

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

LAND APPEAL NO. 22 OF 2020

*(Originating decision of the District Land and Housing Tribunal for Arusha in
Application No. 117 of 2014)*

SEVERINE A. MALLYA 1ST APPELLANT

JOVITA P. MSELE 2ND APPELLANT

Versus

**CHARLES WILLIAM (Legal Representative of
the late William Kichao) RESPONDENT**

JUDGMENT

12th May & 23rd July, 2021.

MZUNA, J.:

In the District Land and Housing Tribunal for Arusha (the trial Tribunal), **Charles William**, the respondent herein, acting as the administrator of the estate of the late William Kichao, successfully sued the appellants herein vide Application No. 117 of 2014, claiming for a piece of land measuring $\frac{1}{4}$ of an acre, located at Sanawari Arusha (herein after referred to as the suit land). In its judgment delivered on 26/3/2020, the trial Tribunal declared the suit land the property of the late William Kichao, the respondent's father, and the same was handed to the respondent for administration as part of the deceased's estate. The appellants were declared trespassers, they were ordered to vacate the suit land immediately, and they were permanently restrained from interfering with the suit land.

Before venturing into what was argued in the appeal, it is pertinent to recount facts leading to the appeal, albeit briefly: The suit land was originally owned by one, Isack Loniek Kichao in the 1950's. In 1960, he leased the suit land to Paulo Sefu, the second appellant's father who was permitted to construct a commercial house and a latrine. Paulo Sefu leased the land on agreement that he would pay rent to the tune of Tshs 50/= annually. The lease was witnessed by a tenancy agreement which was admitted as exhibit P6. A year or two years later, Isack Loniek passed away, the land was inherited by William Kichao, the respondent's father. William Kichao developed the front part and continued living with Paulo Seif until 1983. Paulo Seif invited his brother-in-law, Alloyce Maluti, the first appellant's father, whom together were running a hotel business at the demised property. Dispute arose, as William Kichao demolished the latrine that was built by Paulo Seif.

Paulo Seif and Alloyce Maluti instituted Civil Case No. 64 of 1988 in the Resident Magistrates' Court of Arusha, against William Kichao and 2 other people who were running business at the suit land. The Resident Magistrate's Court in its judgment (exhibit P2) that was delivered on 11/11/1993 declared the second defendant (William Kichao) the lawful owner of the suit land, save for the portion of land that Paulo Sefu had built a house and the latrine. The Court further ordered William Kichao to pay Tshs 5,000/= to Paulo Sefu as compensation for the latrine that was demolished.

Paulo Sefu and Alloyce Maluti were not satisfied, they appealed to this Court vide RM Civil Appeal No. 22 of 1996. This Court (Kapaya RM with Ext. Jurisdiction) dismissed the appeal with costs, declaring William Kichao the lawful owner of the suit land which was measured and found to be 23 paces by 16 paces. The High Court judgment (exhibit P3) did not reserve any right to Paulo Sefu and Alloyce Maluti. The record shows that on 9/2/1996, Paulo Sefu and Alloyce William through a clan meeting allocated the suit land with a six rooms house to the appellants herein. The allocation was witnessed by writings which were admitted in the trial Tribunal as exhibit D3. On 4/7/1997, Paulo Sefu died. William Kichao filed application for execution of the judgment of the High Court, seeking to attach the house that was built on the suit land vide Misc. Civil Application No. 101 of 1997 against the appellants herein but the application was dismissed since the appellants were not parties to the case in the High Court.

On 5/8/2013, William Kichao died. The appellants continued living on the suit land. After being appointed as the administrator of the estate of his late father, the respondent served all the tenants in the suit property with notice to give vacant possession. All the other tenants complied with the exception of the appellants, who considered themselves the lawful owners of the suit land that was allocated to them by their late fathers. The respondent instituted the suit in the trial Tribunal, vide Application No. 117 of 2014. The trial Tribunal declared him the lawful owner of the suit land, as was part of the estate of his deceased

father. The appellants were declared trespassers. They were aggrieved, they have thus preferred this appeal on the following grounds:

- a) *That, the trial Tribunal erred in law and fact by failure to identify "suit premises" in the suit in hand from the "suit premises" previously held and explicitly stated in exhibit P2 and P3;*
- b) *That, the trial Tribunal erred in law and fact when failed to perceive the findings of the court as contained in exhibits P2 and P4;*
- c) *That, the trial Tribunal erred in law and fact in holding that exhibit P2 and P4 explain that the suit premises in the matter at hand belonged to the late William Kichao;*
- d) *That, the trial Tribunal erred in law and fact in its holding that the Respondent's evidence before it was strong and consistent to prove his claim;*
- e) *That, the trial tribunal erred in law and fact by holding that the suit land in the matter at hand belonged to the late William Kichao; and*
- f) *That, the trial Tribunal erred in law and in fact for failure to analyze, evaluate evidence produced before it and realize that the appellants are lawful owners of the plot previously and lawfully owned by the late Paulo Sefu.*

Basing on the foregoing grounds of appeal the appellants pray that this court allows the appeal by setting aside the judgment and decree of the trial Tribunal with costs.

At the hearing of the appeal, the appellants were represented by Mrs Aziza Ahmed Shakale, learned advocate while the respondent was represented by Mr. Duncan Joel Oola, learned advocate. The appeal was argued *viva voce*.

