IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

LAND APPEAL NO. 65 OF 2019

(Originating from Land Application No. 69 of 2007 in the District Land and Housing Tribunal for Arusha at Arusha)

FLORA CHRISTOPHER.....APPELLANT

VERSUS

VIOLET MAGLAN.....RESPONDENT

JUDGMENT

18/02/2021 & 04/05/2021

GWAE, J

In this family land dispute, the appellant, Flora Christopher unsuccessfully instituted the case in the District Land and Housing Tribunal for Arusha at Arusha against the respondent, Vailet Maglan. She claimed that the respondent, without shade of right, has trespassed to her parcel of land with four renting rooms which she was given by her late mother, Angelina Nanga Mollel who died on the 5th August 2002 at Selian Lutheran Hospital.

Facts giving rise to this matter are as follows; that, the appellant's late mother Angelina Nanga (deceased), during her lifetime, was a resident of Kijenge Mwanama area and she owned a parcel of land at Mwanama area. The said deceased prior to living as a single mother, she was married to one Sikon Kivuyo

however there was separation between the two. The deceased was blessed with five issues, the appellant being the fifth child and last one, others were; Happiness, Nasare, Maglan and Losaky (Male). That, among five children only two children borne by the deceased are still alive namely; Happiness and the present appellant.

The records of the trial tribunal further reveal that, the deceased person happened to distribute her parcel of land before her demise. Such distribution of the parcel of land including the hut in which the deceased was living and other local or mud house with four rooms which she was using for commercial purposes (renting) which led to the appellant's institution of this case in 2003. That, the deceased person's clan members /leaders attempted to settle the dispute on the 22nd March 2003 between the parties. That clan meeting was attended by some clan members including the parties. However, the respondent was dissatisfied with the decision of the deceased's clan leaders. Thereafter, the appellant applied for grant of letter of administration to Arusha Primary Court vide Probate and Administration Cause No. 59 of 2003 where she was accordingly granted with letters of administration on the 30th September 2003.

Upon hearing of the parties, the trial tribunal finally decided in favour of the respondent by holding that the appellant did not prove to the required standard that the respondent's late husband was given the disputed piece of land on which a house with three room is bult. The appellant's application was consequently

dismissed with costs. The trial tribunal's decision did not please the appellant, hence, this appeal comprised with four grounds of appeal, to wit;

1. That, the trial tribunal erred in law and fact when it held that the evidence of the appellant was self-contradicting without pointing out the alleged contradiction
2. That, the trial tribunal erred in law and fact when it failed to consider the evidence tendered by the appellant's witnesses who stated clearly that the late Maglan had other land given to him by his father that the suit land was given to the appellant
3. That, the trial tribunal erred in law and fact when it held that the appellant had nothing that was bequeathed to her by mother while there is evidence that the appellant took care of her deceased mother till her death without any assistance from any other person
4. That, the trial tribunal erred in law and fact when it failed to properly evaluate the evidence tendered before it

On the date fixed for hearing before me, the parties' advocates that is, Mr. Severin Lawena and Mr. Losyeku Kilusu who appeared for the appellant and respondent respectively prayed for the leave of the court to argue this appeal by way of written submission and the leave was granted as sought. The appellant preferred to arguing his grounds of appeal contained in the Memorandum of Appeal seriatim.

Arguments of the parties' advocates

Arguing for the 1st ground of appeal, the appellant's counsel stated that the trial tribunal chairperson did not specifically state evidence adduced by the appellant that constituted contradictions and if so, she ought to have stated if the contradictions went to the root of the matter in issue whereas the respondent was of the view that the evidence of the appellant was so contradictory particularly when she initially testified that, her deceased mother gave the respondent's late husband the disputed property and thereafter she testified that, it was one Happiness who was given the disputed piece of land.

In the **2nd ground** above, the counsel for the appellant argued that there was ample evidence that, the late Maglan, was given another piece of land other than the one in dispute by his father and the one in which the respondent is dwelling and that, had the appellant considered the appellant's evidence, the trial tribunal would not have reached into that erroneous decision. He then urged this court to make a reference to a decision of this court (Mambi, J) in **Shabani Adamu Mwajulu and another v. the Republic**, Criminal Appeal No. 131 of 2019 with approval of the case of **Yasini Mwakapala v. Republic**, Criminal Appeal NO. 13 OF 2012 (Unreported) where it was held that there must be an objective evaluation of evidence in order to separate the chaff and grains and disregard it after proper scrutiny or evaluation. On other hand, the respondent's

counsel sought for an order dismissing this ground arguing that the trial tribunal objectively evaluated the evidence adduced before it.

