THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPEAL NO. 8 OF 2022

(Originating from Land Appeal No. 49 of 2021 in the District Land and Housing Tribunal for Kondoa at Kondoa and Land Case No. 4 of 2021 in the Changaa Ward Tribunal)

HAMISI RAMADHAN NKWASA ..... APPELLANT

VERSUS

HALIFA NAHATO MAJALI.....RESPONDENT

JUDGMENT

25/5/2023 & 27/6/2023

KHALFAN, J

This appeal is based on the dispute over the ownership of a piece of land situated at Changaa village within the District Council of Kondoa in Dodoma region ('the land in dispute'). The dispute in the first place was lodged in the Changaa Ward Tribunal ('trial tribunal') where the appellant was declared as the lawful owner of the land in dispute.

During trial, the appellant testified that he was the owner of the land in dispute by virtue of inheritance from his father since 1998 but on 12/7/2021, the land in dispute was invaded by the respondent. To support his testimony, the appellant brought to the trial tribunal three witnesses but

the first witness, Juma Issa Nkwasa did not testify after being rejected on the ground that he heard the matter before the Kitongoji. Hence, Iddi Masudi Hela was the first witness to testify who testified that in 1976 during operation vijiji, the land in dispute was allocated to one Hamis Majala. The second witness was Jumanne Issa Bande who testified that the land in dispute belonged to one mzee Ramadhani Nkwasa and during operation vijiji, the land in dispute was allocated to the appellant.

The respondent, on his part, testified that the land in dispute of one (1) acre size was allocated to him by the village authority during operation vijiji. Having acquired the said land in dispute, he erected a house and lived therein for six (6) years before he left the same to his wife and later to his sister. The respondent brought four witnesses to prove his claim. The first witness, Shabani Sadiki, did not testify because there was an objection that he testified on the same matter before the 'kitongoji' (local authority of the area within which the land in dispute is situated). Therefore, Tabu Ally Gwandi was the first witness who told the trial tribunal that she witnessed the dispute which arose over the land in dispute which belonged to her neighbour, the respondent and while responding to the Tribunal's questions,

she said that the land in dispute was allocated to the respondent by the village authority.

Selemani Iddi Sadi was the second witness. He testified that as being the village secretary, he participated in the allocation of the land to villagers during the operation vijiji. He said that the land in dispute, which is of one (1) acre size, was allocated to the respondent who built the house and lived therein before he left it to his sister and later to Adinani who was keeping goats therein. He added that in the first place, before operation vijiji, the land in dispute belonged to one Ramadhani Nkwasa, the appellant's father. Aziza Nahato Majali was the third witness, she told the trial tribunal that the land in dispute was entrusted by the respondent. While responding to the questions by the trial tribunal, she said that the land in dispute was allocated to the respondent by the village authority.

It is from the above summary of evidence that the trial tribunal declared the appellant the lawful owner of the land in dispute. The trial tribunal's findings considered the fact that the appellant inherited the land in dispute from his father and the trial tribunal went further to declare that the land in dispute was not of one (1) acre size as contended but rather a quarter (¼) of an acre.

The respondent was aggrieved by such findings of the trial tribunal. Hence appealed to the District Land and Housing Tribunal for Kondoa at Kondoa ('Kondoa DLHT'). Among other things, he contended that the Trial tribunal erred in law and fact to disregard his evidence that the land in dispute was allocated to him by the village authority in 1976 during operation vijiji. The Kondoa DLHT, having heard the appeal, reversed the trial tribunal's findings and declared the respondent the lawful owner of the land in dispute. That is, one (1) acre sized piece of land.

The appellant is now before this Court challenging the findings of the Kondoa DLHT. His petition of appeal consists of seven grounds which are based on the contention that the Kondoa DLHT did not re-evaluate the evidence properly considering that the appellant had stayed in the land in dispute for twenty-three (23) years since 1998 and made improvements thereupon. Further, the appellant contends that the respondent's evidence was weak and contradictory and wrongly maintained that the size of land in dispute is of quarter (¼) acre and not one (1) acre as concluded by the Kondoa DLHT.

