IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPEAL NO. 29 OF 2021

MALITHA SINDANO.....APPLICANT

VERSUS

VICENT ALEX..... RESPONDENT

(Originating from Land Application No. 29/2019 of Sumbawanga DLHT)

JUDGMENT

Date of Last Order: 14/11/2022
Date of Judgement:08/12/2022

MWENEMPAZI, J.:

The appellant herein was aggrieved with the decision of the District Land and Housing Tribunal of Rukwa at Sumbawanga whereby the respondent mentioned above was declared the rightful owner of a piece of land which both sides had before the decision believed to have the right of possession over it. And therefore, the appellant preferred this appeal to this Court consisting of three grounds which are as hereunder;

1. That the trial tribunal erred in law by allowing assessor who had not heard the testimonies and observe the demeanour of previous witnesses who testified in the trial tribunal and give opinion on the case.

2. That the trial tribunal erred in law to declare that the respondent was the lawful owner of the disputed land without considering that the respondent was an invitee can not exclude his host whatever the length of his occupation.
3. That the trial tribunal erred in deciding the deciding in favour of the respondent for lack of cogent evidence in proving the ownership of the land in dispute.

However, the respondents through his reply to the Memorandum of Appeal did rebut all that has been drafted by the appellant and stressed that the trial tribunal did justice in declaring him as the rightful owner of the disputed land.

As the hearing date was fixed, the appellant was represented by Ms. Neema Charles learned Advocate and the respondent had also legal representation whereby, he was represented by Ms. Rehema Akilimali Mponzemenya. Both camps prayed before this court that this appeal be settled by way of written submissions, a prayer which this court gladly granted.

On the 1st ground of appeal, the learned counsel for the appellant submitted that during the hearing of this matter at the trial tribunal during the prosecution stage, there were two assessors sitting with the Chairlady namely J. Mzurikwao and H. Wamay but during the defence stage on the 27th

day of July 2021, there was only one assessor namely H. Wamay who was present and the that the defence case proceeded whereas the appellant adduced her testimony in the absence of one assessor.

She added that, the trial tribunal proceeded to hear the case under Section 23(3) of the Land Dispute Court Act Cap 216 R. E. 2019 but during obtaining the opinions from the assessors, the Chairlady allowed J. Mzurikwao to give his opinion knowingly that he was not present during the hearing of the defence case on the 27th day of July, 2021. That, the said assessor gave his opinion while he was not present during the defence case as he could have observed the demeanour of the respondent.

Ms. Neema insisted that, as the assessor gave his opinion while he never heard the defence case and heard no chance of cross examining of the testimony adduced in which it renders the proceedings and the judgement a nullity and the learned counsel cited the case of M**akambako Saccoss and Gaudence Hiruka vs Petro Mwandamele & Elide A. Sanga Misc. Land Application No. 08 of 2021** (Unreported) at page 4 and the case of **Ameir Mbarak vs Edgar Kahwii Civil Appeal No. 154 of 2015 CAT Iringa** (Unreported), where the court addressed the consequence of allowing the assessors to give an opinion when they did not hear all the evidence, it renders the proceedings a nullity.

Ms. Neema submitted on the 2nd ground that the evidence adduced by

the appellant and her witnesses proved that the land in dispute belonged her since the Respondent was an invitee to the said land after he had sold all the land he owned and decided to leave for Chunya whereas later on he returned where he had no land to cultivate and therefore appellant's father invited the respondent to cultivate on the appellant's farm. However later on the respondent refused to vacate from the said land hence depriving the appellant's right of ownership over the suit land.

The learned counsel insisted that the appellant testified that the disputed land belonged to her father and later on she inherited the same after her father passed away, and therefore the respondent is just an invitee despite his claims that he has used the disputed land for more than 31 years. She added that, an invitee can not exclude his host whatever the length of his occupation, and to support her submission she cited the cases of **Samson Mwambene vs. Edson James Mwanyingili [2001] TLR 1**, **Makofia Merianangа vs. Asha Ndisia [1969] HCD No. 2014** & **Swalehe vs Salim [1972] HCD No. 140** and also, she cited the case of **Hughs vs Griffin [1969] 1 All ER 460**.

