THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 112 OF 2022

(Arising from the District Land and Housing Tribunal for Ulanga at Mahenge, in Land Appeal No. 47 of 2021, originating from Milola Ward Tribunal Land Dispute No. 31/ 2020)

MOHAMEDI KAKANGA ..... APPELLANT

VERSUS

SELEMANI MVOGO ..... RESPONDENT

JUDGEMENT

Hearing date on: 27/02/2023

Judgment date on: 17/03/2023

NGWEMBE, J.

This is a second appeal originating from Milola Ward Tribunal, where the appellant sued the respondent for the alleged trespass to ¼ an acre area out of 32 x 62 metres of land located at Milola ward within Ulanga District in Morogoro region. The appellant claims to have allocated such land by the Village Authority in year 2005. Equally the respondent claims to have acquired the said land by purchasing from one lady daughter of Mtandikile who was the appellant's neighbour in year 2015.

The said daughter of Mtandikile later on sold her plot of land to the respondent. The dispute arose on complaints by the appellant that the respondent crossed the boundaries and entered into the appellant's land. While on the other side, the respondent defended that he honoured the boundaries which were clearly demarcated.

In both tribunals below, the appellant has been consistently losing it. The dispute was decided in favour of the respondent at ward tribunal as well as on appeal before the district land tribunal. The appellate tribunal dismissed the appeal on ground that the trial tribunal was correct in analysing the evidence and that the respondent was the rightful owner. The appellant was still aggrieved, thus filed this appeal clothed with nine (9) grounds, which upon scrutiny same centres on four complaints that: -

1) *The appellate tribunal ruled that the appellant failed to prove his case while the respondent had a duty to prove his case as well.*
2) *The appellate tribunal argued the grounds of appeal on behalf of the respondent.*
3) *The appellant was denied right to tender exhibits.*
4) *The first member of the trial tribunal did not give reason for his opinion that the respondent had established his case.*

Notably the respondent upon being served with those grounds of appeal, filed his reply to the petition of appeal, vehemently opposing the appeal.

On the hearing date, unfortunate both parties were unrepresented, therefore their input were to a great extent limited. The appellant despite having raised numerous grounds of appeal, on the hearing of his appeal, just prayed this court to consider his grounds of appeal and added that, the land in dispute is his property since the year 2005 and prayed this court to declare him as the rightful owner of the suit land.

The respondent on his side stated that, the land in dispute is his property applauding the decision of the tribunals below, which were in his favour. He added that, the trial tribunal visited *locus in quo* and found that the disputed part of land belonged to him. The land plots were surveyed and beacons demarcations placed accordingly. Rested with a prayer that the appeal be dismissed.

Having summarized the arguments of both parties and upon revisiting the background of this suit, it is evident the issue for determination is whether the appeal bears merit. In testing the merit of this appeal, the appellate court usually consider the proceedings and evidence laid before the trial court. Also, the submissions advanced by the parties on the grounds in respect of the lower courts, while applying statutes, doctrines and precedents. In so doing the court considers all surrounding circumstances to unearth whether or not there is any point of fact or law upon which, the lower courts/tribunals faulted.

Among those doctrines and principles, the one which governs the second appeal, where two tribunals below have had concurrent findings, the second tribunal/court will rarely depart with unless observed serious miscarriage of justice. This rule travels through famous cases of **Watt Vs. Thomas [1947] AC 484** and **Peters Vs. Sunday Post Limited [1958] EA 424,** often referred by our courts in relevant cases. The principle therefore has been faithfully followed by our courts in many cases, including the cases of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H. Jariwala t/a Zanzibar Hotel [1980] T.L.R. 31,** and **Neli Manase Foya Vs. Damian Mlinga [2005] T.L.R. 167.**

What the doctrine entails is that the second appellate court will not lightly interfere with concurrent finding of facts by the courts below,

save when there is a strong reason for such interference; strong reasons for interference in the circumstance includes misdirection or misapprehension of evidences or law. In **Neli Manase Foya's** case, the Court in applying this principle observed: -

> *"It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact."*

In similar case of **Musa Hassani Vs. Barnabas Yohanna Shedafa (Civil Appeal 101 of 2018) [2020] TZCA 34,** the Court of Appeal having referred to its previous decisions, proceeded as follows: -

> *"It is our considered view that the Court will only interfere with findings of fact of lower courts in situations where a trial court had omitted to consider or had misconstrued some material evidence; or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence."*

The rationale of this principle of law is that, the trial court is in a better position with all advantages of perfect assessment and judgement of demeanour and other aspects. Such advantage is not endowed to the appellate courts which, except in cases of additional evidence, will usually be dealing with the case on record. As it is, this court will honour that doctrine and religiously follow it.

On the grounds above, the appellant claims that both tribunals below erroneously decided in favour of the respondent. Believes that there is sufficient material evidence for this court to depart from the concurrent findings of the two tribunals.