Supporting this appeal as far as the 3rd ground of appeal is concerned, the appellant's advocate argued that it was wrong for the trial tribunal to hold that nothing was given to the appellant before the deceased's demise while the truth supported by the evidence is that, the appellant was given the disputed land when neither the respondent nor her late husband was present adding that the appellant never claimed the property given to the respondent's late husband. Responding the 3rd ground of appeal argued that the trial tribunal held the appellant has failed to establish that she was the one who was bequeathed the disputed land and not as wrongly as complained and perceived by the appellant that the appellant was bequeathed with nothing.

As the appellant relied on her submission on the 2nd ground in arguing ground four equally the respondent's relied to his submission that the trial tribunal clearly analyzed the evidence before it. In his rejoinder the appellant's counsel mainly reiterated what is in his submission in chief supporting the appeal however he stated that, if as contended by the respondent that the said late Maglan was given a house with four living rooms, the respondent could start living therein and she could produce a "will" to that effect.

Having briefly outlined the parties' written submissions for and against this appeal, I am now duty bound to determine the grounds of appeal which are mainly on the evaluation of evidence given before the trial tribunal by the parties and their respective witnesses. I shall, as the 1st appellate court judge, step into shoes of the trial tribunal to thoroughly and properly analyze both oral and documentary evidence in the record. Since the appellant has dropped the fourth ground, I now remain with three grounds of appeal which I am therefore going to determine them as herein under;

> Ground 1, **that, the trial tribunal erred in law and fact when it held that the evidence of the appellant was self-contradicting without pointing out the alleged contradiction.**

Having carefully looked at the record and the impugned judgment of the trial tribunal delivered on the 22nd March 2018. I am from outset of the considered view that, the learned chairperson correctly found that the evidence adduced by the appellant who stood as AW1 was contradictory. And I find her testimony to be contradictory to the vital matter particularly on whether the deceased mother wholly distributed her parcel before she passed away. The appellant is found contradicting herself as whether the said Happiness, her elder sister was given an open space and a hut by her late mother or she distributed it in her favour after she (Appellant) had been appointed as an administratix. This contradiction is not normal, in my increasingly opinion, it goes to the root of the case. The Court of

Appeal when faced with a similar situation in the case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval the authors of Sarkar, The Law of Evidence, 16th Edition, 2007 had this to say:

> "Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

In our instant case, the time when the family meeting was convened (22/2/2002) as testified by the appellant during trial, can conveniently be viewed as minor however the issue whether the appellant's sister was given nothing by her late mother or whether she was given an open space with a hut by her mother or whether the appellant distributed it to Happiness after being appointed as an administratix is crucial. For the sake of clarity parts of the appellant's testimony during examination in chief or during cross examination by her advocate and respondent's advocate respectively are reproduced herein under;

> "The land I was given had two houses, the house the mother was living and the house she was renting out...our mother divided her land

> into three parts. First piece was given to me, then Maglan and Happiness Suikan..... I called boma meeting on 22/2/2002. she started collecting rent on my house I inherited
> On the land I was given there was there was three roomed house and tenant house which had four rooms ...it was my brother one Maglan who was given land first, the **remaining land was given to me and my sister Happiness Sikon**. After being appointed, I gave my sister one happiness **who was not yet allocated anything**, an open space which had a toilet and a hut ..... **Happiness was given a piece of land by mother**.. my mother did not involve Andrea, she did not involve me , I don't know . She could give Andrea is she is not her son.....Before she passed away, she had already been allocated his land"

Examining these pieces of evidence, it goes without saying that the evidence of the appellant is not worth of consideration since the same is contradictory as to whether the deceased person, her late mother had given Happiness a parcel of land or not. This aspect of the evidence adduced by the appellant is found to be quite contradictory as rightly found by the trial tribunal chairperson. Nevertheless, her testimony regarding the disputed parcel of land, a house comprised of four rooms is consistent but the same is not credible as that of the respondent as shall be discussed herein below. This ground of appeal is thus dismissed.

Ground two; **that, the trial tribunal erred in law and fact when it failed to consider the evidence tendered by the appellant's witnesses who stated clearly that the late Maglan had other land given to him by his father that the suit land was given to the appellant.**

Assessing the testimonies of both parties plus exhibits tendered by the parties namely; clan meeting minute sheet dated 22nd March 2003 (A2) and the

deceased's letter (R1) distributing her properties to her children (Maglan) and her appellant's son, Frank as well as appellant's nephew, (Andrea). I have also apprehended no doubt that the respondent's late husband might have been given a property at njiro area by his father however that alone cannot deprive her husband's property given to him by his late mother in-law and, so to the respondent who bequeathed the estate of her late husband.

