IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 184 OF 2022

(C/F Application No. 23 of 2018 District Land and Housing Tribunal of Karatu at Karatu)

JULIANA AXWESSO TLEMU (Presented by Safari Gadiye through Power of Attorney) ..... **APPELLANT**

VERSUS

NASIBU GADIYE ..... **1ST RESPONDENT**

SHIDOLIA TOURS ..... **2ND RESPONDENT**

JUDGMENT

23rd February & 01st March, 2024

TIGANGA, J.

In Application No. 23 of 2018 before the District Land and Housing Tribunal of Karatu at Karatu (the trial tribunal) the appellant herein filed a suit against the respondents for trespassing into her land measuring 1.5 acres located at Sumawe area within Ganako Ward in Karatu District which she was allocated during Operesheni Vijiji in 1974.

According to the appellant's evidence at the trial tribunal, she claimed that she and her late husband were given the suit land by her father-in-law, and had been living there peacefully until 2018 when the 1st respondent trespassed into the said land and sold ½ an acre to the 2nd respondent. Her evidence also shows that, following both her father-in-

2nd respondent. Her evidence also shows that, following both her father-in-law and her husband's demise no one had petitioned for letters of administration of either deceased person's estate, hence, the suit land was never distributed to anyone. Her witnesses testified that the suit land was a family farm but the 1st respondent sold it without family consent and he did not share the proceeds with other family members.

On the other hand, the 1st respondent who is the appellant's son, denied this allegation and claimed that the suit land belonged to their late father (appellant's late husband) who bequeathed it to them and they have been using the same ever since their father was alive. Thus, following his father's demise, together with his brother they divided the whole farm which was four acres to two acres each as only two male heirs.

Of his two acres, he sold half (1/2) an acre to the 2nd respondent in 2008. He also claimed that the appellant left their father in 1974 and just returned for this dispute while they had all along been living with their father. He also claimed that he has been living in the suit land with his family for more than twenty years.

The 2nd respondent's evidence shows that he bought the suit land from the 1st respondent way back in the year 2008. After purchasing it

she planted trees therein. However, in 2018 when he wanted to develop the area, he found the trees cut down by the 1st respondent. When he inquired from him, he told him that there was a dispute and it was when he was summoned for this case.

The 2nd respondent also claimed that he had engaged an engineer to design for him a hotel that was to be built on the suit land, and other pieces of land nearby which he bought from the natives. According to him, he paid him Tshs. 15,000,000/=, however, the said engineer failed to execute such task as the appellant removed the beacons and caused chaos. He prayed to be compensated such an amount as his contract with the engineer had a no-refund policy.

In the end, the trial tribunal decided in favour of the 2nd respondent by declaring him a lawful owner of the suit land. The tribunal also ordered the appellant to compensate the 2nd respondent Tsh. 15,000,000/= which he paid to the engineer. Aggrieved by the decision, the appellant filed this appeal on the following grounds;

1. That, the trial tribunal erred in law and fact to find that the appellant failed to prove his claim while the appellant's case was stronger than that of the respondents.

2. That, the trial tribunal erred in failing to properly scrutinize the evidence adduced during trial and employed wrong reasoning.
3. That, the trial tribunal erred in failing to find that, the 1st respondent had no capacity to sell the disputed land to the 2nd respondent therefore no good title was transferred.
4. That, the trial tribunal erred in law and fact in giving orders which by its nature have been prayed in the form of a counterclaim.
5. That, an order for payment of compensation to the tune of Tshs. 15,000,000/= is unjustifiable, unfair, and illegal and the same was erroneously made by the trial tribunal.
6. That, the trial tribunal's finding that the 1st respondent lived in the disputed land for over 22 years is unfounded and without supportive proof hence erroneous.
7. That, the trial tribunal erred in law and fact in failing to record the assessor's opinion in the proceedings as per the law.

Hearing of the appeal was done by way of written submissions. I applaud the parties for the timely filing of their respective submissions. The appellant was represented by Mr. Samwel Welwel whereas the

respondents were jointly represented by Mr. Fridolin Bwemelo, both learned Advocates.

Supporting the appeal, Mr. Welwel jointly submitted on the 1st and 2nd grounds of appeal that, the appellant is the wife of the late Gadiye and the 1st respondent's mother. He also submitted that, after the death of the late Gadiye, as his estate was jointly owned by him, and the appellant, by the right of survivorship, his said estate devolved to his wife, the appellant herein.

According to him, there is no evidence to prove that, the late Gadiye bequeathed the suit land to the 1st respondent as a gift, or if the suit land was distributed to him by the operation of the law i.e. through administration of estate by inheritance. In the circumstances, the land in question remained in the hands of the appellant as the rightful owner being the surviving owner. Further to that, there was no justification for the 1st respondent's claim that they divided the suit land among themselves with his brother.

He also argued that the trial tribunal erred in declaring the 1st respondent as the legal owner of the suit land as he lived there for more than 22 years while there was no proof given to that effect. He referred this Court to the case of **Mukyemalila & Thadeo vs. Luilanga** [1972]

HCD 4, and the Court of Appeal decision in the case of **Registered Trustee of Holy Sisters of Tanzania vs. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 where it was maintained that eight things have to be proved by an adverse possessor one of them being total absence of possession by a true owner throughout the whole time of abandonment. In his view, since the suit land was not abandoned, the trial tribunal erred in holding that the respondent was the legal owner by being an adverse possessor.

On the 3rd ground, Mr. Welwel submitted that the trial tribunal erred in declaring the sale made by the 1st respondent legal without taking into consideration the fact that, he had no good title to pass to the 2nd respondent. He prayed for this court to find the said sale to be illegal and nullify it.

As to the 4th ground of appeal, learned counsel submitted that the trial tribunal erred in granting orders that ought to have been prayed in the counterclaim. He argued that parties are bound by their pleadings and the 2nd respondent neither in his written statement of defence nor by way of filing a counterclaim prayed to be compensated Tshs. 15,000,000/= hence, the trial tribunal erred in granting the same as the appellant was not given the right to defend herself on the same.

More so, the 2nd respondent never prayed to be compensated such an amount, he only prayed for the costs of the case, hence the trial tribunal erred in granting such an amount. He prayed for this Court to set aside the compensation order passed by the trial tribunal.

On the 7th ground of appeal, the learned counsel averred that the trial chairman erred in failing to record the assessors' opinion under section 23 (1)(2) of the **Land Disputes Act**, [Cap 216 R.E. 2019] read together with section 19 (2) of the same law. He contended that the trial chairman only wrote *"Maoni yamesomwa"* which according to him is not enough proof that the said opinion was read.

To cement this point, he cited the case of **Sebastian Kudike vs. Mamlaka ya Maji safi na Maji Taka**, Civil Appeal No. 274 of 2018 where the Court of Appeal insisted that, the assessor's opinion cannot be assumed to have been read if it is not on record, regardless of the trial chairman's acknowledgment on the same. He in the end prayed for this appeal to be allowed with costs.

In reply, Mr. Bwemelo submitted in respect of the 1st and 2nd grounds of appeal that, the trial tribunal properly analyzed the evidence on record and reached a just decision. In his view, the appellant failed to prove that, the suit land belonged to her whereas the evidence proved

that, the 1st respondent's father passed ownership of the suit land to the 1st respondent and his brother before his demise. He also argued that the evidence showed that, the appellant abandoned the suit land for more than 44 years, hence she lacks legal ground to claim ownership of the same.

Mr. Bwemelo further argued that the appellant did not show any documentation to prove that she legally co-owned the suit land with her late husband for her to claim ownership by survivorship following his death. More so, there was no proof that the suit land was a family land hence the cited case of **Mukyemalila vs. Luilanga (supra)** is distinguishable from the case at hand.

