

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO. 53 OF 2021

*(Arising from Land Appeal No. 91 of 2020 at District Land and Housing Tribunal for Tarime,
Originating from Land Application No. 51 of 2020 for Kemambo Ward Tribunal)*

MARIAM NYAMHANGA APPELLANT

VERSUS

MHERE NYAMHANGA RESPONDENT

JUDGMENT

6th Sept & 27th Sept, 2021

F. H. MAHIMBALI, J.:

The appellant Mariam Nyamhanga is dissatisfied by the decisions of the two lower tribunals. Their dispute is on ownership of land alleged to have been left by the deceased Nyamhanga Mhere who is the husband of the appellant and the father to the Respondent. The appellant and the respondent are mother and son. Whereas the appellant is the second wife to the deceased Nyamhanga Mhere, the respondent is the son to the deceased by the first wife. Both the first wife and the husband are dead.

Whereas the appellant apart from being granted her own land by her deceased husband, she claims the remaining portion as also her

share, she being the surviving wife. On the other hand, the respondent alleges that the land in dispute is his upon being granted by his late father during his life time.

After hearing the parties and their witnesses, the trial tribunal ruled in favour of the respondent that as per the available evidence and the visit at the locus in quo, they were satisfied that the Respondent is the lawful owner of the land in dispute. The same view was upheld by the first appellate tribunal.

Dissatisfied with the concurrent findings of the two lower tribunals, the appellant has approached this court armed with a total of five grounds of appeal for this court to disturb the concurrent findings of the two lower tribunals: -

- 1. The trial tribunal erred in law to entertain the matter as it lacked pecuniary jurisdiction and the same trial tribunal entertained the matter without indicating the size and value of the suit land/matter for purposes of pecuniary jurisdiction.*
- 2. The trial tribunal erred in law for failure to join necessary party one Chacha Mhere and denying him the right to be heard.*
- 3. The trial tribunal erred in law to declare the respondent lawful owner of the suit land whilst the Respondent did not tell the*

*court how the title of the suit land passed to him/respondent
intervivo.*

*4. The trial tribunal erred in law as the proceedings do not disclose
what transpired at the visit to the locus in quo.*

*5. The trial tribunal erred in law for failure to show date and
members who visited at the locus in quo and whether parties
were present.*

Based on these grounds of appeal the appellant prays that her appeal be allowed and that she be declared the lawful owner of the land in dispute and the respondent should stop from interfering the enjoyment of the appellant on the suit land. Alternatively, the judgment of the trial tribunal be quashed and declared null and void.

During the hearing of this appeal, the appellant prayed that this court adopts her grounds of appeal as submission of her appeal. She added that she being the second wife of the deceased, she had more rights to inherit the said land than other remote persons such as the respondent and others.

On the other hand, the respondent who filed a written reply prayed that the same be adopted, his written reply contained the following points herein under;

- 1. The trial tribunal was acquainted with pecuniary jurisdiction to entertain this matter as the value of the suit land is below four million and that the size of the suit land was well indicated at the Ward Tribunal of Kemambo.*
- 2. That Chacha Mhere is the third party and son to the respondent with no interest to the suit land.*
- 3. That, the respondent managed to provide adequate information during the proceedings at the trial tribunal and the appellant was given an opportunity to cross-examine the respondent on the same as per the record of the proceedings in the trial tribunal.*
- 4. That, the trial tribunal as alleged under the fourth and fifth grounds of appeal managed to visit the locus in quo and the date and members who visited the suit land were listed as evidenced by the judgment of the tribunal at page 7 as annexed to this reply.*

In addition to the reply to the grounds of appeal, the respondent added other grounds of appeal in which he termed them as legal objections to the appellant's appeal:

- 1. That the matter at hand involves professional misconduct for the counsel one Kigombe who has prepared the grounds of appeal for the appellant as he had served as advocate for the respondent*

upon preparing the reply of the grounds of appeal before the Land and Housing Tribunal case no.91 of 2020.

- 2. That this Honourable Court lacks jurisdiction to entertain this appeal as the value of the suit land is below four million shillings falling below the required amount of above fifty one million shillings, falling below (51,000,000) under section 37 (a) of the Land Disputes Courts Act, Cap 216 of the R.E 2019.*
- 3. That this court has no power to quash or declare the same null and void under the spirit of substantial justice as per section 45 of the Land Disputes Courts Act.*
- 4. That the summons to this hearing was not given in reasonable time paying regard to the time the petition was dully instituted before this honourable court that is on the 23rd March, 2021 and the summons served to the respondent in August, 2021 pending the period pf five good months.*

Based on the Respondent's reply to the grounds of appeal, it is prayed that:

- a. The appeal be dismissed and the tribunals verdicts be upheld.*
- b. The court to order this matter be taken and heard at village level where the appellant didn't comply.*

c. That the respondent to be declared lawful owner of the suit land as decided at all level to this appeal for the purpose of the Respondent to effect development on the suit land.

