IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MUSSA, J.A. And MUGASHA, J.A.)

CIVIL APPEAL NO. 114 OF 2012

GODFREY SAYI.....APPELLANT

VERSUS

ANNA SIAME as legal Representative

of the late MARY MNDOLWA.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Shangwa, J.)

dated the 27th day of June, 2007

in

Civil Appeal No. 44 of 2006

JUDGMENT OF THE COURT

8th & 21st February, 2017

MUGASHA, J.A.:

The appellant, GODFREY SAYI is challenging the judgment and the decree of the first appellate High Court at Dar-es-salaam which upheld the decision of the trial court. Apart from making an order to apportion Farm No. 2243 into what each party was entitled to, the first appellate court also ordered revocation of Title Deed No. 50312 in respect of Farm and its re-survey.

The centre of controversy before the trial court was the said Farm which was registered in the name of the appellant as Guardian of his six children namely: **MICHAEL GODFREY SAYI, GRACE GODFREY SAYI, MPOLY GODFREY SAYI, HAWA GODFREY SAYI, GLADNESS GODFREY SAYI and SOPHIA GODFREY SAYI.** The appellant's complaint before the trial court was that, the respondent had trespassed into Farm No 2243.

The brief evidence of the appellant is that, the respondent was his mother in law as he was formerly married to her daughter but they had separated. He testified that, Farm No. 2243 constituted land which he had purchased from other people and five (5) to six (6) acres (Land in dispute) he was given by the respondent. Having built two houses on the land in dispute in between 1989 and 1991, later he opted to register that land in the names of his six children. It was his further account that, in 2001, the respondent trespassed into the land in dispute having sold part of it to one George Lulandala who embarked into developing the area. Also the appellant testified that, the dispute in question arose because the respondent's daughter was no longer the appellant's wife.

Apart from the appellant, four other witnesses testified on his side. PW3 **MARIAM MSHAMU** testified to have sold about an acre to the

appellant and that other land was sold to the appellant by her uncle and late grandfather. However, PW3 told the trial court that he was not aware if the appellant leaved within the area before. PW6 **SALIMU MUDEME** testified to have sold to the appellant about ¾ of an acre. The other two witnesses, PW2 **BLASSIA KIBANO** and PW4 **MATHIAS MAZUGO** were government officials from office of Commissioner for Lands who testified on land registration procedures and the pre-requisites and how the appellant registered Farm No. 2243. According to PW2, the appellant requested that the Farm be registered in his name as Guardian of his six children who he indicated to be actual owners. Besides, he wrote a letter informing the land office that he had spent money for the survey. When he was cross-examined by Mr. Mtanga PW2 replied as follows as reflected at page 104 of the record:

> *".....Normally the procedure is that any requests for land/plots must be accompanied by a letter from the area leader. The letter from the area leader is very important to avoid a double allocation that is among the necessary requirements."*

PW2 went ahead and told the trial court that the appellant did submit a letter from the area leader to show that he is the lawful owner of the Farm. However, evidence of PW2 is contradicted by the evidence of PW4 who at page 113 of the record, apart from testifying that he was custodian of the land survey records, he told the trial court that the appellant's request for the survey was not accompanied by recommendation from the village authorities.

On the other hand, the respondent refuted the appellant's claim. She told the trial court to have purchased the land in dispute from four different people. She added that, apart from selling the two acres to one George Lulandala, she denied to have given her land to the appellant or his children. She further testified to have allowed the appellant who was her son in-law to build a hut for her own use when she was tending her farm. The other defence witnesses included DW2 **ALLY MUHAJI** and DW3 **HALIMA MANGOLI** who all confirmed to have sold land to the respondent while DW4 **SAIDI KIRUMBI** confirmed that the land in dispute belonged to the respondent, it had a small house and in 1997 the respondent sought permission of the local leaders to commence ownership registration process. DW4 also confirmed that, in 2001 being

a ten cell leader, he witnessed a transaction whereby the respondent sold part of the land to George Lulandala.

At the trial two issues were framed as follows:

(1) *Who is the lawful owner of Farm No. 2243 Kibamba area Dar-es-salaam.*

(2) *To what reliefs are parties entitled to.*

In its judgment, the trial court dismissed the appellant's case with costs after being satisfied that the appellant failed to prove his case on a balance of probabilities that he is lawful owner of Farm No. 2243. The respondent was declared lawful owner of the entire Farm and the appellant was ordered to give up possession. Moreover, the sale of part of the farm conducted by the appellant was declared illegal and the purchasers were required to give up possession to the respondent.

In the first appellate court, the judge observed that the appellant had secretly acquired registration of the Farm No. 2243 in his name in a bid to swindle the respondent of her 5 to 6 acres. Apart from upholding the decision of the trial court, the first appellate court, having concluded

that 5 to 6 acres belong to the respondent and the remaining portion belongs to the appellant, the judge revoked Title Deed No 50312 of Farm No 2243 and ordered its re-survey. The appellant was ordered to refund the illegal purchasers of part of the respondent's land. Subsequently, the first appeal was dismissed with costs.

Still aggrieved, the appellant has appealed to the Court. His Memorandum of Appeal has five grounds which are conveniently condensed into three main grounds namely:

1. *That, the 1st appellate judge erred in not considering that the respondent gave the appellant 5 to 6 acres for permanent use under love and affection which together with appellant's land comprised Farm No. 2243 registered in the name of the appellant.*

2. *That, the 1st appellate judge erred to order demolition of two houses without considering that it is the respondent who permitted the appellant to construct such houses.*

3. *The 1st appellate judge erred in not ordering that each party should bear own costs.*

At the hearing of the appeal the appellant appeared in person and Mr. Hashim Mtanga, learned counsel represented the respondent. Parties adopted written submission earlier on filed.

