

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 13 OF 2020
*(Arising from the decision of the District Land and Housing
Tribunal of Kyela in Land Application No. 05 of 2019)*

ULIMBOKA W. MWAIKASU.....APPELLANT
VERSUS
ELIAS KASUNGA.....RESPONDENT

JUDGMENT

Date of last order: *04/09/2020.*
Date of Judgment: *30/10/2020*

NDUNGURU, J.

In this appeal, the appellant one, Ulimboka W. Mwaikasu is challenging the judgment and decree of the District Land and Housing Tribunal of Kyela (herein referred as the trial tribunal) in Land Application No. 05 of 2019. In that trial tribunal, the respondent, Elias Kasunga sued the appellant, Ulimboka W. Mwaikasu for trespass over a suit land located at Kulu area-Isimba hamlet within Makwale Village in Kyela District.

In his testimony, the respondent, Elias Kasunga testified that, he was given the said suit land by his late father one, Paulo Kasunga

Mwavulamba way back on 01st day of June, 1986. He further told the trial tribunal that, one side of the suit land was used for rice cultivation whereas other side of the suit land was not used. Also, he testified that, his late father passed away in October, 2018.

The claim was opposed by the appellant contending that, the suit land owned by his late father one, William Mwaikasu. Also, he told the trial tribunal that, he is an administrator of his late father.

Having heard the evidence tendered by the both parties together with their witnesses, the trial tribunal found that, the respondent's evidence was heavier than the evidence adduced by the appellant. Therefore, the trial tribunal declared the respondent to be the lawful owner of the disputed land. In addition, the trial tribunal ordered that, the appellant to vacate the possession of the suit land and issued the permanent injunctive order against the appellant, his agents, workmen or assignees to interfere the suit land. Also, the appellant had to pay costs of the suit

The appellant felt aggrieved with such decision and order of the trial tribunal henceforth he has preferred the present appeal. The appellant has lodged the memorandum of appeal consisting of six grounds of appeal. Thereafter, by leave of this Court; the appellant filed

the supplementary grounds of appeal. The grounds of complaint are as follows:

1. That, the learned chairman grossly both erred in law and facts for failure to involve the wise assessors in determining the suit.
2. That, the learned chairman grossly both erred in law and facts for failure to consider the opinion of the wise assessors.
3. That, the trial tribunal erred in points of law and facts for declaring the respondent to be owner of the disputed land in question despite sufficient evidence proving the contrary.
4. That, the trial tribunal erred both points of law and facts when reject to admit my document which show that the appellant is the administrator of the estate of his late father including such land which is in dispute.
5. The trial tribunal grossly erred both erred in law and facts for declaring the respondent to be owner of the disputed land while the respondent had no locus standi in the matter.
6. That, the trial tribunal erred both in points of law and facts when failed to consider the weight of the evidence of the appellants' witness.

7. That, the learned chairman grossly both erred in law and facts to entertain the matter as if it is a new case which was ordered by the same tribunal to be retried at the ward tribunal.
8. That, the learned chairman grossly both erred in law and facts by finding that the respondent was the lawful owner of the disputed land when there was no evidence to establish as to how his late father alleged to have given him such land in 1986.
9. That, the trial tribunal erred in points of law and facts for declaring the respondent to be owner of the disputed land in question despite by relying on the conflicting evidence adduced by the respondent regarding the boundaries of the disputed land.

When the appeal was placed before me for hearing, the appellant appeared in person whereas Mr. Emmanuel Clarence, learned advocate appeared for the respondent. The matter was argued by the way of the written submissions following the order of this Court and both parties have adhered to the scheduled order.

Arguing to the first and second grounds of the appeal, the appellant submitted that, the trial tribunal did not involve the wise assessors as required by Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003. He added that, the wise assessors were not given a chance

to give out their opinion hence the opinions of the wise assessors were not considered by the trial tribunal. He cited the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (unreported) quoting the approval in the case of **Ameir Mbarak and Azania Bank Corp. Ltd. vs. Edgar Kahwili**, Civil Appeal No. 154 of 2015, Court of Appeal of Tanzania (both unreported).

Explaining the 3rd, 6th, 8th, and 9th grounds of appeal, the appellant contended that, the evidence available in the record does not support case of the respondent. He added that, the evidence adduced by PW1 is not credible because at the time he had 12 years old hence it is not possible to witness the same. He also stated that, there was no material evidence to establish as to how his late father has given him such land in 1986. He went on to submit that, his evidence was heavier than the evidence adduced by the respondent. Also, he alleged that, the evidence adduced by the respondent had a lot of contradiction on the aspect of the boundaries of the suit land.

