IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPEAL NO. 18 OF 2022

MODEST TEITEI.....APPLICANT

VERSUS

AMOSI J. KAGIE..... RESPONDENT

(Originating from Land Appeal No. 44/2021of Mpanda DLHT and Land Dispute No. 25/2020 of Urwira Ward Tribunal)

JUDGMENT

Date of Last Order: 14/11/2022
Date of Ruling: 06/12/2022

MWENEMPAZI, J.:

The appellant herein successfully sued the respondent at the trial tribunal for trespass over a piece of land measured two acres, however, the respondent was not satisfied with the decision and appealed to the District Land and Housing Tribunal of Katavi at Mpanda (Appellate Tribunal) where the decision of the trial tribunal was overturned and the respondent herein was declared as the owner of the disputed land. Being dissatisfied by both the decision and decree, the appellant herein preferred this appeal to this court consisting of three grounds which are as hereunder;

1. That, the Appellate Tribunal misdirected itself by holding that the

Appellant failed to prove his claims which is contrary to what transpired at the Ward Tribunal at which the Appellant proved beyond the proof required in Civil Cases.

2. *That, the Appellate Tribunal erred at law by deciding in favour of the Respondent on the pretext that the Appellant's evidence contradicted that of his witness, while in fact there was no contradiction whatsoever.*
3. *That, the chairman of the appellate tribunal lacked concentration and seriousness hence he unceremoniously deprived the appellant's right.*

Essentially, the respondent refuted the grounds of appeal paraded by the appellant 'in discontent of the findings' of the decision of the appellate Tribunal. Both parties, in this contentious appeal following a respondent's reply, appeared in their personal capacities, unrepresented. The appeal was argued through written submissions.

However, the appellant chose to submit on the 1st and the 2nd grounds and in his submission as per the 1st ground, the appellant submitted that the appellate tribunal misdirected itself to hold that he has failed to prove his claim to the required standards of Civil cases, while while at the trial Tribunal he explained in detail how he acquired the disputed land, which in

fact he bought it from his only witness one Peter Nkinda in the year 1978.

The Appellant's asserts that, what he submitted at the trial tribunal was supported by his witness one Peter Nkinda, that at the said year the witness sold to him the disputed land for a consideration of Tsh. 30,000/=.

Meanwhile, the respondent's witness one Augustino Katabi stated at the trial tribunal that he is the neighbour to the appellant on the North side and that he is also a neighbour to the land with dispute on the North side, but he remembers the appellant as the rightful owner. This witness also testified that; he is the one who sold a piece of dry land to the respondent herein but the land he sold did not reach at the forest area. The appellant added that, even the other witness of the respondent at the trial tribunal did testify that he was a witness in the purchase of the dry land by the respondent from Augustino Katabi, and that the forest does not belong to the respondent.

The appellant insisted that, the dispute them lies upon a forest piece of land 'mbuga' whereas at the trial tribunal, he managed clearly to prove that he is the owner of the disputed land and that the respondent is just a mere trespasser, and to that he is surprised by the decision of the appellate tribunal that his evidence has contradicted the evidence of his witness and

that he has not proved his ownership of the disputed land, whereas the contrary is the truth.

And on the 2nd ground, the appellant submitted that there was no contradiction between his evidence and the evidence of his only witness one Peter Nkinda as he had demonstrated on the 1st ground. He insisted that, at the trial tribunal he and his witness did testify that he acquired the suitland in 1978 by purchasing it from his witness and that he has been the owner since then a claim which was not faulted by the respondent.

The appellant insisted that, contrary to the findings of the appellate tribunal that it was the respondent whose testimony contradicted the statement of his witness, where he claimed to have acquired the suitland by grabbing as he claimed that up until the year 2015 the suitland was a reserve forest, but it was changed and that is how he acquired the suitland.

The appellant submitted further that it is very interesting and contrary to the law that the Appellate Tribunal supported the Respondents claim that the disputed land was part of a reserved land which after change of boundaries it was transferred for Public Use, whereas the respondent never adduced any evidence to support that claim. He added that, the respondent failed to assemble evidence that the disputed land was a reserved land

transferred and gazetted for public use. He continued by citing the case of **Mwinyikambi Mohamed vs Rukia Mohamed Civil Case No. 37/2010** (unreported);

"The person who wishes to prove the existence of a certain fact, the burden to proof shall lie upon him"

And he insisted that, contrary to the above cited case, the respondent failed to prove that the disputed land was a reserved land.

