IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 78 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Case No. 174 of 2019)

Kawawa Mjengwa Shantiwa ..... **APPELLANT**
(Administrator of the Estates of the Late Mjengwa Helasita Shantiwa)

VERSUS

JIMSON MWANAMBIGA..... **RESPONDENT**

JUDGEMENT

Date of last Order: 28.04.2022

Date of Judgment: 10.06.2022

Ebrahim, J.

The herein appellant, Kawawa Mjengwa Shantiwa standing in his capacity as an administrator of the estates of the Late Mjengwa Shantiwa filed an instant appeal challenging the decision of the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT) made in Land Case No. 174 of 2019 dated 16th September, 2021.

Brief facts of the case as gathered from the record are that: the appellant claimed at the District Land and Housing Tribunal for Mbeya at Mbeya that his late father one Mjengwa Helasifa Shantiwa had been owning a disputed land, 4 acres since 1969 together with his wife, the late Nagerita Mpigo. The late Mjengwa passed on in 1998 leaving behind his wife who passed on in 2010. The children were left behind cultivating and residing in the disputed land. It was in the same year, i.e., 2010 when the respondent started living in the disputed land and denied to give vacant possession to the appellant claiming that the land belongs to his late grandfather. Hence, the land case which is the subject of the instant appeal.

Responding to the application, in his written statement of defence, save for the contents pertaining to the address, location, pecuniary jurisdiction of the subject matter and the initial proceedings that were instituted before, the respondent denied each and every allegation and put the appellant to strict proof thereof.

Having heard the evidence from both sides, the trial Tribunal decided in favour of the respondent. Being discontented, the appellant filed the instant appeal with a total of 3 grounds of appeal. In essence he complained that the trial Tribunal did not properly evaluate and

considere his evidence and relied on the inconsistent and contradictory evidence of the respondent's witnesses.

In this appeal, both parties appeared in person, unrepresented. The appeal was heard by way of written submissions.

The appellant arguments are mainly that the Respondent failed to prove that he was given the suit land by the late Mjengwa Helasita Shantiwa by way of a gift as there was no gift deed that was tendered contrary to the requirement of the provisions of **section 110(2) of the Evidence Act, Cap 6 RE 2019** which requires a person to prove an existence of a fact that he claims. He claimed therefore that the respondent obtained the disputed land fraudulently and he was only allowed to use it temporarily. He contended further that the trial Tribunal merely relied on the empty words of SU1 whilst he did not discharge his legal burden of proof as required under **section 112 of the Evidence Act, Cap 6 RE 2019.**

The appellant also talked about the principles pertaining to the disposition of land in terms of **section 2 of the Land Act, CAP 113 RE 2019** and referred to the case of **Alice Paul Riwa Balongo Vs Gaston Ngao**, Land Appeal No. 72 of 2017(unreported) in showing that there was no written document like deed of gift to confirm that the

deceased donated the land to the respondent. He prayed for the appeal to be allowed with costs.

In his response, the respondent firstly pointed out to the legal issue that the appellant had no locus to sue as he testified in the trial Tribunal that the land belonged to his mother, the late Nagerita Namposo.

He stated further that, he brought the witnesses to prove that the respondent was gifted the suit land way back in 1985 and has been using the same until 2018 when the appellant invaded it. He referred to page 9 to 12 of the typed proceedings in showing that the appellant and his witnesses admitted that the respondent was gifted the suit land by the late Mjengwa Helasita Shantiwa. He contended further that the respondent did not depend on the deed of gift or documentary evidence to prove his ownership as he has been using the disputed land for more than 30 years without disturbance. Also that the testimony of the respondent was supported by DW2 and DW3. Citing the case of **Hemed Said Vs Mohamed Mbilu (1984) TLR 113** reading together with the provisions of **sections 111 and 112 of Cap 6**, the respondent argued that his evidence was heavier than that of the appellant. Concluding on insisting that the onus of proof was on the appellant, the respondent cited the case of **Jasson Samson Rweikiza Vs Novatus**

Rwechungura Nkwama, Civil Appeal No. 305 of 2020 (CAT) where it was held that:

"...it is again elementary law of burden of proof never shifts to the adverse party until the party on whom onus lies discharges his, burden of proof is not diluted on account of the weakness of the opposite part's case."

The appellant prayed for the appeal to be dismissed with costs.

In rejoinder, the appellant respondent on the point of law that the same is vague as it has not stated with certainty which provision of the law has been offended by the appellant. To cement his stance, he cited the case of **James Burchard Rugemalira Vs The Republic and Another**, Criminal Application No. 59/11 of 2017 (CAT-DSM) where it was held that:

"notices of objection must provide such particulars to enable the adversary party as well as the court to understand the nature and scope of the objection".

