IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISC. LAND APPEAL NO. 97 OF 2020

1. KUMARY SHADRACK ..... 1ST APPELLANT
2. JUSTINE KITANG'ONI ..... 2ND APPELLANT

VERSUS

SHADRACK KITANG'ONI ..... RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for Mara at Musoma in Appeal No. 44 of 2019)

JUDGMENT

20th and 21st May, 2021

KISANYA, J.:

Parties to this appeal are close relatives. The respondent, Shadrack Kitang'oni is a biological father of the 1st appellant, Kumary Shadrack. He is also the 2nd appellant's (Justince Kitang'oni) brother. The case subject to this appeal was instituted before Mugeta Ward Tribunal by Shadrack Kitang'oni. The respondent alleged that Kumary Shadrack and Justine Kitang'oni had sold a family land. The case ended in favour of Kumary Shadrack and Justine Kitang'oni who were declared as the lawful owners of the disputed land.

Aggrieved, Shadrack Kitang'oni appealed to the District Land and Housing Tribunal for Mara at Musoma (the first appellate tribunal) in Land Appeal No. 44 of 2019. Upon considering that the disputed land was previously owned by Kitang'oni Kihagere who was the father of the respondent and 2nd appellant and

also the 1st appellant's grandfather. The chairperson of the first appellate tribunal was of the view that the matter falls under the probate and administration of the estate cause. Therefore, he went on to nullify the proceedings and judgment of the ward tribunal on the ground that, the trial tribunal had no jurisdiction over probate and administration of estates issues.

That decision aggrieved the appellants who decided to approach this Court by way of appeal. They advanced the following grounds, in verbatim:

1. *That, the first appellate Tribunal erred in law and fact for failure to consider that the case filed by the Respondent was not probate and administration of the estate cause but a land dispute case.*
2. *That, the first Appellate Tribunal erred in law and fact by failing to consider that the issue of probate and administration of the estate raised in stage of appeal which was not discussed during the trial.*
3. *That, the first Appellate Tribunal erred in law and fact by failing to evaluate the evidence and determining the dispute in favour of the Respondent which was not supported by evidence.*

In the course of hearing this matter, I found it pertinent to call upon the parties to address the Court on two issues, namely:

1. Whether the respondent had *locus standi* to institute the suit before the trial tribunal.
2. Whether, the procedures for conducting the visit to a *locus in quo* were complied with.

Both parties appeared in person. However, at the hearing of the issues raised by the Court, *suo motu*, they were also duly represented by Mesress. Edson Philipo and Baraka Makowe, learned advocates for the appellants and respondents, respectively. I will consider their respective submissions later.

I prefer to start with ground two. The appellants fault the first appellate tribunal for considering the issue of probate and administration of estate at appellate stage. It is my considered opinion that the said issue was related to jurisdiction of the ward tribunal to try the matter lodged before it. The law is settled that matter related to jurisdiction can be raised at any stage, even at appellate stage. See **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017, CAT at Mwanza (unreported). Pursuant to the Ward Tribunals Act [Cap. 206, R.E. 2002] and the Land Dispute Courts Act [Cap. 2016, R.E 2019], ward tribunals have no jurisdiction over probate and administration of estates cause. Therefore, the first appellate court did not error in considering that issue at appellate level.

Now, reverting to ground one, was the matter before the trial tribunal a probate and administration of estates cause? The first appellate tribunal

answered that issue in affirmative as reflected at page 3 of the typed judgment, where it was held:

> *"There is strong evidence on record, as Mr. Makowe for the appellant rightly pointed out, that the previous owner of the suitland was one Kitang'oni Kihagere who is father to the appellant. Kitango'oni Kihagere is father to the appellant and 2nd respondent, and grandfather to the 1st respondent. In my opinion, this matter falls under probate and administration of the estates causes, and it was supposed to be so treated."*

In their submissions before this Court, the appellants contended that the respondent instituted the case as lawful owner of the disputed land. The first appellant argued further that the disputed land was not part of estates of the late Kitang'oni Kihagere. Replying, the respondent submitted that the disputed land was allocated to him by the village land committee and that it is the 2nd appellant who grabbed his land. He submitted further that there was no evidence that the disputed land belonged to Kitang'oni Kihagere.

