IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA DISTRICT REGISTRY)

AT KIGOMA

(LAND DIVISION)

APPELLATE JURISDICTION

MISC. LAND APPEAL NO. 7 OF 2020

(Arising from District Land and Housing Tribunal of Kigoma in Land Appeal No. 48 of 2018 before M. Nyaruka chairman, Original Land Case No. 10/2017 of Murufiti Ward Tribunal).

MELINA D/O LEMERO.....APPELLANT

VERSUS

DUNIA S/O TEGEJE.....RESPONDENT

J U D G M E N T

07/10/2020 & 26/10/2020

I.C. MUGETA, J

This is a second appeal against the concurrent finding of the two lower tribunals. The law is that a second appellate court cannot interfere with a concurrent finding of two lower courts on matters of facts unless a misapprehension or wrong application of the law by the lower court is proved. Chubwa Muheza, advocate for the appellant has moved this court to interfere because the lower Tribunal misapprehended the evidence. He cited the authority in the case of **Edwin Isdory Elias v. SMZ** [2004] TLR 297. According to him, the two lower courts failed to appreciate the evidence that the village council had no powers to allocate the dispute land to the

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appellant which land the owner Manikila had allocated to the appellant before he died. The respondent, being unrepresented, said nothing on this legal issue. Hereunder are the facts of the case.

One Manikila lived at Murufiti village. He died in June 1990. He left on his land his wife whose name has not been disclosed. Manikila and his wife are parents of the wife of one Tegeje who is father of the respondent. They are also parents of Dismas who is the appellant's husband. Dismas and his wife lived at Murufiti. When he died in 1976, the appellant and her children relocated back to her family. Therefore, the appellant is a daughter in law of Manikila while the respondent is a grandson.

In 1990, after death of Manikila, the respondent and Obed Tegeje (his father) went to Murufiti village to find a land where the respondent could establish his family. By this time, the wife of Manikila who occupied the land had become of age that she needed someone to take of her but there was none. On that account, the village leadership, considering the respondent is a grandson of the old woman, required the respondent to stay with his grandmother and take care of her until death with view of permantly acquiring the land upon the woman's death. This way, the respondent acquired the land todate. The record is silent on when the old woman died.

The appellant's children who were raised up at the maternal side after they left with the appellant in 1976 have now become of age. They pressed upon their mother to take them back to their roots. On their home coming, in 2018, they found the respondent in occupation of part of Manikila's land measuring 70 x 40 metres. The rest of the land had been sold by one Pius.

She demanded vacant possession as she deemed the respondent a trespasser. In quest of a peaceful enjoyment of the land, the respondent referred the despute to the Ward Tribunal for a declaratory order that he is the lawful owner of the land. The Ward Tribunal, among other findings, held:-

(i) *"Mlalamikaji alitumia ngazi za kiofisi kupata Kiwanja hicho"*

(ii) *"...Kiwanja hicho kitaendelea kuwa mali ya mlalamikaji ndugu Dunia Tegeje.*

Aggrieved, the appellant appealed to the District Land and Housing Tribunal which upheld the decision of the Ward Tribunal hence this appeal. The District Land and Housing Tribunal in extra ordinary brief judgment held: -

> *"I think the claim of the applicant (sic) is untenable as even when the lower court he (sic) failed to show the boundary of the land and that of the appellant had been away for almost 42 years since when he (sic) left the village".*

The memorandum of appeal has six grounds of appeal. These are:_

(i) *That the 1st appellate tribunal erred in law in upholding the decision of the trial tribunal which emanated from nullity proceedings as the trial tribunal was improperly constituted while conducting the proceedings thereat.*

(ii) *That the 1st appellate tribunal erred in law in upholding the decision of the trial tribunal which emanated from nullity proceedings since the witnesses' evidence was taken without oath/affirmation.*

(iii) *That both the trial tribunal and the 1st appellate tribunal erred in law and in fact in entertaining the matter concerning the suit property whose value was not established.*

(iv) *That the decision of the trial tribunal is bad in law for the reason that it has been reached without opinion of assessors.*

(v) *That both the trial tribunal and the 1st appellate tribunal erred in law and in fact in deciding the matter in favour of the respondent whose evidence was not sufficient enough to grant him the suit property compared with the appellant's.*

(vi) *That both the trial tribunal and the 1st appellate tribunal erred in law and in fact in granting the suit property to the respondent merely on the reason that he (the respondent) stayed on the suit property for 28 years without disturbance.*

During hearing, Chubwa Muheza, learned advocate, argued the 1st and 4th grounds jointly, the second ground independently, the 3rd ground was dropped and the 5th and the 6th grounds were combined. I shall determine these complaints in the above order. I shall be disposing of one ground after another.

On the legality of the proceedings and the decision of the Ward Tribunal, the learned counsel submitted that the decision has the following shortcomings: -

(i) It does not bear opinions of the members contrary to section 4 (4) of the Ward Tribunal Act [Cap. 206 R.E 2019]

(ii) The proceedings do not reflect which member of the Ward Tribunal asked which questions.

(iii) The coram at each sitting is not reflected in the proceedings contrary to section 4 (3) of Cap. 206 which requires the coram to be half of the members at each sitting.

(iv) It is uncertain if at each sitting half of the members were woman as required by section 11 of Cap. 216 R.E. 2019.

