

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND APPEAL NO. 68 OF 2020**

**WAMBURA MWIKWABE ..... APPELLANT**

***VERSUS***

**JUMA NYAMHANGA ..... RESPONDENT**

***(Appeal from the decision of the District Land and Housing Tribunal  
for Mara at Musoma in Application No. 204 of 2018)***

**JUDGMENT**

9<sup>th</sup> April and 17<sup>th</sup> May, 2021

**KISANYA, J.:**

This appeal arises from the decision of the District Land and Housing Tribunal for Mara at Musoma in Application No. 204 of 2018 in which, the respondent, Juma Nyamhanga was declared as lawful owner of the land in dispute situated at Mesaga village within Serengeti District.

For better understanding what transpired, the following brief background is deduced from evidence adduced before the trial tribunal. The case which led to the decision subject to this appeal was instituted by Juma Nyamhanga. He claimed that Wambura Mwikwambe had in August, 2018, trespassed to the disputed land and built a house thereon.

It was the respondent's case that he acquired the disputed land in 2000 by clearing a virgin land and building a house. He also recalled that the disputed land was invaded by one, Chacha Magiwa in 2009 and the dispute was resolved.

To supplement his testimony, Juma Nyamhanga called Inang’o Nyamako (PW2), Chacha Butiko (PW3) and Juma Massi (PW4). All witnesses gave evidence to the effect that Juma Nyamhanga had been in occupation of the disputed land from 2000.

On the other side, Wambura Mwikwabe disputed the respondent’s claim. He told the trial tribunal that he had been in occupation of the disputed land from 2012. Wambura Mwikwabe went on to state that he decided to settle on the disputed land when his grandparents visited and informed him in a dream that the disputed land was previously owned by them (grandfathers). The appellant called Yusuphu Chacha (DW2), Songo Mwita (DW3) and Daudi Marea (DW4) who deposed that he (Wambura Mwikwabe) acquired the disputed land in 2012 and that no person was occupying it.

In the end of hearing, the trial tribunal decided the matter in favour of Juma Nyamhanga. As stated herein, he was “declared the rightful occupier of the suitland”. The trial tribunal went on to grant him costs of the application.

Therefore, Wambura Mwikwabe has come to this Court on appeal upon the grounds which have been summarized as follows:

1. That the proceedings of the trial tribunal were vitiated as the assessors’ opinion were not read in the presence of parties.
2. That the learned trial chairman failed to note that PW3’s evidence was not true and that it was not supported by PW1, PW2 and PW4.

3. That the learned trial chairman erred in holding the respondent as lawful owner of the disputed land while he had never been in occupation or developed the said land.
4. That the learned trial chairman erred in law and fact in departing from the issue for determination.
5. That the learned trial chairman failed to evaluate evidence adduced by the appellant and his witnesses that the respondent was residing at Masanga village and not Majimoto where the suitland is situated.
6. That the learned trial chairman failed to consider that the appellant acquired the disputed land in 2012.
7. That the learned trial chairperson failed to note that PW1 and PW2's evidence on when the appellant invaded the disputed land differs from the contents of paragraph 6 (a) (1) of the application form.

When this matter was called on for hearing, the appellant appeared in person while the respondent was represented by Mr. Daudi Mahemba, learned advocate. Both parties made their respective submissions.

I have dispassionately considered the evidence on record and the submissions for and against the appeal. This being the first appeal, the Court is duty bound to re-hear and re-evaluate the evidence and consider the appellant's grounds of appeal. See for instance the decision of the Court of Appeal in **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019

(unreported). In exercising that duty, I will also consider the submissions by the parties.

In the first ground, the appellant contends that the opinion of assessors who sat with the chairman was not read in the presence of the parties. Mr. Mahemba replied that the said opinion was read in the presence of the parties. In terms of regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, G.N. 174/2003 (the Regulations), the Chairman is required to direct the assessors who sat with him to give their opinion before he composes the judgment. It is trite law that the assessors' opinion must be read in the presence of the parties and that the omission to such effect vitiates the proceedings. This stance was stated by the Court of Appeal in **Edina Adam Kibona vs. Absolom Swebe**, Civil Appeal No. 286 of 2017 and **Sikuzani Saidi Magambo and Kirioni Richard vs. Mohamed Roble**, Civil Appeal No. 197 of 2018, both unreported.

I scrutinized the record and found that when the appellant closed the defence case on 24<sup>th</sup> June, 2020, the trial chairperson ordered that the opinion of assessors would be given on 17<sup>th</sup> July, 2020. Reading from what transpired on 17<sup>th</sup> July, 2020, it is clear that the opinion of two assessors was read in the presence of the appellant and the respondent. Thereafter, the trial chairperson fixed 11<sup>th</sup> August, 2020 as the date of judgment. In that regard, the first ground is devoid of merit. It is accordingly dismissed.

I now move on to consider the second and seventh grounds. These grounds call me to determine whether PW1 and PW3 are not credible witnesses. The appellant faulted the trial chairperson for believing PW3's evidence that he (the appellant) had demolished the respondent's house while such evidence was not given by PW1, PW2 and PW4. He submitted that PW1 and PW3 gave false evidence because the application form indicated that appellant trespassed to the disputed land on 18<sup>th</sup> August, 2018 and not 20<sup>th</sup> August, 2018 adduced in their evidence.

Mr. Mahemba responded that it was not possible for PW1 to state exactly what was testified by other witnesses. He argued further that the appellant did not dispute to have demolished the respondent's house.

