IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 24 OF 2022

(C/F Land Application No. 109 of 2016 District Land and Housing Tribunal of Babati at Babati)

GISHING'DA MAGING ..... APPELLANT

VERSUS

HAWU AWEDA ..... RESPONDENT

JUDGMENT

29th May & 6th July, 2023

TIGANGA, J.

This appeal emanates from the decision of Land Application No. 109 of 2016 from the District Land and Housing Tribunal of Babati at Babati (the trial tribunal) in which the respondent herein claimed that, the appellant had trespassed into part of her land measuring 1 and ½ acres located at Dindirmo hamlet in Endamang Village within Nar Ward in Babati District.

According to the trial tribunal's records, the respondent has been owning a total of 5 and ½ acres of land with her husband since 1963/1964. According to him, the said land was verified in 1974 during Operation Vijiji and they had been living peacefully until 2016 when her

husband died before the appellant trespassed into the suit land claiming ownership and started cultivating therein.

According to the appellant, in 2008, his father, Maging Surumbu distributed his area of 38 acres to his four children to wit; Manonga Maging, Gidare Maging, Safari Maging, and the appellant. Each of them was allocated 9 acres and the remaining two acres were allocated to the respondent as the wife of Manonga Maging (the first son). According to the appellant, such distribution was done under the supervision of the hamlet and village government leaders. The documentation of the said distribution was admitted in evidence as exhibit D1. He further said that the respondent invaded the appellant's allocated area in 2014 and they tried to settle the matter amicably but failed. Following that failure to settle, the respondent decided to file the suit before the trial tribunal.

At the time of distribution, the respondent had built one house and was living in the suit land hence, she was supposed to vacate the area but she refused. There is also another contention that, the appellant once stayed in the suit land but had left for more than 30 years and when he returned it was when he started claiming ownership of the suit land. The trial did not only record oral testimony but also visited the *locus in quo* and the final analysis, after considering the evidence before it decided in

favour of the respondent, on the grounds that, she had lived in the suit area undisturbed for more than 53 years; she had built a house thereon and had even buried her child and grandchildren in the suit land. Aggrieved, the appellant preferred this appeal with the following three grounds;

1. That, the trial tribunal erred in law and fact in failing to interpret, evaluate the property, and consider the evidence tendered before it by the appellant and her witnesses compared to that of the respondent.
2. That, the trial tribunal erred in law and fact in relying his decision on the time spent by the respondent on the suit land, houses built, and graves used to bury his grandchildren.
3. That, the trial tribunal erred in law and fact in failing to consider the law while reaching into its decision.

During the hearing, the appellant was represented by Mr. Joseph Mwita Mniko whereas the respondent was represented by Mr. Paschal Peter all learned Advocates.

Supporting the appeal, Mr. Mniko submitted on the 1st ground of appeal that, the evidence from the appellant was greater than that of the respondent, thus, had the trial tribunal evaluated it properly, it could have reached a different decision. He argued that, according to exhibit D1, family minutes of the meeting sat on 15/10/2008 showed how the 38

acres were fairly distributed. According to such distribution, the respondent was the one who trespassed on the suit land and was asked to vacate through another family meeting convened on 05/12/2016 but refused to do so.

The learned counsel also challenged the respondent's evidence together with that of her witnesses as contradictory in respect of the year in which the respondent started owning the suit land and its boundaries. As to the year, he averred that, PW1 stated that, she started owning the suit land in 1964 whereas PW2 and PW3 said it was 1974. Regarding the boundaries, he argued that, while in the application, the boundaries are seen as North-Sikay Gidale, West-Hill/Gidatu Soya, East Qwari Manonga, and South-a cow path. However, PW1, PW2, and PW3 all mentioned completely different neighbouring boundaries. He asserted that, such contradiction shows that, the respondent is not sure of the land which she is claiming which makes her claims an afterthought. In that regard, the respondent's evidence was weak and had no quality as stated in the case of **Hemedi Said vs Mohamed Mbilu** [1984] TLR 113.

On the 2nd ground, the learned counsel argued that, prior to the current occupation, the suit land was owned by the respondent's father-in-law who allegedly distributed it to his children in 2008. Thus, the claim

that the respondent owned the suit land since 1964 is misconceived, as she could not own it before it was distributed to her. Moreover, the dispute arose in 2016 which is eight years from the day it was distributed hence the doctrine of adverse possession cannot apply. Mr. Mniko also contended the fact that back in 2008 there were no houses in the suit land and if the respondent claimed that she had already built it, such house was illegally built as she was supposed to vacate the land after the distribution was made in 2008. More so, the alleged graves were made in 2015 and 2018 after the matter was already at the trial stage thus, they cannot be considered as the ground for ownership as they can easily be removed and transferred.

