IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC LAND APPEAL NO. 21 OF 2020

(Appeal from the judgment of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Appeal No. 71 of 2017 dated 14th of September, 2018)

PETRO MISALABA ..... APPELLANT

VERSUS

MABULA SANANE ..... RESPONDENT

JUDGMENT

21st December, 2020 & 12th March, 2021

ISMAIL, J.

This appeal stems from a disposition of a 12-acre piece of land located at Nkungulu C Hamlet within Kwimba District, Mwanza Region. The disputed land was disposed of on 17th November, 2005, by a Mr. Daud Ngunila who posed as the owner of the disputed land, while the appellant was the purchaser. The consideration for this disposition was three herds of cow and five goats.

In 2013, the respondent got a wind that the disputed land had been sold to the appellant. It is at that point in time, that he took steps to secure the land by planting some demarcation trees. In 2016, the appellant

surfaced and claimed ownership of the disputed land. After a long bickering, the matter was referred to the Village Executive Officer whose effort to mediate the parties failed. He then referred the matter to the Ward Tribunal at Lyoma, claiming that the disputed land was a clan land whose disposition was not blessed. The Ward Tribunal ruled that the disputed land should be in the hands of the appellant, until a resolution is reached on the quantum to be refunded to him. If the respondent failed to refund the purchase price to the appellant, the disputed land would remain in the appellant's ownership.

This decision did not amuse the respondent. He decided to challenge it by way of appeal to the District Land and Housing Tribunal (DLHT) for Mwanza at Mwanza, on a single ground that the Ward Tribunal's decision was so skewed in the appellant's favour that its execution would depend on the whims of the respondent. The DLHT allowed the appeal and varied the order by putting a time frame for redemption of the disputed land. The respondent's clan was given three months to refund the appellant.

It is this decision which has evoked the appellant's fury, hence his decision to institute the instant appeal. The appeal has ten grounds which are reproduced with all their grammatical challenges, as follows:

1. *That the Tribunal grossly erred in fact and in law by failure to hold that the respondent was not entitled to sue the appellant as the cause of action was time barred.*
2. *That the Tribunal grossly erred in fact and in law by entertained (sic) the appeal while the respondent had no locus standi to sue the appellant.*
3. *That the Tribunal grossly erred in fact and in law by order (sic) the respondent to pay back the appellant purchasing (price) without taking into account exhausted improvement made by the appellant on the property in dispute for more than 13 years.*
4. *That the Tribunal grossly erred in fact and in law by failure to evaluate evidence presented before it showing that the appellant is the lawful owner of the suit property.*
5. *That the Tribunal grossly erred in fact and in law by failing to hold that the ward tribunal entertained the dispute which (sic) it has no jurisdiction as the same was not properly constituted.*
6. *That the District Tribunal erred in law in proceeding to determine the appeal without due regard to the evidence tendered at the Ward Tribunal and opinion of the lay assessors.*
7. *That the District Land and Housing Tribunal erred in determining the appeal in favour of the respondent despite the fact that there is overwhelming evidence tendered below showing that the disputed land belongs to the appellant.*
8. *That the Tribunal grossly erred in fact and in law by failing to consider the fact that there is no any clan member from the respondent clan testified and prove that they were not involved in the disposition of the suit premises.*

9. *That the Tribunal erred in law and in fact by holding that the property in dispute was clan land while there were no any evidence to that effect.*
10. *That the Tribunal erred in fact and in law by deciding the matter against (sic) before it while downgrading the weight of evidence on records which were brought by the appellant.*

Disposal of this matter took the form of written submissions, preferred on a consensual basis by the parties, and consistent with the schedule drawn by the Court.

Mr. Joseph Kinango, learned counsel, featured for the appellant. He began his address by informing the Court that he was dropping four of the ten grounds of appeal. These were grounds 7, 8, 9 and 10. Submitting on ground one, the appellant's counsel contended that, having purchased the dispute plot in 2005, he enjoyed an un-interrupted occupation of the land until 2017 when the respondent instituted a suit claiming that the suit land was a family property. He contended that this decision was taken after a lapse of 12 years, meaning that the suit was time barred. The counsel argued that the respondent cannot feign ignorance of the sale since he was employed to till the land, at some point, and was paid TZS. 5,000/-.

