

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA DISTRICT REGISTRY)**

AT MBEYA

LAND APPEAL NO. 11 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Mbeya, at Mbeya, Land Application No. 273 of 2019)

Moses Mathias Chitumbo..... Appellant

Versus

Catheline Mathias Chitumbo (*an administratrix of the estate of the late Mary Mathias Chitumbo*)Respondent

JUDGEMENT

Date of Last order: 08.07.2021

Date of Judgement: 11.08.2021

Ebrahim, J.:

Parties in this case are blood relatives. The Appellant has filed the instant appeal contesting the decision of the District Land and Housing Tribunal of declared the suit premises as the property of their late mother one Mary Mathias Chitumbo who passed on in March 2019.

The background of the matter as can be deduced from evidence on record is that the Applicant claims that he purchased the land where the disputed premises was built on 30.09.2007. He also built the house and finished/ in October 2007. The Appellant said the house is

located at Vingunguti Street, Isyesye, house no. 59 and it is registered in the name of their father. After the death of their mother, they rented the house but the family now seek to sell the suit property in administration of the estate of the deceased. The Respondent is the administratrix of the estate of the deceased. She testified in court that upon retirement of their late mother from a teaching job in 2008, she gave money to the Appellant to purchase a plot. In 2009 their mother started building the same and it was until 2010 when it was completed and the deceased moved into the house with her mother (parties' grandmother). She testified further that the electricity and the water supply was installed in 2012 by their mother and the Appellant has never lived in the suit premises.

Upon hearing and evaluation of evidence from both sides and considering the testimonies of the assessors, the trial tribunal declared the suit premises to be the property of the deceased, the late Mary Chitumbo and the same be handled to the Respondent as the administratrix of the deceased estate.

Aggrieved by the decision of the trial tribunal, the Appellant has lodged the instant appeal raising four grounds of appeal mainly complaining that the trial tribunal did not properly analyse and evaluate the evidence adduced by parties and disregarded his

evidence on the ownership of the land. He also faulted the trial tribunal for believing the testimonies of relatives without testing their credibility.

In this appeal, the Appellant was represented by advocate Felix Kapinga and the Respondent was presented by advocate Irene Mwakyusa.

Submitting in support of the grounds of appeal, advocate Kapinga opted to argue the 1st and 2nd grounds of appeal together, and in the same order on the 3rd and 4th grounds of appeal.

In arguing the issue of evaluation of evidence, he referred to the case of **Stanslaus Rugaba Kasusula and AG V Falesi Kabuye** [1982] TLR, 388 which insisted on the evaluation of evidence of each witness and assessment of their credibility. He argued that the trial Chairman wrongly did a general evaluation of witnesses.

Arguing the 3rd and 4th grounds of appeal, Counsel for the Appellant faulted the trial tribunal for basing its decision on the evidence of relatives without basing on the principle that the decision shall be based on the quality of evidence as stated in the case of **Godfrey Gabinus @ Ndimba and 2 Others Vs The Republic**, Criminal Appeal No. 273 of 2017 (CAT- Unreported) pg 5-2nd line that the four tests must be looked upon. He concluded therefore that the

evidence of the Respondent was not heavy and urged this court to revisit the evidence on record.

Advocate Mwakyusa in reply, responded on the 1st and 2nd grounds of appeal that the trial Tribunal evaluated the evidence of all witnesses and explained what the witnesses brought by the Appellant testified at the Tribunal that it was the Applicant who purchased the disputed land but they said they do not know anything else. She responded further that the trial tribunal also evaluated the evidence of the Respondent witnesses who testified that it was true that the Applicant purchased the disputed land after being asked by their mother and it was their mother who built the house. She distinguished the cited case of **Stanslaus Rugaba** that the same does not fit the circumstances of this case.

