

TANZANIA / JUDGMENT

patrick kinana vs hamis mlowea

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA DISTRICT REGISTRY AT MBEYA LAND APPEAL NO. 54 OF 2022 (Originating from the District Land and Housing Tribunal for Mbeya in application No. 248 of 2020 before T. Munzerere dated 11th May, 2022) between PATRICK KINANA.....APPELLANT
VESRSUS HAMIS MLOWEA..... RESPONDENT

JUDGMENT

Date of last order: 10th November, 2022 Date of judgment: 14h December, 2022 NGUNYALE, J. The appellant sued the respondent District Land and Housing Tribunal for Mbeya at Mbeya in application No. 248 of 2020 for invasion of the land measuring sixteen acres located at Kapunga Village. He prayed for declaration that the respondent was the trespasser, general damage to the tune of Tsh. 5,000,000, costs of the suit and any other reliefs. The respondent in his Written Statement of Defence (WSD) disputed each and every allegation of the appellant. Facts leading to the dispute was that, the appellant was the lawful owner of the suit land since 1977 and in 1993 the Matebele Village Council officially allocated to him. He alleged that he has been living in the suit land since then to date and in 2020 the respondent invaded it. he called two witnesses in support Tera Kurubay (PW2) and Philip Koeney (PW3) who were hamlet and village chairman respectively. He also tendered one documentary evidence as receipt of allocation, exhibit Pl. In defence the respondent alleged that the suit land is part of 125 acres which was allocated to him by the Matebete Village Council in 1993. He alleged that he started to use it and have built four houses in the suit land. He called Karima Atupakisye Mwinuka (DW2) who was the chairman of the allocating committee and a neighbour to the suit land and Luhende Malili (DW3) a neighbour since 2005. Upon full trial the tribunal found that the appellant failed to prove his case to the standard required in civil cases i. e on the balance of probabilities. The chairman reasoned that the respondent has been using the suit land since 1993 and called witnesses who allocated him, and neighbours to the suit land. He therefore declared the respondent the lawful owner. This decision aggrieved the appellant, he filed memorandum of appeal consisting of ten grounds of appeal namely;

1. That the chairman erred in law and fact to apply the principle of Adverse Possession in favor of the respondent without considering the fact that the appellant with his witnesses stated that the appellant has been in possession 2 since 1993 and he stated that he had been cultivating up to 2020 the dispute arose in 2020 when the respondent invaded the farm.
2. That the Chairman erred in law and fact for stating that, it was agreed by all parties that the one who is cultivating all years the said farm is the respondent (Hamisi Miowea) and the applicant (appellant) had never cultivated the said farm even at once before dispute but the applicant (appellant) entered into farm in the year 2020 and to cause dispute while the appellant (applicant) had established that he was cultivating and he was using since 1977 and registered on 1993 by village land committee and the evidence was backed up by his (appellant) witness.
3. That the Chairman erred in law and fact for failure to assign reasons for rejecting the witnesses of the appellant (applicant) who appeared in the locus in quo and to give any opinion regarding rejecting them on the proceedings.
4. That the Chairman erred in law and fact for delivering the decision in favor of the respondent who failure to produce the same and it was admitted thus proved the appellant was the lawful owner. 41
5. That the honourable Chairman erred in law and fact for filing gaps on part of the respondent whose case was weak compared to the case of the Appellant who proved the matter on balance of probabilities.
6. That the Chairman erred in law and fact for failure to consider exhibit tendered by the PW3 as exhibit P1 on 19/08/2021 which was properly received by the tribunal and the same proved ownership of the land by the appellant and location of the disputed land.
7. The trial Chairman erred in law and facts for failure to analyze and to evaluate the evidence of the appellant as the same was strong and straight in proving ownership of land by the appellant.
8. That, the trial Chairman erred in fact for stating that the appellant (applicant) brought PW2 and PW3 who were not members of land division committee also not leaders of the village and that they come from different area with the area where the land was located without considering that the said PW2 and PW3 were leaders also their members of committee and the said fact was not objected by the respondent when those witnesses were adducing their evidence.
9. That, the trial chairman erred in fact to consider that PW3 was not leader without considering that Kago Keney is the same person as PhiHpo Keney (PW3) was the Chairman of the village government (council).

