THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 163 OF 2016

IKIZU SECONDARY SCHOOL ---------- APPELLANT

VERSUS

SARAWE VILLAGE COUNCIL ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza Registry)

(Bukuku, J.)

dated the 29th day of October, 2015

in

Land Case No. 35 of 2011

JUDGMENT OF THE COURT

10th & 14th Dec. 2018

MWANGESI, J.A.:

The appellant herein was the plaintiff during trial of the case leading to this appeal. He instituted proceedings in the trial Court praying for declaratory order that, he was the rightful owner of a plot of land measuring about 300 acres situated at Chamtigiti area within the District of Bunda in Mara Region, allegedly encroached by the respondent. Additionally, he prayed for compensation of specific damages against the

respondent to the tune of TZS 60 Million for destruction of trees and crops which had been grown on the disputed piece of land. He also prayed for general damages for psychological and mental torture.

The claim by the appellant was strenuously resisted by the respondent in its written statement defence. It was stated therein that the respondent never encroached any piece of land belonging to the appellant. What was once done by the respondent was to give part of its land measuring about 50 acres to the appellant after it had been pressurized by the Ward Secretary to do so for implementation of the policy of Siasa ni Kilimo. Thenceforth, there had never been any interaction with the appellant, it argued.

The brief facts of the case as summarized by the learned trial Judge were to the effect that, sometimes in the year 1974, the appellant applied in writing for a piece of land from the Ward Secretary of Ikizu, within Bunda District in the Region of Mara, for use of the appellant school. In response to the letter, it was allocated the suit land by the relevant authorities and proceeded to use it uninterruptedly. And, during the period of using the plot of land, they nurtured the natural trees grown thereon and also planted new ones. Also part of the plot of land was planted crops.

In the year 2007, there was an attempt by people from the village of Hunyari to encroach it, but the issue was resolved amicably. Later in the year 2011, the respondent encroached the plot and thereby, triggering the lodgment of the suit of which its decision is being impugned.

To establish its claim, the appellant relied on the testimonies of four witnesses going by the names of George Meshack, Mayoba Katani Zonzo, Steve Majura Mashauri and Eliud Togoro Manombo. In supplement to the oral testimonies, there were tendered four exhibits. On its part, the respondent relied on the testimonies of Buhendile Msakwe Masta, Cheba Waziri Genga and Tabu Luzama. There was no documentary evidence which was tendered.

In resolving the suit between the disputants, the learned trial Judge framed three issues for determination. They read verbatim that:

1. *Who is the lawful owner of the disputed plot of land.*
2. *Whether the appellant suffered any damages to the tune claimed in the plaint.*
3. *To what reliefs was each of the parties to the suit entitled.*

Upon evaluating the evidence that was placed before her, the learned trial Judge answered the first issue in the negative that the appellant had failed to establish its claim to the standard required by law. The second issue was also answered in the negative that the appellant had not suffered any damages. To that the end, the suit was dismissed in its entirety and the appellant was condemned to bear the costs.

Aggrieved by the judgment of the trial Court, the appellant preferred the current appeal premising his grievances on six grounds namely:

> ***One**, that the learned trial Judge erred in law and fact for failure to analyze the evidence on record objectively and observe that the appellant proved her case to the standard required in civil cases as to ownership of the disputed plot of land.*
>
> ***Two,** that the learned trial Judge erred in law for raising the standard of proof in civil case to that of beyond shadow of doubt and as such occasioned failure of justice in this case.*
>
> ***Three,** that the learned trial Judge erred in law and fact for failure to observe that the witnesses for the respondent were untrustworthy and did not shake the strong evidence of the appellant.*

Four, *that the learned trial Judge erred in law and fact for failure to take into account the oral testimony of PW1 to PW4 coupled with documentary evidence of exhibits P1 to P4, which was cogent, coherent and watertight in the circumstances of this case.*

Five, *that the learned trial Judge erred in law and fact to hold that the amount of acres, were to be proved by valuation report as against the sworn oral testimony of the appellants' witnesses.*

Six, *that the learned trial Judge erred in law and fact for failure to hold that the act by the respondent to invade the disputed plot of land, the appellant has greatly been inconvenienced as such, he was entitled to general damages in the circumstances.*

On the date when the appeal was called on for hearing before us, Mr. Elias Rachuonyo Hezron, learned counsel, entered appearance for the appellant whereas, the respondent enjoyed the services of Mr. Leonard Elias Magwayega, also learned counsel. Before we embarked to consider the appeal, we had to dispose of a preliminary objection which had been raised earlier on by the respondent, founded on four grounds which were

however reduced to one after the second, third and four grounds, had been abandoned.

We resolved to hear both the preliminary objection and the appeal together and compose our ruling later. In case the preliminary objection would be sustained, then the process would end there, whilst, if it would be overruled, we would proceed to compose the judgment for the appeal.

