

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 202 OF 2022

(Arising out of Land Application No. 28 of 2022 before the District Land & Housing Tribunal for Arusha at Arusha.)

OLOSHI KANJALO _____ **APPELLANT**

VERSUS

SAILEPU MANIE _____ **RESPONDENT**

JUDGMENT

17/11/2023 & 15/03/2024

BADE, J.

Aggrieved by the judgment of the District Land and Housing Tribunal for Arusha District at Arusha (Henceforth "The Land Tribunal"), the appellant herein lodged this appeal to challenge it. The grounds of appeal are reproduced verbatim hereunder;

- I. That the trial tribunal erred in law and facts by failure to put proper records as adduced by the parties to the suit.*
- II. That, the trial tribunal erred in law and fact by delivering its decision which is not in harmony with the evidence on the record.*



- III. That, the trial tribunal erred in law and facts by entertaining and determining the matter which was time-barred.*
- IV. That the trial tribunal erred in law and facts by delivering its judgment without giving reasons to reach that decision.*
- V. That the trial tribunal erred in law and facts in delivering the judgment in favor of the respondent without considering documentary evidence adduced by the appellant.*
- VI. That the trial tribunal erred in law and in facts in deciding application No. 28 of 2021 where the judgment does not correspond or harmonize with the proceedings.*
- VII. That the trial tribunal erred in law and fact in delivering a contradictory judgment in favor of the respondent.*
- VIII. That the trial tribunal erred in law and facts as it decided the matter in favor of the respondent while failing to call his key witnesses.*
- IX. That the trial tribunal erred in law and facts in deciding the matter in the favor of the respondent without considering that there is contradictory evidence on the respondent's side.*



Having obtained leave of this court, the appellant added other grounds to the effect that:

- i) That the trial tribunal erred in law and fact in deciding the matter in favor of the respondent who adduced or testified its evidence on a different Suitland which is contrary to his pleadings.*
- ii) That the trial tribunal erred in law and fact in deciding the matter in favor of the respondent while the respondent himself did not appear to adduce on his oath.*

The short background of this matter is that the respondent sued the appellant before the land tribunal claiming that he trespassed into his land measuring 10 acres in 2021, located at Baraka-Kigongoni Village. The land is bound by the child of Olomunisho and the child of Zelema on the eastern side, livestock paths (pario la mifugo) on the western and northern side, and Endakoni Road on the southern.

The Respondent testified before the land tribunal that he was given the suit land by the village some time ago and confirmed by

the Village General Assembly. He built and cultivated on the suit land. The Respondent further testified that he made a complaint before the Ward Tribunal and it was decided in his favor. The case before the Ward Tribunal was between one Ngorisa whom the suit land was sold by the appellant and himself.

On the other hand, the Appellant testified that the respondent trespassed on his land since 2011. He reported the matter to the village office and the respondent was told to stay away from suit land. The Appellant was ordered to demolish his house in the suit land, which order he complied with, but after 6 years he came back.

After hearing the evidence of both sides, the chairman of the tribunal ruled out that the Respondent managed to prove his claim against the Appellant as the evidence shows that he was using the suit land for a long period. Even the Ward Tribunal when deciding the matter opined that the suit land belonged to the Respondent. Aggrieved by the said decision the Appellant appealed to this Court.

This appeal was argued before the court with the Appellant being represented by Mr. Ngeseyan and Mr. Masiahaya, learned counsel,

whereas the Respondent enjoyed the services of Mr. Daniel Lyimo, learned counsel.

During the hearing, counsel for the Appellant dropped the 1st and 4th grounds of appeal and argued grounds 2 and 6 jointly. Mr. Ngeseyan submitted that when one look at the proceedings, it was contended that the applicant does not speak Kiswahili, he referred this Court on page 4 and 5 of the proceedings. A translator by the name of Jackson Melamie Mollel was called. Mr. Ngeseyan further contended that the witness tendered exhibits P1 and P2, and the said exhibit is recorded to have been read by the witness. In his view, it is illogical to say the witness who doesn't know how to read and speak the language had actually read out the exhibit in court. In his opinion, that contradicts what is recorded in the proceedings. Mr. Ngeseyan further submitted that the record says that the Applicant was recorded to have sworn as a Christian while he was not a Christian and he could not have sworn to testify as such.

Moreover, it is Mr. Ngeseyan's contention that the proceedings do not augur with the judgment. It is not stated in the judgment what are the correct borders of the suit land particularly on the northern

side. He added that the north border details are missing on the judgment. Mr. Ngeseyan contended that the time over which the Respondent acquired the suit land is only recorded on the judgment while it was not captured in the proceedings. At page 3 of the judgment, it was recorded that the Applicant was allocated the said land in 2004 and his witnesses, DW2 and DW3 supported that fact; but the same was not captured in the proceedings. To support his position, he cited the cases of **Alfani Sudi [1998] 527** and the case of **Mandile Kinayo vs Ngoilyale Konerei**, PC Civil Appeal No. 40 of 2020, where it was held that court records should accurately represent what transpired in court.

