IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LAND APPEAL NO. 82 OF 2022

(*Originating from Land Case Application No. 17 of 2022 before the District Land and Housing Tribunal for Kondoa at Kondoa*)

ZAKIA ATHUMANI

(As Administratrix of the Estate of Athuman Marusu).....**APPELLANT**

Versus

IDD RAMADHANI ITURI.....RESPONDENT

JUDGMENT

Date of Last Order: 17/11/ 2023.

Date of Ruling: 21/11/2023.

LONGOPA, J:-

The appellant herein filed Application No. 17 of 2022 before the District Land and Housing Tribunal of Kondoa at Kondoa against the respondent. She claimed that his late father is the lawful owner of the disputed land located at Makamaka Village, Chemba District within Dodoma Region. She alleged that her late father cleared the virgin land in 1974 he used it peacefully until he met his earth race on 11th September 2006.

Thereafter, the appellant's family continued to enjoy the land until sometimes in 2021 when the respondent allegedly trespassed into it. Asserting her right over the suit land, she prayed for a declaratory order that the suit land be declared the property of his father the late

Athumani Hita, costs of the suit and any other relief the tribunal seems just and fit to grant.

The respondent disputed the allegation and claimed ownership of the suit land as he purchased it from one Ramadhani Selemani Lacha in 2020. The application proceeded to a trial at the end of which the tribunal had to determine who, between the appellant's father and the respondent is the lawful owner of the suit land and the reliefs to which each party was entitled to. The suit ended in the respondent's favour after the trial tribunal declared him the lawful owner of the suit land.

Aggrieved, the appellant has knocked the doors of this court with an appeal based on the following grounds:

1. *That, the trial tribunal erred in law and fact by failing to consider the weight of evidence adduced by the appellant herein together with his witnesses, the appellant proved his case beyond reasonable doubt.*

2. *That, the trial tribunal erred in law and fact by failing to inspect the sale agreement which was tendered as exhibit by the respondent herein without the seller being summoned to testify before the tribunal.*

3. *That, the trial tribunal erred in law and fact by failing to evaluate properly the evidence adduced by the appellant herein and of his witnesses hence it reaches unreasonable and unjustifiable judgment.*

On 17th day of November 2023, the parties appeared before me in person and unrepresented. Submitting in support of the appeal, the appellant stated that the trial tribunal did not consider her evidence regarding the residence of her father one Mzee Athumani. The evidence were the letters from the village government written on 1985, 1995 and 2021. She admitted that the 1985 and 1995 did not establish the ownership of her father rather was introducing him to be a villager in that village. The 2021 letter was an introductory letter introducing the appellant to get death certificate of his father's death.

Submitting on the sale agreement tendered by the respondent during trial, she argued that the seller had no title to pass to the respondent as the land did not belong to him rather the appellant's family. It was her submission further that the trial tribunal did not evaluate the evidence adduced before it correctly. The tribunal could have considered who the first owner of the suit land was. In conclusion, she prayed the court to consider the rights of her late father who was the owner of the suit land.

In reply, the respondent submitted that the evidence adduced before the trial tribunal was watertight. He had all exhibits to prove that he is the owner of the suit land. He personally testified and tendered a sale agreement that was concluded between him and the seller one Ramadhani Lacha who testified as DW2.

The responded added that the sale was concluded before the village chairman who also drafted the sale agreement. It was his

submission that the trial tribunal visited the ***locus in quo***, where all leaders who participated to allocate the land to DW2 showed up and proved the suit land to be owned by him. It was stated that even the appellant was present when the visit was conducted in presence of village leaders who participated in allocating the land to DW 2 in 1996.

In a short rejoinder, the appellant insisted that the respondent's witness did not testify before the trial tribunal.

I have keenly considered the submissions presented by the parties as well as the records of the trial tribunal and I will now proceed to determine the appeal. This being a first appeal, it is tantamount to a rehearing of the case meaning that, this court is duty bound to reassess the evidence on record to ascertain whether the anomaly pointed out in the grounds of appeal exist and ultimately make its independent finding.

All the three grounds of appeal set out by the appellant in his memorandum of appeal revolve around the failure of the trial court to properly evaluate, assess and analyze the evidence as whole and in so doing, wrongly dismissed the appellant's claim while had proved to the required standard that her father was the rightful owner of the suit property.

It is a trite law that in civil litigations, the burden of proof lies on the party who desires a court to believe him and pronounce judgment in his favour. Section 110 provides as follows:

> 110. Whoever desires any courts to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those fact exist.

This is cardinal principle of law and has been echoed in numerous cases including in **Hemedi Said vs Mohamed Mbilu** [1984] TLR 113 and in **Antony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna),** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015) (TANZLII). In the latter case, the Court of Appeal while reiterating this principle lucidly stated that:

> It is a common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and standard in each case is on the balance of probabilities.

That in this case, the appellant being the one asserting that her late father is the lawful owner of the suit land, she was duty bound to prove its assertion to the required standards, that is, proof on the balance of probabilities. It is in line with principle, the appellant testifying as PW1 told the trial tribunal that the suit land belonged to his father who acquired it by clearing a virgin land in 1974.

However, reading the evidence adduced by PW2 one Mwanaidi Athumani testified that his late father (appellant's father too) was given the suit land by his brother one Ramadhani Hita Marusu. But this person

Ramadhani Hita Marusu was not called to testify to this effect making this court to draw an inference against the appellant that her father was not given the suit land by this person. Furthermore, PW3 one Zaina Athumani testified that their father moved to the suit land during operation vijiji meaning he acquired the law by being allocated the suit land by operation vijiji. There is contradiction on how the appellant's father acquired the suit land.