On the 3rd ground, Ms. Neema submitted that the evidence adduced by the applicant (now respondent) and his witness at the trial tribunal does not prove on the balance of probability that the disputed farm belonged to the respondent, but it belongs to the appellant. Whereas the respondent

commenced the complaint at the trial tribunal claiming that the disputed land belongs to him, of which it is not true because the evidence adduced by him and his witnesses contradict each other, whereas the respondent said he started to won the suitland in 1987 while his witnesses testified that the respondent started owning the suitland in 1997.

Responding to these submissions starting with the 1st ground Ms. Rehema submitted that, at the trial tribunal during the hearing of the case on both prosecution and defense case, the coram consisted of two assessors namely J. Mzurikwao and H. Wamay who were present at the hearing, as it is the position of the law that provide under Section 23(1), (2) of **The Land Disputes Courts Act [CAP. 216 R.E. 2019].** She added that the trial tribunal did not ere in law by allowing the assessor namely J. Mzurikwao to give his opinions for his was the one present during the commencement of hearing until the day of the decision save for the days the matter was adjourned for different reasons.

In response to the submissions regarding the 2nd ground of appeal, the counsel for the respondent submitted that the trial tribunal was correct by declaring that the respondent herein is the lawful owner of the land in dispute because he has been in possession of the said land in dispute for more than 31 years whereas, he acquired it through clearing a forest and began using it without any disturbance from any person until when the

appellant herein came on 2018 to claim that his father was the one who owned the disputed land and she goes further by saying that the respondent was invited by his father to cultivate on the said land. Ms. Rehema proceeded that, it has been the position of the law now, that a long and undisturbed possession of Land passes a title to the occupier, and that the courts would not disturb him, and she referred this court t several cases of **Shabani s/o Nasoro v. Rajabu Simba (1967) HCD. 233, Musa Hassani vs. Barnabas Yohanna Shedafa (Legal Representative of the Late Yohanna Shedafa) CIVIL APPEAL NO. 101 OF 2018 CAT** Tanga (unreported) at page 17 and 18 whose decisions are pinned on the following quote: -

> *"...That case is an authority for the point that the court has been reluctant to disturb persons who have occupied land and developed it over a long period of time..."*

Ms. Rehema submitted further that, it is clear that the respondent has been enjoying the use of the disputed land for a long time now and the same was said in the decision made in the District Land and Housing Tribunal based on the said principle above. However, she insisted that they have taken note that the Appellant did not advance any evidence or witness to testify during the trial to show that the principle of an invitee shielded her. Ms. Rehema stressed even further that, the appellant did not prove anyhow that the

disputed land was owned by her father and that the possession later on passed to her and that the respondent was only an invitee. Also, the appellant neither in her written submission nor in her submission before District Land and Housing Tribunal (DLHT) gave a specific date or year as to when her father began to possess and use the land in dispute and when did her father give her the said land and also, she does not even know how many acres that they did give the respondent as they claimed. And therefore, to Ms. Rehema it is clear that the respondent is not an invitee to the disputed land rather he is a lawful owner as rightly decided by the trial tribunal.

On the third and final ground, the counsel for the respondent submitted that the evidence adduced by the respondent herein and his witnesses was enough to persuade the trial tribunal in deciding the dispute in favour of the respondent because he managed to prove his case on the balance of probabilities that he owned the disputed land for over 31 years and acquired through clearing a forest and began using it and not in 1997 as mistakenly said by the third witnesses during the submission before the tribunal. Ms. Rehema proceeded that it is not true that the respondent herein lacked cogent evidence in proving the ownership of the land in dispute instead it is the applicant who lacked the evidence to prove that the disputed land was owned by her father and later on transferred to her. In that, she concludes that the Trial Tribunal was correct by deciding in favour of the

respondent.

As there were no any rejoinder submissions made by the counsel for the appellant and after a thorough perusal of the submissions from both camps, plus reading between the lines the records of the trial tribunal, the main determinant issue which suffices to deal with this appeal is ***whether this appeal is meritious before this court.***

As I take off, it is my desire to tackle each ground of appeal separately as they are. Whereas, starting with the first ground. The strong allegations put forthwith by the appellant had me go through the proceedings of the trial tribunal, because if indeed the assessor in question was allowed to give his opinion regarding the case at hand while he was not present during the hearing of the defence case, the proceedings of the trial tribunal would surely be a nullity.

