

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

(LAND DIVISION)

LAND CASE APPEAL NO. 35 OF 2023

*(Originating from the Judgment of the District Land and Housing Tribunal for Songea
at Songea in Land Application No. 110 of 2017)*

REMIGIUS NGUNJA 1ST APPELLANT

FABIAN MPONJI 2ND APPELLANT

VERSUS

BENEDICT LUAMBANO

MABALANGANYA RESPONDENT

JUDGMENT

Date of Last Order: 10/10/2023

Date of Judgment: 29/11/2023

U. E. Madeha, J.

This appeal originates from the decision of the District Land and Housing Tribunal for Songea in Land Application No. 110 of 2017, in which the Respondent sued the Appellants for trespass in a farm measuring sixty acres located at Mkongotema Village within Madaba District Council. After full trial, the Respondent was declared to be the lawful owner of the disputed land and the Appellants were declared to be trespassers and ordered vacate on the disputed land. The Appellants

were also ordered to pay to the Respondent TZS. 3,000,000.00 as general damages.

Briefly, the evidence given by both parties before the trial Tribunal are simply as follows: The Respondent who was the Applicant testified that, in 1997 his father, one Alex Alphonse Mabalanganya Luambano gave him sixty acres of land located at Luvengi Village, Mkongotema Ward within Madaba District Council. He further told the trial Tribunal that he has been in use of the land for twenty-five years and he planted various trees, banana and other fruit trees.

The Respondent testified further that the Appellants, who were the Respondents before the trial Tribunal are well known to him and in 2016 they invaded in his farm by cutting trees for timber and removing the bee hives which were put by him in his farm. He testified that, his land is bordered by the land of Yunus Ngwembe in the Southern side, Illolinus Mponji in Northern Side, Luvengi River in the Western side and Elenzian Nyoni in the Eastern side. He prayed for trial Tribunal to declare him to be the lawful owner of the disputed land and the Appellant be ordered to pay the damages for the destructions made in the land in dispute.

PW2 one, Zabinus Lazaro Nyoni who was the only witness called by the Respondent, told the trial Tribunal that the Respondent is the owner of the land in dispute and he was given by his grandfather who was known by the name of Alphonse. The Respondent has been using the disputed land for agricultural activities and in 2015 the Respondents invaded the disputed land by cutting trees and growing crops. He further told the trial Tribunal that the disputed land is bordered by his land, Kinemo, Elenziana Nyoni and Fabiana Mponji.

On the other hand, the Appellants gave their testimony under oath and they managed to call two their witnesses to collaborate what they testified. The first Appellant (Remigius Beatus Ngunja), told the trial Tribunal that, he is the owner of the land in dispute and he was given by his uncle, one Fabian Mponji (the second Appellant) in 1995. He has been in use of the disputed land and he has planted various crops including avocado tree in fifteen acres. He added that he don't know the exactly size of the disputed but it is bordered by the land of Kinemo family in the Eastern side, Luvengi river in the Western side, Fabian Mponji in the Northern side and Salvius Ngonyani in the Sourthern side.

On his party, the second Appellant told the trial Tribunal that, the disputed land was his property and he was given by his father and he

was the one who gave it to the first Appellant in 1995. He added that there was no written agreement made when he gave the land to the first Appellant.

DW3 (Merkitidis Julius Kinemo) told the trial Tribunal that the first and the second Appellants are his neighbours and they he knows that the second Appellant gave the disputed land to first Appellant in 1995 and he is still using it. He further told the Tribunal that he witnessed the process of handing over the land and it has the size of forty acres.

DW4 (Leo Beatus Ngunja) told the trial Tribunal that, the first and second Appellants are his brother and uncle respectively. He added that the disputed land is the property of the first Appellant and he was given by the second Appellant who is their uncle. He testified further that, he was present when the second Respondent gave the land to the first Appellant and the land was not measured.

