IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 2 OF 2022

(Arising from decision of the District Land and Housing Tribunal for Mbulu at Dongobesh in Land Application No. 22 of 2020)

THE REGISTERED TRUSTEES OF

KANISA LA MUNGU TANZANIA..... APPELLANT

VERSUS

LIBERATI RAFAELI..... RESPONDENT

Date of last order: 25/1/2023

Date of judgment: 13/3/2023

JUDGMENT

BARTHY, J.

Before the District Land and Housing Tribunal for Mbulu, (the tribunal), the above-named respondent sued the appellant herein for trespass over a piece of land measuring 70 by 80 paces situated at Yaeda village in Bashay Ward (the suit land). The respondent prayed before the tribunal to be declared as a lawful owner of the suit land and the appellant be ordered to vacate therefrom.

The appellant contested the allegation and claimed to have been the lawful owner; since 1994 where he acquired two acres of land from the village government.

After hearing the parties, the tribunal decided in favour of the respondent declaring him the lawful owner of the suit land; the appellant was then ordered to vacate the said land.

The appellant aggrieved with the decision of the tribunal, preferred the present appeal with four grounds of appeal as follows;

1. *That the learned chairman of the trial tribunal misdirected himself in declaring the respondent as the lawful owner of the suit land while there was no tangible evidence showing how the respondent's mother acquired the suit land before she transferred it to the respondent.*
2. *That the learned chairman of the trial tribunal erred in law and facts as he misinterpreted and misconstrued the provisions of the Village Land Act [Cap 114 R.E 2019].*
3. *That, the learned chairman of the trial tribunal erred in law and fact as he did not manage to evaluate and analyze the evidence of the appellant who was the respondent at the trial tribunal.*
4. *That, the learned chairman of the trial tribunal misdirected himself in declaring the respondent as the lawful owner of*

lawful owner of the suit land notwithstanding the fact that the appellant has been in continuous occupation of the same for a period more than twenty-eight (28) years.

The appellant therefore prayed the appeal to be allowed and the judgment of the tribunal be set aside.

In this appeal, Abdallah Kilobwa and Mr. Pascal Peter learned advocates appeared for the appellant and the respondent respectively. The appeal was disposed of by way of written submissions.

In the submission made by Mr. Abdallah the learned counsel for the appellant, he argued that, there was no tangible evidence showing how the respondent had acquired the suit land from his mother.

He further submitted that, although the respondent tendered a document which he referred to as the deed of gift, but it was not clear as to how the respondent's mother obtained the suit land. The appellant's counsel further argued that failure of the respondent to call the mother as a witness raises doubts and therefore it was wrong for the tribunal to declare the respondent the lawful owner of the suit land.

Submitting on the second ground, Mr. Peter contended that, the tribunal misinterpreted and misconstrued the provision of the Section 8(5) of the Village Land Act [CAP 114 R.E 2019], (the Act). As the trial tribunal stated appellant did not prove the ownership of the suit land by tendering the village resolution minutes showing that the suit land was allocated to him.

Mr. Abdallah was of the view that, the appellant was allocated with the land in the year 1994 while the Act came into operation in the year 1999 and it could not operate in retrospective.

He added, the minutes tendered by the respondent before the tribunal (marked as exhibit U1) were sufficient to prove that the appellant was allocated the suit land.

Mr. Pascal Peter the respondent's counsel on his reply submission he contended that there was sufficient evidence tendered to establish on how the respondent had acquired the suit land from his mother.

As there was a deed of gift "*sui juris*" as the proof of ownership. The same when it was tendered it was never contested by the appellant.

Mr. Pascal submitted further that, there was no need to call the respondent's mother as a witness as there were other three witnesses who witnessed and signed the deed.

He further counter argued that, the tribunal had no duty to inquire on how the respondent's mother obtained the suit land, as that did not fall within the ambit of dispute between the appellant and the respondent.

On further submission Mr. Pascal argued that, the tribunal properly analyzed the evidence on record. As the respondent had the deed of gift to prove ownership with witnesses who testified: Whereas the appellant's evidence was said to be hearsay and not backed up with unreliable documents. Thus, Mr. Pascal was of the view that, respondent's evidence was stronger and reliable than that of the appellant.

