IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 65 OF 2021

(Arising from Land Application No. 33 of 2020 in the District Land and Housing Tribunal - Maswa)

LUDOVICK KWEZI.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES KANISA LA UKOMBOZI MINISTRIES FOR ALL NATIONS (UMINA) .....RESPONDENT

JUDGMENT

2nd June & 15th August, 2022

A. MATUMA, J.

In the District Land and Housing Tribunal for Maswa the Respondent sued successfully the Appellant for ownership of the suit land located at Bundilya street, Isanga Ward within Bariadi District in Simiyu Region.

The brief facts of the matter goes this way; The Appellant was serving as a pastor in the church of the Respondent whose Headquarter is in Mwanza. In the year 2014, the Appellant was posted to Bariadi to render the church services in Bariadi District within Simiyu Region. As they had no church building thereat, the church services started into a rental building of Bariadi Motel.

Later on the Appellant and some other followers purchased the suit land from one Magembe Maduhu Kalunde in two pieces at different times. At first on 16/3/2015 they bought a piece of land measuring 80 paces

length and 31 paces width (80x31 paces) at Tshs. 2,350,000/= (exhibit P2). On the 21/04/2016 they purchased a piece of land from the same person measuring 80x47x16 paces at Tshs. 5, 000, 000/=

The two pieces are adjacent and were all bought in the names of "KANISA LA UKOMBOZI BARIADI" the appellant being its chairman and signatory.

It is on record that, the Appellant and the Respondent developed some misunderstandings as the Respondent accused the Appellant to default services of Kanisa la ukombozi Ministries for All Nations (UMINA) under the leadership of B.G. Malisa and started his own church ministry. In that regard, on 16/12/2015 the so called Nabii B.G. Malisa stopped and chased him from being a church pastor or even a member there of because God has told him to part away with the appellant. That is in accordance to exhibit D2 which in part reads;

> *"Kanisa limekuvua mamlaka na kukusimamisha kutoa huduma za kiroho kupitia jina letu kuanzia tarehe ya leo 16/12/2015. Nimeamua kukusimamisha kutoa huduma ya kiroho kutokana na maelekezo kutoka kwa Mungu kama nilivyokwambia kuwa Mungu ameniambia tuachane...."*

It is from this back ground the dispute over ownership of the herein named suit land arose. While the Appellant claimed such land to belong to his church kanisa la ukombozi Bariadi, the Respondent claimed that it belongs to her; kanisa la ukombozi ministries for All Nations (UMINA).

The respondent thus sued the Appellant in the District Land and Housing Tribunal for Maswa where it was decreed that the land in Dispute is the property of the Respondent. The appellant was ordered to give vacant possession to the Respondent and pay costs of the case.

The Appellant was aggrieved hence this appeal with six grounds which were however argued into three major complaints namely;

i) That the trial tribunal erred to receive in evidence secondary evidence and rely on them contrary to the law.

ii) That the trial tribunal erred in law to rule out that kanisa la ukombozi Bariadi was a branch of kanisa la ukombozi Ministries for All Nations (UMINA)

iii) That taking the evidence generally the Respondent had insufficient evidence to prove ownership of the suit land.

At the hearing of this appeal Mr. Elias Hezron learned advocate represented the Appellant while the Respondent was represented by two learned advocates Mr. Tuguta and Mr. Kibulika.

Submitting on the first set of complaint Mr. Elias Hezron learned advocate submitted that, the Respondent's certificate of incorporation exhibit P1 so does various documentary evidences by the Respondent were photocopies and uncertified nor could have been certified interms of section 85 of the Evidence Act because they do not qualify. He also submitted that, such documentary evidences were received without a ruling rejecting the objections to their admissibility which was raised by the Appellant's advocate.

Mr. Tuguta and Mr. Kibulika learned advocates responding on the submissions of Mr. Hezron (supra) argued that, the law of Evidence Act do not have automatic applicability in the District land and Housing Tribunal which has its own rules of procedure for admission or rejection of documentary evidence. Mr. Tuguta argued that, the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 were made for that purpose and that vide **section 51 (2)** of the **parent Act, Cap.**

216 R.E. 2019, District Land and Housing Tribunals are required to apply the rules (supra) in conducting land cases.

In that respect, he cited regulation 10 (2) and (3) of the regulations supra to the effect that secondary evidence were properly received under such regulations.