10. That, the trial chairman erred in law and fact for failure to draw adverse inference against the respondent who failed to produce the receipt and ended to state that the receipt was lost when he produced the same at Primary Court without the tribunal to consider that the same are returned to the parties after the end of matter and the tribunal erred for failure to order the respondent to request the copy from the office of the village. When the appeal came on for hearing parties appeared in person, had no legal representation. They prayed the appeal to be heard by way of written submission, the court granted the prayer, obediently the parties complied with the scheduling order of filing the respective submissions. In the first ground the appellant submitted that chairman wrongly applied the principle of adverse possession while there was evidence that the respondent invaded in 2020. He contended that the principle was not applicable to the case at hand. The argument that there was no dispute that the respondent was cultivating the suit land and that he was allocated since 1993 was misdirection and is not reflected in the proceedings. He stated by so holding the chairman was biased as he took extraneous matters not in record. He cited the case of *R vs Athumani Rajabu* [1989] TLR 44 in support of the point. In third ground, the appellant complain that his witnesses were rejected during locus in quo. He added that evidence obtained during locus in quo was not properly analysed and PW2 and PW3 were not called during locus in quo as such it occasioned injustice to him. He faulted the tribunal for conducting locus in quo. In fifth ground, the appellant submitted that the chairman filled up gaps in the respondent's case, the case of *Ahamada Musa Ntimba vs / Mohamed Kashangaki vs R* [1998] TLR 268, *Marando S. Marando vs SMZ* [1998] TLR 375 were cited in support of the argument. He said that the allegations that the respondent has been cultivating paddy for long time without the appellant to complain are matters which were added by the chairman. Sixth ground was that exhibit P1 which was tendered by PW3 established his ownership and location but it was no considered by the tribunal. He contended that, once documentary evidence is tendered then ownership is said to have been proved. He cited the case of *Japan International Cooperation Agency (JICA) vs Khaki Complex Limited* [2006] TLR 343 and Order XIII Rule 7(1) of the Civil Procedure Code to the effect that once a document has been admitted it forms part of the records of the court. /! In seventh ground the appellant submitted that evidence was not properly evaluated and analysed despite being strong and straight forward. He added his case was backed up by his witnesses and receipts tendered. He said that, evidence in record established that he was in use since 1997 and in 1993 he was allocated by village council officially. He contended PW2 was a hamlet leader and participated in allocating land to him in 1993 the same to PW3 who adduced that in 1993 they gave land to him and supported by producing a receipt. He cited the case of *D.B Shapriya and Co. Ltd vs Mek One General Traders and Others*, Civil Appeal No. 197 of 2016, HCT at Dara es Salaam. In eighth ground the appellant faults the chairman for disregarding evidence of PW2 and PW3 on the ground that they came far from where the suit land is located and not members of the allocating committed. He reproduced part of their evidence which shown that they were leaders. He submitted that PW2 and PW3 were leader and member of the allocating committee the fact which was not objected by the respondent. He discredited DW2 for being a liar witness. He added DW2's evidence was planted by DW1 to

misdirect the tribunal. The ninth ground was about PW3's names, he submitted that the chairman was wrong in holding that he was not a leader, rationalizing the 6 argument he said the name of Philipo Keney and Kago Keney belongs to the same person who was PW3. He complained that the chairman ought to verify the names instead of reaching to the decision he did. He cited the case of D. R Pandya vs R [1957] EA 336 to the effect that the first appeal court has to scrutinise evidence as a whole. 4th and 10th grounds of appeal were jointly argued, he submitted that the tribunal failed to draw adverse inference for failure of the respondent / to produce receipts of allocation which he said it was lost in the primary court while it was returned to parties. He attributed respondent's failure to tender receipts as failure to prove his case. He added that his evidence was strong than that of the appellant and in support he cited the case of Hemed Said vs Mohamed Mbilu [1984] TLR 113. He went on to submit further that under section 112 of the Evidence Act burden of proof lies with a person who wants the court to believe him, and that the burden of proof is not static it keeps shifting from time to time. On this Sakar on Evidence, 14th edition 1993 was cited. He Lastly submitted that, the respondent failed to prove his case under section 110 of the Evidence Act by not producing receipts. In response the respondent submitted that the chairman did not employ the principle of adverse possession in the decision rather several reasons. 7 He added that evidence that the respondent was in use after being allocated the land in 1993 by Matebete village council was not challenged by the appellant which implies that he admitted to be the truth. The second, fifth and seventh grounds were replied together that evidence in record established that the respondent has been using the suit land for all years from 1993 until 2020 when the dispute arose. He added that the language used by the tribunal to hold that parties were not in dispute on certain facts meant that the use of land by the respondent was not challenged in any way. He cited the case of Nyerere Nyague vs R, in which it was held failure to cross examine on an important fact is equal to admission of that fact. In third ground the respondent submitted that records are silence if any witness was called by the appellant and rejected by the tribunal. He added that despite the respondent mentioning neighbours to the suit land none of them were called in support of his case, on this he stated that; it was failure by the appellant to bring material witnesses and hence adverse inference had to be drawn against the appellant. He cited the case of Amiri Hassan Kudura vs R, Criminal Appeal No. 217 of 2020 in support of his argument 8 Sixth and tenth ground was also answered conjunctively, he submitted that at the time the appellant gave evidence he admitted to have no receipts but surprisingly when PW3 was called he sought to tender a receipt. The respondent raised objection for the same being in contravention of regulation 10 (3) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003 for not being served to the respondent but the objection was overruled. He implored this court being the first appellate court to evaluate evidence and see if exhibit P1 was properly admitted. He cited the case of Amratial Damodar Maltaser t/a Zanzibar Silk Store and Another vs A.H Jariwala