I went on the record and found no complaint predicated under section 17 (2) and (3) of the LDCA, to determine the nature of dispute referred by the respondent to the ward tribunal. I then considered evidence adduced by the both parties. The respondent's (the then plaintiff) evidence in chief was to the effect that, the first appellant had sold the disputed land without involving the family. He maintained that stance when cross-examined by the 2nd appellant.

No mention by the respondent that, at one point in time the land belonged to Kihagere Kitang'ori.

On the other hand, the 1st respondent adduced to have acquired the disputed land in 1994. He went on to depose that, he had a dispute over the boundaries of the disputed land, with his grandfather (Kihagere Kitang'ori). On his part, the 2nd respondent told the trial tribunal that the disputed land was acquired by the 1st appellant and Kitang'oni Kihagere in 1994.

In view of the above, it is apparent that the matter filed before the trial court was not related to probate and administration of estate. It was a land dispute whereby, each party claimed to be the lawful owner of the disputed land. The duty of the lower tribunals was to consider and evaluate evidence given by both parties and make decision basing on the party who proved the matter on the balance of probabilities.

Before considering the third ground of appeal, I will address the issues raised by the Court, *suo motu.* On the issue whether the Shadrack Kitang'oni had *locus standi* to institute the matter before the trial tribunal, both counsel for the parties were at one that the respondent had no *locus standi.* Their arguments was based on the decisions of the lower tribunals that the disputed land belonged to Kitang'ori Kihagere. Mr Makowe went on to submit that the respondent was required to institute the case as administrator of the estates of the said Kitango'ri Kihagere.

It is trite law that, a party bringing a matter to court must be able to demonstrate how his right or interest has been interfered with by the other party. See the case of **Lujuna Shubi Balonzi vs Registrar of Chama cha Mapindunzi** (1996) TLR 203. As alluded earlier, in absence of the pleadings (a land complaint) filed in the ward tribunal, the issue whether the respondent had *locus standi* is deduced from the evidence. I have shown herein that, the respondent's complaint was to the effect that, the appellants had sold the family land. For instance, see his reply when he was cross-examined the 2nd appellant:

> "*Swali: Umesema eneo hilo ni la familia naomba unijulishe ni eneo la familia ipi?*
>
> *Majibu: Ni eneo la familia ya Mzee Shadrack.*

Therefore, if the disputed land belonged to the family, the respondent had no *locus standi* to sue in his own name. He could sue on behalf his family in a representative suit or after obtaining a power of attorney.

Furthermore, as rightly argued by the learned counsel for both parties, the lower tribunals were satisfied that the disputed land belonged to late Kitang'oni Kihagere. Therefore, if the respondent's claim over the disputed land is based on such evidence, he could institute the case as an administrator of estates of the late Kitang'ori Kihagere and not otherwise.

In relation to the second issue, it is common ground that the ward tribunal visited the locus in quo. The guidelines as to a visit to a *locus in quo*

were set out in **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29 which was cited with approval in **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble,** Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported) that:

> *"When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter... When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future."*

As rightly observed by the learned counsel for both parties, neither the appellants nor the respondent was accorded the right to ask questions to witnesses who adduced evidence during the visit to a *locus in quo*. The omission prejudiced the parties because evidence gathered from the visit to a locus in quo was considered in the decision of the both tribunals. This contravened the article 13(6) (a) of the Constitution which provides for right to fair hearing.

Therefore, I am satisfied that the pointed omissions and irregularities amounted to a fundamental procedural error that vitiated the proceedings and

the entire trial before the ward tribunal and the first appellate tribunal. Therefore, I will not address the third ground because it premised on the vitiated proceedings.

In conclusion, I am constrained to invoke the revisional powers vested in this Court to nullify the proceedings and quash and set aside the judgments and orders of the ward tribunal and first appellate tribunal. Any party who is still interested to pursue the matter is at liberty to institute a fresh suit before a tribunal with competent jurisdiction, subject to the law of limitation. In the event the fresh suit is filed at Mugeta Ward Tribunal, it should be heard by new members. As the appeal is disposed of basing on the issues advanced by the Court, *suo motu*, I make no order as to costs. It is so ordered.

Dated at Musoma this 21st day of May, 2021.

E.S. Kisanya.
JUDGE

COURT: Judgment delivered this 21st May, 2021 in the presence of the 1st appellant in person, Mr. Baraka Makowe, learned advocate for the respondent and in the absence of the 2nd appellant. B/C Simon- present.

E.S. Kisanya.
JUDGE
21.05.2021