With regard to the 3rd ground, he submitted that the trial tribunal entertained the matter that was time-barred. The appellant stayed in the suit land for more than 12 years as per page 3 of the judgment, since 1994.

Arguing the 8th ground of appeal he submitted that the Respondent did not call his key witnesses to prove his ownership of the suit land, adding that on page 6 of the proceedings, he stated of the many other persons that have been called to prove his case including the village leadership. Mr. Ngeseyan added that

the omission to call a key witness for undisclosed reasons should make the tribunal draw a negative inference. To support his stance, he cited the cases of **Azizi Abdalla vs R**, 1992 TLR 184 and **Hemed Said vs Mohamed Mbilu** [1984] TLR 113.

With regard to the 1st additional ground of appeal, Mr. Ngeseyan submitted that parties are bound by their own pleadings. That the farm is 10 acres located in Baraka Village and it boarded north Kolila/Ester Luminisho while on the proceedings at page 6, north is referred as livestock path (pario la mifugo). That south is noted to border the path of Lusio Belgiji in the application, while in his testimony pointed as Endakoni road, for east Endakoni road is noted while in his testimony says he boards Luminisho son and Zeleman, while the west is said to border path of baraka/Elerai while in his testimony he stated that it borders the livestock path.

In his opinion pleadings and the testimony are not in congruent, and thus the tribunal erred in law for entertain and awarding judgment in favor of the applicant based on this kind of pleadings/evidence. To cement his position, he cited the case of **Registered Trustees of the Archdiocese of Dar es Salaam vs Bunju Village Government and 11 Others**, Civil Appeal No.

147 of 2006 where it was held on page 7 that submission is not evidence, it is an elaboration or explanation of evidence already tendered not substitute evidence.

With regard to the additional ground no. 2, he submitted that the Applicant/Respondent herein is Sailepu Manie but the person who stood to testify was Sailepu Mawe. He referred to this Court on page 5 of the proceedings. The evidence may be confusing because the person testifying is different from the person who instituted the case before the tribunal and there was no affidavit to show the two are one and the same person.

With regard to the 5th ground of appeal, Mr. Masiahaya submitted that the Land Tribunal delivered its judgment without considering documentary evidence adduced by the Appellant. Pages 7, 8 and 9 of the proceedings show that the Appellant tendered some exhibits, exhibit D1 a letter authored by Faraja Ally to Kuya Mani but in the judgment the Chairman of the Tribunal did not consider the said letter or in any way analyze it to accord any weight. He argued further that the Appellant tendered exhibit D2 a letter by WEO of the Esilale to Sailepu Ole Manie of Out Kai Village which show the discrepancy in the address of the respondent as well as

refuting that the respondent was allocated land in Losiwa Village or applied for land in the said village. He added that if the Land Tribunal considered this exhibit, he would have seen the respondent could have not been the one who had the suit land and he would have arrived at a different finding.

Mr. Masiahaya contends that on page 9 of the proceedings, exhibit D3 is the minute that allocated the land to the Appellant dated 19th September 2000, but the trial tribunal did not consider that exhibit, arguing that had he considered it his decision would have been different, urging that this Court as the *first appellate court* should reevaluate the evidence including the exhibits and come up with a finding.

On the 9th ground of Appeal, he submitted that the Land Tribunal did not consider contradictions in the respondent's evidence. Paragraph 1 of the AW1 evidence states that Oloshi was in occupation of his land referring to exhibit P1, a decision of the Ward tribunal, but the Respondent never sued the Appellant at the Esilale Ward Tribunal. He added that exhibit P1 does not include a description of the land which would pin the land as the same as

the suit land. In his view exhibit P1 does not suffice to show whether the respondent is the owner of the disputed land.

He argues further that Order VII Rule 3 of the Civil Procedure Code states that any immovable property has to be properly described since the failure of which would prejudice the execution process at a later stage.

In opposing the appeal, the respondent submitted that those grounds listed by the appellant are not qualified as appeal grounds as all grounds are about errors made in the proceedings, most of which are *typographical and none of them are on point of law*. He further reckoned that cases cited in support of the appeal are not supporting those grounds of appeal, arguing that even the point made by the counsel for the Appellant that submissions are not evidence as it was held in the case of **Konireyi** (supra) is only talking on the value of submissions which is not evidence.

