

TANZANIA / JUDGMENT

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I' IN THE HIGH COURT OF TANZANIA AT DODOMA LAND CASE APPEAL NO 4 OF 2014 (From the Decision of the District Land and Housing Tribunal of KONDO A District. at KONDOA in Land Case No. 20 of 2012) MAULID KEBU APPELLANT VERSUS BUKULU VILLAGE COUNCIL RESPONDENT

JUDGEMENT

20/5/2016 & 4/10/2016. MOHAMED, J. This is an appeal against the decision of Ndimbo, Chairman of the District Land and Housing Tribunal for Kondoa (hereinafter "the trial Tribunal") in a dispute over ownership of two parcels of land between the appellant Maulid Kebu and the Bukulu Village Council, the respondent. It is important at the outset to have a clear appreciation of the relevant facts of the case as the decision depends thereon. The appellant claims he owns two parcels of land; the first consists of two acres which the respondent also contests ownership and wishes to build a health center thereon; the second is a one acre piece of land 1 about a kilometer away on which the respondent built a well in 2002. It is the appellant's claim he has owned, developed and been in uninterrupted occupation of both parcels of land since 1958. On the other hand, the respondent claims he acquired the suit land in 1974 during Operation Vijiji and that it was part of 10 acres reserved for Government buildings according to a 1978 map. In regard to the 1 acre piece of land, the respondent maintained it was unoccupied village land that it built a well in 2002. The appellant has the following grounds of appeal.

1. That the trial tribunal erred by disregarding the appellant has been in occupation of the suit land since 1958 and has developed it by building thereon four houses and planted trees.
2. That the trial tribunal erred in deciding for the respondent without giving adequate opportunity to the appellant to produce his evidence.
3. That, the trial tribunal erred by being biased and had recorded the appellant's witnesses' testimony in favour of the respondent.
4. That, the trial tribunal erred by relying on the respondent's weak documentary evidence of a map that is not related to the suit premises. 2 At the hearing of the appeal on 28/6/2016, the appellant was represented by Mr. Kassim Iddi Saidi vide a power of attorney whilst the respondent had the services of Mr. Makacha, leaned advocate. In amplifying the 1st ground of appeal, Mr. Saidi for the appellant, maintained the appellant has owned the two parcels of

land since 19 58 by clearing the bush and has built four houses on the two acre piece and planted permanent trees on the other one acre piece. He said the trial tribunal was biased and refused to visit the locus in quo to ascertain the truth. As regard the 2nd ground, he submitted that the trial tribunal refused to hear the testimonies of the appellant's two key witnesses to wit Baraka Maulidi Kego and Juma Kego. On the 3rd ground, Mr. Saidi submitted that the learned trial tribunal Chairman did not properly record the appellant's witnesses who had given their testimonies. He gave the example of Ramadhani Maulidi Kego who testified that his father entered on that land in 1958 but it was erroneously recorded in the proceedings that he had said his father occupied that land in 1955. And further that Ramadhani had said the area where the village government built a well was his father's property but that fact was not recorded in the trial tribunal's proceedings. 3 As for the 4th ground, Mr. Saidi submitted that the trial tribunal erred in relying on a map produced by the respondent which does not relate to the disputed land. He went on to say he had requested for any documentary evidence proving the disputed land was owned by the respondent but none was availed to the court. He urged this court to allow the appeal as the respondent had failed to prove ownership of the appellant's two parcels of land. In resisting the appeal, Mr. Makacha for the respondent, countered the 1st ground of appeal by submitting the respondent had proved his ownership of the disputed parcels of land. He said that his six witnesses to wit DW1 Isa Simbi Kumbu, DW2 Ramadhani Nuru, DW3 Shabani Juma Baimoja, DW4 Shabani Diosa Jengo, DW5 Juma Abdurahman and DW6 Mohamed Gera Nahai testified on how the land was acquired and set aside in 197 4 during Operation Vijiji for Government buildings. He added that DW4 and DW5 said the Village Government allowed a number of people to temporarily use the said land and they left voluntarily when asked to do so. He said all these witnesses testified the land was reserved for government buildings. He added that DW3, the Village Executive Officer produced a map showing the area where government buildings were to be built which was admitted as exhibit D1. 4 The learned counsel went on to submit that the appellant had three witnesses; PW 1 Kassim Iddi Said; PW2 Hussein Abdallah and PW3 Ramadhani Maulidi. Only PW1 said the appellant occupied the land in 1958. The other two could not say when the appellant entered thereon. PW2 and PW3 said they were told of the date of entrance. The counsel was of the view the respondent's evidence was more credible and that it was proper the trial tribunal Chairman disregarded PW1 's evidence of the appellant's occupation of the land in 1958 as his witnesses could not tell clearly how the land was acquired. PW1 said it was in 1958 while PW3 said it was in 1955. He concluded that the appellant and his witnesses were not telling the truth. He further submitted the land was acquired by the respondent in 1974 vide section 15(1) of the Village Land Act [Cap. 114 RE 2002]. He said the provision describes any land occupied or acquired between 1/1/1970 and 31/12/1977 either lawfully or unlawfully was validly acquired. He argued all 6 of his witnesses testified that the land was acquired in 1974. He concluded therefore, the disputed land was acquired by the respondent in 197 4 by vide the said provision. In regard to the 2nd ground of appeal, Mr. Makacha submitted that a party has the obligation to bring his witnesses and as the proceedings do no show the appellant requested and was refused by the court to bring the said witnesses, then he cannot so claim.

