IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 9 OF 2022

[*From Maswa District Land and Housing Tribunal Application No. 38 of 2019*]

JULIUS NYADU (*Administrator of the estate of the late Nyadu Susa*)**.....APPELLANT**

Versus

TOBONGO KWILASA.....RESPONDENT

JUDGEMENT

Oct. 26th & 31st, 2023

Morris, J

The appellant above stands dissatisfied with the judgement of the District Land and Housing Tribunal for Maswa (*the DLHT*) in land application No. 38 of 2019. He has now preferred this appeal. He fronts two grounds whose gist is that the trial tribunal erred in law and fact by holding that the suit land belongs to the respondent's mother (late Kwangu Susa) and not the appellant's father (late Nyadu Susa).

In brief, the parties' dispute is over a farm measuring at 70 acres situates at Hinduki Village within Maswa District (*the suit land*). The appellant alleges that the suit land belongs to the estates of the late Nyadu Susa whose estates he administers. The said Nyadu Susa died on 2014. The respondent, however, claims the land to belong to him. That he got it from his mother, late Kwangu Susa, who died on 1983. The DLHT held in favor of the respondent herein; hence, this appeal.

When the matter came for hearing, the appellant was represented by advocate Paul Kaunda. However, the respondent appeared in person, unrepresented. It was the submissions of Mr. Kaunda that, the DLHT erred to decide that the suitland belongs to Kwangu Susa. Citing page 18 of proceedings, he argued that DW1 testified that he was the administrator of Nyadu Susa's estate. Further, DW1 gave an account of how the deceased got the land in dispute before his demise. So, to the counsel, the trial tribunal was supposed to hold that the subject land now forms part of estate of the late Nyadu Susa.

The appellant's advocate submitted further that the respondent did not controvert DW1's evidence above. According to him, the law provides that

when the evidence of a witness is not controverted through cross-examination; the opposite party is to be inferred as having accepted the same. Further, Mr. Kaunda argued that when the respondent herein was cross-examined (at page 29 of proceedings) he responded that the disputed land is his property; and that he got it from his mother (Kwangu Susa) who allegedly got it from her mother (Holo Jibulya – respondent's grandma) too. To the appellant, these facts were not corroborated anyhow. That is, it was not established how late Holo Jibulya acquired the land before transmitting it to Kwangu Susa and ultimately to the respondent.

Moreover, the appellant's counsel stated that the respondent tendered various documents (page 25 of proceedings) which were challenged by the appellant. That is, the appellant objected tendering of such documents because they were neither attached to the pleadings nor paid for. The DLHT sustained such objection but it later on allowed him to tender the same. In the view of the counsel, the subject documents were illegally admitted in evidence. That is, the procedure adopted by the tribunal was illegal. To him, after ruling that they were inadmissible, the DLHT was *functus officio*. Consequently, exhibits "D1", "D2" and "D3" were illegally admitted and later

relied on in the judgement. On such basis, the appellant prayed for this appeal with costs.

In reply, the respondent submitted that the appellant was supposed to administer his late father's estate which comprised of 170 acres. To him, the land in dispute never belonged to the appellant's father. He stated further that, under one occasion, the appellant's father convened a meeting to resolved the dispute between the respondent and his siblings over the said land. And the such meeting resolved that the suitland should be occupied and used by the respondent and siblings. That is, the appellant's father knew pretty well that he did not own such land.

The above position notwithstanding, the respondent argued further that following death of his father, the appellant administered his father's property (170 acres) and then proceeded to encroach the respondent's property (70 acres – the suitland). According to the respondent, the appellant intends to illegally access to and administer the land which does not belong to his later father's estate. He also added that the impugned exhibits were correctly admitted by DLHT. Therefore, the respondent prayed that this appeal should fail.

