

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. LAND APPEAL NO. 18 OF 2020**

*(Arising from the decision of the District Land and Housing Tribunal of Geita in Land Appeal No. 39 of 2019, Originating from Bujula Ward Tribunal Case No. 08 of 2019)*

**1. NZEGERA DEREFA**

**2. MATHIAS DEREFA**

} ..... **APPELLANTS**

**VERSUS**

**MCHELE SHILEKA ..... RESPONDENT**

**J U D G M E N T**

*Date of Last Order: 10.12.2020*

*Date of Judgment: 17.12.2020*

**A.Z.MGEYEKWA, J**

The appellants filed an appeal against the Judgment of the District Land and Housing Tribunal of Geita in Land Appeal No. 39 of 2019, which was decided in favour of the respondent.

The background to this appeal is briefly as follows. The appellants filed a Land Case No. 08 of 2019 before Bujula Ward Tribunal against the respondent claiming ownership over the disputed land. The trial Magistrate determined the case and decided in favour of the respondent. The decision of the District Land and Housing Tribunal on the same authority upheld the decision of the Ward Tribunal and considering the respondent a lawful owner of the suit land after a long occupation of 30 years.

Undeterred, the appellants have lodged this second appeal containing four grounds of appeal as follows:-

1. *That, the Honourable Chairperson erred in law and fact in holding that the Appellants are barred by the law of limitation without considering the fact that the Appellants only came into notice of the Respondent's intrusion in 2015 after the demise of their elder brother Mao Derefa (who was the care taker of the suit land) in 2014.*
2. *That, the Honourable Chairperson erred both in law and fact by holding that the Respondent is entitled to the suit land after long use and occupation without considering the fact that any use of the suit land by the Respondent was due to permission given to them by the land care taker (Mao Derefa).*



3. *That, the Honourable Chairperson grossly erred in law and fact for not taking into account the fact that suit land is a clan land hence any sale transaction if any between the Respondent and one Mao Derefa lacked consent from other clan members.*
4. *That, the Honourable Chairperson erred in law and in fact in holding that the seller of the suit land or his administrator ought to have been joined without considering the fact that there is no evidential proof that there was a sale transaction on the suit land in 1984.*

When the matter was called for hearing, the appellant appeared in person fended for himself while the respondent enjoyed the legal service of Mr. Erick Mutta, learned counsel.

Being a layperson, the appellant had little to contribute to the arguments in the appeal. The appellant argued the grounds of appeal generally. He complained that he was dissatisfied with the decision of the appellate tribunal. He claimed that the respondent is not the lawful owner of the disputed land since he did not produce any document to prove his ownership and to prove his long stay in the suit land. He added that the respondent did not prove that he dwelled in the suit land for more than 20 years. He went on to state that Mao sold the suit land without consulting them and the respondent did not tender any document to prove that Mao sold him the said

suit. The respondent refuted that the respondent bought the suit land in 1984. He added that they occupied the suit land from 1965 to 1983 when his father moved to another place.

The respondent continued to argue that their father handed the suit land to their brother one Mao who was a caretaker until when he passed away in 2014. He asserted that in 2015 when he went to visit the suit land he found the respondent has invaded the suit land. He concluded by stating that his father is the one who bought the suit land therefore the respondent was required to buy the land from the clan members, not from a single person.

Opposing the appeal, Mr. Mutta consolidated the first and second grounds together as well as the third and fourth grounds. On the consolidated first and second grounds, Mr. Mutta submitted that the complaint hinges on the evidence on record. He contended that the appellant's witnesses contradict each other. He added that they testified to the effect that since 1983 they moved from the suit land and left their mother who moved in 1987. Mr. Mutta went on to state that thereafter the confusion arises as to whom the suit land was left with, either Musa Ruben or any other person?. He asserted that since 1987 the appellant left the suit land to-date.



Mr. Mutta did not end there he went on to state the respondent occupied the suit land in 2018 when the dispute arose. He went on to state that when the tribunal visited locus in quo the disputed land, the respondent was able to identify the borders and neighbours whom he is bordering with and the neighbours identified the respondent. He went on to state that the appellant stated that Mao passed away in 2004 while at the first appellate tribunal they stated that Mao passed away in 2014. He added that it is clear that counting from 2004, 14 years lapsed therefore the law of limitation is against the appellant.

Regarding the third, fourth, and fifth grounds, as consolidated, the learned counsel for the appellant argued that the appellant did not prove if the disputed land was a clan land. He went on to argue that there is a contradiction; the appellant said that the suit land belonged to his late father therefore the appellant has no legs to stand on because he is not an administrator of the estate. He went on to state that the evidence reveals that the clan is left with only two relatives who are the appellants to the present case. He added that in that case administration of estate could not be a problem. He insisted that as long as the appellant's father was the owner of the suit land therefore the procedure of instituting a claim as an administrator of the estate had to be followed.

On the strength of the above, Mr. Mutta argued this court to dismiss the appeal with costs.

In his brief rejoinder, the appellant insisted that the respondent had no any proof that he bought the suit land from Mao. He claimed that he is a complainer who wants to see the sale agreement otherwise Mao did not sell the clan land.

