IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 101 OF 2016

(Arising from Maswa District Land and Housing Tribunal Land Application No 90 of 2015)

NGUSA NONI ..... APPELLANT

Versus

SAYI MADUKA .....RESPONDENT

Date of last order: 05/11/2018
Date of Judgment: 22/01/2019

JUDGMENT

KIBELLA, J.

The appellant, NGUSA NONI, was sued by one SAYI MADUKA, herein referred to as the Respondent, for a claim of land percel about 70 – 76 acres approximately valued at Tshs. 38,000,000/= at the rate of 500,000/= per acre. It was before the District Land and Housing Tribunal of Maswa at Maswa vide Application No 90 of 2015.

At the end of the trial the applicant (Respondent) was declared a winner as judgment was entered in his favour with costs.

Dissatisfied with that decision of the trial tribunal the appellant has preferred this appeal before this court.

Briefly the prosecution evidence before the trial tribunal was led by one Zilipha Sayi, PW1 who had a power of attorney from the applicant/Respondent before this court, who testified on behalf of applicant that, the respondent sent people into suit land on 15/11/2015 and planted sisal plants and decided the same amongst themselves. The applicant

acquired the suit land in 1957 by cleaning the suit land and built his residential house. In 1974 the applicant was forced to join the Ujamaa village but continued to use the same without disturbance until 2004, when the respondent started to give/allocate parts of the suit land to some other people without good cause.

That in 2005 one person claimed the suit land before Bariadi District court but failed. However, it was in 2015 when the Respondent trespassed into the suit land and arrested the grandsons and son of the applicant and sent them at Nyakabindi police post whereby they were forced to sign and divide the suit land. The respondent's customary right of occupancy was cooked and the same was issued in 2010 and at that time already the dispute had arisen. The committee of village Land Council was present during the issuance of the said customary right of occupancy and the applicant was there hence the said customary right was made in camera. Matongo is the step grandfather of the respondent and he had not owned the suit land even once.

The respondent did not see the said Matongo who passed away long time ago. Thus, PW1 prayed the application to be allowed with costs and dismiss the counter claim with costs. The above evidence was supported by the evidence of PW2, Makala Sayi, PW3, Kulwa Makoye, PW4, Mashuda Lungwaga, PW5, Kadulyu Zanzui and PW6, Robert Mayenga.

Finally, PW1, prayed to close the prosecution case in the following words:-

"M/S Zilipha:-

I pray to close the prosecution case. That is all."

The prayer by PW1 was granted and the case proceeded with defence hearing.

In his affirmed defence, Ngusa Noni, testified as DW1 and stated that, the disputed land belonged to Matongo Malandala since colonial era. The said Matongo continued using the same up to 1940 when he passed away. However, he left the same in the hands of his family who were equally named including Noni Matongo as among his children. Those family members of the late Matongo Malandala continued using the suit land as it was so directed by their late father that the same should be used by his grandsons after 8 children had passed away. Thus remained one Masunga Matongo who in 1995 also passed away where DW1 and his fellow family members continued using the Suitland.

However, they appointed Mageni Silundi and DW1 for supervising the Suit land. But, in 2008, they appointed Mageni Silundi to be the administratrix of the estate of late Matongo before the Bariadi District court. They had intended to divide the suit land amongst themselves however, Mageni's husband Sayi Maduka objected. Hence the case was instituted before the District land and Housing Tribunal at Shinyanga which denied that the suit land belonged the estate of the late Matongo Malandala. Thus the judgment of the DLHT was admitted as exh. DE 1. However, Sayi Maduka later filed case No. 57/2011 which was dismissed for non-appearance whose order was admitted and marked as exh. DE2. And for that, Ramadhani filed an application for execution of the above decision and was granted (refer exh. DE3).

Finally, DW1, stated that the suit land was the property of Matongo Malandala since long time ago to the date the matter was before the trial tribunal. Thus prayed the application to be dismissed with costs.

The above evidence was supported by the evidence by DW2 Magulya Kwena and DW3, Masanu Siludi. Later on the tribunal visited the locus in quo in the presence of both parties. The suit land was estimated to be more than 70 acres whose ¾ was cultivated several crops by the applicant who used it since 1950's to that date the matter was heard.