With respect to ground two, Mr. Kinango's argument is that the respondent did not have a *locus standi* to sue the appellant. The learned counsel argued that, the testimony adduced by the respondent in both of the lower tribunals showed that the disputed land was sold by David Ngunila, under whose stewardship the said land was, it having passed onto him from the respondent's grandfather. The appellant's counsel contended that there is no proof that the respondent was his grandfather's representative in the matter or that of his clan. Expounding the principle with respect to locus standi, the learned counsel asserted that a person is said to have locus standi if he himself is the owner, agent or legal representative of the deceased estate. On this, he cited the Court's decisions in ***Julius Mganga v. Robert Malando***, HC-Civil Appeal No. 112 of 2004 which was quoted with upproval, in the subsequent decision in ***Zuhura Bakari Mnutu v. Ali Athumani***, HC-Misc. Civil Appeal No. 9 of 2015 (both unreported); and ***Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi*** [1996] TLR 203. It was the appellant's contention that, in the absence of any proof or any right or interest in the suit land, the respondent could not be said to be representing the clan in the proceedings that bred the instant appeal. It was the appellant's view that the respondent has no *locus standi*.

The appellant's consternation in ground three is that the DLHT's decision did not take into account unexhausted improvements effected by the appellant during his 13-year old stranglehold of the disputed land. The learned counsel further decried the decision to let the respondent keep the disputed land as the respondent's clan was mobilizing a refund of the purchase price. He took the view that since the clan was not part of the proceedings in both tribunals, it was quite erroneous for the tribunals to order that a refund of the purchase price should come from the clan and that this would make the execution impossible.

With regards to ground four, the appellant's contention is that the trial Tribunal failed to evaluate the evidence adduced during trial. Mr. Kinango contended that the testimony of DW2 and DW3 was clear that the suit land belonged to Daudi Ngunila, the respondent's uncle, who acquired it from the late Nzwili, the latter having acquired it from Lugomola, the son of Mwana Matumba, the original owner of the disputed land. It was the appellant's contention that this testimony was corroborated by the testimony of the respondent himself who admitted that the suit land was allocated to his uncle, the seller.

On ground six, the appellant's argument is that since there was no evidence to justify the allegation that the suit land was a clan land, the

DLHT's Chair erred when he disregarded the opinion of the assessors who held the view that the suit land was not a clan land and that the sale was regular and unblemished.

The appellant prayed that the appeal be allowed by declaring him as the lawful owner of the suit land. He also prayed that he be awarded costs.

The respondent enjoyed the services of Mr. Anthony Nasimire, learned counsel, whose submission began by holding the view that the complaints about legality or otherwise of the Ward Tribunal's decision is not properly grounded. He contended that the only contention ought to have revolved around the quantum payable by the clan for the redemption of the suit land.

With respect to ground one, Mr. Nasimire's contention is that the suit is not time barred because the same was instituted within the time prescription set out in Item 22 of the 1st Schedule to the Law of Limitation Act, Ca. 89 R.E. 2019. He further contended that the contention on time limitation is a new ground which did not feature anywhere in the previous proceedings. In view thereof, this Court lacks the requisite jurisdiction to entertain it. He submitted further that the trite law is that, an issue which was not raised at the trial cannot be raised for the first time and be

determined by the appellate court. He fortified his contention by citing the Court of Appeal's decision in ***Sebastian Rukiza Kinyondo v. Medard Mutalemwa Mutungi*** [1999] TLR 479.

On ground two of the appeal, the respondent's counsel was of the view that the question of *locus standi* cannot arise since matters touching on the redemption of a clan land can be taken up by any member of the clan. He was of the view that this ground is baseless and it should be rejected.

Submitting on ground three, Mr. Nasimire shrugged off the contention that there were unexhausted improvements on the suit land. The counsel argued that there was no evidence to justify the appellant's contention, adding that such evidence, if any, would not have the effect of invalidating the DLHT's decision. He further argued that, in such a case, the remedy would be to order payment for the unexhausted improvements, subject to the valuation by relevant authorities.

In respect of ground four of the appeal, the counsel's contention is that the Ward Tribunal's decision that the suit land is a clan land to the effect that should be redeemed upon agreement on the quantum was not

appealed against, and that complaining against it, at this stage, is a mere afterthought.

