IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

LAND APPEAL NO. 01 OF 2022

(Arising from the decision of The District Land and Housing Tribunal for Morogoro, in Land Application No. 202 of 2016)

DANIEL GILBERT.....APPELLANT

VERSUS

HASHIMU SHABANI.....RESPONDENT

JUDGMENT

30th November, 2022

CHABA, J.

This appeal has a long and checkered history. It has been in court for a period of 24 years now. Before me, the appellant, Daniel Gilbert is appealing against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro in Land Application No. 202 of 2016 (the DHLT) where it ruled in favour of the respondent, Hashimu Shabani.

The historical background which led to this appeal as gathered from the lower Tribunals records is as follows: The disputes between the parties over ownership of parcel of land started way back in 1999. As result, the Respondent, Hashimu Shabani instituted Shauri la Madai No. 216 of 1999 at Morogoro Urban Primary Court against the Appellant, Daniel Gilbert claiming

ownership of the disputed parcel of land, but he lost, and the appellant was declared the lawful owner. The victory of the appellant was followed by a series of civil and criminal cases between the parties including Civil Appeal No. 15 of 2000 which stemmed from Shauri la Madai Na. 216 of 1999. Though I tried as much as I could, to trace and obtain the copy of the judgment pronounced in Civil Appeal No. 15 of 2000, but my efforts ended in vain. However, on perusing the court records, I came across with the judgment of the Urban Primary Court in Shauri la Jinai Na. 164 of 2015 wherein the court observed that the plot or parcel of land in dispute in Shauri la Jinai No. 164 of 2015 which was concluded on the 20/01/2016 was different from the disputed parcel of land in Shauri No. 216 of 1999 which resulted to Civil Appeal No. 15 of 2000. Further, the Primary Court stated that if the complainant, Daniel Gilbert believed that he is the lawful owner of the land in dispute, he must channel his complaint before a proper forum preferably, the DLHT which is vested with appropriate jurisdiction to adjudicate land matters with a view to determine the issue of ownership.

Moreover, it is apparent on court record that, the appellant, Daniel Gilbert was unhappy with the decision of the Urban Primary Court in Criminal Case No. 164 of 2015, and therefore he appealed to the District Court of Morogoro, at Morogoro in Criminal Appeal No. 08 of 2016. The District Court of Morogoro at page 4 advised parties to file their dispute at proper tribunal in order to determine who is the true owner of the disputed parcel of land.

Adhering to the advice given by the District Court, the respondent herein filed a land matter against the appellant herein at Mwembesongo Ward Tribunal, registered as Shauri Na. 01 of 2016 and he was declared the rightful owner of the disputed land. Dissatisfied, the appellant herein appealed to the DLHT through Land Appeal No. 54 of 2016 where his appeal was allowed, but the DLHT ordered that the matter had to be tried de-novo before it, hence Land Application No. 202 of 2016. The record reveals further that, upon hearing the Application No. 202 of 2016 the Chairperson of DLHT for Morogoro, at Morogoro concluded on 14/06/2019 that since at the material time he was in dilemma to rule out, then had no other option other than referring the matter to the High Court of Tanzania, Land Division at Dar Es Salaam for further directions and neither party was declared to be lawful owner of the disputed land.

Aggrieved, the appellant, Gilbert Daniel preferred an appeal before this Court - Land Division, at Dar Es Salaam through Land Appeal No. 170 of 2019 wherein the appellant's appeal was allowed on technical ground that there was no proper judgment on record. Thus, this Court (Makani, J.) ordered that the case file be returned to the DLHT for Morogoro with instruction (direction) to the Chairman to properly evaluate the evidence on records and compose a judgement reflecting a clear, concise, correct reasoning and verdict. For ease of reference, I propose to quote the relevant part as hereunder: -

"In shauri la Jinai No. 164/2015 when the same court was referring the matter to the competent land Tribunals/Courts,

the court observed among other things that the land in dispute is different from disputed land in shauri la madai No. 216/1999 (refer last paragraph of the 7th page of judgement in shauri la Jinai No. 164/2015). The said decision was confirmed by Morogoro District Court in Criminal Appeal No. 08/2016. As per records, the decision of Morogoro District Court was not appealed against, therefore its decision remains valid, therefore there is no valid decision involving the same parties same subject matter by the courts of competent jurisdiction as alleged by appellant. The court thus had jurisdiction to entertain matter".

As noted above, the DLHT complied with the order of this Court by composing a fresh judgment in Application No. 202 of 2016 and delivered it on 15/12/2021 wherein the respondent, Hashimu Shabani was declared as the lawful owner of the disputed land, hence the present appeal.