From the above evidence from both sides, the trial tribunal was satisfied that the applicant had proved its case, where judgment was entered in his favour and declared the legal owner of the suit land, the application was allowed with costs.

The appellant in his memorandum of appeal advanced seven (7) grounds of appeal as follows:-

1. That the learned trial chairman and his bench all erred on point of law and fact to disregard the truth of facts and evidence and grant ownership of the suit land to the respondent without considering that the applicant himself never claimed the suit land as himself but the same formerly was claimed by his late wife (one Mageni Siludi) and in deed who is the sister of the appellant.
2. That, the trial chairman erred in law to disregard that the respondent is time barred to claim back the suit land
3. That the DLHT Hon. Chairman erred in law and fact to disregard the appellant's heavy evidence adduced at the trial Ward Tribunal

the appellant's heavy and weight of evidence of which it was proved that the suit land is the clan land of Matongo clan since long time way back before even independence and the same remained in ownership and occupation of the clan of Matongo.

4. That the DLHT Hon. Chairman disregarded the documentary evidence by the appellant and raised unfounded grounds that the said documentary evidence was a cooked evidence without even indulging himself in scrutinizing on whether the said documentary evidence was a cooked one or not.
5. That the trial learned chairman was biased in the case because even during the visit of locus in quo, he denied to listen to the appellant saying that the appellant was talking rubbish and he listened more to the respondent.
6. That the whole proceedings in the trial case is hopelessly bad before the eyes of the law and cannot stand to grant right to the respondent.
7. That the DLHT chairman erred in law and fact to disregard the fact the respondent in this appeal he was a son in law of Matongo clan and he claims the land from his inlaw something is not applicable in Sukuma Tribe.

After being served with the memorandum of appeal the Respondent Sayi Maduka, filed reply thereto as follows:-

1. The contents of paragraph 1 of the memorandum of appeal is baseless because the respondent proved on balance of probability on the ownership of the disputed land hence he is the real owner of the

suitland, therefore the trial chairman was correct to declare him to be the owner of the said suitland.

2. The contents of paragraph 2 are ridiculous because the same would have been raised during or before the hearing of application No. 90/2015 and not in this appeal.
3. The contents of paragraph 3 have no merits because the appellant is talking about the evidence adduced at the Ward tribunal hence his abusing the court process.
4. The contents of paragraph 4 are strongly disputed because all documentary evidence were tendered before the DLHT and the same proved the respondent this appeal is the real owner of the suitland. Hence the appellant is put to strict proof thereto.
5. The contents of paragraph 5 are strongly disputed and the respondent states further that during the visit of locus in quo all parties were afforded opportunity to answer all questions put to them freely.
6. The contents of paragraph 6 are also disputed because the proceedings of application No. 90/2015 were recorded according to law and the judgment and its decree was executed by the court broker on 01/4/2017 without any objection from the judgment debtor. Hence the respondent herein started to use his land forthwith to date.
7. The contents of paragraph 7 are strongly disputed because the trial chairman was guided by the law of the country such as Act No. 2/2002, Act No 4/1999 and Act No. 5/1999. Therefore the Sukuma Tribe law was not an issue in application No. 90/2015.

At the hearing of the appeal the appellant appeared in person and was unrepresented. However, he had nothing to add to what is contained in his memorandum of appeal. He prayed that the same be considered so that justice be rendered. The Respondent as well appeared in person and unrepresented and had nothing to add to what is contained in his reply to memorandum of appeal as they are sufficient thus prayed for the same to be considered.

Having thoroughly gone through the evidence on the records, the ground of appeal and the reply thereto as well as the submissions by both parties, the issue for determination here is whether the appellant's appeal has merits. However, before I start answering the above issue, I have discovered that, the applicant one SAYI MADUKA never testified before the trial tribunal in support of his claim. Instead, one Zilipha Sayi, PW1 in possession of a power of attorney testified on behalf of the appellant and her evidence was to the effect:-

*"**PW1***

NAME	-	*ZILIPHA SAYI*
OCCUPATION	-	*BUSINESS WOMAN*
RESIDENTIAL	-	*IKUNGULYABASHASHI*
REGION	-	*CHRISTIAN*
TRIBE	-	*SUKUMA*
AGE	-	*46 YEARS*
10/10	-	*ROBERT MAYENGA.*

PW1.

