THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND APPEAL NO. 19 OF 2019

(Arising from District Land and Housing Tribunal for Mtwara in Land Application No. 11 of 2019 before Hon. Chairman Wambili)

THE BOARD OF TRUSTEES OF THE FREE PENTECOSTAL CHURCH OF TANZANIA ..... APPELLANT

VERSUS

ASHA SELEMAN CHAMBANDA .....1ST RESPONDENT

RASHID SELEMAN CHAMBANDA .....2ND RESPONDENT

JUDGEMENT

Last Court Order on: 29 /10/2020

Judgement date on: 27/11/2020

NGWEMBE, J:

The Appellant, Board of Trustees of Free Pentecostal Church of Tanzania, instituted a Land Dispute No. 11 of 2019 against the respondents, before, the District Land and Housing Tribunal for Mtwara on 15th February, 2019. Among other claims, the appellant sought: declaration of right of ownership of the suit land; and that the respondents Asha Seleman Chambanda and Rashid Seleman Chambanda be declared as trespassers.

Upon final determination of the dispute, the Tribunal adjudicated that the two respondents are the lawful owners of the suit land and the owners cannot be trespassers on their own land.

The appellant being dissatisfied with the judgement of the District Land and Housing Tribunal, preferred an appeal to this fountain of justice armed with eight grounds namely:-

1. *The Tribunal erred in law and fact to adjudicate on the boundary of the surveyed plot of land without affording the right to be heard to the Commissioner for land, the Director of Survey and Mapping and the Hon. Attorney General;*

2. *The Tribunal erred in law and fact to adjudicate on the boundary of the surveyed plot and affect the said boundary and the right of occupancy thereon without impleading the Commissioner for Lands, the Director of Survey and Mapping and the Hon. Attorney General as necessary parties;*

3. *The Tribunal erred in law and facts to hold that the Respondents are the lawful owners of the disputed land without proof of the fact that they were given the piece of land through the valid and completed administration of the deceased's (Seleman Chambanda) estate authorized by the competent court of law;*

4. *The Tribunal erred in law and in fact to rely on the testimony of the lay person to resolve the boundary dispute in respect of the Surveyed and registered piece of land;*

5. *The Tribunal erred in law and in fact to rely on the hearsay testimony that the late Seleman Chambanda was not paid compensation on the disputed land;*

6. *The Trial Tribunal erred in law and in fact to hold that the failure of compensation if any, was a valid ground to revoke the appellant's right of occupancy on the disputed land;*

7. *The trial Tribunal erred in law and in fact to hold that the late Seleman Chambanda was denied the right to compensation while there is plenty of evidence to the effect that the said late Seleman Chambanda was given the right to compensation on the disputed land but he refused;*

8. *The trial Tribunal erred in law and in fact for failure to hold that the Appellant's rights on the disputed land accrued when the said disputed land was surveyed and allocated to the said Appellant, that was in the year 1998, and has been there for over 12 years while the late Seleman have been silent on the said survey and allocation of the disputed land to the Appellant all that time.*

May be it is important to point out at this earliest stage of this appeal and as part of introduction, land is a prime resource upon which, all human activities are dependent. All along, land has become a parable that is profoundly intertwined with customary law and legislative laws. Due to its dual existence, land has resulted into endless conflicts not only between individuals, but also between nations. Therefore, disputes involving land occupation and ownership must consciously and soberly be adjudicated.

In our jurisdiction, the laws pertaining to land matters are many including but not limited to; Constitution of United Republic of Tanzania (Article 24) which deals with right to property and proper compensation in case of acquisition; Land Act; Village Land Act; Land acquisition Act; Customary law as recognized under section 180 (1) of Land Act and section 20 (1) of Village Land Act; and many other laws. Land is a source of livelihood of human kind, that is, why there are many laws, codified and uncodified laws. Therefore, any conflict related to land must be decided soberly.

From that understanding, this appeal will be considered along the applicable land laws, the arguments of the disputants and critical review of the evidences adduced during trial.

In this appeal, the appellant is represented by learned counsel Mr. Francis K. Stolla from Noble Attorneys, while the respondents appeared in persons. In the cause of hearing this appeal, the parties prayed to address the court by way of written submissions, which prayer was granted and both parties complied with the scheduling order of filing their written arguments.