The appellant winded up his submission by arguing that, in Tanzania all land is Public land vested in the President as trustee on behalf of all citizens of Tanzania as provided under Section 4(1) and (4) of the Land Act Cap. 113 R. E. 2019. That, had the disputed land been reserve land, it was the President of this country as trustee who could have degazetted and transferred it to Public use most likely to nearby villages as per Section 5(1) of the Land Act Cap. 113 R.E. 2019. But contrary to this provision, there is no evidence tendered by the respondent that proves that the law was observed and to that is quite impossible that the disputed land was a reserve land. And therefore, the observation made by the appellate tribunal that simply because in 2020 the respondent was found using the disputed land proves that he was the rightful owner is an observation devoid of reasoning

and lacks any legal backing, and it is indeed a mockery of justice to hold a trespasser as a rightful owner of a land that he does not hold title to, and with this submissions, the appellant prayed for this court to decide in his favour and declare him the rightful owner of the disputed land with cost.

The respondent's reaction is on all the two grounds as filed by the appellant. He briefly submitted on the 1st ground that the appellate tribunal rightful declared him as the owner of the disputed land as he was still in possession of the suitland as the dispute arose. To this, he cited Section 119 of the Evidence Act Cap. 6 R. E. 2019 and insisted that it was the burden of the appellant to prove his ownership and not otherwise because he (respondent) was found in possession of the suitland.

On the 2nd ground, the respondent also briefly submitted that in the trial tribunal, the appellant claimed to have acquired the suitland in 1978 and his witness also said that he had acquired the suitland in 1978 and used it for three years before selling it to the appellant. He insisted that the appellants case was too contradictory and that led the appellate tribunal to reverse the trial tribunal's decision and declare him as the rightful owner of the suitland.

I have carefully considered the parties' written submissions and

reviewed the proceedings before the lower tribunals. I have further gone through the law and my view is that, the main issue for consideration is ***whether the present appeal is meritorious.***

As for the first ground of appeal, it is obvious that, the appellant was the one who sued the respondent before the trial tribunal after learning about his encroachment over his land. That was in the year 2021 when he became aware of the trespass. It is my sincere observation, and the trite of the law that the burden of proof never shifts to the adverse party until the party on who the onus lies, discharges the burden. It does not cease on account of the weakness of the case of the adverse party. This was emphasised in the case of **PAULINA SAMSON NDAWAVYA VS THERESIA THOMAS MADAHA,** Civil Appeal No. 45 of 2017 (unreported), where the Court said:

> "... *In our view, since the burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant."*

In his submission, it is evident as I perused the trial tribunal's records that, the appellant did buy the suitland from one Peter Nkinda, and the testimony of the latter did corroborate the testimony made by the appellant.

The saga was even cleared further by the witnesses of the respondent who testified that indeed the disputed land belonged to the appellant and that the piece of land owned by the respondent did not reach the boundaries of the disputed land owned by the appellant. Thus, the appellate tribunal's decision on that aspect was not proper. As such, I hold the first ground of appeal to be of merit.

As for the remaining ground, in the records of the trial tribunal I have not come any contradictory testimonies between the appellant and his witness as the decision of the appellate tribunal is based on that facet, that the Appellant told the trial tribunal to have acquired the suitland in the year 1978 while the same was still a reserved land up until the year 2015 when it was changed to a Public use, while his witness one Peter Nkinda testified that he acquired the suitland in 1978 and used it for three years before selling it to the appellant.

I am not unsound of the principle that, in order the contradictions or inconsistencies in evidence by witnesses to be capable of vitiating a case, such contradictions or inconsistencies must go to the root of the case. This is the stand in a number of decisions, as it was in the case **Dickson Elias Nsamba Shapwata & Another vs Republic, Criminal Appeal No.92**

of 2007, the Court of Appeal held inter alia that;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for 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".***
>
> [Emphasis is Mine]

In the appeal at hand, as the contradiction is cited by the appellate tribunal, firstly and in grief to declare there was no any contradiction between the two testimonies of the appellant and his witness, but secondly, if at all there was such contradiction, it does not go to the root of the case because in the year 1978 neither of the witnesses from both sides had mentioned the respondent as the person being in possession of the suitland. It is in indeed a mockery of justice to hold that the respondent is the rightful owner of the land which was acquired in the year 1978 while in his testimony, the respondent himself declared to acquire the same in the year 2015.

On the strength of the appellant's evidence, I am inclined to overturn the decision of the appellate tribunal, in that I declare this appeal to be

meritious and proceed to allow it with costs. The decision of the Urwira Trial Tribunal is hereby restored.

It is so ordered.

T.M. MWENEMPAZI

JUDGE

06/11/2022.

Right of appeal explained.

T.M. MWENEMPAZI

JUDGE

06/11/2022.