IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 120 OF 2022

(C/F Application No. 23 of 2014 in the District Land and Housing Tribunal for Karatu at Karatu)

SHAMBOTA CHIGANGA.....APPELLANT

VERSUS

GITIYENGA KWEKU.....RESPONDENT

JUDGMENT

03rd May & 16th June 2023

TIGANGA, J

This is the first appeal arising from Application No. 23 of 2014 of the District Land and Housing Tribunal for Karatu, at Karatu (trial Tribunal). Before the trial Tribunal, the respondent filed a suit against the appellant for trespassing on his land measuring 21.159 acres. After a full hearing, the trial Tribunal entered its judgment in favour of the respondent.

Aggrieved by the decision, the appellant preferred the appeal at hand which consists of three grounds namely;

(i) That the tribunal erred in law and fact for failure to properly analyze and evaluate the evidence of parties herein and hence reached a wrong decision about ownership of the suit land.

(ii) That the tribunal erred in law and facts for making the orders of specific and general damages which were not pleaded and proved by the respondent herein.

(iii) That the tribunal erred in law and entertained Application No. 23 of 2014, the subject of this appeal which was filed out of time.

As earlier pointed out, the appeal records are to the effect that, the respondent filed a suit against the appellant for trespassing into his land measuring 21.159 acres. The respondent claimed that in December 2010 the appellant trespassed into his land which he customarily obtained from his family by inheriting it. He further claimed that the invaded land was part of his farm measuring 145.583 acres. He thus sought to be declared the owner of the disputed land while the appellant was to be declared the trespasser. He also asked for the appellant to be ordered to pay the respondent Tshs. 50,000,000/= being the compensation for loss of income for each year from 2010 to the time when the land was restored to him and the payment of Tshs. 50,000,000/= as general damages to be

assessed by the tribunal as well as the costs of the suit which was to be borne by the appellant.

The appellant, on the other hand, through his written statement of defence opposed the application in which he stated that, the disputed land measuring 350 acres situated at Haydesh hamlet in Matala Village belonged to him and that he acquired the same in the year 1997 through the sale from one **Kasubi Makrija.** He proved that sale by a sale agreement executed between the parties to that agreement. He thus prayed for the dismissal of the application.

After considering the evidence from both parties, the trial Tribunal decided in favour of the respondent whereby the suit land was declared to be the property of the respondent thereby declaring the appellant a trespasser to the suit land and further ordered to pay Tshs. 7,000,000/= being compensation for the loss suffered by the respondent for not using his land from when the time the dispute arose. He was also ordered to pay Tshs. 5,000,000/= as general damages for the disturbance caused and to bear the costs of the suit.

When the appeal was scheduled for hearing before me, the appellant was represented by the learned counsel Mr. Stephano James, on the other hand, the respondent enjoyed the legal services from

Qamara A. Peter, Advocate. With the leave of the court, the appeal was disposed of by way of written submissions. Parties filed their respective submissions as ordered.

Arguing in support of his grounds of appeal, Mr. Stephano submitted that, the trial tribunal failed to evaluate the evidence Consequently arrived at a wrong decision over the ownership of the disputed land. Expounding on this ground of appeal, Mr. Stephano challenged exhibit P2 which was refereed in the judgment as evidence proving ownership of the suit land by the respondent. According to him, exhibit P2 was not worth proving ownership of the suit land as the same demonstrates, that the appellant was summoned by the Village Executive Officer (VEO) of Matala Village after being accused of cutting down 80 trees without being permitted by the Village Authority. From that dispute, the VEO found that the appellant had committed the offences he was accused of and thereafter proceeded to pronounce the respondent as the owner of the suit land.

The counsel went further stating that the trial tribunal failed to consider the value of the evidence of DW3 as to why he did not sign exhibit D2 which was the sale agreement, for in his testimony, DW3 stated that he did not sign the agreement because he was just informed about the sale transaction by the ten-sell leader. About the requirement of

village approval as demonstrated in the case of **Methuselah Paul Nyagaswa vs Christopher Mbote Nyirabu** [1985] TLR 111 the counsel argued that the appellant herein fulfilled all the requirements established in that case and the same could be seen in the contract for sale through the seal and signature of the acting VEO (DW5) and (DW3) the ten-sell leader.

