THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY)

AT MUSOMA

Misc. LAND APPEAL No. 28 OF 2022

(Arising from the District Land and Housing Tribunal for Mara at Musoma in Land Appeal No. 118 of 2021; originating from Kenyamonta Ward Tribunal (Serengeti) in Land Dispute No. 63 of 2021)

MAGANZO MACHUMBE ..... **APPELLANT**

Versus

MOHERE MORATE ..... **RESPONDENT**

JUDGMENT

09.08.2023 & 10.08.2023
Mtulya, J.:

In the present appeal, the record displays that both parties and their witnesses are in agreement that **Mr. Machumbe Kitamonka** (the deceased) had several wives and lands located at **Majimoto Village in Kenyamonta Ward of Serengeti District, Mara Region**. The record shows further that the deceased before his demise, sometimes in 1990s, he entered into matrimonial disputes with his wives. It is unfortunate that the record is silent on the words *several wives*, without any specific number of the said several wives.

The record shows further that sometimes in early 2000s, the matrimonial disputes were at their peak elevation stages which had caused the deceased to turn hostile to his wives and started to

persecute and force them out of his lands. In order to secure their lives, the wives escaped the hostility and persecution of the deceased. The record is also silent on where the wives found their safe places. However, the record shows that the deceased had faced difficult situations which had forced him to sale some of his lands, including the land in the instant appeal.

In the instant appeal, the record shows further that in early 2000s the deceased had sold one of his pieces of land to **Mr. Nyamako Maitari**, who had also sold the same to **Mr. Mohere Morate** (the respondent) in 2004. The record shows further that the deceased's wives were well aware of the sale, but remained silent on the initial land transaction between the deceased and **Mr. Nyamako Maitari** and later, the second transaction between **Mr. Nyamako Maitari** and the respondent. It is unfortunate, the record is silent as to when the deceased had expired, but it was certain and settled that the deceased had expired.

The record shows that sometimes in 2018, one of his wives, **Maganzo Machumbe** (the appellant), who is adjacent to the respondent's land, had raised up and started to uproot the sisal trees boundaries which were demarcating their lands. The dual parties, the appellant and respondents took initial stages of settlement at the family and village level without any reconciliation

hence the respondent on 12th January 2021 had approached **Kenyamonta Ward Tribunal of Serengeti District** (the ward tribunal) and preferred **Land Dispute No. 63 of 2021** (the dispute) complaining that:

> *Mimi Mohere Morata wa Majimoto ninalalamikia kiwanja changu cha makazi ambacho nimekimiliki tangu mwaka 2004 mpaka mwaka 2018, ndipo kimevamiwa na ndugu Maganzo Machumbe wa Mesaga.*

In order to fairly resolve the dispute, the ward tribunal on 3rd June 2021 had invited the parties and their witnesses to register relevant materials for and against the dispute. The ward tribunal further visited *locus in quo* on 7th May 2021 to meet neighbors surrounding the dispute land to have the reality on ground. In brief, the appellant stated before the ward tribunal that he bought the land from **Mr. Nyamako Maitari** in 2004 and in September 2018, the appellant had uprooted the sisal trees beacons pegged on the land and trespassed onto it without consent of the respondent.

The statement of the respondent was supported by the respondent's witness, **Mr. Masese Mohere**, appellant's witnesses **Mr. Vidan Charles** and **Mr. Bhoke Machango**. According to Mr. Masese Mohere: *Mimi nafahamu kuwa Mzee Mohere alinunua kiwanja hicho kwa Mzee Nyamako Maitari...baada kuwa amenunua hilo eneo, nikawa nalitumia kulima*. The appellant's witness Vidan Charles on

the other hand stated that: *Katika mgogoro huu ni nyumba inang'ang'aniwa na hiyo nyumba iliuzwa na mwenye nyumba ambaye ni Mzee Machumbe Kitamoka ambaye ni mme wa mdaiwa Maganzo Machumbe*. Mr. Bhoke Machango on his part stated that: *Mzee Machumbe alijenga nyumba. Mara baada ya kujenga, alianza kuwafanyia wake zako fujo na walikimbia kutoka nyumbani...ndipo alipopata nafasi ya kuuza*. The appellant on her evidence had stated that:

