IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND APPEAL NO 11 OF 2021

(Appeal From the Decision of the District Land and Housing Tribunal for Rukwa at Rukwa in Land Application No. 26 of 2019)

BETWEEN

LIBERATUS PESAMBILI..... APPELLANT

VERSUS

LUCAS KUSONGWA.....RESPONDENT

JUDGMENT

MRUMA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Rukwa in Land Application No 26 of 2098 which was delivered on 30. 11. 2021.

In that Application the Appellant Lebaratus Pesambili had sued the Respondent Lucas Kusongwa over ownership of a 25 acres piece of land situated at Mvula area of Katazi Ward in Kalambo District. After a full trial the District tribunal declared the Respondent as thr rightful owner of the land.

Aggrieved by the decision of the trial tribunal the appellant has preferred this appeal on the following grounds:-

1. *That the trial tribunal erred both in law and fact evaluating the evidence on record as who is the rightful owner of the disputed land hence it arrived at a wrong conclusion.*
2. *That the trial tribunal erred both in law and fact to find that the appellant's evidence and that of his witnesses did not prove the claim against the respondent on the balance of probabilities.*
3. *That the trial tribunal erred in law and fact to believe that the respondent was declared the lawful owner of the disputed land without proof.*

At the hearing of this appeal parties were not represented as a result of which I found it wise to argue it by way of written submissions.

Arguing in support of his appeal, the Appellant submitted that as per evidence on record the Respondent did not dispute the evidence of the Appellant the disputed land was formerly owned by one Valeliano Nwele his father. Further to that the Appellant faulted the decision of the trial tribunal for basing its decision on the assertions that in 2011 the Respondent had successful sued his paternal uncle without having any documentary proof such as a copy of judgment of that case being

produced before it. On those grounds he prayed this court to allow his appeal

In reply, the Respondent asserted that during the trial the Appellant failed to prove how the land in dispute was acquired. He said that the Appellant's evidence was weak and contradictory. He said that in his evidence the Appellant stated he was given the suit by his father but he didn't call his father to substantiate that assertion and no other evidence was given to prove such fact.

I have considered the grounds of the trial tribunal, grounds of the appeal and the parties' submissions. The issue for consideration and determination by this court is whether the trial tribunal did err in evaluating the evidence before it as a result of which it arrived in an erroneous conclusion of the matter.

It is trite law that he who alleges must prove. **Section 110 (1) of the Evidence** Act provides that whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist. This being a civil

dispute, the standard of proof is on the balance of probability and the burden is on he who alleges.

This being the first appeal court it has a duty to re-hear and re-evaluate the evidence and come to its own conclusion based on the evidence. This position was stated in the case of **Kaimu Said vs Republic, Criminal Appeal No. 391 of 2019** [unreported], where it was stated that:-

> *"We understand that it is settled law that a first appeal is in the form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."*

From the evidence on record the Appellant is on record telling the trial tribunal he had used the suit land for fifteen years undisputedly but when he grew maize in 2019 his maize crops were destroyed by the Respondent. He successfully instituted a criminal trespass case against the Respondent but on appeal the District appellate court quashed the conviction and set aside the proceedings and directed parties to resort their disputes in a land court and

hence these proceedings. He told the tribunal that his land share boarders with one Leonard to the East, a forest to the North and to one Maembe to the South. On the Western side it boarders with Ephraim Nwele (PW2). According to the Appellant he acquired the suit land by being given it by his father one Valeliano who at the time he gave his testimony in 2019 the said father had become blind.

He called one witness Ephraim Nwele (PW2) who testified on his behalf. PW2 (apparently his paternal uncle) told the trial tribunal that originally the suit land was owned by one Heneriko Sukwa (i.e. PW2's father). After the demise of Heneriko 24 years before 2019, the suit land passed to Appellant's father who gave part of it to the Appellant in 1983.

As stated in the course of this judgment, in law the burden of proof is on he who alleges [See Section 110(1) of the Evidence Act]. The Appellant testified that he acquired the suit land from his father one Valeliano Nwele. In law he had burden to prove that assertion and under normal circumstances one would naturally have expected the Appellant to call the said Valeliano Nwele, his father to give evidence. He however did not do so and the reason given is that at the time of the trial Valeliano Nwele was a blind. However there is no law which exempts a blind person from giving evidence and this is for obvious reasons. Blindness is a term used to describe those who have

complete lack of light perception or eye disorders or persons who cannot see. On the other hand evidence is a spoken statement given in court usually under oath. Since a blind person can speak, there is nothing that could prevent him to give his evidence on how he gave the Appellant the suit land. The law under section 128 (1) of the Evidence Act obliges even a dumb person to give evidence in court.

But apart from Valeliano Nwele, the Appellant's father and PW2's brother there were other persons who could be material witnesses in the matter. They were Leonard and Maembe whose lands boarded the suit land according to the Appellant. For undisclosed reasons they were not called to testify. In the Case of Hemedi Saidi Versus Mohamed Mbilu [1984] TLR 113 this court (Sisya J as he then was) held inter alia 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 witnesses were called they would have given evidence contrary to the party's interest"*

In the instance case, the Appellant gave flimsy reason for not calling Valeliano Nwele his father and no reasons at all was given for not calling the other two witnesses whom I find to be material witnesses too. Thus, the trial tribunal

was correct in finding that the Appellant had failed to prove his claim over the suit land.

Further to that the Appellant's evidence was material contradictory regarding the time he acquired the suit land. According to the Appellant at the time he was giving his testimony before the tribunal in 2019 he had used the suit land for fifteen years undisturbed. This means that he started to use the said land in 2004. However this PW2's evidence which is to the effect that the Appellant was given the suit land in 1983 contradicts the Appellant's evidence that in 2019 he had been using the land for 15 years. It is also contradicts the Appellant's statement that in 2019 when he was giving his evidence he was 34 years of age because this would mean that he was born in 1985 while the evidence of PW2 suggests that he was given the suit land in 1983, that is two years before he was born!

In the final result this appeal has no merit and it is dismissed with costs.

A. R. Mruma

JUDGE

28. 08. 2023