On the respondent part, his evidence was straight forward on how he acquired the suit land that, he bought the same from DW2 one Ramadhani Selemani Lacha. His evidence was corroborated by DW 2 Ramadhani Selemani Lacha who testified before the trial tribunal that he was allocated the land by the village authorities through community service scheme.

In fact, during the visit of ***locus in quo***, one Mohamedi Issa Yondo who is the hamlet leader where the suit is located informed the trial tribunal about ownership of the land in question. He added that it belonged to DW2 who sold it to the respondent, and he had never seen the appellant's father in the suit land since he was young as he was born on 1982. This fact was also subscribed by Mustapha Ramadhani who was the Chairman of committee of social service of Makamaka village and it is this committee which allocated the suit land to DW2.

The trial record particularly at page 14 and 15 the respondent tendered the sale agreement, which was admitted as exhibit D1. The document reads "Makubaliano ya Kuuziana Eneo la Ardhi lenye Ekari

Moja, kati ya Muuzaji ndugu Ramadhan Lacha Selemani na Mununuzi ndugu Iddi Ramadhani Ituri "dated 19/11/2020.

The document indicates that the Vendors being a rightful owner of the land willing sells his portion of land to the Purchaser at the price of TZS 500,000/=. It is witnessed by one witness for each party and it describes the neighbours of that plot of land on each side of the boundary.

The evidence of DW 1 and DW 2 in totality indicate that there was a contract between the two. The agreement concerned sale of plot of land by DW 2 and purchase of by the respondent herein. The agreement has a consideration, and it was for lawful purpose. The parties also were competent to contract as they are both adults.

However, the said document seems to have not been read after its admission. It is now a well-established principle in law of evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person. See the case of **Bulungu Nzungu vs. Republic** (Criminal Appeal 39 of 2018) [2022] TZCA 454 (21 July 2022) (TanzLII). That being the law since such exhibit was not read out after admission as record does not clearly indicate so then the same is expunged from the records. However, even if the exhibit is expunged the oral evidence adduced by the respondent is heavier when compared to the one adduced by the appellant.

I am satisfied that the evidence of DW 1 and DW 2 is strong against that of the appellant. The DW 1 and DW 2 testimonies tally in the sense that the respondent testified to have bought the land from DW 2 who also testified that it is true he sold the land to the respondent. Further, he narrated the means through which he became an owner of that piece of land. The village leaders who participated in allocation of that land to DW 2 were present during the ***locus in quo.*** Thus, it is more convincing that the respondent is the rightful owner of the suit plot vide sale agreement concluded between himself and one Ramadhan Selemani Lacha.

It is on that account, the District Land and Housing Tribunal found that the appellant failed to prove her case within the required standard of balance of probability and hence declared the respondent as the lawful owner of the suit plot given weight of his evidence.

This is in line with the provision of section 3(2) of the Evidence Act, Cap 6 R.E. 2019 which states as follows:

> **(2) A fact is said to be proved when-**
> (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;
> (b) **in civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability.**

In a civil case a person who manages to establish its case on balance of probability is the one who should be entitled to the judgment of the Court. I subscribe to finding in case of **Hemedi Saidi v. Mohamed Mbilu** [1984] TLR 113 where the High Court (Sisya, J.) observed that a party whose evidence is weightier than the other party, that party is entitled to the decision of the Court.

The respondent being the one with heavier evidence compared to the appellant on the likelihood of his evidence being true if the same is compared to that of the appellant, it is my considered view that the District Land and Housing Tribunal reached into a correct and proper decision to declare the respondent as rightful owner of the land in question.

Furthermore, the appellant complaint that her evidence was not considered. Such evidence are letters from village authority wrote in 1985, 1995 stating that her father was a resident of Makamaka village and the owner of the suit land. This evidence is nowhere to be found in evidence adduced during trial. It has been raised on appeal and during submission of grounds of appeal.

It is a trite law that appellate court cannot consider or deal with issues that were not canvassed, pleaded or raised at the lower court. In the case of **Richard Majenga vs Specioza Sylivester** (Civil Appeal 208 of 2018) [2020] TZCA 227 (14 May 2020), the Court of Appeal stated that:

> As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal.
> Similarly, in this case, the first appellate court was not supposed to introduce a new issue that was not canvassed by the trial court. In the circumstances, it was improper and a misdirection on the part of the first appellate court to proceed to consider and determine such an issue in the respondent's favour at an appellate stage.

This was also the decision of the Court of Appeal in the case of **Sunshine Furniture Co. Ltd vs Maersk China Shipping Co. Ltd & Another** (Civil Appeal 98 of 2016) [2020] TZCA 1934 (23 January 2020), where the Court stated that:

> ... usually the Court of Appeal will only look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided by either the trial court or the High Court on appeal.

As pointed out in foregoing analysis, I am of the settled view that the appellant could not be allowed to bring new evidence namely letters purporting to come from the village authorities in 1985, 1995 and 2021 which were not tendered before trial tribunal during hearing of the case. Such letters if allowed at the appeal stage it will amount to determination of the new issue as to whether the appellant's father was

a villager in Makamaka village so as to establish possibilities of him owning land in that village.

In the circumstances, the District Land and Housing Tribunal was right in deciding the matter in favour of the respondent given weight of evidence on record regarding the ownership of the plot in question. All the three grounds of appeal are destitute of merits thus should be rejected.

That said and done, this court finds no merit in the appeal warranting reversal of the judgment and decree of the trial tribunal. In the end, the appeal is dismissed. Each party shall bear its own costs.

It is so ordered.

DATED at **DODOMA** this 21st day of November 2023.

Longopajr.

E.E LONGOPA

JUDGE

21/11/2023.