

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 23 OF 2022

(Arising from the District Land and Housing Tribunal for Mkuranga in Land Appeal No.14 of 2021, originating from Ward Tribunal of Vikindue in Land Case No.08 of 2020)

HIZA ABASI SHESHE APPELLANT

VERSUS

YUNUS JUMA LILINGANI RESPONDENT

JUDGMENT

Date of Last order: 18.05.2022

Date of Judgment: 23.05.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Vikindu in Land Dispute No.08 of 2020 and arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No.14 of 2021. The material background facts to the dispute are briefly as follows; Yunus Juma Lilingani, the respondent instituted a case at Vikindu Ward Tribunal against Hiza Abasi Sheshe, the appellant. The respondent

claimed that he is the lawful owner of the suit land. He testified to the effect that he acquired the suit land in 1998/99 and in 2017, the appellant invaded his land and demolished two pillars. On his side, the appellant testified to the effect that the respondent uprooted his two pillars and other crops. He also stated that he started to engage surveyors and during the process of survey the respondent lodged a case at the trial tribunal.

Aggrieved, Yunus Lilingani appealed to the District Land and Housing Tribunal for Mkuranga at Mkuranga vide Land Appeal No. 14 of 2021 complaining that the trial tribunal faulted itself to consider water tight documentary evidence advanced by the respondent and the appellant failed to prove his ownership. The District Land and Housing Tribunal quashed the judgment of the trial Tribunal and allowed the appeal.

The District Land and Housing Tribunal decision did not amuse Hiza Sheshe, hence he decided to challenge it by way of appeal before this court on two grounds of appeal and he also filed two supplementary grounds as follows:-

- 1. That the appellate tribunal erred in law and facts to quash the decision of the trial tribunal by holding that the respondent proved ownership of the disputed land.*

2. That the appellate tribunal erred in law and facts to quash the decision of the trial tribunal based on the general evidence by the respondent tendered before the trial tribunal.

When the matter came up for hearing on 18th May, 2022, the appellant had the legal service of Mr. Sakibu Ahmaed, learned counsel, and the respondent enlisted the legal service of Mr. Benjamin Karume, learned counsel.

In his submission in support of the appeal, Mr. Ahamed argued both grounds of appeal separately. On the first ground, he contended that the appellate tribunal faulted itself to quash the decision of the trial tribunal based on the reason that the respondent proved his case. He valiantly contended that the respondent at the trial tribunal was required to tender documentary evidence such as a Sale Agreement to prove that he was the lawful owner of the suit land. He added that it was the appellant who tendered a Sale Agreement regarding the suit land thus, the appellant emerged a winner. Mr. Ahamed argued that the respondent tendered documentary evidence in relation to other pieces of land that was not in dispute and the said document does not give him the right of ownership.

The learned counsel for the appellant continued to argue that land ownership is proved by a written contract. Fortifying his stance he cited

section 64 (1) of the Land Act, Cap. 113. Insisted that the appellant is the lawful owner as he proved his ownership by tendering documentary evidence.

On the second ground, the appellant's counsel was brief and straight to the point. He contended that the appellate tribunal erred in law and fact to quash the decision of the trial tribunal based on general evidence adduced by the respondent. Mr. Ahamed contended that in general evidence of the respondent and the documentary evidence tendered does not render him a rightful owner since the said documents were not related to the suit land. Stressing on the point of documentary evidence, Mr. Ahmaned averred that the respondent was required to show cogent evidence; sake agreement in relation to the suit land.

On the strength of the above submissions, the appellant's counsel beckoned upon this court to quash and set aside the judgment of the appellate tribunal, uphold the trial tribunal judgment, and allow the appeal with costs.

Opposing the appeal, on the first ground, Mr. Karume strongly objected the submission of the learned counsel for the appellant. He submitted that at the trial tribunal the respondent tendered a sale agreement to prove that he bought the suit land, one acre from Abdallah Hussein. He added

that the respondent was able to identify his neighbours. He averred that on the other hand, the appellant claimed that he bought the suit land in 2005 but the sale agreement reads 2010 while the respondent bought the suit land from different owners starting from the years 1997 and 1998 and acquired in total 25 acres whereas the suit land is within the 25 acres. Mr. Karume emphasized that the respondent is the lawful owner and occupied the suit land before the appellant. To support his submission he referred this court to pages 1 & 2 of the trial tribunal decision. He added that the respondent's land is surveyed.

Arguing for the second ground, Mr. Karume strenuously opposed the submission of Mr. Ahmed, he submitted that the respondent's testimony was a collection of evidence to prove his ownership and his evidence was heavier compared to the appellant. The learned counsel for the respondent urged the court to be guided by the decision of **Hemedi Said v Mohamed Mbilu** (1984) TLR 114, the court held that the one with heavier evidence must win. Mr. Karume also cited the case of **William Mahengela v Cosmas Mwandole**, Land Appeal No. 103 of 2019.

On the strength of the above submission, the respondent's counsel beckoned upon this court to dismiss the appeal for being meritless and upheld the decision of the appellate tribunal.

In his brief rejoinder, the appellant reiterated his submission in chief. Mr. Ahamed insisted that the documentary evidence does not give the respondent right over the suit land. In conclusion, he urged this court to quash the Judgment and Decree of the appellate tribunal and allow the appeal.