[1980] TLR 31 to elaborate his point. Regarding eighth and ninth grounds, he submitted PW2 and PW3 were not members of the allocating committee. He added that the name of Philip Akenney and Kago Akeney are different persons and no affidavit was produced in the tribunal rationalizing the names of PW3. He went on to submit that PW2 and PW3 did not know the boundaries of the appellant's land. He rounded up his submission that the appellant failed to prove the case and the burden cannot be shifted to the respondent. Having heard and considered the written submissions and the cited authorities by both parties and the record of appeal, I proceed to delve into the grounds of appeal in the order that first, second, third, fifth, sixth and nine grounds of appeal to be dealt separately while fourth, seventh, eighth and tenth grounds will be dealt together. It is pertinent to remember that in the instant appeal, as a first appellate Court my duty is to analyze and re-evaluate the evidence which was before the tribunal and come to own conclusion on the evidence without overlooking the conclusions of the trial court. See the case of Pendo Fulgence Nkwenge vs Dr. Wahida Shangali, Civil Appeal No. 368 of 2020, CAT at Dar es Salaam (Unreported). In the first ground the appellant criticises the chairman for using adverse possession while the respondent reply was that it was not used and is in applicable in this case. The law as to adverse possession is that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person acquires ownership by adverse possession. In order to acquire title to land by adverse possession the following has to exist;

- (a) That there had been absence of possession by the true owner through abandonment;
- (b) that the adverse possessor had been in actual possession of the piece of land;
- (c) that the adverse possessor had no color of right to be there other than his entry and occupation; 10
- (d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
- (e) that there was a sufficient animus to dispossess and an animus possidendi; (I) that the statutory period, in this case twelve 12 years, had elapsed; [See the case of the Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016, CAT (unreported)]. I have perused the judgment of the tribunal and found that what the chairman did after considering evidence in record was satisfied that the respondent had long physical occupation from 1993 to 2020 without any competing claim from the appellant. It is from that evidence the tribunal found the appellant ought to have preferred the claim within twelve years. Although the tribunal found adverse possession was applicable, I agree with both parties that it was inapplicable in this case because evidence in record shows that each party claimed to have been allocated the suit land by the Matebete village Council. By any imagination both parties alleging to have been allocated by relevant authority, adverse possession cannot be invoked. The decision of the tribunal as rightly

argued by the respondent was not solely based on adverse possession. The first ground fails to that extent. (li In second and fifth grounds, the appellant complaint is that the chairman considered matter not in recording when he held that the appellant did not dispute some of the facts. I have perused the impugned judgment and found that what the chairman did was to consider what the other party testified and how it was responded by the other. He arrived on matter which found uncontroverted based on the principle that a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. See the case of Patrick William Magubo vs Lilian Peter Kitali, Civil Appeal No. 41 of 2019, CAT at Mwanza (Unreported). In the third ground the appellant complain that his witnesses were denied by the tribunal. After going through the records and competing arguments there is nowhere records shows that the appellant called a witness and was denied by the tribunal. Evidence during locus in quo indicates that each party did not call any witness even those who testified in the tribunal. Even in the submission the appellant did not mention the name(s) of his witnesses who were denied to testify by the tribunal. Be that it may after reviewing evidence in record I have found that locus in quo in this case was uncalled for. There is no evidence adduced by the parties which required to be verified by proceedings in quo. The law on having locus in quo was well stated in the case of Avit Thadeus Massawe vs Isidory Assenga, Civil Appeal No. 6 of 2017 (unreported) referring to the Nigerian case 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 various factors to be considered before the courts decide to visit the locus in quo were elucidated. These include that;

1. Courts should undertake a visit to the locus in quo where such a visit will dear the doubts as to the accuracy of a piece of evidence when
 - such evidence is in conflict with another evidence
2. 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
3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo
4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. In this appeal none of the above factors existed, locus in quo was therefore unnecessary. I have perused the impugned judgment and found that although the tribunal conducted locus in quo its^decision is not based 13 on what was recorded during visit locus in quo. Therefore, the ground has no merits. The sixth complaint was that exhibit P1 was not considered by the chairman, in response the respondent criticised the way it was admitted. He counted that PW3 was not

