IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

(SONGEA SUB-REGISTRY)

AT SONGEA

LAND APPEAL NO. 54 OF 2023

(Originating from the District Land and Housing Tribunal of Songea at Songea Land Application No. 37 of 2021)

DICKSON BUMBULA .....APPLICANT

VERSUS

ABDALLAH RASHID MVULA.....RESPONDENT

RULING

Dated: 18th March & 24th April, 2024

KARAYEMAHA, J

The appellant was the unsuccessful litigant in a land dispute filed by the respondent in the District Land and Housing Tribunal of Songea (hereinafter the trial tribunal) where the latter was claiming **firstly,** for a declaration that the appellant is a trespasser in the suit land from the date he sold it to Nestory Magingo, who was the 2nd respondent before the trial tribunal. **Secondly,** a declaration that the sale of the house done by the respondent to the 2nd respondent was void. **Thirdly,** a declaration that the appellant was rightful owner of the suit land.

Fourthly, an order of vacant possession. **Fifthly,** payment of general damages by the respondent and lastly, cost of the application.

After hearing the evidence, the trial tribunal was of the unanimous decision that there was no proof of sale or transfer of the suit land to the appellant's father, namely, Florian Bumbula, hence the respondent was declared the rightful owner of the suit land.

The appellant is aggrieved by the decision pronounced. He opted to register the instant appeal to this Court giving four grounds of appeal. In a nutshell, he is saying that the appellant's evidence and that of DW2 and exhibit AR-1 were not considered. That the respondent's evidence established a criminal case not land dispute and lastly, that the suit was lodged out of time.

The background of the matter can be captured on the versions of both the appellant and the respondent in their evidence before the trial tribunal. According to the respondent who was the applicant before the trial tribunal, the suit land allocated to him by Shule ya Tanga Village Council in 1997 and given a card which he tendered and was admitted as exhibit AR1. He went on testifying that the two (appellant and respondent) were friends and due to their friendship, he left one of his

houses built in half acre (suit land) at Shule ya Tanga in Songea District, under the care of the appellant who was the respondent before the trial tribunal. After agreeing that the appellant would stay and care his house, the respondent travelled to Dar es Salaam in 2015. In 2020 he was notified that the appellant had demolished his house and sold the house to Nestory Magingo, the 2nd respondent before the trial tribunal. His wife told him that the appellant said that the respondent sold the house to him. The respondent denied the assertion that he sold the suit land to Dickson Bumbula or his father.

The appellant's version was pointedly that the respondent sold the house to Florian Bumbula, his father. After purchasing the suit land Florian Bumbula demolished two huts in 2000 and allowed him (appellant) to build a house therein. He stated further that at that time the respondent had migrated to Mitawa area.

In essence that is parties' evidence in brief before the trial tribunal. As hinted hereinabove, the appellant raised four grounds of appeal which are reproduced hereunder with their grammatical challenges as follows:

1. *That the trial tribunal erred in law and facts for deciding the matter without considering the evidence of the 1st respondent herein the appellant and of his witnesses too,* ***especially DW2 Benedicto Paulo Liloka Camparing*** *to exhibit AR-1, tendered by PW1 Abdallah Rashid Mvula.*
2. *That the trial tribunal erred in law and facts for failure to note that the evidence of the applicant herein the respondent was based on criminal nature and not in the issue of ownership of land, especially when cross examined.*
3. *That the trial tribunal erred in law and facts for failure to note that the respondent claim herein who was the applicant at the trial tribunal was out of time comparing to his evidence and the evidence of the 1st respondent herein the appellant.*
4. *That the trial tribunal erred in law and facts for failure to note that the evidence of the applicant herein the respondent especially of his witness who is* ***PW4 Benedicto Manifred Mbano*** *his evidence was based on biasness to the 1st respondent herein the appellant herein, compared to* ***exhibit DB1****.*

Disposal of the appeal was done through written submissions filed by the parties pursuant to a schedule drawn by the Court on 22/1/2024. Both parties were represented. Mr. Bernard Mapunda, learned counsel represented the appellant, whereas the respondent enlisted the legal services of Mr. Edson Oswald Mbogoro, leaned counsel.

The complaint in the first ground of appeal is that the respondent (PW1) failed to call the material witness one Benedicto Paulo Liloka (DW2), who wrote exhibit AR-1. He contended further that the authenticity of exhibit AR-1 is questionable because DW2 disowned it while testifying at the trial tribunal. He, therefore, held the view that PW1's evidence was not corroborated by DW1.