The appellant stated that, the respondent gave him the disputed land and she had endorsed that such land be registered in the name of the appellant. In his written submission, the appellant stated that he agreed with the respondent that the processing of the Title Deed should not be in appellant's name but his six (6) children including those born outside wedlock. He also argued that, since the respondent allowed him to construct a small hut on the farm that was implied permission to the appellant to construct the two houses.

On the other hand, Mr. Hashim Mtanga submitted that, the land registration under Plan No. E. 302/23 was fraudulently obtained by the appellant because the entire Farm No. 2243 belongs to the respondent who had purchased four pieces of land from different buyers. We had to remind Mr. Hashim that, since there is no Notice of a cross appeal in terms of rule 94 (1) of the Rules against the decision of Shangwa,J. who allowed the appellant to retain part of Farm No. 2243, the respondent

cannot before the Court further pursue the issue of respondent's entire ownership of Farm No 2243.

Pertaining to the demolition order, the learned counsel submitted that, it was justified because initially, on the land in dispute, there was a small shelter land for respondent's use but later the construction was undertaken by those who illegally purchased the land in dispute from the appellant.

After a careful consideration of the entire record and the submission of the parties, we have to resolve if the respondent gave the farm to the appellant or his children.

We shall dispose the two first grounds as they have a bearing on each other. We begin with what was pleaded by the appellant as reflected in the paragraphs 4 and 6 of the amended Plaint at page 12 of the record:

> Para 4 :
>
> *"The plaintiffs through their next friend applied for and were granted survey instructions to survey the disputed farm. Originally the said farm was offered to the plaintiffs by the defendant who is their*

grandmother under natural love and affection. Copy of survey instructions is attached as annexture A."

Para 6 :

On or about January, 2001 the defendant trespassed to the disputed farm with intention of disposing part of the farm to the third party without the consent of the legal owner whereas the plaintiffs have already constructed a residential house therein."

It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act **[CAP 6 RE, 2002]** which among other things state:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

See also the case of **Attorney General and two Others vs Eligi Edward Massawe and Others, Civil Appeal No. 86 of 2002** (unreported).

It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil cases, the Court in **Anthony M. Masanga vs Penina (Mama Ngesi) and another, Civil Appeal No. 118 of 2014** (unreported), cited with approval the case of In Re B [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities states that:

> *" If a legal rule requires a fact to be proved(a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the*

party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."

In the matter under scrutiny, since it is the appellant who alleged that the land in dispute belonged to him, the burden of proof was on the appellant. The question is whether he successfully discharged his duty?

We have observed that, the appellant's own evidence at the trial that the land in question was given to him by the respondent is not compatible with what he had earlier pleaded in the amended plaint that, the land in question was originally given to the six children by their grandmother, the respondent. Moreover, none of the appellant's witnesses supported either what the appellant pleaded or his testimonial account. Besides, in the light of contradictory account of PW2 and PW4, it is uncertain if the appellant's survey request was channeled through and recommended by the village authorities as none of the village leaders was brought as a witness on that account. Furthermore, the

appellant's account that the respondent had agreed and endorsed the survey and registration of the land in dispute in his name is apart from being not being supported by the evidence on record, it is highly contradicted of the respondent who maintained that she did not give her land to the appellant or his children. In a nutshell, what was pleaded by the appellant is not entirely supported by the evidence he paraded and indeed failed to establish his case on the balance of probabilities.

In the light of uncertainty surrounding recommendation of the area leaders on the survey and registration of Farm No. 2243, and the strong account of the respondent that she neither gave nor allowed the appellant register her land as part of Farm No 2243, we are in agreement with the first appellate court's finding that the appellant embarked on a secret survey registering land in his own name in a bid to swindle the respondent.

Moreover, the appellant in his submission wanted us to believe that, since the respondent allowed him to construct a hut that was implied permission to build a residential house. We do not agree entirely with the appellant because, apart from his assertion not being backed

any evidence, it is clear on the record that, as far as the land in dispute is concerned, the respondent specifically requested the appellant to build a hut for her own use and not to build his own residential houses.

The appellant is also faulting the first appellate judge who ordered demolition of the two houses. We are in agreement with the first appellate judge that, apart from the appellant embarking on illegal sale of land which is a nullity, since the respondent neither gave nor permitted the appellant sell or develop the land in dispute.

In view of the aforesaid, we think that the appellant ought to have proved that, the respondent did give him the land in dispute in 1989. Unfortunately, the evidence on record does not lead us to believe so and as such, we do not find any cogent reasons to fault the first appellate judge who was justified that the respondent was not a trespasser.

Pertaining to the appellant's complaint on costs he stated that since each party was given his or her portion the appellant should not have been condemned to shoulder the entire cost. As a general rule, costs are awarded at the discretion of the court and a successful party

normally is entitled to costs. We are of a considered view that the first appellate Judge properly his exercised discretion under the law in dismissing the appeal with costs.

In view of the aforesaid, we find no merit in grounds one, two and three. Consequently, we dismiss the appeal in its entirety with costs.

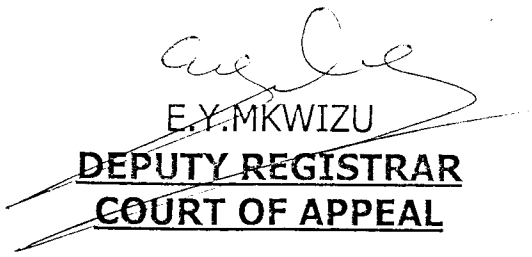
DATED at **DAR ES SALAAM** this 15th day of February, 2017.

B.M. LUANDA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y.MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL