IN THE HIGH COURT OF TANZANIA

LAND DIVISION

LAND APPEAL NO. 219 OF 2023

(Originated from the decision of Kibaha District Land and Housing Tribunal in Land Application No. 92 of 2018 before Hon. S.L Mbuga- Chairman)

VITALIS JUBA YEMBA (Administrator

of Estate of the late Halima Mfaume) .....APPELLANT

VERSUS

ATHUMAN MAKUSANYA.....RESPONDENT

J U D G M E N T

Date of last Order:26/07/2023
Date of Judgment:17/10/2023

K. D. MHINA, J.

This is the first appeal. It stems from the District Land and Housing Tribunal ("the DLHT") for Kibaha in Land Application No. 92 of 2018 whereby, Vitalis Juba Yemba (Administrator of estate of the late Halima Mfaume), the applicant who is now the appellant, lost a suit for recovery of one acre of unserveyed land located at Kwala Village within Kibaha District.

The brief facts which led to the institution of Application No. 92 of 2018 before the DLHT were that appellant as an administrator of the estate of the late Halima Mfaume alleged that the deceased acquired the suit land in 1974 during operation vijiji vya ujamaa. She developed that

land by planting permanent and seasonal crops and constructed mud house where she was living until her demise in 1990.

He further alleged that after the death of Halima Mfaume, her beneficiaries constructed a two rooms house where he was living. In 2012 the respondent trespassed to the suit land for about one acre.

This background prompted the appellant to rush and seek redress in the DLHT. After the trial, the DLHT dismissed the appellant's suit and declared the respondent as the lawful owner of the suit land.

In discontent, the appellant appealed to this court and preferred the following grounds to fault the DLHT decision;

i. *That the Trial Tribunal erred both in law and in fact by deciding in favour to the respondent while he does not give any Exhibits to prove his case.*
ii. *That the Trial Tribunal erred both in law and in fact by basing in the hearsay evidence in reaching un fair decision against the appellant.*
iii. *That the Trial Tribunal Chairman erred both in law and fact by granting the suit land to the respondent by relied on the evidence of Dw3 as adduced that he was the eye witness of the transaction of sales agreement entered the year 1975 between the late Halima Mfaume (seller) and the late Zainabu Kondo (buyer) without taking into consideration for the aforesaid year he has no legal*

capacity to witness contract agreement.

iv. *That the Trial Tribunal Chairman erred both in law and fact by delivering judgement in favour to the respondent by ignoring the vital evidence from PW1, PW2 & PW3 that the late Halima Mfaume was allocated the land during operation Vijiji being in occupation and developed the suit land from the year 1974 to 1990 without interference from the late Zainabu Kondo.*

The appeal was argued by way of written submissions. The appellant was represented by Mr. John Michael, Advocate, while the respondent was represented by Ms Ritha Ntagazwa Advocate.

Supporting the first ground of the appeal, Mr. Michael submitted that the respondent had failed to tender the sale agreement as an Exhibit to prove the ownership which contravened Section 100(1) of the Evidence Act [CAP 6 R.E. 2022]

He explained that in any civil action the question of ownership is not established by a mere plain word but clear and cogent evidence that will resistibly and specifically point to the source of acquisition and occupation of the property under contest. He supported his submission by citing **Issa Ahmed vs. Mussa Abdul Mohamed,** Land Appeal No 72/2010 (Unreported)

He further submitted that it is cardinal principle of the law that requires

the disposition of the land should be in writing as provided under section 64(I)(a) in the Land Act [CAP 113 R.E 2019]. On this he cited **Dandity vs. Sekatawa (1964),** ALR Comm.25, where it was stated that an agreement that was not reduced into writing was discounted.

He concluded by submitting that Section 110(1) of the Evidence Act, CAP 6 R.E 2022 provides on the burden of proof whoever desires any court to give judgment as to any legal right or liability depends on the existence of facts which he asserts must prove that those facts exist.

But in this matter DW1 did not manage to prove his burden beyond reasonable doubts because he failed to prove that there was a sale agreement with late Zainabu Kondo entered in 1975 and also failed to tender such a document as exhibit before the trial tribunal.

Mr. Michael faulted the decision of the DLHT in the second ground by submitting that both DW1, DW2 and DW3 were not present at the time when sales agreement entered between the parties.

Therefore, the DLHT made grossly error when relied on the hearsay evidence on acquisition of the suit land to reach un fair decision.

In respect of the third ground, he submitted that at the DLHT, DW3 testified that in the year 1974 he was at the age of ten (10) years and he was the eye witness of the transaction of the land in dispute between the

late Zainabu Kondo and Halima Mfaume.

He stated that was contrary to Section 11 of the law of contract Act, Cap 345 which provides on the capacity of contract that.

> *"Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject".*

During hearing of the complaints at the trial tribunal the appellant managed to present three witness and tendered clan meeting to substantiate his claim.

Further, there were no contradictive testimonies which could vitiate the appellants legal right of ownership over the piece of land in dispute.

On the other hand, there was no sale agreement tendered by the respondent which proved the agreement was in respect with the suit land. He also failed to tender the clan meeting minutes and to call the beneficiaries who can testified whether the land in dispute was among the properties left by the late Zainabu Kondo.

Therefore, he concluded that the appellant sides adduced heavier evidence than of the respondent.