The Court ordered the appeal to be disposed of by way of written submission and both parties submitted as follows:

The appellant, to support his appeal, contended that the Kondoa DLHT erred in law and fact by not considering the weight of evidence adduced by him during trial that he acquired the land in 1998 through inheritance from his late father until 2021 when the respondent invaded it. He added that, his witness Iddi Masudi Hela supported his evidence that during the operation vijiji, the land was allocated to one Hamis Majala who was his relative and the said Hamis Majala left the land to his late father Mzee Ramadhani Nkwasa who he inherited. He further contended that this piece of evidence was supported by Jumanne Issa Binde.

The appellant contended further that the respondent's evidence that he left the suit land in 1983 until 2019 supports his ownership as there is expiry of thirty-six (36) years despite the fact that the respondent returned to the land in dispute in 2021. The appellant also pointed out the contradictions which appear in the respondent's evidence that it is not certain as to whom the land in dispute was left to after Aziza Nahato Majali which infers that the respondent had no intention of returning to the land in dispute. That the respondent told the trial tribunal that the same was left to Hasan Nahato while Selemani Iddi Sadi, said that the same was left to

Adinani on behalf of Musa Shabani Ndee and Aziza Nahato Majali said she left the land to Musa Shabani Ndee.

Another contradiction pointed out by the appellant is on the improvements made on the land in dispute in which the respondent testified that there was a house he erected, livestock shed and toilet contrary to the testimony of Aziza Nahato Majali who said that the house left by the respondent was demolished.

Also, the appellant reduced the size of the land in dispute as contended that the land was one (1) acre sized while his witness Aziza Nahato Majali said it was half (½) acre which was different from what the tribunal observed during the visit as the land in dispute was found to be of quarter (¼) acre size. The appellant having so submitted contended that the appellant had strong evidence and proved his ownership in terms of Section 110 of the Evidence Act, [CAP.6 R.E 2022]. He cited the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 to support his contention.

The appellant went further to submit that the Kondoa DLHT was supposed to consider the fact that he had been in the land in dispute for the period of twenty-three (23) years undisturbed and developed the land by building therein until when the respondent invaded it. To cement this

contention, he cited the case of **Shabani Nasoro vs Rajabu Simba** (1967) HCD 233.

The appellant wound up his submission by contending that the respondent, despite being allocated the land by the village authority; he did not produce any document to prove such allocation. Thus, the appellant insisted that his evidence was heavier than the respondent's. As such, his appeal should be allowed. He also prayed for costs.

The respondent, in reply, opposed the appeal. He submitted that the same should be dismissed for want of merit. He challenged the argument that the Kondoa DLHT did not evaluate properly the available evidence saying that the tribunal exercised its duty properly and made its findings. He contended that in the light of the case of **Hemed Said** (supra) and Section 110, 111 & 3(2) of the Evidence Act, [CAP.6 R.E 2022] he discharged his duty to prove his ownership of the land in dispute as his evidence was heavier than the appellant's evidence. He also cited the case of **Magambo J. Masato and Others vs Ester Amos Bulaya** and 3 Others, Civil Appeal No. 199 of 2016 and the case of **Antony M. Masanga vs Penina and Others**, Civil Appeal No. 118 of 2014 to support his contention.

The respondent opposed the argument that the improvements made to the land in dispute by the appellant were to be considered by citing a maxim '*quicquid plantatur solo solo cedit*' to mean that whatever is affixed to the land in dispute belongs to the respondent being the owner of the land.

It is his further argument that the appellant occupied the land in dispute without any formal mode of disposition as he did not prove how the land was transferred to him. He added that, the appellant was supposed to prove how he came into ownership of the land in dispute rather than basing on the contention that he had stayed therein for more than twenty-three (23) years. He cited the case of **Abdul Karim Haji vs Raymond Nchimbi Alois and Others**, Civil Appeal No. 99 of 2004 that he who alleges is the one responsible to prove his allegation.

