

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO.75 OF 2022**

(Arising from the District Land and Housing Tribunal for Kisarawe in Land

Appeal No.74 of 2019, originating from Ward Tribunal of Mafizi in Land

Case No.22 of 2019)

**JENIFA L. MANYIGU ..... APPELLANT**

**VERSUS**

**KONDO ABDALLAH..... RESPONDENT**

**JUDGMENT**

*Date of Last order: 30.12.2022*

*Date of Judgment: 24.01.2023*

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Mafizi in Land Case No. 22 of 2019 and arising from the District Land and Housing Tribunal for Kisarawe in Land Appeal No. 74 of 2019. The material background facts to the dispute are briefly as follows; Jenifa Manyigu, the appellant instituted a case at Mafizi Ward Tribunal against Kondo Abdallah, the respondent. The dispute involved a five-acre piece of land located at Mafizi Street, Mafizi Village

Mafizi Ward within Kisarawe District. Jenifa Manyigu claimed that in 2012, Mafizi Street allocated the suit land to her, and in 2013 she started to cultivate the suit land. On his side, Kondo Abdallah claimed that he is the lawful owner of the suit land which he inherited from his late father. The trial tribunal determined the matter and decided in favour of the appellant.

Dissatisfied, Jenifa Manyigu the appellant lodged an appeal at the District Land and Housing Tribunal for Kisarawe claiming among other things that the trial tribunal failed to evaluate evidence on record and the trial tribunal was required to decide that Jenifa Manyigu is an intruder. The appellate tribunal quashed and set aside the decision of the trial tribunal and declared the respondent the lawful owner of the suit land.

The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on nine grounds of appeal as follows:-

- 7. That, the tribunal Chairperson erred in law and fact by misleading itself and disregarding the power of the Village Council on land allocation.*
- 8. That, the tribunal Chairperson erred in law and fact for failing to consider and evaluate evidence and fact adduced by the appellant.*
- 9. That, the tribunal Chairperson erred in law and fact in holding that the respondent is the legal owner of the disputed land basing on the*

*unsupported evidence of the respondent.*

*10. That, the tribunal Chairperson erred in law and fact by deciding In favour of the respondent without considering strong evidence of the appellant versus weak evidence of the respondent.*

When the appeal was called for mention on 5<sup>th</sup> December, 2022 before me, the respondent prayed to argue the appeal by way of written submissions. By Court order, the appellant submitted the submission in chief on 8<sup>th</sup> December, 2022 and the respondent filed his reply on 19<sup>th</sup> December, 2022. The rejoinder was to be filed on 22<sup>nd</sup> December, 2022. Pursuant thereto, a schedule for filing the submissions was duly confirmed by both parties.

In his submission in support of the appeal, Mr. Singa, learned counsel for the appellant opted to argue the first and third grounds separately because they are interrelated. The second and fourth grounds were combined and argued together. On the first ground, the counsel for the appellant contended that the tribunal Chairperson erred in law and fact by misleading herself and disregarding the power of the Village Council on land allocation. He submitted that Mafizi Street did not allocate the suit land to the appellant rather it conformed and acknowledged via letter that there were eight newcomers in the said Street and among them was the appellant who was given five acres. To support his submission he referred this Court to a letter dated 15<sup>th</sup> November, 2012. Mr. Singa, counsel for the appellant went on to submit that the Chairman of Mafizi Village one Yadhameni Ng'onde

acknowledged, confirmed, and signified via letter totiled Yah: *Uthibitisho wa Kupatiwa Ardhi ekari 5 za Kilimo Ndg. Jenifa Manyigu*. He insisted that via the said letter it is proved that the Village Council allocated five acres of a piece of land to the appellant. To fortify his submission, he cited Part IV Section 8 (1), (5) of the Village Land Act, Cap. 114. He added that the appellate tribunal differed with the assessors' opinions, the Chairman misdirected herself by stating that there is no evidence on records that proves that Mafizi Kitongoji allocated the suit land to the appellant rather than invited her as a new member of the village.

