

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[LAND DIVISION]
AT ARUSHA

MISC. LAND APPEAL NO. 8 OF 2019

(Originating from the Decision of the District Land and Housing Tribunal for Arusha at Arusha in Land Appeal No. 43 of 2017, Original Land Application No. 3 of 2017 at Olturoto Ward Tribunal)

SAMWEL ANDREA APPELLANT

VERSUS

RICHARD ANDREA 1ST RESPONDENT

EDWARD ANDREA 2ND RESPONDENT

JUDGMENT

31st August & 2nd October, 2020

Masara, J.

The Appellant herein successfully sued the Respondents in Olturoto Ward Tribunal (the trial Tribunal) in Land Application No. 3 of 2017. The Appellant was declared the lawful owner of a six-room house (the suit premise) allegedly inherited from his deceased father, the late Andrea Seng'enge. The Respondents successfully appealed to the District Land and Housing Tribunal for Arusha (the Appellate Tribunal) vide Land Appeal No. 43 of 2017, which reversed the trial Tribunal's decision and declared the Respondents lawful owners of two rooms each in the suit premise.

The background from which this Appeal arises can be summarized as follows. The parties herein are blood brothers, born from the same parents. The house subject of this case was owned by their father, the late Andrea Seng'enge who died on 23rd December, 1990. Prior to his death, Mr. Seng'enge convened a family meeting on 31st July, 1990 where he

distributed all his estate to his surviving male children, including the parties herein. He is said to have given one house to his first born, Thadei Andrea and another house was given to his other son, Simon Andrea. The Respondents and the Appellant were bequeathed with a six-room family house (the suit premise) in which their parents lived. Each male child was also given 3 farms. The distribution was witnessed by the deceased's young brother, one Sambeke Seng'enge.

It is said that the parties herein had peaceful coexistence in the house but things turned sour in 2017 when the Appellant sought to evict the Respondents from the suit property on the account that he, being the last born, was entitled to inherit the suit premises according to the Maasai customs which mandated him to inherit the house and plot in which his parents lived. To actuate his intention, he filed a suit in the trial Tribunal which decided in his favour based on the alleged customs and traditions. On appeal, the first Appellate Tribunal reversed the trial Tribunal decision holding that the Maasai customary law would only have applied had the parents died leaving the estate undistributed. Since the parties' deceased father had distributed all his estate to his children, the Appellate Tribunal held that it was improper for the trial Tribunal to invoke the alleged Customs. The appellate Tribunal therefore declared all the parties herein lawful owners of two rooms each in the house bequeathed to them by their father. The Appellant was aggrieved by that decision. He has preferred this second appeal on the following grounds reproduced verbatim:

premise. The other two houses were small, and they were given to their elder brothers by their father. The house subject of this case has 6 bedrooms, and it was given to the three, each occupying two bedrooms. He contended that it has been 30 years now since their father died, each with his rooms, with each one's separate entrance. He added that there is a will written on 31/7/1990 showing how their father bequeathed his estate and each has developed his part, including the Appellant.

On the second ground, the first Respondent submitted that it is true that Sambeke Seng'enge testified that he was present on the date their father distributed his properties. His claim is that Mejooli Sambeke who testified was not there during the division of the properties. He therefore maintained that all the grounds of appeal have no merits and that the District Land and Housing Tribunal's decision was justified as it tallied with the will and evidence before the trial Tribunal.

On his part, the second Respondent corroborated what was submitted by his co-respondent. He added that, the Appellant was greedy as the house was given to the three of them. Mr. Edward Andrea submitted further that at the time the division was taking place he was in form four, and his uncle Sambeke was there. He added that the first Respondent is the one who raised them up, including the Appellant. He was of the same view as his co-Respondent that Mejooli lied in court and he was fined. He claimed to have made developments on his property but the Appellant has destroyed the

same. On that basis, he reiterated the prayer made by his brother urging this Court to dismiss the appeal.

On a short rejoinder, Mr. Msey reiterated that the Respondents did not call any witness, therefore he prayed that the appeal be allowed with costs.

I have meticulously examined the trial Tribunal records as well as those of the Appellate Tribunal and the submissions of the parties in view of the appeal before this Court. The issue for determination is whether this appeal should be sustained on the grounds submitted.

Regarding the first issue, I have taken time to go through the judgment of the Appellate Tribunal, I could not find a place in which the Appellate Tribunal chairman concluded that the deceased had only one house. And, even if that would have been the case, it would have been resolved as argued by the Respondents that the house in dispute is only one. It is common ground that this Court is not asked to determine the number of houses that were owned by the late Seng'enge. The claim before this Court which was also before the two lower Tribunals relates to the six-room house occupied by the parties herein. Therefore, the contention by the Appellant is not well premised. In his deliberation, the Appellate Tribunal Chairman referred to the 'suit property' as the six-room house in dispute. I agree with the submissions made by the Respondents that there would be no point of referring to the other two houses given to Thadei Andrea and Simon Andrea respectively since those houses were not in dispute. Their owners are neither

parties to this appeal and those two houses were not a subject of any dispute before the lower Tribunals and in this Court. On the premises, the first ground of appeal lacks merits.

On the second ground of appeal which relates to the testimony of Sambeke Seng'enge, I agree with the finding of the Appellate Tribunal Chairman that the said Sambeke, being the only person who witnessed the distribution of his brothers' properties, was a key witness who was expected to clear all the doubts over the ownership of the disputed premise. The records show that the said Sambeke who testified as the second witness for the Appellant was not a reliable witness.