On the claim that there was no documentary proof of allocation produced by him, the respondent argued that his ownership was corroborated by his evidence adduced during trial. The respondent having replied as such, he prayed the Court to dismiss the appeal with costs and uphold the decision of the Kondoa DLHT.

In his rejoinder, the appellant maintained his submission in chief and argued that the respondent had not replied on the contradictions and the

contention on the size of the land which means that he admits such contentions. He also rejoined that the respondent on his reply had admitted the fact that the appellant had occupied the land in dispute for about twenty-three (23) years without disturbance. Therefore, his ownership is not contested.

On the issue of documentary proof of ownership, the appellant insisted that there must be a documentary proof to prove the ownership of the land in dispute by the respondent. The appellant therefore maintained his prayer that this court should find that the appeal has merit and allow the same with costs.

The issue for determination by this court is whether the appeal has merit by considering the records of appeal together with the submissions made by both parties.

It is trite law that he who alleges has a burden of proof in terms of Section 110 of the Evidence Act, [CAP. 6 R.E 2022] as submitted by both parties. The standard of proof in this matter should be on balance of probabilities subject to the provision of Section 3(2)(b) of the Evidence Act, [CAP. 6 R.E 2022].

'(2) A fact is said to be proved when-

(b) in civil matters, including matrimonial causes and matters, its existence is established by ***a preponderance of probability'.***

See also the case of **Jasson Samson Rweikiza V. Novatus Rwechungura Nkwama,** Civil Appeal No. 305 Of 2020, the Court of Appeal of Tanzania at Bukoba clearly narrated this principle by stating:

'It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour...It is also common knowledge that in civil proceedings, including matrimonial causes and matters, ***the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities****.'*

Basing on the above stated position of the law, both the trial tribunal and the Kondoa DLHT were supposed to examine the credibility of evidence adduced by both parties. In the case of **Agatha Mshote vs Edson Emmanuel and Others**, Civil Appeal No. 121 of 2019, CAT, Dar es Salaam, the Court of Appeal stated:

'Thus, in civil cases, the standard of proof is on balance of probabilities which is to the effect that the ***Court will sustain***

such evidence which is more credible than the other on a particular fact to be proved. *' (Emphasis supplied)*

Weighing the evidence briefed above in line with what transpired in the Kondoa DLHT and before this court, I am inclined to find that the evidence of the respondent is more credible compared to the appellant.

This is because, the evidence adduced by the respondent to prove that the land in dispute was allocated to him by the village authority during operation vijiji has been substantiated by the testimony of Selemani Iddi Sadi who was involved in the allocation as a village secretary (*katibu wa Kijiji*) and no evidence was adduced by the appellant to contradict the assertion that he was a village secretary and participated in the allocation of lands to the villagers during the operation vijiji.

Also, Aziza Nahato Majali while responding to the trial tribunal's questions supported this piece of evidence that the respondent was allocated the land in dispute by the village authority and apart from that, she testified that at the moment when the respondent was leaving the village, he left the land in dispute to her. This means that the land in dispute was not abandoned. Likewise, Tabu Ally, when asked by the trial tribunal how the

respondent obtained the land in dispute said that the same was allocated to him by the village authority.

Turning to the evidence adduced by the appellant and his witnesses, without hesitancy, I find the same to be incredible. This is because, there is contradiction on the evidence adduced by the appellant who claimed ownership of the land in dispute after having inherited the same from his late father, while Iddi Masudi Hela who was his first witness, said that during the operation vijiji, the land in dispute was allocated to one Hamis Majala without telling how the same was transferred to the appellant. Moreover, Jumanne Issa Binde who was the second witness testified that the land in dispute belonged to one mzee Ramadhani Nkwasa and that during the operation vijiji, the same was allocated to the appellant.

