

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 20 OF 2020

*(Arising from the ruling of the District Land and Housing Tribunal for Mara at  
Musoma (Hon. J.T. Kaare, - Chairman) dated 16<sup>th</sup> October, 2019  
in Appeal No. 101 of 2019)*

MASHAKA MASANJA MABULA ..... APPELLANT

VERSUS

PAULO KITAIDA MANDIRA ..... RESPONDENT

JUDGMENT

*24<sup>th</sup> August and 13<sup>th</sup> October, 2020*

**KISANYA, J.:**

Before the Rigicha Ward Tribunal, Paulo Kitaida Mandira, respondent in this appeal sued the appellant, Mashaka Masanja Mabula. He claimed that, the said Mashaka Masanja Mabula had trespassed to his land and erected his grandmother's grave. In his defence, Paulo testified to have bought the disputed land, from Mashaka's grandfather namely, Mabula Sangija in consideration of Tshs. 37,000 in 2002. His evidence was supported by Mayala Seleke Malulu, the then Hamlet Chairman who testified to have witnessed the sale. In his defence, Mashaka deposed that, the disputed was not sold to Paulo. He contended that, Paulo was empowered to administer the land at the pleasure of his grandsons/daughters who were still minor.

At the end of trial, the appellant (Mashaka) was declared lawful owner of the disputed land. Dissatisfied, the respondent (Paulo) appealed to the District

Land and Housing Tribunal (DLHT) for Tarime at Tarime (the appellate Tribunal”) in Appeal No. 101 of 2019. The appellate tribunal considered the grounds of appeal against the evidence and came to its own conclusion that, the respondent had proved his claim on the balance of probabilities. As a result, the decision of the trial Tribunal was reversed and Paulo (the respondent) declared lawful of the disputed land.

Mashaka has lodged an appeal before this Court to challenge the decision of the appellate Tribunal. At first, he had four grounds of appeal. In the course of hearing, his advocate prayed to drop the third ground of appeal. Further, with leave of the Court, he amended the first ground. The following grounds were advanced and argued before this Court:

1. That, the appellate Tribunal was not properly constituted as the opinion of assessors was not read to the parties.
2. That the appellant had no *locus standi* to institute the suit before the trial Tribunal.
3. That, the trial and first appellate tribunal erred in law and fact by failing to evaluate evidence adduced by the appellant and relied on the respondent’s evidence though the evidence of the appellant was heavier than that of the respondent.

At the hearing of this appeal, the appellant was represented by Mr. Mwita Emanuel, learned advocate while the respondent enjoyed the services of Ms Mary Joachim, learned advocate.

Arguing in support of the appeal, Mr. Emanuel started to tackle the first ground of appeal. The learned counsel argued that, the proceedings were not clear on whether the opinion of assessors who sat with the Chairperson of the appellate Tribunal read/gave their opinion. He was of the view that, the

provision of section 23(2) of the Land Courts Disputes Courts Act, 2002 (as amended) and regulation 19(2) of the Land Disputes (District land and Housing Tribunal) Regulations, 2003 (hereinafter referred to as the DLHT Regulations”) were not complied with. Citing the case of **Kibona Mwambeta vs Mbeya City Council**, Civil Appeal No. 87 of 2017 (unreported), Mr. Emanuel argued that, failure to record the opinion of assessors vitiated the proceedings of the appellate Tribunal.

As to the second ground of appeal, Mr. Emanuel argued that, Paulo had no *locus standi* to institute the land complaint before the trial tribunal. He contended that the said Paulo was a mere trustee of the disputed land and not owner.

In respect of the third ground, Mr. Emanuel submitted that the appellant’s evidence was not considered by the appellate Tribunal. He contended that, the respondent was authorized to administer the disputed land and that, it was not sold to him. The learned counsel stated further that, the person who witnessed the appellant’s grandfather selling the disputed land to the respondent were not called to testify before the trial tribunal. He finally urged the Court to allow the appeal.

In reply to the first ground, Ms Joachim argued that the opinion of assessors was read in the presence of the parties on 19/10/2019. Therefore, she urged the Court to refrain from entertaining this ground.

Responding to the second ground of appeal, Ms Joachim submitted that the respondent had direct interest in the disputed land and hence a *locus standi* to institute the case before the trial tribunal. The learned advocate went further

to contend that, the respondent instituted the case on his own and not on behalf of any person or family.

In respect of the third ground of appeal, Ms Joachim argued that the respondent's case was proved. She submitted that, the respondent proved his case by tendering the letter of sale agreement and calling the hamlet chairman who witnessed the sale. The learned advocate for the respondent concluded by imploring the Court to dismiss the appeal in its entirety with costs.

In his brief rejoinder, Mr. Emanuel reiterated that the opinion was not read in the presence of the parties. He also rejoined that, the respondent did not tender evidence to prove person who witnessed the sale agreement on behalf of the late Mabula Sangija.