With regard to the 8th ground of appeal, he submitted that the case does not support the appeal, since it is not the mandate of the court to call a witness neither does any law put a mandate to any party as to who should be called a witness. He added that nor

it is the number of witnesses that determines the weight of evidence.

On the 3rd ground, he argued that the cause of action arose in 2020 and the suit was filed in the same year. That it certainly did not arise in 1994. He further contended that the argument based on adverse possession is baseless as it is not founded on evidence since no evidence is on record on when the land was occupied.

Coming to the 5th ground of appeal, the Respondent submitted that exhibits D1, D2, and D3 show that the Appellant was given the land on 19/09/2000 hence the suit was filed on time which trespass as the cause of action arose.

Concerning the 9th grounds of appeal, he submitted that the Appellant has not established the contradictions made in the Respondent's case, insisting that no evidence or documents were pointed out by the counsel to show the contradictions.

In rejoining, Mr. Ngeseyan submitted that it is untrue that all issues are based on typing errors, maintaining that the counsel has neither responded on the issue regarding the description of

the land nor has he responded on the name of witness discrepancy against the party suing at the trial tribunal.

Moreover, he submitted that on the number of witnesses, they made assertions on the issue of a key witness, not the number. Responding to the allegations that the cases cited were irrelevant, he retorts that the case of **Mandile Kinayo** (supra) talks of the importance of court records, insisting that the case is relevant to show the land tribunal's record represents what has transpired during trial. Mr. Ngeseyan further contended that exhibit D3 should have been considered on its specific weight which would have helped the tribunal to arrive at a proper decision on this matter.

After perusing the court records and rival submissions by the parties I think the issue for determination here is whether this appeal has merit, in which case I will endeavor to discuss those grounds as argued by the counsel for the Appellant. It was argued by the counsel for the Appellant that the judgment of the Land Tribunal is not in harmony with the proceedings in the sense that it is on record that the Respondent claimed that he could not speak Kiswahili and he was thus given an interpreter therein, but

surprisingly when exhibits P1 and P2 were admitted, the record indicates that it was read out by a witness. If you think of the practicality of the matter, one would see the counsel's argument is without any merit in the sense that the record shows that the witness (Respondent) was speaking through his interpreter, so obviously he read out the said exhibits through his interpreter.

Another argument by the Appellant's counsel is that the Respondent swore as a Christian while in truth he is not a Christian, going through the proceedings before the Land Tribunal I found out that when the witness was asked his religion on page 5 of the typed proceedings, he replied that he was a Christian, and then he was sworn. The allegation that he is not a Christian was not raised at the trial Tribunal and is certainly not supported by the record.

Counsel for the Appellant also alleges that the proceedings do not augur with the judgment in the sense that there was some evidence that is reflected in the proceedings but is not reflected on the judgment, and some were discussed in the judgment but not reflected on the proceeding, making an instance of the border of the suit land, noting that the north border details are missing on

the judgment. On the Judgment, it records the time when the respondent acquired the suit land but the time is not reflected in the proceedings. Going through the record of the trial tribunal, it is true that when the Chairperson of the Tribunal mentions the border of the suit land, he did not mention the northern part. In my view, this omission is not prejudicial, neither has the Appellant stated how he was prejudiced by such omission.

On the allegations on the time that the Respondent acquired the suit land being recorded on the Judgment while the same fact is not captured in the proceedings, I find this argument to be meritless due to the reason there is nowhere in the Judgment where the Chairperson discussed the time that the Respondent acquired the suit land. Also, the allegation that page 3 of the Judgment indicates that the Applicant was allocated the land in 2004 and evidence of DW2 and DW3 supporting this fact, all of these facts are not reflected in the proceedings and are unfounded as I could not find anywhere on the Judgment where that factor was discussed.

Concerning the 3rd ground, where the counsel for the Appellant argues that the Land Tribunal entertain the matter which was

time-barred as per page 3 of the Judgment, since the Appellant stayed on the land for more than 12 years. With due respect to the counsel for the Appellant, the Judgment of the Land Tribunal does not indicate that the Appellant was given the said land in 1994. My keen reading of the Judgment reveals on page 3 of the Judgment where the Chairperson narrated what was stated by the witness of the Appellant. My further findings are that while I went through the proceedings of the Land Tribunal, the Appellant did not raise the issue of adverse possession, the Appellant did not even state when or how he acquired the suit land or adduced evidence on the said issue. So it is also baseless.