The learned advocate for the appellant argued all eight grounds of appeal seriatim. He took enough time to argue with several useful authorities on the parties to the suit. He challenged the Tribunal quite strongly, for entertaining the land dispute, which involved a surveyed land without involving the Government Institutions, that is, the Commissioner for lands; Director of Survey; and the Hon. Attorney General. Arguing the first and second grounds jointly, vehemently insisted that the Tribunal seriously erred in law to entertain the land dispute contrary to section 13 (1) of Land

Survey Act; Land Act; and sections 7 and 10 of Government Proceedings Act. To support those sections of law, he referred this court to the case of **Shaibu Salim Hoza Vs. Helena Mhacha, Civil Appeal No. 7 of 2012 (CAT)** at pages 6 & 7 of the judgement.

Much as I would agree with the learned counsel's strong arguments, yet I am troubled seriously, on who initiated the dispute before the trial Tribunal? I think the learned counsel misdirected his mind and possibly, did not peruse the case records properly to see who initiated the suit before the Tribunal? Obvious the record is clear like brightest day light, that the appellant was the one who initiated the land dispute at the District Land and Housing Tribunal.

The appellant was the founder of the suit at Tribunal against the two respondents. Thus, the whole arguments on the first two grounds of appeal, in essence are against the appellant itself. The learned counsel argued as if the respondents were the once who initiated the claim against the appellant at Tribunal.

It is elementary knowledge of civil proceedings including land matters, that the plaintiff is the one who knows who should be sued for which claim, if any. The claimant may sue whoever so long he has a genuine claim of right recognized by law. The number of defendants are known by the plaintiff/claimant. In the contrary, the defendant has no choice and in fact the nature of claim is best known by the plaintiff/claimant. This position is well spoken in Order I Rule 3 and Order VII of Civil Procedure Code Cap 33 R. E. 2019.

Moreover, the plaintiff has uncompromised duty to know where to file his claim, the jurisdiction of either the court or tribunal depend on the nature of claim. Notably such duty cannot be shifted to the defendants/respondents. Doing otherwise, will be contrary to sections 111 of the Evidence Act. The burden of establishing claim against the defendants/respondents always lies on the claimant, in this appeal is on the shoulder of the appellant not otherwise. Since the appellant was the one sued the respondents before trial Tribunal, was the one to know who should be a proper party and who should be a necessary party.

In turn, the appellant's counsel argued these two grounds of appeal as if a surveyed land or granted right of occupancy is superior over and above customary right of occupancy. Such understanding may apply only on limited areas like in areas where there are no villages like Dar es Salaam. Otherwise, to the best of my understanding of Land Laws, customary right of occupancy and granted right of occupancy are in every respect have equal statute and effect.

In this appeal the respondents alleged to owner the suit land through their parents who cleared bush and continuously used it all along. The community surrounding them, recognized them as owners of such piece of land, that is why, it is on record that at one time the appellant attempted to purchase it, but the respondents' father denied the offer to sale his land. With such understanding, I would safely conclude on the first two grounds of appeal as lacking merits.

The third ground on whether the respondents, the first or second respondents, doesn't matter, that they had no proof of being administrators of the deceased estate of Seleman Chambanda. In arguing this point, the learned counsel strongly, challenged the respondents and the Tribunal by citing clause 5, 10 and 11 of Fifth Schedule to the Magistrates' Courts Act Cap 11 R.E. 2019. Also he referred this court to the judgement of **Abdul Latif Mohamed Hamis Vs. Mehboob Yusuf Osman, Civil Revision No. 6 of 2017 (CAT) at pages 29 & 30.**

In answering this ground, the respondents briefly, argued rightly, so to speak, that the appellant was the one to know the administrator of the deceased estate. Further, pointed out that, the 1st respondent is an administratrix of the deceased estate. And the appellant was right to sue her at the District Land Tribunal. This ground falls on the same reasoning of the first two grounds. It was a duty of the appellant to know who should be sued. In the contrary, the respondents have no legal right or duty to stop the appellant from suing them. At best the respondents could do is to raise an objection that the claimant has sued wrong parties. In up shorts, this ground likewise, lacks merits.

The remaining grounds of appeal may not tie me up, because they all fall under one principle of evidence as per section 112 of the Evidence Act to wit; *"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"* The appellant strongly argued that the trial Tribunal erred in relying on lay persons to resolve the boundary dispute in respect of the surveyed and registered piece of land.