With this kind of contradiction, it is my firm opinion that the credibility of the evidence of the appellant and his witnesses regarding the appellant's ownership of the land in dispute is shaken. This is because of the nature of dispute which requires consistent evidence to prove ownership. See the case of **Ombeni Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017, where the Court of Appeal at Dar es Salaam had the following to say:

'The position of law is that for a contradiction or inconsistence or omission in evidence to be considered material, it must not be a minor contradiction, ***the inconsistence must be going to the very substratum of the case for it to be considered a material inconsistence****'*(Emphasis supplied)

The appellant also claimed to be the owner of the land because he had undisturbedly, occupied the land in dispute for a period of twenty-three (23) years and made developments thereupon. I am aware of the principle stated in the case of **Shabani Nasoro** (supra) that the court should be reluctant to disturb persons who have occupied the land and developed it over a long period, which nevertheless in the circumstance of this matter, the same is inapplicable. This is for the reason that the allegation that the appellant had been in the land in dispute for such period of twenty-three (23) years or the alleged improvements, is not substantiated in evidence.

The appellant on the other hand, challenged the respondent's claim for ownership of the land in dispute because there was no any documentary evidence produced to prove the alleged allocation during the operation vijiji. With the guidance of Sections 15 and 16 of the Village Land Act, [CAP. 114 R.E 2019], I find this contention unfounded. This is because the law under the said provisions has validated the grant during the operation vijiji and in

the circumstance; the requirement that the grant must be signified in writing is inapplicable.

On the other hand, the evidence adduced by Selemani Iddi Sadi has revealed that prior to allocation, the land in dispute was owned by the appellant's father but this also remains in the favour of the respondent. This is based on the reason that Sections 15 and 16 of the Village Land Act (supra) extinguished any right or obligations vested to any person prior to the allocation during the operation vijiji.

The appellant also pointed the contradiction appearing on the evidence of the respondent, saying it was not certain as to whom the land was entrusted to after Aziza Nahato Majali. This contention will not detain me for the reason that it is evident in the records that there is a contradiction as to who exactly was using the land after it was left by the respondent to Aziza Nahato Majali. However, with the guidance of the case of **Ombeni Kimaro** (supra), this kind of contradiction is not material as it does not go to the root of the dispute. More so, the evidence of Aziza Nahato Majali becomes more reliable to clear the controversy because she is the one who was in first place entrusted with the land in dispute by the respondent. This

also goes to the variation on the type of improvement on that land in dispute because such facts do not help to determine the owner of the land in dispute.

Moreover, the appellant has countered the size of the land basing on the visit conducted by the trial tribunal to the *locus in quo* and the evidence adduced by the respondent and his witnesses. Having discounted the appellant's claim of ownership of the land in dispute, it is my considered view that the evidence of the respondent and his second witness, Selemani Iddi Sadi that the size of the land in dispute is one (1) acre sized, is reliable and consistent.

With regard to the observation made by the trial tribunal on the size of the land in dispute after having visited the *locus in quo*, it is the finding of this court that it is more than opinion. It should be noted that to *visit locus in quo* is not mandatory but instead it is conducted in exceptional circumstances where the evidence adduced is not sufficient to dispose of the matter. See the case of **Dar es Salaam Water and Sewerage Authority vs Didas Kameka and Others**, Civil Appeal No. 233 of 2019 where it was

or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial.'

This also goes to the matter at hand where the visit to the *locus in quo* was conducted by the trial tribunal without ascertaining which kind of fact they wanted to verify, hence, the size of the land in dispute stated by it cannot detain this court except the available evidence. As such, the Kondoa DLHT rightly held the size of the land in dispute to be one (1) acre as reasoned above.

For that reason, it is my humble opinion that the Kondoa DLHT being the first appellate court, properly re-evaluated the evidence adduced by parties during trial before the tribunal and was right to give weight to the respondent's evidence.

Conclusively, this court finds that the appeal has no merit and is consequently dismissed. The judgment and decree of the District Land and Housing Tribunal for Kondoa at Kondoa is hereby upheld. Each party shall bear his own costs.

Dated at **Dodoma** this 27th day of June, 2023.

F. R. KHALFAN

JUDGE