

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MTWARA

LAND APPEAL NO. 14 OF 2022

(Arising from Land Application No. 17 of 2021 at the DLHT for Lindi at Lindi)

SOMOE NANGOMWA HAMISI..... APPELLANT

VERSUS

MAULIDI MKULUMA.....RESPONDENT

JUDGEMENT

Date of last Order: 16.02.2023

Date of Judgment: 22.03.2023

Ebrahim, J.

The herein appellant filed the instant appeal challenging the decision of the District Land and Housing Tribunal for Lindi at Lindi (the DLHT) delivered on 29.07.2022 in Application No. 17 of 2021.

Before the District Land and Housing Tribunal the appellant sued the respondent for illegal invasion and trespass into her land that she was bequeathed by the late Hadija Abdallah Makanjila on natural love and affection through a deed of gift dated 23.12.2010. The appellant said she has been using the said land since then until year 2015 when she travelled to Mombasa Kenya for business purposes

and abandoned the said land. However, between year 2016 to 2021, the respondent herein invaded into her suit land and developed the same claiming that it is his property. She thus prayed for the trial Tribunal to declare her as a rightful owner of the suit land and order the respondent to demolish the structure therein and deliver the same to the appellant.

Responding to the claim by the appellant, the respondent in his written statement of defence profusely disputed the claim by the appellant and contended that he legally purchased the disputed land way back on 01.12.2015 from one Hadija Abdallah Makanjila. Otherwise, he put the appellant to strict proof thereof.

When the case was called for hearing, the appellant's side had three witnesses and the respondent's side four witnesses.

After hearing and considering the evidence from both sides and the exhibits tendered, the trial chairman found for the respondent on the basis that there is proof that the late Hadija Abdallah Makanjila disposed of her property before she met her death. Thus, the Will bequeathing the suit land to the appellant halted to exist.

The trial Chairman also raised a concern on how the said Will was been handled that the same was in the custody of the bequeathed.

The decision of the trial Tribunal did not amuse the appellant. She thus preferred the instant appeal raising three grounds of appeal which can mainly be condensed to the complaint that the trial Chairman did not properly evaluate the appellants evidence and that the respondent had no legal documents to prove ownership of land.

When the case was called for hearing, the appellant appeared in person unrepresented; and the respondent had the representation of advocate Rainery Songed.

Submitting in support of the appeal, the appellant firstly adopted her grounds of appeal. She then added that the trial chairman did not properly consider the evidence adduced by her witnesses and herself. She further pointed out that DW4 adduced a contradictory testimony comparing with other witnesses for the respondent. She also pointed out that the sale agreement had no signature of the buyer.

In reply, advocate Songea, told the court that the trial chairman properly evaluated the evidence presented before him. He responded further that the gist of the matter is whether the Will bequeathing the appellant was still operational after the deceased sold her property before she passed on. He told the court that since the Will becomes operational after the death of the deceased; and that since Hadija Abdallah Mwakanjila had a right to dispose of her property before meeting her death of which she did, the will dated 23.12.2010 had no effect following the fact that the late Hadija sold her land on 01.12.2015. He invited me to the case of **Hemedi Saidi Vs Mohamed Mbilu** [1984] TLR 213 on the position of the law that a party with the heavy evidence wins. He asked the court to uphold the decision of the trial Tribunal because the evidence of the respondent was heavier than that of the appellant.

Responding on the issue of signature, he said the same ought to have been objected during the trial as it requires investigation. As for the contradiction, counsel for the respondent said the same is baseless because there is none. He prayed for the appeal to be dismissed with costs.

In brief rejoinder, the appellant commented that the purchase of the land was witnessed by the same magistrate who attested the Will.

I have dispassionately followed the submissions by both parties' vis à vis the presented grounds of appeal and exhibits tendered therein. In essence, the bone of contention is whether the will continued to be operational following the disposal of the said land by the late Hadija Abdallah Mwakanjila before meeting her death.

I shall discuss the grounds of appeal generally and shall be guided by the cardinal principle of the law that the burden of proof in a civil case lies on "he who alleges" and the standard of proof is on the balance of probability - see the case of **Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported) and **Sections 110 and 111 of the law of Evidence Act, Cap. R.E. 2022.**

Moreover, I am also mindful of the position that when parties are at squabble on the evaluation of evidence, the first appellate court is duty bound to re-appraise the evidence of the trial tribunal and if merited come to its own findings of fact.

I am inspired by the position stated in the case of **Shah Vs Aguto** (1970) 1 EA 263 citing with authority the case of **Peter Vs Sunday Post** (1958) EA 424 where it was held at page 492 that:

*"It is a strong for an appellate Court to differ from the finding on a question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed jurisdiction to review the evidence in **order to determine whether the conclusion originally reached upon that evidence on records and find out whether the appellant's defence can stand or otherwise**". [Emphasis added].*

Similar position has been illustrated by the Court of Appeal of Tanzania in the cases of **Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017; and **Jamal A. Tamim Vs Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (both unreported) to name but a few.

Conversely, as the main ground of appeal challenges the evaluation and consideration of evidence, I find it apt to begin by re-assessing the evidence and in so doing, I consider it crucial to give a summary of the evidence adduced by the parties.

In a bid to discharge her legal burden of proof, the appellant testifying as **PW1** told the trial Tribunal that she was bequeathed the disputed land by her mother on 20.10. 2010. However, she went away leaving her mother behind who passed on in 2016. It was

when she came back that she found the disputed land has been sold but she did not take any action and went back to Mombasa. She came back year 2020 and that was when she filed the case. She tendered in court "Hati ya Wosia" which was admitted as exhibit P1. Responding to cross examination questions, PW1 said that the respondent purchased the house in 2015 but her mother passed on year 2016.

