IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 09 OF 2023

(Originated from the District Land and Housing Tribunal for Rukwa at Sumbawanga

in Land Application No. 64 of 2020)

EVOD MALIKAWA.....APPELLANT

VERSUS

PETER KALANGULA.....RESPONDENT

JUDGMENT

13th December 2023 & 20th March, 2024

MRISHA, J.

Following the decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga (the trial tribunal) in Land Application No. 09 of 2023, the appellant **Evod Malikawa**, approached the court armed with a memorandum of appeal which is predicated into six (6) grounds of grievance namely:

1. That, the learned Chairperson of the trial tribunal erred in law and fact by failing completely to evaluate the evidence of the appellant which was watertight and corroborative which if properly

evaluated would have caused the trial tribunal to come up with a different decision.

2. That, the evidence of the respondent was very weak compared to the strong evidence of the appellant which was strong yet it was ignored.
3. That, the learned trial chairperson of the trial tribunal did not consider that the respondent did not call any witness to corroborate his evidence.
4. That, the learned trial chairperson erred in law by not considering the issue of long cultivation of the disputed land by the appellant.
5. That, the learned trial chairperson erred in law by not considering that the said plot was inherited by the appellant from his late father.
6. That, the appellant was not fully treated as according to the principles of natural justice.

It is the appellant's prayer that should the above grounds of appeal be considered and found to be with merits, then the court be pleased to grant the following orders in his favour: -

i. That, the appeal be allowed.

ii. That the proceedings and judgment of the trial tribunal be nullified.

iii. That costs to follow the event.

The appeal was heard by way of oral submissions by the appellant and the respondent namely **Peter Kalangula** both of whom appeared in person, but not legally represented. In his submission in chief, the appellant adopted his grounds of appeal as contained in his memorandum of appeal in order to form part of his submission in chief and prayed that his appeal be allowed with costs and the court be pleased to nullify both the judgment and proceedings of the trial tribunal.

On the adversary side, the respondent submitted that his reply to the appellant's memorandum of appeal which he also adopted, is self-explanatory. Hence, he urged the court to dismiss the appeal with costs and uphold the decision of the trial tribunal. Upon completion of the submission by the respondent, the appellant informed the court that he had nothing to rejoin and that marked the end of oral submissions by both parties.

Having gone through the above rival submissions in light with the grounds of appeal raised by the appellant, the typed records as well as

the impugned judgment of the trial tribunal, I am of the view that the only issue for determination by the court is whether the present appeal has merit.

As indicated hereinabove, there are six grounds of appeal which need to be considered by the court as it deals with the appellant's appeal. However, looking on the first and second grounds of appeal, it appears that they all deal with issues of evidence. Hence, I shall deal with them all together.

It is the appellant's complaint that the trial tribunal did not evaluate completely his evidence which according to him, was very strong compared to the one adduced by his counterpart to the extent that had the learned trial chairperson properly evaluated and considered the same, she would have come to a different decision.

Admittedly, it is a trite law that it is the duty of the trial court to evaluate evidence of each witness and make findings on the issues; See **Stanslaus Rugaba Kasusura and Another vs Phares Kabuye** [1982] TLR 338. However, it should be borne in mind that there are situations where the appellate court may be prompted to exercise its powers in order to reevaluate the evidence adduced before the lower

court where it appears that the trial court omitted to play the above role which was described in **Stanlaus Rugaba Kasusura**'s case (supra).

That can be done by abiding to the long-established principle that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact, as it was stated in the case of **Deemay Daati & 2 Others vs The Republic**, Criminal Appeal No. 80 of 1994 (CAT at Arusha, unreported).

