

TANZANIA / JUDGMENT

JUDGMENT JAILOS MWALUKASA MWANJENYI VS AYUBU MWAKATOB

COURT
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LAND APPEAL NO. 17003 OF 2024 CASE REFERENCE NO.
202407161000017003 (Originating from Land Application No. 42 of 2023 in the District Land and
Housing Tribunal for Mbeya) between JAILOS MWALUKASA MWANJENYI
APPELLANT VERSUS AYUBU MWAKATOB RESPONDENT

JUDGMENT

7th November & 11th December 2024 NONGWA, J. In Application No. 42 of 2023 of the District Land and Housing Tribunal for Mbeya (the DLHT), the appellant sued the respondent for encroachment of his land measuring length 14.5 metre and width 11.5 metre located at Mapinduzi hamlet, Ikhoho Village within Mbeya district in Mbeya region (disputed land). He alleged that he got the same through allocation by village government during villagization in 1974 and has been using it until 2019 when the respondent encroached. He thus prayed the tribunal to declare him the legal owner of the disputed land, that the respondent was the 1 trespasser, permanent injunction against the respondent and his agents, compensation for disturbances and costs of the suit. The respondent in his written statement of defence denied the claim, he alleged that he was the owner by way of purchase from one Selela Sawimo since 2011. He prayed the application to be dismissed with costs. The appellant appointed Mwalukasa Jailos Mwalukasa to be his attorney in prosecuting and defending the application. The appellant summoned three witnesses Mwalukasa Jailos Mwalukasa (PW1), Charles Jungwa Mkoma (PW2) and Veronika Jailos Mwalukasa (PW3). On his part, the respondent testified as (DW1) and called Ally Nasson Mwampina (DW2), Emmanuel Nyanganga Mwaswale (DW3) and Hasewa Nasson (DW4). No documentary evidence was tendered by either party. The DLHT also conducted visit of locus in quo. In its judgment the tribunal found the appellant had failed to prove his claim against the respondent. Consequently, dismissed the application with costs. The appellant is aggrieved by the above decision and filed memorandum of appeal on four grounds; one, that DLHT erred in law and fact in declaring the respondent is the owner of the disputed land, 2 while failed to prove the same; two, that the DLHT Chairman erred in law and facts when delivered its judgment in favour of the respondent who had contradictory evidence; three, that the DLHT erred in law and facts in favour of the respondent without opinions arrived by the second Tribunal assessor who heard the

matter from the beginning, and four, that the trial Tribunal Chairman erred in law and facts for failure to consider the appellant's evidence proved the same that the disputed land belongs to the appellant. On the hearing date parties appeared in persons, with no legal representation, they prayed and were granted leave to argue the appeal by filing written submission. They complied with the scheduling order. Submitting in the first ground, that the respondent failed to prove the case, the appellant stated, the respondent in his WSD did not say he bought the disputed land in 2011. That the respondent said there was sale agreement done before village leader, but he did not summon the seller, village leaders and tender the sale agreement. In the second ground on contradiction of respondent's evidence, the appellant argued that evidence of the respondent was contradictory in that DW1 said he bought for 100,000/= while DW2 said 300,000/=. Another contradiction was that while DW2 said the appellant denied to 3 witness the sale, DW4 said the appellant was not present. He cited the case of Emmanuel Abrahamu Nanyaro vs Peniel Ole Saitabau

