IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND APPEAL NO. 33 OF 2019

(Originating from the decision of the District Land and Housing Tribunal Manyara at Babati Application No. 16/2015)

THERESIA JOHN ..... APPELLANT

Versus

SISILIA DAWIDO ..... RESPONDENT

JUDGMENT

06th July & 1st, September 2021

MZUNA, J.:

Theresia John, the appellant herein, was sued together with Seloto Village Council and Dareda Water Supply Board by Sisilia Dawido, the respondent herein, before the District Land and Housing Tribunal of Manyara (the trial Tribunal) allegedly that they failed to heed to the compromise agreement whereby the said respondent was to be paid Tshs 2,500,000/- compensation. It was therefore sought for the said respondents to be ordered pay such compensation and give vacant possession.

The suit proceeded ex parte against Seloto Village Council and Dareda Water Supply Board who failed to file written statement of defence. The basis of the said respondent's claim is that there was already a judgment issued by the Ward

Tribunal of Dareda in Application No. 22/2011. That execution was ordered by the District Land and Housing Tribunal of Babati in Application No. 56/2012.

The background story shows, the respondent is the wife of the brother of the appellant who had separated but there is no decree for divorce. She says the disputed land was allocated to her out of the two acres she was given leaving one acre to her husband Joseph John Songai (DW3).

On the other hand, the appellant says the alleged suit land is the clan land which was owned by her late mother Josephine. Theresia, the appellant, was appointed as the administrator of the estate.

The tribunal drafted four issues namely:- 1. Whether the applicant is a lawful owner of the suit land. 2. Whether the 1st respondent acquired the applicant's land without payment of compensation. 3. Whether the applicant is entitled to compensation from the 1st respondent. 4. Reliefs

The trial Tribunal adjudged in favour of the respondent for the reasons that she was the winner right from Dareda Ward tribunal case No. 22 of 2011 and then Misc Application No. 92 of 2013 before the same tribunal for execution. The trial Tribunal overruled the raised a preliminary objection that the fresh suit was unmaintainable for failure to serve 30 days notice to the Local Government in terms of Section 190 of the Local Government (District Authorities) Act, Act No. 7

of 1982. The respondent was awarded compensation and damages. The appellant and her agents were restrained from interfering the respondent's suit land.

The Appellant being aggrieved by the decision of the District Land and Housing Tribunal for Manyara preferred this appeal on the following grounds:

1) *That the trial chairman erred in fact and in law to deliver judgment which does not finalise the dispute between the parties.*
2) *That the trial chairman erred in law and in fact to declare the respondent as the lawful owner in the absence of substantive evidence to that effect.*
3) *That the trial chairman failed to analyse and evaluate the evidence on record thereby reached unjust decision.*
4) *That the trial chairman erred in law and in fact for failing to consider opinion of the tribunal assessors hence delivered illegal judgment.*

During hearing of the appeal which proceeded verbally, the appellant was represented by Mr. Koisenge, learned advocate while the respondent was unrepresented. Mr. Koisenge abandoned the fourth ground of appeal. The second and third grounds of appeal were consolidated together, while the first ground was argued separately.

Mr. Koisenge submitted in line with the first ground of appeal that, they challenge the judgment of the trial tribunal as it did not finalise the dispute between the parties.

In line of that he argued that, the respondent claims to obtain the disputed piece of land from her mother-in-law but did not claim that it was a matrimonial

property or the land was given to the respondent only as a custodian who had no right to sell, and since the said mother in law passed away in 2011, the said land reverted back to the administrator of estate that being the appellant.

That, the tribunal declared the respondent as the lawful owner while the evidence shows that the respondent was the custodian of the disputed land together with her husband (DW3) and the real owner was Josephina John thus the decision was unfair.

Submitting on the 2nd and 3rd ground of appeal MR. Koisenge stated that, there was no evaluation of evidence in the trial tribunal as DW3, DW2 and AW2 testified that the disputed land belongs to Josephina John and the respondent in her evidence stated land belonged to her mother-in-law and did not mention the witnesses who were present when the land was given to her and the time when she was given the said land was not even mentioned.

Mr. Koisenge further stated that, the respondent evidence (AW1) admitted to have dispute of land after her husband attempted to sell the land without mentioning the buyer or purchase price and they separated from 1998 and came back to claim the land on 2011 after the death of her mother in law.

It was further stated that almost over 15 years had lapsed, when the respondent came to claim the land. From AW2 evidence it is clear that the

respondent was a mere custodian and even the clan meeting resolved that nobody has to sell the land thus the land still belongs to Josephina John. Mr. Koisenge prayed before this court that the appeal be allowed with costs.