Responding on the 3rd and 4th grounds of Appeal on the issue of ownership, she said the Appellant brought the sale agreement of the land and the Respondent testified how the deceased built the house. She referred to the testimonies of the Respondents witnesses and argued that the witnesses testified on the acquisition of the disputed land and that the Appellant had a chance to either bring the Ward Secretary or relatives to prove ownership. She further distinguished the relevance of the cited case of **Godfrey Gabinus @ Ndimba (supra)** on

the basis that parties in this case are blood relatives and the decision of the Court of Appeal did not preclude the evidence of relatives. She prayed for the appeal to be dismissed with cost and informed the court that the house has already been disposed of.

In brief rejoinder, Counsel for the Appellant insisted that the trial Tribunal only summarized the evidence. As for the evidence of relatives as stated in the **Godfrey Gabinus case (supra)**, he stressed that the court must ascertain the credibility of whether their relatives or not. He reiterated his previous prayers.

I have carefully examined the rival submissions of parties in view of the grounds of appeal. The bone of contention in this appeal is pegged on the evaluation of evidence and the weight attached to it, credibility of the testimonies of the relatives and proof of ownership of the disputed house.

Beginning with the ground of evaluation of evidence of each witness, certainly, I am abreast of the proposition by the Court of Appeal in the cited case of **Stanslaus Rugaba Kasusula and AG V Falesi Kabuye (supra)** that it is the duty of the trial court to evaluate the evidence of each witness as well as their credibility and make a finding on the contested facts in issue. The contested fact in issue in

this case is the ownership of the disputed house as claimed by the Appellant.

I thoroughly perused through the judgement of the trial court. The trial chairman generally rounded the evidence of all Appellants' witnesses and stated that they do not know anything else on the dispute between parties apart from sell and purchase of the disputed land. He did the same thing on the evidence of the Respondents' witnesses that after narrating the testimony of DW1, he said that the other witnesses reiterated what was testified by DW1.

I am sitting as a first appellate court where I am obliged without fail to re-appraise the evidence on the record and draw its own inferences and findings of facts. In so doing, I am having regard to the fact that the trial court had the advantage of assessing the credibility of the witnesses in so far as demeanour is concerned. This principle has been illustrated by the Court of Appeal in the cases of **Jamal A. Tamim vs. Felix Francis Mkosamali & the Attorney General**, Civil Appeal No. 110 of 2012 (unreported); and **Martha Wejja vs. Attorney General and Another** [1982] TLR 35, to mention but a few.

In re-visiting the evidence on the proof of ownership of the disputed house, the Appellant (**PW1**) testified before the trial court that he purchased the disputed land from one Venance Francis

Showela on 30.09.2007 and built a house at the disputed land. He tendered a sale agreement which was admitted in court as exhibit P1. He testified also that he completed building the house in October 2007 and the house was registered in the name of his father. Responding to cross examination questions, he said that he only talked with his mother that he builds a house for her and that there is no evidence that her mother wanted to move to Isyesye. Responding to further cross examination questions he said that he was not the one who installed the electricity or paid for the same nor installed the water supply but her late mother who has stayed in the house for 9 years. He added also that no any other member of the family knows that the house belongs to him and not the deceased. The Appellant called **Paulo Nihuri (PW2)** who testified that he was a witness on the purchase of the disputed land but does not know how and where the Appellant obtained the money to purchase the same. He testified also it was the deceased who was staying in the disputed house. He admitted to be present when the house was built but said also that he does not know who built the house and he was not involved. He said, he also does not know who is the lawful owner of the disputed house. **PW3-** Sanga Loud, testified that it was Francis Shonyela who sold the farm in 2007 and that the late Mary Mathias (the deceased)

was living in the disputed house until she met her death. He testified also that the Appellant had never resided in the disputed house.

David Mwarunde, PW4 testified as the person who was hired by the Appellant in 2007 to put the floor, doors and plaster in the disputed house. However, when responding to cross examination questions, he said he was not sure that he was given a building work on the suit house nor does he know the owner of the disputed house or the house. Again, at one time he said that the Appellant gave him materials for the house but when prompted further, he said he has no proof that he helped the Appellant to purchase building materials.

