IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE APPEAL NO. 73/2018
(*Arising from application No. 136/2013 of the District Land and Housing Tribunal of Bukoba*)

FRAISCA A. RUGIMBANA.....1ST APPELLANT
MARISI RUGIMBANA.....2ND APPELLANT
LETICIA A. RUGIMBANA.....3RD APPELLANT
ADELINA A. RUGIMBANA.....4TH APPELLANT
LETICIA A. RUGIMBANA.....5TH APPELLANT
SHUBI A. RUGUMBANA.....6TH APPELLANT
MELDESI A. RUGIMBANA.....7TH APPELLANT
SWEETHBETHS A. RUGIMBANA.....8TH APPELLANT
PENDO A. RUGIMBANA.....9TH APPELLANT
DENIS SIMON NDAMUGOBA.....10TH APPELLANT

VERSUS

AUGUSTINE ANATORY RUGIMBANA.....1ST RESPONDENT
ADOLPH A. RUGIMBANA.....2ND RESPONDENT

JUDGMENT

Date of last order 20/10/2020
Date of judgment 13/11/2020

Kilekamajenga, J.

The background of this dispute shows that the disputed land belonged to the late Anatory Rugimbana who died in 2001. Before his death, he wrote a will in 1993 bequeathing the properties, including the disputed land, to his children. Immediately after the funeral in 2001, the children sat down and divided the land among them according to the will. Their agreement

and division was documented and signed by all the children including the respondents.

Later in 2003, the first respondent applied for the administration of the estates at Bukoba Primary Court where he was appointed to administer. In 2012, ten female children of the late Anatory Rugimbana convened in Dar es salaam to discuss the fate of the piece of land which was allocated to them; they agreed to sell the land. In 2013, the land was sold to Denis Simon Ndamugoba at the price of Tshs. 10,000,000/=. The sale agreement was approved by the village authority (Mwenyekiti was Kitongoji) and also witnessed by other persons. In 2013, one of the sons of Anatory Rugimbana called Adolph Anatory Rugimbana sued the ten female children of the late Anatory Rugimbana and the buyer of the land claiming that the land belonged to Abagiri clan. He also prayed for the order to redeem the land from the purchaser. Later, the application was amended and the applicants were Augustine Anatory Rugimbana (Administrator of estate of the late Anatory Rugimbana), Deogratius Anatory Rugimbana and Adolph Anatory Rugimbana. At the end, one of the applicants, namely Deogratius Anatory Rugimbana, dropped the case and the two applicants remained.

During the hearing of case at the trial tribunal, the respondent's case had five witnesses. AW1 (Adolph Anatory Rugimbana), who was the brother to the appellants and respondents, testified that the disputed land was sold without following the proper procedures because clan members were not involved. Therefore, the appellant were not the proper persons to sell the land. He urged the tribunal to order the return of the land to Deogratius Rugimbana who is the clan member. During cross examination, AW1 admitted that he did not know where his father got the land. He further admitted that his father Anatory Rugimbana distributed the land to the appellants and they were at liberty to sell the land. The land was distributed to the appellants but later given to Deogratius by the clan members after they realised that he got nothing.

AW2 (Augustine Anatory Rugimbana) who was also the brother of the parties testified that he was the administrator of estates of their father Anatory Rugimbana. He further testified that the land which belonged to their clan was sold by the appellants. The will left by his father bequeathed the estates to each child. He prayed for the returned of the land to the clan. He testified further that the land was given to female heirs but later given to Deogratius by clan members. He urged the Court to nullify the

sale agreement, order the refund of money to the buyer and return of the land to Deogratius Rugimbana.

AW3 (Albert Rugimbana) was the brother to the parties who testified that Augustine Anatory Rugimbana was appointed the administrator of estates. He further admitted that the land was bequeathed to the appellants through their father's will although the will prevented them from selling it. If they sold it the the proceeds were supposed to be equally divided. He further alleged that the land was bequeathed to Deogratius. AW4 (Benezeth Benedicto Kanyambo) testified that the land at Kyetema was given to the female children of the later Anatory Rugimbana. AW5 testified that he bought a piece of land from the deceased at Kyetema in 1997 and his purchase has not been queried until now.