Determining the merits of the 8th ground of appeal, the Appellant's counsel contended that the Tribunal decided the matter while the respondent failed to call key witnesses. It is trite law that has been stated time and again that what matters is the quality of the evidence, not the number of witnesses giving evidence. See section 143 of the Evidence Act, Cap 6 RE 2019 and a plethora of authorities on this issue, whose basis is the same, that it is not the quantity, but the quality that is material, because evidence has to be weighed. Not counted. See **Kennedy Owino Onyachi & Others vs Republic** (Criminal Appeal 48

of 2006) [2009] TZCA, **Tafifu Hassan @ Gumbe vs The Republic**, Criminal Appeal No. 436 of 2017 and **Bakari Juma Ling'ambe vs Republic**, Criminal Appeal No. 161 of 2014. In the latter case it was held:

"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the Tanzania Evidence Act, Cap 6)."

Looking at the 1st additional ground of appeal, the counsel for the Appellant argues that the Respondent departed from his pleadings as the boundaries of the suit land indicated in the application are different from the ones he testified on. I had made consideration on this point which took me to the records of the Land Tribunal. In the Application, the boundaries to the suit land are indicated that on the North side it borders Esta Lomisho, on the South it borders a Path of Losirwa Belgiji, on the East it borders Intakon Road and on the West, it borders a Path of Baraka/ Elerai; while in his evidence the Respondent testified that the suit land borders on the Eastern side Child of Olomunisho and child of Zeleman, Western side is the livestock path (pario la ng'ombe), same for the Northern side, and the Southern side is Andakoni road. While the borders seem they differ in some parts, the Appellant did not raise that

issue at the Land Tribunal, neither did he raise an objection that the suit land is a different land from the land that is being described, and/or it is not the same land that the Respondent was claiming. The Appellant can not raise this fact now.

Concerning the 2nd additional ground of appeal, counsel for the Appellant argues that the Respondent herein is Sailepu Manie but the one who testified before the land tribunal was Sailepu Mawi. At page 5 of the typed proceedings, the name of the Respondent appeared as Sailep Mawe, but when going through the handwritten notes of the proceedings it is Sailep Manie, so the name mix-up is a mere typing error.

On the 5th ground of appeal, the counsel for the Appellant argues that the Land Tribunal did not consider exhibit D1, exhibit D2 which is a letter by WEO of Esilale to the Sailepu Ole Manie refuting that the Respondent was allocated the land at Losiwa Village, and exhibit D3 - minutes that allocated the land to the Appellant dated 19th day of September 2000. Going through exhibit D1 with the title *"taarifa ya kuhamisha nyumba uliyojenga eneo la mgogoro Kijiji cha Losirwa"*, in my view, the said exhibit is of no help to the Appellant's case as it is directed to the person known as Kuya Mani and not Sailep Manie. In any

case, even if it was directed to the Respondent, the said exhibit does not indicate any ownership or the particular land on which the Respondent was required to demolish the house.

Looking at exhibit D2 with the title *"mgogoro wa ardhi kati yako na ndugu Oloshi Kanjalo wa Kijiji cha Baraka"* this letter was directed to the appellant to inform him that he did not prove the ownership of the land in dispute. It certainly does not show that the Appellant was the owner of the land. Exhibit D3 on the other hand is about a request which was made by the Appellant to the Village of Losirwa requiring to be allocated a land measuring 30 acres. The boundaries of the said land are different from the ones in the suit land; so this exhibit too does not evidence the ownership of the suit land by the Appellant.

About the 9th ground of appeal, the Appellant's counsel argues that the Land Tribunal did not consider contradictions in the Respondent's evidence. I have failed to follow any of those contradictions in the submissions by the counsel, as pointed out in the response by the Respondent's counsel. Furthermore, I do not reckon that the Respondent not suing the Appellant at the Ward Tribunal would amount to a contradiction by any yardstick.

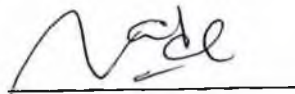
In his further arguments, Counsel for the appellant submitted that exhibit P1 does not describe the land, hence it does not suffice to show that the Respondent is the owner of the disputed land. This argument in my view, is without merit as exhibit P1 a Judgment of the Ward Tribunal of Esilalei between the Respondent and one Eliasi Ngorisa, it is shown in it the description of the suit land (see page 6 of the said exhibit).

But more importantly, the said exhibit was admitted without any objection, nor was the issue that the land mentioned in the exhibit is not the same raised at the Land Tribunal.

Having said so and based on the foregoing analysis of the grounds of appeal, this appeal is dismissed with cost as it lacks merits.

It is so ordered.

DATED at ARUSHA this 15th day of March 2024


A. Z. Bade
Judge
15/03/2024

Judgment delivered in the presence of the Appellant and their representative counsel holding brief for the Appellant and the Respondent in chambers on the **15th** day of **March 2024**



A handwritten signature in black ink, appearing to read "A. Z. Bade", is written above a horizontal line.

A. Z. BADE
JUDGE
15/03/2024