel for the respondent continued to state that the Sale Agreement tendered by the respondent before the trial tribunal indicates the size of the suit land and the trial tribunal visited locus in quo and it is revealed that the respondent's land is within the boundaries described in his Sale Agreement which was exhibited before the trial tribunal. He further submitted that the appellate tribunal in its judgment upheld the findings of the tribunal by stating that the trial tribunal record clearly shows that the tribunal visited the locus in quo and identified the boundaries. He ended up urging this court to concur with the findings of both tribunals. To support his submission he cited section 110 of the Evidence Act, Cap.6 [R.E 2019]. Throughout his submission, the learned counsel contended that the tribunals' decisions were correct.

On the strength of the above submission, the respondent's Advocate beckoned upon this court to dismiss the appeal in its entirety with costs.

After a careful perusal of the record of the case and the final submissions submitted by both parties, I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113,

which requires, "*the person whose evidence is heavier than that of the other is the one who must win".* In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Geita.

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, see **Salum Mhando v Republic** [1993] TLR 170. See also the decision of the Court of Appeal of Tanzania in **Nurdin Mohamed @ Mkula v Republic**, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported).

However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *" An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

In my determination, I will consolidate both grounds because they are intertwined. The appellant is complaining that the first appellate court did not consider the evidence concerning boundaries and measurement of the suit land, thence the trial tribunal decided in favour of the respondent.

The learned counsel for the respondent in his submission has raised a concern that the appellant has raised the same grounds which were before the appellate tribunal that relates to the credibility of the witness. It was his concern that the trial tribunal was in a better position to assess the credibility of the witnesses than the second appellate court which merely reads the records. The learned counsel for the respondent contended that there are no any points of law raised by the appellant worth for determination by this second appellate court. From the outset, I have to say that this court can determine and evaluate the evidence which is based on the point of law. Therefore, I had to go through the trial tribunal records to find out whether the issue of boundary and measurement was established by the seller.

The trial tribunal stated that the respondent's certificate indicated proper measurements of the suit land. I have revisited the trial tribunal records and noted that the appellant in her testimony did not state the measurement of the suit land. However, his witness one Salehe Abraham testified to the effect that the appellant's plot was measuring 20 x 18

meters. The appellant claimed that the respondent's witness who witnessed the sale did not mention the size of the disputed land. In my view, this ground cannot stand since the records reveal that the respondent's Sale of Agreement dated 2nd February, 2012 shows the measurements and the location of the suit landed plot. On the other hand, the appellant's Sale of Agreement does not state the size of her Plot.

Moreover, the trial tribunal based its decision on the said Sale Agreement which is true a clear document to rely upon. In such circumstances, the respondent is the one who proved his case. The appellant was the one who alleged she was required to prove her case but to the contrary that was not done. Instead, she is blaming the respondent's witness who witnesses the signing of the sale agreement for not mentioning the size of the suit. I fully subscribe trial tribunal analysed and evaluated the evidence on record. Therefore above grounds of appeal are demerit.

One of the canon principles of civil justice is for the person who alleges to prove his allegation. Section 110 of the Evidence Act, Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

" Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The same was held in the case of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:-

" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "

Likewise in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that *"he who alleged must prove the allegations"*.

Above all, guided by the evidence of analysis of all two grounds of appeal, it is without a speck of doubt that the respondent's evidence overweight the evidence of the appellant. The appellant was required to prove her allegations.

Following the above findings and analysis, I proceed to sustain the decisions of both tribunals. The appeal has no merit the same is dismissed in its entirety with costs. Order accordingly.

Dated at Dar es Salaam this date 15th November, 2021.

THE HIGH COURT OF TANZANIA
LAND DIVISION

A.Z.MGEYEKWA
JUDGE
15.11.2021

Judgment delivered on 15th November, 2021 in the presence of the respondent and in the absence of the appellant.

A.Z.MGEYEKWA

JUDGE

15.11.2021

Right of Appeal fully explained.