The appellant has submitted further that PW1 hesitated to call DW2 as his witness in order to testify on the authenticity of exhibit AR-1. In the event he has urged this court to draw an inference against the respondent on what he claims that the respondent knew exhibit AR-1 was not genuine. The appellant has invited this court to visit the holding in the case of **Hemed Said v Mohamed Mbilu** (1984) TLR 113 HC which stated that:

> *"Where for undisclosed reasons a part fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called, they would have given evidence contrary to the party's interest."*

See also **Haika Chesam Mgao v The Republic**, Criminal appeal No. 37 of 2021 at page 14.

Punching further holes in the respondent's evidence, the appellant has contended that whereas it is stated that the suit land was acquired in 1997 from Shule ya Tanga Village council, exhibit AR-1 indicates that it was written and signed in 2017. Further to that it is contended zealously that whereas exhibit AR-1 was stamped with a rubber stamp of *Mwenyekiti Mtaa wa Tanga*, but the genuine stamp ought to be *Mwenyekiti wa Kitongoji* or *Mwenyekiti wa Kijiji* because there was no *Mwenyekiti wa Mtaa*.

In reply, Mr. Mbogoro contended that DW2 refused to testify in favour of the respondent albeit being approached by him being the first. He said further that when he was cross-examined on that DW2 denied before the trial tribunal to have been approached by the respondent. The learned counsel did not expect DW2 to have positive evidence on exhibit AR-1.

Mr. Mbogoro was convinced that even if exhibit AR-1 was superfluous, there was no dispute by the appellant and all his witnesses including DW2 that the respondent was the original owner of the suit land. The dispute centered on whether the respondent subsequently disposed it off, the learned counsel submitted. He contended further that the trial tribunal did not rely on exhibit AR-1 to decide who the rightful owner of the suit land is.

The learned counsel also contended that the trial tribunal did consider the appellant's evidence and that of his all witnesses.

The contention in this ground of appeal stems from the decision that the respondent is the lawful owner of the suit land. It also questions the authenticity of exhibit AR-1 which is claimed to be the basis of the decision. In my considered opinion, the issue is who is the lawful owner of the suit land between the appellant and the respondent.

I have carefully gone through the evidence of both parties as gathered in the proceedings and judgement of the trial tribunal. The 1st issue that needed determination by the trial tribunal was "*nani ni mmiliki halali wa eneo lenye mgogoro*".

In order to prove that he is the lawful owner, the respondent's evidence shows that he was given the suit land in 1997 by Shule ya Tanga Village Council. His evidence was a card. The respondent said that the first card was lost and acquired another one which is exhibit AR-1. This exhibit was not subjected to objection at the time it was admitted. It appears that the appellant was left to stay in one house and fix a machine in the other house.

The appellant's evidence is that the respondent sold the house to Florian Bumbula, his father, in 1999. Since Florian Bumbula needed the land, he demolished the huts built therein. In 2000 Florian allowed him to build a house. The trial tribunal found this evidence wanting because no sale agreement was tendered by the appellant. This is a true fact because the appellant testified that he was present when the sale agreement was being recorded and the document is there. Throughout the appellant's evidence, it is revealed that the respondent was the lawful owner of the suit land but sold it to his father. No sale agreement was tendered as alluded before. This was one of the reasons that triggered the learned trial Chairman to hold, guided by the holding in **Mohmodu Ally Salum & others,** Land Appeal No. 6 of 2021 that, his

claim was not proved. I agree with the trial Chairman that there is no evidence proving that there was a sale or that title over the suit land passed to the appellant's father.

I have also spared time and read DW2's evidence. Undisputedly, it is centered on disowning exhibit AR-1. It is also revealing that he signed a sale agreement between the respondent and Florian Bumbula. He neither did not tender the sale agreement he prepared apart from saying that it was kept by the Village Secretary.

I find no fault in the trial tribunal's decision that there was nothing proving that the appellant is the lawful owner of the suit land.

Strictly speaking under our laws, when parties have freely agreed to have the land disposed of and reduced their agreement into writing that document should be tendered to add weight and value to the oral testimony. In this case since the appellant informed that trial tribunal that the sale agreement between the respondent and Florian Bumbula is in his custody, he had a duty to tender it to assist the trial tribunal reach to a fair decision.