However, that principle is only to be applied by the appellate court with caution. This was emphasized in the case of **Peters v. Sunday Post Ltd.** (1958) E.A. 424, whereby the Court of Appeal for East Africa set out the principles in which an appellate court can act in appreciating and evaluating the evidence: it was held intel alia that:

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution* ***if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or***

***has plainly gone wrong**, the appellate court will not hesitate so to decide".* [Emphasis supplied].

On my part, while being guided by the above principles, I revisited the evidence of the appellant who testified before the trial tribunal as SM1 together with the evidence of one Fidel Joseph Zumba, the appellant's only witness who testified thereat as SM2, and observed that such evidence does not bear out the appellant on his complaint that his evidence despite being stronger than that of the respondent, was ignored by the trial tribunal.

I say so because it appears plainly on those records that the evidence adduced by the appellant in regards to the disputed land which is located at Movu in Malagano Village in Sumbawanga District within Rukwa Region, is contradictory to the extent that one fails to appreciate his claim that the disputed land really belongs to him, not the respondent.

The contradiction is that at paragraph 6 of his application, the appellant averred clearly that the disputed land belongs to him because he purchased it from one Mandamo, but during hearing, he told the trial tribunal that it was his late father one Mathias Malikawa who purchased

the disputed land from one Mandamo and that he inherited the same after demise of his late father.

If the above is not enough, I have also noticed that whereas the appellant in his testimony claimed that the disputed land was purchased from one Mandona by his late father whom he mentioned as Mathias Malikawa, his witness who is SM2, testified that the disputed land was purchased by one Casiano Malikawa which again makes a contradiction on the part of the appellant's evidence.

Having noted such discrepancies on the evidence adduced by the appellant, the honourable learned chairperson did not bother to waste much of her time in resolving the land dispute between the appellant and the respondent.

This is shown at page 5 to 6 of her judgment where she properly evaluated the evidence adduced by both parties before her and found that the appellant failed to discharge his duty of proving his claim of the disputed land on the balance of probabilities, as required of him under section 110 (1) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act) due to his failure to stand by his pleadings as opposed to the respondent whose evidence appears to be clear and watertight as far as his ownership of the disputed land is concerned.

On my side, I do not see any reason to fault the findings of the trial learned chairperson as far as the land dispute between the appellant and the respondent is concerned. I hasten to say so because as rightly observed by the learned trial chairperson, it is apparent that the appellant failed to convince the trial tribunal that the disputed land belongs to him.

Had it been true that the said land belongs to him, the appellant could not fail to adduce evidence which supports his pleadings. The principle of law that parties are bound by their own pleadings which I also find to apply in this appeal, was restated in the case of **Maria Amandus Kavishe vs Norah Waziri Mzeru** (Administratix of the Estate of the late SILVANUS MZERU) & **Another**, Civil Appeal No. 365 of 2019 (CAT at Dar es Salaam, unreported) where it was stated that:

> *"...parties are bound by their own pleadings and they cannot be allowed to raise a different matter without amendments being properly made. That,* ***no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded****." [Emphasis supplied]*

Back home, in his pleadings which he filed with the trial tribunal, the appellant (applicant) averred that he is the lawful owner of the disputed

land and described the mode of its acquisition. This can be seen at paragraph 6 of the appellant (applicant's) pleading where he averred that:

> *"That the applicant is the lawful owner of the disputed land. The respondent has trespassed the same. The applicant did buy the said land from one Mandona & the same came into his possession until when the respondent invaded."*

A careful close look on the above excerpt entails that the appellant pleaded that he is the lawful owner of the disputed land because he purchased it from on Mandona. If that was the case, then one would have expected him to lead evidence proving exactly what was pleaded by him in his pleading and not otherwise.

However, the records of the trial tribunal tell the opposite. This is because in his testimony, the appellant (applicant) told the trial tribunal that the disputed land used to be his late father's property, but he inherited it after his late father's passing. Worse still, the records are silent whether the appellant (applicant) amended his pleading in order to show that he inherited the disputed land from his late father.

In the circumstances, it is my settled view that the principle that parties are bound by their own pleadings, as it has just been restated above,

applies against the appellant (applicant) for he has failed to go side by side with what the law requires him to do.

