**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTICT REGISTRY**

**AT MWANZA**

**LAND APPEAL NO. 55 OF 2019**

*(Originating from Land Application No. 43 of 2010 of the District Land and Housing Tribunal for Geita)*

**ADREA DUDA ---------- 1ST APPELLANT**

**ESTER NYACHAMBA ---------- 2ND APPELLANT**

**TABU BALYEHELE ---------- 3RD APPELLANT**

**PASCHAL MARCO ---------- 4TH APPELLANT**

**MERCIANA NYAMASEMI ---------- 5TH APPELLANT**

**MPINA KAZUNGU ---------- 6TH APPELLANT**

**PAULINA JACOBO ---------- 7TH APPELLANT**

**PASKAZIA LAURENT---------- 8TH APPELLANT**

**SIMON RICHARD ---------- 9TH APPELLANT**

**VERSUS**

**MARTINE DOTTO NYENGE**
The Administrator of
The Estate of the Late
**LUCAS KULWA NYENGE ---------- RESPONDENT**

**JUDGMENT**

21st April & 08th May 2020

**TIGANGA, J**

Way back in 2010, one Kulwa Nyenge sued the appellants in Civil Application No. 43 of 2010 seeking the following orders;

i. Declaration that the applicant is the lawful owner of the piece of land measured 30 acres at Nyankurumbu Kalangalala Geita.
ii. An order for permanent injunction restraining the respondents, their agents from interfering in any manner with the Land in dispute.
iii. An order to require the respondent to vacate the suit Land.
iv. Costs of the Application and
v. Any other relief as the tribunal may deem fit and just to grant.

After full trial, the trial tribunal granted the application, in the sense that all orders sought in the application were granted as prayed. Aggrieved by the decision, the appellants who were the respondents before the trial tribunal filed a three grounded memorandum of appeal to challenge the judgment and decree of the trial tribunal as follows;

a) That the trial tribunal chairperson erred in law and facts by failing to give due consideration to the evidence adduced by the appellants which amply prove that the appellants were allocated the suit land in the year 1974.
b) That the trial tribunal chairperson erred in law and facts by disregarding the evidence adduced by the appellants to the effect that the late Lucas Kulwa Nyenge invaded their respective piece of land in the year 1999 and that the dispute has passed through different levels as evidenced by exhibit D1.

c) That the trial tribunal chairperson erred in law and facts by ignoring the evidence adduced in favour of the appellants in proving ownership of the suit land and wrongly believed the evidence adduced in favour of the respondent which is very contradictory and doubtful.

They prayed for the following orders;

i. The appeal be allowed, the judgment be quashed and set aside.
ii. The appellants be declared to be rightful owners of the land in dispute.
iii. The court to order the respondent to give vacant possession of the land in dispute to the appellant.
iv. The respondent to be ordered to pay to the appellants costs in this court and in the trial tribunal.
v. Any other relief this honourable court may deem just and equitable to grant.

With the leave of the court, the appeal was argued by way of written submissions. The appellants were represented by Miss Marina Mashimba, learned counsel, while the respondent was represented by MNM - Advocate (in which Mr. M.K. D. Mhingo Advocate) works.

Submitting in support the first ground of appeal, which is a complaint that the trial tribunal failed to give due consideration to the evidence adduced by the appellants, which amply proves that the appellants were allocated the suit land in the year 1974. He complained that, had the trial tribunal considered the adduced evidence, it would not have held as it deed.

She submitted that, the evidence clearly prove, that the appellants were allocated the land in 1974. They also gave evidence that the respondent invaded the land in 1999 by trespassing in the appellants' land and started to plant the trees thereon, when the dispute arose. She submitted further that there is evidence by Dotto - DW2 that the land was allocated to other people other than the late Lucas Kulwa Nyenge, and that facts was not disputed. According to her, the appellants had the customary right of occupancy which is protected under Article 24 of the constitution, if the village wished to deprive them of the ownership and allocated the land to Lucas Kulwa Nyenge it ought to have made sure that the appellants are fairly compensated.