He also disputed the appellant's claim of being in possession or having used the land for more than twenty years, as there was no proof of the appellant being allocated with the suit land from 1994.

It was Mr. Pascal rebuttal that the appellant was granted the suit land with his mother for construction of church for a short while, but it remained in that piece of land and later grabbed it.

The appellant did not file any rejoinder submission.

Having gone through the parties' rival submissions, in determining this appeal the sole issue for determination is whether the appeal has merits.

The gist of this appeal as gathered from the first, third and fourth grounds is that, the appellant is faulting the trial tribunal to declare the respondent the lawful owner of the suit land. The appellant claims that the tribunal failed to evaluate the evidence tendered and considered that the appellant had long possessed the said land. Also, there was no proof how the mother of the respondent had obtained the said land.

This being the first appellate court, it is charged to re-evaluate the evidence on record and where there is non-direction or misdirection of the same it can make its own findings. See the case of **Peters v. Sunday Post Ltd** [1958] EA 424 quoted in **Deemay Daati & 2 others v Republic** [2005] TLR 132,

The issue for determination is respect of the first, third and fourth grounds of appeal is whether the respondent is the lawful owner of the suit land.

The appellant's major argument before the tribunal and before this court is that, the respondent had no evidence to be declared the lawful owner of the suit land.

In dealing with the issue of ownership of the suit land, the tribunal had the following to say;

> *"Baada ya kuona Ushahidi wa wadaawa Pamoja na mashahidi wao na vielelezo vilivyowasilishwa barazani nimeona kuwa mdai ameweza kuthibitisha umiliki wake juu ya eneo la mgogoro baada ya kutoa Ushahidi wa jinsi alivyolipata hilo eneo baada ya kupewa na mama yake tarehe 4/12/2018.*

The trial tribunal was satisfied that the respondent was able to prove together with documents tendered on the ownership of suit land suit to have been obtained from the mother of the appellant.

In civil cases the standard of proof required is that on the balance of probabilities, as provided under Sections 110 through to 113 of the Evidence Act, [Cap 6 R.E. 2019]. See the case of **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017. Court of Appeal of Tanzania at Mwanza (unreported).

I have keenly gone through the entire record of the tribunal in which the respondent herein was claiming to be the lawful owner of a piece of land

measuring about 70 by 80 paces. It was stated, the land was acquired as the gift from his mother on 4/12/2018.

The respondent stated his mother acquired the suit land through *operesheni ya mwaka 1974.* The respondent's evidence that his mother acquired the suit land through the 1974 operation does not agree with exhibit M1' which is the deed of gift entered between the respondent and his mother for transfer of the suit land to the respondent.

Paragraph one of exhibit M1 reads;

> *"ploti hii naimiliki kabla na baada ya operesheni ya vijiji ya mwaka 1974"*

The respondent's mother was never called to testify before the tribunal, to prove to have gifted the said land to the respondent or she had allowed the appellant to use part of it for the while in the year 2019.

I am very much aware that no particular number of witnesses is required to prove the case, but the party should produce material witness.

The record shows that, the appellant was sued for trespassing on the respondent's land, but there were inconsistencies and discrepancies on their evidence. Hence, the tribunal ruled in favour of the respondent herein court.

Looking on the application form, which is essentially equivalent to the plaint, under paragraph 6 (a) (iv) and (v), the respondent claimed that his mother allowed the appellant's agents who were the pastors "wachungaji" to construct a temporary church sometimes in the years 2019 on a piece of land measuring 30 by 80 paces.

However, the appellant proceeded to erect a permanent structure and invaded the adjacent piece of land measuring 70 by 80 paces claiming to be theirs.

The respondent in her testimony before the tribunal did not make any claim on the parcel of land measuring 30 by 80 paces which was said to have been given to the appellant by his mother (the respondent's mother). The respondent's claim is on the peace of land measuring 70 by 80 paces.

On cross examination by the appellant's advocate, the respondent had stated before the tribunal that;

> *Mlinzi wa kanisa ndiye aliyevamia eneo langu na kuanza kulima kwenye eneo langu la hatua 20 x 80 kati ya eneo lote la hatua 70 x 80.*

The record before the trial further reveals that, PW2 on cross examination by the appellant's advocate had the following to say;

> *Ninalifahamu eneo la mgogoro, uvamizi wa eneo hilo haupo kwa sasa bali ndio wadaiwa wanataka kuvamia na kwa sasa hivi mdaiwa anatumia eneo lake.*

Similarly, PW3 when cross examined by the appellant's advocate he had the following to say;

> *Mdaiwa amevamia eneo la ukubwa wa upana hatua 20 kwa urefu hatua 80...*

With respect to the variance of evidence on the respondent's side, I have considered the decision in the case of **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies***

going to discredit the witness which count".

[Emphasis added].

From the above pieces of evidence extracted from the record an inference can be drawn that, the document tendered at the trial tribunal (exhibit M1) shows that, the land was given to the respondent's mother. However, there was no evidence to prove that it is the same land which the respondent claimed to be his.

Also, it was not clear when the trespass on the suit land had occurred and on what size of land. As there was the contradictions and inconsistences on the evidence adduced by the respondent and his witnesses.

The appellant also claimed to have uninterrupted ownership of the suit land since 1994 when the village committee had allocated the land. However, the respondent had claimed the trespass of the suit land to have occurred in the year 2019. Therefore, this court cannot rule that the suit was time barred in terms of paragraph 22 Part I of the Second Schedule of the Law of Limitation Act, [Cap 89 R.E. 2019].

Since the contradiction touched the core of the matter, on the respondent's evidence, his witnesses and the exhibit tendered could not prove trespass of

the suit land on the standards of proof required. The court finds merits on the first, third and fourth grounds of the appeal.

Now turning to the second ground of the appeal, the tribunal is faulted for wrongly applying the provisions of Section 8 (5) of the Act, because the appellant was allocated the suit land in the year 1994 before the enactment of the Act. The tribunal on its findings decided that, there were no minutes of the village assembly from the appellant to prove the allocation of land by the local government.

As per the evidence adduced, the appellant claimed to have been allocated the suit land by then Harsha Village government in the year 1994 and documents from the village land committee were tendered as "exhibit U1".

There is no doubt that the tribunal erred by invoking the provisions of Section 8(5) of the Act in the instant matter. In so doing the tribunal applied the law retrospectively to cover the matters which happened before its enactment.

Prior to the enactment of the Land Act [CAP 113 R.E 2019] as well as the Act, land management was governed by different laws such as; the Land Acquisition Act No. 47of 1967 which gave the president powers to acquire land in any part of the Republic of Tanzania for public interest.

On the 1967 Arusha Declaration, the Village and Ujamaa village Act of 1975, the Land Regularization Act of 1982 and the Local Government District Authorities Act number 7 of 1982. As I Venturing on those laws, I could not see any provision requiring prior approval of the village assembly before granting ownership of the village land.

Such requirement was brought with enactment of the Act which do not apply in the circumstance of this matter. The provisions of Sections 15 and 16 of the Act recognized the disposition of land that were made prior to its enactment. Section 16 of the Act reads;

> *For the avoidance of doubt and in order to facilitate security of tenure and contribute to the development of village land, the provisions of section 15, other than subsections (2) and (3), shall apply to any and every allocation of village land made by village council or by any other authority on and after the first day of January, 1978 until the date of the commencement of this Act...*

According to the evidence on record, the appellant claimed to have been allocated the suit land by the village government as evidenced by exhibit U1. DW3 who was then the village executive officer; where one of the village

land allocation committee members witnessed the appellant being allocated the suit land.

Ever since, the appellant has been occupying and utilizing the suit land uninterrupted until to-date. This fact was also admitted by the respondent in his application form on paragraph 6 (a) (v), in which the respondent is acknowledging that the appellant has erected permanent structure on the suit land.

The appellant's evidence was stronger than that of the respondent. Had the learned trial chairperson analyzed the evidence on record and properly applied the law, he would have arrived to a different conclusion. I therefore find the second ground of appeal also has merits and it is accordingly allowed.

That being said and done, the appeal is hereby allowed entirely with costs. The decision and decree of the tribunal are hereby quashed and set aside since there was no proof of the trespass of the respondent's land.

It is so ordered.

Dated at **Babati** this 13th day of March, 2023

G. N. BARTHY,
JUDGE
13/3/2023

Delivered in the presence of Mr. Pascal Peter for the respondent and Abdallah Kilobwa for the appellant and the respondent in person.