I have subjected the rival arguments by the learned counsels to the serious scrutiny they deserve. Having so done, I think, the bone of contention between the learned counsels is *whether the respondent proved his ownership*. The appellant's counsel has locked horns with the respondent's counsel on this matter. Each part opposes the version of the other. In my determination, I will address all two grounds of appeal together because they are intertwined.

I want to make it clear from the beginning that this is a second appellate court. 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, Therefore this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the case of *Edwin Mhando v R* [1993] TLR 174. It is a

settled principle that the second appellate court has to deal with the question of law. 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.”

With respect to the grounds of appeal, the record at the trial tribunal reveals that Yunus Juma Lilingani, the respondent in his defence testified to the effect that he occupied the suit land in 1997/98 and thus he is the lawful owner. In support of his testimony, the respondent tendered several sale agreements related to the suit land which he bought in pieces. For example sale agreement dated 5th April, 1998 between Abdallah Omari Hussein and Yunusi Juma Lilingani is located in Kitangwi area. Sale agreement between Abdallah Omari Hussein and Yunus Juma Lilingani located at Tambani ward dated 25th May, 199 exhibit K1a'. Sale agreement between Seleman Saidi Tupa and Yunusi Juma Lilingani located at Tambani area dated 5th September, 1998 'K1b'.

Hiza Abasi Sheshe on his side testified to the effect that he is the lawful owner of the suit land, to support his testimony he tendered a sale

agreement dated 2010 between Bi. Catherine Michael Kazaro and Hiza Abas Ahmadi 1 acre located at Kisemvule at Mkuranga the sale agreement is prepared by the District Council of Mkuranga Pwani Region.

The defendant's counsel raised an argument that the appellant in his testimony claimed that he bought the suit land in 2005 while the sale agreement was prepared in 2010 thus in his view, they had a better title than that of the appellant. In my opinion, it was upon the party who alleges the existence of a certain fact bears the evidential burden of proving such existence. This is the import of sections 110, 112, and 115 of the Evidence Act, Cap. 6 [R.E 2019], and it has been emphasized in various court decisions. Like in all cases of a civil nature, and consistent with section 110 of the Evidence Act, Cap.6 [R.E 2019], such burden is borne by the Plaintiffs and the standard set is that of the balance of probabilities. The Court of Appeal of Tanzania in **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 - CAT (Mwanza-unreported) held that:-

"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from

without strong reason. ... Until such burden is discharged the other party is not required to be called upon to prove his case.

The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party ..."

[Emphasis added].

Applying the above authority in the instant appeal, means the burden of proof lies upon the respondent who lodged the suit at the Ward Tribunal. Therefore, he is the one who was required to prove his case, he cannot rely on the appellant's weakness.

The appellate tribunal declared the respondent the lawful owner by basing on the evidence of the Village Chairman that he identified the respondent as the lawful owner of the suit land. However, the sale agreements were all irrelevant to the case at hand. Reading the appellate tribunal judgment, it shows that the Village Chairman did not state that the suit land belongs to Yunusi rather he testified to the effect that he knows the respondent and the respondent bought pieces of land at Kimsemvule and he is there for a long time. With due respect being at Kimsemvule for a long time cannot be proof of ownership of the suit land. Therefore, the Village Chairman's testimony is not reliable. Again, the said minutes of

1999 do not specify the survey of the piece of land. The evidence on record shows that the disputed land is located at Kisemvule Village, the documentary tendered by Yunusi Lilingani in my view does not indicate that the said lands were located in Kismevule Village. The respondent bought various pieces of land, therefore, he was required to prove his ownership on particular piece of land which is in dispute not otherwise. On his side, the appellant tendered a sale agreement that bears the village council stamp and the same was signed by Kisemvule Village leaders.

Additionally, as pointed out earlier this is a second appellate court therefore this is the court is cautious when deciding to interfere with the lower court's decision as was propounded in the case of **Edwin Mhando** (supra). The record reveals that the trial tribunal visited *locus in quo* and was in a better position to determine the matter. In the case of **Askari Kawinda Mapunda v Joseph Masaligeni Mapunda**, PC Civil Appeal No. 10 of 2006, HC of Tanzania in Songea (unreported) held that:-

"...the trial court which had a chance to visit the disputed land drew a sketch map showing the appellant's land adjacent to the disputed land. The trial court had a chance of seeing both the disputed land and the witnesses' credibility."

Similarly, in the case of **Ali Abdallah Rajab v Saada Abdallah Rajab & Others** (1994) TLR 132, the Court of Appeal of Tanzania held that:-

“ where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion. ...The decision of a case is wholly based on the credibility of the witnesses then it is the trial court, which is better placed to assess their credibility than an appellate court, which merely treads the transcript of the record.”

Applying the above authorities in the instant appeal, I find that there is nothing to fault the Ward Tribunal's decision. I am satisfied the appellant's evidence was heavier compared to the respondent's evidence.

The upshot of what I have discussed above is that I fully subscribe to the appellant's counsel's submission that the appellant proved his case and thus, he is the lawful owner of the suit land.

That said and done, I quash and set aside the District Land and Housing Tribunal judgment and proceed to allow the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 23rd May, 2022.

 Z.MGEYEKWA
JUDGE
23.05.2022

Judgment delivered on 23rd May, 2022 in the presence of Sakibu Ahmad, learned counsel for the appellant and Ashura Mansoor, learned counsel for the respondent.



Right of Appeal fully explained.