The learned advocate further argued that, even though the Respondent had issued a notice to produce original documents to the Appellant who was in possession of them or else rely on secondary evidence. That the appellant did not head to the notice nor disputed to have in possession of such documents. In respect of exhibit P1 the certificate of incorporation the learned advocate argued that even if it is expunged there would not be any injury to either party as its purpose was to show that the Respondent is a registered body.

He also cited section 45 of Cap. 216 supra that cures errors, omissions or irregularities during trials or decisions by the District Land and Housing Tribunals. He fort feed section 45 (supra) by the Court of appeal decision in the case of **Yacob Magoiga Gichere V. Penina Yusuph, Civil Appeal no. 55 of 2017**. Mr. Kibulika learned advocate finalized the submission of Mr. Tuguta by arguing that the complaint of secondary evidence to have been used cannot stand because during defence the appellant tendered some original documents including those which the Respondent tendered in its secondary form as exhibit P2 which in defence was tendered as exhibit D1.

In rejoinder to this ground, Mr. Hezron learned advocate argued that, regulation 10 of the District land and Housing Tribunals Regulations (supra) do not provide for use of secondary evidence and therefore

section 45 of Cap. 216 R.E 2019 cannot be applied to cure the irregularity.

This ground should not detain me much. I agree with Mr. Hezron that regulation 10 of the Regulations mentioned above were not made to circumvate the rules of evidence provided in the Evidence Act. The requirement that facts must be proved by primary evidence which is the document itself i.e the original document under section 64 (1) of the Evidence Act was not made redundant by regulation 10 (supra).

In fact and as rightly submitted by Mr. Hezron such regulation do not provide for the room of uses of secondary evidence.

In fact such regulation is only softening the procedure for allowing the parties to produce documents which were otherwise not annexed to the pleadings.

But when it comes to original or photocopies regulation 10 (3) (b) of the Regulations supra is very clear to the effect that the tribunals shall not receive in evidence any document unless the authenticity of the document is resolved.

The rules requiring the use of primary evidence was meant to ensure that documents produced as evidence are authentic. It is in that regard secondary evidence are restricted to avoid unauthentic documents to be used in evidence and relied upon to the detriment of justice.

Even though, in this case I find this complaint as follows; in regard to exhibit P1 the certificate of incorporation by the Respondent. Such document was not said to have ever been in possession of the Appellant. Even the Notice to produce and reliance to secondary evidence dated 23rd June, 2020 do not name the certificate of incorporation as one of the documents which were in the hands of the Appellant.

In that respect, the respondent ought to have tendered the original document or satisfy the tribunal for why should her have been allowed to use secondary evidence.

On record, no any excuse was made and therefore I expunge exhibit P1 from the record. I also expunge all other received documentary exhibits of the respondent which were tendered in its secondary form except those which are mentioned in the notice to produce and the Appellant did not dispute to have been in possession of them. They are;

i) The appellant's appointment letter.

ii) Purchase agreements of the suit land

iii) UMINA letter dated 01/07/2019 which is a letter to the Appellant with Reference no. UMINA/RC/SIMIYU/02/2019 titled; kusimamishwa na kukabidhi mali zote za kanisa la ukombozi ministries for All Nations exhibit P9.

iv) UMINA letter with reference no. UMINA/RC/SIMIYU/01 dated 07/05/2019

v) List of ukombozi Bariadi church members contributions for the construction of the church building

I therefore in respect of the first ground of complaints find that the trial tribunal erred to receive and rely on secondary evidence except those whose notice to produce was dully issued and filed to the tribunal as herein above determined. **Section 45 of Cap. 216 R.E. 2019** can not be invoked as a shield in that respect.

On the second complaint whether or not kanisa la ukombozi Bariadi was a branch of UMINA, Mr. Elias Hezron submitted that the respondent was duty bound to prove that kanisa la ukombozi Bariadi was a branch of UMINA but did not do so. The learned advocate argued that, the

respondent ought to have tendered in evidence documents for establishing a church at Bariadi and the resolution of UMINA to the effect that they intended and established their branch at Bariadi. Mr. Elias Hezron further contended that the respondent did not even plead to her pleadings that she started a branch at Bariadi and should therefore be bound by her pleadings as held in the case of **Paulina Samson Ndawavya versus Theresia Thomasi Madaha, Civil Appeal no. 45 of 2017 (CAT)**.