Thus, going by the testimonies of the prosecution witnesses above, with the exception of PW1; PW2, PW3 and PW4 testified that they did not know the owner of the disputed land or house. PW2, a friend of the Appellant, testified only to be present when the Appellant purchased the suit land but could not tell how and where did he obtain the money. It was the same testimony of PW3. PW4 while testifying that he was the one who put the floor and door in the house where it would seem that he did the finishing job of the house, still responded in cross examination that he was not sure if he worked on the disputed house. This is a major contradiction considering he is purported to have been the one who built the said house. On the

Appellant's own evidence, he testified when adducing his evidence in chief that the house was registered in the name of his father as mentioned by his mother. The question here is if it was the Appellant who bought the land and built the house by his own money why register the same into his father's name who passed on in 1994 as the records reveal?

The posed question can be enlightened by the evidence adduced by the Respondent and her witnesses. The Respondent who testified **as DW1**, told the court that the disputed house belonged to their mother who in 2007 gave money to the Appellant to purchase the suit land. She testified further that; their late mother started building the house in 2009 after retiring in 2008. She completed building the house in 2010 and the water and electricity was installed in 2012. She explained before the court that the water and electricity bills were written in the name of Mary Mathias Chitumbo and she tendered retirement benefits voucher which were admitted **as exhibit D1**. She contended also that exhibit P1 does not show that the Appellant is the owner of the disputed house but their mother who has been living in the house until she met her death. Responding to cross examination question, she insisted that the house was built by their late mother. Another witness was their Aunt who testified **as DW2**.

She testified before the court that the disputed house was built by the late Mary Mathias Chitumbo in 2009 and the Appellant is not an owner. She testified also that the late Mary Mathias Chitumbo consulted her before purchasing and building the suit house. She concluded that the Appellant has never owned the suit house nor lived in it. Responding to cross examination question, she said she did not participate in building it. The last defence witness was Moris Mathias Chitumbo, a younger brother of the Appellant **(DW3)** who testified that their mother asked them to find her a plot to build a house. In 2007, the Appellant found the plot at Isyesye for their mother. It was their mother who gave the Appellant money to purchase the plot. Their mother retired in 2008 and built the house in 2009 from her retirement benefits. He testified further that the Appellant refused to give their mother her sale agreement and it was their mother that installed and paid for water and electricity bills. He tendered the bills which were admitted without objection as **exhibit D2**. He concluded therefore that the house belongs to their mother.

The Appellant did not cross examine DW3 at all, nor did he cross examine on all testimonies of all three defence witnesses that the Appellant was given money by the late Mary Mathias Chitumbo to buy her a plot. Again, the Appellant did not cross examine on the

fact that the deceased started building the house in 2009 after her retirement and finished building the same in 2010 contrary to the Appellant's testimony that he purchased the plot in September 2007 and completed building the house in October, 2007. Surely, even in the stretch of imagination, one cannot build the whole house and considering the prevailing technology and the place at that time in one month. More-so, it is the principle 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 such evidence be rejected. This principle was held by the Court of Appeal in the case of **Shadrack Balinago vs. 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".

Therefore, the Appellant cannot fault the evidence of defence witnesses now that the trial court found his evidence on the ownership of the disputed house to be weak.

Again, the proof of ownership of the disputed house goes hand in hand with the salutary principle of the burden of proof that "he who alleges must prove" as per **section 110 of the Evidence Act, Cap 6 RE 2019**. As the case is a civil in nature, the standard of proof is on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. A statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 340 suffice to emphasize on the point as reproduced hereunder:

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. I f the evidence is such that the tribunal can say - We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not... "

Tailoring the requirement of the burden of proof with the facts of this case, the Appellant again did not avail to the court any title deed or licence of residence to prove that the disputed house is his as he claims. It is strange for a person who claims to have bought the land, and build a house to not have any documentary proof of any kind to prove ownership of such house. Infact, even the bills of the house are in their late Mother's name (Exhibit D2) in proving that she was the owner of the house.