He 5 went on to say at the appellate stage, the court looks only at the evidence on record. And further, the appellant could have prayed to bring additional evidence on appeal. He therefore urged this court to dismiss this ground. In reply to the 3rd ground of appeal, he submitted that the learned trial Chairman properly recorded the appellant's witnesses. He said Mr. Saidi lied as he had said his second witness was Ramadhani Kebo whereas the proceedings show Hussein Abdallah was his second witness. He wondered if Mr. Saidi did not know his own witnesses how could he say the Chairman did not record the proceedings properly. Mr. Makacha also prayed this ground be dismissed. As for the 4th ground of appeal, the counsel insisted that the respondent's witnesses' testimony on the acquisition of the land in 1974 was more credible than that the appellant's evidence. He submitted the learned trial Chairman's judgment did not state he relied on the map in arriving at the decision. He stated the respondent's evidence was strong whereas the appellant's was contradictory. He went on to say that the map showed part of the village land reserved for government buildings. He countered the appellant's claim to be shown documentary evidence of the village's ownership of the land as baseless as his witnesses from DW1 to DW6 had told the trial tribunal the said well was built in 2002. Mr. Makacha 6 maintained that the evidence shows that the one acre parcel of land in dispute near the spring was unoccupied until the government built the well. He also urged the court to dismiss this ground. He finally prayed this court to dismiss the appeal, and declare the respondent as the lawful owner of the land. He further prayed this court permanently restrains the appellant and his agents. from entering the land and upholds the trial tribunal's decision with costs. Mr. Makacha also prayed this court to order the appellant to demolish his houses on the 2 acre piece of land. He said the respondent will allow the respondent to harvest and cut his trees on the other 1 acre and any further reliefs deemed by this court. In his rejoinder submissions, the appellant reiterated that he occupied the land in 1958 and that his land was not occupied or taken during Operation Vijiji 1n 197 4. He also claimed that the respondent did not produce 1n court any document evidencing ownership of the said parcels of land. He said the respondent claimed there was a decision to acquire his land made in a meeting of villagers but he did not show any minutes of such meeting. He went on to reiterate that he has been in uninterrupted occupation of that land and has built four houses on the 2 acre parcel and has planted a number of trees on the one acre one. He further argued that if it were not his property, how the respondent allowed him to effect all these developments. In regard to the one acre parcel of land, he argued the respondent trespassed onto it in 2010 when he went for treatment 7 at Dar es Salaam. He stressed why the respondent didn't take any steps to stop the appellant to develop the land until 2012? After hearing the parties' contentions and upon reviewing the trial tribunal's record, I have discerned the appellant's grounds of appeal can conveniently be consolidated and reduced into the following sole question for this court's determination: Whether the trial tribunal properly evaluated the evidence on record before it arrived at its decision. Before answering this question, I will briefly reproduce at some breadth the evidence on record to have a clear view of the relevant facts. PW1 Kassim Iddi Saidi said there were two parcels of land in dispute; the first comprised 2 acres where the appellant had built 4 houses and the other a 1 acre where the

