

TANZANIA / JUDGMENT

JUDGMENT ESTA MASUMBUKO VS LONDA MWAKALUKWA final

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LAND APPEAL NO. 16864 OF 2024 CASE REFERENCE NO.
202407151000016864 (From Application No. 20 of 2023 of the District Land and Housing Tribunal
for Mbarali) ESTA MASUMBUKO APPELLANT VERSUS
LONDA MWAKALUKWA RESPONDENT

JUDGMENT

14th January & 11th March, 2025. NONGWA, J In the District Land Housing Tribunal for Mbarali, the appellant filed Application No. 20 of 2023 against the respondent for trespass of five-foot steps over the land located at Mwaluma village Ihahi ward within Mbarali (the disputed land). Upon hearing parties, the tribunal dismissed the claim. Briefly, the appellant's case stated was allocated the disputed land by Chief Kahemele in 1984 and embarked to develop it but the respondent invaded it in 2022 by entering five-foot steps and built a house therein. She was supported by PW2(Bai Paulo Mwaipungu) and PW3(Emmanuel Yeremias Mwilongo) on how she acquired the disputed 1 land. On the other hand, the respondent stated the disputed land was initially owned by his brother who died in 1988 and since then has been living in such land. He was supported by DW2(Sophia Salum Mapembe) and DW3 (Seth Kilamile). The tribunal found the appellant had failed to prove her case and dismissed the application. Aggrieved has filed memorandum of appeal on five grounds one, that the tribunal erred in law and fact to decide in favour of the respondent without considering that respondent's adduced evidence did not support his written statement of defence. Two, the tribunal erred in law and fact in its evaluation of evidence, the appellant failed to trace his ownership and how he came into possession of the suit land. Three, that the Honourable District Land and Housing Tribunal erred in law and fact to hold in favour of the Respondent basing on contradictory evidence on the part of the Respondent. Four, that the Honourable District Land and Housing Tribunal erred in law and fact to hold in favour of the Respondent despite the strongest evidence of the Appellant compared to that of the Respondent which was very weak. Five, that the Honourable District Land and Housing Tribunal mislead itself as far as proof in civil cases as compared to Criminal Cases. 2 When the appeal came for hearing parties appeared in person, without legal representation. Owing to the circumstances, they prayed and were ordered to argue the appeal by filing written submission. In her

submission, the appellant sought leave under Order XXXIX Rule 2 of the Civil Procedure Code Cap 33 to argue the new ground, on failure to visit locus in quo. She said although it is not mandatory to be conducted owing to the nature of the dispute, it was necessary to verify physical features which were mentioned. He supported the stance with the case of Nizar M.H La Dak v. Gulamalx Fazal Janmohamed

[1980] T.L.R 29 and Avit Thadeus Massawe vs Isdory Assega, Civil Appeal No. 6 of 2017 [2018] TZCA 357 (14 December 2018; TanzLII) Ground one and three were argued conjointly, she submitted that the respondent failed to prove that he acquired the disputed land from his brother be it by inheritance or as gift inter vivo. Further that per evidence of DW2 and DW3 the land was the property of Edson. She added their evidence contradicted while DW2 said the respondent said started to live in 1988 DW3 said it was in 1989. Arguing ground two, the appellant submitted that she proved how she acquired the land from chief Kahemele as per answers found in her cross - examination. She stated the tribunal failed to analyse evidence of 3 PW2 and PW3 who supported her on how he acquired the disputed land. On holding that she did not call members of allocating committee, the appellant submitted that were not necessary witnesses after PW2 and PW3 has testified how she acquired the land. Based on the decision in Ndizu Ngasa vs Masisa Nagasha [1999] TLR 202 prayed the court to re-evaluate and re-consider evidence afresh. In ground four and five, the appellant stated burden of proof under section 110 and 112 of the Evidence Act lies on a person who alleged anything in his favour and that the standard is on balance of probabilities. That in civil suit burden of proof is not static and referred to the case of Henry Hidaya Ilanga vs Manyama Manyoka [1961] EA 705. The appellant repeated arguments in ground two on evidence which proved her claim. She added that the respondent did not produce letter of administration of any other evidence on how the disputed land passed to him from his brother. Further that the respondent's evidence contradicted with his written statement of defence, in that while he pleaded was allocated by the local government, in his evidence said got it from his brother. He submitted parties are bound by their pleadings, any evidence which is at variance with one's pleading must be ignored. She supported this 4 argument with the case of Barclays Bank T. Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019) [2020] TZCA 1875 (26 November 2020; TanzLII). Finally prayed the appeal to be allowed with costs. In rebuttal and on the new ground added in the submission, the respondent submitted that owing to the circumstance of the case, locus in quo was not necessary as every thing was resolved through evidence adduced. Replying to ground one and three, he submitted that evidence of the appellant was contrary to his pleading in that while she pleaded was allocated by village, he testified was by chief Kahemile. He added that on his part there were no such contradiction as submitted by the appellant. In ground two, the respondent stated he proved how he came into possession of the disputed land and that he started to live in 1988 and was supported by DW2 and DW3. On failure to call members of allocating committee he countered that the same were necessary witnesses but were never called by the appellant. The respondent argued that the appellant failed to prove her case per section 110(1) of 5 the

Evidence Act and supported the position with the case of Barelia Karangirangi vs Asteria Nyalambwa, Civil Appeal No. 237 of 2015)

