

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

LAND APPEAL NO 3 OF 2020

(Arising from Land Case No. 18 of 2018 of Mtwara District Land and Housing Tribunal)

MFAUME HASSAN.....1st APPELLANT

HALUNA ABEID MKOKO.....2nd APPELLANT

VERSUS

MUSSA SWALEHE MUHIDIN RESPONDENT

JUDGMENT

Hearing date on: 10/09/2020

Judgment date on: 11/11/2020

NGWEMBE, J:



The appellants Mfaume Hassan and Haluna Abeid Mkoko are in this court challenging the decision of Mtwara District Land and Housing Tribunal in the Land Case No 18 of 2018. The Tribunal entered judgment in favour of the respondent (Mussa Swalehe Muhidin an *administrator of Estate of the Late Fatu Selemani Nakupa*). The appellants have seven (7) grounds of appeal as narrated in the Memorandum of Appeal.

Briefly, this suit commenced by the respondent, Mussa Swalehe Huhidin, who preferred a land case against the appellants. The respondent sued under capacity of an administrator of the deceased estate of late Fatu Selemani Nakupa, claiming ownership of the suit land. The land in dispute is located at Mahumbika Village at Mahumbika Ward within Newala Town Council in Mtwara region, bearing an approximately two hectares' worth around TZS. 10,000,000/= (ten million shillings).

It is on record that in year 1998, the deceased permitted the 2nd appellant to use the suit land with condition that he has to vacate at any time when the land is required by the owner. Such facts remained the same for the whole life time of the owner Fatu Seleman Nakupa. In year 2016, she became aware that the 1st appellant concluded a lease agreement with Airtel Tanzania Ltd to construct communication tower. Such contract triggered the claim to regain ownership and use of the suit land from the 2nd appellant. Since then to date, the parties are in court struggling against who is the true owner of the suit. While the Tribunal conclusively declared the suit land is owned by the deceased Fatu Selaman through her administrator Mussa Swalehe Muhidin, the appellants on the other side are firm that they have better title over the suit land.

On the hearing, the appellants did not procure legal representations, while the respondent Mussa Swalehe Muhidini procured legal representation of Mr. Ally Kasian Mkali. By consent, the court ordered the appeal to be heard by way of written submissions. With appreciation, both Parties complied with the scheduling order of filing their written submissions.

The appellants have argued their grounds of appeal seriatim to the effect that, on the first ground, they argued generally that the land under their occupation is different from the land occupied by the respondent. To support this argument, they referred into the resolution arrived by the Mahumbika Ward Tribunal in year 2017 that resolved the dispute in favour of the 1st appellant upon visiting *locus in quo*. When they resolved the dispute the deceased Fatu Selemani Nakupa was still alive, hence ascertained that, the appellants' piece of land was separate and far from the land of Fatu Selemani Nakupa. The distance between the two plots of land was about 300 meters.

Added that, during trial of Land Case No. 18 of 2018, the appellants (respondents) refused to visit *locus in quo*. Had the tribunal visited *locus in quo* same could have arrived into a different conclusion from that of Mahumbika Ward Tribunal.

In respect of the second ground, the appellants argued that, the Mahumbika Village Council was in a better understanding of the facts of the suit land. In third ground they argued that, the 1st and 2nd appellants occupied the suit land since 2001, without any disturbances and their whole life depends in the same. They emphasized that, the piece of land which is subject to the late Fatu Selemani Nakupa is different from the appellants' Land.

In essence the appellant's arguments were centered on the fact that the District Tribunal failed to visit *locus in quo* thus, arrived into an offending decision.



In response, the respondent contested the applicants' submission by arguing that, the act of the appellants not to join Airtel Tanzania Limited in their appeal makes their appeal, incompetent because the orders which they are appealing against, touches the interest of Airtel Tanzania Limited whose presence is crucial as was in the Tribunals.

He argued further that, the appellants were just invitees to the land, invited by Sharifa, mother of Fatu Selemani Nakupa and Mzee Laini Selemani Nakupa. The appellants were not given title of ownership to the suit Land. He added that the 1st appellant was grazing goats of Mzee Laini Selemani Nakupa, thus he had no legal capacity to pass ownership of the suit land to Airtel Tanzania Limited or even to lease the same without prior consent from the true owners who is Fatu Selemani Nakupa. Referred this court to the cases of **Swalehe Vs. Salim (1969) HCD 140** and in the case of **Meriananga Vs. Asha Ndisia (1969) HCD 204**.

He pointed out that, Mahumbika Ward Tribunal resolved the matter in 2017 and Fatuma Selemani Nakupa died in 2017. He was of the view that the 1st appellant and Airtel Tanzania Limited to erect its communication tower cannot be regarded as legal contract by mere involvement of Mahumbika Village Council, simply because the 1st appellant had no good title and even interest in the suit land. Hence unable to make any contract or disposition of the suit land.



Further argued rightly, that an invitee cannot establish adverse possession against the host even if the invitee had made some improvements therein. He referred this court to the case of **Mukyemalila & Thadeo Vs.**

Luilanga (1972) HCD 4. Likewise, it doesn't matter for how long the appellant has been occupying the suit land, but the truth shall remain to be a mere invitee, thus he has no legal right and even interest over the said land.

To conclude his submission, he argued that, the trial tribunal was right not to weight the position of Mahumbika Village Council, simply because the lease entered between the 1st appellant and Airtel Tanzania Limited was null and *void ab initio*.

In rejoinder, the appellants reiterated what they have submitted in chief, however they emphasized that, the respondent sued the 1st and 2nd appellants together with Airtel Tanzania Limited under the capacity of being an administrator of the late Fatuma Selemani Nakupa, but he did not tell the tribunal nor did he attach a copy in his application showing him as a legal administrator of the estate of the late Fatuma Selemani Nakupa nor did he name any formal meeting which sat to appoint him to administer the estate of late Fatuma Selemani Nakupa.

Upon summarizing the disputants' legal arguments, I have noted some crucial matters to be discussed hereto before embarking into consideration of the main appeal. **Fist**, the original disputants were Mussa Swalehe and Mfaume Hassani before the Ward Tribunal of Mahumbika, whereby, the Tribunal decided infavour of Mfaume Hassan. However, such decision was nullified by S.H. Wambili Chairman of the District Land and Housing Tribunal on 23/11/2017. The appellate Tribunal was clear that the dispute should start afresh before the Ward Tribunal. **Second**, instead of



instituting a fresh suit before Ward Tribunal, rightly so to speak, preferred a fresh suit before the District Land and Housing Tribunal registered as Land Application No. 18 of 2018 whose parties were Mussa Swalehe Muhidini (an administrator of the deceased Fatu Seleman Nakupa) against Mfaume Hassani, Haluna Abeid Mkoko and Airtel (T) Ltd. This time the dispute landed before another chairman Mr. H.I. Lukeha who decided in favour of the applicant and proceeded to nullify even the lease agreement entered between Mfaume Hassan and Airtel (T) Ltd. Also ordered the respondents to demolish their building and vacate the suit land and handover to the applicant Mussa Swalehe Muhidini.

Third, the appellants were not satisfied with those orders, hence this appeal. In this appeal, the appellants have questioned the *locus standi* of the respondent who according to the Tribunal's decision is the lawful owner of the suit land. *Locus standi* is a legal issue which must first be determined and decided. It is a cardinal principle that whoever appears in court and claims any right against another person must be clothed with *locus standi*. In this appeal, the documentary evidences speak louder than parties' arguments. The trial Tribunal at page 2 of the judgement noted clearly that Fatu Seleman Nakupa demised on 5th July, 2017, subsequently the respondent was appointed an administrator by Newala Urban Primary Court on 13th September, 2017. The letter of administration was tendered in court marked exhibit A – 2. Therefore, without using much energy, the issue of *locus standi* of the respondent was legally and rightly settled during trial by the District Land and Housing Tribunal same cannot be

raised on appeal without having new facts to contradict the previous documentary evidences.