In turn, the respondents responded that, there is no hard and fast rule in proving certain factual issue, rather depends on credibility and truthfulness of a witness. This point has reminded me on the decision of the court of appeal in the case of **Goodluck Kyando Vs. R**, **Criminal Appeal [2006] TLR 363**, whereby the Court of Appeal provided a long living guidance on testimonies of witnesses as quoted hereunder:-

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"*

In this appeal, the appellant challenged the evidences of the so called lay person to show boundaries of the suit land. I think two issues should be considered hereto. First, once a case is called for hearing in court or tribunal, parties to the suit have legal duty to procure credible and reliable witnesses to build their case of either side, failure of which, the court will decide based on the weight of evidences. The side with heavier, reliable and credible witnesses will obviously win and the one with weak and questionable evidences may lose.

Second, the court or any party may, when need arise, seek expert opinion from whoever depending on the subject matter. But always expert opinion will remain an opinion, none binding to the court. Always, courts/tribunals determine and decide cases based on evidences adduced in court by credible and reliable witnesses.

Procedurally, during trial, the appellant had every right to call experts as witnesses to prove the boundaries of the suit land. Unfortunate, it is on

record that the trial Tribunal even when decided to visit *locus in quo* together with all parties in dispute, the record does not indicate, if at all the appellant/applicant ventured to invite experts on land survey to prove the alleged boundaries. Above all, both disputants had every opportunity to prove and disprove the alleged boundaries of the suit land. Since the appellant opted not to call experts as alleged, now the appellant cannot be heard complaining on a lost opportunity when they visited *locus in quo*.

It is a trite law, that in civil disputes or land, a party with legal burden also bears evidential burden. The standard of prove is on a balance of probability. In addressing a similar scenario on who bears the evidential burden in civil cases, the Court of Appeal in the cases of **Godfrey Sayi Vs. Anna Siame as legal representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012** (unreported) and the case of **Anthony M. Masanga Vs. Penina (Mama Ngesi) and another, Civil Appeal No. 118 of 2014** (unreported), they cited with approval the case of **Re B [2008] UKHL 35,** where Lord Hoffman defined the term balance of probabilities to mean:-

> *"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"*

Always parties should remember that, the Court decide disputes according to the available evidences, applicable laws and the prevailing circumstances. Courts/Tribunals do not invent facts of the case but relies on what the parties have submitted in court, interms of material facts, applicable laws and the prevailing circumstances.

The question of compensation as argued in ground five, six and seven are purely factual issues, based on evidences adduced during trial. The record at pages 18 to 19 of the proceedings, provide that the 1st respondent denied quite frankly that, her late father was never compensated for the suit land. Above all the original boundaries are still existing as mentioned by DW1. In cross examination, as per page 20, she disclosed that at one time the appellant intended to compensate the late Seleman Chambanda, but refused and the appellant failed to prove if they compensated him.

Moreover, DW3 at page 23 disclosed that the late Chambanda refused any compensation for his farm from the appellant. In cross examination, he said "*Mzee Chambanda refused to sale his farm as he was not interested to sale it*" When he was asked questions with Assessor – Jumaa had this to say *"there was no dispute for all that times of life of Mzee Chambanda himself up to date with Ward Tribunal"*. Such piece of evidence is in line with PW1 Hamis Mfaume Dadi who at page 3 of the proceedings testified that:- *"Mzee Chambanda refused to be paid compensation, applicant (Appellant herein), paid compensation to all other persons who agreed to be paid compensation"*. He added that: "*there was no dispute between the applicant (appellant herein) and respondent's father from 1982 – 2015*"

The records in pages 30 & 31 of the proceedings, indicates clearly that the Tribunal visited *locus in quo* whereby the only issue which was well discussed were boundaries of the suit land. In conclusion, the two assessors' unanimously opined as follows:- *"Shamba Hilo ni mali ya Asha Chambanda na Rashidi Chambanda (Respondents)"*

What does this piece of evidence mean in these grounds of appeal? I think the appellant directed her minds on superiority of surveyed land over customary right of occupancy. This point may be answered by perusing the old precedents of supreme court of our land. Justice of Appeal Lugakingira in the case of **James Ibambas Vs. Franncis Sariya Mosha [1999] T.L.R. 364 at page368** had this to say:-

> *"when the respondent was offered plot .....the appellant's customary title still subsisted, since it had neither been surrendered nor otherwise extinguished, and no valid offer can be made of land with a subsisting title. The respondent therefore, acquired no title and there was no title which he could renew from year to year"*

The same reasoning was repeated in the famous judgement written by Justice of Appeal Mfalila in the case of **Mwalimu Omari and Another Vs. Omari A. Bilali [1999] T.L.R. 432 at page 442** when the Court held:-

