

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 81 OF 2020

(Originating from Application No. 67 of 2016, at Karatu District Land and Housing Tribunal)

RASHID QAMBO.....APPELLANT

VERSUS

ODILIA INGI MEFURDA.....RESPONDENT

JUDGMENT

2/06/2021 & 01/09/2021

GWAE, J

This appeal arises from the judgment and decree of the District Land and Housing Tribunal for Karatu at Karatu (DLHT) dated 6th July 2020 in Application No. 67 of 2016. In that case, the appellant unsuccessfully sued the respondent claiming that the respondent had trespassed into his land measuring three acres located at Rhotia Kainam village, Rhotia Ward, Karatu District, Arusha Region. The appellant prayed to be declared the lawful owner of the suit land and a permanent injunction against the respondent, her agents, servants or workmen from trespassing into the suit land.

The material facts gathered from the DLHT's records are as follows; the appellant alleged to be the owner of a land measuring 32 acres which he claimed to have been given by his mother in the year 2010 by way of a gift. 15 acres Out of the 32 acres are said to have been used for cultivation and 17 acres for grazing, the 3 acres claimed to have been invaded by the respondent being among the 15 acres used by the appellant for cultivation. The appellant further stated that the claim by the respondent that her husband had exchanged the land in dispute with the appellant's brother one Sixbert Banga Qambo is false as the land which the appellant's brother exchanged with the respondent's husband is quite different from the land in dispute, according to him, the exchanged parcel of land is measuring seven (7) acres and its boundaries were well defined. The appellant further contended that, it is the respondent and her husband who decided to extend boundaries by encroaching 3 acres belonging to the appellant.

In reply to the appellant's application, the respondent in her written statement of defence stated that the land in dispute belonged to his late husband Cornel Fabiano after he had exchanged it with the appellant's brother Sixbert Banga Qambo. The respondent further stated that during the life time of her late husband several cases were instituted at different times

by the appellant's mother, the appellant's brother and the appellant himself against the respondent's late husband over the disputed land and in all occasions the respondent's husband was being declared as the lawful owner.

It is the contention of the respondent that at the time the appellant is alleging to be given the land by his mother, the appellant's mother had nothing to transfer since the disputed land was already in possession of the respondent's husband following the transfer which was approved by the Village Council.

In proving his case at the trial tribunal, the appellant summoned a total of four witnesses while the respondent side had two witnesses and eight (8) documentary exhibits. After evaluation of evidence before it, the trial tribunal gave its judgment in favour of the respondent on the reason that the appellant failed to prove his case on the balance of probability on how he came into possession of the said land and his evidence and that of his witnesses was so contradictory compared to the oral evidence and exhibits which were tendered by the defence. More so, the trial tribunal was of the view that the appellant had wrongly sued the respondent on the reason that, exhibit D1 which was tendered by the respondent's witness, DW2 shows that DW2 Simon Cornel was appointed as the administrator of the estate of his

late father, Cornel Fabiano, the estate which includes the disputed land, therefore it was proper for the appellant to sue the administrator of the estate than to sue the respondent who is the deceased's wife taking into account that the disputed land is now under the occupation of the said Simon Cornel. The application was therefore dismissed with costs.

Dissatisfied with the above decision of the trial tribunal the appellant has filed this appeal comprised of four (4) grounds of appeal reproduced hereunder;

1. That, the Hon. Chairman erred in law and fact when he decided that the evidence tendered by the respondent and her witness in the District Land and Housing Tribunal for Karatu in Application No. 67 of 2016 was stronger than that of the appellant and concluded that the piece of land in dispute belonged to the respondent.
2. The Hon. Chairman erred in law and fact when he decided that the evidence tendered by the appellant and his witnesses in and before the Hon. Tribunal was full of contradictions.
3. That, the Hon. Chairman erred in law and in fact when he decided that it was wrong for the appellant to sue the present respondent.
4. That, the Hon. Chairman erred in law and fact when he decided that the appellant then the applicant failed to establish his claims of ownership of the piece of land in dispute in the District Land and Housing Tribunal for Karatu.

At the hearing of this appeal the appellant was represented by the learned counsel Dr. Ronilick Mchami while the respondent was represented by Mr. Geoffrey Mollel-advocate. Arguing his appeal Mr. Mchami submitted that it is not true that the respondent evidence was heavier than that of the appellant on the reason that the appellant through PW1 PW2 and PW3 established that the disputed land is the property of the appellant and that the respondent is the trespasser. Dr. Mchami went on arguing that the evidence of the appellant is not contradictory as alleged by the trial tribunal as the appellant's evidence and that of his witnesses was so direct regarding the trespass of the of the disputed land (3 acres) and the exchange of the seven (7) acres by the appellant's brother one Sixbert.

On the third ground of appeal the learned counsel was of the opinion that the proper person to be sued was the trespasser who is the respondent and not the administrator, actually he argued that the issue of an administrator of the estate had nothing to do with the ownership of the land.