It is a trite law governing evidences that whose evidence is heavier in court and proves the allegations on balance of probability, obvious must win. Parties are bound by their pleadings and or written arguments. On appeal courts do not deal with evidences, rather relies on the evidences adduced by credible and reliable witnesses as recorded by the trial court/tribunal together with documentary evidences tendered and admitted thereto.

Therefore, in determining this appeal, the court will rely on the underlying principles narrated above together with provisions of laws and applicable precedents.

Having so said, the question remains, that is, who is the rightful owner/ who is the lawful owner of the suit land between the disputants? I have carefully, visited both typed and handwritten proceedings of the trial District Land and Housing Tribunal, with full purpose to unearth what went wrong, if any, before the trial Tribunal which the appellants have forcefully argued to convince this court to decide in their favour.

This court as first appellate court has decided to review the evidences adduced in court.



The evidence of PW1 (Hadija Swalehe Muhidini) reliably testified before trial Tribunal that the suit land located at Mahumbika Villange in Newala District is owned by the late Fatu Selemani Nakupa who got the same from

her late father Selemani Nakupa. During cross examination by 1st respondent she responded as reproduced hereunder:-

"You were not given exact time to stay on the suit land but you said if you got [sic] money you would go to live elsewhere".

On cross examination by the 2nd respondent, she boldly responded:-

"It is true that my mother Fatuma Selemani built that house".

On cross examination by advocate for the 3rd respondent she responded:-

"Fatuma Selemani Nakupa died on 6/12/2016, after her death Mussa Swalehe was appointed to be administrator of estate of Fatuma Selemani Nakupa"

She testified further that, after the coming of Airtel, they heard that Mfaume Hassan Namtandi leased the suit land to Airtel (T) Ltd. During cross examination by the advocate of 3rd respondent she responded:-

"At the family meeting nothing was agreed because Mfaume Hassan (1st appellant) (1st respondent) refused to hand over the lease agreement".

The testimony of PW1 was corroborated by the evidence of PW2 (Mussa Swalehe Muhidini) who testified as administrator of the estate of the late Fatuma Selemani Nakupa. In his testimony at the trial, said Fatuma Selemani Nakupa was given the suit land by her father Selemani Nakupa whereby Fatuma Selemani's mother Sharifa Mkova came to live with her on the suit land whereby she built the house on the said suit land. He added that Sharifa Mkova brought two grand children to live with her in the suit land who was Haluna Abeid Mkoko (2nd appellant) and Zuhura Abeid

Mkoko, Zuhura and Haluna Abeid Mkoko (2nd appellant) were living in the house built by Fatu Selemani Nakupa on the suit land taking care of their grandmother Sharifa Mkova.

The records also demonstrate that Airtel (T) Ltd erected a communication tower on the suit land during the life time of Fatuma Selemani Nakupa whereby Mfaume Hassani (1st appellant) and Haluna Abeid Mkoko (2nd appellant) knew the agreement with Airtel.

During cross examination by 1st respondent he responded that:

"Fatuma Selemani left you to live in the suit land as home and not as owner".

During cross examination by 2nd respondent he responded that:-

"Fatuma Selemani built the house for her mother, you went to live with Fatuma Selemani Nakupa as grandchildren".

During cross examination by the advocate of the 3rd respondent he responded that:-

"Mfaume Hassani is not the owner of the suit land where Airtel tower was erected"

Apart from PW1 and PW2's evidences, the records also shows that another evidence which corroborated PW1's testimony was the evidence of PW3 (Akili Laini Selemani) who testified that the suit land is the property of Fatuma Selemani Nakupa which land was previously owned by her late father Selemani Nakupa. That the Airtel tower was constructed while the owner of the suit land Fatuma Selemani Nakupa was still alive. They

conducted a family meeting where she attended. They discussed on the place where Airtel constructed its communication tower. It was resolved that the contract of Airtel to erect its tower between Airtel and Mfaume Hassani (1st appellant) should be handed over to Fatuma Selemani Nakupa, the lawful owner of the suit land.

