

TANZANIA / JUDGMENT

Judg Land appeal No 16485 HUSSEIN

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUB-REGISTRY OF MANYARA
AT BABATI LAND APPEAL NO. 16485 OF 2024 (Arising from Land Application No. 49 of 2022 at
Kite to District Land and Housing Tribunal) HUSENI FARAJI.....
APPELLANT VERSUS PENDO JOEL NGAITI.....RESPONDENT

JUDGMENT

10th October & 19th December, 2024 Kahyoza, J. Huseni Faraji was adjudged a trespasser in a land disputed Pendo Joel Ngaiti instituted against him in the District Land and Housing Tribunal (the tribunal). Aggrieved, Huseni Faraji (Hussein) appealed against the decree of the tribunal contending that; one, the tribunal erred to entertain a time barred application; two, the tribunal failed to apply the principal of adverse possession in favour of the appellant; three, the tribunal failed to evaluate the evidence; and lastly, the tribunal neglected to consider the appellant's evidence. The issues arising from the grounds of appeal and bearing in mind the fact that this Court being the first appellate court has duty to evaluate the evidence are- 1

1. Was the application time barred?
2. Did the appellant occupy the disputed land for 20 years, adversary or otherwise?
3. Did the tribunal evaluate evidence properly?
4. Was the appellant's evidence ignored? A brief background is that; Pendo sued Hussein claim 1.5 acres of land (the suit land) contending that she acquired from her father inter vivos. Pendo's father acquired it from his brother. She claimed that her father occupied the suit land from 2000 up to 2015 peaceful and from 2015, she took possession of the dispute land. Hussein refute the allegations that Pendo was the lawful owner of the suit land. In his reply to the Application, Hussein, pleaded that he lawfully and customarily owned the disputed land. Pendo (Pw1) deposed in support of her application that Hussein invaded her land measuring 1.5 acres located in Engusero village. She contended that she obtained the suit land from her father. She contended that she has been using the land from 2000 and that the respondent invaded her land in 2022. Hussein cross-examined Pendo who replied to his question that the land belongs to them as there are graves of their grand parents. 2 Yona Stanely (Pw2) the hamlet chairperson of Engusero "B" supported Pendo's evidence that the disputed land belonged to her. He contended that she got the said land from her parents in

2000. He added that Hussein invaded Pendo's land in 2022. After receiving the complaints, Yona Stanley (Pw2) summoned Hussein who refused to him to heed to the summons. Hussein deposed that the suit land belonged to his father. He contended that his late father owned 106 acres of land in 1980. His father gave land to the government and retained six acres of land which he is occupying to date. He deposed further that, he was the owner of the suit land after his father passed on. Hussein summoned Haji Mohamed (Dw2) who deposed that the respondent inherited the suit land from his father in

1992. He stated that Hussein's father's land had 106 acres and he gave 100 acres to the government and remained with 6 acres. Haji Mohamed (Dw2) testified that he did not know the disputed land. The tribunal had an opportunity to visit the locus in quo to identify the respondent's 6 acres land and 1.5 acres of land, which were subject of dispute. The tribunal noted that there were graves of Pendo's departed relatives to the suit land. The respondent deposed that he allowed Pendo's 3 family members to bury their loved ones to they land. The tribunal read the notes or facts collected from visiting the locus in quo to the parties. The tribunal found that Pendo, the applicant's evidence was heavier than that of Huissen, the respondent and decided in her favour. Given the above background, I will determine the issues raised. During the hearing of appeal, the appellant and the respondent, relied on the memorandum of appeal and the reply to their memorandum of appeal, respectively. They did not argue the appeal at length. Was the application time bared? The appellant complained the tribunal erred to entertain an application which was time bared. He did not provide explanation to this complaint. The respondent opposed the complaint. The appellant did not raise the issue that the application was time barred before the tribunal. All in all, I resolved to consider it as it was a preliminary point of law which may be raised at any stage of the proceedings even at appeal stage. I reviewed the record and found that Pendo and her witness, Yona Stanly (Pw2) deposed that the respondent invaded the suit land in 2022. Hussein did not cross-examine Pendo (Pw1) or Yona Stanley 4 (Pw2) regarding the issue. Failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence and it will be difficult to suggest that the evidence should be rejected. As held in *Paulina Samson Ndawavya vs Theresia Thomasi Madaha* (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019). The Court of Appeal emphasized that its position in *Shadrack Balinago vs. Fikiri Mohamed @ Hamza*, Tanzania National Roads Agency (TANROADS) and Attorney General, Civil Appeal No. 223 of 2017 (unreported) it stated that- "As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account". The appellant's failure to cross-examine implies that he accepted that he invaded the suit land in 2022 or that the dispute arose in 2022. There is no evidence that the cause of action, which is the claim for the suit land, 5 was time barred when the respondent instituted the suit before the tribunal. I find no merit in the first ground of appeal and dismiss it in its entirety. Did