I have dispassionately considered the submissions of both parties. Indeed, this Court being the second judicial body to determine the dispute between parties; I will adopt the re-hearing approach. It is, thus, legitimate for this Court to re-appraise, re-assess and re-analyze the evidence on record for it to arrive at its own reasoned conclusions. See, for instance, ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, *Civil Appeal No. 356 of 2019; and* ***Diamond Motors Limited vs. K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

I will start with the appellant's contention that exhibits D1, D2 and D3 were improperly admitted and relied on by the DLHT. The preference herein is on the basis that the raised concern is intrinsically a point of law. It was submitted by Mr. Kaunda that after ruling that the documents were inadmissible, the trial tribunal was *functus officio* to admit the same later. For ease of comprehension, I will reproduce part of the relevant DLHT's proceedings at pages 25 and 26.

It reads;

> *"Madai ya heka (sic) sabini ni batili sasa urithi wa baba yao ni heka (sic) mia sabini na ameshazigawa ushahidi wake ninao. Na kikao alichokitumia cha ndugu ni batili alijifanya hajui heka (sic) alizozigawa hii ilikuwa danganya toto karatasi yenyewe ninayo hapa naomba niitoe kama kielelezo.*
>
> ***Ms. Neema Adv.***
>
> *Ninapinga sababu hajatupa na hakuambatanisha*
>
> ***BARAZA***
>
> *Kwa kuwa kielelezo hakikuambatanishwa awali na upande mwingine kupewa na wala hakijalipiwa ninakikataa kupokea kama kielelezo*
>
> ***Mdaiwa***
>
> *Basi naomba nikilipie na niwape*
>
> ***Baraza***
>
> *Maombi yamekubaliwa*
>
> ***Ms. Neema***
>
> *Nitaomba kupewa na ipangwe tarehe nyingine."*

Following the prayers by parties, the DLHT adjourned the matter to another date on which the advocate for the applicant-appellant was served with the subject documents. Principally, the then appellant's counsel

accordingly registered her readiness to proceed with the hearing. Consequently, the respondent tendered exhibit D1 (Primary Court judgement in Criminal case No 466 of 2006); exhibit D2 (the minutes of the meeting alleged convened by Nyadu Susa and also attended by the appellant; and exhibit D3 (judgement of the Sukuma Ward Tribunal).

To the appellant those exhibits were improperly admitted. I respectfully disassociate myself with the appellant's line of argument. My disentanglement is four-fold: **firstly**, under section 45 of ***the Land Courts Disputes Act***, Cap 216, the judgement of the DLHT should not be faulted on the basis of improper admission of evidence unless injustice is occasioned. The provision reads;

> *" No decision or order of a Ward Tribunal (sic) or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or* ***on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice****"* (bolding rendered for emphasis).

In view of the above reason, in absence of argument from the appellant that such admission occasioned injustice to him, I remain loath to fault the DLHT in that respect. See also, ***Yakobo Magoiga Gichere v Peninah Yusuph***, Civil Appeal No. 55 of 2017 (unreported);

Secondly, pursuant to regulation 10 of ***the Land Disputes Courts*** (***The District Land and Housing Tribunal***) ***Regulations***, 2003; GN 174 of 2003, DLHT is permitted to, *inter alia*, receive any document when the trial is ongoing even if the same was not annexed to the pleadings; provided such document is authentic and the other party is supplied with a copy thereof. **Thirdly**, the represented appellant did not raise objection when the respondent herein prayed to re-tender the documents whose admission was overruled by the DLHT earlier on. Further, on the other day when defence hearing continued, his advocate joined no issues with both continuation of defence hearing and tendering of exhibits by the respondent.

Fourthly, exhibits D1 and D3 being judgements of the Primary Court and Ward Tribunal respectively, are documents for which the court/tribunal may take judicial notice. Pursuant to sections 58, 59 (1) (c) and (e) and 89 (1) of ***the Evidence Act***, Cap 6 R.E.2022; the subject documents bear the

signatures of the court/tribunal officials and/or court seal. Therefore, admitting them was legit.