appellant had planted permanent trees. He said the appellant cleared the bush in 1958 with the help of one Sulu and had been in uninterrupted occupation to date. He further said the dispute with the respondent arose on 14/10/2012 when the latter deposited stones on his land attempting to build a building thereon. PW2 Hussein Abdallah, the appellant's neighbor, testified the appellant occupied the 2 acre land prior to the 1960's and developed by building houses on it and has been in uninterrupted occupation to date. PW3, Ramadhani Maulidi, the 8 appellant's son aged 27 said he was born on the suit land and that his father occupied it in 1955. On the respondent's part, DW1 Issa Simbi Kumbi, in the examination in chief, said before Operation Vijiji, the 2 acre piece of land had been unoccupied and was used for grazing purposes. He added the land was still unoccupied. In regard to the 1 acre piece where the well was constructed, he said there might be documents to prove ownership by the respondent. However when cross examined, he admitted the appellant has a house on the 2 acre piece of land. As to the land at the well, he said the land was not used in any manner as no one is allowed to use that land. DW2 Ramadhani Nuru said in 1974 the disputed 2 acre parcel was unoccupied and is still vacant to date. He further testified and i quote him that: "There are document (sic) to prove that land was reserved for that purpose. There are minutes, map of the village and (sic) registration document of the village. The appellant never used that land at all before" In regard to the land at the well, he said there were people owning gardens there but the appellant was not amongst them. DW3 Shaban Juma Beimoja said he was the Village Executive officer of Bukulu Village from 2004 until 2006. He was a non-villager and returned to the village in 2008. He said that the suit land was 9 designated in 1974 as village land. He added that the map was drawn by experts from the District Authority in 1978. Shaban Dose Jengo (DW4) said he is the incumbent Chairman of Bukulu village. He went on to say that in 1974, villagers designated the disputed area for the construction of Government buildings. He further said that a Village map showed the suit land was designated for that purpose and that a number of persons to wit Mama Maulidi, Jamila Juma and Waziri Musa were allowed to use that land. He went on to say the appellant was not among the persons engaging in horticultural activities where the well was constructed. In cross examination, he responded that: HI do not have with me documentary evidence . to prove . that the land was reserved in 1974. There is a village map that will prove the land was designated" In regard to the one acre parcel of land at the well, he said there were no people using that land prior to 2002 as it was a water source. He said there are no people using the adjacent land. However in cross examination he admitted some people are engaging in horticultural activities there but when questioned by assessors, he said the appellant was not one of those engaging in horticultural activities there. The 5th witness, DWS Juma Abdullahman said he was one of the persons allowed by the village Government to use the land and had surrendered it voluntarily. He said the appellant was not using the disputed land. However, in cross examination he said: 10 "The appellant was allowed to build as people were allowed to build following the recommendations of the DC." He further said: "It is the village decision to start effectively building a health centre there. I want health services to be provided to us. There was a meeting to build a health centre. In the last 3 years a meeting was held in the Village Council. Then a Village Assembly followed.