On the last ground of appeal, Mr. Mchami contended that the appellant herein had established ownership of the disputed land measuring 3 acres and urged this court being the 1st appellate court to re-evaluate the evidence and come up with its own finding.

On the other hand, Mr. Mollel submitted on the 1st and 2nd grounds that there was an exchange of seven acres between sixbert and the respondent's husband Cornel Fabian. Mr. Mollel supports the trial tribunal's findings that the evidence of the appellant and his witness was contradictory taking into account the evidence of the said sixbert who testified to have no knowledge of the suit farm, further contradiction is on the evidence of the appellant whose evidence is contradictory as to whether the land in dispute was given to him by his father or mother.

Replying on the third ground of appeal, Mr. Mollel submitted that the dispute over the disputed land arouse way back when the respondent's husband was still alive where the deceased was sued as a trespasser, therefore since the said Cornel Fabian is dead the respondent cannot be sued except the administrator of the estate of the late Cornel Fabian. The counsel went further commenting that according to the nature of the dispute the trial tribunal ought to have visited the locus in quo. He therefore urged this court to dismiss the appeal.

Having carefully considered the rival arguments advanced by the counsel for the parties and after having examined the record of appeal

before this court, I should now consider if this appeal is meritorious by determining grounds of appeal advanced by the appellant.

I would wish to start with ground **number three** which I think suffices to dispose this appeal. In this ground of appeal the appellant is trying to challenge the decision of the trial tribunal in that, it was wrong for the appellant to sue the respondent who had no locus quo. Having read the records of the trial tribunal it is evident that the disputed land initially belonged to one **Cornel Fabiano** who according to the evidence (Exhibit D2-Hati ya "makubaliano ya ubadilishanaji uwanakijiji) acquired the same through an exchange of land with one Sixbert Banga Qambo the fact which is also supported by the appellant together with his witnesses who testified that there was an exchange of land (subject of this appeal) between one Sixbert who is the appellant's brother and the late Cornel Fabiano, the respondent's husband. The records further show that before the demise of the said Cornel Fabiano there were several cases instituted against him over the land in dispute claiming that the said Cornel Fabiano had trespassed into the land in dispute. To this end it is vividly clear that the land in dispute belonged to the late Cornel Fabiano, the next question that follows is whether it was proper for the appellant to have instituted a suit against the

respondent who is the wife of the deceased over the property which belonged to the deceased whose estate is administered by a person other than the respondent.

The appellant during cross examination by the respondent counsel stated that he instituted a suit against the deceased's wife because she is living in the disputed land and that she has inherited the properties of her late husband including the land in dispute however when asked as to whether he is aware of the administrator of the estate of the late Corneli, he replied that he did not know the administrator of the estate of the late Corneli.

The respondent on the other hand when testifying, stated that the land in dispute was acquired through an exchange of land that was done between her husband who is now deceased and one Sixbert Qambo. However, the respondent informed the court that after the death of her husband Corneli Fabiano an administrator of his estate of his late husband was appointed who is **one Simon Corneli** and he is the one who is in possession of the said land. This piece of evidence is supported by the evidence of the said Simon Corneli testifying as DW2 who stated that he is the son of the deceased Corneli Fabiano, and an appointed administrator of the estate of his late

father, he tendered exhibit D1 which is the appointment letter of administration issued by the Karatu Primary Court on the **20th March 2017**.

Given the above circumstances of this case, this court is of the considered view that at the time when the suit was filed on the **11th November 2016** even though no administrator was appointed but yet the respondent had no locus over the disputed land. It is apparent that where a person is claiming any interest over the deceased's properties his claims must be directed to either an administrator where the deceased person died intestate or executor where the deceased died testate.

In the suit at hand, since the property in dispute belonged to the deceased one Corneli Fabiano, it is apparent that the proper person to be sued is the administrator of the estate of the late Cornel Fabiano who in this case is **Simon Cornel**, the appellant suing the respondent in her own capacity is as good as to say that he had no cause of action over the deceased's property. I am guided by the decision of the Court of Appeal in the case of **Antony Leonard Msanze and another vs. Juliana Elias Msanze and 2others**, Civil Appeal No. 76 of 2012 (Unreported) where it was held that;


"In our opinion, in the above cited paragraphs of the plaint where the appellants are claiming that they are administrators of the estate of the deceased, **manifest cause of action and sufficient interest in the estate of the late Elias Leonard Msanze.**" (Emphasis is mine)"

The appellant and or trial tribunal ought, in my view to have caused and amendment of the appellant's application by substituting the respondent with the administrator instead of proceeding with hearing of the matter. As doing so without joining necessary party to the suit would make a decree emanating from such proceedings nugatory.

In the event, this appeal is dismissed with no order as to costs as the appellant was aware of the death of the respondent's husband and more so he was made aware of the appointed administrator of the estate of the late **Cornel Fabiano**. Consequently, the proceedings, judgment and decree thereto of the trial tribunal are hereby quashed and set aside. If the appellant, still desirous to pursue the matter, he may file the dispute afresh against a proper person.

It is so ordered.




M. R. GWAE
JUDGE
01/09/2021