THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

LAND APPEAL NO. 148 OF 2022

(Arising from the decision in Land Application no. 42 of 2017 before the District Land and Housing Tribunal for Kilosa)

COSMAS MOHAMED ..... APPELLANT

VERSUS

ATHANAS SALUM KALEGA ..... RESPONDENT

JUDGEMENT

Date of last order: 15/03/2023

Date of Judgement: 19/05/2023

MALATA, J

This appeal stems from the decision of the District Land and Housing Tribunal (DLHT) for Kilombero in Land Application no 42 of 2017. The material background facts of the dispute are briefly as follows; the applicant (the respondent herein) instituted an application at the DLHT for Kilosa via Land Application no. 42 of 2017 claiming to be declared as the lawful owner of the land in dispute. That in 2013, the respondent

(the appellant herein) trespassed into his land and unlawfully reaped the sugarcane crops planted thereon. Following the trespass, the appellant instituted the criminal case against the respondent where the respondent was convicted but upon appeal to the District Court conviction was quashed for the reason that theft and trespass cannot be established before the ownership of the suit is determined.

The applicant thus filed the application to the DLHT, where the DLHT entered decision in favour of the applicant by declaring him to be the lawfully owner of the land in dispute.

Aggrieved by the decision of the DLHT the appellant herein appealed to this court on the following grounds;

1. That, the trial tribunal erred in law and fact by accepting, admitting and delivering judgement relying on exhibit A – 1 that was tendered by incompetent witness.
2. That, the trial tribunal erred in law and fact by failing to consider and correctly evaluate the evidence of the appellant.
3. That, the trial tribunal erred in law and fact for allowing the application without evidence on whether the allocation of the disputed land to the respondent followed proper required legal procedure.

4. That, the trial tribunal erred in law by delivering a judgement in the land matter where the necessary party (Ruhembe Village Council) was not joined or required to testify.

He thus prayed to the court to set aside judgement of the trial tribunal and the appellant be declared the lawful owner of the disputed land and appeal to be allowed with costs.

The parties agreed the appeal to be heard by way of written submission which prayer was honoured by the court.

In support of the first ground the appeal, the appellant submitted that; the trial tribunal improperly admitted and relying to exhibit A -1 which was tendered by AW1 Amani Mohamed Mbilikila, who was not party to the case, the competent person to tender the said exhibit was AW4 or the officer from Ruhembe Village Council.

Submitting on the second ground, the appellant stated that, his witness testified to the extent that he was given the land in dispute by his mother in a year 2000, and that his mother acquired the same by traditional way, that is, by clearing of bush land.

The appellant's evidence was disregarded and no weight was given on the same. The appellant further submitted that, the evaluation of

evidence is all about comparing the evidence of both parties and come out with the conclusion as to why the evidence of one party is heavier than of the other party. He submitted that, the ground for disregarding the appellant's evidence is that there is no evidence that the land in dispute was given to the appellant and that appellant did not call his mother as witness and had no document to prove the same.

It was the appellant's submission that failure of the appellant to call his mother as a witness is not fatal as she was not party to this case, though necessary party and the appellant had no way of compelling her attendance as a witness.

With regard to ground number three the appellant submitted that, the allocation of village land has its own legal procedures which were not followed when allocating the same by the respondent.

The appellant refereed to section 22 of the Village Land Act, Cap 114. The appellant submitted that there is no evidence that the respondent made an application on the prescribed form and the procedures as laid down under section 22 adhered to the end.

On ground number 4 the appellant submitted that, the suit commenced and was determined in the absence of Ruhembe Village council as a necessary party, because the respondent pleadings and evidence shows

that he was allocated the land in dispute by Ruhembe Village Council, and the source of conflict between the parties is the allocation made by the village in 2004, if the allocation wouldn't have been done there would be no land conflict between the parties.

The appellant further submitted that the necessity of Ruhembe Village Council is to determine whether the procedures for allocating the land were followed. The appellant on this ground cited the case of **National Housing Corporation vs. Tanzania Shoe Company and others** (1995) TLR 251 where the court held that, the court which proceeds without a necessary party is deemed to proceed without authority (jurisdiction), the same being termed as a major defect rendering the whole proceeding null and void.