In essence, both parties requested this court to consider his/her written grounds of appeal and reply thereto as filed in court. The issue for determination here is whether this appeal is meritorious. In determining this issue, I will lead myself as to the available evidence who between the two is the rightful owner of the said land.

At first, I will consider whether the trial tribunal lacked pecuniary jurisdiction. I consider it as an afterthought. The appellant being the person who filed the suit at the lower tribunal, is surprisingly addressing this argument to this court now as a good ground of appeal. I think the argument is misplaced. It not being an issue at the trial tribunal and that none contested it at trial tribunal, it is unwelcomed to raise it at the second appeal. It is my humble view that the appellant was supposed to raise her eyebrows and show the court how the trial tribunal lacked jurisdiction to entertain the matter as they both submitted themselves to the pecuniary jurisdiction then. The Court of Appeal of Tanzania in the case of **SOSPETER KAHINDI vs MBESHI MASHINI** (in **Civil Appeal no. 56 of 2017**) insisted that: -

"We would also stress that parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction. Indeed, the [Emphasis added] Much as we agree that the issue of jurisdiction can be raised at any time, we think, in view of the orality, simplicity and informality of the procedure obtaining at the Ward Tribunal level, the appellant's concern on jurisdiction ought to have been raised at the earliest opportunity, most fittingly at start of the proceedings. It is noteworthy that in line with the applicable procedure, the parties did not exchange any pleadings and, therefore, all questions for trial were based upon the claimant's oral statement of claim and the respondent's oral reply as recorded by the tribunal. Both parties, then, presented witnesses to establish their respective claims of title.

..... We are of the view that the jurisdictional issue raised could not be determined without evidence on the value of the subject matter".

Therefore, Considering the precedent by the Court of Appeal in **SOSPETER KAHINDI vs MBESHI MASHINI and SHYAM THANKI AND OTHERS V. NEW PALACE HOTEL** (supra) pecuniary jurisdiction being a matter to be disclosed by the parties to the case, it must have been raised by the parties themselves at the earliest opportunity of the case. In the instant matter, as all facts are silent and undisturbed at the lower tribunal, raising it now the fact which was never deliberated at the trial serves no any useful legal purpose at this stage. Worse of the story,

the appellant being the claimant at the trial tribunal. Thus, I'm inclined to hold that the appellant's request for termination of proceedings on this ground came rather belatedly and serves no any useful legal purpose in the circumstances of the instant appeal.

On the second argument that the trial tribunal erred in law for failure to join Chacha Mhere as necessary party to the case, the argument is legally speaking untenable. The law is, it is the claimant who choses who to sue and no any other person/body. Never has it been the legal duty of the trial court or tribunal to advise or tell the party who to sue. Going by the trial tribunal's proceedings, there was no where the appellant prayed to join the said Chacha Mhere as a party to the suit and his request denied. Hence, this ground is bankrupt of merits and it is dismissed.

As regards the third ground of appeal that the trial tribunal erred in law to declare the respondent the lawful owner of the suit land whilst the Respondent did not tell the court how the title of the suit land passed to him/respondent intervivo, the issue is wanting of material facts. Having gone through the trial tribunal's records, it is clear that the said land is neither the appellant's land nor that of the respondent. The available testimony provides that the land belonged to the deceased Mzee Nyamhanga Mhere. The Appellant being the wife and the

respondent being the son each having been apportioned his/her own land by the deceased prior to his death (during his life time), the land in dispute if it remained undistributed as asserted by the appellant cannot automatically pass title to her but by a due process of law. In the case of **MALIETHA GABO vs ADAMU MTENGU** miscellaneous Land Appeal no. 21 of 2020 my learned brother, I. C. Mugeta, J cited the case of **MGENI SEIF V. MOHAMED YAHAYA KHALFANI** , Civil Application No. 1 / 2009, Court of Appeal – Dar es Salaam (unreported) where at page 14 , it was held :

"As we have said earlier, where there is a dispute Over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership".

Additionally, on page 8 of the cited case of the Court of Appeal had this to say;

"It seems to us that there are competing claims between the applicant and the respondent over deceased person's estate. In the circumstances, only a probate and administration court can explain how the deceased person's estate passed on to the beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate".