He also prayed for the same to be overlooked as it has not caused any miscarriage of justice on part of the respondent. Otherwise, he reiterated what he submitted in chief.

After going through the rival submissions between the parties, it is obvious that this appeal is hinged on the complaint by the appellant that the trial Tribunal did not properly evaluate and consider the evidence of

each witness, hence coming to erroneous decision despite the fact that appellant's evidence was heavier than that of the respondent's. Moreover, before I proceed to address the facts in issue, I find it apt to determine the point of law as raised by the respondent that the appellant had no locus standi to sue. His argument comes on the fact that the appellant testified that the land belonged to his mother. Without wasting much time, the point of law raised by the respondent has no any bearing because at no point did the appellant claimed to be standing on behalf of his mother. What he testified is that the land belonged to his mother following the death of his father. It follows for the court to evaluate his case on preponderance of evidence and see whether he managed to prove his case as per his pleadings. Moreover, the alleged point of law does not qualify as such because it was a statement said in adducing evidence subject to further evaluation of the court, hence exercising of judicial discretion. I therefore find the said point of law to have no relevance.

Verily, it is a jurisprudential position of the law that a trial court or tribunal is duty bound to evaluate evidence of each witness and their credibility and make a finding on the contested facts in issue. This position has been well articulated in the case of **Martha Wejja Vs**

Attorney General and Another [1982] TLR 35; and the case of **Stanslaus Rugaba Kasusula and Attorney General Vs Falesi Kabuye** [1982] TLR 388.

I am abreast of the cardinal principle of the law that being the first appeal, this court is obliged without fail to re-appraise the entire evidence on record, subject it to critical analysis and arrive to its own findings of fact if need be. This position has been extensively discussed by the Court of Appeal in the case of **The Registered Trustee of Joy in the Harvest Vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017.

Again, in determining this appeal, I shall be guided by the salutary principle of law in civil proceedings that whoever alleges the right on the existence of a fact, he has an onus of proving the existence of such fact. This principle has been stated in the case of **Anthon M. Masaga Vs Penina (MamaMgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported) and **Sections 110 and 111 of the law of Evidence Act, Cap. R.E. 2019.** Equally the same, a party with legal burden of proof also bears the evidential burden on the balance of probabilities as provided under **section 3(2)(b) of the Evidence Act**. It follows therefore that a court shall sustain a more credible and heavier evidence on proving a particular fact. Furthermore, in proving

the case, it is an elementary principle of the law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden. Thus, a burden of proof would not be diluted on account of the weakness of the opposite party. I fortify my stance by the principle held in the case of **Paulina Samson Ndawavya Vs Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) cited with approval in the cited case of **Jasson Samson Rweikiza (supra)**.

Basing on the above guidance, another step is to re-visit the evidence on record and see as to whether the appellant being the Applicant at the trial Tribunal managed to prove his case.

The appellant testified at the trial as **PW1.** According to his testimony, he the disputed land belongs to his mother Nagerita Nampiso whom she was passed on by his late father. He said, together with his mother, they started cultivating it. In year 2010, his mother died and the respondent requested to be allowed to use the land temporarily. It was year 2012 when he demanded the shamba back, the respondent refused to hand it to him. Responding to cross examination questions, PW1 said he had eye witnesses to prove that he only licenced the respondent to use the

land. He admitted also that the respondent and his family have built houses since 2013 and he was there.

The appellant called **Anna Mbembela (PW2)** as his witness. She testified that the respondent was licenced the land in 2011 and refused to surrender it to date. She admitted not knowing the date when the appellant's mother died but was present when the appellant allowed the respondent to use the land.

Conversely, the respondent testified as **SU1.** He told the court that he was given the disputed land since 1985 by his grandfather. He has built a house and living in the same area since then and was blessed with 12 children. His grandfather left him there. The respondent called his uncle **Lebisob Mjengwa Shantiwa (SU2).** SU2 shares a father with the appellant. He testified that the respondent is their elder sister's son who was given the disputed land by their father in 1985. He said their father died in 1998 and left the respondent using the land, thus the family knows that the respondent was given the land as a grandson and the family was present when their father gave SU1 the said land. **SU3, Samola Jackson Mwashitete** said he is also the grandson of the late Mjengwa Shantiwa. He testified that the respondent started using the land in 1985 and it was in 1990 when the late Mjengwa Helasita

Shantiwa told him that he has given the land to SU1 as his grandson and the respondent and his family has been using it ever since.