[1987] TLR 47 in support of the preposition. Submitting in ground three on participation of assessors, the appellant stated the tribunal is dully constituted when held by a chairman and two assessors who are required to give opinion at the end as per section 23(1) of the Land Disputes Courts Act [Cap 216 R: E 2019] "the LDCA". He argued while proceedings show two assessors heard the matter only one assessor gave opinion. That opinion of Mussa was lacking while he participated from the beginning to the end. In respect of ground four on failure to consider appellant's evidence, it was submitted evidence was clear that was given by the Ikhoho village in 1974 and has used for more than 45 years without disturbance. He said he was supported by PW2 and PW3 but the chairman disregarded such evidence. He added being a neighbour was not called to show boundaries during sale of the land to the respondent. Responding to the above submission, the respondent stated the appellant did not discharge his burden of prove and it never shift to the respondent. He cited the case of Paulina Samson Ndawanya vs Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 [2018] TZCA 4 218 (12 October 2018; TanzLII). He contended the appellant was the complainant and is the one who was required to prove his case. So, it was wrong for him to blame him, the respondent submitted. The case of Habiba Ahmadi Nangulukuta & Others vs Hassani Ausi Mchopa & Another, Civil Appeal No. 10 of 2022 [2022] TZCA 156 (29 March 2022; TanzLII) was referred to support the argument. On contradiction in ground two, it was the respondent's reply that different in price was minor and did not change the truth that he bought from Selela. He referred to the case of Mohamed Said Matula vs Republic [1995] TLR 3 on duty of the court when addressing contradiction in evidence. On participation of one of the assessors, it was submitted that one assessor did not hear the defence evidence and visit of locus in quo. He argued participation of assessors is found in handwritten proceedings and what is appearing in typed proceeding is typical errors. Further submission was that the law allows to continue with assessor(s) present under section 23(3) of the LDCA and the same to give opinion. On submission that the chairman did not consider appellant evidence, the respondent replied that the appellant failed to call any member of Ikhoho village who

participated in allocating the land to him. 5 He added PW2 said the land belonged to Selela which means it was not allocated to the appellant as pleaded. He concluded the appellant failed to prove the case and the chairman was right in his decision. Having considered rival submission issues for my determination are one; whether the tribunal was dully constituted (ground 3); and two, whether the appellant proved his case to the standard required (ground 1, 2 and 4). Starting with issue of composition of the DLHT, under section 23 of the LDCA the tribunal is dully constituted when composed of the chairman and at least two assessors. It provides; '(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

- (2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.
- (3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman 6 and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.' Hearing of the case has to commence with at least two assessors and in case of absence of one or more assessors, hearing may continue with the remaining assessor(s). This was emphasized in the case of Jasmine Ayoub Ally Mosha vs Ramadhani Ally Mosha, Civil Appeal No. 197 of 2020 [2020] TZCA 27 (26 February 2020; TanzLII) when the court stated that; 'Our observation in this, is this that, there should be appointed assessors once and for all to participate in trial of a certain case whose number should not be less than two. Equally, are the appointed assessors if, one or some of them do not attend, then the chairman and the remaining assessor or assessors may continue and conclude proceedings in terms of the provisions of section 23 (3) of Cap.216.' [Emphasize supplied.] The appellant has submitted that hearing started with two assessors to its completion but one of assessor did not give his opinion. The argument was strongly denied by the respondent, he stated from defence to end only one assessor participated as reflected in handwritten proceedings. 7 Record shows assessors were Sarah and Mussa who participated in the beginning of the case. I examined the typed proceedings and the handwritten proceedings and found that the two records differ as to the participation of assessors. The handwritten proceedings show that Mussa did not hear the defence evidence on 12/10/2023, the date of visiting the locus in quo and the date of giving opinion. While the typed proceedings show Musa was present on 12/10/2023 and 13/3/2023 during defence hearing and locus in quo. Further that only one assessor was given opportunity to ask questions and prepare opinion. It is settled that in case of conflict between handwritten and typed proceedings, the handwritten proceedings take precedent aid is the one which is original. I am persuaded by the holding of my learned brother Mbagwa, J in the case of Shadrack Ambakisye vs The Republic, Criminal Appeal No. 63 of 2021 [2021] TZHC 9472 (27 December 2021; TanzLII) where he observed inter alia that; 'In fact, there is variance of between typed proceedings and handwritten proceedings as to pregnancy of PW1, it is a settled practice and indeed cardinal principle of practice that