The basis of the ground of the preliminary objection which was retained, was to the effect that the appellant failed to comply with the requirement of Rule 97 (1) of the Court of Appeal Rules, 2009 (**the Rules**), for not serving the respondent with copies of the lodged memorandum of appeal within seven days.

In amplification of the preliminary objection, Mr. Magwayega, submitted that since the memorandum of appeal was lodged by the appellant on the 15th December, 2015, and served on the respondent on the 1st January, 2016, which was after the lapse of about sixteen days, offended the provision of Rule 97 (1) of **the Rules** which stipulates verbatim that:

"The appellant shall, before or within seven days after lodging the memorandum of appeal and record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirement of Rule 86."

When the learned counsel for the respondent was probed by the Court as to how the Court could ascertain such facts, he exhibited before the Court his copy of the record of appeal, which indicated that the appellant appended his signature to acknowledge service of the documents on the 1st day of January, 2015. In that regard, he prayed the appeal to be struck out because it was improperly before the Court, with costs.

In response to what was submitted by his learned friend, Mr. Hezron, told the Court that he was alive to the requirement stipulated under Rule 97 (1) of **the Rules,** of which he argued, was complied with by his client. This was so from the evidence contained in the record of appeal that was in his possession, which he also exhibited before us, indicating that the respondent signed the record of appeal to signify acceptance of service on the 21st December, 2015. He was thus of the firm view that, the record of appeal of the appellant was timeously served to the respondent and

thereby, rendering the preliminary objection which was raised by the appellant to be without merit. In the event, he urged us to overrule it with the contempt it deserves and let the appeal be determined on merit.

The issue which stood for our determination in the light of the submissions from either side above, was whether or not the preliminary objection raised was founded. The decision in the landmark case of **Mukisa Biscuits Manufactures Company Limited Vs West End Distributors Limited** [1969] EA 696, laid a settled position of law in regard to preliminary points of objection that, they have to be founded on a point of law.

In the matter which is before us, the date on which the respondent is alleged to have been served with the record of appeal is disputed in that, each side has got its own. Under the circumstances, in order to resolve the dispute, evidence has to be called upon to establish as to which side's assertion was correct. Once that is the case, it involves facts of which, in view of the holding in **Mukisa Biscuits'** case (supra), it fails to qualify in being termed a preliminary objection. We would wish to conclude this part with a piece of advice to the respondent that, instead of treating the point which he raised as a preliminary objection, he would have properly

pursued it under the provisions of Rule 89 (2) of **the Rules,** by applying to seek the appeal to be struck out for failure by the appellant to take an essential step of serving him with the record of appeal within the period prescribed under Rule 97 (1) of **the Rules.** That said, we overrule the preliminary objection.

Having overruled the preliminary objection above, we now turn to consider the appeal. From the six grounds of appeal which have been preferred by the appellant in its appeal, we note that the first and fourth grounds of appeal which revolve around the evidence that was received in Court during trial of the suit are the key ones. From them two issues stand for determination that is first, whether or not a plot of land measuring about 300 acres was allocated to the appellant. The second issue which is subject to the first issue being answered in the affirmative, is whether or not the plot of land allocated to the appellant, was encroached by the respondent.

We propose to start with the first issue. At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that the burden of proof lies on the one who institutes the suit and so goes the saying that, he who alleges must prove. The rule finds

a backing from provisions of law that is, sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002 (**the Evidence Act**), which stipulate thus:

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

See also: **The Attorney General Vs Eligi Edward Massawe and Others,** Civil Appeal No. 86 of 2002, **Anthony M. Masinga Vs Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (both unreported).

The standard of proof owed by the one who is required to discharge the duty, is on the preponderance or balance of probabilities. The case of **RE B** [2008] UKHL, which was cited in **Anthony M. Masinga Vs Penina (Mama Mgesi) and Lucia (Mama Anna),** (supra), defined as to what is meant by the term "balance of probabilities" when it stated that:

"If a legal 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 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 and the fact is treated as having happened."

With the foregoing principle in mind, we now proceed to consider the issues which we have framed starting with the first. After having earnestly considered the testimonies of the four witnesses who testified for the appellant as well as the four exhibits which were tendered to supplement the oral testimony, we are far from being convinced that the appellant managed to discharge his burden of establishing on preponderance of probabilities that, it was allocated 300 acres as claimed, for the reasons which we are going to demonstrate herein below.