As to the last ground, learned counsel submitted that, the trial tribunal did not base its decision on the evidence on record but rather, the trial chairman was driven by mercy as he held that, it would be a disturbance to vacate the respondent from the suit land. The trial chairman did not deal with substantive justice as per section 3A of the **Civil Procedure Code**, [Cap 33 R.E. 2019]. He prayed that, this appeal be allowed with cost by quashing and setting aside the judgment of the trial tribunal.

In reply, Mr. Peter submitted on the 1st ground that, the trial chairman was correct in his findings as he properly analyzed the evidence before him and arrived at a just finding. In his view, the respondent's evidence and that of her witnesses were strong as opposed to the appellant's testimonies especially exhibit D1 which was a fabricated document, and the same was not corroborated by any of the witness's evidence. He argued that, the allegation that Maging Surumbu distributed his 38 acres to his children is not true because such distribution was never done. Regarding the contradiction of the years of occupation and boundaries, learned counsel argued that, the same are minor discrepancies that do not go to the root of the case in respect of ownership of the suit land.

On the 2nd ground, Mr. Peter submitted that the trial tribunal was correct to consider the time spent by the respondent in the suit land, the house built, as well as the graves she buried her grandchildren as proof that she has occupied such land since 1964 and legalized in 1974 during Operation Vijiji and that, she stayed peacefully until when the dispute arose in 2016. In that, regard, she is a legal owner of the suit land under the doctrine of adverse possession as demonstrated by the trial tribunal chairman in his judgment.

On the last ground, learned counsel submitted that the trial chairman considered the laws of the land in reaching his decision. He did not base on mercy as argued by the appellant. However, the appellant's counsel did not specify which favour or mercy did the trial chairman refer when reaching his decision. He prayed the appeal to be dismissed with cost for want of merits.

In his brief rejoinder appellant's learned counsel reiterated his earlier submission and maintained that the appellant's evidence in respect of the suit land was weak compared to that of the appellant and the trial chairman, erred in relying on it to declare the respondent a lawful owner. He insisted that, this appeal be allowed with cost.

Having gone through the trial court's records as well as both parties' submissions, I now proceed to determine grounds of appeal which are to focus to answer only one issue; whether the trial tribunal was justified to hold that the respondent is the lawful owner of the suit land.

Before I embark to determine the raised issue in this appeal, it caught my attention that, this matter was heard by different two different tribunal chairmen. The first was C.P. Kamugisha who recorded the evidence of the respondent and that of her witnesses. He also recorded the appellant's sole testimony. He thereafter adjourned the matter several

times allowing him to summon other witnesses of his side, that was from 04/04/2018 to 14/04/2021, but he failed to avail his witnesses to testify hence, the defence was closed by the trial tribunal on the respondent's prayer and in his absence. The matter was scheduled for judgment.

He however filed an application to set aside the order which closed his defence vide Misc. Land Application No. 135 of 2021. After the conclusion of that application, the record shows that on 30/05/2022 another tribunal Chairman one H.E. Mwihava, took over the proceedings and continued with the hearing where he recorded the evidence of the 2nd to 4th defence witnesses. He also visited the *locus in quo* and delivered and thereafter the impugned judgment subject to this appeal.

Although none of the parties raised this procedural irregularity as a ground of appeal, it was the requirement for a successor chairman to state in the proceedings of a case the reason for taking over a trial from his predecessor. This not only to show that the parties have been given the right to know why there is a change of chairperson, without prejudicing their rights but also to enable the successor chairman to properly assume jurisdiction of continuing with the trial without chaos in the administration of justice as well as controlling the persons who for personal interest could just pick up any file and deal with it for the detriment of justice. In the

case of **Hatwibu Salim vs. R,** Criminal Appeal No. 372 of 2016, CAT at Bukoba (unreported) the Court of Appeal stated:-

> *"The requirement to state the reasons for the change of magistrates from one magistrate to another is a very important issue to consider. This is for the reason of controlling and avoiding the danger of some mischievous persons who might be able to access the file and do issues not in accordance with the procedure or requirement of the law."*

However, section 45 of the **Land Disputes Courts Act**, [Cap 216, R.E. 2019] provides that;

> ***"45.*** *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."*

From the provision above cited, it is only when there is proof that the error, omission, or irregularity in the proceedings has actually occasioned injustice to any party that the appellate court can reverse the decision of the trial court or tribunal. In this appeal, parties were

represented by Advocates, however, no one has complained either on the ground of appeal or submissions that he was prejudiced. That means the parties were not prejudiced by the said irregularity therefore, it is cured by section 45 of the Land Disputes Courts Act.

Further to that, even the Overriding Objective Principle, which urges the courts to deal with substantive justice, and do away with technicalities cures this irregularity that I have been pointing out. Under this principle, this irregularity can also be pardoned as none of the parties were prejudiced and the matter was indeed heard to its finality.

Coming to the merit of the appeal, it is a trite principle that, in civil cases, the onus of proving the case at the balance of probability lies on the one who alleges anything in his/her favour. This principle is in section 3(2)(b) and 110 of the **Evidence Act [Cap. 6 R.E 2022]** and enshrined in a number of Court of Appeal Cases such as in the case of **Maria Amandus Kavishe vs. Norah Waziri Mzeru (Administratrix of the Estate of the late SILVANUS MZERU) & Another,** Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) where the Court of Appeal had this to say;

> *It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything*

in his or her favour. This is the essence of the provisions of sections 110 (1), (2), and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. See, ***Anthony Masanga v. Penina Mama Ngesi & Another,*** *Civil Appeal No. 118 of 2014, and* ***Hamza Byarushengo vs Fulgencia Manya & 4 Others,*** *Civil Appeal No. 33 of 2017 (both unreported). It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case.*

Applying the above principle in the appeal at hand, it is an undisputed fact that, the appellant and the respondent are in-laws and their saga started in the year 2016 when the appellant herein took possession of the suit land and started cultivating. The appellant does not deny the fact that he went to cultivate the suit land, he claims the same to be his and alleges the respondent is the one who trespassed. However, neither the appellant nor his witnesses testified that, prior to the eruption of the dispute in 2016, the appellant was living in the suit land. They rather admit that, even during the alleged distribution in the year 2008,

the respondent was living on the suit land, and had built her house there. But they said she was supposed to vacate the suit land which she did not. I therefore find the appellant's argument that the respondent was the one who trespassed unfounded and untenable before the eyes of the law and the following are my reasons;

First; If the respondent was already on the suit land when the alleged distribution was done in 2008, the appellant failed to show and prove how did she come into being in possession of the suit land prior to the alleged distribution. But the respondent did through her testimony and that of her witnesses inform the trial tribunal when she started living there. In his written submission, the appellant's advocate averred that the respondent ought to have left after the distribution which proves that she was residing in the suit land beforehand.

Second; at the time of such alleged distribution in 2008, the respondent had already established herself and had even buried her child and grandchildren in the suit land. The appellant claims that, such graves were dug and people were buried after the saga between them had ensued in 2016, was not proved by evidence either of the appellant or his witnesses before the trial tribunal. The appellant did not say that, he even tried to put a caveat against her burying her people there. Simply saying

that such graves can be dug out and transferred now is unwarranted disturbance as rightly held by the trial tribunal that;

> *"Ni maoni yangu kwamba kwa ushahidi huu na ukizingatia muda aliokuwepo mleta maombi kwenye eneo la mgogoro, ukizingatia amejenga nyumba yake (maendelezo) ndani ya eneo kama picha cha (sic) mnato zlnavyoonyesha ambazo zilichukuliwa na baraza hili baada ya kutembelea eneo la mgogoro. Lakini pia kuna makaburi matatu ndani ya eneo la mgogoro ambavyo ni mali (Watoto/wajukuu) wa mleta maombi itakuwa usumbufu kumwamuru aondoke katika eneo la mgogoro.*
>
> *Lakini pia kama ni kweli Mzee Maging Surumbu aligawa eneo lake kwa vijana wake wanne akiwemo mume wa Hawu Aweda basi ni wazi kuwa kipindi hicho mleta maombl allachwa kwenye eneo la mgogoro kwa kuwa tayari alikuwa ameshaendeleza sana. Asingeweza kugawa eneo husika kwa mtu mwingine nje ya mieta maombi na mume wake wakati tayari kuna nyumba, choo, boma ya mifugo na makaburi ya watoto na wajukuu wa mletamaombi..."*

As to the contradictions seen in the proceedings regarding the year, the testimonies show that, the respondent owned the suit land with her husband from 1963 but they were officially allocated 5 and ½ acres in the year 1974 during Operation Vijiji. The same goes for the boundaries and neighbors. As rightly argued by the respondent's counsel, the same is a

minor contradiction that does not dent the truth about the ownership of the suit land.

In light of the above, I do not find any reason to alter the decision of the trial tribunal. This appeal lacks merit and the same is dismissed with cost, in consequence thereof, the decision of the trial tribunal is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 06th day of July, 2023

HIGH COURT OF TANZANIA

J.C. TIGANGA

JUDGE