Aggrieved by the decision of DLHT, the appellant appealed before this court based on the following five (5) grounds: -

1. *That, the trial Chairman erred in law and fact for adjudicating the matter which was already adjudicated and came to conclusion in 1999 in the Civil Case No. 216 of 1999 tried at Morogoro Primary Court;*

2. *That, the trial Chairman erred in law and fact for holding a wrong position that the appellant herein was invited by the respondent in suit area since 1972;*
3. *That, the trial Chairman erred in law and fact for saying that all previous court decisions in relating to the suit area were reversed hence no legal decision exist despite the fact that the decision in the civil case No. 216 of 1999 tried at Morogoro primary courts was not overturned to-date;*
4. *That, the trial Chairman erred in law and fact for awarding victory to the respondent who failed to tender any documentary evidence to substantiate his claims against appellant herein;*
5. *That, the trial Chairman erred in law and fact for failure to evaluate the strong evidence adduced by the appellant together with his documentary during the trial of the matter.*

In response, the respondent filed reply to memorandum of appeal wherein he disputed all the grounds of appeal and stated that there is no any record which shows that the issue of ownership of land was determined to its finality.

With the leave of the Court, the appeal was disposed of by way of written submissions. Both parties had no legal representation, appellant personally drew and filed his written submission, equally; the respondent also filed his reply to written submission.

The appellant in his written submission argued grounds 1 and 3 jointly and grounds 4 and 5 jointly and abandoned the 2nd ground of appeal.

Submitting in support of the 1st and 3rd grounds of appeal, the appellant contended that this case which touches the subject matter, which is also the subject matter to this appeal, has been already adjudicated and it was concluded in 2000. He stressed that the Chairperson erred both in fact and law by entertaining Land Case No. 202 of 2016 whereas the respondent in the year 1999 filed a case against the appellant at Morogoro Urban Primary Court, registered as Civil Case No. 216 of 1999 and the subject matter was the same (land matter).

He further contended that on 24/02/2000 the trial Primary Court ruled in favour of the appellant herein and the respondent herein has never appealed against such decision. He went on submitting that the Chairperson misdirected himself when he stated that the previous decision was reversed something which is not true because the respondent herein failed to tender any documentary exhibit or evidence showing that the decision of Civil Case No. 216 of 1999 was reversed or otherwise by the higher Courts as shown at p. 7 of the typed judgment of the trial Tribunal.

He highlighted further that the act of the respondent to file a fresh suit before the trial Tribunal while having in mind that the matter had been decided, that was against the provision of section 9 of the Civil Procedure Code [Cap. 33

R. E, 2019]. He said, since Land Case No. 202 of 2016 is directly and substantially in issue with the former suit, namely, Civil Case No. 216 of 1999 which involved same parties who are litigating under the same title, in law the Chairperson was barred by the principles of res-judicata because the former suit was finally determined in 2000.

To buttress his argument, the appellant cited the case of **QUALITY GROUP LIMITED V. TANZANIA BUILDING AGENCY,** CIVIL APPLICATION NO. 186 of 2016, CAT DSM (Unreported) and **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED V. INDEPENDENT POWER TANZANIA LTD AND TWO OTHERS (2000) T.L.R 324.**

As regards to the 4th and 5th grounds, the appellant averred that the respondent who firstly instituted the matter before the trial tribunal was duty bound to prove his case, and not the appellant. He said, the burden of proof lies upon him. He submitted that the Chairperson erred in law by shifting the burden of proof to the appellant (respondent at the trial Tribunal). He referred this court to the provision of section 110 (1) and (2) of the Evidence Act [Cap. 6 R. E, 2019] to fortify his contention. He argued further that, in proving ownership of the land in dispute the respondent herein (applicant at the trial Tribunal) failed to tender any document to substantiate and prove his claim. He cited the case of **MANAGER, NBC TARIME V. ENOCK M. CHACHA (1993) TLR 228** insisting that the principle he who alleges must prove, is part of our jurisprudent. It was his argument that, since the respondent failed to meet the

standards and requirement of the law, the court should intervene and allow his appeal.

He further attacked the Chairman by contending that he failed to evaluate the evidence tendered by both parties and pronounced the impugned judgement. Again, he blamed the trial Tribunal by ignoring to consider in evidence his building permit even though he could not directly prove ownership of the disputed parcel of land, but in one way or another was able to assist the trial Tribunal reaching fair and proper decision.

He concluded by arguing that, since the decision of the trial Tribunal was based on weaker and insufficient evidence adduced by the respondent and left behind the strong evidence adduced by the appellant backed up by documentary evidence, it is obvious that the trial tribunal failed to evaluate the evidence tendered before it. He therefore, prayed the court to allow his appeal and set aside the whole judgement and decree of the trial Tribunal with costs.