While challenging the evidence by the respondent, Moreover, Mr. Stephano submitted that the respondent herein claimed that he inherited the suit land from his father who passed away in 1968 but he did not provide evidence to prove the inheritance he claimed because at the time when his father passed away he was too young.

Concluding, Mr. Stephano was of the view that, the trial tribunal's judgment was based more on the evidence of the appellant who was the respondent before it. According to him, the way the trial tribunal treated his evidence shifted the burden to prove ownership to the appellant instead of the respondent who was the plaintiff.

As to the second ground of appeal, the appellant submitted the order requiring the appellant to pay Tshs. 7,000,000/= and Tshs. 5,000,000/= is unjustifiable for the same was neither pleaded in the respondent's application nor they were proved by evidence.

As to the third ground of appeal, the counsel submitted that the suit was filed out of time as the appellant herein started to occupy the suit land in the year 1997 when he purchased the same but the application was filed in the year 2014 which is beyond 12 years which is a time limit for recovery of land as per Item 22 to the 1st schedule of the Law of Limitation Act. [Cap 89 R.E 2019]. He prayed for the appeal to be allowed based on the aforesaid arguments.

Opposing the appeal, the respondent counsel submitted as follows; on the first ground of appeal, he was of the view that the exhibit challenged by the appellant was properly considered by the trial tribunal as the said exhibit proved the admission of the appellant to invade the suit land and destruct the trees in there. The counsel went further to state that, the trial tribunal considered the evidence of every witness including DW3 whom the appellant claims his evidence was not considered. He also insisted that the appellant did not follow procedures in the sale of the suit land as there is no approval from the village council. It was therefore his proposition that the trial tribunal properly evaluated the evidence by the parties.

On the second ground of appeal, the respondent submitted that the reliefs granted were pleaded and proved. To illustrate that point, the

respondent stated that, in the application on page 4 among the reliefs claimed in item 7 Roman (e) & (f) the respondent pleaded for specific damages for the loss of each year to the tune of Tshs. 50,000,000/= but was awarded 7,000,000/= and for general damages occasioned due to, he pleaded 50,000,000/= but was awarded 5,000,000/=. As to whether the same was proved the respondent counsel argued that, on page 2 of the judgment it is shown that the appellant through exhibit P2 admitted to having caused the damages, and the same is also found on pages 19 and 20 of the proceedings. He thus maintained that both the specific and general damages were pleaded and proved.

As to the third ground of appeal, the respondent was of the view that the application was filed in time on the reason that in the application the respondent alleged that, the appellant invaded the disputed land on December 2010, therefore is the year when time started to run and since this application was filed on 2014, then the same was filed within time. According to him the issue of time limitation was raised before the trial tribunal as a preliminary objection on point of law, but the same was withdrawn at the early stage, therefore the appellant cannot raise it at this stage. In conclusion, the respondent's counsel maintained that based on his argument against the appeal, it should be concluded that, the

appeal at hand is devoid of merit. In his short rejoinder, the appellant's counsel reiterated what he stated in his submission in chief.

Having gone through the court's records and the rival submissions by the parties, the issue for determination is whether the appeal before this court is meritorious. It should be noted that this being the 1st appellate court, it is enjoined to consider and re-evaluate the entire evidence of the trial tribunal subjecting it to critical scrutiny and if warranted, arrive at its own conclusions of fact. (See **D. R. PANDYA v R** [1957] EA 336 and **IDDI SHABAN @ AMASI vs. R,** Criminal Appeal No. 2006 (unreported).

In considering this appeal, I will start with the first ground of appeal where the appellant raises a complaint faulting the evaluation of evidence by the trial tribunal allegedly leading to a wrong conclusion.