Basing on the above evidence, the trial Tribunal found the Respondent has proved his claim and he was declared to be the lawful owner. The Appellants were declared to be invaders and they were ordered to leave vacant possession on the disputed land. Also, the Appellants were ordered to pay damages of TZS. 3,000,000.00 to the Respondent. Dissatisfied with the decision and orders given by the trial

Tribunal, the Appellants knocked the doors of this Court for appeal. in their memorandum of appeal, they have the following grounds of complaints;

- i. *That, the trial Tribunal Chairperson erred in law and facts by failing to determine the issue in dispute by misapprehending the facts of the disputed land.*
- ii. *That, the trial Tribunal Chairperson erred in law and facts by failing to evaluate or assess the evidence on record hence reached into a wrong decision.*
- iii. *That, the trial Tribunal Chairperson erred in law and facts by holding that the Respondent is a lawful owner of the land in dispute basin on weak, contradictory and unreliable evidence given by the Respondent without considering the strong evidence given by the Appellants.*
- iv. *That, the trial Tribunal erred in law and facts by declaring the Respondent to be the lawful owner of the disputed land while the application filed was incompetent for failure to describe the suit property as described by law and that led to un-executable decree.*
- v. *That, the trial Tribunal erred in law and facts by declaring the Respondent is the lawful owner while he has no locus stand.*
- vi. *That, the Trial Tribunal erred in law and facts by wrongly applying the principle of proving the case on balance of probability by relying on the purported weakness of the Appellants evidence while the Respondent failed to prove his claim.*

vii. *That, the trial Tribunal erred in law in entertaining the dispute which was time barred without looking the evidence of the Appellants who used the land for long time without any interference.*

At the hearing of this appeal, the Appellants enjoyed the legal services of Mr. Marko Kisakali the learned counsel, whereas Mr. Dickson Ndunguru, learned counsel represented the Respondent.

Submitting in support of the appeal, Mr. Kisakali proposed to argue on the first and four grounds of appeal together, the second, third and sixth jointly, then the fifth and lastly the seventh ground of appeal. On the first and fourth grounds of appeal, he argued that, the Respondent who was the applicant before the trial Tribunal failed to identify and make a clear description of the land in dispute for the orders to be granted to be certain and executable. He went on submitting that the location of the land was disputed by the Appellants in their written statement of defence but the Respondent never troubled himself to prove such a fact which was disputed by the other party. He was of the view that since the Respondent failed to give a clear description of the trial Tribunal, the application was to be strike out since it was incompetent by contradicting *Regulation 3 (2) (b) of the Land Disputes*

Court Act (the District Land and Housing Tribunal) Regulations, 2003
(GN. No. 174 of 2003).

He emphasised that, since the disputed land is an un-surveyed land; specifications of boundaries and features surrounding the disputed land was important for the purposes of identifying the disputed land from other pieces of land bordering it. He added that, the parties in this appeal mentioned different people bordering the disputed land and in order to clear the difference the Respondent was to describe the boundaries of the disputed land in his application and failure to so makes the application incompetent, the decision, orders and the decree of the trial Tribunal un-executable since the application was vague. Thus, he prayed for this appeal to be allowed and the judgement, proceedings and decree of the trial Tribunal be nullified and the Respondent be ordered to pay the cost of this appeal.

On the second, third and sixth grounds of appeal, the Appellants' counsel submitted that it is the trite law that, in civil cases a party whose evidence is stronger than the other must win. But looking at the evidence adduced before the trial Tribunal, it is clear that the Appellants' evidence is stronger, credible, realistic and consistent compared to that adduced by the Respondent who was declared to be the lawful owner.

He added that the Respondent's testimony was full of contradiction since in his pleading he pleaded that his land is measuring sixty acres and it was invaded by the Appellants in the 2016, but such facts contradicted his sworn testimony that the Appellants invaded the disputed land in 2015. He contended that, such contradiction contravened the principles of pleadings since evidence given by the parties does not support the pleaded facts. To cement his stance, he invited this Court to be guided by the decision made in the case of **James Funke Ngwagilo v. Attorney General** [2004] T.L.R 161 and **National Insurance Corporation vs. Sekulu Contruction Company** [1986] TLR157, in which the Court laid a principle that parties are bound by their pleadings and in their testimonies, they are not allowed to depart from what they pleaded. Mr. Kisakali went on submitting that, although such contradictions were not addressed by the trial Tribunal but they must not be ignored since they go to the root of the case.

He averred further that; the Appellants started using the disputed land in 1995 but the Respondent was given the disputed land in 1997 when the land was already in the hands of the first Appellant. He submitted further that, to prove his claim of ownership over the disputed land, the Respondent was to call his relatives but he failed and his

failure to call the relatives calls for the attention of this Court to draw an inference that if they could be called, they would have testified contrary to his wishes.

Mr. Kisakali contended further that, another contradiction is on the boundaries of the disputed land, where the Respondent told the trial Tribunal that the land in dispute is bordered by Yunus Ngwembe, Illolinus Mponji, Luvengi River and Elenzian Nyoni but his witness has a different story that the disputed land is bordered by him, Kinemo, Elenziana Nyoni and Fabiana Mponji and they contradicted each other.