Finally, the appellant prayed to the court to set aside judgement of the trial tribunal and declared the appellant lawful owner of the land in dispute.

Replying in opposition of the appeal, the respondent on the first ground submitted that, the appellant has not cited any legal authority to back up his contention, and he submitted that this ground is with no merits as exhibit A – 1 evidenced allocation of suit land to the respondent herein. AW1 according to the records was the attorney of the respondent and

he testified to that effect. The respondent tendered the same documentary evidence which was labelled as exhibit A3. As such the appellants agrees that the respondent was a competent witness to tender exhibit A – 1, then there is no gainsaying that the same was tendered by an incompetent witness. Further the allegation that exhibit A- 1 was not read before its admission is afterthought and not properly before this court, because it was not in the grounds of appeal and no leave was sought and granted to argue the same, however the same was cleared and read before its admission. This is the position notwithstanding the fact the issue has not been properly brought in this appeal.

As to the second ground, the respondent was of the opinion that, the trial court correctly evaluated the evidence on record and ended with proper findings. The evidence by the appellant failed to prove how the appellant acquired such land neither oral nor documentary produced to prove the same. He thus argued the court to disregard the unfounded allegations.

Submitting on the third ground, that the procedure for allocating village land were not adhered to before the same has been allocated to the respondent herein, the stated that, the argument is bizarre and

misplaced, ***first***, the issue was not raised in the appellant's pleadings filed in the trial tribunal and neither was any evidence brought which sought to suggest that this was the core contention, ***secondly***, there was oral testimony by AW3 which sufficiently prove that the suit land was allocated to the respondent by the village authority. To cement his submission, he cited the case of **Martha Michael Wejja vs. Hon. Attorney General and 3 others** (1982) TLR 35, Mary **Wanjiku Gachigi vs. Ruth Muthoni Kamau** (2003) 1EA 69.

It was the respondent's submission that, it is cardinal principle that cases are to be decided on the basis of the matters pleaded and not otherwise, as stated in the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal no 161 of 2016, CAT, unreported, **Sarah Wanjiku Mutiso vs. Gideon M. Mutiso** (1986) LL. R 4879.

On the fourth ground, he submitted that, looking at the ground, the appellant is contending that Ruhembe Village Council was a necessary party and therefore there was a non-joinder which is fatal to the proceedings. This contention is misplaced and misguided as there is nothing that is sought against Ruhembe Village Council in the suit at hand, he referred this court to the decision of the Court of Appeal, **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman and**

Fatma Mohamed, Civil Revision no 6 of 2017. As per the decision a legal person or natural is a necessary party if a relief is sought against the said person in a suit and also that the court would not be in a position to issue an effective decree in the absence of such person. In the case at hand there is no any relief sought against Ruhembe Village Council.

Based on the cited authorities, the reasons and cumulative effect of all the above, the appellants appeal is misconceived and unmeritorious deserving to be dismissed with costs.

Having heard the rival submissions from both learned counsels, I noted therefore that, the crucial issue to be determined here is whether the evidence on record proved ownership of the land in dispute in favour of appellant

As stated herein above, the chief of dispute in on ownership of land in dispute. Both grounds of appeal hinges on this issue as they fault the Chairperson of the trial tribunal for failing to correctly evaluate the evidence hence resulted to wrong conclusion.

To start with, the burden of proof in civil cases, it is a cardinal principle of law that, the one who alleges existence of certain fact bears duty to

prove it. This principle of law echoes what is provided section 110, 112, 115 of the Evidence Act, Cap.6 R.E. 2022

Section 110 elucidate that

(1) Whoever desires any court to give judgement as to ***any legal right*** *or liability dependent* ***on the existence of facts*** *which he asserts* ***must prove that those facts exist***

(2) When a person is bound to prove the existence of any fact, it is said that ***the burden of proof lies on that person***

section112 provides that;

The burden of proof as to any particular fact lies on that 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.*

Section 115 depict that;

