

TANZANIA / JUDGMENT

LAND APPEAL NO

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TANZLIIDECIDED
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© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA (CORAM: HON. AUGUSTINE RWIZILE) LAND APPEAL NO. 50 OF 2023 JONATHAN NKUREGE COMPLAINANT I APPELLANT/ APPLICANT/ PLAINTIFF VERSUS SERIKALI YA KIJILI KIGENDEKA & ANOTHER RESPONDENT/ DEFENDANT

JUDGMENT

Fly Notes

Facts

Ratio Decidendi 16th of July 2024 Hon. RWIZILE.: The appellant filed a land dispute before the tribunal claiming from the defendants, a piece of land estimated to be 5 acres, situated at Kigendeka village Kifura Busagara area of Kibondo District. It was alleged that the land in dispute was acquired in 1970s was taken away from him by the 1st defendant and allocated it to the 2nd defendant. Before the tribunal, the appellant was heard *ex parte*. It was found that, he had no sufficient evidence to prove his case. It was therefore dismissed. Aggrieved by the decision of the same, he has appealed to this court on the following grounds of appeal; -

1. That, the trial tribunal erred in law and fact by deciding the matter basing on the reason that the applicant was the only witness to prove the ownership.
2. That, the trial tribunal erred in law and fact by giving the decision in favour of the respondent while the evidence of the appellant was uncontroverted by any party.
3. That, the trial tribunal erred in law and fact when it decided that the appellant did not prove the ownership of the land in dispute while the appellant discharged its duty on the required standard.
4. That, the trial tribunal erred in law and fact by deciding the matter while the opinion of the assessors was not read before the parties before the judgment were composed. Page. 1 Hon. AUGUSTINE RWIZILE At the hearing the appellant was represented by Ms. Victoria Nyembea learned advocate. Nickson Tenges learned state attorney appeared for the 1st respondent, while Mr. Kalimunda Yugalila learned advocate was for the 2nd respondent. On the first ground, Ms. Nyembea for the appellant submitted that, section 143 of the Evidence

Act and the case of Tukwaga Sabwiifa vs Upendo Mwasengo, Misc. land Appeal No. 11 of 2021, support the argument that it was wrong for tribunal to decide the dispute basing on number of witnesses to prove the case, instead of weight and credibility of evidence by the parties. She submitted, on the second ground that, the evidence of the appellant was not disputed. Hence, the appellant was to be declared a lawful owner of the suit land. Coming to the third ground, it was her submission that, the appellant used the land in dispute since 1973 to 2014, something which was not challenged by neither the 1st respondent, nor the 2nd respondent. This, according to her, is the proof that the appellant is the real owner of the land in dispute. Lastly, on the fourth ground, she argued that the opinions of the members of the tribunal were not read to the parties before delivering the judgment. She added, it is against the law. She finally asked, the appeal be allowed, and the decisions of the tribunal be set aside. Opposing the appeal, Mr. Tenges, for the 1st respondent, submitted jointly the 1st, 2nd and 3rd grounds, that it is not known specifically when the appellant acquired the land. He added, there are two contradictory statements on that aspect. First, the appellant was given a land in 1972 and started using it in 1973, and the second aspect is that he was in the use of that land in 1983 with his grandmother until when she died. He said, it is not known, when the land was acquired by the appellant because in 1973, he was 13 years old and was not, by law allowed to own land. In terms of section 110 of the Evidence Act, and the case of Bakari Mhando swanga vs Mzee Mohamed Shelukindo, and others, Civil Appeal No. 389 of 2019, the appellant is cast with the onus of proving the allegations, it was argued. It was further argued that the person who allocated the land to the appellant had no such powers as per section 142 of The Local Government (District Authorities) Act [Cap. 287 R.E 2019] and section 8(1)(5) of the Village Land Act. On the fourth ground, it was submitted that the opinions of the members of the tribunal were given in compliance to regulation 19(2) of the Land disputes Courts (District land and Housing Tribunal) GN 174 of 2003 and section 23(3) of Land disputes Courts Act, [Cap. 216 R.E 2019], as shown on page 3 of the judgement. The opinion of members is reflected, he added. Mr. Kalimunda for the 2nd respondent, submitted that, according to section 110 of the Evidence Act, the onus of proving the case is on the one who alleges. His reference was on the cases of Hemed Said vs "Iohamed Ndilu

[1984] TLR 113 and Salum Matheyo vs Mohamed Matheo [1987] TLR 111. He added, ownership of land in the village ought to be proved with customary right of occupancy. The appellant's evidence, he made it clear, did not show the customary right of occupancy. He did not bring witnesses to prove he used it as held in KCB Bank (T) Ltd vs SUNLON General building contractors Ltd and others, Commercial case No. 73 of 2013 page 15. Page.2 Hon. AUGUSTINE RWIZILE Submitting on the 2nd ground, it was his brief point that, the evidence was challenged by presentation of written statement of defence by the 2nd defendant who stated how he got that land through due process. On the 3rd ground, it was his submission that the standard of proof was not met, his evidence was not sufficient to prove the case as held in the case of Ziad Mohamed vs Aneth Joachim, Civil case No. 21 of 2020. His evidence was married by contradictions. Lastly, on the fourth ground, it was his