In his submission on ground six of the appeal, Mr. Nasimire argued that section 24 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 is to the effect that the Chairperson of the Committee is not bound by the opinion of the assessors, though he owes them a reason where the assessors' views differ with his own. The learned counsel argued that, in this case, the Chairperson did what was required of him by giving reasons for his divergence and that the appellant's contention to the contrary is misconceived. With regards to the alleged difficulty in the enforcement of the Ward Tribunal's decision, the counsel contended that, the fact that the said decision was not appealed against by the appellant, means that he was contented with it and that he was only waiting for an opportune moment at which a definite figure would be communicated for the redemption of the suit land.

The counsel concluded by urging the Court to dismiss the appeal for lacking in merit.

For reasons that will be apparent in the course of this decision, I will confine my focus to grounds one, two and six of the appeal. The broad

issue in all of the said grounds is whether this appeal carries any merit that can make it succeed.

Ground one of the appeal takes an exception to the trial Tribunal's decision to entertain a matter which was time barred. The counsel for the respondent is opposed to this contention, arguing that this issue was never in contention in the lower forums. It has surfaced at this stage of the proceedings and he feels that raising it at this stage is irregular. It is true and, indeed, a common ground, that appeals should always be against what the lower court (s) decided and not on something new which was not decided by a trial or 1st appellate court. This general rule is only excepted where the point raised at the latter stages of the proceedings is one of law and not of fact. This position was underscored in the ***Kinyondo case*** (supra), cited by the respondent's counsel, and several other decisions, including the case of ***Elisa Mosses Msaki v. Yesaya Ngateu Matee*** [1990] TLR 90 (CA), wherein it was held:

> *"This Court will only look into matters which came up in the lower court and decided; not on which were not raised nor decided by neither the trial court nor the High Court on appeal."*

This position was emphasized in ***George Mwanyingili v. Republic***, Criminal Appeal No. 335 of 2016 (unreported) which was recited in

Dickson Anyosisye v. Republic, CAT-Criminal Appeal No. 155 of 2017 (Mbeya-unreported). It was held:

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

Since issues relating to time prescription are issues of law, it is my view that it wasn't out of the ordinary that the same were raised at this stage of the proceedings, and the reason is that such issues touch on the very legality of the matter and the competence of the proceedings. I would vindicate the appellant for raising it at the appellate stage. Having held so, I take the view that, taking 17th November, 2005 as the date on which the appellant took possession and ownership of the suit land to March 2017, when the trial proceedings were instituted, the matter was within the 12-year time frame set for institution of suits for recovery of land. The

contention that the matter is time barred is, in my considered view, hollow and misconceived, and I dismiss it.

In respect of ground six, Mr. Kinango's contention is that the DLHT's decision has occasioned a miscarriage of justice for not going the assessors' way as required by law. As rightly submitted by Mr. Kinango, trial or appeal proceedings in the DLHT are conducted with the aid of assessors whose opinions constitute a key part of the decisions made by chairpersons of the DLHT. These opinions are not binding on the chairpersons and they can be departed provided that reasons for so doing are given. This is enshrined in section 24 of the Land Disputes Courts Act, Cap. 216 R.E. 2002, which provides as hereunder:

> *"In reaching decisions the Chairman shall take into account the **opinion of the assessors but shall not be bound by it**, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

See: ***Masalu Basopole v. Shidonge Bujilima***, HC-Misc. Land Appeal No. 76 of 2016; and ***Lucia Ntama v. Lushinge Ally***, HC-Misc. Land Appeal No. 17 of 2019 (MZA-both unreported).

As correctly submitted by Mr. Nasimire, the Chairperson of the DLHT demonstrated, quite clearly, why he was not convinced by the unanimous views held by the assessors. This was done at the tail end of the impugned

judgment and the words used are as reproduced by the respondent's counsel. I hold the view that the Chairperson was perfectly in compliance with the law, and I find the appellant's unhappiness on this issue utterly unfounded. This grounds is dismissed.

Ground two of the appeal queries the respondent's involvement in the matter over which he derives no direct interest, as he has not showed that his appearance is regularized, as to allow him stand and mount a challenge on behalf of the clan he said he was representing. It is what Mr. Kinango contends as lack of *locus standi*. This is a contention Mr. Nasimire has stoutly denied. His take is that any clan member can step forward and found an action in defence of the clan interests.