Responding to the 1st and 3rd grounds of appeal, the respondent asserted that the case registered as Civil Case No. 216 of 1999 was followed by Civil Appeal No. 15 of 2000. When the latter Court (District Court) considered many issues that were brought before it, ultimately on its own motion *(suo motu)* it ruled and directed the parties to file a land matter at Mwembesongo Ward Tribunal with a view to determining first the rightful owner of the disputed land. Thus, in view of the above, the respondent submitted that this case is neither

time barred nor against the principle of res-judicata. He further submitted that the cases cited by the appellant in his submission are distinguishable.

Coming to the 4th and 5th grounds, the respondent underscored that these grounds are unfounded because the judgement of the trial tribunal dated 15th December, 2021 clearly states that after hearing both parties, as well as visiting the disputed parcel of land and considering the neighbors' testimony the trial Tribunal satisfied itself that the respondent (applicant at trial) succeeded to prove his case to the required standards and in actual fact the disputed land did belong to him.

Based on the above submission, the respondent prayed this court to dismiss the appeal for lacking merits, sustain the decision reached by the trial Tribunal and the costs of this appeal be borne by the respondent.

To rejoin, the appellant reiterated what he submitted in chief and added that the respondent is trying to mislead the Court in Civil Appeal No. 15 of 2000 because the District Court did not rule out that parties should file their dispute in proper forum so as to determine first the issue of ownership, rather the appellate Court (District Court) upheld the decision of the Morogoro Urban Primary Court in Civil Case No. 216 of 1999. This is why in 2015 the appellant sued the respondent for criminal trespass based on the decision of the Urban Primary Court at Morogoro where the respondent was found guilty and sentenced.

Having summarized and considered the rival submissions advanced by the two sides in support of their stances in the light of the DLHT records and the series of decisions made by lower courts / tribunals in respect of the disputed parcel of land, I proceed to determine the grounds of appeals presented by the appellant.

Staring with the 1st and 3rd grounds of appeal, the major complaint raised by the appellant is that the trial Tribunal entertained the matter while it was barred from sitting on the same matter between the same parties.

After perusing and scanned the records, no doubt that respondent, Hashim Shabani instituted Shauri la Madai No. 216 of 1999 at Morogoro Urban Primary Court against the appellant, Daniel Gilbert claiming ownership of the disputed parcel of land, but he lost, and the appellant was declared the lawful owner. As hinted above, the victory of the appellant was followed by a series of Civil and Criminal Cases between the parties including Civil Appeal No. 15 of 2000 which stemmed from Shauri la Madai Na. 216 of 1999, Criminal Case No. 164 of 2015, Criminal Appeal No. 30 of 2015, Criminal Appeal No. 08 of 2016, Shauri Na. 01 of 2016 , Application No. 202 of 2016, Land Appeal No. 54 of 2016, Land Appeal No. 170 of 2019 and Land Appeal 1 of 2022 which is now before me.

Going through the court records and numerous decisions pronounced prior to institution of Land Application No. 202 of 2016 which is subject of this appeal,

I found that the disputes over ownership of the parcel of land between the parties was not determined by the proper forum. The decisions pronounced by the District Court of Morogoro in Criminal Appeal No. 30 of 2015 and Criminal Appeal No. 08 of 2016 indicates that parties were advised to refer their disputes to the land tribunals.

This Court while addressing the disputes between the appellant and the respondent in Land Appeal No. 170 of 2019 held *inter-alia* that: -

> *"As per records, the decision of Morogoro District Court was not appealed against, therefore its decision remains valid, therefore there is no valid decision involving the same parties same subject matter by the courts of competent jurisdiction as alleged by appellant".*

Further, it has to be noted that, if at all the disputes between the parties had been finally determined in 2000 as contended by the appellant, appellant was duty bound to raise it before the Ward Tribunal and the DHLT as well, and prove the same by submitting all relevant documents which proves that the dispute was determined to its finality. Even the decision of this Court (Makani, J.) in Land Appeal No. 170 of 2019 as hinted above stated that there was no valid decision involving the same parties and same subject matter dealt by the courts of competent jurisdiction as claimed by appellant. Suffice to say, there is no any evidence which indicate that the disputes were delt and determined

by the proper forum vested with power to determine the land disputes prior to institution of Land Application No. 202 of 2016 which led to this appeal. That being the case, this court find that the appellant's claim is just an afterthought.