In such circumstance, he argued that the Respondent failed to discharge his burden of proof to the required standard and the trial Tribunal relied on the weakness of the evidence given by the Appellants while the Respondent failed to prove her claims. Expounding his argument, he referred to the provision of section 110 of the *Evidence Act* (Cap. 6. R. E. 2022) and the decision of the Court of Appeal of Tanzania in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported), in which the Court stated that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and the burden of proof is not diluted on account of the weakness of the opposite party's

case. He invited this Court to re – evaluate the entire evidence adduced before the trial Tribunal and make its own findings.

On the fifth ground of appeal, Mr. Kisakali submitted that in any case, locus stand is a very crucial point in a sense that a suing person has to prove that he has locus stand. He averred that, from the testimony given by PW2 that the Respondent is the administrator of the estate of his father and no evidence such as letters of administration was given to prove that the Respondent was the administrator, his locus stand is at issue. He added that, from the evidence given by PW2, it is clear that the Respondent was neither given the disputed land by either his father nor his grandfather but he is the administrator of the estate and there is no shifting of ownership. He went on submitting that PW2 told the trial Tribunal that the land in dispute is the clan land and the Respondent was just using it. Finally, he prayed for the decision of the trial Tribunal to be reversed since the land in dispute is not the property of the Respondent.

Arguing on the seventh ground of appeal, he contended that from the joint written statement of defence and the evidence given by the Appellants which was not challenged by the Respondent it is clear that the Appellants were in use of the land prior to the date the Respondent

was given by his father. He added that, since the Appellant's testimony were not challenged, that mean the Respondent accepted what was testified by the Appellants and their witnesses to be the truth and since the Appellants stated that they have been in use of the disputed land for more than twelve years without interferences, the Respondent claim over the disputed land was barred at the time he instituted his suit. Finally, he prayed for this Court to allow this appeal by setting aside the decision of the trial Tribunal which declared the Respondent to be the lawful owner of the disputed land and order the Appellants to be the lawful owner of the disputed land.

On the contrary Mr. Dickson Ndunguru resisted the Appeal. He argued that the first and fourth grounds of appeal are baseless on the account of the reasons, failure to describe the land in dispute sufficiently in the pleading would be fatal if the Respondent would have failed to describe the land sufficiently in his testimony. To cement his stance he invited this Court to be guided by the decision made by the Court of Appeal of Tanzania in the case of **Martin Fredric Rajab v. Ilemela Municipal Council and Another**, Civil appeal No. 197 of 2019 (unreported).

He added that since the Respondent in his sworn testimony described the disputed land sufficiently and his testimony was not challenged by the Appellants during cross-examination and in their joint written statement of defence the Appellants never raised such concern, it implies that the suit land details were known and acknowledge by the parties as it was decided by the Court of Appeal of Tanzania in the case of **Lupembe Village Government Ikolo Ward Kyela District and another v. Bethlehemu Mwandafwa and Five Other**, Civil Appeal No. 377 of 2020 (unreported), that failure to dispute the description of the property at the trial Court means the parties has accepted and agreed on the available description. Lastly, he prayed for this Court to disregard this ground of appeal since there was no any prejudice occurred to the parties.

On the first and fourth grounds of appeal, on the issue of failure to describe properly the disputed land and misapprehension of the disputed land, he submitted that, the disputed land is located at Mkongotema Village, Luvengi area within Madaba District Council as it can be seen from the pleadings and the testimonies given by the Respondent and his witness. He contended that, those grounds of appeal are baseless.

Arguing on the second, third and sixth grounds of appeal on account of evaluation, burden of proof and assessment of the parties' evidence adduced before the trial Tribunal, he contended that the third ground of appeal is baseless on account that the trial Tribunals judgment reveals that the evidence was properly examined and the trial Tribunal found the Respondent's evidence to be credible and heavier than that given by the Appellants. He averred that the inconsistencies claimed by the Appellants counsel are minor and they not worth of paying consideration on them since the testimonies given by the Appellants were also contradictory enough to form the basis of appeal.

On the fifth ground of appeal, he submitted that it is baseless since it was not one of the issues for determination before the trial Tribunal, thus, it cannot be claimed at appellate stage. He contended that, parties are bound by their pleadings and the Respondent claimed the land to be his and not the property of his father or grandfather.

