IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODMA

MISCELLANEOUS LAND APPEAL NO. 64 OF 2022

(C/F Land Case Application No. 272 of 2017 before the District Land and Housing Tribunal for Dodoma at Dodoma)

WILSON CHIPUNZA.....APPELLANT

VERSUS

VICTORY MWAJA.....RESPONDENT

JUDGMENT

Last Order: 31st July, 2023
Judgment: 18th August, 2023

MASABO, J.:-

The respondent herein had filed Application No. 272 of 2017 before the District Land and Housing Tribunal of Dodoma at Dodoma against the appellant. She claimed to be the lawful owner of a parcel of land comprising of six acres located at Chigongwe Village in Dodoma region which she allegedly acquired by clearing a bush on 1956. In vindication of her right, she prayed for a declaratory order that: she is the rightful owner of a suit land, the respondent be ordered to vacate from the suit land, general damages, costs of the suit and any other reliefs the tribunal seems fit and just to grant.

The application proceeded to a trial after which the tribunal had to determine who was the rightful owner of the suit land and the remedies to which each of the parties was entitled to. In support of her case the respondent testified as PW1 and called one witness; PW2, Severin Mlelwa.

The respondent testified that the suit land is situated at Chigongwe area having six acres. She cleared it being a virgin land in the year 1956 and that since then she used it without any interruption until in 2012 when the appellant surfaced with a claim of ownership of the same. Her testimony was corroborated by PW2 who told the tribunal that the suit property belongs to the respondent. He saw her clearing it in 1956.

The defence case was led by the appellant who stood as DW1. He called one witness; DW2, Andrea Swaga. DW1 testified that he inherited the suit land from her late father who died in 2005. This evidence was corroborated by DW2 who added that the dispute arose in 2012 where the respondent invaded on it.

Upon weighing the evidence of both parties, the trial tribunal found that the respondent proved her claim and her application was granted with costs. The appellant was aggrieved by such decision. He has filed this appeal on the following grounds;

1. That, the trial court erred in law and fact when it failed to properly evaluate the pleadings and evidence in record and to take into account critical aspects of evidence adduced by the respondent on proving ownership of the suit land.
2. That, the trial Chairperson erred in law and fact by ignoring the evidence adduced by the appellant that he has a good title over the suit land.
3. That, the honourable Chairperson erred in law and fact by failing to appreciate the fact that the appellant is the owner of the said land in quo measured 3 acres, from time immemorial after his father inheritance who passed away in 2005 but the respondent trespassed into the said land in quo claiming to be six acres, which is not the matter of fact.

4. That, the honourable Chairperson erred in law and fact by relying on inconsistent and insufficient evidence adduced by the respondent on proving ownership of the said suit land. In fact, the respondent claimed over the land she has never owned not even seen over a period of thirty years, in which at all time the appellant's family has been uninterruptedly using the said land in quo.
5. That, the honourable Chairperson misdirect himself in holding that the said land in quo is located at Chang'ombe while it is situated at Chigongwe.

On 31st July 2023, the parties appeared before me in a viva voce hearing. The appellant was represented by Mr. Lucas Komba, learned counsel whilst the respondent was represented by Mr. Robert Owino learned counsel as well. In support of the appeal, Mr. Komba consolidated all the grounds of appeal. He said that, the appellant is displeased by the trial tribunal's decision because the suit land was not identified. The boarders were not ascertained. The appellant claimed the suit land to be three acres whereas the respondent claimed that it has six acres. He argued that no report was tendered to show the actual measurement of the suit land.

It was his argument further that, in the judgment it is indicated that the suit land is at Chang'ombe area whilst the respondent stated and adduced evidence that it is at Chigongo. He said the two are different places. Hence the suit land was not ascertained. Therefore, he argued, it was important for the District Land and Housing Tribunal to visit the *locus in quo* to ascertain the suit land. In the absence of such ascertainment, he argued, the respondent who is the judgment holder risks the danger of being handed over a parcel of land other than the suit land. In supporting his

submission on the issue of visiting *locus in quo* he cited the case of **Masoya Mahemba vs. Nyasuma Kihaga,** Land Appeal No. 41 of 2021.

In conclusion Mr. Komba submitted that the appellant ably proved that the land is his. He obtained it in 2005 after it was bequeathed to him by his father. This evidence was corroborated by DW2. Thus, he prayed the appeal to be allowed.