Let me tackle this point by first pointing out how and under what circumstances this legal principle applies in court proceedings. Besides the famous ***Lujuna Shubi Balonzi*** (supra) which has been cited by the counsel for the appellant, the other captivating position in this respect was set by the Supreme Court of India, in the land mark case of ***S.P Gupta v. Union of India*** AIR SC 149, in which Mr. Justice Bhagwati held at p. 185 thus;

".... the traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or public authority or any other person or who is likely to suffer."

This position was underscored by the Court of Appeal of Tanzania in the case of ***Godbless Jonathan Lema v. Mussa Hamis Mkangaa and Others,*** CAT-Civil Appeal No. 47 of 2012 (unreported) (at p. 11), in which the decision of Malawian Supreme Court of Appeal, in the case of ***The Attorney General v. Malawi Congress Party and Another,*** Civil Appeal no 32 of 1996 was quoted with approval, as follows:

"Locus standi is a jurisdictional issue. It is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say ***unless he stands in a sufficient close relation to it so as to give a right which requires prosecution or infringement of which he brings the action."*** [Emphasis supplied].

The argument made by the respondent is that his involvement in the proceedings, right from its inception, is informed by his position as the representative of the clan to which the disputed land belongs. Such

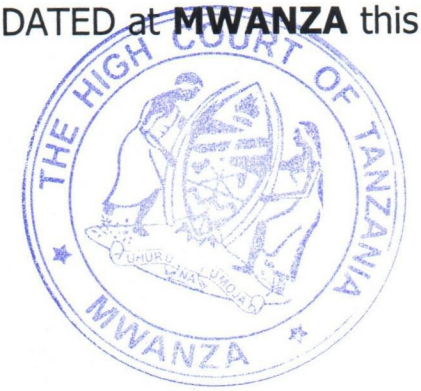
involvement, in the counsel's view, need not be subjected to any formal procedure. With respect, I choose to drift from this reasoning. The reason for my stance is twofold. ***One***, the respondent has not given any semblance of proof that he belongs to the clan which he purports to be the owner of the disputed land. But, even if he did and, noting that there may be other members who would harbour a similar interest, proof would be required on whether the respondent has a concurrence of other members of the clan and that they settled on him as a choice to represent them. ***Two***, in the presence of evidence that the suit land was the seller's personal property, acquired through his parent, establishment of the respondent's standing held a more critical importance. A properly constituted court would not allow any person to meddle in the affairs of a property in respect of which his interests are not ascertained. In my considered view, establishment of a sufficient close relation that gave the respondent the right against which infringement is alleged is profoundly important, lest we allow imposters to unleash anarchy and dispel decency in the conduct of court proceedings. I am not convinced, one bit, that the respondent's entry into the fray of these proceedings took into consideration this important jurisdictional issue.

It is my unflustered conviction that the respondent's entry into the proceedings, first as the complainant, and then as the appellant and finally as the respondent in the instant proceedings, was irregular and unjustified. He simply did not have the requisite *locus standi* in the matter, and I find this ground of appeal meritorious. I allow it.

On the basis of the findings in the second ground of appeal, I allow the appeal and order that the proceedings in both of the lower tribunals be quashed and the ensuing judgments set aside. The appellant is to have his costs.

It is so ordered.

DATED at **MWANZA** this 12th day of March, 2021.



M.K. ISMAIL

JUDGE

Date: 12/03/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online. Mobile No. 0752 845 092

Respondent: 0754 845 092

B/C: J. Mhina

Mr. Joseph Kinango, Advocate:

My Lord, I represent the appellant and we are ready for the judgment.

Sgd: M. K. Ismail
JUDGE
12.03.2021

Mr. Anthony Nasimire, Advocate:

I am also ready, My Lord.

Sgd: M. K. Ismail
JUDGE
12.03.2021

Court:

Judgment delivered in the virtual attendance of Messrs Joseph Kinango and Anthony Nasimire, learned Counsel for the parties, respectively, this 12th day of March, 2021.

M. K. Ismail
JUDGE

At Mwanza
12.03.2021