Upon careful consideration of the grounds of appeal and the submissions by the learned counsel for both parties, the Court is enjoined to decide whether this appeal is meritorious or otherwise. In so doing, I will address the three grounds in the manner they were argued by the learned counsel.

As regards the first ground of appeal, the appellant complained that the assessors who sat with the learned chairperson of the District Land and Housing Tribunal (DLHT) was not read to the parties. This ground is premised on the provisions of section 23 (1) and (2) of the Land Disputes Courts, Cap. 216, R.E. 2019. In terms of the said provisions, the DLHT is properly constituted by the Chairperson and not less than two assessors. The assessors present at the hearing of the matter before the DLHT are required to give out their opinion before the judgment is delivered. Further, regulation 19(1) and (2) of the Land DLHT Regulations, 2003 requires the Chairman to solicit opinion of each assessor. It is now settled that, the assessors' opinion has to

be given or read in the presence of the parties. Failure to take the opinion of assessors in the presence of the parties vitiates the proceedings before the DLHT. See **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017, Criminal Appeal No. 164 of 2015 (unreported), **Edina Adam Kibona vs Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 and **Sikuzani Said Mogambo and Kirioni Richard vs Mohamed Roble**, Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported).

It is on record that, the appeal before the appellate Tribunal was heard on 24/07/2019. The appellate Tribunal was constituted by Kaare, J.T., learned Chairperson and two assessors namely, Mrs. Milambo and Mr. Matiko. Upon hearing the parties' submission, the matter was adjourned to 9/10/2019 for hearing opinion of assessors. The records show further that, when the appeal was called on for opinion of assessors on 9/10/2019, the appellate Tribunal was constituted by Kaare, J.T., learned Chairperson and the above named two assessors and that, both parties were present. This is what transpired on that day:

**Tribunal**

*The appeal is coming for hearing of opinion of assessors. Both assessors have read their opinion in the hearing of the parties. I now fix a date for judgment.  
Order. Judgment 16/10/2019*

*Sgnd  
09/10/2019*

Furthermore, written opinion of each assessor is in the case file. While opinion by Mrs Milambo was authored on 3/10/2019, Mr. Matiko wrote his opinion on 27/09/2019. In that regard, I find that the opinion of assessors was procured and read in the presence of the parties as required by the law. Therefore, this ground of appeal fails.



In relation to the second ground, the appellant contended that the respondent had no *locus standi* to sue on the reason that, he was authorized to administer the land on behalf of the late Mabula Sangija's family. The principle of *locus standi* requires, a person bringing a matter to court to show that his right or interest has been breached or interfered with. See also, **Lujuna Shubi Balonzi Senior vs the Registered Trustees of Chaman cha Mapinduzi** (1990) TLR 203.

In the instant case, the respondent claimed to have bought the disputed land from the late Mabula Sangija. He also testified that, the respondent had trespassed to his land. He did not file the land complaint on behalf of any other person. Thus, the respondent managed to show that, his right or interest in the disputed land had been interfered with. Therefore, I find that, Paulo had *locus standi* to institute the land complaint before the trial tribunal. It is for that reason that, this ground fails as well.

This moves us to the last ground of appeal that the appellant's evidence was not considered by the appellate Tribunal. In my opinion, this ground can be addressed by considering whether the respondent proved his case. It is elementary that a burden of proof lies on the person who alleges. It also fundamental that, the dispute at hand being civil case, the standard of proof was on a balance of probabilities. Thus, the Court will look evidence which is more credible to prove certain fact. Also, it is settled law that the burden of proof cannot shift to the other party unless the person alleging the fact has discharged the duty of proving it.

It is not in dispute that, at one point in time, the land in dispute belonged the late Mabula Sangija (the appellant's grandfather). Since the land complaint was instituted by the respondent, he was duty bound to prove how land in

dispute came into his possession. He fended himself and called Mayala Sekele Malulu, the then hamlet chairman who deposed to have authorized the sale. Although it is not clearly reflected in the proceedings of the trial tribunal, it appears that the sale agreement was tendered in evidence. The trial tribunal was not convinced with the evidence adduced by Paulo on the ground that, the sale agreement was not witnessed by any person on behalf of the parties especially the late Mabula Sangija. However, the appellate tribunal, was satisfied with Paulo's evidence that, he bought the disputed land from the late Mabula Sangija. That finding was based on the evidence adduced by Paulo Mayala Seleka Malulu and the sale agreement.

I have gone through the evidence deposed by Paulo, Mayala Seleke Malulu and the purported sale agreement. There are doubts on how the sale agreement was executed.