On the 3rd ground, learned counsel further contended that the 1st respondent legally transferred the suit land to the 2nd respondent because he had a good title to pass. In his view, had the appellant's claim been genuine, she would have claimed for the whole four (4) acres that the 1st respondent and his brother divided in half rather than claiming for only half an acre that was sold to the 2nd respondent.

On the 4th ground of appeal, Mr. Bwemelo submitted that, although the 2nd respondent did not pray for compensation of Tshs. 15,000,000/= by way of counterclaim, but in his written statement of

amount in his testimony which was backed up with exhibit D1, the trial tribunal was justified to grant the same.

On the 7th ground regarding the assessor's opinion, the learned counsel contended that it is not a must that the assessor's opinion be reduced into writing. That, in the matter at hand the assessor's opinion was read out to the parties and the trial chairman acknowledged it hence, the case of **Sebastian Kudike** (supra) as cited by the appellant's counsel is distinguishable with the circumstances of the matter at hand. He prayed that the court disregard grounds 5 and 6 of the appeal as the same were not submitted by the appellant. He also prayed for the case to be dismissed with costs for want of merit.

In his brief rejoinder, learned counsel reiterated most of what he submitted in chief and insisted that this appeal be allowed. Now, having gone through the trial court's records as well as both parties' submissions, I proceed to determine the grounds of appeal which are to prove only one issue. Whether the trial tribunal was justified to hold that the suit land belongs to the 1st respondent.

I will determine the 1st, 2nd, 3rd, and 6th grounds jointly in which the appellant challenges the trial tribunal for failing to thoroughly analyze the

I will determine the 1st, 2nd, 3rd, and 6th grounds jointly in which the appellant challenges the trial tribunal for failing to thoroughly analyze the evidence on record and ended up holding that, the suit land belonged to the 1st respondent thus, had a right to sell it to the 2nd respondent.

In deciding this issue, I will be guided by the principle of the burden and standard of proof that, in land disputes, just like in normal civil cases, the onus of proving the case is on the shoulder of the plaintiff/claimant, and the standard of proof is on the balance of probability. This principle is enshrined under sections 110 and 111 of the **Evidence Act,** [Cap 6 R.E. 2022] (Evidence Act) and in some decisions of the Court of Appeal such as the case of **Maria Amandus Kavishe vs. Norah Waziri Mzeru (Administratrix of the Estate of the late Silvanus Mzeru) & Another,** Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) where the Court of Appeal had this to say;

> *"It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his or her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of a civil nature, the standard of proof was on a 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."

In the appeal at hand, from the outset, I find the appellant to have failed to prove that, the suit land belonged to her and her late husband due to the following reasons; **One**, in her application, the appellant claimed that she obtained the suit land through Operesheni Vijiji back in 1974, and had been living there peacefully throughout until 2018 when the dispute arose.

However, when giving her evidence at the trial tribunal, she claimed that she was given the suit land together with her late husband by her father-in-law. She did not specify the time when such a handover was done. Also, none of her witnesses proved that the land was either allocated to the appellant through Operesheni Vijiji as pleaded or that she was given the same by her father-in-law together with her late husband. What they testified was that they understood the Suitland to be family land for years.

In the case of **Makori Wassaga vs. Joshua Mwaikambo & Another** [1987] T.L.R 88, the Court stated that:

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved

in evidence; hence he is not allowed to set up a new case."

It is therefore clear that what was pleaded in the plaint was different from what was testified in court as evidence.

Two, the size of the disputed land is not certain, while in her pleading the appellant claimed 1.5 acres, in her evidence, she said the dispute is in respect of half an acre only, which was sold by the 1st respondent to the 2nd respondent. Further to that, all of her witnesses gave evidence to that effect save for AW3 who told the court that the area in dispute is a quarter an acre.