Submitting on the third ground, Mr. Singa contended that the respondent at the trial tribunal and before the appellate tribunal did not mention when his family started to own the suit land. The counsel for the appellant went on to argue that the respondent did not support his evidence with any documentary evidence or Title Deed to justify his ownership of the suit land and did not call any member of the family or neighbours to justify his ownership. To buttress his contention he cited sections 110(1) and (2) of the Evidence Act, Cap. 6 [R.E 2019], Mr. Singa contended that the respondent claims that the suit land is his family's property while the same is not registered by the Village Land Register as customary land. Supporting his argumentation he referred this Court to section 21 (1) (2) of the Village Land Act, Cap. 114 [R.E 2019],

On the second and fourth grounds, the learned counsel for the appellant contended that the appellate tribunal erred in law and fact by deciding in favour of

the respondent without considering strong evidence of the appellant. The counsel for the appellant valiantly argued that the appellant in her testimony testified to the effect that she is the lawful owner of the suit land and to substantiate her testimony she produced documentary evidence; a letter from Mafizi Village Office written by the Village Executive Officer, a letter from Mafizi Street which enlisted several people who were allocated land by the Village Council. Mr. Singa added that the appellant planted cashew nuts trees and cassava and continued to cultivate the suit land and the same was confirmed by the trial tribunal during the visit *locus in quo*. To bolster his submission he cited the case of **Mr. Mathias Erasto Manga v M/S Simon Group (T) Ltd**, Civil Appeal No. 43 of 2013.

On the strength of the above submissions, the appellant's counsel beckoned upon this court to allow the appeal with costs.

In his reply, the respondent's counsel decided to argue the first ground separately and combine the second, third, and fourth grounds because they are intertwined. On the first ground, he argued that the village assembly accepted the appellant as a villager on 15<sup>th</sup> November, 2012 and the suit land was allocated to the appellant on 10<sup>th</sup> November, 2012 by the Village Council. Mr. Hassan argued that the appellant ought to be allocated first before being accepted as a villager. He added that the respondent inherited the suit land before the appellant and the respondent's family had been living in the suit land for over 30 years continuously

without any interruption and there was no any adverse possession of the suit land.

Mr. Hassan defended the appellate tribunal's decision as sound and reasoned.

On the second, third, and fourth grounds, the learned counsel for the respondent contended that the uninterrupted occupation of the suit land for over 30 years without any interruption, the same proves that the respondent is the lawful owner of the suit land. He went on to submit that they did not register as newcomers because they lived in the suit land continuously even before the appellant occupied the suit land. In his view, the respondent proved his case as per the requirement of section 110 (1) and (2) of the Evidence Act, Cap. 6 [R.E 2019],

Stressing, Mr. Hassan submitted that the Chairperson of the appellate tribunal made a correct decision. To support his submission he referred this Court on pages 1 and 5 of the appellate tribunal's Judgment. Mr. Hassan added that the appellant was unprocedural allocated the suit land by Mafizi Ward since the respondent already inherited the suit land from his late father. The learned counsel for the respondent contended that the Chairperson had the mandate to make her own decision following the evidence adduced at the trial tribunal adduced by both parties. To bolster his submission, he referred this Court to page 6 of the appellate tribunal's Judgment and sections 24 and 35 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], Mr. Hassan stressed that the appellate tribunal decision was sound and reasoned, therefore, the appellant is not a lawful owner of the suit land.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this Court to dismiss the appeal with costs.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief.

Before the determination of this appeal, I should 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 ora violation of some principle of law or practice.”*

I have subjected the rival arguments by the learned counsels for the appellant and

respondent to the serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question *whether the appellant had good reasons to warrant this court to allow the instant appeal*. In my determination, I will combine the first and fourth grounds because they are intertwined. Equal related are the second and third grounds the same will be argued together.

