

TANZANIA / JUDGMENT

SOSTENESS JOSEPH Vs

COURT
TANZLIIDECIDED
13 December 2024

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA LAND APPEAL NO. 11378 OF 2024 (Arising from the Judgment and decree of District Land and Housing Tribunal for Dodoma at Dodoma in Land Application No. 286 of 2019 dated 18/04/2024) SOSTENESS JOSEPH.....APPELLANT Versus ERICKA NOLO.....RESPONDENT

JUDGEMENT

Date of last order: 13th December, 2024. Date of Judgment: 21st February, 2025. E.E. KAKOLAKI, J. In this appeal the appellant is discontented with the decision of the District Land and House Tribunal for Dodoma at Dodoma (the DLHT) in Land Application No. 286 of 2019 handed down on 18/04/2024, dismissing his application for declaration that he was the lawful owner of the suit land measuring 3 acres located at Chidimo village, within Dodoma City, in lieu of declaring the respondent as lawful owner of the land measuring 6 acres while at the same time restraining the appellant from doing any activity in the said land. In his petition of appeal he has expressed his grievances in two (2) grounds of appeal going thus: 1

1. That, the Chairman erred in law and fact to analyze the issue of how the respondent acquired the land.
2. That, the Chairman erred in law and fact to evaluate evidence of the applicant and give the respondent lawful ownership of the suit land without considering balance of evidence of both parties. Hearing of the appeal proceeded in writing and both parties were represented as the appellant had the services of Mr. David Malugu who prepared the submission while the respondent defended by Ms. Aisha Kijuu, both learned advocates. All parties filed their submission in time save for the appellant who without any reason chose not to file his rejoinder submission hence fixing of the judgment date. After having gone through and internalized the submissions made by the parties as well as revisiting the impugned judgment and evidence in record, I now start to determine the two grounds of appeal as raised by the appellant. In his submission on first ground the Mr. Malugu is faulting the learned trial chairman for failure to analyse evidence on how the respondent acquired the disputed land. He contended that, the respondent did not produce evidence to prove ownership of the said land, hence the case ought to have been decided in appellant's favour. In reply submission Ms. Kijuu recited part of 2 the respondent's evidence as found in the

typed proceedings and submitted that the submission by Mr. Malugu was misleading as the respondent testified on how she acquired the said land when detailed that, was given six (6) acres of land by the children of her late brother in 1982 and that she was in continued use of the land since then. In her view the appellant is the one who failed to prove his claims in terms of section 110 of the Evidence Act instead wants to shift the burden of proof to the respondent, hence prayed for dismissal of this ground of appeal. As correctly submitted by Ms. Kijuu the settled principle of law in proving any case is that, it is the one who alleges existence of a certain fact who carries the burden of proof. See section 110(1) and (2) of the Evidence Act, [Cap. 6 R.E 2022] and the case of Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004 (CAT-unreported) where the Court of Appeal held thus: "...it is an elementary principle that he who alleges is the one responsible to prove his allegations." Equally it is elementary that, the standard of proof to be maintained in civil cases is that of balance of probabilities in terms of section 3(2)(b) of the Evidence Act, [Cap. 06 R.E 2022] meaning that, the Court will sustain such evidence which is more credible than the other as it was observed in the case of Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha, Civil Appeal No. 53 of 2017 (CAT-unreported) at page 14, where the Court of Appeal had this to say: "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..." (Emphasis supplied). In this matter as gathered from the pleadings before the DLHT for Dodoma the appellant was claiming ownership of three (3) acres of land allegedly given to the respondent for temporarily use who refused to return it to him. In terms of the provisions of section 110 (1) and (2) of the Evidence Act, he was duty bound to prove first ownership of the said land on how he acquired the same as land can be acquired in different ways. These are one, allocation by the Government authority, two, sale, three, inheritance, four, gift, five, adverse possession and six, clearance of unoccupied bushes. See also the decisions of this Court in Serikali ya Kijiji Karumo Vs. 4 Wahalalika Siyonka, Land Appeal No. 02 of 2021, Ramadhani Rashid Kuhuka Vs. Jela Maiko Meja and 44 Others, Land Case No. 25 of 2022 and Andrew Mikael Vs. Abdalla Ukotya, Land Appeal No. 4349 of 2024 (all HC) Tanzlii. Neither of the six ways of land acquisition featured in the appellant's evidence to be a form of acquisition of the disputed land. What is gathered from his evidence at page 10 of the typed proceedings is that the claimed land is a family land that belonged to his late father, without more on how he acquired the same to entitle him with the right to claim its ownership. To avoid putting some words into his mouth this is what the appellant told the trial Tribunal as found at page 10 of the typed proceedings and I quote: "I gave the respondent the land in question to use but later on she refused to return the same. It is three acres. She said to pay me some amount of money as the purchase price but she did not. It was my land. Belongs to my father. The suit land is family land." While the appellant is stating that the suit land was a family land the two witnesses (PW2 and PW3) paraded by him before the DLHT to beef up his claim over the disputed land gave a rather contradictory evidence when said that, the land was given to him by his late father who