On the first ground of appeal, the appellant argued that the tribunal below erred to rule that, he failed to prove his case, while the

Repeatedly, it is stated quite clearly that the burden of proof in civil cases stand on a firm position that, the claimant bears the burden to prove his claim on the balance of probability. This is both statutory and precedents. In sections 110, 112 and 3 (2)(b) of **The Evidence Act, Cap 6 R.E. 2019 (now R.E. 2022)**.

In the same vein there are countless precedents including the cases of **Anthony M. Masanga Vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014** and **Geita Gold Mining Ltd & Another Vs. Ignas Athanas [2019] 1 T.L.R. 318 [CA]** among the relevant precedents on the burden and standard of proof in civil cases.

Equally, when the claimant has established his claim, rightly as the appellant argues, the defendant bears a duty to disprove what the claimant has established and bears the duty to prove every fact that is in his knowledge, which he wishes the court to believe. See Section 115 of **the Evidence Act** provides: -

> *Section 115. "In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

The above is *inpari materia* with **Sarkar on Evidence, 14th Edition** (1993) at page 1339 where it is stated that: -

> *"The initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the defendant to prove those circumstances, if any which would disentitle the plaintiff to the same"*

At trial, the plaintiff advanced his evidence that, he was allocated the suit land by the Village authority and it was undisputed, the core of

At trial, the plaintiff advanced his evidence that, he was allocated the suit land by the Village authority and it was undisputed, the core of the dispute is on demarcations. As earlier alluded, the appellant claimed that the respondent had trespassed into his land. The proceedings before the trial tribunal shows the testimonies of witnesses as well as the sketch map made on *visiting locus in quo*. The trial tribunal in its judgment considered the evidence of both parties. Having discussed the evidence of all witnesses from both sides, it proceeded to decide as follows: -

> *"Kwa kuangalia hoja husika na kwa kuangalia maelezo ya mdai na mdaiwa, unaonesha uthibitisho kuwa mdai ni mmiliki halali wa eneo la mgogoro ni* ***hafifu*** *kwa sababu zifuatazo; mdai ameshindwa kuonesha eneo lake na mipaka yake. Aidha, kiwanja husika kinaonesha kuwa mipaka na alama zinajibainisha wazi. Hivyo eneo la mgogoro linaonesha lote ni la mdaiwa."*

To paraphrase the above contents in the court's language, the tribunal stated that, by looking at the issue and the testimonies of parties, it was evident, the evidence on the appellant's ownership of the disputed land was weak. That the plot in question had clear demarcations and therefore all of the disputed land belonged to the defendant.

Much as I agree that the defendant also bears a burden of proof in the case, in the first place, I am not convinced in this case that the appellant established any strong evidence for the defendant to disprove. However, the respondent went farther and adduced strong evidence against the appellant's claims. Likewise, the chairman of the district land

tribunal, along with wise assessors, found that the respondent had strong evidence than that of the appellant, which I agree.

The appellant ought to know that, in practical sense the burden of proof by the defendant is relative and subjective, always depend on the evidence adduced by the claimant. If the claimant has not established anything, in most cases the plaintiff will lose even without the defendant adducing any evidence.

In arithmetic equation, we would generally say, the plaintiff's burden of proof is greater than or equal to that of the defendant and the defendant's burden of proof is less than or equal to that of the plaintiff. That is why, where the weight of evidence on both sides seems to be equal and balanced, the claim is dismissed. It is only when the plaintiff's evidence is stronger than that of the defendant when the plaintiff will win the case. Otherwise, I am of the settled opinion that the appellant misconceived the law in respect of the burden of proof. In the matter at hand the appellant did not score any weight on his evidence, he cannot therefore be heard lamenting about the defendant's burden of proof when he is not done with his burden so as to shift the same. The two lower courts, therefore, were correct in their concurrent findings. The appellant's evidence on demarcations which was the main contention was weak and contradictory, while the respondent was clear and supported by the *visit of locus in quo*. Hence, I join hands with both tribunals and dismiss the first ground of appeal forthwith.

The second ground is that the appellate chairperson argued the appeal on behalf of the respondent. Though the appellant did not specifically point out this allegation, I have understood he suggests the appellate tribunal chairman was biased against the appellant. An adjudicator being biased is against the principles of natural justice on the

rule against bias, which says *"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding"*

As to how bias can be established, I have made reference to two cases of **Registered Trustees of Social Action Trust Fund and Another Vs. Happy Sausages Ltd and Others, [2004] T.L.R. 264** and **Metropolitan Properties Co. (FGC) Ltd Vs. Lannon (1966) 1 QB at page 599.** In **Metropolitan Properties**, among others, Lord Denning MR., observed the following: -

> *"In considering whether there was a real likelihood of bias the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right - minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."*

The above wise observation as it stands, is a perfect guidance on matters of recusal and when the judge or chairman of the tribunal turned down the recusal prayer. In this case, no question of bias was raised before the appellate tribunal. It is at this stage the appellant complains that the chairman wore the shoes of the respondent so to say.