Customarily, the issue of sale and the existence of the sale agreement should be proved by the appellant. In all civil cases, such

burden is on the balance of probabilities, consistent with the requirements of section 110 of the Evidence Act, Cap 6 R.E. 2022 (hereinafter the evidence Act). As stated in various decisions of this Court, including **Khalfan Abdallah Hemed vs. Juma Mahende Wang'anyi**, HC-Civil Case No. 25 of 2017 (MZA-unreported), the position in the cited provision traces its roots from the Indian Evidence Act, 1872. The latter statute has been discussed in the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by *Lexis Nexis*, which states at page 1896, as follows:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

It is my unflustered view that the DLHT assisted by the evidence was, quite spot in its evaluation of evidence and its findings that the

aspect of selling the suit land was not done. I hold that view, because having gone through the record and combed the documents, I have failed to come out with any evidence showing that the respondent sold his land to the appellant's father. This then definitely brushes off the complaint that the respondent was to call DW2 as his witness. I don't think that DW2 was a material witness to prove whether the appellant was the lawful owner. However, the appellant's efforts to call him have revealed that he is not reliable witness.

I am constrained at this juncture to accept Mr. Mbogoro's contention that even if exhibit AR-1 is expunged from the record or that it is found by police officers that it was forged, there is still strong evidence from both sides that the suit land belongs to the respondent. I am strengthened by the evidence on record that the respondent is the rightful owner of the suit land.

The second ground of appeal raises a complaint that the respondent's evidence proved criminal case not issues of ownership. Mr. Mapunda submitted that by claiming that the appellant demolished his houses, the respondent was bringing forth criminal allegations. According to him, the respondent was to prove them. He added that in

view of the respondent's evidence, the claim was to be criminal trespass which the trial tribunal had no jurisdiction to determine. The learned counsel was convinced that the respondent was not to enlist the intervention of the trial tribunal to resolve this matter.

In response, Mr. Mbogoro contended that trespass is both a crime and civil wrong giving rise to tortious liability. The learned counsel's conviction is that the respondent had a choice and would resort to run two horses at the same time. He held the view that since the respondent wanted to recover his property this was his best option.

Having heard the rival argument, the issue for determination is whether the claim by the respondent at the trial tribunal had elements of criminality.

My assessment of the amended application filed before the trial tribunal on 28th June, 2022 does not lead to a conclusion that the claim centered on the demolition of the house(s) built by the respondent. Paragraph 2 of item 6(a) of the amended application states as follows:

> *"Baada ya kupewa ardhi hiyo mleta maombi aliendeleza kwa kujenga nyumba mbili. Mnamo mwaka 2015 mleta maombi alienda Dar es Salaam akamwachia nyumba hizo mjibu maombi wa kwanza kwa makubaliano kuwa azitumie na*

kuzitunza atamkabidhi mleta maombi atakaporejea. Mnamo mwaka 2000 mleta maombi alipata taarifa kuwa mjibu maombi wa kwanza amevunja nyumba moja na ameuza kiwanja ilipokuwepo nyumba hiyo kwa mjibu maombi wa pili."

This allegation is followed by a relief section which implores the trial tribunal to declare the respondent the rightful owner of the suit land. However, under relief number (V) the respondent asked for payment of compensation flowing from the appellant's act of demolishing one of his houses. I quote for readymade reference:

"(V) Amri ya baraza ya kumuamuru mjibu maombi wa kwanza kumlipa mleta maombi fidia ya jumla ya kiasi ambacho itaona kinafaa kutokana na mjibu maombi wa kwanza kubomoa nyumba moja ya mleta maombi katika ardhi ya mgogoro."

Along with these excerpts, I have with great care gone through the respondent's evidence. The information I gather from it is quite different from Mr. Mapunda's perceptions. In it the respondent did not say that the appellant having demolished his house should be held criminally liable. He simply asked the trial tribunal to order the appellant to return his houses.

Guided by the quoted extracts, I find force in Mr. Mbogoro's submissions and I hold that what was to be determined was whether the respondent was the rightful owner of the suit land. That was what the respondent asked for. The rest was contributing factors not to stand alone. In summary I find no merit in the second ground and I dismiss it.

The third ground of appeal is essentially criticizing the trial tribunal for not holding that the suit was time barred. Of significancy, Mr. Mapunda submitted that the respondent sold the suit land to the appellant's father in 1999 who in turn handed it over to the appellant in 2000. Further to that he said that the cause of action was out of time and blamed the respondent for not stating the real time when asked about the years during cross-examination.

On his part, Mr. Mbogoro replied emphatically that the appellant was an invitee in the suit land and remained there at the pleasure of the respondent. He, therefore, held the view that the law of limitation could not apply under these circumstances.

In rejoinder, Mr. Mapunda stressed that the appellant sold the suit land to the appellant's father and could not be an invitee.