A resolution to build a health Centre was reached" He went on to say he was allowed to use the land together with Joseph Titus, Waziri Musa and Hussein Lacha. When questions were put to him by the assessors he replied that the disputed 2 acre land was never used by the appellant at all. PW6 Mohamed Nahal was the Village Executive officer from 1993 to 1997. He was not in the village and does not know the history of the land in dispute. His only evidence of the respondent's ownership of the land was the map. When cross examined, he said the root to ownership by the respondent is a Village map showing the land in dispute was a designated area for government buildings. In cross examination he said the land belongs to the village Government but does not know who formed the village in 1974. 11 After reproducing the relevant evidence and the parties' contentions, I will earnestly consider them. But before I do so, I have to bear in mind the principle stated in *Salum Bugu V. Mariam Kibwana*, (CAT) Civil Appeal No. 29 of 1992 (unreported) that an appellate court can only interfere with a finding of fact by a trial court where the court is:- " ..satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises" Upon hearing both parties' witnesses and analyzing the evidence before it, the trial tribunal found the respondent had acquired the disputed land in 1974. According to that tribunal the finding was based by the testimonies of the respondent's six witnesses and "Exhibit D1" a map purportedly showing the appellant's parcel of land was planned for erection of Government buildings. The claim was bolstered by the provisions of section 15(1) of the Village Land Act [Cap. 114 RE 2002] which validates any legal or illegal allocation or acquisition of land during Operation Vijiji. . I will first proceed to consider the testimonies of the respondent's 6 witnesses. They all testified the two parcels of land were acquired by the village in 1974 during Operation Vijiji. Apart from the map ("Exhibit D1 "), which I shall deal with later in the course of this judgment, none of them produced in Court any document showing any minutes of the alleged decision to expropriate the disputed land by the respondent. In their examinations in chief, all of these witnesses apart from DW3 testified that the disputed parcels of land were unoccupied in 1974 and are still unoccupied to date. However when cross examined, they all changed their earlier positions and admitted the appellant was in occupation of the two acre parcel of land and had developed it by building houses thereon. In regard to the one acre piece of land, DW1, DW2, DW4, DW4 and DW6 all refuted that the appellant had occupied and developed it. In fact DW1 said that the land is not used in any manner as no one is allowed to use it. DW4 on the other hand said that land is used by villagers for horticultural activities but the appellant is not amongst them. He added that no one used either that land or adjacent to it prior to 2002. It is even bizarre that the respondent's counsel in his submissions at the appeal prayed that this court issues a demolition order for the appellant to demolish his houses on the 2 acre parcel of land and cut and remove his mature trees on the one acre parcel of land . . I am satisfied these express admissions by the respondent's witnesses and counsel support the appellant's claim of being in uninterrupted occupation of the disputed parcels of land for a considerable period of time. It was also alleged by the respondent that he allowed a number of people to temporarily use the land designated for Government buildings but the appellant was not one of them. DW4 named those allowed as Mama