It was also the submissions for the counsel that, unlike the respondent who did not establish his title over the land herein; the appellant fully proved the mode through which the suit land formed part of the estates of late Nyadu Susa. Mr. Kaunda also insisted that the evidence of DW1 was unchallenged during cross examination.

I have taken time to re-evaluated the evidence on record. Without overemphasizing the principle of law hereof, civil cases must be proved on a balance of probabilities. Such holding is found in, for instance, the case of ***Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)***, Civil Appeal No. 118 of 2014 (unreported). Further, in law, whoever alleges must prove his/her contentions [***Obed Mtei v Rakia Omari*** (1989) TLR 111; and ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported)].

From his pleadings, the appellant averred that the suit land belonged to the estates of the Nyadu Susa. But the respondent, vide his Written Statement of Defence (*WSD*) asserted that, the suit land belongs to him

(delivered his title from his mother, Kwangu Susa); and that his family had been using it since even when the appellant's father was alive (paragraph 7 of WSD and page 29 of the proceedings).

Further, the appellant testified (pages 17, 18 and 19 of proceedings) that the late Nyadu Susa cleared the forest on the suit land in 1957. And that the said deceased used the land for farming and livestock keeping until his demise. He also stated that the respondent trespassed onto it effective 2018. In addition, during cross examination, the appellant stated that there was no clan meeting which sat to discuss the suit land except that his late father left a house and a 70-acre farm.

The foregoing testimony notwithstanding, the respondent's testimony (pages 23, 24, 25, 27,28,29 and 30) opposed the whole case. He stated that the dispute over the said land between him and his siblings had ensued well before the late Nyadu Susa passed on; and that the said deceased once mediated them on the basis that the land belonged to Kwangu Susa. That testimony was buttressed by exhibit D1 (Judgement of Nyalikungu Primary Court in Criminal Case No. 466 of 2006). In that case, James Nyandu, the appellant's brother sued Pastory Kwilasa, Zengo Kwilasa, Costantine Pastory

and Castory Zengo for assault arising from the land dispute over the suit land.

Further, the Sukuma Ward Tribunal's judgement (Exhibit D3) indicates that there was a land dispute between the respondent and appellant (on his father's behalf) way back in 2008. Hence, was aware of the land in dispute being contested by the respondent. Moreover, DW1 testified in support of such version of state of affair (page 24 of the proceedings).

Thorough analysis of the evidence on record, it is evident that the PW1's (the appellant's) testimony was challenged during cross examination in line with case theory and theme of the respondent as reflected in his WSD. The evidence that the dispute survived the late Nyadu Susa who convened a meeting to resolve the matter was unchallenged by the appellant's cross-examination. Exhibits D1 & D3 also prove that the two families were in protracted battles before the death of Nyadu Susa in 2014.

Furthermore, as it was correctly found by the DLHT, the appellant before the Nyalikungu Primary Court filed accounts of the estates of the late Nyadu Susa with regards to one house and 170 acre-farm at Handuki which was divided to six heirs of the deceased at the portion of 28 and ¼ acres

each (the appellant inclusive). The accounts were received by the court on 29/3/2019.

Therefore, one is justified to take judicial notice that before the matter subject of this appeal was filed at the DLHT on 2/10/2019; the appellant (as administrator of the estates of Nyadu Susu) was well aware that the suit land never belonged to the estate he was administering. That is why it was included in the accounts filed before at the Primary Court.

In addition, even if one assumes that the land herein belonged to the latter appellant's father; another critical aspect to consider would be the duration the respondent has stayed thereon in the presence of the former. On record, it was testified that the respondent's mother occupied the same even before she died in 1983. Consequently, the respondent will benefit from the doctrine of adverse possession.

In upshot, all grounds of appeal lack merit. The appeal is hereby dismissed. Bearing in mind the fact that the parties are relatives, no order as to costs is entered. It is so ordered.

The right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

November 3rd, 2023

Judgment is delivered this 3rd day of November 2023 in the presence Mr. Tobongo Kwilasa (the respondent) alone.

C.K.K. Morris

Judge

November 3rd, 2023