In response, Ms. Ntagazwa submitted that the appellant had failed to prove the case to the required standard as per the law because of the

doubt in his case. She narrated that while testifying, the appellant with his witness had inconsistencies in their evidence which resulted into doubt. She cited **Jeremiah Shemweta v Republic (1985) TLR 228**, to bolster her submission.

She explained that, in his testimony PW1 testified that the suit premise was owned by his grandmother who allocated during operation Vijiji in 1971, while PW2 testified that the said suit premises was obtain via operation Vijiji in 1974. Further, PW3 testified that the appellant started to live at the suit premise in 1989 while PW2 said the appellant started to live on 1998 and the appellant said that he started to live in 2008.

Ms. Ntagazwa also stated that the appellant tried to shift the burden of proof to the respondent.

She explained that the respondent called the material witness who testified according to the reality of the matter. The evidence was to the effect that the suit premise was owned by the late Zainabu Kondo who obtained it from the late Halima Mfaume. And Zainabu had been using the suit premise since 1975, by cultivating various crops on the suit premise. In case there was a dispute between Halima and Zainabu, it could arise even before their demise. The respondent continued to enjoy the fruits of the suit premise since Halima lifetime up to 2018.

Therefore, in this matter, the appellant with his witness had failed

to prove their case on the required standard.

She submitted further that in **Hemedi Said v Mohamedi Mbilu (1984) TLR 113** it is required that " *the person whose evidence is heavier than that of the other is the one who must win".* And in this matter the appellant had failed to substantiate his claim against the respondent. The respondent evidence was heavier compared to the appellant as the circumstance of this case created doubt as to why the appellant started to raise his claims after 28 (from 1990 to 2018) good years after the death of his grandmother.

She concluded by submitting that taking account of the nature of the dispute, the appellant claims were based not only on hearsay evidence but the history of the suit premise that Zainabu and her descendants has been using the suit premise without any dispute before and after demise of Halima Mfaume.

Mr. Michael filed his rejoinder, which I don't see the reason to summarize it here, since mostly it contained what he submitted earlier in his submission in chief.

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I find that the both grounds of appeal revolved around the issue of evaluation of

evidence. The appellant basis of complaints are **one;** the dispute was decided in favour of the respondent while he failed to tender any exhibit, **two;** the decision was entered based on hearsay evidence, **three;** the DLHT relied its decision on the evidence of DW3 while in 1975 he has no legal capacity to witness contract agreement and **four;** that the DLHT decided in favour of the respondent by ignoring the evidence of PW1, PW2 and PW3 that the Halima Mfaume was allocated the land in 1974 during operation Vijiji.

At the DLHT, neither party tendered any document regarding ownership of the land in dispute. The appellant did not tender a document indicating that the late Halima Mfaume was allocated that land during Operation Vijiji as he claimed and the respondent did not tender the sale agreement to indicate that the late Zainab Kondo Makusanya purchased the same from Halima Mfaume.

Therefore, it based its decision on the available oral evidence which was on record.

From above it is a cardinal principle that he who allege must prove the allegation and the burden cannot shift to the adversary party. See **Hemedi Said (Supra)** and Section 110 (1) of the Evidence Act, Cap. 6 [R.E. 2019] which reads

"Whoever 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."

Therefore, the one who was supposed to prove the ownership of the land in dispute was the appellant. And on that the DLHT held the appellant' s evidence was not strong. It used the word "hafifu".

Reverting to the first ground of appeal and having gone through the records. First of all, as I alluded to earlier, at the DLHT neither party tendered any document/ exhibit regarding the ownership of the suit land. Therefore, the DLHT based its findings upon the oral evidence testified from both sides.

In addition to that, it was not the respondent who was supposed to prove his case, it was the appellant who was alleging that the plot belonged to him as an administrator of the estate of the late Halima Mfaume. Therefore, the burden of burden was on the appellant not the respondent. Thus, the first ground is devoid merits.

Regarding grounds 2 and 3 which I will determine together, first, of all as in ground 1, the burden of prove was on the appellant to prove that the land in dispute belonged to him and not looking at the evidence of the respondent as whether it was weak or not.

Further, in its decision, the DLHT based its findings on the evidence of DW2 who was once hired by the late Zainabu Kondo to cultivate in the suit plot and DW3 who was present when suit land was purchased by late Zainabu Kondo, the agreement which was before the ten-cell leader one Minshehe Misahilo.

Therefore, flowing from above, **first**; it is not true that the DLHT based its finding on hearsay evidence.

Second, the in its decision, the DLHT did not solely based its decision on the evidence of DW3. There was the evidence of DW1 and DW2. By the way if you look at the evidence of DW3, he signed he was present when the sale agreement was done, therefore, that does not necessarily mean he signed the sale agreement as a witness.

On the last ground of appeal, having gone through the DLHT record, I find that it analyzed and considered the evidence of PW1, Pw2 and PW3 as indicated at page 8 and 9 of impugned judgment. The DLHT analyzed the evidence of PW1 and held that the same failed to prove the ownership because he did not know anything regarding that land as he was only appointed to be an administrator.

Also, the evidence of PW2 and PW3 were analyzed and found to be not credible.

Flowing from above, after a careful scrutiny I am satisfied that not only that the evidence of PW1, PW2 and PW3 were evaluated but also were evaluated properly, and the DLHT reach into a just decision.

In the event, I find no merit in this appeal and I hereby dismiss it with costs.

It is so ordered.

K. D. MHINA
JUDGE
17/10/2023