Again, since what the appellant (applicant) appears to have pleaded at paragraph 6 of his pleadings touch the issue of ownership of the disputed land, then equally, it is as good as saying that by his failure to lead evidence to prove what he has pleaded in his pleading, it means that he failed to discharge his legal duty of proving his claim against the respondent on the balance of probabilities which is provided under section 110 (1)(2) of the Evidence Act.

Also, in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported), the Court of Appeal had the following to say: -

> *"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue* ***and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...****Until such burden is discharged the other party is not required to be called upon to prove his case****. [Emphasis supplied]*

In the case at hand, since it was the appellant (applicant) who pleaded in his pleading to be the lawful owner of the disputed land, it was incumbent upon him to produce strong evidence to prove on the balance of probabilities that the disputed land actually belongs to him and not his counterpart.

In my view, the respondent could have been required to prove his case upon the former discharging his legal duty first. Since, the appellant failed to prove his claim, as it was rightly found by the learned trial tribunal's chairperson, the appellant's case could hardly be decided in his favour.

Besides, it is a trite law that the court itself is as bound by the pleadings of the parties as they are themselves; See **Maria Amandus Kavishe vs Norah Waziri Mzeru** (supra). In her judgment, the honourable learned trial chairperson found that the appellant (applicant's) claims over the disputed land were not true for his failure to lead evidence which prove what he had pleaded in his application. That indicates that the trial tribunal also complied with the above principle which require courts to be bound by the parties' pleadings. Hence, I find that the findings made by the honourable learned chairperson in that regard, were correct.

On the complaint that the trial tribunal failed completely to evaluate the appellant's evidence, I think that complaint cannot delay me much because right from page 5 to 6 of her judgment, the honourable learned chairperson evaluated not only the appellant's, but also the evidence adduced by the respondent.

What she did was to deal with the issue of appellant's failure to lead evidence which supports or proves his pleading regarding ownership of the disputed land. I have noticed that in evaluating the evidence of the appellant along with that of his sole witness, the learned trial chairperson observed that the evidence adduced by the appellant in relation to his claim over the ownership of the disputed land varies to his averment in his pleading which offends the principle of law that parties are bound by their own pleading, as it was also emphasized in the case of **Astepro Investiment Co. Ltd vs Jovin** Investment, Civil Appeal No. 8 of 2015 (unreported).

Also, at page 6 of the typed judgment of the trial tribunal, it is shown that the honourable learned chairperson also noted another discrepancy in the evidence of the appellant (applicant) and the one adduce by his witness who testified that the disputed land was purchased by one Casiano Malikawa while the appellant (applicant) claimed that the

disputed land was purchased by his late father one Mathias Malikawa which variation, according to the honourable learned chairperson, makes the testimonies of those two witnesses incredible.

It is also revealed at page 6 of the typed trial tribunal's judgment that the honourable learned trial tribunal evaluated the evidence of the respondent and found that the same shows that the respondent has been in long occupation of the said land after the demise of his late father whom it is evidenced that he had purchased it in 1953.

Thus, based on the principle that the duty of proving a civil claim never shifts to the other party unless the one who is duty bound to prove it on the balance of probabilities has discharged his, I am of the view that the respondent ought not to be called upon to prove his case for it is obvious that the appellant (applicant) failed to discharge his legal duty on the required standard, as rightly found by the honourable learned trial chairperson. Thus, in the totality of what I have endeavoured to deliberate above in the course of dealing with the first and second grounds of appeal, I am settled that those two grounds are without merits and are bound to be dismissed on their entirety, as I hereby do.

Having concluded on the above grounds, my remaining task is to deal with the remaining grounds of appeal. Through his third ground of

appeal, the appellant has faulted the honourable chairperson of the trial tribunal for her omission to consider that the respondent did not call any witness to corroborate his evidence.