On the other hand, the defence also had five witnesses. DW1 (Gaudensia Anatory), who was the wife of the late Anatory Rugimbana, testified that her husband bought the land at Kyetema in 1959. The daughters of the late Anatory Rugimbana were given the land at Kyetema; they were allowed to sale the same and distribute the proceeds. The land at Kyetema which is the subject of the dispute is not a clan land because the deceased

bought it. DW2 (Denis Simon Ndamugoba) testified that he bought the disputed land from the daughters of the late Anatory Rugimbana, which was given to them as heirs, at the price of Tshs. 10,000,000/=. Before buying the land, he was shown the will which stated that the land was given to ten daughters of the late Anatory Rugimbana. The said will allowed them to sale the land. DW3 (Pendo Anatory), who was one of the daughters of the later Anatory Rugimbana, testified that the disputed land was given to them through their later father's will. The will instructed them to sell it and divide the proceeds equally. She objected the claim that the land belonged to the clan. Her testimony was supported by DW4 (Melesi Anatory Rugimbana) who testified that the disputed land was allocated to 10 daughters of the later Anatory Rugimbana and she was among of those daughters. The will allowed them to sell the land and equally divide the proceeds. DW5 (Fraisca Anatory Rugimbana) also confirmed that they sold the land which was allotted to them as an inheritance. The will bequeathing the land to them directed that the land be sold so that they can divide the proceeds.

Finally, the case was decided in favour of the respondents. Being aggrieved with the decision of the trial tribunal, the appellants preferred this appeal and advanced eight grounds thus:

1. *That the trial chairman of the District Land and Housing Tribunal grossly erred in law by hearing and determining the application without following proper procedure of framing issues;*
2. *That the trial Hon. Chairman erred in law and facts by delivering a judgment on the nullity proceedings which did not involve assessors;*
3. *That the trial tribunal erred in law by pronouncing judgment without opinion of assessors;*
4. *That the trial learned Chairman greatly erred in law and facts by failure to decide on each issue and give reason of on the same;*
5. *That the trial chairman grossly erred in law and facts to allow the application on matter/issue which was raised suo motto by the tribunal and without giving the appellants right to be heard;*
6. *That the learned trial chairman grossly erred in law and facts by allowing application and pronouncing orders against the appellants which were not prayed in the application form (Form No. 1) by the respondents;*
7. *That the trial tribunal erred in law and in fact for basing its finding on the contradictory evidence of the respondents and thereby pronouncing contradicting judgment against the weight of evidence;*
8. *That in totality the proceedings of the District Land and Housing Tribunal are nullity and tainted with illegalities.*

When the appeal was scheduled for hearing, the learned advocate, My Mwita Makabe appeared for the appellants who were absent whereas the respondents were represented by the learned advocate, Ms. Aneth Lwiza. In defending the appeal, the counsel for the appellants prayed to abandon the first three grounds and argued five grounds of appeal. On the 4th ground, he submitted that the trial tribunal failed to consider every raised issue in that case. The tribunal raised four issues but the decision of the chairman was hinged on issues which were not raised by the tribunal. The tribunal finally decided that the appellants sold the land which was not distributed to them by the administrator of estates something which was not among the issues framed by the tribunal and the parties were not invited to argue the same issue. In his view, the land was legally sold by the appellants. The raised issues were generally not discussed by the tribunal contrary to **Regulation 20(1)(b) of the District Land and Housing Tribunal Regulations, GN No. 174 of 2003**. He cemented the argument with the case of **Peter Ng'homango v. The Attorney General, Civil Appeal No. 114 of 2011**, CAT at Mwanza (unreported). This argument also applies to the fifth argument.