cleared the land. As 5 correctly observed and found by the learned trial chairman at page 4 of the judgment which observation I have no reason to fault, in absence of any evidence from the appellant himself on how he acquired the said land which is the family land according to him, his two witnesses would not have gained mandate to state otherwise. In short, the appellant failed to discharge his duty under section 110 of the Evidence Act and could not have in any way shifted that burden to the respondent as rightly submitted by Ms. Kijuu. I don't agree with Mr. Malugu's submission that, the respondent did not state how she acquired the disputed land as from her version as found at page 18 of the typed proceedings, the disputed land was given to her by the children of his late brother in 1982 who had bequeathed them and that, she continued to be in its use since then. Further to that, the fact that the respondent continued to be in use of that land since 1982 was never challenged by the appellant during cross examination something that leads this Court to believe her story as the settled rule is that, failure to cross examine the opposite party on an important fact leads to its admission and that entitles the court to believe his/her story. See the cases of Damian Ruhele Vs. R, Criminal, Appeal No. 501 of 2007, Martine Misara Vs. R, Criminal Appeal No. 428 of 2016 (CAT) and Jaspini Daniel @Sizakwe Vs. 6 DPP, Criminal No. 519 of 2019 (both CAT-unreported). In Martine Misara (supra) the Court of Appeal on the subject matter had the following observation to make: "It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter. See: Damian Ruhele v. Republic, Criminal, Appeal No. 501 of 2007, Cyprian Athanas Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992, George Maili Kemboge v. Republic, Criminal Appeal No. 327 of 2013, Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010 and Ismail Ally v. Republic, Criminal Appeal No. 212 of 2016 (all unreported)." In this matter since the appellant failed to discharge his duty in proving ownership of the land and given the fact that he failed also to cross examine the respondent on the continued use of the disputed land which forms part of six (6) acres of land given to her by the children of her late brother, this Court is satisfied that her evidence is heavier than that of the appellant and therefore the first ground is barren of merits hence dismissed. Next for determination is the second ground in which the complaint by the appellant is that, the trial chairman failed to evaluate appellant's evidence as 7 a result decided the issue of ownership in favour of the respondent. It is Mr. Malugu's submission that, by weighing both parties' evidence the appellant proved his case on the required standard which is on the balance of probabilities as emphasized by the Court of Appeal in the case of Charles Richard Kombe t/a Building Vs. Evaran Mtungi, Civil Appeal No. 38 of 2012 (CAT). In response Ms. Kijuu held a contrary view submitting that, the trial tribunal was justified to arrive at its finding after proper evaluation of both parties' evidence and satisfied that, the respondent had managed to establish on how she acquired the disputed land, the evidence that covered also its size and location as against appellant's evidence that indicated the disputed land to be a family land and not his land. She thus implored the Court to dismiss the ground and entire appeal. Having considered both parties submission, I think this ground need not detain this Court much. When dealing with the first ground this Court addressed and

analysed extensively appellant's evidence as against respondent's version and satisfied that, the respondent's account is heavier than that of appellant in as far as the disputed land of three (3) acres is concerned. It is therefore the findings of this Court that, the trial tribunal was justified to declare the respondent a lawful owner of the disputed land 8 after having satisfactorily proved that, she is a lawful owner of the land. This ground fails too. Before I pen off, I wish to make an observation on the anomaly noted in the order of the trial tribunal more particularly on the size of the land declared to be owned by the respondent. There is no doubt that the land under contest in this matter as per the pleadings is three (3) acres. However, in its judgment the trial tribunal declared the respondent a lawful owner of six (6) acres allegedly given to her by the children of her late brother in 1982, which apparently never formed part of appellant's claim in the pleadings before it. I find the tribunal's order more particularly on the size of the disputed land under parties contest to be an error material on the merit of the case as not all six (6) acres were subject of dispute in this case. I however such error in my humble view does not affect legality of the trial tribunal's decision. In view of that glaring error this Court invokes its revisionary powers under section 43(1)(b) of the Land Courts Disputes Act, [Cap. 216 R.E 2019] and proceed to vary the order declaring the respondent the legal owner of the land measuring six (6) acres at Chididimo Village, within Dodoma City and substitute it with an order declaring him lawful owner of the suit land measuring three (3) acres located at Chididimo Village, within Dodoma City. 9 Save for the variation made on the size of the disputed land in which the respondent was declared to be a lawful owner by the DLHT for Dodoma in its judgment of 18/04/2024, the rest of its orders remain undisturbed as this appeal is dismissed with costs for want of merit. It is so ordered. Dated at Dodoma this 21st day of February, 2025. E. E. KAKOLAKI JUGDE 21/02/2025. Court: The Judgment has been delivered at Dodoma today on 21st day of February, 2025, in the presence of Ms. Aisha Kijuu, advocate for the respondent and Respondent in person and Ms. Veradina Matikila, Court clerk and in the absence of the appellant. Right of appeal explained. E. E. KAKOLAKI JUGDE 21/02/2025. 10

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