> *Mimi ninakumbuka hilo eneo tulijitwalia na mme wangu Machumbe Kitamoka na katika eneo hilo tulijenga nyumba ya kudumu na baadae kunifanyia fujo ya kunikata na panga, ndipo nilipokimbia kutoka nyumbani na baadae nilirudi na kukuta tangazo la kutaka kuuza nyumba...wakati nimerudi niliambiwa kuwa nyumba imeuzwa ndipo nilipokimbilia kwa ndugu na jamaa lakini msaada sikupewa. Niliambiwa nyumba imenunuliwa na Mzee Nyamanka Maitari...*

The appellant in her evidence had remained mute as to when he noticed the sale from the deceased to **Mzee Nyamanka Maitari** and steps taken. However, upon inquiry by one of the ward tribunal's members on why she uprooted the sisal trees boundaries and which steps she took since she noticed the land sale agreement to 2018, the appellant had replied that she wanted further open

space and did not take any steps, respectively. The tribunal after receiving all necessary materials, on 14th July 2021, it resolved in favor of the respondent and reasoned that:

> *...baada ya kuwa wajumbe wamesikiliza maelezo ya pande zote mbili na pia ushahidi wa pande zote mbili, pamoja maelezo ya majirani wa eneo la mgogoro husika, Wajumbe wa Baraza wamebaini kuwa eneo la mgogoro ni haki ya Mdai Mohere...[Baraza] limeridhika na maelezo ya Mdai na Mashahidi wake.*

However, before delivery of the decision, the ward tribunal members had visited the *locus in quo* on 7th May 2021 and consulted a total of twenty-two (22) neighbors surrounding the land in dispute and drew a sketch map of the land in dispute with its associated boundaries and size. The record of *locus in quo* shows that there is no dispute of the land sale from the deceased to Mzee Nyamako Maitari and the transaction from Mzee Nyamako Maitari to the respondent, and a large percentage of the neighbors stated that the disputed land belongs to the respondent.

Similarly, before decision was rendered down, each ward tribunal member was consulted and their record shows that all were

in favor of the respondent. Their opinions reflect the following facts and reasons, in brief:

1. Mokiri: *eneo ni mdai kwa sababu alinunua na mdaiwa Maganzo alikuwepo. Mdai amekuwepo kwenye eneo kwa muda mrefu*;
2. Machota: *nimebaini kuwa haki ya Mdai. Mdai alinunua*;
3. Nyantinto: *ninatoa haki kwa mdai. Eneo ni la mdai*; and
4. Chacha: *haki ni ya mdaia kwa sababu amemiliki Zaidi ya miaka kumi (10) mdaiwa Maganzo akiwepo bila kutoa pingamizi kuhusu kiwanja hichi.*
5. Masaka: nimebaini kuwa eneo ni haki ya mdai.

The thinking of the members, the ward tribunal and neighbors to the disputed land aggrieved the appellant hence approached the **District Land and Housing Tribunal for Mara at Musoma** (the district tribunal) in **Land Appeal No. 118 of 2021** (the land appeal). The district tribunal after hearing of the land appeal, it dismissed the same and had produced three (3) reasons in favor of the judgment.

In brief, at page 5 of the decision, the district tribunal, had reasoned namely: first, *mrufaniwa Mohere Morate amekaa kwenye eneo hilo la mgogoro kwa muda mrefu tangu mwaka 2004...ni wazi kwamba mrufani Maganzo Machumbe aliifumbia macho haki yake (kama ilikuwepo) kwa muda mrefu*; second, *wajumbe wote watano*

wa Braza la Kata waliona kwamba Mjibu Rufaa Mohere Morate ana haki kwenye eneo hilo la mgogoro; and finally, *hakuna sheria au kanuni yeyote iliyovunjwa na Baraza la Kata wakati wa kutembelea eneo lenye mgogogoro*.

This thinking of the district tribunal did not convince the appellant hence approached this court and filed **Misc. Land Appeal No. 28 of 2022** with five (5) reasons of appeal, which in brief show that: first, the seller of the land was not joined as necessary party; second, no proper procedure in visiting the *locus in quo*; third, no analysis of evidence; fourth, the dispute arose in 2018 and not 2004; fifth, the district tribunal had no votes in decision making; and finally, the disputed land was matrimonial property.