The learned advocate was of the further argument that with the available evidence on record, the trial chairman did not analyse it but made a mere conclusion in the judgement that kanisa la ukombozi Bariadi was a branch of UMINA. He therefore called this Court to step into the shoes of the trial Court and re-evaluate such evidence to reach its own decision on the matter.

Mr. Tuguta learned advocate in response to this ground submitted that, there is no evidence on record that kanisa la ukombozi Bariadi was a branch of UMINA nor the respondent pleaded so. That is why no issue was framed to that effect for kanisa la ukombozi Bariadi is not an existing body. And therefore courts are bound to confine to the issues drawn.

The learned advocate however argued that, despite of all those realities, kanisa la ukombozi Bariadi arose from the purchase deeds of the land in dispute by the Appellant who by then acted for the Respondent UMINA.

He called this Court to find that everything the appellant did, did so on behalf and for the benefit of the Respondent and that by the time the suit land was purchased, the appellant was still acting for the respondent. He further argued that, the purchase agreements were written locally and

thus there is no need to determine the relationship between kanisa la ukombozi Bariadi and UMINA for there can't be a relationship with a none existing body.

My finding on this issue is very simple and strait forward that the trial tribunal in ruling out that kanisa la ukombozi Bariadi was a branch of UMINA was absolutely wrong. I agree with both parties that neither party pleaded that kanisa la ukombozi Bariadi was a branch of UMINA nor there was evidence tendered to establish that fact.

Therefore the trial chairman acted on speculative views born beyond the records at hand. He ought to have been confined to the issues framed and agreed by the parties upon which the evidence was adduced as rightly argued by both parties and more so Mr. Tuguta learned advocate.

In the case of **Materu Leison and J. Foya versus R. Sospeter (1998) TLR 102** it was held that; it is wrong for the trial Court to allow speculative views to affect its decision.

I also had time to rule the same in the case of **Denis Elias Nduhiye versus Lemina Wilbad, Juveride Civil Appeal case no. 1 of 2019**, High Court at Kigoma that;

> *"Speculative views have no room in Civil trials and the trial Magistrate in this case erred to rest this case on his speculative views."*

In the like manner, the trial chairman in this case erred to import his speculative views that kanisa la ukombozi Bariadi is a branch of UMINA to affect his decision making. Neither party pleaded so nor tendered evidence to that effect.

In any case the said kanisa la ukombozi Bariadi was not a party to the suit and could have not been discussed and its rights determined without being accorded opportunity to be heard.

I am aware that the respondent through her advocates contends that kanisa la ukombozi is a none existing body and that might have been the reasons for them not to have sued it but I cannot conclude that such church is really not existing. This is because no issue to that effect was drawn and there was no evidence adduced to prove or disprove the existence of such church.

I agree with Mr. Hezron that those are words from the bar which cannot be acted upon. Infact in the case o**f Morandi versus Petrol (1980) TLR 49** it was held that mere submissions by the parties or their advocates at the appellate stage are not evidence to be relied upon. The court held;

> *"Submissions made by a party to an appeal in support of the grounds of appeal, are not evidence but arguments on the facts and laws raised before the Court.*
> *Such submissions are made without oath or affirmation, and the party making them is not subject to cross examination by his opponent."*

In the like manner, the arguments of Mr. Tuguta that kanisa la ukombozi Bariadi is not an existing body is not evidence nor he can be subjected to cross examination to ascertain his arguments. Even though such arguments are inconsistent with the purchase documents of the land in dispute which the respondent herself relies. Those documents are in the names of Kanisa la ukombozi Bariadi. If I have to believe that such church is not existing then I have to reject the purchase documents against the respondent herself. I am not prepared to agree with such argument.

I now turn to the last ground of complaint in relation to the weight of evidence. On this ground advocate Elias Hezron argued that as there was no evidence that kanisa la ukombozi Bariadi was a branch of UMINA nor the respondent accounted for the big variations between its names and that of kanisa la ukombozi Bariadi, the respondent had no evidence establishing her ownership of the suitland.