Arafa Abdallah Juma was the appellant's second witness who testified as **PW2**. She told the court that the appellant was not the late Hadija Abdallah's biological daughter. She said the appellant left and when she came back the late Hadija bequeathed her the land. On 23.12.2010, they went to court to prepare the Will. She said at a certain given time, the deceased moved from her place and went to leave at another area but did not know why she left. Responding to cross examination, she said the suit land was bought by the deceased. It was not a matrimonial asset because she purchased after the divorce. **PW3, Hassani Mohamed Chikwambe** said he witnessed the late Hadija Abdallah Makanjiro signing a Will bequeathing the suit land to the appellant on 23.12.2010.

Responding to cross examination questions, PW3 said the Will was handed to the appellant.

On his part, the respondent testified as DW1. He told the trial Tribunal that he purchased the suit land from the owner the late Hadija Abdallah Makanjila in 2015. He testified that he instructed his friend one Abdallah Kitalu to purchase the suit land for him. He tendered a letter dated 29.11.2015 allowing Abdallah Kitalu to purchase the land on his behalf which was admitted as **exhibit D-1**. He further tendered the sale agreement of 01.12.2015 for the purchase of the suit premises which was admitted as **exhibit D- 2**. He said it has been six years since he built on the suit land. **Abdallah Ally Kitalu** testified as **DW2**. He testified that he purchased the disputed land on behalf of the respondent from the late Hadija Abdallah Makanjila and the people present were Hashimu Makiti and Hemedi Leba who was his witness. **DW3, Hemed Matola Hemed** said he was the witness of the purchaser and that he was present at home when the money was paid and also in court where the sale agreement was attested. He mentioned Mzee Chai being the person who supervised the sale on behalf of the seller. The fourth defence witness was **Chai Bakari (DW4)**.

He testified that the late Hadija Makanjira used to talk to him about her problems. He was present when the late Hadija sold her land to the respondent through Abdallah Kitalu. He said the money was paid at home and later they went to court to obtain a sale agreement. He testified further that the appellant was not present when the family meeting convened to talk about the estate of the late Hadija.

As alluded earlier, the legal burden of proof is on the person who seeks the claim of right on his/her favour.

Indisputably, is the fact that the disputed land once belonged to the late Hadija Abdallah Makanjira. While the appellant claim that she was bequeathed the land by the late Hadija in 2010; the respondent says that he purchased the same from the late Hadija in 2015. The appellant agrees that her mother passed on while she was away and she has not been living with her for a while. She admitted also that when she went back for a short period of time, though she did not say when, her mother was already dead and the suit land has been sold. She did not do anything until 2020. She tendered the Will (**exhibit P1**).

Incidentally, much as the Will leaves a lot to be desired including the annotations therein which is an issue for another day, exhibit P1 clearly states at **item 2(b)** that *"Kwamba baada ya kufa kwangu mali hiyo banda Arithishwe mwanangu mtoto wa mume wangu aitwae Somoe Nangomwa Hamisi"*

Both witnesses say that the late Hadija bequeathed the suit land to the appellant. PW2 said the late Hadija said she left the inheritance to the appellant. However, PW2 said, that Will was concluded after the appellant came back from where she had gone before and then left again. PW2 did not mention the year. To the contrary, according to the testimony of PW1, by the time she left to Mombasa her mother had already left her the said suit land and when she came back in 2016 her mother was already dead. It was when she found out that the suit land had been sold. More-so, PW2 simply said the appellant and her late mother went to court and when they came back the appellant told her that she has been bequeathed the land and she so believed. As for PW3, he was the assessor of the court when the late Hadija bequeathed the land to the appellant.

On the other hand, there is **exhibit D1** and **D2** showing that the respondent asked DW2 to buy the land for him. The testimonies of all four witnesses i.e., DW1 to DW4 reveal that before meeting her death, the late Hadija decided to dispose of her property that is said to have been bequeathed to the appellant.

Verily, the law pertaining to the Will is clear that unless otherwise stated a Will starts operating from the date of the death of the deceased. More-over a Will becomes effective after being probated. Probating means filing an application in court to seek a grant of powers to execute the Will. Furthermore, the creator of a Will has the power to amend, write a new Will, give away the property to another person as a gift or even dispose of. That is the reason that it is called "Last Will and Testament" meaning it must be his/her last Will before meeting his/her death.

Fitting the above circumstances to our instant case, there is ample evidence that the late Hadija sold her land when she was alive of which she had the right to do. It follows therefore that the said suit land could no more be bequeathed to the appellant as she claims as it was not the property of the late Hadija anymore.

Coming to the issue of signature, there is ample evidence that DW2 purchased the land on behalf of the respondent and it is clearly indicated at the signature part where it is written "ABDALLAH KITALU KNY" (Kwa niaba Ya).

As for the fact that it was the same magistrate who attested the Will and the sale agreement, the law does not forbid the person who attested the Will not to attest the sale agreement if the creator decides to sale the same.

The contradictions of amount of money by DW4 does not go to the root of the matter to defy the fact that indeed there is ample evidence that the late Hadija sold her property to DW1 before she died.

From the above therefore, it is clear that the appellant failed to prove ownership as the suit land was disposed of by the owner before it could legally pass over to her. Certainly, the respondent managed to prove that he purchased the disputed suit land from the owner. From the spirit of the cited case of **Hemedi Saidi V Mohamed Mbilu (supra)**, the respondent's case was heavier than that of the appellant. Thus, he wins.

At the end results, I dismiss the appeal in its entirety with costs.

Ordered accordingly.




R.A. Ebrahim
JUDGE

Mtwara

21.03.2023