Yesterday afternoon the appeal was scheduled for hearing and both parties appeared without legal representation and being lay persons had very brief submissions. According to the appellant, the respondent at the tribunal did not sue the seller of the disputed land as necessary party; the trial tribunal visited the *locus in quo* twice, but did not consider appellant's evidence; the district tribunal had declined to analyse evidence registered in the ward tribunal; the appellant was living in the disputed land since 1998; the ward tribunal did not allow members to vote; and that after expiry of the deceased the appellant was supposed to inherit the disputed land.

In replying the submission, the respondent submitted that he had no interest with the seller but the trespasser of his land; the ward tribunal visited the scene of the land and neighbours were consulted and gave their opinion on sisal boundaries; he could not tell on evaluation of evidence as that is not his role; and finally, the appellant has her own land adjacent to the respondent, but she needs more open space for reasons known to her.

The present appeal centers on two issues, first time limitation to take steps in disputing land matters and second, totality of the evidence on record. Reading the record from what I have indicated above, it is obvious that the respondent had better evidence at the ward tribunal where it was vivid that the disputed land was sold to the respondent by **Mr. Nyamako Maitari**. The established practice is that the one with better evidence wins the case. This court has already said in the precedent of **Hemedi Saidi v. Mohamed Mbilu** [1984] TLR 113, that parties to a suit cannot tie their evidence, but the one whose weight of evidence is heavier than that of the other, is the one who must win.

In the present appeal likewise, the respondent stated in the ward tribunal on how he had acquired the land in 2004 and he found support of his witness, **Mr. Masese Mohere**, appellant's witnesses, and neighbors surrounding the disputed land. It is obvious that the

respondent had proved its case on a balance of probabilities as required by section 3 (2) (b) of **the Evidence Act** [Cap. 6 R.E. 2019] and a large dockets of decisions on the subject resolved by the Court of Appeal (see: **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002; **Anthony M. Masanga v. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014; **Paulina Samson Ndawavya v. Theresia Madaha**, Civil Appeal No. 45 of 2017; and **Mary Agnes Mpelumbe v. Shekha Nasser Hamud**, Civil Appeal No. 136 of 2021.

In the precedent of **Mary Agnes Mpelumbe v. Shekha Nasser Hamud** (supra), the Court stated that:

> *standard of proof in a civil case is on a preponderance of probabilities, meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved.*

In the present case, there is an indication of an innocent buyer, the respondent, buying an undisputed land from **Mr. Nyamako Maitari**. The law in precedent is certain and settled those innocent buyers, like the respondent in the present case, must be left to peacefully enjoy lands, which they have lawfully purchased (see: **I.S. Mwanawina & John A. Chale v. Chiku Mapunda**, Land Appeal No. 53 of 2018).

On the other hand, the appellant had admitted in the ward tribunal during the hearing of the dispute that the deceased had sold the disputed land to **Mr. Nyamako Maitari**. Although the appellant had declined to cite when she came aware of the sale, facts on the record show that **Mr. Nyamako Maitari** had bought the land before 2004. That means the appellant was aware of the sale before the respondent had bought the same in 2004 from **Mr. Nyamako Maitari**. It is certain that the appellant, having known the change of title in land, had decided to remain mute without any legal action against his husband or **Mr. Nyamako Maitari**.

In short, the appellant did not take action to dispute the sale of the disputed land from sometimes in 2004 up to 2018. That is more than required time period to recover lands in disputes as per requirement of section 3 (1) and Item 22 Part I of the schedule to the **Law of Limitation Act [Cap. 89 R.E. 2019]** (the Law of Limitation). The law has received interpretation of the court in a bundle of precedents (see: **Bhoke Kitang'ita v. Makuru Mahemba**, Civil Appeal No. 222 of 2017; **Jackson Reuben Maro v. Hubert Sebastian**, Civil Appeal No. 84 of 2004; **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016; **Shabani Nassoro v. Rajabu Simba** (1967) HCD; **Mbira v. Gachuhi** [2002] E.A. 137; **Hughes v.**

Griffin [1969] 1 All ER 460; and **Moses v. Lovegrove** [1952] 2 QB 533.