From the above explanations, it is my considered view that, the trial Tribunal was not barred by the principle of resjudicata as alleged by the appellant. The DHLT did adjudicate Land Application No. 202 of 2016 in accordance with law following directives of this Court in Land Appeal No. 170 of 2019. As gleaned from the series of Civil and Criminal Cases, I am not convinced by the appellant's submission that the Chairman of the DLHT was barred from sitting on Application No. 202 of 2016 for a reason that Land Application No. 202 of 2016 is directly and substantially in issue with the former suit, namely, Civil Case No. 216 of 1999. Basing on the reasons I have amply stated above, I find that the 1st and 3rd ground have no merits. (**See:** Section 3 (1) and (2) of the Land Disputes Courts Act [Cap. 216 R. E, 2019], section 167 of the Land Act [Cap. 113 R. E, 2019], and Section 62 of the Village Land Act [Cap. 114 R. E, 2019]).

As regards to the 4th and 5th grounds, I had an ample time to objectively scrutinize the entire record of the DLHT. It is apparent on records that, at first, the appellant was invited by the respondent into his area where he stayed therein for a while. Later, the respondent left to Mkuyuni area and left the respondent together with his mother within the disputed area. When he came

back, he found the appellant herein had already built a house and encroached his parcel of land without his consent.

I learnt that the pieces of evidence relied on by the DLHT to establish ownership of the land in dispute, is a piece of evidence which indicates that the respondent purchased the disputed parcel of land from Juma Mohamed. His testimony shows that the size of the disputed parcel of land is measured 20 steps long in both sides and 10 steps wide in both sides. He also erected therein a house and left a bare parcel of land which later, was encroached by the appellant while he was away.

Moreover, the testimony of the respondent's neighbors as reflected at page 6 of the trial Tribunal's Judgement, shows that Tarsisi Mawala featured as AW-II recounted that he knew the respondent as the lawful owner of the disputed parcel of land. His testimony reveals further that, the appellant purchased only one room house. Upon extending his house, he found himself occupying the area owned by the respondent. He added that, the appellant took such advantage while the respondent was away. His evidence was supported by the evidence adduced by Ahmad Iddi Itigilo featured as AW-III at the Ward Land Tribunal. He testified that the disputed land did belong to the respondent. He further stated that, the appellant bought a small parcel of land from one Binti Rashid nearby the respondent's parcel of land. However, while developing his small area the appellant extended his building and occupied a parcel of land owned by the respondent.

On the other hand, the appellant told the trial Tribunal that the disputed parcel of land is his property, and he obtained a building permit from Morogoro Municipal Council. He further asserted that he also possesses a site plan of the area and have all necessary documents.

With the above pieces of evidence, however, the question that arises here is whether the appellant did manage to adduce evidence and successfully proved on the required standard that he is a lawful owner of the land in dispute.

As correctly submitted by the appellant, the standard of proof in civil cases is on the balance of probabilities as provided by the law under section 110 (1) and (2) of the CPC (Supra). This position was expounded in the case of **HEMEDI SAIDI v. MOHAMEDI MBILU [1984] TLR 113** wherein it was held inter-alia that: -

> *"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".*

The Court went on stating that: -

> *"In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence".*

Applying the above principle of law in this appeal, there is no doubt that the land in dispute was un-surveyed area as reflected at page 7 of the impugned

decision. Although the appellant claimed that he bought the disputed land from Stamili Rajabu, he didn't tender in evidence any documentary exhibits indicating that he bought the same from Stamili Rajabu or even producing a Certificate of ownership proving that he is a lawful owner of the disputed land. It has to be noted that, the building permit tendered by the appellant at the trial Tribunal cannot prove ownership of the parcel of land. On this facet, it is my considered view that, the appellant didn't manage to prove ownership of the disputed parcel of land.

On the Contrary, the respondent did manage to prove ownership, based on preponderance of probabilities. The appellant tendered the sale agreement which indicate that he purchased the disputed land from Juma Mohamed. This piece of evidence was backed up by the testimonies of neighbors who testified that the disputed land did belong to the respondent and the area purchased by the appellant was small compared to the area he possesses right now.

Basing on the forgoing reasons, I have no flicker of doubt that the respondent did manage to prove his case on balance of probability that he is the rightful owner of the parcel of land in dispute.

It is worth noting that, it is very rare for the appellate court to interfere with the decision of the trial Tribunal unless if there is misdirection or non-direction of evidence apparent on the face of the records. It follows therefore that, the evidence adduced by the respondent's sides is heavier than that of

the appellant and it is too hard in the circumstance of this appeal to depart from the decision of the trial Tribunal.

For reasons stated herein above, the decision of the District Land and Housing Tribunal for Morogoro at Morogoro, is hereby sustained, and the appellant's appeal is dismissed with costs**. I so order.**

DATED at **MOROGORO** this 30th day of November, 2022.

M. J. CHABA

JUDGE

30/11/2022.