THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

LAND CASE APPEAL No. 54 OF 2022

(Originating from the District Land and Housing Tribunal for Kiteto at Kibaya Application No. 11 of 2021)

MARTHA KITEMBELE..... APPLICANT

VERSUS

PAPAA LEPAPA..... RESPONDENT

JUDGMENT

19th October & 16th November, 2022

TIGANGA, J.

This appeal is in respect of the decision and decree issued by the District Land and Housing Tribunal for Kiteto at Kibaya ("DLHT") in Application No. 11 of 2021. The appellant was also the applicant in that application whereas the respondent stood with the same status thereat. The appellant was dissatisfied with the decision given by he DLHT and therefore lodged this appeal.

To appreciates as to whether things were in order before the DLHT or went wrong thereat, the factual background of what happened before it is important as can be seen hereunder:

The appellant sued the respondent before the DLHT for trespass of un surveyed land with 50 acres estimated to be of Tshs. 10,000,000/= located at Kimana Village, Kiteto District in the region of Manyara. The suit land is alleged to have been bordered with the road in the North, the forest in the South, Ramadhani Bakari in the West and Safari Feo in the South part. The appellant alleged further that, she was allocated the suit land by the Kimana Village since 2010 and she has been using it for agricultural activities.

On the other side of the story, the respondent is alleged to have been bought the suit land together with other pieces of land totalling 120 acres from three various people. After hearing the application on merit, the DLHT decided that the land belongs to the respondent as the appellant failed to convince it as regarding her ownership.

Dissatisfied by the decision, the appellant filed this appeal by advancing two arguable grounds of appeal to wit;

1. That the trial chairman erred in law and in fact by not weighing and deciding on the strength of the evidence and exhibit tendered by both parties.

2. That the proceedings are tainted with irregularities.

When the time for arguing the appeal came, it was agreed by both parties and of course with the leave of the Court that, hearing be conducted by way of written submissions. For that matter, the appellant had the service of Mr. Kennedy Harouldy Chando, Learned Advocate whereas Ms. Beatrice Mboya appeared for the respondent.

Submitting in support of appeal, Mr. Kennedy in omnibus style argued the grounds of appeal that, originally, the suit land belonged to the village of Kimana and later on, sometimes in 2010 it was allocated to the appellant. To substantiate the submission, he drove the strength from exhibit P1 which is the letter from the Village Executive Officer (VEO) of the said village.

That, according to that letter it is of no doubt that the appellant was allocated with the said suit land. Mr. Kennedy also relied his submission on Exhibit P2, the letter from the VEO of the said village allowing the appellant to clear the bushes of the said land in dispute for her own landed use. Also, the counsel went on arguing that, those who are alleged to sell the suit land to the respondent did not show to the satisfaction of the DLHT on how they came to the ownership of the said land.

Mr. Kennedy went on substantiating that, during testimony in the DLHT, the respondent testified that, he bought the suit land for Six Hundred Thousand shillings (Tshs. 600,000/=) while at page 7 of the impugned judgment it is written that the respondent bought the said land for Six Million Shillings (Tshs. 6,000,000/=) contrary to the proceedings.

Therefore, to him the evidence of the appellant was strong enough than that of the respondent to declare that, the suit land belongs to the appellant contrary to what the DLHT decided. Fortifying on that point, Mr. Kennedy Cited the case of **Hemed Said versus Mohamed Mbilu** (1984) TLR No. 113 in which it was held that, the party whose evidence is greater than that of the other, is the one who must win the case.

Mr. Kennedy also argued that so long as the respondent alleges to have been bought the land in dispute (120 acres) from the three sellers, and since it is clear that the land initially belonged to the village of Kimana, the evidence of the persons who were there when the said three sellers were allocated land by the village was important. Failing to bring them before the DLHT to testify, amounts to failure to call material witnesses and therefore, the DLHT would have been drawn adverse inference against the respondent. To strengthen the argument, he

reiterated the case of **Hemed Said versus Mohamed Mbilu** (supra) on the argued principle.

The counsel went on faulting the decision of the DLHT. He referred this Court to paragraph 3(iii) of the Written statement of defence. Onto this paragraph he said, it is the admission of the alleged prior owning of the suit land to have been not involved in the process of reallocation of the land in 2010. From that percept, he said, if at all the alleged sellers believed the land to be theirs, they would have been complained for compensation and not selling the said land to the respondent.

Without so doing, it is the manifestation of acceptance of facts that, the land was allocated to the appellant and the sell being illegal, he said. Together with that argument, the counsel also cited the case of **Yara Tanzania Limited versus Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & 2 Others,** Commercial Case No. 5 of 2013 (unreported) which held that, parties are bound by their own pleadings.

Arguing the appeal against, Ms. Mboya asked the court to dismiss all the submission made by her fellow counsel Mr. Kennedy. She said, the DLHT properly analysed and considered the evidence on record together with the exhibits tendered. That, it reached to such findings because the

appellant's evidence and exhibits were weak to the extent of not ruling the application in her favour.

The counsel said, the DLHT was guided by Section 8(5) of the Village Land Act, [Cap. 114 R.E 2019] in grounding the decision which supports the position. That, the appellant failed to prove that, there was an approval of the Village Assembly for the alleged allocation of the suit land, she argued. Ms. Mboya Continued submitting that, Exhibits P1 and P2 tendered by the appellant were just mere letters which could not sufficiently prove ownership.