I am aware that the appellant has produced six (6) reasons of appeal in this court to fault decisions of the district and ward tribunals. I will briefly reply them. First, under the circumstances of the present case, there was no necessity to join the seller for the reason that there was no dispute that the deceased and **Mr. Nyamako Maitari** had land contractual relationship, and that **Mr. Nyamako Maitari** and the respondent had land agreement regarding the same land.

The law in Order I Rule 10 (2) of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code), shows that a person may be joined when he is necessary to enable the court to adjudicate and settle all the questions involved in the dispute. The law was appreciated in the decisions of the Court of Appeal in **Musa Chande Jape v. Moza Mohamed Salim**, Civil Appeal No. 141 of 2018, **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017, and **George Ndege Gwandu & 19 Others v. Kastuli Safari Tekko & Another**, Civil Appeal No. 225 of 2018.

I am aware that the rule has an exception. The law in Order I Rule 3 of the Code provides for defendants who may not be left out in the institution of a suit. The rule has received the support of our

superior court in a bundle of precedents (see: **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another** (supra); **Musa Chande Jape v. Moza Mohamed Salim** (supra); **Farida Mbaraka & Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006; **Departed Asian Property Custodian Board v. Jaffer Brothers Ltd** [1999] E.A 55 (SCU); **Tang Gas Distribution Limited v. Mohamed Salim Said & 2 others**, Civil Application for Revision No. 68 of 2011; **Stanslaus Kalokola v. Tanzania Building Agency & Mwanza City Council**, Civil Appeal No. 45 of 2018; and **Ami Mpungwe v. Abas Sykes**, Civil Appeal No. 67 of 2000

However, in the present case, as I have indicated, there was no dispute on the sale of the disputed land from the deceased to **Mr. Nyamako Maitari** and from **Mr. Nyamako Maitari** to the respondent. I think, in my considered opinion, in the present appeal there was no any possibility of another suit to be filed to reply questions of law or fact related to the disputed land.

I have glanced the record of both tribunals below, and found that the members in the tribunals were within the law. The ward tribunal members gave their opinion on 14th July 2021, before delivery of the decision. Similarly, assessors in the district tribunal were involved and produced reasons on 8th & 10th December 2021 and were reflected at page 4 of the decision of the district tribunal.

On the same level, the record shows that the ward tribunal visited the *locus in quo* on 7th May 2021, consulted neighbors and recorded proceedings attached with a sketch map of the scene of the disputed land. It cannot be said there are faults in the visitation.

I have also perused the decisions of both tribunals below and found that the defence case was considered. The second page of the typed decision of the ward tribunal and fourth page of the judgment of the district tribunal display it all. However, the dual tribunals found nothing merited the case. Similarly, I heard parties in this appeal, and it was vivid that the respondent has good case against the appellant.

On my part, having carefully considered the complaints of the appellant, and examined the record before me, I wish to reiterate the settled principle which state that the second appellate court should not normally interfere with the concurrent findings of the two courts below except for compelling reasons (see: **Juma Kasema @ Nhumbu v. Republic**, Criminal Appeal No. 550 of 2016; **Salum Mhando v. Republic** [1993] TLR 170; **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; and **Amratilal D.M t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31).

The rationale behind is that the trial court having seen the witness is better placed to assess their demeanor and credibility, whereas the second appellate court assess the same on record. Therefore, the court is entitled to interfere with the concurrent findings of the facts made by lower courts if there has been misapprehension of the nature and quality of evidence and other recognized factors occasioning miscarriage of justice (see: **Juma Kasema @ Nhumbu v. Republic** (supra) and **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (supra).

In the present appeal, after having considered all necessary materials on record, I am satisfied that the dual tribunals below directed themselves on the same thinking and thus arrived at the right conclusion. I shall not reverse the decisions.

For the foregoing reasons, I find that this appeal has been brought to this court without sufficient reasons to protest the two lower tribunals' decisions. The same lacks merit and hereby dismissed without costs. I do so due to the nature of the dispute and parties.

It is so ordered.

Right of appeal explained to the parties.

F. H. Mtulya

Judge

10.08.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of the appellant, **Maganzo Machumbe**, and in the presence of the respondent, **Mohere Morate**.

F. H. Mtulya

Judge

10.08.2023