On that she relied on the position of the case of **Attorney General Vs. Lohay Akonnay** and **Joseph Lohay** (1995) T.L.R 80 CA where it was held that customary right of occupancy is protected by Article 24 of the constitution their deprivation without fair compensation is prohibited by the constitution.

Further to that she cited the authority in **Methunselah Paul Nyagwaswa Vs Christopher Mbole Nyirabu** (1985) T.L.R 103 CA which is to the effect that transfer of land is void and ineffectual if it took place without the approval of the village council.

Arguing in support of the second ground of appeal, she submitted that the trial tribunal erred in disregarding the evidence, that the late Lucas Kulwa Nyenge invaded their respective pieces of land in 1999, as evidenced by exhibit D1.

She referred me to page 23 of the judgment, the dispute has already been dealt with even at the Ward Tribunal of Nyankumbu at Kalangalala Ward. She said that if at all Lucas Kulwa Nyenge was allocated land in dispute in 1990, the appellants were unaware of the allocation until 1999 when he invaded the land. Therefore, it was wrong for the tribunal to decide the case in favour of the respondent only by the reason that the late Kulwa Nyenge planted trees on the suit land.

Arguing in support of the third ground of appeal, which states that the trial chairperson erred in ignoring the evidence adduced in favour of the appellant in proving the ownership of the suit land and wrongly believed the evidence adduced in favour of the respondent which is very contradictory and doubtful.

The counsel for the appellant submitted that the trial chairperson ignored the evidence that the appellant were allocated the suit land since the year 1974. She failed to consider the fundamental evidence given by the appellants that they were allocated the land and used it up to the year 1999 when Kulwa Nyenge invaded their land. She in the end asked the court to allow the appeal as prayed.

Replying on the first ground of Appeal, Mr. Muhingo submitted that it is not correct that the appellants were allocated the suit land in 1974. The reasons he gave are that, the evidence by PW1 was to the effect that the respondent was given suit land in the year 1988 by the village authority, also PW2, added that the official documents of allocation of land was done on 04/04/1990 as per exhibit P1. Further to that, he submitted that, PW3 Ngeke

Mlya stated that she lived there since 1976, when the appellants were not there. According to him, the allegations that the appellants were allocated the suit land since 1974, has not been substantiated by any evidence except their words.

It is his further submission that, if at all they were allocated the suit land since 1974, why didn't they take action up to 2009 when they sued before the Ward Tribunal. That means they slept on their own night for 35 years.

Further to that, he submitted that even if the court will take the year 1990 as the time when the respondents occupied the land yet still from then up to 2009 when the appellants started to take action, it will be 19 years, therefore the appellants were time barred in terms of rule 22, part I to the schedule of the Law of Limitation Act [Cap 89 RE 2002], as they could not claim after 12 years. He submitted that, the authority in **Methusela Paul Nyagwaswa Vs Christopher Mbote Nyirabu** [1985] TLR 103 CAT is distinguishable as it applies to the transfer of land in the village which is registered.

In this case, there is no proof that the village in question is registered or had already been registered in the years 1990.

Submitting in reply to the second ground of appeal, he submitted that, it is not true that the respondent invaded the land in the year 1999, as there was no independent evidence tendered to prove that. The appellants did not, according to him, call any village leader who were in office to prove

those allegations. Contrary to what has been submitted by the counsel for the appellant, the respondent occupied the land since 1988, not 1999.

In respect of 3rd ground he submitted that the evidence has no any contradiction, it is clear and straight forward. According to him, a mere claim without evidence to prove the claim is nothing but allegations which are not evidence. He submitted further that, even if it is ruled that there was contradiction, that contradiction cannot adversely affect the evidence to the effect that the respondent was allocated the land in 1988, and was officially so allocated in 1990.

Relying on section 100 (1) of the Evidence Act (Cap 6 RE 2002), he said, the contracts which are required to be reduced in writing must be proved by documents so executed. No oral evidence to contradict the documents can be accepted. He submitted in the end that, the evidence of the respondent is heavier than that of the appellants, he prayed the court to find so and dismiss the appeal for want of merit.