[2019] TZCA 51 (1 April 2019; TanzLII). In respect of grounds four and five, it was countered by the respondent that evidence he adduced and that of DW2 and DW3 tilts in his favour compared to that of the appellant. He said PW3 did not testify on how he was involved in the allocation of the disputed land to the appellant. Basically, the respondent was in favour of the findings and reasoning of the chairman. From the submissions of parties and grounds of appeal they revolve on evaluation of evidence. Thus, the five grounds of appeal raised are consolidated to one issue, whether the appellant proved her claim. I will start with the point of locus in quo, raised in written submission. As rightly submitted it is not mandatory to conduct visit of locus in quo and in essence it is discouraged to avoid the judicial officer becoming witnesses to the case. Locus in quo can only be done in exceptional circumstance where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence, to eliminate minor discrepancies as regards the physical condition of the land in dispute; and there is dispute in evidence of the parties as to the identity of the land in dispute. Visit of locus in quo is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims and by large the same witnesses who testified are those who will be required to verify their evidence during locus in quo. In the case of Avit Thadeus Massawe vs Isdory Assega (supra) the court quoted with approval the decision of the Nigerian High Court of Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which it was stated; 'The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries.' At hand the appellant stated the respondent trespassed five foot- steps, that is not featuring in her evidence, however I am sure parties are aware of the land in dispute that is why were able to marshal 7 evidence for and against. From evidence of both sides, they testified on ownership of the disputed land and there is no indication that there was conflicting evidence on boundaries or any physical feature. I thus reject the complaint. On whether the appellant proved his claim, the law under section 110(1) of the Evidence Act [Cap 6 R: E 2022] is that he who alleges must prove his allegation to succeed in a suit. A party who has the burden of proof must discharge his burden on balance of probabilities in terms of section 3(2) of the Evidence Act regardless of the weakness in the case of his opponent. This means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved. See African Banking Corporation T. Ltd vs T-Better Holdings Co. Ltd, Civil Appeal No. 207 of 2017 [2024] TZCA 165 (6 March 2024; TanzLII). Equally, it is also the law that in civil cases burden of proof is not static, will shift from one party to the other depending upon applicable legal presumptions and the weight of the evidence

adduced. See *Yusufu Selemani Kimaro vs Administrative General & Others*, Civil Appeal No. 266 of 2020 [2022] TZCA 306 (24 May 2022; TanzLII). 8 In civil suit pleadings constitute the foundation of a case, hence it is time honoured principle of law that that parties are bound by their own pleadings and they cannot be allowed to raise a different matter without amendments being properly made. That, no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves. In *Maria Amandus Kavishe vs Norah Waziri Mzeru & Another*, Civil Appeal No. 365 of 2019 [2023] TZCA 31 (20 February 2023; TanzLII). In the application the appellant pleaded the respondent had trespassed five-foot step. However, there was no any evidence to that effect. Her evidence and that of the witnesses focused on the whole land occupied by the respondent. On how she came into possession, pleaded was by allocation by the committee of chief Kahemele but in the entire evidence, the appellant did not mention members of the chief committee who allocated her the disputed land. Further she did not even mention neighbours as featuring in the application. PW2 said that the appellant was allocated in 1985 but his evidence is doubtful because at that time he was only eight years of age and did not explain at that age how was he involved in the allocation. 9 Further the appellant pleaded the respondent invaded in 2022, when put to cross - examination by the respondent, she said the respondent invaded in 2002. The same was testified by PW3 who said in October 2002 was told by the appellant that his plot has been invaded. On those circumstance, the dispute arose in 2002 and not 2022 as pleaded in the application. In the entire submission the appellant submitted the respondent did not prove his case. This is erroneous because burden of proof does not shift to the opposite party until the plaintiff has discharged his duty. Expounding the rule of burden of proof in *Paulina Samson Ndawanya vs Theresia Thomas Madaha*, Civil Appeal No. 45 of 2017 [2018] TZCA 218 (12 October 2018; TanzLII) the court quoted a passage passage from Sarkar's *Laws of Evidence*, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis in which the author explains; '... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged 10 the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....' Emphasize added. From the above, it need be emphasized that burden of proof was upon the appellant who set the law in motion and could not shift to the respondent to prove the negative. Swaying of burden of proof applies only when one has discharged his duty of proving the allegation, that is to say if no defence is given, the plaintiff will win the case. As I have tried to discuss, the appellant's case had holes which any properly constituted court or tribunal could not decide in her favour. Therefore, even if the case of the respondent had any weakness, he cannot be blamed for had nothing to prove before the tribunal. It could only be relevant if the

appellant had proved her case to the standard required. From the pleadings and evidence of the appellant, she failed to prove that was allocated the land by Chief Kahemele, in fact, it contradicted with PW2 and PW3 who said was by the government. Further neighbours she mentioned in the application to be Coster Kahemele, Madeto Nselu and Mzee Daud were not called. Also, when 11 the respondent invaded the disputed land was at variance with what she pleaded. Following from the above, I find no reason to fault the decision of the tribunal that the appellant failed to discharge burden of proof which was upon him. In the premises the appeal is devoid of merits however, owing to the circumstance of this matter I order no costs on the appellant, each party to bear own cost. V.M. NONGWA JUDGE 11/3/2025 Dated and Delivered this 11th March 2025 in presence of the appellant and Respondent in persons. V.M. NONGWA JUDGE 12

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