More so, in her pleadings, she described the Suitland borders as follows; in the Northern part - Shabani Jumanne, in the Southern part - Ramadhani Penicto, in the Eastern part - Gadiye Tsere farm and in the Western part - Shidolia Tours. Meanwhile, in her testimony, she mentioned the borders in the Northern part as an - agricultural area, in the Southern part as an - agricultural area, and the Eastern part as – Barani, and West - Massay Tluway. Looking at what was pleaded and what was testified in evidence they are quite different implying that the areas described are two different areas.

On this aspect, the Court of Appeal in the case of **Maria Amandus Kavishe (supra),** had this to say regarding giving certain size and boundaries of the suit land and it held thus;

> *"...From what was pleaded by the appellant above, it is glaring that the description and the size of the suit premises is not certain and it is at variance with what she testified before the trial court. Pursuant to the above principles and Order VII Rule 3 of the CPC, it was incumbent for the appellant to state in the plaint the proper description and size of the suit premises she was claiming."*

If I may add to what the Court of Appeal held in the above case, the description in the plaint should be proved by the testimony given and recorded under oath. In the case at hand, it is therefore not certain on the exact size and description of the piece of land which the appellant claimed.

It is also worth noting that, in her testimony, the appellant told the trial tribunal that the suit land was a family land. This was supported by all of her witnesses including AW2 who testified the whole family land is about five acres, and AW4 who testified that the whole area of the said family land is 4.5 acres but the sold portion is only half an acre which is the one in dispute. The evidence that the farm within which the suit land is located is family land is heavier than the 1st respondent's evidence

that only him and his brother were bequeathed the said land by his father as there was no proof ascertaining the same.

In the circumstances, I join hands with the appellant's counsel that, the trial tribunal erred in declaring the 1st respondent's the owner of the suit land as either an adverse possessor or through a gift given to him by his late father. These grounds have no merit and they all fail.

Because, the 1st respondent does not deny selling the suit land to the 2nd respondent, as rightly submitted by the appellant's counsel, in the absence of any probate of either appellant's husband who is the 1st respondent's father, to ascertain the distribution of the said family land, the 1st respondent had no legal authority to sell the same.

In the premises, although the sale conducted by the 1st respondent to the 2nd respondent may be seen as illegal due to the fact that the 1st respondent had nothing to pass to the 2nd respondent, nevertheless, the 2nd respondent is protected as the *bonafide* purchaser. Therefore, I find two options available, **one,** he may recover the purchase price from the 1st respondent. **Two,** the 1st respondent being among the family members who sold the said half an acre to the 2nd respondent, either the sold half an acre be deducted from his share as

one of the heirs once the legal distribution through the probate and administration process will be conducted.

On the 4th and 5th grounds of appeal, the appellant challenges the trial tribunal for ordering the compensation of Tshs. 15,000,000/=. The law is clear and as alluded to earlier, the court cannot grant what was not pleaded in the pleadings and proved during the trial through evidence, see **Makori Wassaga vs. Joshua Mwaikambo & Another** (supra). The fact that the trial tribunal ordered the appellant herein to compensate the 2nd respondent Tsh. 15,000,000/= without giving her the right to defend on the same was uncalled for.

It is my considered opinion that, such an amount was too massive to be granted without more proof than only the proof of the contract between the 2nd respondent and the said engineer. On the same note, as this chaos was initiated by the 1st respondent, it would have been prudent if the said compensation was ordered against him, the appellant has no apparent liability to compensate the 2nd respondent to the tune of Tshs. 15,000,000/=, therefore the said order is hereby quashed and set aside. These grounds have merit and are allowed to the extent explained.

into writing and incorporated in the judgment of the tribunal. In the circumstances, sections 19 (2) and 23 (1)(2) of the **Land Disputes Act**, were fully complied with. This ground also fails.

In light of the above, this appeal is partly allowed to the extent explained above. Taking into account the nature of the dispute and the fact that some of the parties are blood-related, I give no order as to costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 01st of March, 2024

J.C. TIGANGA

JUDGE