On the sixth ground, Mr. Makabe argued that the trial tribunal ordered the land to be in the hands of the administrator of estates something which was not prayed by the applicants. On the seventh ground, Mr. Makabe argued that the trial tribunal decision was based on contradictory evidence because there was no proof whether the land belonged to the clan. The said land was not a clan land because their father purchased it from Kagaruki. The administrator of estates admitted that the land was allocated to the deceased's daughters but later allocated to Deogratius who withdrew from this case. On the 8th ground, the counsel for the appellants argued that the proceedings of the trial tribunal had illegalities. For instance, at 20 of the typed proceedings, on the coram, the assessors do not appear. At page 26 of the typed proceedings, assessors appear cross-examining the witness something which is contrary to **section 177 of the Evidence Act, Cap. 6 RE 2019**. Mr. Makabe invited the Court to revisit the trial tribunal evidence and allow the appeal by deciding on the matter based on the raised issues.

In response, the counsel for the respondents stressed that the trial tribunal discussed the raised issues. The issues were itemised at page 3 of the judgment and issues not in dispute identified. The counsel concurred with the decision of the trial tribunal on the issues which were not in dispute. She invited the Court to evaluation the application because the first administrator of estates also died. The order to place the land under the administrator of estates was prayed under the umbrella of 'any other reliefs that the court deems fit to grant.' She further argued that there was no contradiction on the evidence adduced before the trial tribunal. The will left by the deceased was never executed by the administrator of estates. The female heirs sold the land which belonged to Deogratius Rugimbana. Generally, the land was not officially given to the appellants.

Ms. Lwiza further submitted that there was no illegality on the proceedings of the tribunal. Assessors participated in the hearing of the case and asked questions to witnesses. However, the counsel for the appellants failed to demonstrate how his clients were prejudiced by such an illegality. Even the will was received by the tribunal but was not relied on during the decision. Furthermore, there is no proof that the land was sold by the appellants

because the sale agreement was not tendered before the tribunal. She finally urged the Court to dismiss the appeal with costs and uphold the decision of the trial tribunal.

When rejoining, the counsel for the appellants reiterated that the issues raised by the trial tribunal were not addressed. He further insisted that the disputed land belonged to the appellants and it was not a clan land. He reiterated that the assessors did not fully participate in the hearing of the case. Any irregularity injures the rights of the parties something which offends section 174 of the Evidence Act, Cap. 6 RE 2019. It is not in dispute that the land was sold by the appellants. He reiterated the prayer to allow the appeal.

It is apposite at this stage to consider the merits in the grounds of appeal advanced by the appellant. On the 4th and 5th ground the appellant argued that the trial chairman did not address the issues raised during the trial. I perused the proceedings of the tribunal and found out that there were four issues thus:

1. Whether the disputed land is a clan land;

2. Whether the sale of the land between 1st to 10th respondents was proper;
3. Whether the 11th respondent belongs to the Abagiri clan;
4. Reliefs.

Upon reading the judgment of the trial tribunal, it is evident that the chairman failed to address the issues. As argued by the counsel for the appellant, the decision of the tribunal was based on the issue which was not among the issues raised before the hearing. I find the 4th and 5th ground of appeal have merit.

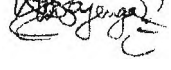
On the 8th ground, the counsel for the appellant submitted that there were illegalities in the proceedings of the trial tribunal. He cited some few examples on the absence of assessors during the hearing of the case. I perused the proceedings of the trial tribunal and found that, the issues were raised by the tribunal on 30th November 2015 in the presence of the chairman and two assessors. On 10th January 2017, the hearing commenced, however there is no record to show whether the assessors were presence. I perused both the typed and handwritten proceedings of the trial tribunal but I could not find record indicating the presence of the

assessors. However, at page 26 and 27 of the typed proceedings, the names of assessor appear asking questions to the witness. But, on the coram, such names are missing. Also, on 20th April 2017, the hearing continued and there was no record showing whether the assessors were present. Under **section 23 of the Land Disputes Courts Act, Cap. 216 RE 2002** the law provides:

> *'The District Land and Housing Tribunal established under section 22 shall be composed of at least a chairman and not less than two assessors.'*

It is therefore against the law and unprocedural for the hearing of the tribunal to proceed in the absence of the assessors. For that reason, this irregularity renders the proceedings and decision of the tribunal a nullity because assessors were not involved in the hearing.

