IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 79 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 216 of 2019)

BERDON TEWELA.....APPELLANT

VERSUS

TABU ROBERT.....1ST RESPONDENT

GROLIA KIMARIO.....2ND RESPONDENT

AYOUB MABULA.....3RD RESPONDENT

JUDGEMENT

Date of Last Order: 10.08.2022
Date of Judgment: 06.09.2022

Ebrahim, J.

The appellant was the applicant in the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT) in Application No. 216 of 2019. He instituted a suit against Tabu Robert, Grolia Kimario and Ayoub Mabula (the 1st, 2nd and 3rd respondent respectively) claiming that the 1st respondent has invaded his land, **Farm No. 21 with Title No. 3731 - DLR situated at Uyole area within the City of Mbeya.** He also claimed that the 1st Respondent unlawfully apportioned that land and two potions thereof were sold to the 2nd and 3rd respondents.

The record shows that the 1st respondent filed her written statement of defence where she denied substance of the claim and put the appellant to strict proof whereas the 2nd and 3rd respondent did not file any.

At the hearing of the case in the DLHT all respondents did not enter appearance though duly served. The case thus proceeded *ex-parte*. The content of the appellant's claim and evidence adduced thereat were to the effect that the appellant's father, the late Yesaya Tewela Mwambungu (the deceased) had a large farm which he owned under right of occupancy with Title No. 3728- DLR. The deceased decided to apportion the said farm into seven (7) shares to his children and those farms were numbered. Among the children were the appellant and one Robert Tewela (the appellant's brother and the husband to the 1st respondent) who were bequeathed with farm No. 21 and 24 respectively.

The evidence further stated that the appellant had sold a portion of his farm (farm No. 21) and remained with a part of it. More to that, in 2016 the 1st respondent without the consent of the appellant sold the remained part to the 2nd and 3rd respondents. The appellant tendered a

Certificate of Occupancy of the deceased's farm and a survey map indicating all apportioned farms including farm No. 21.

It is also indicated in the proceedings that when the DLHT asked questions to the appellant for clarification, he said that he sold many plots measuring 24 x 24 paces from his farm No. 21 to about 10 persons. That he remained with a plot measuring 50 x 24 paces which is the disputed land and subject of the instant appeal.

The appellant also called one witness who testified that in 2009, he bought a piece of land from the appellant and he has a title in respect of the respective piece of land.

On that thread of evidence, the DLHT found that though the case was prosecuted *ex-parte,* the appellant failed to prove his case. The case was therefore dismissed. Basically, the reasons given by the trial Chairman is that the appellant did not prove how the same farm was sold to other persons and at the same time the respondents invaded it. Another reason was that the appellant did not show if he made sub-division of the same farm after being surveyed and given farm numbers. He was thus, of the view that the appellant sold the whole farm 21 and did not remain with any portion to be invaded by the respondents.

Dissatisfied, the appellant appealed to this court raising three grounds of appeal as follows:

1. The trial tribunal erred in law when delivered its judgment without considering the evidence adduced by the appellant hence reached into wrong and biased judgment.
2. That the trial tribunal erred in law and in fact when determined the matter without considering that the respondents have ignored the notice to appear for defence.
3. That the trial tribunal erred in law and facts when it failed to analyze and evaluate the evidence tendered by the appellant.

When the appeal was called for hearing, the appellant appeared in person without legal representation. Whereas, like at the DLHT, the respondents did not enter appearance. The matter was thus heard *ex-parte* by way of written submissions.

Submitting in support of the appeal though in a language a bit difficult to comprehend, basically the theme of the appellant's case is that since the respondents defaulted to appear to defend their case; trial Tribunal was supposed to pass its judgment in his favour. The appellant also said that since the application disclosed the cause of action alongside his testimony and that one of his witnesses testified under

oath, the DLHT did not properly evaluate the evidence and pass the decree in his favour. He thus, implored this court to turn the decision of the DLHT and declare him a lawful owner of the suit land.

Having considered the grounds of appeal, the appellant's submissions, the record and the law, the issue for consideration is whether the appeal is meritorious.

The appellant's grounds of appeal are interrelated as he basically complains about the failure by the DLHT to analyze and evaluate evidence adduced. Therefore, this court being the first appellate court is duty bound to re-appraise the evidence on record and draw its own inference and findings of facts.

In the first place, it should be understood that though the appellant prosecuted the case *exparte*, he still had a duty to prove each fact of the pleaded claim. This is in accordance with **Regulation 11(1) (c) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002,** GN. No. 174 of 2002 and **Order VIII Rule 14(1) of the Civil Procedure Code**, Cap. 33 R.E. 2019.

In the course of re-appraising the evidence adduced by the appellant, I will be guided by a trite and elementary principle of law that *he who alleges has a burden of proof* as per **section 110 of the**

Evidence Act, Cap. 6 R.E. 2022. It is equally elementary that in civil case like the instant one, the standard of proof is on the balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. Again, I will be under the guidance of the observation underscored by the Court of Appeal of Tanzania in the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported), in which the Court quoted with approval comments from Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar**, **S.C. Sarkar** and **P. C. Sarkar**, published by Lexis Nexis as below:

> "***...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 ancient rule founded on consideration o f good sense and should not be departed from without strong reason.... Until such burden discharged the other party is not required to be called 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 on the basis of weakness of the other party....***"

In the circumstance therefore, the appellant was supposed to prove at the particular time his ownership of farm No. 21. Actually, the

1st respondent in her written statement of defence said that the same, i.e., farm No. 21 was initially bequeathed to the appellant by the deceased.

Nevertheless, the appellant was supposed to prove that the 1st respondent invaded the suit land, apportioned and sold two plots to the 2nd and 3rd respondents. In my scrutiny of the appellant's evidence on record, in proving the invasion of the suit land by the 1st respondent, the short evidence at page 15 of the typed proceedings is to the effect that; the appellant's father had a large farm. He (appellant's father) caused it to be surveyed into seven farms which he allocated to each child. Farm no. 21 was allocated to the appellant. He (appellant) sold a small piece of it and remained with part of it. Now his sister-in-law (Tabu Robert) and his child Dule have sold the said farm No. 21.

The appellant called one witness whose evidence is at page 20 of the typed proceedings. In essence the appellant's witness said he bought the plot from the appellant.

At any means, as to that piece of evidence, this court cannot confidently hold that the appellant proved his claim that the respondents invaded his land. Neither the appellant nor his witness tried to give a clear account on how the 1st respondent trespassed to the suit land

(farm No. 21) and sold it to the 2nd and 3rd respondents. The appellant was recorded by the trial Tribunal saying that he sold some plots in the same farm to about 10 persons. However, he did not firstly establish the measurements of farm No.21. He also did not establish how many portions/plots were in that very farm after apportionment.

That being the case, as the per the above quoted commentary by the scholar M.C. Sarkar, (supra) that; ***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;*** like a trial Tribunal I find no evidence to prove the appellant's claims.

In the circumstances, I join hands with the findings of the DLHT and find that the appellant did not adduce evidence to establish his case. As a result, I hereby dismiss the appeal. For the respondents did not enter appearance, I give not order as to costs.

Ordered accordingly.

R.A. Ebrahim
JUDGE

Mbeya
06.09.2022

Date: 09.09.2022.

Coram: Hon. A.P. Scout, Ag-DR.

Appellant: Present.

Respondent: Absent.

B/C: Patrick Nundwe.

Court: Judgement is delivered in the presence of the appellant with the absent of the respondents and Court Clerk in Chamber Court on 09/09/2022.

A.P. Scout

Ag-Deputy Registrar

09.09.2022