the appellant occupy the disputed land for 20 years' adversary or otherwise? The appellant complained that the tribunal erred to decide in favour of the respondent, when there was evidence that the appellant acquired the suit land for more than 20 years. The respondent vehemently opposed the allegation. The undisputed evidence on record showed that the suit land has graves of the respondent's deceased relatives. Pendo (Pw1) told the tribunal that the suit land has graves and when the tribunal visited the locus in quo saw the graves as the respondent had deposed. The appellant told the tribunal that he permitted the respondent's family to bury the body(ies) of their beloved ones to the suit land. It is unfortunate that the appellant gave the explanation when the tribunal paid a visit to the locus in quo and not when he was testifying. Thus, it was not proved that the appellant permitted the respondent's family to burry bodies of their deceased relatives. It was an afterthought. 6 In addition, the respondent and her witness proved that the appellant invaded the suit land in 2022 before that the respondent had a quiet enjoyment of the suit land. The appellant's witness Haji Mohamed (Dw2) apart from knowing that the appellant owned 6 acres, he told the tribunal during his evidence in chief, that he did not know the suit land. The appellant's witness's evidence had no value in relation to the suit land. His evidence cannot be relied upon to support the contention that the appellant has occupied the suit land for 20 years. I finally find the appellant did not prove the allegation that he occupied the suit land for 20 years. The fact that there are graves of respondent's departed family members establishes on the balance of probability, the respondent's claim that the suit land belonged to her father before she acquired it. The respondent's family members would not have buried their departed relatives to the land not belonging to them unless it was a public graveyard. I find no merit in the second ground of complain and dismiss it in its entirety. Did the tribunal properly consider the appellant's and analyze the evidence? 7 I will consider the appellant's complaint that the tribunal did not analyze the evidence together with the complaint that the tribunal ignored his evidence. The respondent was the applicant before the tribunal who had a duty to prove the allegation that the appellant who was the respondent invaded his suit land. He who alleges must prove. Pendo (Pw1), the appellant deposed and summoned one witness the hamlet chairperson who deposed that the suit land belonged to Pendo. The hamlet chairman, Yona (Pw2), went further and stated the boundaries of the suit land. He deposed that he summoned the appellant who refused to heed to the summons. Yona (Pw2), the hamlet chairman, was a reliable witness. Not only that but also Pendo (Pw1) told the tribunal that there were graves of her family members to suit land and the tribunal found the graves. I find Pendo (Pw1) more reliable than Hussein (Dw2). I also found the explanation Hussein (Dw2) offered regarding the presence of Pendo (Pw1)'s departed family members' graves, that he permitted them to entomb the respondent's deceased relatives, wanting and an afterthought. I had a review of Hussein's evidence that the disputed land was part of 6 acres he inherited from his father and that of his witness Haji Mohamed (Dw2). Haji Mohamed (Dw2) supported Hussein's evidence that Hussein 8 inherited 6 acres of land but he did not know the disputed land. I have already stated and I wish to repeat that Haji Mohamed (Dw2)'s testimony had no value as far as the suit land was in issue. His testimony was that- "It is the land of the respondent. He

inherited from his father in the year 1992. It had a size of 106 acres, the family gave the government 100 [acres] also last year 2022 I passed at the suit land but I do not know the land in dispute” The above testimony had no any value. I find that the tribunal was right to find that the respondent’s evidence was heavier than that of the appellant. The only issue I must state is that the respondent stated the size of her land but did not state the boundaries of the suit land. The respondent’s witness stated the boundaries of suit land while testifying. The appellant did not cross examine the witness regarding the boundaries. The parties had no quarrels regarding the disputed land’s boundaries. I am alive of the trite law that 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. (See Makori Wassaga V. Joshua Mwaikambo & Another [1987] TLR 88). I am also alive of the trite law that failure to give sufficient description of the subject matter in dispute in land disputes renders the suit incompetent, I find an 9 exception in the present case that the as Pendo described that her land has graves which the respondent does not dispute. The tribunal visited the locus in quo and saw the graves which are the land mark of the suit land. That description properly and sufficiently identified the land in dispute. Consequently, I am of the view that the respondent proved that the appellant invaded her 1.5 acres of land as she identified to the tribunal. The appellant instituted the appeal without any reasonable cause. I dismiss the appeal with costs and uphold the tribunal’s findings. I order accordingly. Dated at Babati this 19th day of December, 2024. John R. Kahyoza Judge Court: Judgment delivered in the virtual presence of the appellant and respondent. B/C. Mr. Damas (RMA) present. John R. Kahyoza Judge

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