This court has already determined that the appellant failed miserably to prove that Florian Bumbula purchased the suit land from the respondent. Capitalizing on the evidence on record, this court has held that the suit land belongs to the respondent. In addition, it is quite clear, as submitted by Mr. Mbogoro, that the appellant was an invitee in the suit land. I hold so because in his evidence, the respondent testified that the appellant was his friend and since he was travelling to Dar es Salaam, he left the houses under his care. This contention was not serious challenged through cross-examination. It stands as the appellant stated it. It is the position of the law that failure to cross-examine a witness on a particular important point may lead the court to infer admission of such fact and it will be difficult to suggest that the evidence should be rejected. This principle was held by the Court of Appeal in the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General**, Civil Appeal No. 223 of 2017 (unreported) where it was 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".

I fully associate myself with the above principle of the Court of Appeal. In essence therefore, I buy the respondent's evidence wholesale that he invited the appellant in the suit land. Principally, Mr. Mbogoro is correct in his argument that an invitee remains an invitee and cannot find protection under the law of limitation to justify his stay in the suit land by asking the court to invoke the doctrine of adverse possession. in the upshot, this ground is baseless and it is rejected.

In the fourth ground Mr. Mapunda faults the trial tribunal for failing to note that Benedicto Manifred Mbano (PW4) gave bias evidence. Mr. Mapunda's contention was a contemplation of Land Application No. 50/2018 and Misc. Land Application No. 599/2021 which were between the appellant and PW4. The learned counsel submitted that those cases were determined in favour of the appellant and PW4 lost. He held the view that since PW4 lost, he could not be impartial witness against the appellant.

In his laconic reply, Mr. Mbogoro argued that impartiality on the part of PW4 could not be proved by any yardstick. He said that PW4 was a competent witness whose evidence was subjected to a rigorous cross

examination by the appellant's counsel. He saw nothing faulty in the DLHT because it observed PW4's demeanour when testifying.

On this ground, I am convinced that the DLHT correctly relied on the evidence of PW4 among other respondent's witnesses. I am mindful of the cardinal principal that bias of witness prevails in the estimation of the reasonable man who is fair minded and well informed as against a casual observer who is not aware of all the circumstances of the case.

Witnesses' evidence must be independent in the sense that it is the product of his/her independent judgment, uninfluenced by who has retained him/her or the outcome of the litigation. The witness must be unbiased in the sense that he/she does not intimate unreliability, tells lies or his/her evidence contradicts other evidence or it is exaggerative evidence and other indicators.

I have with utmost attention gone through the record and the arguments. On Mr. Mapunda's submission I find that it is based on the consideration that since PW4 had case with the appellant, he could not be independent from bias. I partly agree with him only on the rule that a witness should not only be subjectively free from bias, but also there should be nothing in the surrounding circumstances which objectively

gives rise to an appearance of bias. However, I part with him on the following reasons. **One**, there is no proof that PW4 was influenced by the respondent who has retained him or the outcome of the litigation. **Two,** there is no proof that PW4 was unreliable, exaggerative or had contradictory evidence. **Three,** going through his evidence nothing comes closer to the fact that lies are being sniffed therefrom. **Four,** as far as I recall Tanzanian law, a witness who had a case with a party to progressing case and lost, is not precluded from testifying against one of the parties. If this was the law, we would have few people qualified to testify in the Court of law.

Now, lacking evidence to that prove the above factors either cumulatively or singly, the complaint becomes baseless. Above all, the issue of bias was to be raised at the trial in order for the trial tribunal address its mind on it. It becomes obdurate to fault the trial Chairman at this stage while the appellant was permitted through his advocate to cross-examine PW4 and inquire into his bias, prejudice, or interest in a case for credibility purpose.

It is from the foregoing rules and principals that I agree with Mr. Mbogoro that PW4's testimony was not proved by any yardstick that he

was indeed bias. His evidence indicates how PW4 heard the discussion between the appellant and the respondent in respect of the former staying in is house when the latter was living in Dar es Salaam. He also left for Lindi Region. He never talked about the sale of the suit land and sale agreement.

Apart from that what influenced the trial tribunal was lack of sale agreement on the part of the appellant and his failure to satisfy the requirements of section 110 of the Evidence Act. It was not the evidence of PW4 even if his evidence is given less weight.

After having said all that, I find the decision of the trial tribunal to be sound and it is accordingly upheld. The appeal is consequently dismissed. I award costs of this appeal and those of the trial tribunal to the respondent.

It is so ordered.

DATED at **MBEYA** this 24th day of April, 2024

J. M. KARAYEMAHA
JUDGE