In reply, Mr. Owino opposed the appeal. In respect to the size of the suit land he stated that, the appellant is the one who stated at the trial tribunal that the suit land is three acres. Thus, he was the one to prove it. Since the respondent stated that the suit land is six acres, her duty was to prove so and she did. It was his argument that, the respondent proved her case to the required standard as she stated how she acquired the suit land that is, by clearing it in 1956 and her evidence was corroborated by the evidence of DW2 who saw the respondent clearing it. He contended further that the respondent did not cross examine the respondent on this fact because he found it true.

On the issue of Chang'ombe and Chigombe, he said that it is merely a typing error and can be corrected under section 78 of the Civil Procedure Act Cap. 33 R.E 2019.

In regard to the issue of visiting of *locus in quo,* he argued that it has been wrongly submitted as it was not listed in the grounds of appeal set out in the memorandum of appeal. He prayed that it should not to be considered as it is a mere submission from the bar. He also argued the court to disregard the cited case in support of the issue of visiting *locus in quo.*

It was Mr. Owino's submission that, the argument that appellant's evidence as corroborated by his witness established his ownership of the land is with no merit because no explanation was given as to when and how did the appellant's father allegedly acquire the suit land. He argued that, to the contrary, the respondent adduced strong evidence on how she acquired the land and in no way was her account contradicted by the appellant. Concluding his submission, he prayed that the appeal be dismissed with costs.

Rejoining briefly, Mr. Komba submitted that the issue of visiting the *locus in quo* is not alien to the memorandum of appeal as it is implicitly set out in the fourth and fifth grounds of appeal. With this, he reiterated the prayer that the appeal be allowed.

I have dispassionately considered the submission of both parties alongside the tribunals record which I have thoroughly read and I will now venture into the grounds of appeal. While considering the submission and record, I have observed that out of the five grounds of appeal which have been preferred by the appellant, four grounds of appeal, that is, the first, second, third and fourth grounds of appeal revolve around the credibility of the evidence rendered by the respondent and her counsel as opposed to the evidence by the appellant and the core issue raised by these grounds is whether the trail tribunal was correct in holding that the respondent proved to be the owner of the suit land measuring six acres. It is a trite law that the burden of proof lies on the person who alleges existence of a certain a fact, hence the famous saying, he who alleges must prove. In our jurisdiction this rule is derived from sections 110 and 111 of the Law of Evidence Act Cap. 6 R.E 2019 which provides thus:

> 110. Whoever desires any courts to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those fact exist.
> 111. The burden of proof in suit proceeding lies on that person who would fail if no evidence at all were given on either side.

Applying this rule in **Antony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 [2015] TZCA 556 (TANZLII) it was held that;

> It is a common knowledge that in civil proceedings the part with legal burden also bears the evidential burden and standard in each case is on the balance of probabilities.

In **Antony M. Msanga's** case (supra) the Court of Appeal referred the case of **Re B (2008) UKHL 35** Lord Hoffman in defining the term balance of probability stated that:

> If a legal rule requires the fact to be proved (fact in issue) a judge or jury must decide whether it happened or not. There is no room for a finding that it might have happened the law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt the doubt is resolved by a rule that one part or the other carries the burden of proof. If the party bears the burden of proof fails to discharge it a value of 0 is returned and the fact is treated as not having happened. If he does discharge it a value of 1 is returned and the fact is treated as having happened.

With the foregoing principle in mind, I will now proceed to answer the question The evidence adduced by the respondent before the trial tribunal was to the effect that, she acquired the suit land by clearing a virgin land in 1956. Her evidence was corroborated by PW1 who saw her clearing the land in 1956. On the appellant's side his evidence was that he inherited the suit land from her late father who died in 2005. His testimony was supported by DW2. The respondent did not mention the name of his farther who was allegedly the original owner of the suit land and neither him nor his sole witnesses told the tribunal when and how the appellant's late father acquired the suit land. Having weighed this evidence, the trial tribunal was of the opinion that the respondent discharged her duty and declared her as the lawful owner of the suit land.

The appellant's complaint is that the respondent's evidence was inconsistent and did not sufficiently prove her claim. However, while submitting on the grounds of appeal no explanation was rendered to demonstrate how inconsistent was the respondent's evidence and, in my perusal, I was not able to spot such inconsistencies. Hence, I find his argument devoid of merit. As regard his complaint that the suit land was not ascertained in terms of size and boundaries, two arguments have been advanced the first one being that it was not certain whether the suit land is 6 acres as claimed by the respondent or 3 as asserted by the respondent. Second, it has been argued that the location was not certain, in that, it was not certain whether the suit land is at Changombe or Chigongwe as the judgment shows it is at Chagombe.

