

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LAND APPEAL NO. 47 OF 2020

*(Original from the decision of District Land and Housing Tribunal for Geita at Geita in Application
No. 10 of 2018)*

SANDA MAVUNO ----- APPELLANT

VERSUS

LEMI LUTEMA ----- RESPONDENT

JUDGMENT

13th May & 10th June, 2021

TIGANGA, J

This appeal fetches its origin from the decision of Land Dispute No. 10 of 2018 which was filed in the District Land and Housing Tribunal for Geita asking the following orders:-

- i) Declaratory order that the applicant as administrator of estate of the late Mavuno Kichenya is the rightful owner of the suit land and the respondent is a mere trespasser.
- ii) Order restraining the respondent from disposing the suit land in any manner,

- iii) Special damages to the tune of 10,000,000/=
- iv) General damages as assessed by Tribunal.
- v) Costs of the suit be provided

After hearing the parties, the District Land and Housing Tribunal dismissed the application with costs.

The decision aggrieved appellant, he appealed to this court by filing four grounds of appeal as follows;

1. That, the trial chairperson erred in law and facts by pronouncing the respondent as the lawful owner of the suit land without any admissible evidence.
2. That, the trial Chairperson erred in law and fact in reaching the decision by not taking into consideration the appellant's evidence in record and relying only on the respondent's evidence.
3. That, the trial chairperson erred in law and fact by admitting a forged sale agreement adduced by the respondent despite being objected by the appellant.
4. That, the trial chairperson erred in law and fact by denying to admit in record the appellant's letters of administration whilst being a true copy carrying the seal of Kharumwa Primary Court.

Having paraded these four grounds of appeal, the appellant asked for the following reliefs;-

- a) The appeal be allowed and the decision of the District Land and Housing Tribunal for Geita be set aside.
- b) Cost of the appeal be granted.
- c) Any other relief(s) that this honourable Court will deems fit and just to grant.

The hearing of the application was conducted orally. At the hearing, the appellant appeared and argued in person, unrepresented while the respondent was represented by Mr. Siwale, learned Advocate.

The appellant combined all four grounds of appeal, and her submission was very brief. She started by adopting the Petition of appeal as part of her submission and further informed the court that after the death of her late father Mavuno Kichenya, she was appointed the Administrator of his father's estate. She said the respondent had no letter proving that he bought the land. She in the end asked the appeal to be allowed with costs.

In reply, the counsel for the respondent submitted in respect of the first ground of appeal that, the decision of the District Land and Housing Tribunal was substantiated by two types of evidence and exhibits. First is the sale agreement between Mavuno Kichenya and Limi Lutema dated on

25/07/2003, second is the confirmation of the village government of Ifugandi village dated on 19/08/2003. He submitted that these types of evidence proved the case in favour of the respondent.

On the second ground of appeal, which raises the complaint that, the trial tribunal did not take into consideration the appellant's evidence in record and relied only on the respondent's evidence, he submitted that the evidence by the respondent was heavier than that of the appellant because the respondent had a lot of evidence to prove that he bought the suitland from the father of the appellant, the sale which was proved by the village authority. His evidence was therefore heavier than that of the appellant.

Regarding the third ground of appeal which raises the complaint that the trial chairperson erred in law and fact by admitting a forged sale agreement adduced by the respondent despite being objected by the appellant. He submitted that the trial court was correct to admit the documents because the documents were first attached to the written statement of defence in Application No. 10 of 2018 and were tendered in original form during the hearing. He submitted that the documents were not forged, as had they been forged the appellant would have engaged the

police to investigate. He said the ground is an afterthought therefore it be rejected.

On the fourth ground of appeal that the trial chairperson misdirected himself by refusing to admit letter of administration of the estate which was original and stamped Kharumwa Primary Court, he submitted that the trial tribunal was correct to reject them because the documents which were tendered at the hearing were completely different in form and content with the documents which were attached to the application.

Regarding the issue whether the appellant was the administrator or not, he submitted that there was no evidence to prove that she was so appointed. As the copy of the judgment which purported to appoint her, was not attached to the application and the appellant did not issue a notice of additional document as required under regulation No. 10 (2) of the Land Disputes Courts Act, (Regulations), 2007 GN. No. 174 of 2003. He in the end asked the court to base on the documentary evidence (the sale agreement and confirmation from the village authority) and find that the evidence by the trial respondent was heavy therefore it dismiss the appeal with costs.

In rejoinder the appellant submitted that, she was sure there was no sale agreement. She insisted that she tendered the documents which appointed her administrator of the estate but the same were rejected. She said that the documents she tendered were the same with those attached. For comparative purpose she submitted without objection from the respondent and this court accepted the original document which she tendered and were rejected for identification purpose. He asked the appeal to be allowed with costs.

Having summarised the contents of the records, the documents instituting the appeal, as well as the oral submissions made in support and in opposition of the appeal, I will discuss and resolve the grounds of appeal in the manner adopted by the parties.

To appreciate what brought about the appeal at hand, the brief background of the fact is important. Briefly, the facts are that, the suit land belonged to one Mavuno Kichenya who is the father of the appellant. According to the evidence presented by the respondent, in the year 2003, the late Mavuno Kichenya sold the land measuring 17 acres to the respondent to get the money to clear the criminal liability of his son one Hoja Mavuno who was accused to commit rape.