Regarding to the 4th ground of appeal, the appellant submitted that, the trial tribunal erred in law to reject the letter of the administration of the estate which introduce him as administrator of the estate of his late father.

Coming to the 5th ground of appeal, the appellant argued that, if the respondent failed to prove how the disputed land moved from his late father to his possession that means had no locus stand to sue in respect of the said disputed land. He further stated that, it is not true that the respondent was gifted the said disputed land from his late father because he failed to call the material witness to prove the same and also there is no "*deed of gift*" to prove the same as alleged by the respondent.

On the 7th ground of appeal, the appellant contended that, the trial tribunal was erred in law to entertain this case while it was the same tribunal which was ordered the same to be retried to the Ward Tribunal but the respondent ignored the said order and he filed the same to the District Land and Housing Tribunal. Finally, he prayed for the Court to set aside the decision of the trial tribunal and allow this appeal.

Responding to the 1st and 2nd grounds of appeal, Mr. Clarence stated that, the wise assessors were properly involved by the trial tribunal and the assessors' opinions were read in the presence of the parties. He cited Regulation 19 (2) of the Regulations (*supra*) to support his submission. He added that, the assessors' opinions were pointed out and well considered by the trial chairman in arriving to the decision.

On the 3rd, 6th, 8th, and 9th grounds of appeal, Mr. Clarence replied that, the respondent's root of ownership stem in two fold; one respondent was given the suit land and secondly, through adverse possession from long use of the suit land. He added that, the respondent's evidence is clear, strong and heavier. Also, he argued that, the appellant and his witnesses nowhere have supported the root of his ownership of the suit land.

In regard to the 4th ground of appeal, Mr. Clarence submitted that, the chairman properly rejected the admission of the letters of administration since the same was not pleaded and worse still the said letter of administration was not served to the respondent as per Regulation 10 (3) (a) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations G.N. No. 174 of 2003.

In respect to the 5th ground of appeal, Mr. Clarence contended that, the amended application under paragraph 6 (a), (ii), (iii) and (vi) when read together with the respondent's testimonies one can safely conclude that the respondent was given the suit land by his late father and also the respondent has been in effective occupation.

In relation to the 7th ground of the appellant, Mr. Clarence replied that, it is a new fact which was not discussed by the trial tribunal thus is an afterthought and invite this Court to apply the doctrine of estoppel as

per Section 123 of the Evidence Act (Cap 6 R.E. 2019). He added that, the right to appeal is the statutory one against the decision of the trial tribunal.

He continued to submit that, this ground goes against that, in that there is no decision of the trial tribunal with respect to the issue raised on this appeal. He also stated that, the pecuniary value of the suit land fall within the jurisdiction of the District Land and Housing Tribunal and thus Ward Tribunal was excluded and had no jurisdiction to determine the matter. In conclusion, he prayed for the Court to dismiss this appeal with costs.

I have labored much to go through records and, grounds of appeal presented and the submissions made by the parties in this Court, the issue calling for determination is whether this appeal has merit or not.

As regards the first and second grounds of appeal, I have gone through the Court's record and found that, the trial chairman properly invited the wise assessors to give their opinion before he/she reached in his judgment. This is seen at page 31 and 32 of the typed proceedings of the trial tribunal. Further, the record revealed that, after the respondent closed his case the chairman fixed the date for the assessors to read out their opinion.

Again, on 12th day of March, 2020 the opinions of the wise assessors were read in presence of the parties and the same were recorded in the trial tribunal's proceedings. Also, it is apparent on the record that, the trial chairman considered the opinions of the wise assessors before reached his decision. These facts confirmed and reflected at page 9 of the typed judgment.

On the basis of the above stated analysis it is my view that, the trial chairman properly invited the wise assessors and also well considered their opinions before reaching to his decision as required by the law and various guidance given by the Court of Appeal of Tanzania in its decisions. See the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (Unreported) and **Tubone Mwambete vs. Mbeya City Council**, Civil Appeal No. 287 of 2017. Therefore, these grounds of appeal must fail.

In the third, sixth, eighth, and ninth grounds of appeal, it is my opinion that, the respondent did not prove his ownership on the balance of probabilities. I hold so because in his testimony the respondent told the trial tribunal that, he was given the said suit land by his late father in 1986 and PW2 one, Tumaini Disus witnessed such transaction the thing which raises doubt to this Court.

The basis of my reasons is that; first at the time the PW2 testified before the trial tribunal in 2019 he had 45 years old and when the respondent was gifted the suit land by his late father in 1986 the PW2 he had 12 years old by simple calculation this seen at page 11 of the typed proceedings of the trial tribunal hence he was not capable to witness such serious transaction in law. Secondly the respondent did not tender any deed of gift to support the same.