In my considered view, the first argument is without merit as this issue was not among the issues determined before the trial tribunal. Besides,

since the appellant was the one disputing that the suit land is not 6 acres but three acres, he ought to have demonstrated that the actual size of the suit land is 3 acres. Besides, the records loudly speak that the respondent testifying as PW1, stated that the suit land is six acres and the respondent never cross examined her which implies that he found this fact to be true. It is a principle of law that, failure to cross examine a witness on an important fact may be deemed as an admission to such fact. In the decision of the Court of Appeal in **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported) as upheld by the same court in **Khalidi Mlyuka v. Republic,** Criminal Appeal No. 442 of 2019, it was held that:

> "It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."

Going by this authority, the appellant herein ought to have cross examined the respondent and since he did not, he is deemed to have admitted it and cannot complain at this stage.

As to whether the suit is at Changombe of Chigongwe, going through the record, I have observed as correctly argued by Mr. Komba, the trial tribunal judgment shows that the suit land is located at Changombe a record which is also reflected in the typed proceedings. However, when reading the hand written proceedings, there was no dispute that the suit land is at Chigongwe. The appellant and their witnesses were at one that, the suit land is located at Chigongwe. Thus, there is no doubt in my mind that, the word 'Changombe' in the trial tribunal's judgment and typed

proceedings is a mere clerical error curable under section 96 of the Civil Procedure Code Cap. 33 R.E 2019 which reads that:

> Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties.

The error cannot be resolved through appeal. The Court of Appeal has instructively directed that rectification of the judgment resulting from accidental slip or omissions should be by way of a separate order (**NIC Bank Tanzania Limited and Flamingo Auction Mart vs. Samora Mchuma Samora Co. Ltd**, Civil Appeal No. 340 of 2020, [2023] TZCA 76 (TANZLII). In another case, **William Getari Kagege vs. Equity Bank and Ultimate Auction Mart,** Civil Application No. 24/08 of 2019 [2021] TZCA 185 and in **Jewels & Antique (T) Ltd vs. National Shipping Agencies Co. Ltd** [1994] TLR 107 the Court held that, litigants should not suffer through mistakes of court officials associated with precise record of the proceedings in the administration of justice. Thus, the appellant ought to have approached the trial tribunal for rectification of the same instead of formulating it as a ground of appeal.

Finally, with regard to the issue of visiting *locus in quo,* I will not belabour on it as I entirely agree with Mr. Owino that this issue deserves no attention as it was set not out as one of the grounds of appeal. Hence, as correctly argued by Mr. Owino, it was raised contrary to the provisions of Order XXXIX, Rule 2 of the Civil Procedure Code, Cap. 33 R.E 2019 which prohibits parties from arguing a point that was not set out in the

memorandum of appeal save where there is a court leave to that effect. It states thus;

> 2. The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of appeal or taken by leave of the court under this rule: Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

Indeed, since no leave was either sought or obtained prior to submission on it, it was contrary to the law. In the case, much as visiting locus in quo may be necessary in some cases to get a visual appreciation of the area in contention and check the accuracy of the evidence given in the course of the trial, it is not a legal requirement and the apex court has on numerous occasions cautioned that such visits should only be carried out on exceptional circumstances and the should be cautiously done else the court/tribunal will risk institute itself as witness in the case (see **Thadeus Massawe vs. Isidory Assenga, Civil Appeal No. 6 of 2017** [2020] TZCA 365 (TANZLII) and **Nizar M.H.Ladak vs. Gulamali Fazal Jan Mohamed** [1980] T.L.R. 29). Thus, a court/tribunal's judgment cannot be overturned simply because it did not visit the locus in quo unless, the appellant demonstrates such exception circumstances none of which have been demonstrated in the present case. Thus, even if the leave had been sought, this ground would, for the foregoing reasons, fail.

That said and done, and save for the clerical error above discussed, this court finds no merit in the appeal warranting the reversal to the judgment and decree of the trial tribunal. In the end, the appeal is hereby dismissed with costs.

DATED and **DELIVERED** at Dodoma this 18th day of August 2023

J.L. MASABO

JUDGE