First, as rightly argued by Mr. Emanue,<sup>1</sup> evidence as to the person(s) who witnessed the deceased person's selling or signing the sale agreement is wanting. When cross-examined by the respondent as to whether the neighbours were involved, Paulo replied in affirmative. He named the neighbours involved as Kichemu Gafufeni (East side) and Machibya Kalabo (West side). But, when asked further whether they signed the sale agreement, Paulo deposed that they were shown the boundaries of the disputed land. However, the said Kichemu Gafufeni and Machibya Kalabo were not called to testify on this important fact. On the other hand, Mashaka called the said Machibya Kalabo and another neighbor namely, Yusufu Wambura Nyakonge. Both denied to have been involved in the alleged sale.

Furthermore, the hamlet chairman (Mayala Seleke Malulu) deposed that the late Mabula Sangija could not afford to pay witnesses. But, Kija Maduhu

Swale who testified for Paulo (the respondent) when the trial tribunal visited the locus in quo, stated that he was present at the time of sale. It is not known as to why none of the neighbor or the said Kija Maduhu Swale alleged to be present at the sale did not witness the sale agreement.

The second issue relates to the place where the sale agreement was executed. The respondent testified that, the sale agreement was signed at the hamlet chairman's house. This is reflected in his answers to the members of the tribunal. The same are reproduced hereunder:

*11. Katika manunuzi mlikuwa kwa M/kiti nyumbani au eneo husika? Jibu- Kwa M/kiti nyumbani.*

*12. Kama majirani walihusika kuweka mipaka. Ni kwani wasiweke sahihi zao katika manunuzi hayo? Jibu- Ni kwa sababu tuliandika kwa M/kiti wao walionyesha mipaka tu.*

This evidence was totally different from the evidence adduced by Mayala Seleke Malulu. He adduced that, the sale agreement was signed at the disputed land. This is what happened when cross-examined by the appellant (Mashaka).

*2. Kama walikubaliana wenyewe wewe ulienda kufanya nini kama M/kiti? Jibu- kufanya maandishi.*

*3. Ulienda kuidhinisha nyumbani au shambani? Jibu- Tulienda shambani.*

In my opinion, the place of executing the sale agreement was a relevant and essential fact in the case at hand. This is so when it is considered that, Mayala Seleke Malulu contended that the appellant could not afford to pay costs for the witnesses. On the other hand, Paulo, stated that, the neighbours could not witness the sale agreement because it was executed at the hamlet chairman's house. Such contradiction goes to the root of the case and raises



a doubt on the evidence adduced by the respondent (Paulo) and the said Mayala Seleke Malulu before the trial tribunal.

The third issue relates to the purported sale agreement dated 2/11/2002. The document tendered in evidence is not original. I am live to the principle of substantive justice enshrined under section 45 of the Land Disputes Courts Act (supra). However, in the circumstances where parties were at issue on whether the sale agreement was executed, the original copy ought to have been tendered. Again, the respondent did give evidence or explanation as to the whereabouts of the original document. Thus, the said letter cannot be relied upon as evidence to prove sale of the land in dispute.

Further, upon examining the purported sale agreement which was treated as such by the first appellate Tribunal, I have a different opinion. It was not a sale agreement but a letter written by Mayala Seleke Malulu stating how Paulo and the late Maduhu Sangija had reached the agreement in respect of the disputed land. Thus, the appellate tribunal erred to treat the same as agreement.

In view of the above, I find that the respondent failed to prove how he bought the land from the late Mabura Sangija. Had the appellate tribunal examined the evidence on record, it could have arrived at a different decision. The third ground is therefore meritorious.

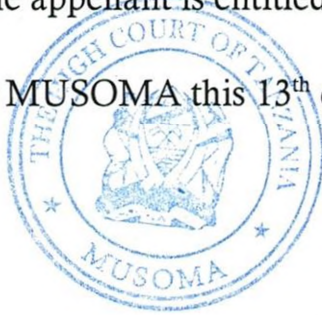
However, I hesitate to declare the appellant as lawful owner of the disputed land. His evidence was clear that, the disputed land belongs to his late grandfather. He was sued by the respondent (Paulo) on his own capacity on the ground that he had trespassed on the disputed land. Thus, the appellant was not sued as administrator of the estates the late Mabura Sangija. In that regard, this Court finds the disputed land as part of the estates of the late

Mabura Sangija. The issue was the disputed land was left to the appellant alone is a family issue which cannot be determined in this case.

In the result, the appeal is partly allowed to the extent stated herein. I accordingly orders as follows:

1. The decision and order of the District Land and Housing Tribunal are hereby quashed and set aside.
2. The disputed land is part of the estates of the late Mabura Sangija.
3. The appellant is entitled to the costs of this appeal.

Dated at MUSOMA this 13<sup>th</sup> day of October, 2020.



  
E. S. Kisanya  
JUDGE

Court: Judgment delivered this 13<sup>th</sup> October, 2020 in the absence of the appellant and the respondent. Bench Clerk, Ms Mariam present.

An aggrieved party may wish to appeal to the Court of Appeal.



  
E. S. Kisanya  
JUDGE  
13/10/2020