In rejoinder submission, the counsel for the appellants submitted that, although there was no documentary evidence, the appellants gave enough evidence to prove that they were allocated the land in 1974. She proved that contention by referring to the evidence of DW8 - Maria Immaculata Laurent, who was a ten cell leader who was involved in the allocation of the land to the appellants. She submitted that the other leaders who were involved in allocation exercise are now dead that is why they were not called.

She submitted that, the appellants gave the first hand information contained in the oral testimony, therefore, the witnesses and their evidence

are credible. Being credible, they were entitled to be believed, she cited the Case of **Goodluck Kyando Vs Republic** CAT Criminal Appeal No. 118 of 2003 CAT Mbeya (unreported). She also cited the case of **Patrick s/o Sanga Vs. Republic** CAT, at Iringa Criminal Appeal No. 213 of 2003 (unreported).

On the issue of limitation, she submitted that the cause of action arose in 1999 when the late Lucas Kulwa Nyenge invaded the land in dispute. It is her submission that, counting from 1999 up to 2009 when the dispute was referred to the Ward Tribunal, 12 years had not yet lapsed. Yet still, even before referring the dispute before the Ward Tribunal, there were several attempts to resolve the dispute using the village leaders as testified by Dw9 at page 69 and 70 of the proceedings.

In rejoining on the second ground, she submitted that, partly, that was answered in ground number 1, and the issue was sufficiently tackled in the submission in chief. Furthermore, she submitted that if at all the respondent was allocated the land in 1990, the appellants were not made aware up to 2009.

On the third ground, she rejoined that the appellants believe that, they gave sufficient evidence to prove that they were allocated the land in the year 1974. She went ahead and said that, even if it is believed that the respondent was allocated the land in 1990, which right could not override the right of the appellants as the lawful owners of the land.

She lastly asked the court to base on the submission in chief and the rejoinder to allow the appeal.

Having summarized at length, the submissions by the parties, I am now going to resolve one ground after the other. Starting with the first ground of appeal which essentially raises a complaint that the trail tribunal did not give due consideration of the appellants' evidence which proved that they were allocated the land in the year 1974. Now from the phraseology of the ground, the answer to this ground is in the proceedings, and how the trial chairperson considered the evidence to resolve the dispute.

Before the trial tribunal, only two issues were framed for determination by the tribunal, which were "who is the lawful owner of the suit land" while the other one being "to what reliefs are the parties entitled".

This means, the evidence ought to have been directed in proving the two issues. In such endeavour, both parties directed their evidence in proving that they are the lawful owners of the disputed land, as opposed to their adversaries. While most of the appellants claimed to acquire the title in the suit land through their allocation by the village authority during operation vijiji in 1974, the respondent claimed through the administrator of the estate, to have acquired the land after being allocated the same by the village council in the year 1988, and later the allocation was documented in the year 1990.

This means, the court in its decision was required to consider each parties evidence and resolve the two sub issues, first, is when did each of the parties acquire the land? Second, where did each acquire the land from? Thirdly, basing on whether each party was allocated the land by appropriate

authority, the last issue was supposed to be who was the lawful owner of the suit land?

From the evidence, both parties claim to be allocated the suit land by the village authority. The appellant claimed to be so allocated in the year 1974, while the respondent in 1990. While the appellants had no any documents proving that they were so allocated the land except the oral evidence of the witnesses who alleged to have been there when the land was so allocated, the respondent has the allocation letter issued by the village government showing that the respondent was allocated 30 acres in 1990 as per exhibit P2. That contention, has been supported by oral evidence of PW3, who alleged to be there when the respondent was so allocated.

In both cases, the village council is alleged to be the allocating authority. However, neither the appellants no the respondent called any of the village leaders in office to give evidence proving who, according to their record, is the owner or allocatee of the land in question.