On the second and third grounds, the appellant's counsel is faulting the Chairman for failure to analyse and evaluate the evidence on record. In the case at hand both parties are claiming that she/ he is the lawful owner of the suit land. One of the canon principles of civil justice is for the person who alleges to prove his allegation. Sections 110 (1) & (2) and 112 of the Evidence Act, Cap. 11 [R.E 2019] place the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

*“110 (1) 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.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. On whom the burden of proof lies*

*111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of*



*proof of the particular fact.*

*112. 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. ”*

Similarly, in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that:-

*“He who alleged must prove the allegations”.*

Exploring the evidence on record, the appellant testified to the effect that she is the lawful owner of the suit land measuring five acres. The appellant claimed that in 2012, the Street Government allocated the suit land to her, and in 2013, she started to cultivate the suit land. For ease of reference, I reproduce part of the Jenifa Manyigu evidence as appeared on page 21 of the trial proceedings hereunder: -

*“Ndugu Kondo Abdallah amevamia shamba langu lililopo Kitongoji cha Mafizi Kijiji cha Mafizi lenye ukubwa wa ekari tano. Shamba nilipewa na Uongozi wa Kitongoji mwaka 2012 kwa kufuata taratibu zote nilizopewa na Uongozi wa Kitongoji...”*

Perusing further the trial tribunal proceedings, I noted that Kondo Abdallah testified to the effect that their fathers cultivated the suit land and they inherited part of the suit land from their father. However, there was no any other supporting evidence from the respondent related to his ownership of the suit land and he did not tender

any documentary evidence to support his allegations. On the side of the respondent, it seems that the appellant's testimony was supported by a documentary evidence; a letter from the Street Government of Mafizi, however, the Street Chairman of Mafizi was not called to testify in Court.

Applying the above findings, it is my considered view that the respondent's evidence was not cogent enough to move the appellate tribunal to declare him a lawful owner.

On the first and fourth grounds, the appellant is faulting the appellate tribunal for disregarding the power of the Village Council and deciding in favour of the respondent without considering the strong evidence of the appellant against the weak evidence of the respondent. I have perused the trial tribunal proceedings and found that Jenifa Mnyigu testified to the effect that the Street Government of Mafizi allocate the suit land to her. As rightly stated by the appellate tribunal the Street Government is not empowered to allocate a piece of land. Therefore the appellate tribunal was correct to vary the decision of the trial tribunal. However, it was not correct to declare the respondent the lawful owner because he did not prove his ownership. Considering the fact that the respondent in his testimony claimed that the suit land was part of the inheritance from their fathers who used to cultivate it.

Consequently, in the interest of justice, I find that the trial tribunal in the first place

was nor required to determine the case without including the necessary parties such as the leaders of the Street Government of Mafizi because they were certain that the appellant is among the newcomers and was allocated a piece of land. The Street Government was in a better position to elaborate the whole saga and move the trial tribunal to reach a fair decision. Joining the Street Government as a party will give them an opportunity to justify the appellant's claims and they will be bound by the result of the action. In the case of **Amon v Raphael Tuck and Sons** (1956) 1 ALL ER. 273. The Supreme Court observed that:-

*"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, **and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party...**"[Emphasis added].*

Applying the above authority in the matter at hand, it is clear that the ownership of disputed land according to the appellant features the necessity of including the alleged authority that confirmed and acknowledged that the appellant is the lawful owner. Dismissing this appeal will not save a purpose because as pointed above even the respondent did not prove his ownership to the standard required by the law.

In the upshot, I quash and set aside the Judgment and Decree of the District Land and Housing Tribunal for Kisarawe and Mafizi Ward Tribunal. I allow the appeal

without costs. Parties are at liberty to lodge a fresh suit and include necessary parties to the suit. Order accordingly.

Dated at Dar es Salaam this date 24<sup>th</sup> January, 2023.



  
A.Z.MGEYEKWA  
**JUDGE**  
24.01.2023

Judgment delivered on 24<sup>th</sup> January, 2023 in the presence of the respondent.



  
A.Z.MGEYEKWA  
**JUDGE**  
24.01.2023

Right of Appeal fully explained.