Having stated the above this court finds that the appellant had no legal justification to institute the case at the trial tribunal to adjudicate on land dispute. It being deceased's estate it must have been filed at the probate court for it to determine properly. As a result the proceedings were a nullity and they could not be appealed against.

In consideration of the above findings, I find no need of discussing the remaining grounds of appeal as doing so serves no useful purpose for the legal determination as this ground alone is sufficient to dispose of this appeal. However for the interest of justice I wish to say something in respect of the Respondent's three concerns which he raised in the course of submission of this appeal: that this court lacks jurisdiction, the issuance of court's summons was so delayed upon filing of the said appeal and lastly that the appellant's counsel who drafted her grounds of appeal also served him for the same matter during the first appeal at the DLHT.

As regards the argument that this court lacks pecuniary jurisdiction to entertain this matter as per section 37(1) of the Land Disputes Courts Act, I better reproduce what the law says on that.

Subject to the provisions of this Act, the High Court shall have and exercise original jurisdiction-

(a) in proceedings for the recovery of possession immovable property in which the value of the property exceeds three hundred million shillings

In this matter, it is not the original jurisdiction of the High Court which is being exercised here but appellate powers of the High Court. The law is, on administration of land matters when one is aggrieved by the decision of one court/tribunal has a right of appeal to another court/tribunal by way of appeal. So, this being an appeal matter originating from Ward Tribunal, the relevant section is 38(1), (2) and (3) of the land Disputes Courts Act. In this situation, it does not matter what was the value of the said landed property at the trial tribunal provided it has come by way of appeal, the High Court is well vested with the legal powers for adjudication. The argument would have been relevant had the High Court been exercising the original jurisdiction in which dictate of section 37(1) would come into play. Thus, this court is dully mandated to determine this matter as per law.

Another issue for consideration of the court is on delay of issuing court's summons upon filing the said appeal by the High Court. It is true this appeal to High Court is dated 23rd March, 2021 upon being dissatisfied by the first appellate tribunal's decision dated 12th February, 2021. The law is, any party who is aggrieved by a decision or order of

the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court (see section 38 (1) of the LDCA). Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought. Upon receipt of a petition under this section, the District Land and Housing Tribunal **shall within fourteen** days dispatch the petition together with the record of the proceedings in the Ward Tribunal and the District Land and Housing Tribunal to the High Court (See section 38(2) & (3) of the LDCA). Thus, unless the lower tribunal records reach the High Court, summons to parties cannot be issued for a commencement of the appeal proceedings. In the current case, it is not clear as to exactly when the said appeal records reached High Court from Tarime DLHT for its registration, however it is clear that assignment of it was done on 4th August 2021 and court's summons for hearing were ordered to be issued on 4th August, 2021 and signed on the following day. Therefore, I admit that there had been laxity somewhere in the compliance with the law as timeliness in the administration of justice is concerned. It is a good wake up call at the High Court's Deputy Registrar's office and the DLHT's office to make sure that timeliness as per law is a matter of strict

adherence so as to serve the parties and the general public in compliance with the Judiciary's vision: *Timely, Quality and Accessible Justice for all*.

Lastly is on the issue of conflict of interest of Mr. Tumaini M. Kigombe (Adv) who was retained by the appellant and drew the grounds of appeal for the appellant but also served the respondent at the DLHT in respect of the same matter. I am satisfied there might be a conflict of interest though the said advocate just appears to have been engaged in drawing only. Thus, as he did not take role actively in arguing the said appeals, his degree of conflicting interests can be not so prejudicing. Otherwise, it is unethical for an advocate to keep on changing sides in the same matter for the same parties as if it is a political party or as recently seen to even spokespersons of football clubs on reason of being well paid or highly remunerated. This being a noble profession, advocates are again reminded to make strict adherence to law and abide to the available code of ethics.

All said, the appeal is allowed in the context that the proceedings at the trial tribunal were a nullity and so is its resulting appeal at the first appellate tribunal.

Considering the consanguinity nature of the parties, each party

shall bear own costs.

As what is the way forward of the matter, I advise the parties if still at contention to refer their dispute at the appropriate probate court subject to the law of limitation in order to resolve the probate issue involving them as none of them holds good and better title of the said property.

DATED at MUSOMA this 27th day of September, 2021.




F. H. Mahimbali

JUDGE

27/09/2021

Court: Judgment delivered this 27th day of September, 2021 in the presence of both parties and Miss Neema Likuga – RMA.


F. H. Mahimbali

JUDGE

27/09/2021