Further, I am not in line with the argument advanced by the counsel for the respondent that, the respondent acquired the ownership over the suit land through adverse possession from long use of the suit land. I hold so because the issue of adverse possession was not part of issues discussed before the trial tribunal hence it does not form the basis of the decision given by the trial tribunal.

Moreover, in his testimony the respondent acknowledged that his late father is the real owner of the said suit land and even the respondent's evidence adduced at the trial tribunal he did not show the desire to rely on the doctrine of adverse possession hence, the principle of the adverse possession in this circumstances cannot be applicable. This position is well stipulated in case of **Moses vs. Lovegrove** [1952] 2 QB 533 and **Hughes vs. Griffin** [1969] 1 All ER 460. It was held that:

"[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following:-

- (a) That there had been absence of possession by the true owner through abandonment;*
- (b) That the adverse possessor had been in actual possession of the piece of land;*
- (c) That, the adverse possessor had no color of right to be there other than his entry and occupation;*
- (d) That, the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
- (e) That, there was a sufficient animus to dispossess and an animus possidendi;*
- (f) That, the statutory period, in this case twelve 12 years, had elapsed;*
- (g) That, there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
- (h) That, the nature of the property was such that in the light of the foregoing/adverse possession would result."*

Also, see **Bhoke Kitang'ita vs. Makuru Mahemba**, Civil Appeal No. 22 of 2017, Court of Appeal of Tanzania and **Registered Trustees of Holy Spirit Sisters Tanzania vs. January Kamili Shayo & 13 others**, Civil Appeal No. 193 of 2016, Court of Appeal of Tanzania (both unreported).

On the basis of the above stated position, therefore, I find out that, there is no enough evidence which support the root of the

respondent's ownership over the suit land neither through gift nor adverse possession. Therefore, these grounds have merits.

In relation the fourth ground of appeal, my determination is that, the trial chairman was right to reject the admission of the letters of administration I hold so because the appellant did not plead the same in his written statement of defence and the same was not served to the respondent contrary to the Regulation 10 (3) (a) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003. On that regard, I am in agreement with the argument advanced by the counsel for the respondent therefore; this ground of appeal has baseless.

The fifth ground of appeal, this ground will not detain me long because the respondent's evidence does not show how he acquires the capacity of suing the appellant over the suit land considering the fact that there is no enough evidence to prove that he acquired the said suit land either through adverse possession or gifted by his late father. It is my considered view, that, the respondent had no locus standi to sue the appellant over the said suit land. Therefore, this ground of appeal holds water.

Coming to the seventh ground of appeal, my determination is that, I subscribe with the argument advanced by the counsel for the

respondent that, this is new fact which was not discussed by the trial tribunal hence; the appellant is disallowed to rely upon new fact. Therefore, this ground of appeal must fail.

From the above analysis, it is clear from the record of the trial tribunal that, neither the respondent nor the appellant was appointed as administrator of the estate of their late father.

It is important to reproduce the provision of Section 71 of the Probate and Administration of Estates Act (Cap 352 R.E 2002):

"After any grant of probate or letter of administration, no person other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration have been revoked or annulled."

It is clear from the wording of the provision of law cited above that, only the administrator or executor vested power to sue or prosecute on behalf of the deceased and no other person allowed to sue or act on behalf of the deceased. Therefore, both the respondent and appellant had no locus standi over the disputed farm, I say so because there is no any evidence in record showing that the respondent or appellant was granted probate or letters of administration hence the respondent and appellant locus standi has remained questionable.

In the circumstances, it is my firm view that both parties that is, the respondent Elias Kasunga had no locus standi to institute suit at District Land and Housing Tribunal of Kyela. Being the case there is no competent appeal before this Court. It follows therefore that the proceedings, judgment and orders in Land Application No. 05 of 2019 of the District Land and Housing Tribunal for Kyela are nullity.

Therefore any party is at liberty to institute a fresh suit if he so wishes, after the process of appointment of administrator to be complied with subject to limitation of time. The above said, I find merit in this appeal to the extent shown above. I make no order as to the costs.

It is so ordered.




D. B. NDUNGURU
JUDGE

30/10/2020

Date: 30/10/2020

Coram: D. B. Ndunguru, J

Appellant: Present

Respondent: Present

For the Respondent: Mr. Emmanuel Clarence – Advocate

B/C: M. Mihayo

Mr. Emmanuel Clarence – Advocate:

The case is for judgment, we are ready.

Appellant:

I am ready.

Court: Judgment delivered in the presence of the appellant, Mr. Emmanuel Clarence advocate for the respondent and the respondent.




D. B. NDUNGURU
JUDGE
30/10/2020

Right of Appeal explained.