Contesting this appeal, the respondent replied that the dispute was against Seloto Village but the appellant was joined as the owner. She stated that the farm was allocated to her and her husband and that they have been using the said farm up to year 2010.

That, after the death of her mother in law, the family wanted to grab the farm away from her husband since he did not take care of his mother. Then in year 2011, her husband sold the house and she sued him and won and the farm was placed on her as a care taker for her family and she used the land till dispute arose in year 2012. The respondent insisted that the land belonged to her late husband and therefore this appeal be dismissed with costs.

In a brief rejoinder Mr Koisenge implored this court to disregard the respondents' submission as it did not rely on evidence on record of the DLHT. He insisted that respondent was a custodian and was not allocated it.

Having considered the submissions made by the parties for and against the current appeal, this court will now turn to discuss and answer to the grounds No. 1-3 generally.

The main issue is whether the trial tribunal was right to find in favour of the respondent based on the nature of the case and available evidence?

Looking at the case as a whole, the said Application No. 16 of 2015 never indicated that it arose from Dareda Ward tribunal case No. 22 of 2011 and then Misc Application No. 92 of 2013. If the respondent won, then it was expected that she executes the decision instead of reinstituting another case.

If as the respondent says the farm was allocated to her and her husband and that they have been using the said farm up to year 2010, when did the other respondents trespass it such that even a house could be built thereon but never took action? In her evidence, she says she decided to move away after her husband used to beat her. The evidence shows, the suit land is a clan land of the husband's clan including the present appellant. The respondent stayed with her husband for two years before moving away. Under normal circumstance, she ought to have said if there was divorce and whether the suit plot fell in the matrimonial assets.

If as she says her husband passed away, does it fall in the deceased's estate? I tend to agree that the respondent is a mere care taker for her family land. She has no right to claim it without consent of other family members.

Mr. Koisenge was right to say that the respondent was only a care taker to that land. It was not subject to sell unless there was a blessing of the clan. After

the death of the mother in law and of course the husband of the respondent, land reverted back to the clan. Unless one has probate letters appointing her or him, the suit cannot be maintainable under the pretext that she won in the Dareda Ward tribunal. I took time to read the record. The alleged Ward Tribunal case concerned about 65 foot steps x 69 foot steps. In the present application, PW1 Sesilia Dawido, the respondent, claimed 12 paces x 18 paces and said should be compensated Tshs 2.5 million. This is opposed to the evidence of PW2 Rubanus Thomas Slaa, who said that in 2010 after the said Sesilia had separated with Joseph in 1998, she was given two acres while Joseph was given one acre. Proof of such allocation is doubtful though the respondent says it is different not the one in dispute.

Another question, does the suit land fall within the two acres or 65X 69 footsteps or 12 x 18 paces? The claim is verge. The trial tribunal never resolved such issues. It is therefore correct to say, as well submitted by Mr. Koisenge the learned counsel that the impugned judgment of the Trial tribunal, does not finalise the dispute between the parties. It is verge in its context.

I turn to the appellant's evidence. DW2 Emmanuel Gasper Safari stated that the appellant was appointed as an administratrix of the estate of Josephina Joseph and the land belongs to her. DW3 Joseph John Songai, also stated that the land belonged to his mother who allocated the said land to Theresia John and Maltha

and that Theresia John was appointed as the administrator. Such evidence cannot also grant ownership to the appellant.

It was held in the case of **Geita Gold Mine Ltd & Another v Ignas Athanas,** Civil Appeal No. 227/2017, CAT at Mwanza (unreported) quoting with approval, the case of **Anthony M. Masanga versus Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (unreported) it that:

> *"Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law Evidence Act, Cap. 6 of the Revised Edition, 2002."*

The respondent never proved her claim to the required standard. Even the appellant just alleged to be the administrator but did not prove the same to be hers. The trial tribunal failed to analyse the evidence especially whether the suit plot was a different one from the one which had gone up to execution? If it was the same, could it have been reinstituted by the winning party?

For that reason, I direct that any party who thinks has the right over the suit land should reinstitute the case in the appropriate tribunal before another Chairperson instead of misleading court on the pretext that the suit subject for appeal is the same as the one which was decided in the Ward tribunal. In the

mean time, the status of the parties should remain as before the institution of the case subject for this appeal.

Appeal partly allowed. Each party to bear its own costs.

M. G. MZUNA,

JUDGE.

01/10/2021