argument that under section 24 of Land court Disputes Court Act. The members have to give their opinion as per the cited regulation and the case of Mirko Kisanza vs Mariam Ndababisa, Land appeal No. 28 of 2022. The learned counsel added that, the opinions of members were read, and it is therefore plain, it was justified, as reflected on page 3 of the judgement. He prayed, the appeal be dismissed with costs In a rejoinder, it was submitted that the contradictions noted were minor. She added, when the appellant was allocated the land, it was prior to the enactment of the Land Act. Having heard submissions of the parties and gone through the records, I have to commence with the first ground. It is styled as if, the case was decided based on the number of witnesses. The extract below shows what was in mind of the chairperson when deciding the case, on page 4 of the judgement "Mleta maombi katika shuri hili angeweza kuwaleta watu/majirani alokuwa anapakana nao kwenye eneo hilo ili kuthibitisha madai yake kwamba yeye ni mmiliki wa eneo hilo au walioshiriki kumgawia eneo hilo kama wapo. Haiwezekani Kijiji kizima kisiwe na mtu wa ziada anayejua juu ya umiliki wa mleta maombi kwenye eneo hilo zaidi yake yeye mwenyewe." It was the view of the chairperson that the appellant may have brought witnesses such as neighbours to support his claims. It was added that, it is not possible for the whole village to have no other person who would support his claim. In my considered opinion, I do not think, the tribunal said, absence of many witnesses was an issue. The tribunal was not satisfied that the evidence tendered by him was enough to justify his claim. In other words, the tribunal wanted at least supporting evidence to clear the doubt on ownership. I do not think, therefore section 143 of the Evidence Act, which provides no particular number of witnesses needed in proving a case was at issue. The tribunal discredited his evidence as to have not proved the case. I find no merit in this ground of appeal Before determining the succeeding two grounds, let me first go by the 4th ground. It is about reading the opinion of members. To be able to appreciate this, the record shows, the application was heard exparte. The respondents did not deliberately call evidence to defend their case. On 28th June 2023, the judgement was pronounced exparte. The members had on 8th June filed their opinions with tribunal. The record therefore is plain that the opinions of the members were read before the judgement was pronounced. It is explicit therefore that the opinions of members were read. This ground as well has no merit. Page. 3 Hon. AUGUSTINE RWIZILE The rest of the grounds will be determined jointly, since they are almost alike. It is the appellant who filed the dispute claiming ownership of the land in dispute. He said, land was allocated to his grandmother, it was in 1972, and she started using it in 1973. In civil cases, the burden of proof lies on the party who alleges anything in his favour. See the case of Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama, (CAT), Civil Appeal No. 305 of 2020 on page 12 "It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. . . ." On the same trend, also the court will consider among the parties who has credible evidence compared to the other. See Agatha Mshote v. Edson Emmanuel & 10 Others, (CAT), Civil Appeal No. 121 of 2019, on page 19; "Thus, in civil cases, the standard of proof is on balance of probabilities which is to the effect that the Court will sustain such evidence which is more credible than the other on a particular fact

to be proved. " The appellant testified that he was a legal owner of the land in dispute which he acquired by way of allocation. This was not disputed, because the 1st respondent did not file a written statement to rebut it. I have perused the record, it shows, the 2nd respondent filed a written statement of defence where she alleged to have acquired the land lawfully. But there is no evidence that was tendered to prove how she followed legal procedures to acquire a better title. As shown, it is the appellant who claimed the ownership over a disputed land since 1973. Not until 2014, when the land was trespassed into by the 2nd respondent, at the expenses of the 1st respondent. All that time, it was said, with his grandmother and after she died, land was being subdued and fruits enjoyed peacefully by the appellant. Under the circumstances, the evidence available from the record, is that of the appellant. But the tribunal was clear that there was no sufficient evidence to prove the appellant's ownership of the land. While the record shows, when he attempted to tender the letter approving his ownership from the village, it was rejected on reason that he was not the maker. I think, that was not right. The document can be tendered by any person who has at one point in time been in possession of the document. The appellant having a letter from the village council he was the right person to have it tendered since he was the owner of it. From the foregoing, there is no evidence to the effect that the land was owned by the village. It therefore had no title to pass to the 2nd respondent. As a result, the village has no capacity to allocate the land to the 2nd respondent. The first respondent has submitted that a ten-cell leader has no powers to allocate land to any person, in terms of section 8 (1)(5) of the Village Land Act. He also challenging the acquisition of the land by the appellant that it was not known whether it was in 1972 or 1983. I do not think, this is proper, because, the appellant said, his grandmother was allocated land in the 1970s and the village council confirmed land belonged to him. I do not think, this point may affect the quality of the evidence of the appellant. It is my finding that the two grounds have merit. The appellant's case was strongly made and proved he is the rightful owner of the land in dispute. The appeal therefore succeeds. The decision of the tribunal is hereby quashed and set aside. Costs to follow the event. Page. 4 Hon. AUGUSTINE RWIZILE Dated at KIGOMA ZONE this 16th of July 2024. AUGUSTINE RWIZILE JUDGE OF THE HIGH COURT Page. 5 Hon. AUGUSTINE RWIZILE

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