When bias is raised as a ground at the second appeal level and in circumstances like in this matter, the appellant must submit on the same and at least the court must see the likelihood of bias not from a

reasonable man's view (common man's view), but from a fair minded and informed observer's view to the facts alleged if established. The Court of Appeal decision in the case of **Registered Trustees of Social Action Trust Fund and Another Vs. Happy Sausages Ltd and Others, [2004] T.L.R. 264** held: -

> *"In the instant case, the alleged bias pertains to the learned trial judge who conducted Miscellaneous Civil Application Number 10 of 2001 in the High Court, Arusha. We have already examined at length the circumstances which led the appellants to suggest that the learned trial judge was biased against them. The next question to ask then is whether or not those circumstances would lead a fair minded and informed person/observer to conclude that there was a real possibility that the learned trial judge was biased.* ***It is important to bear in mind that this observer has to be fair-minded and informed. In our context such an observer should be aware of our Court procedures; the role and function of a trial judge in adjudicating cases.*** *He should be aware of interlocutory proceedings during a trial and that an aggrieved party can always appeal to the higher echelons in the Court hierarchy.* ***Moreover, such an informed observer would be aware that there is no proforma ruling or judgment. They differ in substance and linguistic style."***

Having that basic rule in mind, I should peruse the appellate tribunal's proceedings and judgment in line with the prescription above, I have made a keen study of them and seen only fair procedure and determination of the grounds, which were well-reasoned by the learned chairman. I am therefore, satisfied that, the appellate chairperson was

not biased. This finding gives the court strength to dismiss this ground for bearing invalid allegations.

Regarding the third ground, the appellant claims that, he was denied his right to tender the exhibits before the trial tribunal. This one is a point of law, since denying a person his right to tender documents is equal to denial of right to be heard. It is known that a party to a case has the right to be heard under the maxim *audi alteram partem* (hear the other party). This right is fundamental that should not be interfered with. In **Mbeya Rukwa Auto Parts Transport Limited Vs. Jestina George Mwakyoma** [2003] T.L.R. 251, also followed in **Grand Regency Hotel Limited Vs. Pazi Ally & Others [2017] T.L.R. 154 [CA]** the Court held: -

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law"*

Any court decision breeding from such proceedings will therefore be illegal liable to be quashed. With this allegation, equally this court dutifully visited the proceedings of the Ward tribunal, to satisfy itself of the complaints. I found one documentary exhibit, which was tendered by the appellant and accordingly admitted.

The appellate tribunal was correct when it ruled that this allegation had no basis. The trial tribunal's proceedings though cannot be beyond reproach, shows that 02/01/2020 during trial, the appellant was asked as to whether he had any exhibits for his claim, he affirmed and stated the year he was allocated the said land by the village authority to be 2005.

Then in the trial tribunal's proceedings we find TZS 4,000/= receipt dated 9th August 2005, which was said to be a land allocation fee. Considering that proceedings of the Ward tribunal which should not be treated with an advanced technicality but handled with normal citizen, I am convinced the appellant was availed all his rights, including the right to tender any exhibit of his choice.

Again, there was no dispute that, the appellant was allocated a land plot by the Village Authority, the dispute as earlier alluded gravitated on the boundaries and whether the respondent actually, trespassed into the appellant's land. From that study, I think the trial tribunal committed no procedural fault, equally the appellate tribunal was correct in its concurrent findings. This ground, bears serious allegations, but devoid of any merit and unsupported by the proceedings. I thus proceed to dismiss it in total.

The last ground of appeal bears a complaint that, the first member of the trial tribunal did not give reason for his opinion. Of course, it has been ruled in number of cases that the duty of judicial officers and any other adjudicator must assign reasons for the decision. I will not go any further on the rationale for reasoning in the judicial and quasi-judicial bodies, because I have referred to the tribunal's proceedings and found that all members assigned reasons to their respective opinions. The first member in giving her opinion (Tatu Amiri) opined that: -

"Haki apate mdaiwa ***kwa sababu mshtaki ameshindwa kulielewa eneo lake"***

The above means dispute be decided in favour of the respondent (as the owner) because the appellant failed to describe his land and all other members gave their reasons, there is no point in producing their opinions hereto.

I would reiterate, the fact that the appellant was allocated the suit land by the Village Authority is undisputed, though the appellant has persistently preferred sticking to this point. What was in question and that the appellant bore a duty to establish was demarcation in order to find out if in real sense the respondent has crossed the boundaries. *Locus in quo* was visited, the trial tribunal found boundaries were very clear between the parties. I have visited the trial tribunal's sketch map, same supports the finding of the trial tribunal. Equally this ground must fail as I hereby dismiss in total.

Having so done I find the concurrent findings of the two tribunals below were correct in law and in fact, hence this court has no justification to interfere with. Consequently, the whole appeal in unmerited as same is dismissed entirely with costs payable to the respondent.

Dated at Morogoro this **17th day of March, 2023.**

P. J. NGWEMBE

JUDGE

17/03/2023

Court: This judgement is delivered at Morogoro in Chambers this 17th day of March, 2023 in the presence of the appellant and the respondent, both appearing in person and unrepresented.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

17/03/2023