Nevertheless, when one peruses the said trial tribunal's typed proceedings, specifically at **page 15**, contrary to what the appellant claims is seen. I find it best to extract the particular page for more clarity as hereunder;

27/07/2021

AKIDI: *J. LWEZAURA|.....MWENYEKITI*

MDAI*-YUPO*

MDAIWA*-YUPO*

***WASHAURI**: 1. MRS. H. WAMAY*

*2. **MR. MZURIKWAO***

***T/C:** MARIAM*

***BARAZA:** Shauri limepangwa kusikilizwa*

***MLETA MAOMBI:** Nipo tayari kusikilza*

***MJIBU MAOMBI:** Nipo tayari kusikiliza*

KESI UPANDE WA UTETEZI IMEFUNGULIWA

***SU1:** MALITHA SINDANO*

***UMRI:** SIJUI*

***MAKAZI:** KIPETA*

***SHUGHULI:** MKULIMA*

It is unfortunate that the extract above reveals the truth contrary to what has been claimed by the appellant in her 1st ground of appeal. The said assessor namely **J. Mzurikwao** is seen to be present during the hearing of the defence case, as rightly submitted by the counsel of the respondent. Nevertheless, in the judgement of the trial tribunal at page 5, the learned Chairlady insisted that both of the assessors opined that the disputed land belonged to the appellant herein only that she differed with them for she had different reasoning. It is therefore a pity that the assessor in question opined for the appellant, had it been different I would have been convinced that the appellant's right has been deprived. I therefore dismiss the first ground of

appeal for it lacks merit.

Dealing with the 2nd ground as filed by the appellant. She claims that the respondent is an invitee in the said suitland, and that he cannot exclude the ownership of his host. This ground made me keenly go through the entire records of the trial tribunal, and as I did so, at page 16 of the typed proceedings I noticed that the appellant claimed to inherit the said suitland from her grandfather, and that she invited the respondent to the suit land where the invitation was reduced into writings.

However, in the trial tribunal's judgement at page 4, the learned chairlady stated that the appellant herein had tendered some exhibits but she did not adhere to the rules governing the tendering of the exhibits and hence they were rejected. It is my considered view that the right to be heard goes hand in hand with the avoidance of technicalities in the attempts of attaining justice keeping in mind that the appellant had no witness to support her, I believe that the documents which were technically rejected by the tribunal would have made the learned chairlady to arrive to a rather different decision. The decision of the trial tribunal wants both parties to continue using the portions of land they possessed before the dispute arose. An extract from the trial tribunal's judgement would support my reasoning. The extract is as follows: -

"Vilevile, mjibu maombi (SU1) alidai kuwa alikuwa na

maeneo aliyopewa na babu yake. Mimi ninaona kuwa ni busara mjibu maombi (SU1) huyu akabaki na matumizi yae neo hilo alilopewa. Na kwa kuwa mleta maombi ndiye anayetumia eneo lenye mgogoro basi aendelee na matumizi yae neo hilo na yeye ndie mmiliki wa eneo hilo."

It is my strong observation that, the learned Chairlady has not resolved the dispute between the two parties considering her conclusion in her judgement, this is because the appellant herein as argued that she has inherited the disputed land from her grandfather and invited the respondent who in turn refused to give back the invited land, and yet at the end of her judgment the learned Chairlady acknowledged that the appellant had inherited some land from her grandfather and the respondent has acquired the disputed land in the year 1987, so both sides should continue using the portions of land they own. It is my holding that this ground of appeal has merit and I proceed to allow it.

Coming to the 3rd ground of appeal, it is the trite that he who alleges must prove. The Rule finds backing from the provisions of sections 110 and 111 of the Law of Evidence Act, Cap.6 [R.E2019] which states categorically to whom the burden of proof lies as follows: -

"110 (1) Who ever 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. (3) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

The records of the trial tribunal reveals that the respondent claimed to be the possessor of the suitland from the year 1987 without being in any interreference up until the year 2018. His witnesses also corroborated his testimony that the true owner of the suitland is the respondent herein. It is this claim that moved the trial tribunal to declare the respondent the rightful owner of the suitland. Again, I find third ground of appeal to lack merit and it stands to be dismissed.

As the matter of fact, for the three grounds of appeal as filed by the appellant, I found only the 2nd ground to be meritious as elaborated above. To that extent, I proceed to allow this appeal partially as the result of the said ground that, the dispute was not fully resolved by the trial tribunal. For that reason, I remit this matter back to the trial tribunal for a fresh trial by another competent chairperson in order for justice to prevail. I make no orders as to costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

T.M. MWENEMPAZI
JUDGE
08/12/2022