More so, this issue is strangely raised in this appeal but if one carefully looks at the parties' evidence, there was no such issue raised before the lower tribunal as to the respondent's possession of another property at Njiro by his father, Sikon as neither the appellant nor respondent who testified on whether the late Maglan had another property at njiro area given by his father. Guided by the decision of the Court of Appeal in the case of **Remigious Muganga vs. Barrick Bulyanhulu Gold Mine** Civil Appeal No. 47 of 2017 cited by the respondent's counsel where it was held that;

> "It is a settled principle that a matter which did not arise in the lower court cannot be entertained by this court on appeal."

In our present appeal, the appellant has raised this issue that. the respondent's husband had been given another property at njiro in this court as the 1st appellate court and **not** before the trial tribunal. This act of raising new issue

at appeal stage is legally prohibited, the same was to be raised in the trial tribunal and not at this appeal stage.

Similarly, **to hold that the clan** elders witnessed the alleged giving of the disputed parcel of land to the appellant by her late mother is not founded in the evidence since the 'will' was rightly rejected by the trial tribunal and the testimonies of those who testified on behalf of the appellant (AW2 and AW3) are all about the meeting and its decision which was not instantly accepted by the respondent and there is an indication to that effect ("Mke wa marehemu yeye akajibu hayupo tayari"). The clan meeting sat on 22nd March 2003, in my view, was meant to reconcile the parties however it went in vain as the respondent did not agree that, the disputed house with four rooms to be given to the appellant so that she could act as a trustee of the children of the late Nasare, her late brother. Had it been true that the appellant was given the land comprised of a living house where the deceased was living and one house with four rooms for renting, how did it come possible for the house with four rooms to be given to the late Sanare's children and the appellant to play role of a trustee? The answer, in my view is negative.

Last ground, ground 3, **that, the trial tribunal erred in law and fact when it held that the appellant had nothing that was bequeathed to her by mother**

while there is evidence that the appellant took care of her deceased mother till her death without any assistance from any other person.

The evidence adduced by the appellant is clearly and undoubtedly to the effect that, she was taking care of the deceased person together with her elder sister, Happiness while the deceased was a bed ridden at Selian Hospital and the same is clearly not contested by the respondent or her witnesses. Yet, in my view, taking care of the deceased person by the appellant was her moral obligations as a daughter to the deceased which cannot in any way be a ground to take a property given to her late brother, Maglan before the deceased's demise.

If the respondent did not take care of the deceased while she was at comma stage, that omission, in my view, does not amount to a justification to take away what was given to her late husband by her late mother in-law as evidenced by exhibit R1 indicating that, the appellant was given a house of three rooms (Nyumba iliyoko mashariki ni ya Flora-Rumu 3") and that a house with 'ELO' with four rooms was given to the respondent's husband, Maglan. Despite the evidence of the respondent plus exhibit R1 still her testimony is credibly supported by her witnesses, RW2 and RW3 who sufficiently testified that the suit land was given to the late Maglan.

The distribution of properties by late Angelina Nanga before her death ought **not** to be interfered by the administratix, the appellant by any reason as an

administrator is entitled to distribute whatever was not distributed before the deceased's death and not those properties which were given to persons including the respondent's late husband and the appellant as well as one Andrea and Frank unless those given out of love and affection consent to surrender or give the appellant or any other person with or without any condition. This ground of appeal also lacks merits.

Before concluding, I have found it to be apposite to note that it was very legally unjustifiable for the appellant to reiterate her oral testimony in chief on the 6th June 2013 after the adjournment of hearing on the 27th day of March 2013. She ought to proceed she ended. More so, I have noted unusual delay of hearing and determination of this case, the delay pertaining with no reason given by the trial chairperson. That is wrong, if the trial tribunal was prevented by any justifiable reason to expeditiously deal with the dispute, reason (s) ought to have been reflected in the judgment otherwise that is improper way of adjudicating the disputes, that, conduct on the part of the learned trial tribunal chairperson, ought to be seriously discouraged.

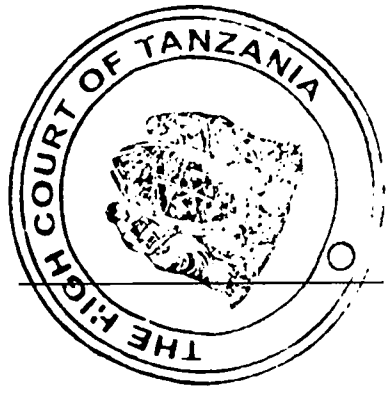
Basing on the discussion and reasons thereof, this appeal is devoid of merit, I therefore dismiss it in its entirety. Taking into account of relationship that exists between the parties, each party shall bear the costs of this appeal and those in

the tribunal. The decision of the trial tribunal is hereby upheld save to the order as to costs.

It is ordered.

M.R. GWAE
JUDGE
04/05/2021

Court: Right of appeal fully explained



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