His testimony was vividly contradictory as he, at one hand, testified that the house belonged to the parties' mother and at the same time he also stated that he knew that after the death of the parents, the house is given to the last born. When cross examined, this witness admitted that the late Andrea Seng'enge had distributed his houses to his five sons. This is contrary to the testimony of the Appellant that the house was dedicated to him as the last son. Again, the same witness when cross examined, he seemed to have forgotten most of the things that transpired. As held by the Appellate Tribunal Chairman, this witness's evidence was contradictory, it was very unsafe to rely on.

When asked about the number of houses the deceased had, he responded that they were two. He could not even remember who was absent at the

time the deceased was distributing his properties. This makes his evidence unreliable. The second ground is devoid of merit, it is dismissed as well.

Regarding the third ground of appeal, relating to the ownership of the disputed property, I note that the Appellant admitted both at the trial Tribunal and at the Appellate Tribunal that his father distributed all his properties to his children, giving two houses to each of his two elder sons. However, he provided no proof regarding his ownership over the disputed premise as he admitted that the Respondents have been occupying the suit property for 27 years. The question to ponder is why did the Appellant wait for 27 years to claim for sole ownership at this time. Claims for recovery of land and landed properties are governed by the Law of Limitation Act. The limitation of time for recovery of land which is owned customarily is 12 years.

In ***Mathias Katonya Vs. Ndola Masimbi*** [1999] TLR 390 it was stated:

"Firstly, the shamba was clan land owned under, and governed by the customary law. The period of limitation for its recovery was twelve years according to item 6 of the Schedule to the Customary Law (Limitation of Proceedings) Rules 1963, GN. 311 of 1964."

Appellant and the Respondents were in that house for all the 27 years after their father's death. The Appellant had ample time to claim the property at the earliest opportunity, if he so wished. He knew that he had no basis for his claim, that is why he never bothered.

The other concern I feel duty bound to address, is the basis the trial Tribunal relied on in awarding the Appellant the property. The trial Tribunal relied on the Maasai customs. The trial Tribunal was misconceived in so deciding

because the notion of customary law came after the dispute arose. From 1990, when their father was still alive, to the time of his death, and now more than 20 years after, such customs were never addressed. I agree with what was stated by the first Appellate Chairman and from the testimony of Sambeke Seng'enge that the said customs apply where the parents die before distributing the estate to the heirs. This is not the position in this case, as all the parties admitted that the deceased had distributed his estate to his sons before his death.

I hold the view that the Appellant did not prove his ownership over the suit premise apart from relying on the Maasai customs, which in my view was inapplicable. The Appellant admitted that when the distribution was made, he was only 12 years old. He did not state how he came to own the suit premise. The evidence of one Mejoor Sambeke, as submitted by the Respondents, was unreliable since he admitted that he was not present when the distribution took place. His evidence was unnecessary as he had nothing to testify over the Appellant's ownership of the suit premise. The Appellant did not substantiate why the Respondents were denied ownership over the house while all the three deceased's sons were given their houses. This Court has in various decisions denounced discriminatory laws, including customary laws. In ***Andrea Albert Makoi Vs. Maria Albert Anthony Makoi*** [2003] TLR 389, at page 395 it was held:

"The property rights of the Respondent are also protected by Article 13(1)(2) of the Constitution of the United Republic of Tanzania, 1977 which guarantees equality and equal protection before the law. Article 13(2) goes further and denounces all forms of discriminatory laws in the United Republic. In that regard, any Customary law barring a father

or parent from bequeathing his lawfully acquired land or other property to his female heirs would be unconstitutionally and therefore null and void pursuant to article 13(2) of the Constitution of this country and also the Village Land Act 1999, section 20(1)(2)."

Having gone through the trial Tribunal record, it is apparent that the late Andrea Seng'enge intended that his properties be inherited by all his surviving male children. It is unfortunate that the trial Tribunal records are silent on the "will" that the first Respondent alleged to have reduced into writing. It is not part of the trial Tribunal record. All in all, the deceased's intention is clear, as the other two elder sons were given their houses and farms, there is no evidence to suggest his intention to disinherit the Respondents and give the suit premise to the Appellant on the ground of being the last son at the expense of the respondents. In the absence of express intention of the deceased to disinherit any of his own children, the law presumes that each child has the right to inherit the estate of his parent. In the case of ***Masudi Ally Vs. Chiku Masudi*** [1992] TLR 50, the Court held:

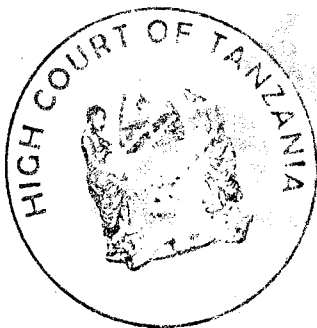
"According to the para 26 of the second Schedule of the Declared Customary Law G/N 436/63, it is the children- them alone- of the Deceased that are customarily entitled to inherit the entire property, (without exception), of their late father, the Appellant having being a completely stranger to the family of the Respondent's late father, he is equally a stranger to the property of the Respondent's late father."

Similarly, this Court is far from being convinced that the Appellant is entitled to inherit the suit premise alone on the account of being the last born. The purported Maasai Customs, even if it exists, seems not to have been observed by the late Andrea Seng'enge. He wanted all his children to have

a share on his hard-earned properties. Having so observed, the third ground of appeal is likewise devoid of merits.

From what I have endeavored to discuss above, this Court is of the view that the Appellant has failed to prove his sole ownership to the suit premise. The testimonies of the witnesses sufficiently proved that the Respondents were also bequeathed two rooms each by their late father. This Court, therefore, upholds the finding of Appellate Tribunal. Consequently, the appeal before this Court is dismissed in its entirety for want of merits. For the sake of harmony between brothers, I direct that each party bears their own costs for this Appeal.

It is so ordered.




Y. B. Masara

JUDGE

2nd October, 2020