IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)
AT SUMBAWANGA
LAND APPEAL NO. 15 OF 2021

(C/O Application No. 30 of 2020 of District Land and Housing Tribunal for Mpanda)

(Gregory K. Rugalema, Chairman)

SUDI KASAPA .... APPELANT

VERSUS

PAULO FUTAKAMBA .... RESPONDENT

JUDGMENT

Date: 24/02 & 18/03/2022

NKWABI, J.:

It is routine law that *he who alleges must prove.* In this appeal, the one who had that duty was the respondent one Paulo Futakamba who sued the appellant Sudi Kasapa for a piece of land located at Mpanda Ndogo within Tanganyika District. The application was lodged on 10/06/2020. In its judgment, the trial tribunal decided thus:

> *"Nimeridhika kuwa ushahidi upande wa mwombaji ni mzito kuliko ule wa mjibu maombi ... na hivyo dai la ekari 31 liko sahihi. Maombi haya yanakubaliwa na gharama."*

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The appellant lodged a petition of appeal to this court listing four grievances. One of them being the trial tribunal erred at law by deciding in favour of the applicant who had failed to prove his case in the preponderance of probabilities required by law.

In reply to that ground of appeal, the respondent stated that he presented water-tight evidence and his witnesses adduced direct evidence which was convincing enough and the case was decided on balance of probabilities.

At the hearing, both the appellant and the respondent adopted what they had filed as a petition of appeal and the reply to the petition of appeal as their submissions respectively. Understandably, they are lay persons.

That said and being the position, I associate myself with the view of the appellant and holding in **John Rwonga v Salimu Ngozi,** Land Appeal No.31 of 2017 HC (unreported) that:

> *"It is trite law in balance of probability rule that, if the evidence is such that the court or tribunal can say "we think it is more*

probable than not" the case succeeds, but if the probabilities are

equal the case fails."

Likewise, I subscribe to the position in **Hemed Said v. Mohamed Mbilu**
[1984] TLR 113 that:

"*The party whose evidence is heavier than that of the other is*

the one who must win the case."

Now, in this appeal, the pertinent question is whether the respondent proved

his case on the balance of probabilities? Answering that question will entail

answering another question as to whether the evidence of the respondent is

heavier than that of the appellant? This question will not detain me much

because this is a very simple case. It has to be decided according to the

evidence that is available in the court record.

The respondent testified in the trial tribunal that he, the respondent and

other persons acquired the land in 1986. He used it for 4 years and left the

land for 5 years, he gave the land to Fidel Joseph (PW2) for use. After 10

years he was informed by Fidel that his land was invaded by a neighbour

(the respondent in the trial tribunal). He instituted a land dispute in ward

tribunal which gave him 4 acres and 31 acres were left. On being probed for

explanation by the tribunal assessors, he explained that the appellant sold

his piece of land. One of the witnesses who were called to support the

respondent is PW2 Fidel, who said the respondent and the appellant are

neighbours at the area. He further said the appellant invaded the land of

PW1 in 2017 and the land dispute arose. He confirmed that the land is the

property of the respondent.

Going by the evidence of the two witnesses, that is, the respondent himself

and PW2, one would see that there is a grave contradiction that goes to the

root of the matter. While PW1 (the respondent) suggests that the appellant

invaded the land in 2005 according to calculations of the years on incidences

he mentioned in his evidence, PW2 says that the dispute arose in 2017. In

the circumstances it is difficult to believe anyone's story between the

respondent and PW2. In the circumstances, the case ought to have been

held to have not been proved. If the dispute arose in 2005, why would

respondent wait until 2018 when he referred the matter to the ward tribunal?

If I accept his testimony, then such testimony leads to the effect that the

land matter was time barred at the time it was instituted. I am not, however, deciding the matter on the question that the suit is time barred and I believed that there is no need to go that far as the evidence of the respondent cannot be found to be true. PW3 January Julius too, contradicted the respondent when he suggested that the dispute arose in 2017 when the appellant came back. In the circumstances, the respondent cannot be said to have proved his case on the balance of probabilities.

PW2 also suggested that the appellant is the neighbour of the respondent, if he sold his land how could the appellant be the neighbour of the respondent? In totality, the story created by the respondent does not add-up and merely shows that the respondent cannot be trusted as he is short of credibility.

The appellant denied that he is the aggressor. He denied to have invaded the piece of land. He maintained that the piece of land belongs to him. The appellant was not under an obligation to prove his story as he was not the applicant in the trial tribunal. As such the appeal has to succeed. I also agree

with the appellant in his 2nd ground of appeal that the trial tribunal shifted the burned of proof from the respondent to the appellant. That is unacceptable in law. The situation reminds me, though said in a criminal matter, what the late Lugakingira, J. which a borrow leaf from, in **Mathias Timoth v. R. [1984] TLR 86** HC.:

> *"(1) In testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the witness.*

Based on the above deliberation I allow the appeal. I quash the judgment of the trial tribunal and set aside its orders with costs.

It is so ordered.

DATED at **SUMBAWANGA** this 18th day of March, 2022.

J. F. NKWABI

JUDGE