According to the proceedings of the trial tribunal, the respondent, herein who was the applicant before the trial alleged that he inherited the suit land from his late father who died in 1968, and in supporting his contention he summoned one witness Gang'ai Gilabayi who only testified to know the respondent, and that he acquired the suit land from his late father. The appellant on the other hand testified to have obtained the suit land through a sale agreement between himself and one Kasubi Makrija who is now deceased. Further to that, the appellant supported his

assertion with a sale agreement which was tendered and admitted in court as exhibit D1. The appellant summoned five more witnesses including DW2 who testified to have witnessed the appellant executing the sale agreement with the said Kasubi. According to him, the appellant obtained the land measuring 350 acres through exchange with 13 cows. On cross-examination, he stated that at the time of witnessing the sale he was the hamlet leader. This piece of evidence was supported by that of DW3, DW4, and DW5 who was the acting VEO at the time when the appellant was purchasing the land in dispute and he testified to have witnessed the parties executing the sale agreement by exchanging the land with 13 cows.

I wish to state at this juncture that it should be noted that it has been the position of the law that he who alleges has the burden to prove that certain facts exist. The above position, has been well articulated in the case of **Abdul Karim Haji vs Raymond Nchimbi Alois and Another,** Civil Appeal No. 99 of 2014 (unreported), in which we held that:

> *"....It is an elementary principle that he who alleges is responsible for proving his allegation."*

Moreover, the standard of proof in civil cases is on the balance of probabilities whereby the court will always sustain such evidence which is

more heavier and credible than the other on a particular fact to be proved. Considering the evidence of the parties before the trial tribunal in respect of the respondent's claim, it is the court question whether the respondent proved his case on the balance of probabilities.

In the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 propounded the principle that the person whose evidence is heavier than that of the other must win.

It is thus apparent on the record of the proceedings of the trial tribunal that, the appellant and his witness only testified to the effect that he obtained the suit land from his late father but there was no other witness from the family to substantiate the fact that the respondent inherited the land from his father. Much as he claimed that he obtained the land customarily, it is the view of this court that, there must be some family members who are aware of the transaction. Inheritance is an acquisition of property rooted in a probate process. Its validity must as a matter of law be proved by evidence involving the whole process of probate and administration of the estate of the deceased. In this case, the respondent did not tell the trial tribunal the probate case numbers, who was the administrator, and how the suit land was passed to him.

I have revisited the judgment and it is my view that the success of the respondent's case relied on the weak evidence of the appellant herein. I am saying so because reading from the judgment, the Hon. Chairman invested his finding on the credibility of the evidence produced by the appellant together with the sale agreement that was tendered to support his case, and even the finding based on the weakness of the appellant's defence evidence.

Bearing the principle enunciated in section 110 of the Evidence Act [Cap R.E 2019] that he who alleges must prove, I am of the firm view that, the trial tribunal unjustifiably shifted the burden of proof from the plaintiff to the defendant and reached its finding based on the evidence of the appellant rather than the strength of the evidence of the respondent who had the burden to prove that the land in dispute belonged to him. My view is fortified by the decision of the Court of Appeal of Tanzania in the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) where it was held as follows;

> *"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."

The above position was extracted from Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar**, **S.C. Sarkar**, and **P. C. Sarkar** published by **Lexis Nexis** and the following was stated;

"., the burden of proving a fact rests 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 an 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. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden, Until he arrives at such a conclusion, he cannot proceed based on the weakness of the other party....." (At page 1896)

In line with the above position of the law, it is my firm view that since the burden of proof was on the respondent rather than the appellant, unless and until the former had discharged his burden, the credibility of the evidence of the appellant was irrelevant. This being the case and having scrutinized the evidence as above, it is the firm view of this court that the respondent's evidence fell short of weight in proving

him to be the owner of the suit land, the exhibits to which he relied did not sufficiently prove that he owns the said land through inheritance as he pleaded.

Therefore, much as the weakness of the appellant's case could not salvage the predicament of the unproven case of the respondent, the appellant cannot be condemned as a trespasser since the respondent failed to discharge the onus of proving that the suit land was his as required by section 110 of the Evidence Act and the authority in the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (supra). That said, the 1st ground of appeal succeeds. Having scrutinized the evidence adduced at the trial tribunal and as it has been observed that the respondent did not prove to be the lawful owner of the disputed land, therefore, the appeal is found to be with merit and this court does not see the reason to venture into the rest of the grounds of appeal. All said and done, the appeal is hereby allowed costs of this appeal and that of the trial tribunal to be borne by the respondent.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 16th day of June 2023

J. C. TIGANGA
JUDGE