IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

LAND APPEAL NO. 14 OF 2020

(Arising from Land Appeal No. 25 of 2019 of the District Lan and Housing Tribunal of Lushoto District at Lushoto and Original Land Case No. 4 of 2019 of Tamota Ward Tribunal)

BETWEEN

HOSSENI ALLY MBILU.....APPELLANT

Versus

MUSSA MDOE SHEHOZA.....RESPONDENT

JUDGMENT

MRUMA, J.

In the Ward Tribunal of Tamota at Tamota in Lushoto District the Respondent herein Musa Mdoe Shehoza sued the Appellant herein Hussein Ally Mbilu for trespass and recovery of a piece of land situated at Ngwelo village in Lushot District Tanga Region.

His case was that the land in dispute was originally owned by his family prior to the year 1971. He gave it to his daughter Mariamu Hamza

(deceased) who was married to the Respondent. The daughter lived and occupied the suit land with her children before she was divorced by the Appellant and got married to another man and continue to live with her new husband in that land. After the demise of Mariam Hamza the Appellant claimed ownership of that land on the ground that he had bought it from one Hamza Mshahara in 1950. The trial Ward Tribunal entered judgment in favour of the Respondent. The tribunal held that there was no evidence that the Appellant Hossein Ally Mbilu (who was the Respondent therein) did acquire the suit land by purchasing it from Hamza Mshahara.

The Appellant was aggrieved by the decision and orders of the trial tribunal. His appeal to the District Land and Housing Tribunal in Land appeal No. 25 of 2019 was dismissed, hence this appeal.

In his two legged new grounds of appeal the Appellant raised completely new complaints against the judgment of the District Land and Housing Tribunal. The two grounds were neither raised nor argued in the first appeal. The first ground is a complaint about the locus standi of the Respondent. The Appellant is contending that the Respondent had claimed that the land in dispute is owned customarily and was reserved for the female members of the family. Counsel for the Respondent submitted that because the suit land was occupied by the late Mariam Hamza it was expected that the administrator of her estate would be the right person to sue or be sued over the land.

Responding to the counsel for the Appellant's submissions, the Respondent who was not represented submitted that Mariam Hamza was his daughter

by virtue of being the daughter of his biological brother one Hamza Mshahara Shehoza . He said that Mariam was only a custodian of the clan land.

It is not the duty of this court as a second appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

The second appellate court may interfere with the findings of facts by the two courts below if it is shown that they have overlooked any material feature in the evidence of a witness or witnesses or if the balance of probabilities as to the credibility of the witnesses is inclined against the opinions of both courts. Only in that situation the second appellate court may intervene to correct the mischief.

As stated earlier, there were only two grounds of appeal. However, counsel for the Appellant dropped the second ground and argued the first. All grounds were new. They were not raised in the first appeal. The Court of Appeal in the case of **Galus Kitaya v. Republic, Criminal Appeal No. 196 of 2015 (unreported)**, was confronted with an issue on whether it can decide on a matter not raised in and decided by the High Court on first appeal, It stated as follows:

> "*On comparing the grounds of appeal filed by the Appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the*

*case of **Nurdin Musa Wailu v. Republic** supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal.*

The Court of Appeal went on to hold that:

"In another case of Hassan Bundala @ Swaga (supra) cited by Ms. Maswi, when the Court was confronted with a similar situation, stated as follows: "Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those grounds for reason of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided,' not on matters which were not raised nor decided by neither the trial court

nor the High Court on appeal. (See also Athumani Rashidi v. Republic, Criminal Appeal No. 26 of 2016 (unreported)).

This court is bound by the decisions of the Court of Appeal I will therefore subscribe myself to the above decisions. As stated hereinbefore looking at the records of the lower tribunals two grounds are new. From the above quoted principles new grounds which were not raised in the first appeal cannot be looked at.

However, I note that the argued ground (i.e. ground one, which states that; the Respondent had no locus standi) raises a point of both law and fact. I think this one has to be looked at as it raises a mixed point of law and fact. In other words, I find myself to have jurisdiction to entertain it as it has some legal issue. I will therefore inquire it to see where the first appellate Court went wrong or right in entertaining the matter.

The term locus standi in law is a condition that a party seeking a legal remedy must show to have by demonstrating to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Counsel for the Appellant has submitted that because the Respondent was not an administrator of the estate of the late Mariam Hamza, he had no locus standi to sue over her land. With due respect to the learned counsel I don't agree. In the

first place it is trite law that where a person dies and cause of action or right to sue or be sued survives him, he can sue or be sued through his/her legal representative. Section 3 of the Civil Procedure Code [Cap 33 R.E. 2019], defines legal representative as:

> *"A person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sue or is sued in the representative character, the person on whom the estate devolve on the death of the party who is so suing or sued"*

From the above quoted provision of the law, there are three persons who can sue of be sued over the estate of a deceased person. They are:

a) A person who in law represents the estate of the deceased person;
b) A person who intermeddles with the estates of the deceased;
c) A person on whom the estate devolves on the death of the party so suing or being sued.

I have no doubt that a legally appointed administrator falls under (a) above. But it is not the requirement of any law that the family of a deceased person must go through a rigorous

court process of appointing an administrator of the estate by the estate can legally be distributed to heirs. Under the second Schedule of the **Local Customary Declaration (No.4) Order GN No. 436 of 1963 Regulations** which governs guardianship, inheritance and wills, when a person dies, the elder male surviving member of the family automatically becomes an administrator of the estate of the deceased. The said law is applicable by virtue of Section 11(1), (2) and (3) of the Judicature and Application of Laws Act [Cap 358 R.E. 2019]. Thus a person who administers the estate of a deceased person by virtue of the Local Customary Declaration (No.4) Order (GN No. 436/1963 is a legal representative in view of section 3 of the Civil Procedure Code.

From the evidence on record, the Respondent was apparently the elder member of the family, therefore was he in-charge of the estate of the deceased therefore and her legal representative within the ambit of the law.

But assuming that he was not the elder surviving member of the family, therefore not qualifying as legal representative by application of the law (i.e. customary law), Section 3 of the Civil Procedure Code recognizes another category of persons as legal representative. That category is of person(s) who intermeddles with the estate of the deceased. A person is said to be intermeddles with the estate of the deceased if he seemingly

interferes with the estate of the deceased. Thus, the act of suing over the estate of deceased person constitutes intermeddling with that estate and gives a person locus standi over the estate.

It is evident from the record of appeal that the respondent's claim is based on exclusive control of the land in dispute as family or clan property under customary law. The land having been considered as a family land his claim in essence was on behalf of the family. The law of this country, as well as the common law systems accepts all types of customary interests in land.

That being the status of the statutory law the respondent had locus standi to institute the dispute.

In the final result, the appeal is dismissed. The judgments of the tribunals below are upheld and cherished. The costs of the appeal are awarded to the Respondent.

A.R. Mruma,

Judge

Dated this 26th day of October 2021.