Mr. Tuguta learned advocate on his party argued that, for better determination of who owns such suitland we have to ask ourselves when was the land purchased. If we find that the same was purchased when the appellant was still serving the respondent as a pastor, then the suitland belongs to the respondent.

He also argued that, the appellant did not claim ownership and kanisa la ukombozi Bariadi is not registered so not existing but the respondent is registered.

In that respect, the suitland must be decreed to the respondent as it cannot be left hanging. He therefore asked this Court to find that the respondent has heavier evidence on record and therefore be declared owner of the suitland.

In rejoinder to this ground Mr. Hezron submitted that, the evidence shows that the suitland was bought by kanisa la ukombozi Bariadi. The said church was not made a party to the suit to establish her ownership of the suitland and therefore the respondent should have proved her claims of ownership of the suitland.

On whether kanisa la ukombozi Bariadi is registered or not he argued this court to ignore the words from the bar because the said church was not a party and therefore not heard. Alternatively he argued

that interms of **section 9 of the Trustees Incorporation Act, Cap. 318 R.E. 2002** a land can be owned even by un-registered body.

To that effect he cited the case of **Sabato Mally V. The Registered Trustees of the seventh day Adventist church, land case no. 64 of 2020**.

On this ground, I start by joining hands with Mr. Hezron learned advocate that the arguments by Mr. Tuguta that kanisa la ukombozi Bariadi is not registered should be ignored.

I have already done so supra. We cannot discuss and adjudge kanisa la Ukombozi Bariadi without according it opportunity to be heard. None registration does not necessarily mean none existing. Within the spirit of section 2 (1) of the Trustees Incorporation Act (supra), existence of a body or association of persons bound together by custom, religion, kinship, or nationality e.t.c should exist first and the incorporation/registration follows.

If a body or association can exist within the spirit of section 2 supra even prior to registration, nothing restricts it to own properties movable or inmovable. As rightly argued by Mr. Hezron learned advocate for the appellant, section 9 of the Trustees Incorporation Act (supra), unregistered body or association can own properties and there is no law prohibits such ownership.

Now the question is who owns the suitland? Mr. Tuguta learned advocate argued at length that it is the respondent who owns the suitland because the appellant bought it in the names of kanisa la ukombozi Bariadi but at that time he was serving the respondent.

Therefore, according to him, if we finds out that the Suitland was purchased when the appellant was still serving the respondent, it is

obvious all what he did was for and on behalf of the respondent. He also sailed me to some pieces of evidence on record on how the suitland was acquired. Without reproducing such evidence let me determine the same to conclude who owns the suitland.

As I have said earlier, the suitland was bought in two pieces at different times. The first one was bought on 16/03/2015 measuring 80x31 paces. That is in accordance to exhibit P2. No doubt by this time the appellant was still in service of the respondent. The second piece of evidence measuring 80x47x16 paces in accordance to exhibit P3 was bought on 21/04/2016. By this time the appellant was already fired out from the services of the respondent as per exhibit D2 which I have quoted (supra) that the respondent terminated the services of the appellant in her church on 16/12/2015 on what she clearly stated that;

> *"maelekezo kutoka kwa Mungu kama nilivyokwambia kuwa Mungu ameniambia tuachane."*

In that regard, if I have to agree with Mr. Tuguta that only those which the appellant did during his tenure at the respondent's church belongs to the respondent then no doubt the land the appellant bought in the names of kanisa la ukombozi Bariadi on 21/04/2016 do not belong to the respondent but to kanisa la ukombozi Bariadi regardless to who owns it whether the appellant or not because it was bought when the appellant was already fired out from UMINA.

But I do not purchase such argument that everything the appellant did before 16/12/2015 when he was terminated, he did it for and on behalf of the respondent. This is because exhibit D2 is a formal termination. By that time the appellant and the respondent had already started to differ as the respondent had already detected that the appellant

was not professing in the kanisa la ukombozi Ministries for All nations under the leadership of the said Prophet B.G. Malisa but had started his new religious ministry

In the Application of the Respondent at page 2 paragraph 6 (a) (iii) such departure of the Appellant from UMINA is clearly stated by the respondent herself although the Application purports that it was on 2018 to 2019 when the Appellant defaulted the services of the respondent. Even though while I agree the differences (misunderstandings) between the two, I don't agree that such differences started on 2018 – 2019 for obvious reason that had it been so the respondent could have not terminated the appellant in 2015.