The Appellant is also complaining on the credibility of the testimonies of the relatives. Firstly, be as it may, I think the weight of the Appellant's case did not depend on the credibility of the family members evidence and their credibility alone. Rather it depended on the duty assigned by law to the Appellant of discharging his burden of proof on the required standard in civil cases relative to the issue to be proved i.e., ownership of the suit house. More importantly, there is no law that bars family members alone from giving evidence in support of a fact in issue unless there is corroboration of independent witnesses. This position that I fully subscribe to was well enunciated by the Court of Appeal in the case of **Paulo Tarayi V Republic**, Criminal Appeal No. 216/1994, where the Court held that:

"We wish to say at the outset that it is of course, not the law that whenever relatives testify on an event they should not be believed unless there is also evidence of a non- relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote certain version of events must be borne in mind, the evidence of each of them. The veracity of their story must be considered and ganged judiciously just as the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative".

Furthermore, I subscribe to the position of the law held by the Court of Appeal in the cited case of **Godfrey Gabinus @Ndimba and 2 Others Vs The Republic (supra)** that there is no law that forbids relatives to testify on the same cause. Secondly, in any case what matters is their credibility, and each evidence is to be considered on merits and weight attached to it. The Court of Appeal further referred to its earlier decision in the case of **Abdallah Teje @ Makula V Republic**, Criminal Appeal No. 195 of 2005 (unreported) where it was held that such evidence must satisfy the following conditions:

- "1. Whether such evidence was legally obtained.*
- 2. Whether it was credible and accurate.*
- 3. Whether it was relevant, material and competent.*

4. *Whether it met the standard of proof requisite in the particular case, that is, its believability".*

For the purpose of the ground of appeal and submission by the Counsel for the Appellant that the trial court based its decision solely on the evidence of family members, I find it apt to gauge the above conditions with the evidence of DW1, DW2 and DW3. Firstly, DW1 is the administratrix of the estate of the late Mary Mathias Chitumbo claimed to be the owner of the subject matter. DW2 is the blood brother of DW1 and the Appellant both being beneficiaries of the deceased estate. DW3 is an aunt who testified under oath that she was close with the deceased and knew about the affairs of the family and that the deceased informed her of her intention to purchase a plot and ultimately built the disputed house. In essence, the testimonies of DW1, DW2 and DW3 are relevant, material and competent to the fact in issue. There is no illegality pointed out on obtaining their evidence and coming to the issue credibility, accuracy and believability, the Appellant has not given the court any cogent reason to discredit their testimonies and credence. There is nowhere that it has been shown that their testimonies were contradictory or there was any discrepancy pointed out by the Appellant to question their credence. If at all, in looking at the

coherence of their testimonies from the record, as an appellate court, I find their testimonies were coherent, corroborated their testimonies without a hitch hence believable. From that observation, I find that the trial tribunal was correct to consider and give weight to the testimonies of the family members.

That being said and from the above background, I find this appeal to be unmeritorious as the Respondent's evidence was heavier and believable than that of the Appellant. The Appellant failed to discharge his burden of proof in proving ownership. Accordingly, I dismiss the appeal with costs.

Accordingly ordered



Mbeya
11.08.2021



R.A.Ebrahim
Judge

Date: 11.08.2021

Coram: Hon. A.P. Scout- Ag-DR.

Appellant: Present.

For the Appellant: Ms. Tumain Advocate.

Respondent: Present.

For the Respondent: Mr. William Advocate.

B/C: Patrick Nundwe.

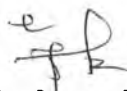
Ms. Tumain Amenye, Advocate for the Appellant holding brief of Mr. Felix Kapinga Advocate for appellant who present before the court.

Mr. William Advocate for the Respondent who present.

The case is coming on for judgment we are ready to proceed.

Mr. William Advocate for respondent: We are ready too.

Court: Ruling is delivered before Parties this 11.08.2021 on chamber court.



A.P. Scout

Ag-Deputy Registrar

11.08.2021