In resolving this issue, I am guided by principle of law that every witness is entitled to credence. Therefore, he must be believed and his evidence accepted and considered unless there are clear reasons for not believing him. See the case of **Goodluck Kyando vs R** (2006) TLR 363.

One of the reasons for not believing the witness is that his evidence is contradicted by other witnesses. It is the appellant's contention that PW3's evidence was contradicted by other witnesses. His contention was based on the fact that PW3 adduced that the appellant demolished the respondent's house in the disputed land while other witnesses did not give such evidence.

As rightly argued by Mr. Mahemba, it is not possible for the witness to state exactly what was adduced by other witness. In that regard, only contradiction which goes to the root of the case can be used to impeach the witness's credibility and reliability. This stance was taken in **Emmanuel Josephat vs The Republic**, Criminal Appeal No. 323 of 2016 (unreported), where the Court of Appeal held:

*"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"*

I went through the evidence of PW3 and noted no material contradiction between his evidence and that of PW1, PW2, and PW4. It is common ground that when cross examined by the appellant, PW3 adduced that the appellant demolished the applicant's house and plants on the disputed land. In my opinion, that evidence suggests that the appellant had invaded the respondent's land. It was not contradicted by PW1, PW2 and PW4 because they told the trial court that the appellant had invaded the disputed land. Thus, the second and seventh grounds are dismissed for want of merit.

Another issue for consideration is whether the respondent' adduced sufficient evidence to prove ownership of the disputed land. This issue is based on the third, fifth and sixth grounds. Since the case before the trial tribunal was filed by the respondent, he was duty bound to discharge that duty under section

110 and 111 of the Evidence Act [Cap. 6, R.E. 2019]. Furthermore, this being a civil case, the standard of proof was on the balance of probabilities. See also **Antony M. Masanga vs Penina (Mama Ngesi) and Another**, Civil Appeal No. 118 of 2014 (unreported).

The appellant contends in the above stated grounds that the trial tribunal did not consider his evidence that, he had been in occupation of the land in dispute since 2012. However, as rightly replied by Mr. Mahemba, there is evidence of PW1, PW2, PW3 and PW4 who told the trial tribunal that the respondent acquired the disputed land in 2000. PW3 is the neighbour to the respondent while PW4 was the village Executive Officer. Their evidence was not challenged as such by the appellant during cross examination. As that was not enough, the appellant's evidence as to how he acquired the disputed land is questionable. He stated as follows in his evidence in chief:

*"...I was visited by dream which informed me that the suitland belonged to my grandparents. I found the suitland bushy. I cleared it and built a house...I have been living onto suitland since 2012."*

In view of the above, I am at one with the trial tribunal the said evidence was not sufficient to disprove evidence adduced by the respondent and his witnesses. This is when it is also considered that the respondent gave evidence to prove that the appellant invaded the disputed land in 2018. For instance,

PW2 testified that in June 2018, the appellant convinced him to invade the respondent's land. Again, the said evidence by PW2 was not challenged by the appellant during cross examination. He was not asked anything about convincing PW2 to invade on the disputed land.

The appellant submitted further that the trial tribunal failed to consider that the disputed land is situated at Majimoto Village and not Masaga village where the respondent resides. I examined the record. It is true that the respondent resides at Mesaga village within Serengeti District. Pursuant to evidence of PW1 and PW2, the disputed land is situated at Mesaga Village. PW1 went on to clarify that the disputed land is within Mesaga Village but at the border of Majimoto village. On the other hand, while the respondent stated that the disputed land is at Majimoto village, his witness (DW3) deposed that "the suitland falls between Nyamakobiti and Majimoto Villages".

Therefore, from the evidence on record there is no doubt at all that the respondent's evidence adduced before the trial tribunal was heavier than that of the appellant. It follows that the third, fifth and sixth grounds are meritless as well.

The last issue is whether the trial chairman departed from the issue for determination. This issue stems from the fourth ground. The appellant's contention is that the proper issue for consideration was whether the disputed land had been developed by the respondent. On my part, this issue should not

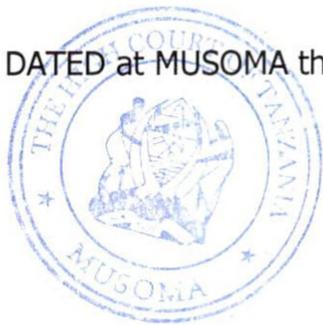
detain me. The respondent indicated in the application form that the applicant had trespassed into his land. In his Written Statement of Defence, the appellant denied the appellant's claims. He also claimed to be the lawful owner of the disputed land. Now, upon considering the pleading, the following issues were framed on 20<sup>th</sup> August, 2019:

1. *Who has a right over the suitland.*
2. *What reliefs.*

The trial tribunal addressed the above two issues in its judgement. It arrived at the decision that the respondent was the lawful owner of the disputed land and that he was entitled to costs. Hence, the fourth ground is unfounded.

For the reasons I have given, I find no merit in all the grounds raised by the appellant. In the result, I dismiss the appeal in its entirety with costs. I so order.

DATED at MUSOMA this 17<sup>th</sup> day of May, 2021.



  
E.S. Kisanya.  
JUDGE

Order: Judgment to be delivered by the Deputy Registrar

  
E.S. Kisanya.  
JUDGE  
17/05/2021

Court: Judgment delivered this 17<sup>th</sup> day of May, 2021 in the presence of the parties.



M.A. Moyo  
Deputy Registrar  
17/05/2021

Court: Right of appeal explained.

M.A. Moyo  
Deputy Registrar  
17/05/2021