Furthermore, I wish to consider the 7th ground albeit in passing. On this ground, the counsel for the appellant argued that the decision was based on contradictory evidence. In addressing this ground, I was obliged to consider the evidence from both sides. There is strong evidence indicating that the dispute land was allocated to female heirs of the late Anatory



Rugimbana (appellants). The will alleged to bequeath the land to the female heirs (appellants) was read at the funeral and the respondents were also present and they never objected. Another document was written on how the contents of the will could be effected. Both the appellants and respondents were present and they approved the proposed distribution of the estates of the deceased. The evidence further shows that the will allowed the appellants to sell the land and divide the proceeds thereof. The dispute arose after the land was sold in 2013; this was almost 12 years after the death of the deceased. In addition, it should be noted that in 2003, the 1st respondent was appointed to administer the estates of the deceased. It is inconsistent to believe that he never distributed the estates for more than 10 years.

Furthermore, what I can easily conceive from the dispute is the old ideology that female children cannot inherit land under Haya customary law. I have insisted in a number of cases that this is an old law and has no place in the current jurisprudence of justice. See, the cases of **Angelo Bisiki v. Antonia Bisiki and others [1989] TRL 225** and **Bilimbasa Zacharia v. Jarves John [1983] TLR 67**. In the case **Leonance**

Mutalindwa v. Mariadina Edward [1986] TLR 120, and Hon. Katiti J. stated that:

> *The first issue, whether a female has legal competence to dispose of clan land, is to both professional and lay members of this zone, susceptible to easy answer, an answer that is particularly attractive, covetously and jealously guarded by chauvinistic males but the envy of females from Kagera Region. The answer as expected is that para 20 of the Customary Law Declaration G. N.536, does operate to deprive the first respondent a female the power to sell clan land. The first issue is therefore answered positively. But I would like to add, may be in passing, that at any one time, we may have bad as well as good law, and* ***I venture to say, without qualms, that this piece of customary law is bad, it discriminates against women, encourages expansionist greed on the part of males against female relatives, and deprives females, important resources for self – assistances,*** *when as in this case, they are in serious trouble, while like wild birds of prey, men, greedily look on, or however, either for the woman to expire, or die, or abandon that shamba, - in this case, this case, this ugly position is with clarity put by the appellant's witness, P.W.4 thus: ...So much for the ugly aspects,* ***but what is encouraging is all that the grave for the same is being dug, for the contemptuous burial of the same for the sake of equality, when the Fifth Constitutional Amendment 1984, takes its rightful place, in 1988.***

Also, the case of **Ndewawiosia Ndeamtzo v. Imanuel Malazi (1968) HCD 127** had the similar position when it stated that:

> *'It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, based on equality.'*

In line with the above law, **section 56 of the Law of Marriage Act, Cap. 29 RE 2002** further protects the rights of women on ownership of land thus:

> ***A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable****, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.*

On the other hand, the **Land Act, Cap. 113 RE 2002 and the Village Land Act, Cap. 114 RE 2002** have provisions which guarantee the right of women to own land. **Section 3(2) of the Land Act** provides:

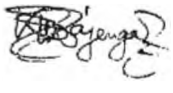
> *3(2) The right of every adult woman to acquire, hold, use, and deal with land shall to the same extent and subject to the same restrictions be treated as a right of any man.*

Also, **section 3(2) of the Village Land Act** has a similar provision thus:

> *3(2) The right of every adult woman to acquire, hold, use, deal with and transmit by or obtain land through the operation of a will, shall be to the same extent and subject to the same restrictions as the right of any adult man.*

See, also the **Mortgage Financing (Special Provisions) Act of 2008**.

In conclusion, after considering the grounds of appeal and going through the records available in the court file, I allow the appeal with costs. I nullify the proceedings of the trial tribunal and set aside the decision thereof. I do not see the need to order retrial of the case because there is no sufficient evidence suggesting that the respondents have any right over the disputed land. It is so ordered.



Dated at Bukoba this 13th November 2020

Ntemi N. Kilekamajenga
Judge
13th November 2020

Court:

Judgment delivered in the presence of the counsel for the appellants, Mr. Peter Makabe and Ms. Liberator Bamporiki (Adv) holding brief for Advocate Aneth Lwiza. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
Judge
13th November 2020