Therefore, the differences started before 16/12/2015 and no evidence from both parties as to when exactly by date and month such differences started.

In that respect, I am of the firm finding that by 16/3/2015 when the first piece of land was purchased the differences had already started and that is why the appellant did not purchase it in the names of the respondent but on different names altogether.

But also going through the Application of the respondent at the trial tribunal the suit land she claimed was only estimated to value Tshs. 2, 000, 000/= only while the first piece of land according to exhibit P2 was purchased at Tshs. 2, 350, 000/= This value alone signifies that the respondent claimed a land different to this which was bought in accordance to exhibit P2. When this value is taken together with the purchase price of the second piece of land Tshs. 5, 000, 000/=, no doubt the suitland is by the purchase price valued Tshs. 7, 350, 000/=. This cannot be said to be the one the respondent claims which was estimated

at Tshs. 2, 000, 000/= only by May, 2020 when she drew and filed her application before the tribunal meaning that by 2015 and 2016 when the two pieces of the suitland were bought they were less valued because value in land is always going high.

But I have again asked myself the source of money for the purchase of the two pieces of land. Mr. Tuguta tried as he could do, to persuade this court that the appellant applied and obtained the money from UMINA headquarter and also used church members' contributions. With due respect, there is no such evidence on record. Masunga King Idebe PW1 who testified for the respondent during questions by the tribunal for clarifications at page 10 he was very clear that he don't remember the source of money which was used to buy the suitland. That fact was so crucial and could not be ignored and go unestablished.

This is because the church member is not barred from acquiring his or her own property nor to start his or her own business including starting a different church. In that respect, such church member cannot be deprived his or her own properties merely because by the time he or she acquired the same he was still a member of the former church. The question would only be what was the source of fund for acquisition of such properties and the purposes of such acquisition. PW2 Emma Mathias tendered in evidence exhibit P4 which is Taarifa ya Mapato na Matumizi purporting to establish the source of the money for the purchase of the suitland and construction of the church.

I find PW2 incredible for having interest to serve. Not only that exhibit P4 was prepared by himself without being authenticated by any other person. Not only that but also such exhibit is in the full name of the respondent as against the names of kanisa la ukombozi Bariadi. It is

stamped the stamp of UMINA On 15/5/2015. If by that time such stamp existed at Bariadi why was it not stamped to the purchase deeds atleast to show that the real purchaser was UMINA despite the shortest names that might have been written in the contract as Mr. Tuguta termed "locally". But again, exhibit P4 was not accompanied by any document to show how those "Mapato" were generated whereas the so called "michango" which carries a total of Tshs. 17, 883, 000/= could have been atleast shown its flow as to which amount from whom unlike "sadaka" which is only Tshs. 681, 000/= which might not been sufficiently established as to which amount came from whom.

But also this exhibit P4 contradicts exhibit P12 the loan form of vision fund which was put in evidence by PW5 Solomoni Edward. With such document kanisa la ukombozi Bariadi borrowed Tshs. 7, 000, 000/= for the purposes of running church services.

In respect of contributions of church members, no any church members, who came to testify that there was contributions for the purchase of the suitland on behalf of the respondent. Even those who testified for the respondent at the trial tribunal none stated to have contributed anything for the purchase of the suitland for the respondent.

In the circumstances, the evidence of the Appellant DW1 that it was the church kanisa la ukombozi Bariadi which purchased the suitland was not contravened. Had that church been sued it could have shade light on the source of money for the purchase of the suitland. Since it was not sued we cannot go further to discuss her affairs including acquisition of properties.

I therefore conclude that the respondent failed to establish her claims at the trial tribunal and wrongly sued the Appellant to dispossess kanisa la ukombozi Bariadi its lawful acquired properties.

I allow this ground of appeal and rule out that kanisa la ukombozi Bariadi is the lawful owner of the suitland as against the respondent. Unless disposed by any other lawful means, the suitland shall continue to be her lawful property under administration of the Appellant among other church leaders thereof.

This appeal is allowed with costs. In that respect the judgment of the trial tribunal is quashed and the decree thereof set aside. Right of further appeal is explained.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
15/08/2022