whenever there is a dispute or impeachment of court record, it is handwritten proceedings that must be resorted to ascertain the veracity of the court document to meet the ends of justice.’ [Emphasize added.] 8 [See also; Godson Gwasan vs Norberth Malihela, Land Appeal No. 9 of 2023 [2023] TZHC 19759 (28 July 2023; TanzLII). Therefore, since the handwritten proceedings are the one which is considered original and typed proceeding originate from handwritten. Since the handwritten proceedings show only one assessor continued with hearing on the dates defence hearing, date of visiting the locus in quo, and the date of giving opinion. I therefore hold that hearing of the case continued with one assessor as permitted under section 23(3) of the LDCA. Thus, ground 3 is dismissed. Coming to whether the appellant proved his case. 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 under section 3(2) of the Evidence Act. 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). At hand, the appellant is the one who filed application in the tribunal, thus burden of proof was upon him. In his application pleaded and 9 testified that the land was allocated to him by the Ikhoho village in 1974 during villagization and it was in 2019 when the respondent encroached. PW2 and PW3 supported the appellant to the effect that they have seen him use until in 2019 when the dispute arose with the respondent. In his submission the appellant attacked evidence of the respondent that did not plead that he bought the disputed land in 2011 and failed to call the seller, village leader and tender sale agreement. He contended that he proved the case to the standard required and was supported by PW2 and PW3. By way of emphasize in civil suit and this case the burden of proof was on the plaintiff rather than the respondent, unless and until the former had discharged his, the credibility of the respondent was irrelevant. It is also trite that, a party who has the burden of proof must discharge his burden on balance of probabilities regardless of the weakness in the case of his opponent. In Paulina Samson Ndawavya (supra), the Court drew inspiration from the distinguished authors of commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis and extracted an excerpt to the effect that, 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 a negative is incapable of proof. 10 The respondent having denied that the disputed land did not belong to the appellant, it was upon the appellant to prove his claim of ownership and not upon the party who denies it for a negative is incapable of proof. My scrutiny of pleadings and evidence in record reveals that the case of the appellant was not watertight. Evidence of the appellant was at variance with his pleadings on boundaries of the disputed land. It is settled that parties are bound by their pleadings. In Makori Wassaga vs Joshua Mwaikambo & Another [1987] TLR 88 the Court said; ‘A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case.’ I understand, boundaries of the disputed land were not at issue in the tribunal, however there was significant doubts

in the whole evidence. One, variation of pleading and evidence on neighbours, under paragraph 3 of the application boundaries were mentioned to be the applicant on East and South, Nasson on North, respondent on West direction. In his evidence said Charles Jungwa and Selela Sawino on West, Mkoma Saja on East and Nasson on North. Only Nasson was retained as neighbour during appellant's testimony. Two, evidence of neighbours, appellant in his evidence mentioned four neighbours but only one (PW2) testified in his support. Most 11 neighbours DW2 and DW4 testified for the respondent. Evidence of respondent's witnesses not disputed by the appellant was that initially the disputed land was owned by Sawimo Selela. In my view when it comes to unregistered land which must be described in form of measurement, specific location including boundaries and neighbours, evidence of neighbours on ownership of the land is of utmost importance depending on circumstances of the case. As the appellant failed to summon witnesses he referred in his evidence, instead they testified for the respondent it spoiled the appellant's case. Three, evidence during locus in quo, when parties were identifying their respective land, it is shown beacons is demarcating them, it appears the disputed land was outside the land of the appellant. Neither in his pleading nor evidence the appellant indicated his land extends beyond the beacons identified. I am persuaded by the holding in the case of Hemedi Saidi vs Mohamedi Mbilu [1984 TLR 113 in which the court observed 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.' In the circumstance after considering evidence in record particularly of neighbours who are familiar with the suit land, the appellant failed to 12 prove that the respondent encroached to his land and it cannot be said he discharged burden of proof under section 110 of the Evidence Act which was upon him. Equally the complaints that the respondent did not call seller, village leader and tender sale agreement is misconceived. Thus, I find nothing to fault the decision reached by the chairman. In the event the appeal stands dismissed with costs. It is so ordered. V.M. NONGWA JUDGE 11/12/2024 Dated and Delivered at Mbeya this 11th December 2024 in presence of Appellant and Respondent. V.M. NONGWA JUDGE 13

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