Indeed, after revising the evidence of both parties and their witnesses, this court firstly observed that the appellant indeed testified during the trial that the disputed land belonged to their mother after the death of their father which according to the pleadings occurred in 1998. Then after the passing of his mother in 2010, it was when the respondent was licenced to use the land. This means that, if the appellant himself admitted that the land belonged to his mother, whilst claiming as an administrator of his father, it means he had no evidence to prove whether his father gave the land to the respondent or not considering the fact that his father died in 1998. He has not also told the court whether his mother had disputed the occupation of the land by the respondent for all that period since the demise of their father. More-so, no such minutes of the family meeting were brought to court to prove that indeed the whole family wanted the respondent to vacate the disputed land because he was a mere licensee. The appellant however, admitted that the respondent has built houses in the disputed land.

As for the testimony of PW2, the respondent was licenced to use the land in 2011 after the passing on of the appellant's mother. At the same

time PW2 said she could not remember when did the mother of the appellant passed on. To the contrary, the appellant said the respondent was licenced to use the land in 2010. It goes therefore that, between the appellant and the respondent it is not certain as to when exactly the respondent was licenced to use the disputed land.

Again, the appellant said they held a family meeting after the respondent refused to surrender the land. On her side PW2 said: ***"they licenced him...the family inquired on him as to why he did not vacate".*** According to their testimonies, it shows that the act of licensing the respondent was not done by the appellant alone but the whole family. The evidence did not reveal the lineage of PW2 to the family.

To the contrary, **SU2**, the son of the deceased and the appellant's brother supported the respondent's argument that he has been given the land by their father, the late Mjengwa Shantiwa in 1985 and the whole family understands so. The same argument has also been supported by **SU3** that the respondent started to use the land way back in 1985 and in 1990, the late Mjengwa told him that he has given the land to the respondent.

As it can be seen from the evidence on record, the disputed land is not surveyed. Thus, strong evidence to prove ownership/occupation is required from either side.

The appellant said the respondent started to use his mother's land in 2010 while also claiming that he is the administrator of his father's estate. Surely if as he claimed that the land is his mother's then he cannot claim on behalf of his father. Moreover, his testimony that he licenced the respondent to use the land in 2010 is not supported by any cogent evidence, as PW2 said the respondent was licenced in 2011 and more so she does not even remember when did the mother of the appellant passed on. Actually they are contradicting each other.

The evidence that the respondent started to use the disputed land in 1985 is strongly supported by SU2 and SU3. The evidence reveals also that the respondent has built houses in the disputed land and had all his 12 children while residing at the same land. The fact that the respondent has built houses in the land is even supported by the appellant himself and his witness, PW2. Moreover, the appellant did not challenge the respondent in cross examination on the issue that the respondent had 12 children while living in the land nor did he challenge

the fact that the respondent was occupying the land when the late Mjengwa passed on.

It is cardinal principle of the law that failure to cross examine the witness on an important fact, ordinarily implies the admission of that fact (see the case of **Shadrack Balinango Vs Fikiri Mohamed and 2 Others, Civil Appeal** No. 223 Of 2017 (CAT)).

I am not oblivious of the position of the law that a mere licensee or an invitee cannot claim adverse possession. However, the same is subject to proof by the so called owner of the disputed land that indeed the invader was merely licenced to use the land. In the absence of which, and in considering the fact that there is evidence that the respondent has been using the land uninterrupted for more than 30 years and made developments, such time of uninterrupted occupation of that property is of great essence to justify that the respondent has been occupying the land since 1985 when the late Mjengwa was still alive. It thus proves his ownership contrary to the contradictory averments of the appellant.

As alluded earlier, the law requires that "he who alleges must prove". To the contrary the appellant failed to discharge his burden of proof and the law would not allow him to depend on the weakness of the adverse part. That notwithstanding, the respondent on the other hand managed

on the balance of probability, to prove a fact that he was given the suit-land in 1985 by his grandfather and he has been using it ever since, hence his claim for ownership.

Owing to the above findings, I find the appeal to be unmeritorious and I dismiss in its entirety with costs.

Ordered accordingly.

R.A. Ebrahim

JUDGE

Mbeya

10.06.2022

Date: 10.06.2022.

Coram: Hon. A.E. Temu - DR.

Appellant:

Respondent: Present.

B/C: P. Nundwe.

Court: The appeal is coming for judgement today.

The same delivered in open chamber court in the presence of both Parties.

A.E. Temu

Deputy Registrar

10.06.2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA