



IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 66 OF 2018

(Arising from DLHT in Application No. 38 of 2010)

JAMES BONIPHACE-----APPELLANT

VERSUS

ROBERT NESTORY-----RESPONDENT

JUDGMENT

31/3/2021 & 28/5/2021

KAIRO, J.

The Appellant in this appeal was not amused by the decision of the DLHT delivered in 28/9/2018 and decided to file this appeal raising three grounds of appeal. He however later decided to abandon the 2nd ground as such I will reproduce the remaining two which he argued as follows:-

- 1. That the trial Tribunal misdirected itself by deciding the case against the applicant basing on the issue of Locus Standi when the estate was already and customarily distributed to the beneficiaries without any challenge. The Trial tribunal failed to note that the beneficiaries had no dispute with the distribution after the WILL was read during*

the funeral and failed to note that statutory law and customary law are always congruent without any precedence.

- 2. That the Trial tribunal erred in law and in fact to decide in the state of discrimination by concluding that Locus Standi concerned only the Applicant whereas the Respondent was on the same umbrella and no any other order was delivered in respect of the Respondent who also alleged the same disputed land to be his late father's estate*

The Appellant thus prayed the court to allow the appeal with cost by setting aside the proceedings and judgment of the trial tribunal. The Appellant further prayed the court to exercise its revisional powers and order either of the parties not to get involved in the land in dispute until determination of the appeal for or against the appeal.

Briefly the background of this dispute is that the Appellant instituted the suit at the DLHT claiming that the Respondent has trespassed into the suit land, and uprooted the planted trees therein and removed the boundaries alleging owner ship of the same. He further stated that, he has inherited the suit land through a WILL given by his late father one Boniphace Rwezahura.

The respondent on his part refuted the contentions claiming that the suit land is the property he collectively inherited from his late father one Nestory Rwechungura together with his 4 siblings. After hearing of the matter by the trial court, the two assessors' opinions were in favor of the Appellant. However, the Trial Chairman differed with them for want of *locus standi*. The trial tribunal thus struck out the application with cost. This is the decision which aggrieved the Appellant, hence this appeal.

The Appellant was represented by Advocate Abel Rugambwa while the Respondent was self-represented.

In his reply to the memorandum of appeal, the Respondent refuted the grounds of appeal adding that the trial tribunal correctly construed the law and properly interpreted the facts and thus reached the proper finding. He prayed the court to dismiss the appeal for want of merit with cost.

As earlier stated, when the Appellant's counsel invited to amplify the grounds of appeal, he informed the court that he will argue grounds No. 1 and 3 and abandon the 2nd ground.

The Advocate stated that each party in this dispute had separately inherited piece of land from his father and that the lands were adjacent. He went on that the two pieces of lands were separated by a trench and that the Appellant's piece of land trespassed measures about 100 paces. The Advocate further amplified that among the witnesses testified at the trial court was Christopher Nsabi (PW3) who told the trial court that he was the one who wrote the WILL of the late Boniphace Rwezahura after he was shown the boundaries of his land and later, he was the one who gave the heirs their portions of lands as per the WILL. However, the Respondent jumped/skipped the previous trench which demarcated the appellant and Respondents' lands and dig another trench into the land of the Appellant, thus, there are two trenches at the moment.

Advocate Rugambwa went on that after the said evidence, the DLHT gave its decision basing on the *locus standi*, reasoning that the Appellant had no *locus standi* to sue on the property of his deceased father despite the

assessors' opinions who both found on the Appellants favor. The Advocate argued that the dispute arose after the deceased's properties were distributed to the beneficiaries with no complaints thus it was a misconception of the DLHT to base its decision on locus while the dispute is against a non-family member. He backed up his argument with the case of **John Shigella & 2 Others vrs Beatus Chandika: Land Case Appeal No. 13 of 2009** (unreported) at Pg.7. He clarified that according to the decision of the cited case which has similar facts with the present case, the DLHT erred in its decision to resolve that there was no administrator while the deceased's' properties were already inherited by the beneficiaries including the land at issue.