Sworn and adduced as here under. The respondent sent people into the suit land on 15/1/2015 and planted sisal plants and decided the same amongst themselves. The applicant acquired the suit land in 1957, by cleaning the same and he built his residential house on (sic) 1974 the applicant was forced to join the Ujamaa village but he continued to use the same without disturbance until 2004 the respondent started to give some people the suit land without good cause.

In 2008 one claimed the suit land at Bariadi District court without success, till 2015 when the respondent trespassed into the suit land and arrested the grandsons and son of the applicant and sent them to Nyakabindi police post whereby they were forced to sign and divide the suit land. The respondent's customary right of occupation was cooked and the same was issued in 2010 and by then dispute had been arose already when the committee of VLASAC (sic) was present during the assurance (sic) of the customary right of occupancy and the applicant was there hence

the said customary certificate was made on (sic) camera. Malongo is the step grandfather of the Respondent and he had not owned the suit land even once.

The respondent did not see the said Matongo who expired longtime ago. I pray the application be allowed with costs and dismiss the counter claim with costs. That is all."

From the above PW1's evidence, it is gallantly clear that the above evidence was total hearsay and that it was against s. 62 (1) of the Evidence Act, [Cap 6 RE 2002] which states that:-

"62 (1) Oral evidence must in all cases whether, be the evidence of a witness who says he saw it:-

(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it.

(c) If it refers to fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sence or in that manner;

(d) If it refers to an opinion or to the grounds of which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds."

The evidence by PW1 Zilipha Sayi above quoted, goes without saying that she did not personally know those facts. Thus her testimony was therefore nothing as was once observed by learned brother Munyera, J, (as he then was) in YUSTACE NDEBEYA . V. CHRISTINA HERMAN, HIGH COURT CIVIL APPEAL NO. 17 OF 1987, HIGH COURT OF TANZANIA BUKOBA REGISTRY (unreported) were under order held that:-

"....secondly the respondent whose name appeared on all documents did not give evidence instead the public writer testified on his behalf, he spoke as if he was the respondent himself speaking. This was no evidence at all as it was not given by the person who knew those facts..."

However, in the present case, the evidence by PW1 certainly was hearsay as was a second hand information especially when she partly stated.

"The applicant acquired the suit land in 1957 by cleaning the same and he built his residential house..."

Taking for granted that PW1 when testified in 2016, was 46 years old that means he was born in 1970, therefore, she was not present when the applicant acquired the suit land in 1957 by cleaning the same and he built his residential house, therefore what she testified was not what she saw, heard etc. Therefore, I'm in agreement with my learned brother Munyera, J, (as he then was) when observed that, this was no evidence at all as not given by the person who knew those facts.

Therefore, since the applicant Sayi Maduka, never testified before the trial tribunal to prove what he had asserted, the evidence by the other witnesses certainly lacked foundation and therefore had nothing to prove.

Since the evidence by Zilipha Sayi, PW1 the holder of power of attorney from Sayi Maduka, the applicant, never mentioned how she was related to the Respondent Sayi Maduka, her evidence completely has been hearsay which in law is inadmissible. And since the same inadmissible evidence was admitted and acted upon by the trial tribunal in reaching to the decision in favour of the Respondent who never testified in support of his application, I find that was an irregularity which went to the root of the matter.

Thus, I find there is nothing of importance proceeding discussing the grounds of appeal as the above flaw suffice to dispose of this appeal.

In the upshot, I find that proceedings, judgment and decree by the trial tribunal were null and avoid and hereby declared a nullity whereby the same are hereby quashed and set aside. The appellant's appeal is hereby

allowed with costs. Parties are at liberty to institute fresh suit if they still intend to further pursue their rights.

Order accordingly.

R. M. Kibella
JUDGE
22/01/2019

Order: Judgment delivered in chambers this 22nd day of January, 2019 in the presence of Ngusa Noni the appellant in person and in the absence of Sayi Maduka the Respondent who is represented by Zilipha Sayi, holding a power of attorney who is present in person.

R/A fully explained.

R. M. Kibella
JUDGE
22/01/2019