In turn the 1st appellant (Mfaume Hassani) told the trial tribunal that, in 1991 was grazing goats of Mzee Laini in the suit land. The evidences of Mfaume Hassani did not demonstrate that Mfaume Hassan was the lawful owner of the suit land, rather supported the evidence testified by the respondent as administrator of the deceased estate of the late Fatuma Selemani Nakupa.

The appellants also complained that the 2nd appellant was offered the disputed land by the late Mzee Laini Selemani Nakupa. During cross examination by advocate for the respondent he responded that:-

"my uncle Laini Selemani and Sharifa Mkova brought me to Mahumbika Village after the death of my mother, at Mahumbika I was living with my grandmother Sharifa Mkovale and my uncle Laini Selemani".

During cross examination by tribunal Assessor he responded that;

"Mzee Laini Nakupa gave me the disputed land verbally in the presence of the late Sharifa Mkova".



Further it is on record that in year 2001 the 2nd appellant (Haluna Abeid Mkoko) left the disputed land and went elsewhere to build another house. When he was asked to clarify more by the chairman of tribunal, he said:-

"I left the disputed land to Mfaume Hassan because he was grown up we could not share the same house"

This piece of evidence leaves a lot to be desired. One may ask, whether the 1st appellant was allocated the suit land by Mzee Laini Selemani Nakupa? or whether the disputed land was left to the 1st appellant by the 2nd appellant when he decided to build another house elsewhere? All in all, I think the tribunal recorded evidences of both disputants' fairly.

In this appeal, the appellants forcefully argued that, they occupied the suit land from 2001 undisturbed. Further argued that it was impossible to trespass an area in a center of the town and stay for more than twenty (20) years. An immediate question is whether an invitee may turn into a lawful owner of the land simply because of number of years he stayed therein? It is a legal position that an invitee however many years will stay in a suit land cannot become a lawful owner or acquire better title over and above the original owner. This position is backed with the Court of Appeal's decision in the case of **Musa Hassani Vs. Shedafa (Legal Representative of the late Yohana Shedafa), Civil Appeal No. 101 of 2018(CAT)(unreported) at Tanga** where the court held:-

"As far as we are aware no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited"



Being guided by the position of the law stated above, I wish to underline that an invitee cannot own land to which he was invited to, in exclusion of

his host whatever the length of his stay. Likewise, it does not matter that the said invitee had even made unexhausted improvements to the land he was invited to.

As I am also fortified in this view by the decision of the same court in the case of **Maigu E.M. Magenda Vs. Arbogast Mango Magenda, Civil Appeal No. 218 of 2017** (unreported) where the court held:-

"We do not think continuous use of land as an invitee or by building a permanent house on another person's land or even paying land rent to the city council of Mwanza in his own name would amount to assumption of ownership of the disputed plot of land by the appellant"

As am about to conclude this appeal, when the above precedents read together with section 45 of the Land Disputes Courts Act, Cap 216 R. E. 2002 as I hereby quote verbatim, I find the grounds of appeal are exhaustively considered: -

*"No decision or order 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**".*

In view of the aforesaid, and on strength of the quoted precedents together with section 45, now I would safely arrive to the conclusion that, I find no cogent reason to fault the decision of the trial Tribunal, which

was justified to declare that the appellants failed to prove ownership of the suit land. I accordingly dismiss this appeal with costs to the respondent.

I Order accordingly.



P.J. NGWEMBE

JUDGE

11/11/2020

Court: Judgement delivered at Mtwara in Chambers on this 11th day of November, 2020 in the presence of appellants and in the presence of Mr. Ruta Bilakwata for Ally Kasian Mkali, Advocate for the respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

11/11/2020