The evidence in regard to allocation of the claimed plot of land by the appellant measuring 300 acres, came from George Meshack (PW1) who in our view, was the star witness. He stated at page 42 of the record of appeal that the appellant school was allocated the suit land. To substantiate his evidence, he referred us to a letter from the office of the Ward Secretary assigning the shamba to the school. The essential part of the letter which was admitted as exhibit P2 reads that:

> *"Ofisi hii inachukua nafasi hii kuikabidhi shule ya sekondari Ikizu shamba ambalo limetajwa katika barua yangu ya tarehe 26/11/1974 katika aya ya tatu ya barua kwamba - shamba ambalo limesimamishwa kwa ajili ya kubishaniwa kati ya matawi ya Bukama na Sarawe lilimwe na shule hiyo ya sekondari --- Mkuu wa shule anaombwa kutekeleza mpango huu upesi iwezekanavyo ili kuwapa nafasi wananchi kulima mapema sehemu itakayobaki."*

Our literal translation of the excerpt quoted above is that, the school was being assigned the shamba which was being disputed between the branches of Bukama and Sarawe. And that, the Headmaster was requested

to act on it expeditiously so that the part which would remain, could be used by the villagers.

What we could gather from that content of the letter is that, first, the plot of land which was allocated to the appellant was being disputed between the Bukama and Sarawe branches. Second, the appellant school was requested to act on the portion of land which it would afford to use expeditiously, so as to let the remaining part to be used by the villagers. Our interpretation of the information is that, the size of the land assigned would depend on the ability of the appellant. From such letter it could not be said that, the appellant was allocated any plot of land let alone one measuring 300 acres.

The fact that the testimonies of the other witnesses that is, PW2, PW3 and PW4 were just to corroborate the line of argument laid down by PW1, apparently there was no evidence to establish allocation of 300 acres to the appellant. In the written submissions by the appellant, the Court was referred to exhibit P4, specifically at pages 68 and 76 of the record of appeal, where it was said that there is information to corroborate ownership of the 300 acres by the appellant. For easy of reference, we hereby reproduce the said information as hereunder.

"Page 68. UAMUZI: Baada ya majadiliano marefu afisa tarafa alisisitiza yafuatayo:

1. *Alisema yeye hakuja kutengua maamuzi yaliyoamuliwa na vikao vilivyopita. Alisistiza kuwa maamuzi hayo yazingatiwe na kuheshimiwa.*
2. *Eneo la shamba la Chamtigiti lisiingiliwe na watu wa Hunyari waache uongozi wa Ikizu Sekondari uendelee kupata mahitaji yao humu. Kwa mfano kuni kwa ajili ya kupikia chakula cha wanafunzi.*
3. *Ramani za vijiji zifuatiliwe ofisi ya ardhi ya wilaya.*

In brief, what was said in the alleged resolution above by the Division Secretary in our literal translation in English was that, after a prolonged discussion he told the meeting that, he had not gone there to reverse what they had resolved but he required them to respect it. Furthermore, he warned the villagers of Hunyari not to interfere with the management of the appellant school and that, a follow up had to made to maps of the villages at the District land office.

The information found at page 76 of the record of appeal reads that:

"Kwa hiyo tatizo hilo limemalizika kwa azimio kwamba eneo hilo lilipewa Ikizu Sekondari ni mali

yao. Kijiji cha Sarawe ndio walipatia Ikizu Sekondari eneo hili mwaka 1976."

Our literal translation in English is that, the problem was resolved that, the area was given to Ikizu secondary school by the village of Sarawe in the year 1976 and it is theirs.

We have failed to find any relevance of the said portions of information in regard to the claim that, the appellant school was allocated 300 acres. Apart from the information not particularizing the area being referred to, there was no mention of any size. To the contrary, the second piece of information has mentioned about a piece of land which was given to the appellant by the respondent in the year 1976. This was a new thing altogether as the complaint by the appellant was in respect of a piece of land allocated to it in 1974. Be that as it might be, what is evident is the fact that there was no evidence to establish that in the year 1974, the appellant was allocated a piece of land measuring 300 acres.

In view of what has been traversed above the circumstances, the first issue which we posed above is answered in the negative. And since the second issue was subject to the first issue being answered in the affirmative which has not been the case, it therefore dies a natural death.

The same applies to the third in which, the complaint was on the untrustworthiness of the defence witnesses.

As regards the fourth, fifth and sixth grounds of appeal, they were subject to proof of ownership over the suit land by the appellant. Since it failed to discharge such task, it crumples down those other grounds.

To that end, we hold that the challenge by the appellant to the decision of the learned trial Judge is inwant of merit. We accordingly dismiss the appeal and order the respondent to have its costs.

Order accordingly.

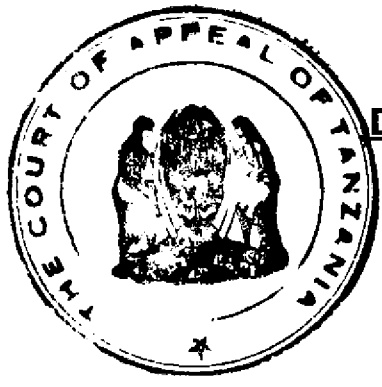
DATED at **MWANZA** this 13th day of December, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL