

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL NO. 55 OF 2020

***(Arising from the Decision of the District Land and Housing Tribunal of DLHT
– Chato District at Chato in Land Case No. 11 of 2019)***

SUNGULILE S/O KANYALALA APPELLANT

VERSUS:

SALAMA MUGASA RESPONDENT

JUDGMENT

29/03/2021 & 26/05/2021

W. R. MASHAURI, J;

Being dissatisfied with the decision of the District Land and Housing Tribunal for Chato at Chato in Land Application No. 11 of 2019 dated 211/2019, the appellant Sungulile Kanyalala has now come to this court. he has fronted 9 grounds of appeal namely: -

1. That the Trial Tribunal erred in law and fact to admit the evidence which tendered by Salama James who was not a part in the suit land.
2. That, the Trial Tribunal erred in law and fact by declaring the respondent who testified that, the respondent's father was citizen of the Republic of Rwanda to be legal owner of the disputed land without

having in place any documentary evidence proving her citizenship in Tanzania.

3. That, the Trial Tribunal erred in law and fact to pronounce the judgment and decree which contradicted with the proceedings.
4. That, the Trial Tribunal grossly misdirected itself by basing its decision on substantively and procedurally improperly tendered by Salama James who was not a part (sic) in the pleadings and admitted annextures exhibits.
5. That, the Trial Tribunal erred in law and fact to admit that the respondent's father was allocated the suit land by the village council in 1980 while the respondent's father was not citizen of the United Republic of Tanzania in 1980.
6. That, the Trial Tribunal erred in law and fact for deciding the matter against the appellant without properly evaluating the evidence on record.
7. That, the Trial Tribunal erred in law and fact for not considering that, the respondent's suit in the tribunal was time barred of 12 years in the respondent's plaint paragraph, 6(iv) testified that the appellant owned the suit land since 1980.

8. That, the Trial Tribunal erred in law and fact for failure to declare that the respondent instituted the suit land without leave of primary court to allow the respondent to be administrator after expired four months.
9. That, the Trial Tribunal erred in law and fact for not declaring that Miss Salama James who prosecuted the case and Miss Salama Mugasa who appeared in the pleadings are two different people.

When the matter was called in court for hearing on 29/03/2021 Mr. Amos under special power of Attorney appeared for the appellant and Mr. Constantine learned counsel appeared for the respondent.

In support of the grounds of appeal, Mr. Amos Luhinda the appellant's representative argued grounds of appeal No. 1, 4 and 9 in consolidation. He submitted that, the person who filed the Land Case No. 11 of 2019 in the Chato District Land and Housing Tribunal was called Salama Mugasa but who attended the case as complainant was Salama James who is not appearing in the plaint nor was he an administrator of the deceased's estate in which the letters of administration is attached to the plaint. On that regard the purported plaintiff Salama Mugasa did not attend and prosecute this case.

On the issue of variation of names in the plaint and proceedings, Mr. Amos Luhinda the appellant's representative referred this court to the case of **Geita Town Council v/s Shaban Hamad and another** Land Appeal No. 27 of 2018 High Court Mwanza Registrar (unreported Hon. Siyani, J.) in which the Hon Judge nullified the proceedings because the names of the plaintiff in the plaint and proceedings were at variance.

He also referred this court to the case of **Marwa Kachene V/s R. Criminal Appeal No. 84 of 2015 CAT DSM Registry** (unreported) in which the Court of Appeal of Tanzania dismissed the appeal as the names of the appellant were at variance.

For the 2nd and 5th grounds of appeal, Mr. Amos submitted that, during trial of the case in the District Land and Housing Tribunal for Chato at Chato, the respondent said that, his father was citizen of Rwanda and was Citizen of Tanzania by registration and was registered in 1998 and that the disputed land was allocated to him by the village council in 1980. While the respondent's father was yet registered citizen of Tanzania. On that regard, under section 14 of the written laws (Miscellaneous Amendments) Act No. 28 of 1970 and Section 4 of the Land Act No. 4 of 1999 as well as Section

20(i) of the Land Act disqualify non-Tanzanian citizens to be given land in Tanzania.

For the 6th ground of Appeal, Mr. Amos blamed the District Land and Housing Tribunal for Chato for it failed to recognize the exhibits tendered by the parties in particular the respondent's exhibits.

That, the respondent's letters of administration tendered in evidence by the respondent who is an administrator of the deceased's estate did not show the properties the respondent, appointed administrator was allowed to administer. Even the land in dispute was not mentioned to be property of the deceased Mugasa Kazaula. That is contrary to rule 7 of the probate and administration of estate G.N. No. 49 of 1971 which requires to state in letters of administration of the deceased's property the properties of the deceased. Which for the time being were under the administrator's information for collection.

That, all the complainant's exhibits tendered in court were not taxed.

The only court fees paid was for the application alone. That, even the sale agreement of the shamba bought by Sungulile for two goats was not produced in the Tribunal. Futherstill, the sale agreement of a shamba which

was bought by Mr. Sungulile of 7 acres for one cow is silent on the size of the shamba. It is nothing in all of the documents showing that the size of the said land was 25 acres which was allocated to Bwana Mugasa Kazabula.

Another exhibit was a contract agreement of lending the land in dispute to Mugasa Kazahula but in the agreement contract, is nowhere written that, the appellant did first borrow the said land in 1986 before the ward Executive Officer and that in 2004 the said agreement was renewed, before the WEO. This exhibit was not tendered in the tribunal what was tendered was an agreement which was entered before the VEO. Who is not mentioned in the plaint.

For the 7th ground of appeal that, the District Land and Housing Tribunal failed to know the time limit for claiming land, Mr. Amos said that, it is stated in the plaint that, the appellant was in possession of the land since 1986 and this matter was filed in the tribunal in 2006 after a lapse of 30 years and the time limit for redeeming land is 12 years and since 12 years have lapsed, the tribunal is barred to entertain such a suit land as per section 3(I) of the Law of Limitation Act Cap. 89 R.E. 2016 as well as item 22 of item I of the 1st schedule to the Act.

On his part, Mr. Constantine learned counsel for the respondent submitted that, of all that submitted by the appellant's representative under special power of attorney are curable under section 45 of the Land Disputes Courts Act Cap. 216 R.E. 2019. Which provides that: -

45. substantial justice:

No decision or order of the Ward Tribunal of District Land and Housing Tribunal shall be reserved or altered on appeal or revision on account of any error, omission or irregularity or improper admission or rejection of evidence unless such error or omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.

Having cited that section of the law, the learned counsel for the respondent objected that, during trial of the case, there was no any omission which should be considered to have occasioned a miscarriage of justice because the appellant failed to prove his occupation of the land and how he got it.

That, in the case of **Yocobo Magwasa Kichele V/s Penina Yusufu Civil Appeal No. 55 of 2017** (unreported), the Court of Appeal held that: -

"It is now time to say that, section 45 of the Land Disputes Courts Act 216 to be considered by courts so as to remove a conduct of involving technicalities" That with the advent of the principle of overriding objective brought by the written laws (Miscellaneous amendments Act, No. 3 of 2018 (Act) which now require the court to deal with cases justly and to have regard to substantive justice section 45 of the Disputes Courts Act should be given more prominence on procedural technicalities.

Having so submitted the learned counsel for the respondent prayed the court to put into account of section 45 (supra) to deny the appellant to invoke technicalities to take the applicant's land.

That, in his submission, the appellant blamed the tribunal of Chato to have made a fault to admit the evidence of Salama James. Which it meant that, the said Salama James was not attending the suit, and that he was not a party a to the suit. That, by so saying it amounts to amend the grounds of appeal without leave of the court. Which is not allowed at law. The leaned counsel therefore prayed the court to disregard the appellant's submission which is contrary to the grounds of appeal.

That, even if Mr. Amos was allowed to say so, it is clear from the trial Tribunal's proceedings that, there is nowhere in the court record that, there

is no any person called Salama James who gave evidence but a person who is complained of to have opened the case and gave evidence was Salama James Mgasas.

That during the time of giving his evidence the 3rd name was added because the witness is required to mention three names.

On that regard, the applicant and PW1 is the same person.

That, proof of names is a matter of evidence. In this matter, the evidence was given to prove the fact that, the said names are of one person. This is said at page 28, 29 and 31 of the typed proceedings when the appellant raised a preliminary objection on the respondent's names and all parties were given chance to address the tribunal and in its verdict, the Trial Tribunal ruled out that all three names are of one person.

He therefore prayed the court to disregard the case cited by the appellant even the case of Marwa as cited by the appellant as the same are distinguishable to this case as this case is a civil matter dealing with ownership of land. It cannot therefore be need as the standard of proof in land and/or civil matters is different with that in criminal case as in criminal cases the standard of proof is that of beyond reasonable doubt while in civil

matters is that of on the balance of probabilities. He also prayed the court to disregard the said ground of appeal.

For the 2nd ground of appeal that, the appellant has complained that he did not tender any document to prove his citizenship the respondent submitted that, the District Land and Housing Tribunal never deals with matters of citizenships of people. It has no jurisdiction to judge anything on citizenship of people. It is not its responsibility. That, had the appellant with evidence that the respondent's father was not Citizen of Tanzania would have brought evidence in court supported with decided cases on citizenship.

That, section 112 of the TEA Cap. 6 R.E 2019 states that, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.

That, since the appellant has raised the issue of citizenship of the respondent's father he is duty bound to prove the allegation even if the evidence of PW1 proves that the respondent's father is a Tanzanian Citizen. He therefore contended that the said ground of appeal lacks merit and it therefore ought to be dismissed.

For the 3rd ground of appeal, that, the tribunal made a fault to give judgment based on evidence which is at variance with the decree, by failing to clearly argued the said ground, by stating the available variation, the respondent also refrains from arguing the same in so far as the appellant had also failed to support it by putting the variations clear.

That, even if the alleged variations should have been clearly stated by the appellant should not be cured by way of appeal.

That, once a judgment is at variance with the decree it is curable under section 96 of the CPC Cap. 33 R.E. 2019. Which require the person prejudiced by such variation to go to the court and pray such court to re-correct the error apparent on the record.

Having so submitted, the respondent prayed the court to dismiss the allegation for want of merits.

For the 4th and 5th grounds of Appeal, the respondent referred this court to what he had submitted in respect of grounds of appeal No. 2.

In respect of ground of appeal No. 6 that the tribunal failed to analyse the evidence, he challenged the ground of appeal by telling the court that, the evidence was properly analysed by the tribunal as shown from page 9 of

the typed proceedings and ahead in which the tribunal observed that, the appellant was a rightful owner of the land in dispute as was said by PW1, PW2 to PW4 and also as stated in exhibits PE3 & PEI in which its stated that the respondent's father was given the disputed land by the village.

The issues for determination in this matter are: -

1. Who deserves ownership possession of the suit land.
2. What reliefs each party is entitled.

Before I work on the issues I have framed, I deem it prudent to narrate in brief the evidence adduced in court by witnesses of each side.

In the trial tribunal, the plaintiff and/or complainant's evidence was to the following effect. In her testimony, the applicant Salama James Mugasa (DW1) testified that, it was on 4/8/2980, when the village counsel of Buziku village under the leadership of Nzee Ilulampenda as village Executive Officer (VEO) did locate the Suitland to the late Mzee Mugasa Kazahula. She tendered in the tribunal the minutes of the village council and was admitted and marked exh. PEI.

In cross-examination she said that the Suitland was 25 acres, her evidence was supported by Clement John Madeni (PW2) the ward councilor

(diwani). This one said in his evidence that from 1995 to 2005 was VEO of Buziku village. On 16/08/2004 was visited at his office by the late Mugasa Kazahura together with Sungulile Kanyalala and Zacharia Mwelo.

They went to him to enter into an agreement that the applicants father was lending to the Respondent and Zacharia Mwelo, together with his village committee, they witnessed the agreement. He recorded the agreement and was signed by other committee members. He identified the agreement of which was in his hand writing and signature.

In cross-examination by Mr. Mbanda he said that the committed responsible for land was the Social Service Committee. All members of the Social Committee signed the agreement Mzee Mugasa Kazahura and Zacharia signed it by using finger prints and the respondent signed it.

Mzee Martin Mulingwa (PW3) secretary of CCM political party Brach said that, on 4/8/1980, there were some people who applied for land for grazing purposes. Among those persons were Mzee Apolinari, Mzee Mugaza Kazahura, Mzee Masele and Mzee Gantu. Those persons were allocated with land Upon payment of Shs. 50/= as an allocation fee, and the families of

Mzee Masele and the late Mugasa Kazahula are still using the lands were allocated to them.

Another witness for the applicant was. Titus Kana Muhoja (PW4) who said he started living in Buziku village of which formally was called Majengo village since 1987. He knows many residents of Buziku, village including the late Mzee Mugasa Kazahula. He was also member of the village Social Services Committee. In 2004 he was called by the VEO to witness the agreement of lending land between the late Mugasa Kazahura, Sungulile Kanyalala and Zacharia Mwelo.

He signed the agreement as member of the village Social Service Committee. The respondent was given land for a temporary use. The late Mzee Mugasa Kazahura is the rightful of the suit land. He well knows Mzee Mugasa Kazahura. He is a Tanzania with Tusi tribe in origin. The VEO (PW2 Clement John Madeni) was responsible for all land concerned matters.

That was the end of the applicant's case.

In his defence one Amos Lulinda representative of the respondent under Special Power of Attorney said that, the respondent shifted to Buziku village from Mwanza in 1988. In 1989, the respondent applied for land to the village

counsel for agricultural purposes and was allowed to clear the bush. The respondent invited Zacharia Mwelo because he was with experience in tobacco plants cultivation. That, upon being allowed by the village counsel to clear the bush, the respondent paid Shs. 100/= as entry fee. The receipt is lost.

That, when the late Mugasa Kazahula wanted to travel to his mother country Rwanda in 2004, he called the respondent and Zacharia Mswelo who was using a land of $\frac{3}{4}$ acre and the process was not documented.

Now going back to the 1st issue who deserves ownership of the Suitland, according to the evidence given by witnesses of the applicant who most of them were members of the village Social Service Committee which was responsible for all matters concerning land, the answer to the 1st issue is simple.

That, the one who deserves ownership possession of the Suitland is the applicant Salama Mugasa Kazahula daughter and administratrix of the deceased's estate. The late Mugasa Kazahula.

The evidence given in the tribunal by the 4 witnesses i.e. PW1, PW2, PW3 and PW4 most of whom were members of the village Social Service

Committee responsible for all matters concerning with land, the evidence of these witnesses which was supported by documents signed by the member of the village Social Service Committee, I am satisfied upon followed their evidence that all four witnesses are reliable witnesses whose evidence has established a fact that the Suitland was allocated by the village Social Service Committee concerned with all land matters to the applicant's late father Mzee Mugasa Kazahura.

As I have said above, the rightful owner of the Suitland is the late Mzee Mugasa Kazahura and not the respondent whose evidence to support his defence was weak. His allegation that his sale receipt was lost is questionable unless if he would have produced in court a certified loss report issued by the police station concerned. His evidence therefore lacks cogency.

Looking at the events, I am driven to reach a verdict that, the Suitland is property of the late Mugasa Kazahura father of the applicant Salama Mugasa Kazahura daughter of the deceased Mugasa Kazahura. In other way round, the Suitland is property of Salama Mugasa Kazahura, the applicant. In the event this appeal is dismissed with costs.



W. R. MASHAURI

JUDGE

26/05/2021

Date: 26/05/2021

Coram: Hon. W. R. Mashauri, J

Appellant: } All absent

Respondent: }

B/c: Elizabeth Kayamba

Court: Judgment delivered in court in absence of all parties on line this 26/05/2021, parties to be informed of the outcome and told their right to appeal.




W. R. MASHAURI

JUDGE

26/05/2021