That, despite the fact that PW2 was the VEO of the said village from 2010 to 2013, he did not tender any proof from the Village Assembly to justify that the land was allocated to the appellant. In the event therefore, it remains a justification that the appellant was not allocate the one, she argued. To her, could have been expected the tendering of minutes of the Village Assembly, which was not made, she rested. That, the evidence of Yohana Lemama who is among the three sellers of the land to the respondent convincingly helped the DLHT to reach to the findings as it did, she argued.

In regard to the second ground Ms. Mboya was of the view that, the difference of amounts in the proceedings and the judgment is a mere

clerical error which is a curable defect owing to that it is a typing error. To clearly convince this court on the argument she said, on the agreement under which the respondent paid the three sellers, it appears the amount paid to be Ths. 6,000,000/= and the said clerical written amount only appears once. On that curability of the typing error, she cited the authority of the provision of section 96 of the Civil Procedure Code, [Cap. 33 R.E 2019] and Article 107A of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, requiring the court to make corrections of clerical errors and avoid embracing use of technicalities when dispensing justice.

Furthermore, the case of **China Henan International Cooperation Group Co. Ltd (CHICO) versus Morning Glory Construction Co. Ltd**, Misc. Application No. 02 of 2021 was cited in reference to topographic errors that the same can be corrected at any time after being noticed.

In rejoinder, Mr. Kennedy reiterated his earlier position in the submission in chief. He, in addition distinguished the case of **China Henan International Cooperation Group Co. Ltd (CHICO) versus Morning Glory Construction Co. Ltd and the Constitution** (supra) as not being applicable in the circumstances of this appeal. Also, he

said, failure by the PW2 to bring minutes of the Village Assembly cannot act as a punishment to the appellant and the letters brought by the appellant (Exhs P1 & P2) which were not objected suffice to prove ownership.

That is the summary of the record, the ground of appeal and submissions filed in support and against the appeal as submitted by both parties. After deliberation of submissions filed by both parties, it is my considered view that, the issue to be determined is whether this appeal stands a chance of success.

Having in mind both submissions as filed by both parties, I would like at the outset to state that, in this matter, I will basically be guided by the cardinal rule of evidence, that is, the burden and standard of proof in civil matters as provided by section 3(2)(b) read together with sections 110, 111 and 112 of the Evidence Act [Cap. 6 R.E 2019], which generally provide that whoever wants the court to decide on his favour must prove the case on the balance of probability.

For purpose of clarity and for easy reference and avoidance of doubt, I will reproduce each respective provision relied upon hereinabove in the sequence as they appear herein; that is section, 110, 111 and 112 they provide:

"110.-(1) Whoever desires any court to give judgement 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.

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.

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."

Reading the facts of the case, it is the appellant who contends that she was given the suit land by the Village Assembly of Kamana. Also, there is no dispute as to whether the respondent bought the said land from the three vendors including Yohana Lemama who testified to that effect as DW2. This is further strengthened by Exhibit D1, a proof of compensation. Also, the appellant does not dispute such fact but rather disputes the said sold land being owned by those who sold it to the respondent. In the circumstances of this nature, it is apparent that the duty to prove that she was allocated with the suit land lies to the

appellant. Therefore, the question to be resolved is, did the appellant prove such fact in terms of Section 111 of the Law of Evidence Act?

To be precise, the appellant relied on Exhibits P1 and P2 as the only documents substantiating her ownership to the claimed land. What is a position of the law in a situation like the one under scrutiny?

In the case of **Udaghawenga & 16 Others versus Halmashauri ya Kijiji cha Vilima Vitatu and Another**, Civil Appeal No. 77 of 2012 CAT at Arusha (unreported) it was observed:

> *"...In conclusion therefore, in the absence of any record of the meetings of 11/12/1999 and 14/12/1999 it will be fair to say that there is no material upon which we could safely say that the allocation of the land in question was made in compliance with the dictates of the law as stipulated above. In other words, there is nothing to show that the Village Council and the Village Assembly were involved in allocation the land in issue. It was imperative that, it be established first in evidence that the 1st respondent allocated land to the 2nd respondent [second applicant herein] in line with the procedures set out by the law before a suit against the appellants [respondents herein] could be sustained successfully. Apparently, no such evidence was forthcoming in the case..."*

Thus, guided by the above authority, it is crystal clear that as correctly argued by Ms. Mboya, it is the appellant who need to prove that she was allocated land by the Kamana Village Assembly. She was duty bound to bring in court the evidence showing that, she was actually allocated the said land. This could be the proof of the meeting of the Village Assembly and Village Council justifying the same. In the absence of such evidence proof cannot be abridged by PW2 as well as exhibits P1 and P2 which in the interpretation of Ms. Mboya of which I also subscribe to, are mere papers without any legal force.

In the circumstances, it is my settled opinion that, the appellant was duty bound to call the people from the Kamana Village in order to justifiably testify in favour of the appellant that truly it allocated the suit land to the appellant. This requirement can be grasped from the decision of the Court of Appeal in the case of **Tanzania Railways Corporation (TRC) versus GPB Limited,** Civil appeal No. 218 of 2020 in which the Court was confronted with the situation akin to this one and had the following observation:

> *"Our close scrutiny of the evidence of witnesses before the trial court and submission of parties in Court, revealed that in order to completely and exhaustively resolve the dispute between the parties a lot more*

information was needed not from the appellant or the respondent, but the official land authority that granted title to the respondent."

With the absence of those conditions enumerated above, the strength of the case on the part of the appellant remains a sham and no legal justification. Those points alone suffice to dispose of this appeal in favour of the respondent. For the foregoing, this appeal lacks merit and it is hereby dismissed with costs.

It is accordingly ordered.

DATED at **ARUSHA** this 16th day of November 2022.

J.C. TIGANGA

JUDGE