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

This above legal position is supported by the Court of Appeal of Tanzania in **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** CAT-Civil Appeal No. 45 of 2017 (Mwanza unreported), wherein the following

excerpt was quoted approvingly from Lord Denning in **Re Miller vs Minister of Pensions** [1937] 2 All ER 372,

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man- unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case.* ***That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."***

In land cases one can proof ownership of land through various ways, these are; ***one***, inheritance, ***two***, purchase, ***three***, gift, ***four***, clearing of vacant bush not owned by anybody, ***five***, allocation by relevant land authority and ***six***, adverse possession

Having pinpointed the principles and how one can attain ownership of land and prove ownership, I am now turning to discuss the grounds of appeal.

The appellant's complaint on the first ground is that, the trial tribunal erred by in relying on exhibit A-1 DLHT which was tendered by an incompetent witness. This brings into court's attention the question as to who can tender evidence in court.

In resolving this complaint, I will be expounding the relevant guidance on persons who may tender exhibits in court during trial. In **The DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported), the Court of Appeal listed the categories of people who can tender exhibits in court. It stated thus: -

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that, it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is* ***whether the witness has the knowledge and he possessed the thing in question at some point in time****, albeit shortly. So, a*

possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."

Also, in the case of **DPP vs. Mziray Haji**, Criminal Appeal no. 493 of 2006 the court detailed that;

*A person tendering exhibit **doesn't have to be a maker or custodian of a report or exhibit as long as the witness has the knowledge of the contents** of the exhibit to be tendered in court.*

Based on the above principle propounded by the court of appeal, an exhibit can be tendered at the trial by; **one**, the maker of the document, ***two***, a party to case who has knowledge of the same, ***three***, custodian of the document who has knowledge of the same, ***four***, one who at a certain point of time was in possession of exhibit.

The present case the document in question Exhibit A-1 was tendered by AW1 who was appointed attorney of the respondent duly authorised to represent him and was in possession and had knowledge of the exhibit. That being the case, he was legally competent to tender such an exhibit. Further, there was no objection sustainable as to the same from the

appellant, thus this is an afterthought. **The first ground therefore is with no merit and is accordingly dismissed.**

On the second ground of appeal the appellants challenged the ownership of the land in dispute by the respondent on the reason that the procedure for allocation by Village land was not complied with, this ground is argued with ground number three. The village Land Act, Cap 114 R.E in section 22(3) provides for the procedure of allocating land by Village council. The Village form no 21 has to be issued which is certificate of occupancy of village land. The certificate has to be issued to the person who was granted land by Village Council.

The trial tribunal record shows that, none of parties tendered any certificate issued by the Village Council as intended by the law to witness ownership of the disputed land. Rather, both of them had only provided oral proof however in addition to the oral proof of the respondent's evidence at the DLHT, there was documentary evidence, exhibit A – 1 supported by oral evidence of AW3 who was the kitongoji chairman who testified that the respondent was allocated the land by the Village Council. The proof of civil cases is on balance of probabilities.

Based on the factual evidence as testified in-the trial tribunal and put on record, both AW1 and AW2 narrated how the respondent was allocated

land in the year 2004. In evidence, only exhibit A1 was tendered and admitted. What Exhibit A1 testifies to is allocation, but not as the original document that was issued or would be required under Village Land Act, Cap 114, but rather a letter testifying that the respondent was allocated a piece of land.

This is to say the persuasive relevance of the letter is to show that the respondent is recognized as one person who had been allocated a particular piece of land at a particular time.

The appellant did not tender any evidence to support his claim of the land in dispute, the only evidence adduced was that the suit land belongs to his mother. It was therefore expected on the part of the appellant to bring his mother to testify taking into consideration that she is alive as stated by DW2 in cross examination. The appellant's mother is the material witness with regard to the issue. Failure of the appellant to bring that key witness entitled the trial tribunal and even this court to draw an inference, as it was stated in the case of **Hemedi Saidi vs Mohamedi Mbilu** (1984) TLR 113 where Sisya, J. held that

> *"Where for undisclosed reasons a party fails to call a material witness on his side/ the court is entitled to draw an inference*

that if the witness were called, they would have evidence contrary to the party's interest';