Having summarized the facts of the case and submissions of the appellant, I now turn to confront the grounds of appeal in determination of the appeal before me. In my determination, I will consolidate the first and second grounds because they are intertwined. Equally related are the third and fourth grounds which I shall also determine together.

On the first and second grounds, the appellant faulted the trial Magistrate for holding that the appellants were barred by the law of limitation while the appellant became aware after the demise of their brother. They also complain that the respondent occupied the land after being permitted by their late brother. The records reveal that the appellants in their testimonies admitted that their late father moved from the disputed land in 1983 and later they started to cultivate the disputed land only to realize that the respondent



occupied and cultivated the suit land. The first appellant also claimed that they have been cultivating the suit land since 1984 and he claimed that his father did not sell the suit land. On the other hand, the respondent claimed that his father moved in the suit land in 1986 and he testified that his father bought the suit. He testified to the effect that he stayed in the suit land for 30 years. also moved in the suit land. I have perused the records and found that none of them tendered any documentary evidence to prove ownership.

Having analysed the evidence on record, I have found that non of the parties produced documentary evidence to ascertain their ownership over the suit land. In a situation where both parties could not produce documentary proof to ascertain their ownership, then the trial tribunal finding, which includes the circumstance of the case, facts, and evidence, will lead this court to determine the matter before it.

The appellants are the ones who instituted the case therefore they were required to prove that they occupied the suit land before the respondent. It is trite law that a burden of proof, in any case, lies on the one who alleges as stated under section 110 of Evidence Act, Cap.6 [R.E 2019], the court has to place more weight on a party who produced a relevant document and who



proved his case on the preponderance of probabilities. The same was held in the cases of **Tatu Mohamed v Maua Mohamed**, Civil Appeal No. 31 of 2000 and **Lamshore Limited and J. S. Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330 it was held that:

*“ he who alleges a fact has the duty to prove it”*

Borrowing a leave from the above authorities, and based on the adduced evidence by the appellants, I find that the appellants are the ones who alleged, therefore, they had a duty to prove that they are the lawful owner of the suit land instead of shifting the burden to prove to the respondent. Therefore, I am satisfied that they have failed to prove that they are the lawful owners of the disputed land. I am saying so because despite that the respondent bought the disputed land from the appellant's brother, this court considered his long occupation of about thirty years, it would be unfair to disturb him. Therefore, he had a right to the possession of the land at the time the appellants filed their suit. Having said so, I find that the appellants failed to prove that the time of limitation was not against them and that they occupied the suit land a long time ago before the respondent. Therefore this ground is demerit.



The third and fourth grounds of appeal seek to address the complaint that the trial Magistrate did not consider that the suit land is a clan land hence any sale transaction between the respondent and Mao Derefa lacked consent from the clan land. They also complained that the trial Magistrate erred in ordering that the administrator of the estate was required to join the suit while the respondent had no any evidential proof that there was a sale agreement.

The appellants are claiming that the disputed land is a clan land. I have perused the trial tribunal records and noted that Nzengera Derefa, the first appellant testified to the effect that their father passed away and left the disputed land in the hands of the children, and in his testimony, he mentioned that the suit land belongs to the clan. One Mathias Derefa; the second appellant claimed that the disputed land belonged to their father and the clan members convened a clan meeting without stating whether the administrator of the estate was appointed or not. He claimed that their father Derefa Ndaki moved in 1983 without selling the disputed land. The appellant's witness one Helena Derefa testified to the effect that the disputed land belonged to their late father. One Musa Reuben Jakobo testified to the effect that the disputed land belonged to the late Derefa Ndaki.



I have perused the court records and found that both parties testified to the effect that the suit land belongs to their late fathers. The appellants were disputing on the landed property, which was not cleared for administration. They instituted the case in their own capacity while all the appellant's evidence points towards the fact the disputed land belonged to their father and now the same belongs to the clan members. The appellants were not appointed as administrators of the estate to administer the estate of the late Derefa Ndaki. Reading section 100 of the Probate and Administration of Estate Act, Cap. 352 [R.E 2019] it states that:-

*“ an executor or **administrator has the same power to sue in respect of all caused of action that survives the deceased**, and may exercise the same power for the recovery of debts due to him at the time of his death, as the deceased had when living.”* [Emphasis added].

Equally, section 71 of the Probate and Administration of Estate Act, Cap. 352 [R.E 2019] state that:-

*“ **After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted shall have the power to sue or prosecute any suit, or otherwise act as a representative of the deceased**, until such probate or letters of administration shall have been revoked or annulled.”* [Emphasis added].




Applying the above provisions of law, it is crystal clear that a person duly appointed to administer the estate of the deceased is the only competent person to file a case. Therefore, as long as the appellants were not administrators of the estate of the late Derefa Ndaki, means that they had no power to sue and recover the landed property of their late father.

In the upshot of the above, I find and hold that this appeal was lodged with no iota of merit. It stands dismissed. Each party to bear its own costs.

Order accordingly.

Dated at Mwanza this 17<sup>th</sup> December, 2020.



  
**A.Z.MGEYEKWA**  
**JUDGE**  
17.12.2020

Judgment delivered on 17<sup>th</sup> December, 2020 in the presence of the first appellant and the respondent.

  
**A.Z.MGEYEKWA**  
**JUDGE**  
17.12.2020

Right to appeal fully explained.