IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 189 OF 2022

(Arising from Land Application No.12 of 2018 of the District Land and Housing Tribunal for Kibaha)

MARTIN MOHAMED KADUMA..... APPELLANT

VERSUS

MOHAMED ISSA MBELWA..... RESPONDENT

JUDGMENT

Date of Last Order:14. 06.2023

Date of Judgment:28.06.2023

T.N. MWENEGOHA, J:

The instant appeal is based on the following grounds; -

1. That, the Honourable trial Chairman erred in law and facts by dismissing the suit with costs by applying the law of Limitation basing on allegations made by defence witness without proof.
2. That, the Honourable trial Chairman erred in law and facts by deciding the matter basing on facts raised at defense level, which was not called upon and addressed before the tribunal.
3. That, the Honourable trial tribunal erred in law and facts by when it failed to take into consideration the evidence adduced by the appellant.

The appeal was heard by way of written submissions where Advocate John Kambo Chandika, appeared for the appellant while Advocate Faraji Mangula represented the respondent.

In his submissions in support of the appeal the, the counsel for the appellant, consolidated the 1st and 2nd grounds and argued them together that the Chairman relied on false information as it is not true that, the original owner of the disputed land had a misunderstanding with the appellant in 1990 as alleged. That, these allegations were only made by a defense witness, one Dotto Sefu Lukemo, but was not supported by any evidence. Either, this was a new issue raised in Court, however, the Trial Tribunal, did not ask the parties to address on this issue before reaching its decision.

The appellant's Counsel argued that the appellant and the late Mzee Lukemo lived in peace without any quarrel throughout the time. That the boundaries between their lands were marked by Michongoma fence which was undisturbed until 2014 when the respondent arrived and encroached inside the said fence for about 4 meters. He argued that, that was when the dispute arose and not in 1990 as alleged by the respondents. That, the dispute arose in 2014 when the respondent removed the Michongoma fence.

The counsel for the appellant argued that the trial Chairmen misdirected himself as to the truth of this fact. That, the respondent had a burden to prove the existence of this matter as he was the one alleging.

On the 3rd ground, it was argued that, since the land is unsurveyed, it was not proper for the respondent to remove the fence without consulting the

neighbours. That, they were the ones to tell him if he was within the area of Mzee Lukemo.

In reply, the respondent's counsel admitted that, it is true that the dispute arose after the respondent started to build a house. That, the appellant complained that the respondent has encroached his land by removing the existing boundaries and entering into the appellant's land by 4 meters. It was his submission that, however, the matter was well decided by the Trial Tribunal after considering the evidence from both sides. That, it is obvious that, the evidence of the respondent was heavier than that of the appellant and that is why he won the case at the Trial Tribunal.

As for the 3rd ground, it was argued that, the testimony of DW2 was enough to show that there was a dispute on the suit land, long before even the respondent came into the area. That, at the time when the boundaries were being marked on the suit land, the appellant was represented by his wife, hence he knew the boundaries well. Therefore, as per section 3(1) of the Law of Limitations Act, Cap 89, R.E 2019, the appellant's claim is barred by time, as it existed since 1990 with the original owner.

In rejoinder, the appellant's counsel reiterated his submissions in chief, and prayed for the Court to order for a retrial of the case.

Having gone through the submissions of the counsels for the parties and also the records from the Trial Tribunal, the issue for determination is whether the appeal has merits or not.

In my discussion and analysis, I will consolidate all 3 grounds of appeal and argue them together. I do so, based on the fact that, all of them have

focused on evaluation and analysis of the evidence produced at the Trial Tribunal.

In his 1st and 2nd grounds, the appellant faulted the Trial Tribunal for basing its decision on the testimony of SU2, Dotto Seif Lukemo, a child of the late Mzee Lukemo. On the 3rd ground, he insisted that, the Trial Tribunal did not consider his evidence before reaching its decision.

I have gone through the Decision of the learned Chairman of the Trial Tribunal, and I found that it is true that he based his Judgment on the testimony of SU2, as it is clearly revealed at pages 4 and 5 of the Judgment.

I further went through the testimony of SU2 (Dotto Seif Lukemo) and he is on record stating the existence of the dispute on the suit land, between the appellant and one Mzee Lukemo, and the settlement that followed. As per his testimony, the said land was surrendered by the appellant to Mzee Lukemo in 1990 through a settlement.

I am in agreement that this testimony raised a new issue, an existence of the dispute and settlement of the same, which was not brought up before the Trial Tribunal. Therefore, it had no record over it. Consequently, it was improper, on part of the Trial Tribunal, to believe such evidence, while the said allegations were not at all proved. If the settlement was reached, over the said land as alleged by SU2, he could have produced at least a written proof as to the terms of settlements. It is hard to easily accept that parties would have a dispute settlement of a land of that size (4 metres), without putting such agreement in writing. Therefore, SU2 was duty bound to prove the existence of this fact, as per the **Law of Evidence Act, Cap 6, R.E 2019,** under section 112, which provides; -

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".

Further, under **section 115 of the Evidence Act**, (supra), it is provided that; -

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

Basing on the two quoted provisions of the law, I find it difficult and dangerous to believe the testimony of SU2, to the extent of forming the basis of a decision, as was the case at the Trial Tribunal. As mentioned above, this fact needed proof before it could be considered in evidence. In absence of such proof in my view, then the testimony cannot be relied upon. I agree with the appellant, that, it was a misdirection on part of the Trial Chairperson to use the said evidence in his Decision.

Focusing further on the testimony of SU1, the respondent herein is on record saying clearly testifying that, when he purchased his land, there were trees in the iron sheet fence of Mzee Kaduma (appellant), making the demarcations of their lands. The said fence was removed, and the respondent claimed not to know who removed it. In analyzing this testimony, we arrive at a simple conclusion that, what the appellant claimed on the removal of Michongoma fence holds water, even though the respondent diverted the said fact.

Therefore, in my settled view, the appellant's evidence was heavier than that of the respondent. Hence, on balance of probability rule the appellant

deserved to win. This rule was well explained by **Lord Hoffman in RE B (CHILDREN) (2008) 35**, that.....

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either it happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that, one party or the other carries the burden of proof. If the party bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not happened. If he does discharge it, the value of 1 is returned and the fact is treated as having happened".*

See also the case, **Hemed said v Mohamed Mbilu (1984) TLR 113.** In consideration of the reasons given above, I find that the 1st to 3rd grounds of Appeal have merits and they are consequently allowed.

Eventually, the entire Appeal is allowed and the decision of the Trial Tribunal is quashed and the orders that followed it are set aside. The appellant is declared to be the lawful owner and the respondent is a trespasser and he is ordered to vacate the land immediately.

Order as to costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

T.N. MWENEGOHA

JUDGE

28/06/2023