competent witness to tender it and it was not served to them prior. Under regulation 10(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation G.N. NO. 174 of 2003 a document can be tendered and admitted despite not being attached to pleading although condition under sub regulation 3 have to be filed first that is be served to the opposite party and its authenticity. In this case when PW3 wanted to tender the receipt it was objected by the respondent, to the surprise the proceedings are silence on nature of the objection, argument advance and the ruling thereto. What is discerned is that the objection was overruled and the receipt admitted as exhibit Pl. This court have been denied an opportunity to see what the objection was about because nothing is reflected in record apart from a note that objection was overruled. Be that it May the appellant contended that the receipt was proof of ownership of the suit land. Upon going through pleadings and evidence in record the court have found wanting in merits. In the application the appellant pleaded that the siyt land is located at Kapunga village, and evidence was led to that regard. The exhibit Pl show that he was allocated the 16 acres at Lwanjilo and not Kapunga as pleaded. Therefore, exhibit Pl is irrelevant to the suit land as it tendered to proof the land at Lwanjilo and not at Kapunga as pleaded. The sixth ground has no merits. In nineth ground the appellant complain that the name of PW3 philipo Keney is the same Kago Keney. I have given due weight of the argument and found unmeritorious. There was no any evidence which was led to shown that PW3's other name was Kago Keney. Had the appellant noted that .ought to have rationalized these names by affidavit or any evidence in the tribunal, raising the issue at the appellate stage is an afterthought. This ground is therefore dismissed for want of merit. Lastly the 4, 7, 8 and 10 will be determined together as they all deal with evaluation of evidence. These grounds, will be resolved based on the rule of pleadings and burden of proof. It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings. See the case of Barclays Bank (T) Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 (both unreported). It is noted from parties' pleadings in Application No. 248 of 2020 that the appellant at paragraph 1 of the application pleaded on address of the suit land and paragraph 4(a)(b) that he is living in the suit land. In reply, in his Written Statement of Defense (the WSD) at paragraph 5(b) disputed the appellant to have at any time used the suit land. Equally it is the settled law that in civil proceedings a party who alleges anything in his/her favor also bears the evidential burden and the standard of proof is on the balance of probabilities which 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. In the case of Hamza Byarushengo vs Fulgencia Manyi & 4 others, Civil Appeal No. 246 of 2018, CAT at Dar es Salaam (Unreported) cited with approval the case of Re B [2008] UKHL 35 where Lord Hoffman in defining the terms balance of probabilities stated thus; 'If a legal rule requires a fact to be proved... a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the Tribunal b left in doubt the doubt is resolved by the rule that one party or other carries the burden ofproof. If the parry who bears the burden ofproof fails to discharge it, a value of 0 is returned and the fact is treated as not having

happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened.' The appellant first pleaded that he was in use of land since 1977 and in 1993 he was officially allocated the same. He also pleaded that he is living

- #4 in the suit land. In support called PW2, PW3 and relied on exhibit P1 which has already been dealt with above. On his part the respondent evidence was that he was allocated the suit land in 1993 by the allocating committee, he called DW2 who was a chairman of the committee and DW3 a neighbour to the suit land. My reevaluation of evidence has landed to conclude that the appellant failed to establish that he had a good title to the same. This is because he did not discharge the legal burden under section 110(1) of the Evidence Act [cap 6 R: E 2022]. From the evidence above, there was no evidence establishing his physical occupation of the suit land as pleaded in the application. PW2 and PW3 apart from testifying that during allocation they were hamlet and village chairman respectively they knew nothing about the suit land as they were not members of the allocating committee which means they were not aware of the land the appellant was allocated. PW2 and PW3 during cross examination said they did not know the neighbors as they are staying far from the suit land. PW3 particularly did not know the one who had been using the suit land before
2020. PW3 said mimisio mjumbe wa kamati ya ugawaji wa ardhi, waliogawa mashamba hayo ni kamati mimi sikuhusiki. From this evidence it was a misdirection on part of the appellant when he submitted that PW2 and PW3 were members of the allocating committee. Although the respondent had no burden of proof, but evidence he paraded was heavier than that of the appellant. His evidence of allocation was proved by DW2 who was the chairman of the allocating committee. Her evidence that PW2 and PW3 were not members of the allocating committee was not challenged during cross examination. See the case of Patrick William Magubo vs Lilian Peter Kitale, Civil Appeal No. 41 of 2019, CAT at Mwanza (Unreported) in which it was held that failure to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. Even physical occupation of the suit land by the respondent was well established by DW2 and DW3 who are neighbors to the suit land. In the circumstances, the appellant failed to prove his case on the balance of probabilities and it cannot be safely vouched that he had discharged the evidential burden as required by section 110 of the Evidence Act. Thus, the appellant's criticism on the chairman having ignored the A evidence is unwarranted. .1 In view of what we have endeavored to discuss we do not find cogent reasons to vary the decision of the trial tribunal. In the end result the appeal is hereby dismissed in its entirety with costs for want of merit. 19

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