Maulidi, Jamila Juma and WaziriJuma. However, DW5, Juma Abdulrahman named them as himself and Joseph Titus, Waziri, Waziri Juma and Hussein Lacha. Neither DW4 nor DWS produced any document to support their claim. But the discrepancies in names of those allowed shows they were not telling the truth and thus were unreliable witnesses. It is clear these witnesses were not credible and their testimonies were not worth their weight in ink used in writing the proceedings notwithstanding their numbers. DW3 admitted he was a non villager and was not present in 1974. His only claim of the respondent's ownership of 'the . . land . was through ' . . the map drawn in 1978 ' by experts ' from the District Authority. Thus his only relevance in this matter pertains to the map. This leads us to II Exhibit D1 ", the map. In essence it is apparent the trial tribunal was dazzled by it. As was testified by DW3, the said map was drawn in 1978 by District Authorities. It shows a general plan for Bukulu Village and possibly the disputed two acre parcel was earmarked for development of social amenities. However a map does not evidence ownership or extinguish pre existing rights. It merely shows an intention to develop in the future. This is the norm in development projects including infrastructure construction. Subsequently the land is surveyed and occupiers are compensated for any developments thereon after due valuation. 14 I need not need to belabor further on this exhibit as it is a map and it remains so. It suffices to say the 1978 map does not confer any ownership rights over the two disputed parcels of land as claimed by the respondent. I will now turn to the respondents' claim of acquiring the suit lands in 1974. I am satisfied the respondent failed to substantiate his claim of acquiring the suit land in 1974 as is discerned from his witnesses and exhibit in the above discourse. There is no substance to back up that claim apart from reliance on section 15(1) of the Village Land Act [Cap. 114 RE 2002] that reads: "An allocation of land made to a person or group of persons residing in or required to move to and reside in a village at any time between the first day of January 1970 and the thirty first day of December, 1977, whether made in pursuance of a law or contrary to or in disregard of any law, is hereby confirmed to be and to have always been a valid allocation capable of and in law giving rise to rights and . obligations in the party to whom the allocation was made extinguishing any rights and obligations vested in any person under any law which may have existed in that land prior to that allocation" This provision presupposes that a particular parcel of land was actually. acquired or occupied. However in the instant case the respondent has, as aforesaid, failed to establish he ever acquired or occupied the land in question to qualify for validation under the 15 above provision. I am satisfied the appellant has proven he has been in actual possession by his evidence which oddly was supported by the respondent's witnesses. In closing on this point, it is evident there is no cogent proof of the respondent's acquisition or occupation of the suit in 1974 or at other time. With respect, I am satisfied the learned trial tribunal Chairman misdirected himself on his finding of the respondent's acquisition in 1974. I am in agreement with the appellant's argument that the respondent's acquisition had to be substantiated by evidence such as tendering proof of minutes of any Village Government meeting that made the decision to acquire the appellant's land in 1974. None was tendered. Nor was any evidence led to the effect that the appellant was allowed to temporarily use the land. In fact the respondent's witnesses support the appellant's claim of occupation of the

suit land for a considerable period of time by admitting he has developed the suit land. Another misdirection on the part of the trial tribunal was its failure to visit the locus in quo in order to ascertain the parties contesting claims of ownership and. I am of the view it could have answered many questions pertinent to the matter before it. Had it done so, it could have made some impartial factual findings on the parties' claims. I will now briefly comment on the trial tribunal's finding that the appellant's evidence was inconsistent. With due respect, I find this finding was incorrect. PW1 said he cleared the suit land in 1958 with the help of one Suli. The trial tribunal found this was inconsistent. The question is inconsistent with what? It is clear Suli was either working for or was the appellant's agent and was therefore furthering the appellant's interests. It is nowhere said Suli had any ownership of land. PW2 said the appellant cleared the bush and occupied the 2 acre piece of land prior to the 1960's and has been in occupation since. I do not find any inconsistency with PW1's testimony of the appellant's acquisition in 1958. In turn, PW3, the appellant's son aged 27, said his father's clearance and occupation of the land was in 1955. But it is obvious he was not yet born in 1955 and thus had said as he had heard. Nevertheless this minor inconsistency should be no cause of concern as was said in *Evarist Kachembeho and Others v R* [1978] LRT 70: "Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story" After the aforesaid, I am satisfied the trial tribunal did not properly evaluate the evidence before it and consequently arrived at a wrong decision. In the final, I allow the appeal as I am satisfied the appellant has on a balance of probability established his ownership of the suit land by uninterrupted occupation and development of the suit land since 1958.

1958. I accordingly quash and set aside the trial tribunal's decision and orders. Consequently I declare that he is the lawful owner of the 2 acre parcel of land as well as the 1 acre at the well. The respondent can compensate him after valuation of his developments on the suit land. He shall have his costs. MOHAMED JUDGE 4/10/2016 The right of appeal explained. A. MOHAMED JUDGE 4/10/2016 18

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