According to that evidence, the respondent through a sale agreement dated 25th July, 2003, exhibit D1, sold the said land in the presence of DW2 and others, and thereafter the sale and handing over was confirmed by the Village Land Council authority by the confirmation of handing over document dated 19th September, 2003. It was also his evidence that he has been using the land since then up to 2017 when this dispute started.

On the other hand, the appellant who happens to be the daughter of the deceased, Mavuno Kichenya, alleges to be appointed administrator of the Estate of the of her late father, in a bid to prove that, she tendered the document to prove her administratorship but the same were rejected for being different from those attached with the application.

In her evidence she does not dispute the facts that, the land in dispute was being used by the respondent but she said it was not sold as alleged, it was given to him for use only that is the reason after she was appointed administrator of the Estate of her late father she started to claim the land but was not given.

Having so summarised the facts of the case, in dealing with the appeal, I thus start with the first ground of appeal which raises the

complaint that, trial Chairperson erred in law and facts by pronouncing the respondent as the lawful owner of the suit land without any admissible evidence.

It is a principle of law that he who alleges must prove, this is built on the philosophy enshrined in the provision of section 110 and 111 read together with section 3(2)(b) of the Evidence Act, requires the person who alleges to prove and the standard of proof in land cases, just like any other civil case, is on the balance of probabilities. This is also held in the case of **Magambo J. Masato & 3 others versus Ester Amos Bulaya & 3 others**, Civil Appeal No. 199 of 2016, CAT - Dsm.

Further to that, the Court of Appeal of Tanzania in the case of **Godfrey Sayi vs Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2021 (unreported) explained.

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

In addressing a similar scenario on who bears the evidential burden in Civil case, the Court of Appeal in **Anthony M. Masanga vs Penina (Mama Mgesi) and Another, Civil Appeal No. 118 of 2014** (unreported), cited

with approval the case of in **Re B [2008] UKHL 35**, where Lord Hoffman in defining the term balance of probabilities states that:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened".

In the case before the District Land and Housing Tribunal, the appellant had evidential burden to prove first that, she was the Administrator of the estate of the late Mavuno Kichenya, second, that the land in dispute is part of the estate of late Mavuino Kichenya.

In the first limb she attempted to tender the documents proving that she was administrator of the estate of the decease, the same were rejected on ground that the documents sought to be admitted were different with those annexed to the application. One of her complaint is

that, the documents were unjustifiably rejected by the trial tribunal. In a bid to prove that, she insisted this court to receive the said documents at the appellate stage for comparison purpose. For that reason, I received the said documents for that same purpose as exh. ID A, 1.

At this juncture I have compared the documents, surely those tendered and rejected were materially different from the ones which were annexed to the application, and you cannot say the documents sought to be tendered were original copies of the photocopies which were annexed to the application as they differ in form and contents. Secondly the copy of judgment sought to be tendered as exhibit was not even attached to the application, with a notice of relying on it as additional document, it could not be admitted as such.

That said, I find that, the two documents were correctly rejected by the trial tribunal, for the reasons given. Now having rejected the documents, the appellant is taken to have not proved that she was the administrator of the estate of the Mavuno Kichenya, and therefore could not prove that the land was part of the estate of the late Mavuno Kichenya. To the contrary the respondent who tendered exhibit D1 the sale agreement and D2 the confirmation of the handing over of the land by the

village authority, has is evidence heavier than that of the appellant. Therefore in terms of the authority in the case of **Hemed said vs Mohamed Mbilu** (1984) TLR 113 in it was which held to the effect that in civil cases, the person whose evidence is heavier that that of the other is the one who must win. That has resolved the 1st, 2nd, and 4th grounds of appeal which are found to have no merits and disallowed.

Regarding the third ground of appeal, which raises the complaint that, the trial chairperson erred in law and fact by admitting a forged sale agreement adduced by the respondent despite being objected by the appellant, to counter that, the counsel for the respondent submitted that, the trial court was correct to admit the documents because the documents were first attached to the written statement of defence in Application No. 10 of 2018 and were tendered in original form during the hearing. He submitted that the documents were not forged, as had they been forged, the appellant would have engaged the police to investigate.

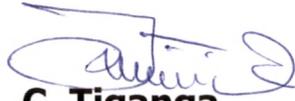
I have passed through the proceedings and found that exhibits D1 and D2 were first attached to the written statement of defence, and on 26th March 2020, they were tendered in original forms, and although they were

objected for being forged but the appellant produced no evidence or proof to show that the same were forged.

It should also be noted that, as the document were attached with the written statement of defence, taking into account that forgery is a criminal offence it suffices to say that, had the appellant been sure of the allegation of forgery, then she would have reported the matter to the proper authority for investigation and possible action. Failure to so report renders the subsequent report an afterthought. This ground therefore lacks merits and is dismissed. That said, I find this appeal devoid of merits and it dismissed with costs. It is so ordered.

DATED at **MWANZA**, this 10th day of June, 2021




J. C. Tiganga
Judge
10/06/2021

Judgment delivered in open chambers in the presence of the presence of the parties. Right of Appeal explained and fully guaranteed.


J. C. TIGANGA
JUDGE
10/06/2021