The respondent being layperson said nothing useful in relation to this complaint. These complaints are not going to detain me because they are at best misconceived for the following reasons. Firstly, no law requires that opinion of members of the Ward Tribunal be reflected on record. Section 4 (4) of Cap. 206 has been misapplied. It provides that the decision of the Tribunal shall be by majority of members present. In such cases recording of members opinion would be absurd as the majority opinion is the decision itself. Secondly, no law requires that questions by members of the Tribunal should bear names of those posing the questions. Admittedly, names of the members who asked the questions are not reflected even though the

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questions are there. Thirdly, according to section 15 (2) of Cap. 206, each Tribunal ought to regulate its own proceedings. No rule requires that a list of member present at each sitting ought to be reflected on record. However, at the end of the proceedings of the Ward Tribunal, a list of members is reflected. Considering this fact, it is my view that a complaint on adequacy of coram in terms of gender balance can hardly be accepted on appeal. Through the list of names in the proceedings it is difficult to ascertain the gender status of each name because names, particularly local community names, can be misleading. In this case eight members are listed and it is difficult for me to determine who was a female or male member by mere looking at those names. Objections of gender balance in a coram ought to be raised at the trial stage. A party who acquiesce should not be heard on appeal unless proved that he raised the objection which is not the case here. The first complaint is, therefore, without merits.

The second complaint concerns witnesses giving evidence without oath. Counsel for the appellant submitted that it is trite law that whenever a witness gives evidence, it must be taken under oath or affirmation. Again, the respondent had nothing useful to say. I agree evidence is ordinarily taken under oath or affirmation. It is a legal obligation under section 4 of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019]. Indeed, all witnesses in this case were unsworn before they testified. However, I shall consider and treat the evidence on record as unsworn evidence because such irregularities are saved by section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019 which provides:-

"No decision of a Ward Tribunal 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"

It is my view that failure to swear witnesses is an irregularity which did not prejudice any party or occasioned failure of justice. The second complaint is without merits too.

The third complaint is that the claim was not proved on the balance of probabilities. The complaint has two aspects. Firstly, on the application of the doctrine of adverse possession and secondly, the analysis of evidence in reaching a decision. Counsel for the appellant has argued that the lower Tribunals misapprehended the evidence in that it misapplied the doctrine of adverse possession because the respondent was not a trespasser. He cited **The Registered Trustees of Holy Spirit Sisters vs January C. Shayo,** Civil Appeal No. 193/2016, Court of Appeal – Arusha (unreported). Regarding the analysis of evidence, he submitted that the evidence did not prove that the respondent was allocated the land by the village leadership but he was invited to stay and take care of the old woman which land could not be allocated while the old woman was still alive. That it is not clear as to who asked for the land between the respondent and Obed Tegeje. The learned counsel also argued that there are contradictions in the evidence of the appellant side on what the respondent paid to be allocated the land

while. While PW3, the ten-cell leader, said he paid local brews, the appellant said he paid village tax and "Kadeti".

In response the respondent submitted that the Ward Tribunal did not error because the appellant failed to even identify the boundaries of the dispute land. About paying tax or pombe to the village, he submitted that that was a practice which enabled a stranger to be accepted as a village member which practice he complied with.

To start with, I am of the view that the lower Tribunals did not apply the doctrine of adverse possession in reaching their respective decisions. The Ward Tribunal in particular, was clear that the respondent was allocated the land by the village authority. The District Land and Housing Tribunal decision was based on the fact that the appellant failed to identify the boundaries. The issue of long possession cropped up in the lower Tribunals' decisions as rhetoric question because the respondent had enjoyed the land for 28 years without interference.

On analysis of evidence the learned counsel submitted that the village authority erred to allocate the land which the owner had already allocated to the appellant. This fact is supported by DW2 and DW2. While I find no problem with the appellant being promised a land by her father in law, it is a fact that that land was not specified. On that account, I hold the view that the land which Manikila allocated to the appellant is not necessarily the dispute land. He could not have done so while his wife was still alive and living on that land. There is undisputed evidence from Jonas Masuta (PW2) that one Pius a son of a brother of *Manikila* sold *Manikila's* land soon after

his death except the land where the wife lived. The appellant, therefore, cannot claim ownership of any remaining piece of land without being specific. The respondent has just been a soft target because he is on the land which was not sold by Pius. Nonetheless, according to the evidence he was allocated the land by the village authority upon application. He made the application while accompanied by his father Obed Tegeje and therefore the argument that it is unknown who applied for the land is untenable. On humanitarian grounds the village authority allocated him the land of the old woman on consideration of being assigned to take care of his grandmother. I find no reason to disturb that allocation. Manikila having passed on, the land was no longer his but of his surviving partner from whom the appellant cannot claim rights through a grant from Manikila.

On contradictions in evidence of the respondent, I find no contradictions on the fact in issue. What the appellant paid to justify his invitation in the village is irrelevant whatever the name used. Those are consequent matters per the village traditions. The real issue is land acquisition and the evidence of the respondent, PW2 and PW3 is clear that the village authority allocated the land. Assignment to take care of the old woman was just a factor as to which land he ought to be allocated.

In the event, I find the two lower tribunals neither misapprehended the evidence nor wrongly applied the law. The appeal is, therefore, wanting in merits. I dismiss it with costs.

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I.C. Mugeta

Judge

26/10/2020

Court: Judgment delivered in chambers in the presence of the respondent. It had to be delivered by video conference as counsel for the appellant is at High Court Shinyanga but connection failed.

Sgd: I.C. Mugeta

Judge

26/10/2020