Accordingly, on the principle of balance of probabilities the respondent discharged his burden of proof in support of the issue while no tangible evidence contradicting the respondent's evidence. For the respondent's evidence to be weak to rely upon there must be appellant's evidence defeating the same. The trial tribunal had nowhere to rely upon and defeat the respondent's evidence. This court as well as found nowhere to interfere with the finding of the DLHT. **Consequently, we find no merit on the second and third grounds and the same is dismissed.**

As to the fourth ground of appeal on whether Ruhembe Village Council was a necessary party to be joined in the suit, in Land Appeal no. 148 of 2022. The question then becomes who is the necessary party? The court of appeal in the case of **Abdi M. Kipoto vs. Chief Arthur Mtoi**, Civil Appeal no. 75 of 2017 it held that;

Secondly, even if we were to agree with the appellant that the village council ought to have been joined, we have serious doubts if it was a necessary party. ***A party becomes necessary to the suit if its determination cannot be***

made without affecting the interests of that necessary party.

Order I Rule 3 of the Civil Procedure Code Cap 33 R. E. 2019 provides as follows;

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."*

In ascertaining whether a party is a necessary party or not in the context of Order I Rule 10(2) of the CPC, the court of appeal in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), stated that;

> *"Under this rule, a person may be added as a party to a suit*
>
> *i). when he ought to have been joined as plaintiff or defendant and is not joined so; or*
>
> *(ii) when without his presence, the questions in the suit cannot be completely decided".*

See also **Claude Roman Shikonyi v. Estomy A. Baraka and Four Others,** Civil Revision No. 4 of 2012 and **Abdilatif Mohamed Hamis v. Mehboob Yusuf Osman**, Civil Revision No. 6 of 2017 (both unreported).

In the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another,** Civil Revision No.6 of 2017 (unreported), when faced with an akin situation, the court stated that: -

> *"The determination as to who is a necessary party to a suit* ***would vary from a case to case depending upon the facts and circumstances of each particular case.*** *Among the relevant factors for such determination include the* ***particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed"***

In view of the afore stated principles of law, it is with no iota of doubt that, factors for consideration on whether a party to ought to be joined or not has to be weighed through inter alia that; ***one***, nature of relief should be sought against the non-joined as well, ***two***, reliefs sought must be affecting directly or impliedly that party, ***three***, execution of the decree passed must be affecting the party.

In the present each party herein is claiming ownership of the land in dispute, the appellant alleging to have been given by his mother while the respondent claiming to have been given by Ruhembe Village council via Exhibit A-1. The then applicant (respondent) prayed for, inter alia, the declaratory order that he be declared a lawful owner of the land in dispute.

This court found that, given the nature of the reliefs sought there is no connection directly or impliedly with the Village and it is not stated as to why the appellant found this to be an issue. However, based on the understanding of when a third party should be joined, then this court is of the settled mind that, Ruhembe Village council has no connection whatsoever with the dispute save that, it can be called as witness and not otherwise. This position is in line with the decision in the case of **Abdi M. Kipoto vs. Chief Arthur Mtoi**, (supra). This is so because, in the circumstances of the case the subject of this appeal, Ruhembe Village Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed.

The fourth ground lacks merits as well and it is accordingly dismissed

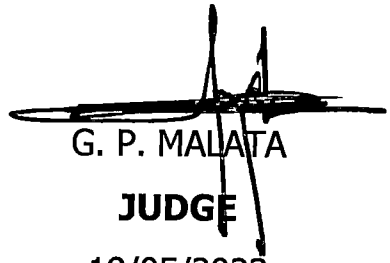
In the upshot, I found no reasons to interfere with the trial tribunal's findings and decision. Further, I noted the evidence by the respondent is

not contradicted in any way by the appellant. Therefore, the District Land and Housing Tribunal correctly decided the case.

Consequently, I hereby hold that the appeal is devoid of merits and is accordingly dismissed with costs.

IT IS SO ORDERED.

DATED at **MOROGORO**, this 19th day of May, 2023.



G. P. MALATA

JUDGE

19/05/2023