It is the law, as per section 110 of the Law of Evidence Act that, any person who wants the court to decide on a certain fact, must take evidence to the court to prove that fact really exists. That being the position of the law, then, it was the duty of the respondent who was the applicant before the trial tribunal to bring evidence to prove that fact. He did not call any witness from the village authority to prove that, but tendered the allocation letter from the village authority proving that fact. The appellants on the other hand, claim to have acquired the suit land by being allocated in 1974 by the village council, during operation vijiji vya ujamaa **(vilagelization)**. The

appellants also, had the duty to bring evidence from the village authority to prove that they were actually allocated the said pieces of land. However, they did not call any.

In civil cases, the standard of proof is on the balance of probability as per section 3(2)(b) of the Evidence Act [Cap 6 RE 2002]. Also see **Anthony M. Masanga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No.118 of 2014 Looking at these two parties in this case, and considering the principle of burden and standard of proof, the respondent tried his best to discharge that burden, although he did not call any witness from the village authority but he had and tendered a letter written by the village council allocating him the piece of land in dispute.

In both cases, the land policy and land use policy in Tanzania, after independence and during villagelization recognized the importance of documenting any allocation of land whether for ownership or use. That was necessary for the purpose of identification of the assigned individual, demarcation, and to keep away the trespasser and minimize the possibility of conflict, as well as for keeping register as required by section 21 of the village Land Act (CAP 114 RE 2002). It was expected of the appellants to have legal documents showing that they were so allocated their respective pieces of land as they allege, in the exclusion of all other members of the village. The respondent managed to prove before the trial tribunal that, in 1990, the village authority allocated him 30 acres of land, while the appellant have not proved to have been so allocated. That said, the 1st ground of appeal fails, it so fails for want of merits.

The second ground of appeal is raising a complaint that the trial tribunal disregarded the evidence adduced by the appellant to the effect that the late Lucas Kulwa Nyenge invaded their respective pieces of land in 1999 and that the dispute passed through a number of levels as evidenced by exhibit D1.

Dealing with this issue it is important to find that this issue is dependent of the 1st issue, as proving who is the lawful owner of the land, is a determining factor of the second issue which in essence raises the complaint of the respondent invading the land in dispute. I find so because, one may invade the land if the same is not his or is someone else's land. One can claim that his hand had been invaded or trespassed into after proving that he owns that land.

As held in the first issue, on the weighing scale, the evidence of ownership by allocation by the village council has proved that he respondent was surely allocated the land by the letter of allocation which he actually tendered in court as opposed to the appellants who tendered nothing proving that they were so allocated. I say so, because section 15 of the Village Land Act [Cap 114 RE 2002] validates the interest of land created under and by operation vijiji, under the village and Ujamaa Villages Act No. 21 of 1975 while at the same time, it confirms and validates the allocation of land made by the village council since 1978.

From the evidence, as the appellants claim to be allocated land, in 1974 under village and Ujamaa village Act No 21/1975, the respondent

alleges to have been allocated in 1990, which means it was between 1978 and 1999, when the Village Land Act was enacted.

As both parties claim to be allocated under the proper law and by proper authority, each party was supposed to prove such allocation. With due respect, the appellants have failed to prove their allocation, while the respondent has proved his. That said, the second ground of appeal is thus dismissed for want of merit.

The third ground lays a complaint that the evidence regarding the ownership of land by the appellants was wrongly disbelieved or ignored, and instead the trial chairperson wrongly believed the evidence adduced in favour of the respondent which was contradictory and doubtful. Looking at the phraseology of this ground, it suffices to find and hold that, it has already been dealt with and resolved when I was resolving the first and second grounds of appeal. This ground also fails for want of merits.

Having held as I have, the appeal is dismissed, the decision of the trial tribunal is upheld. The dismissal is with costs.

It is so ordered.

DATED at MWANZA, on 08th day of May 2020

**J. C. TIGANGA**

**JUDGE**

**08/05/2020**

Judgment delivered in open chambers in the absence of the parties but with directives that they be notified of the results by the court clerk through their mobile phones.

**J. C. TIGANGA**

**JUDGE**

**08/05/2020**