In my view, this ground is without merit because the fact that the respondent did not summon other witnesses to prove his case could have hold water if the appellant (applicant) had managed to discharge his legal duty of proving his claims against the respondent which, as indicated above, he hadn't. Also, even if there was any need of calling witnesses, the respondent could be the one to choose whether or not to call any witness on his side in order to dispute the appellant's claim.

This is because under the law, no particular number of witnesses is required in order to prove a particular fact, as it is provided under section 143 of the Evidence Act which declares that:

"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

In the fourth ground, the appellant has complained that the honourable chairperson did not consider the issue of cultivation for long time. If I have understood him properly, it is his complaint that despite his long occupation of the disputed land, the learned trial chairperson did not

consider that he deserved to be declared as the lawful owner of the disputed land, not the adverse party.

Of course, land can be owned through various ways one of them being by long occupation of land. However, it is not every long occupation of land entitles a person to own land. The law is very clear that there must be long and undisturbed use of land for at least not less than twelve years; See **Ligobert Vakolavene vs Josephine Kashe**, Misc. Land Case Appeal No. 20 of 2018, unreported).

In the present case, the records of the trial tribunal do not show if the appellant expressly told the trial tribunal how long he occupied the disputed land and whether during such occupation, if there was, he was not interrupted by any person who also claims to have interest in that piece of land. In the circumstance, it cannot be said that the appellant acquired the suit land by adverse possession as he has attempted to convince the court. Hence, due to the foregoing reasons, I find that the fourth ground of appeal has no merit; hence, it crumbles.

That apart, the appellant through the fifth ground of appeal has complained that the learned trial chairperson erred in law by not considering that the disputed land was inherited by him from his late father. In his reply to such complaint, the respondent contended that

the issue of inheritance was not raised by the appellant, rather it was himself who raised it and the learned chairperson resolved it in his favour while composing her judgment.

I have gone through both records of the trial tribunal as well as the impugned judgment. What I have grasped therein is that despite the fact that at one point the appellant claimed to have inherited the disputed land from his late father, yet his assertion did not convince the honourable trial tribunal because what he testified before the trial tribunal was different from his averment in his own pleading which shows at paragraph 6 that he claimed to have owned the disputed land from one Mandone through purchasing. That is where the appellant found himself being caught by the principle relating to pleadings which I need not restate at this point.

In the circumstances, it is my considered opinion that the fifth ground of appeal lacks merit because the issue of inheritance could not be expected to be raised by the appellant at any stage since what he pleaded before shows that the disputed land belongs to him after he had purchased it from one Mandona, but that was not backed by his evidence during trial.

Finally, in the sixth ground of appeal, the appellant has complained that he was fully treated according to the principles of natural justice. From what I know the principles of natural justice, as enshrined under Article 12 (6)(a) of the Constitution of the United Republic of Tanzania, 1977 are all about the right to be heard, the reasons for the decision and the rule against bias.

Going by the records of the trial tribunal, it appears plainly that both parties were afforded the right to be heard including to call their respective witnesses. Also, the impugned typed judgment of the trial tribunal clearly depicts that the honourable learned chairperson of the trial tribunal assigned the reasons for deciding the land dispute between the appellant and the respondent in favour of the respondent, as it is shown at pages 5 to 7 of the said judgment.

The records of the trial tribunal do not show anywhere if the appellant had raised any concern regarding the impartiality of the honourable learned chairperson or that she had any interest, be it personal or pecuniary with the respondent. Thus, owing to the foregoing reasons, I am unable to find any merit in that complaint by the appellant. Hence, I also find the sixth ground of appeal to be without merit.

In fine, it is my conclusive finding that the present appeal is not meritorious. It is consequently dismissed with costs and the judgment of the trial tribunal is upheld.

It is so ordered.

A.A. MRISHA
JUDGE
20.03.2024

DATED at **SUMBAWANGA** this 20th day of March, 2024.

A.A. MRISHA
JUDGE
20.03.2024