On the seventh ground of appeal that the application was time barred since the Appellants were in use of the land in dispute for more than twelve years, he averred that this ground of appeal has no merit because it is clear that the Respondent was given the disputed land by

his father in 1997 and before that year the land was used by his father. Finally, he prayed for this Court to dismissed this appeal with cost.

In his rejoinder submission, Mr. Kisakali submitted that; having gone through the Respondent's submissions it is clear that he conceded that the Respondent failed to describe the disputed land, an irregularity which is fatal as it was stated by the Court of Appeal of Tanzania in the case of **Martin Fredrick Rajab v. Ilemela Municipal Council Another**, Civil Appeal No 197 of 2019, that the description of the suit property is important. He went on submitting that in this appeal, the Respondent failed to describe the disputed land and his testimony is full of inconsistency and contradiction between him and his witness (PW2). He contended that, under such circumstance it is difficult to determine whether the disputed land was the same to what was claimed by the Respondent before the trial Tribunal and makes the decree to be un-executable. He added that the case of **Lupembe Village Government Ikolo Ward Kyela District and another v. Bethlehemu Mwandafwa and Five Other** (supra) which was cited by the Respondent's counsel is different to the present appeal since in this appeal the Appellants in their joint written statement of defence they disputed the location of the suit land.

Concerning the second, third and sixth ground of appeal, he insisted on what was submitted in the submission in chief and prayed for this Court being the first Appellate Court, to re-evaluate the evidence adduced by both parties before the trial Tribunal.

On the fifth ground of appeal, he submitted that the issue of locus stand is of point of law and it can be raised at any stage. Rejoining on the seventh ground of appeal, he insisted that the Respondent filed his application out of time since when he filed the suit land was already in the hands of the first Appellant.

Mr. Kisakali prayed for the decision of the trial Tribunal to be set aside and this appeal be allowed with costs, the Appellants be declared the lawful owner of the disputed land or in alternative the proceedings, decision and orders of the trial Tribunal be quashed and this Court order for retrial before another competent Chairperson.

As far as I am concerned, in my response to the grounds of appeal, I will consolidate all the grounds of appeal since they are on the issue of evidence. It is important to note that, DW3, who was one of the Appellants' witnesses, told the trial Tribunal that, the disputed land belonged to a man named Fabian and the first and second Appellants were labourers on that particular farm. But DW3 failed to tell the full

name of Fabian making his testimony incomplete and the evidence to be ambiguous.

The Appellants' counsel, has argued that the evidences given by the Respondent and his witness are full of contradictions. On my party, having gone through the original records, I find the evidences given by both parties are indefinite. They are not clear enough to enable the trial Tribunal to decide the matter justly.

For instance, the first Appellant told the trial Tribunal that the disputed land was given to him by the second Appellant, but there is no sufficient evidence to prove such allegations. On the basis of the trial Tribunal's record, the available evidence does not prove that there was transfer of the land in dispute from the first Appellant to the second Appellant.

On his party, the Respondent testified that he was given the disputed land by his father in 1997 and in 2013, he started keeping bees and he put beehives on it. After two years, he discovered that the bee hive has been stolen and they were nowhere to be seen.

Thus, from the evidence on record, I find three people claims ownership or the disputed land. The first is the Respondent (DW1) who

claims that he was given the disputed land in 1997. The second person is the first Appellant and the third is Fabian who was mentioned by PW3.

In such circumstances, I agree with the Appellant's learned counsel that the available evidence vague, insufficiency, contradicting and cannot prove the issue of ownership. The evidence given by the parties are weak not enough to decide who is the owner of the land in dispute.

The trial Tribunal declared the Respondent to be the lawful owner of the disputed land but there was no enough evidence to prove ownership. It is my view that, in this matter there are some material evidences missing to enable the trial Tribunal to decide who is the lawful owner.

I allow this appeal and set aside the decisions and orders of the trial Tribunal except for orders made during the hearing of PW2. I order for the trial Tribunal to proceed recording the evidence which the parties may wish to adduce. The hearing must resume from where PW2 ended in 26th February, 2018. Each party to bear its own costs. It is so ordered.

DATE and DELIVERED at **SONGEA** this 29th day of November, 2023.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal stroke extending to the right.

U. E. MADEHA

JUDGE

29/11/2023

COURT: Judgment is delivered in the presence of the Appellants' counsel and the Respondent. Right of appeal explained.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal stroke extending to the right.

U. E. MADEHA

JUDGE

29/11/2023