Advocate Rugambwa further stated that according to the evidence of the Respondent (Proceedings Pg. 55 on-wards) he had stated that he had inherited the suit land together with his four siblings, but none of them came to testify nor any relative did. He added that even the Respondent himself is not an administrator of his late father's estate. However, he further argued that the issue had nothing to do with administration. He concluded by praying the court to allow this appeal as it wasn't correct for the court to prevent the Appellant from protecting his land just because he was not an administrator. He further prayed the court to order that the suit land belonged to the Appellant and further orders that the court would deem fit to make.

In his riposte, the Respondent stated that together with his relatives, they inherited the land in dispute from their father; Nestory Rwechungura who got the same from Edwardina Kolienda since 1970. He went on that before



the demise of their father in 1970, he had left a WILL on how the land should be distributed, adding that he knows the boundaries of the land because they were living in it. He was thus surprised in year 2007 to get a summons from the Appellant claiming that they have trespassed into his land. He went on that since he was born in year 1974, he has never witnessed any dispute between the Appellant's father and his father over the land. The Respondent also refuted that his father's land wasn't adjacent to the Appellant father's land and that the two were not neighbors.

Regarding the failure of his siblings to come to testify, the Respondent stated that his siblings agreed and appointed him to represent all of them in this dispute as the land was given to all of them collectively to inherit. But further that he decided to call the neighbors to their land to come and testify. He also refuted to have dug another trench adding that the trench demarcates their father's land and that of Jonathan Kaijage in the north side. He reiterated that nowhere their land is adjacent to the land of Appellant's father as the Appellant's father wasn't a neighbor to his father. He thus prayed this court to declare that the suit land is owned by the Respondent.

In his rejoinder, the Appellant repeated what he had submitted in chief adding that no WILL was tendered by the Respondent at the trial tribunal to evidence that they have collectively inherited the suit land. He further insisted that the Respondent father's land was adjacent to that of the Appellant father's land and the two were neighbors (Pg 45 proceedings). He reiterated his prayer to have this appeal allowed with cost.

Having heard the rival arguments, the issue for determination is whether the appeal is based on founded grounds. I will analyze both grounds of appeal collectively as they all revolve around the question/issue of *locus standi*.

According to records, the trial chairman's decision was based on the want of *locus standi* on the part of the Appellant as no administrator was appointed to administer the late Boniphace's estate. The record further reveals that the Appellant was bequeathed through a WILL left by his father and that there is no dispute/conflict among the heirs of the late Boniphace Rwezahura.

Further that when the dispute ensued the heirs/beneficiaries had already got their portions of inheritance including the Appellant which means the estate had already been distribute to heirs.

The court has further observed that it is not at issue that the dispute that culminated to this appeal is between the persons or individuals who are not from same family members as each claim to have inherited his land from his father.

I paused to ask whether in the circumstances the appointment of the administrator to administer the estate of the late Boniphace Rwezahura was required. In my candid conviction the answer is in the negative. The reason is not far-fetched: - first, there was nothing to distribute as the heirs got their portions of inheritance and there is no dispute among them. But further to that, legally after distribution, the beneficiary becomes the owner of the property bequeathed to him/her with full mandate to sue or

be sued on his own right, as such the question of *locus standi* doesn't arise. To say the least the reason advanced by the trial chairman with much respect is a misconception. Nowhere was it indicated that there was a conflict between the heirs of the late Boniphace Rwezahura to call for the appointment of the administrator in this case. The appellant therefore was correct to sue on his own capacity after being bequeathed the property, now being the owner of the same.

I am fortified in this stance in the case cited by Advocate Rugambwa of **John Shigella (supra)** into which, the court when faced with similar circumstances his Lordship Judge Mjemmas (as he then was) observed as follows to which I fully concur with: -

"If the Respondent's father is dead and there is no administrator who has been appointed does that prevent him from defending the property which had been bequeathed to him?"

His Lordship went on:

"Put it in a different picture, do the Appellants achieve good title in the land in dispute simply because there is no administrator who had been appointed. I do not think so."

I should hasten to add that even myself I don't think so. The Appellant in this case was right to sue on his own right/capacity if he thought that his right has been trumped on or infringed.

In the matter at hand, each party claims to be the owner of the suit land. Unfortunately, the evidence adduced by each wasn't analyzed to answer the first issue framed as to "*who is the owner of the land is dispute*".

I am fully aware that this court being the first appellate court is mandated to look at, evaluate the evidence afresh and come to its conclusion/findings [Refer the case of **Martha Wejja vs A.G. & Others (1982) TLR 35**.

However, in the matter at hand, I am of the view that the court cannot do that.


According to the Appellant's submission, the land he inherited from his father is adjacent to the land the Respondent claim to have inherited from his late father and further that the two lands were demarcated by a trench. The Appellant also submitted that the two fathers (Boniphace Rwezahura and Nestory Rwechungura) were neighbors due to their adjacent lands. But the Respondent entered into the Appellant's land and dug another trench. However, when the Respondent was submitting, he refuted vehemently that the two lands weren't adjacent and the two fathers weren't neighbors. Besides he denied to have dug another trench and that the trench was demarcating their land and another person he mentioned to be Jonathan Kaijage. With the said rival submission, I am with candid view that stepping into the tribunal's shoes and analyze the evidence adduced without going to visit the *status in quo* would be improper and may cause injustice to parties. In that regard therefore, this court hereby decides to exercise its supervisory and revisional powers under section 43(1) (b) and

2 of Cap. 216 RE: 2019 as I hereby do by quashing and setting aside the proceedings, judgment and the orders of the trial court.

The court further gives the following order: -

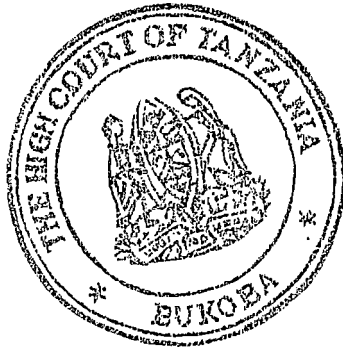
- (1) Retrial of the matter by another chairman with new set of assess.
The court hereby gives specific direction to visit *locus in quo* to determine the boundaries of the lands owned by parties so as to ascertain/determine the owner of the suit land.
- (2) Having in mind that this is a long-time matter, the case file number remain unchanged to enable expeditious determination of the matter and its ordered to be so determined within nine (9) months from the date of this decision.
- (3) The case file is re-verted to the trial court to proceed with the matter as ordered. For avoidance of doubt, the proceedings to start with are those from Pg.33 (applicant's case opens) of 5/3/2018.
- (4) Cost to be in the course.

It is so ordered.


L.G. Kairo
Judge

25/5/2021.

R/A Explained




L.G. Kairo

Judge

25/5/2021.

Date: 28/5/2021

Coram: Hon. J. M. Minde, DR

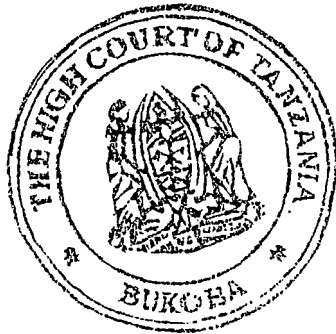
Appellant: Advocate Rugambwa

Respondent: Present

B/Clerk: Lilian Paul

Court:

This matter was scheduled for judgment and I deliver the judgment in the presence of Advocate Rugambwa for the Appellant and the Respondent who appeared himself.



A handwritten signature in black ink, appearing to be "J. M. Minde".

J. M. Minde, DR

Deputy Registrar

28/5/2021