> *"since the title of a holder of a right of occupancy under customary law is recognized by the law of the land, i.e. the Land Ordinance, such a holder ....is being protected by State. Such a title can only be taken away from the holder by an act authorized by a relevant law i.e. the Land Acquisition Act, but*

certainly not by a simple act of declaring an area a planning area"

Justice Kyando in the case of **Rashid Baranyisa Vs. Hussein Ally [2001] T.L.R. 470 at 476,** after making several references to various precedents of the Court of Appeal, at last he concluded, which conclusion I full agree that:-

"A deemed right of occupancy is equal to a granted right of occupancy and none takes precedence over the other"

In similar holding, the Court of Appeal in the case of **Attorney General Vs. Lohay Akonaay and Another [1995] T.L.R. 80 t**he court held:

"We have been led to the conclusion that customary or deemed right in land though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of article 24 of the constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the constitution"

This position is the same as in the current Land Act, when read together with the Constitution of United Republic of Tanzania, assures protection of the holder of customary right of occupancy and whoever intends to acquire it in whatever means, must adequately compensate the original owner. In this appeal the appellant neither compensated the original owner i.e. the late Seleman Chambanda, nor his family, including the two respondents. Therefore, this court cannot deprive the rightful owners, that is, the family of the original owner, simply because the appellant surveyed the suit land. Usually, before engaging into surveying the suit land, the appellant ought

to have agreed with her neighbours on the appropriate boundaries, including the respondents. Since the same was not done, the appellant's title cannot take precedence over the titles of the respondents.

The last ground of appeal is in respect to the existence of the appellant to the suit land from 1992 to the year of death of Seleman Chambanda i.e. 2010, thus constituting 19 years. In support of this ground, the appellant's counsel argued this ground by applying the doctrine of acquiescence for staying to the suit land above 12 years. In turn the respondents argued by asking questions of how could the appellant acquire their land by adverse possession, while all along were using it? They referred to the letter admitted during trial as exhibit D2.

Undoubtedly, the doctrine of acquiescence or adverse possession is well settled in our jurisdiction. If the respondents have been in use of the suit land throughout and that the trial Tribunal when visited *locus in quo*, together with both disputants, surely, the appellant was in the better position to authenticate the allegations of adverse possession.

In this point, I'm fortified with the wisdom of Lord MacMillan of the House of Lords in the case of **Watt Vs. Thomas (1947) 1 A.E.R, at page 590** had this to say:-

> *"the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on question of fact"*

In similar vein the East African Court of Appeal in the case of **Peters Vs. Sunday Post Limited (1958) EA 424** at page 429 held:-

> *"It is a strong thing for an appellate court to differ from the finding, on the question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court would itself have come to a different conclusion"*

The trial Tribunal, had an advantage of assessing who between the parties was telling truth, upon assessment of weight of evidences of each party and when visited *locus in quo* the tribunal was in better position to decide if the doctrine of acquiescence applied in favour of the appellant. The tribunal seem to have believed the respondents' witnesses and authenticated it by visiting *locus in quo.* I find the trial Tribunal's decision was founded on cogent facts and evidences.

With emphasis, as I am about to conclude, section 45 of the Land Disputes Courts Act Cap 216 R.E. 2002 provide a living guidance as I hereby quote:-

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal* ***shall be reversed or altered on appeal or revision*** *on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or*

improper admission or rejection of evidence has in ***fact occasioned a failure of justice"*** **(emphasis is mine).**

In view of the aforesaid, and on strength of section 45 as quoted herein above, this Court finds no cogent reasons to fault the decision of the Tribunal. The trial Tribunal was justified to declare that the appellant failed to prove ownership of the disputed land. Consequently, this appeal is devoid of merits same is dismissed with costs.

I accordingly Order.

DATED at Mtwara this 27th November, 2020

P.J. NGWEMBE

JUDGE

27/11/2020

Date: 27/11/2020

Coram: Hon. L. Kasebele, Ag.DR

Appellant:

For Appellant: Mr. Frank Mchiaba

1st Respondent:

2nd Respondent: Present in person

B/C: Zuena – RMA

Parties: We are ready to proceed with judgment delivery.

Court: Judgment delivered today in Chambers Court in the presence of parties. It is delivered as prepared by Hon. Judge Ngwembe.

L.R. Kasebele

Ag. Deputy Registrar

27/11/2020