The appeal raises four issues, *First, whether there were two plots or one and same plot? Second, whether the effect of compensation transferred title. Did that mean the appellants should give vacant possession or were invitees? Three, whether the alleged transfer to the appellants was a forgery? Lastly whether the appeal has merits?*

Arguing the appeal Mrs. Shakale opted to begin with the sixth ground of appeal. She submitted that the suit land belonged to Paulo Sefu, the father of the 2nd appellant. The trial Tribunal in its judgment relied on exhibits P2, P3 and P4. According to Mrs Shakale, exhibit P2, the court found out that the land belonged to Paulo Sefu, while the Tribunal came up with a different view.

Submitting on the 1st, 2nd and 3rd grounds, Mrs Shakale contended that the Tribunal failed to appreciate the fact that these were two different portions of land. That is reflected in exhibit P2 read together with exhibit D1. According to exhibit D1, there was a portion which was removed from the main plot. Mrs Shakale contends that William Kichao never owned plot that was owned by the appellants. She maintained that the Tribunal failed to distinguish the basis of the two portions of land. The learned advocate for the appellants fortified that payment of compensation on a toilet that was demolished does not mean that he had to give vacant possession, therefore exhibit P4 does not mean that the appellants were trespassers requiring them to give vacant possession as found by the trial Tribunal.

Submitting on the 4th and 5th grounds of appeal Mrs. Shakale averred that the basis of the decision declaring the respondent lawful owner of the suit land is not based on the evidence because the appellants evidence was heavier than that of the respondent. William Kichao inherited the land from Isack who also gave the land to the father of the 2nd appellant. In respect of exhibit P5, the 2nd appellant's father was allowed to be allocated land to build a house and toilet and should not be evicted, as reflected in the civil case. According to the learned advocate, there were two plots, one leased to him and another allocated to the father of the 2nd appellant. The learned advocate for the appellants urged this court to allow the appeal with costs.

Responding to the 6th ground of appeal, Mr. Oola contended that the evidence proved that the respondent is the lawful owner of the suit land. Exhibits P2, P3 and P4 all gave title to the late William Kichao, father of the respondent. Mr. Oola advanced that there is only one plot and not two plots as contended by the Appellants' counsel. He fortified that the High Court declared the 2nd appellant's father as a tenant, and the first appellant was sub-tenant or an invitee as per exhibit P3. The Court observed that being an invitee one cannot be the owner of land. Mr. Oola asked, how can children of tenants own land, faulting the allegation that the suit land consists of two pieces of land.

Mr. Oola strenuously submitted that the trial Tribunal declared exhibit D3 which is sought to be relied on by the appellants purported to have been used in allocating the suit land to them a mere forgery. The exhibit differed with the

one annexed in the written statement of defence. It was Mr. Oola's view that Paulo Sefu and Alloyce Maluti never owned the land jointly as they purport to say in exhibit D3. Further, the alleged transfer did not involve neighbours, and it was done while there was a pending suit. Relying on his submission, Mr. Oola implored the court to dismiss the appeal with costs.

Rejoining to her submission in chief, Mrs Shakale contended that according to exhibit P2, the allegation that the appellants were tenants is not true. She added that the transfer was made during the pendency of the appeal because that plot had never been disputed and was not subject to appeal. Regarding joint ownership of the land, it was parties' agreement to own the land jointly. Regarding exhibit D3 it was not forged as contended rather the witness signed in different serial number but logic of transfer remains, and that the appellants were handed the suit land. Mrs. Shakale maintained that the demarcations show that the respondent claimed even the back house where the house of Paulo Sefu is located, which she considers wrong. She urged this court to weigh the evidence and exhibits P2 P3, P4 and P5, reiterating her earlier prayers.

I have given considerable weight to the grounds of appeal and the submission of the counsel for the parties in support and against the appeal. Let me start with issue No 3 along with the allegation that the evidence was not considered. The question to ask is, was the alleged transfer to the appellants a forgery?

According to the trial Tribunal, the late Paulo Sefu occupied the suit land through tenancy agreement between him and the late Isack Loniek Kichao which was evidenced by exhibit P6. In that exhibit, Paulo Sefu was mandated to erect commercial structure and latrine subject to the instructions of health officer and the local leaders. He built the said structures and continued doing business at the suit land. Prior to his death, the late Isack Loniek gave the land to William Kichao, the respondents' father. The trial chairperson scrutinized exhibits P2 and P4 which are the judgments in respect of Civil Case No. 64 of 1988 and RM Civil Appeal No. 22 of 1996 respectively. She also analysed exhibit P3 which found the appellants as tenants and not owners of the suit land. According to the above exhibits, it was the finding of the trial Tribunal chairperson's view that the suit land belonged to the late William Kichao, therefore lawful property of the respondent as the administrator of the estate of the late William Kichao.

The Tribunal chairperson also scrutinized exhibit D3 stating that it was forged since the photocopy attached to the written statement of defence and its original copy that was tendered as exhibit D3 differ. Moreover, she made a finding that exhibit D4 which was the High Court ruling on execution was not of much help to the appellants since it did not declare the appellants as the lawful owners of the suit land. For the above analysis, the Tribunal chairperson made a finding that the suit land is the lawful property of the respondent.

I agree as correctly ruled by the chairperson of the trial Tribunal, that the said exhibit D3 differs between the original copy that was tendered as exhibit and the photocopy that was annexed in the written statement of defence. This discredits the weight of that exhibit. This suffices to agree with the decision of the trial Tribunal that the respondent deserves to be the lawful owner of the suit land. That is the only document purported to be relied on by the appellants to prove that the land was transferred from Paulo Sefu to them. Its shortfalls therefore weaken the evidence of the appellants. The allegation that it is not forged by a simple reason that witnesses signed in different serial numbers, with due respect, cannot rule out the well-known rules of procedure that the trial tribunal is better placed to evaluate the evidence than the appeal court which reads the transcript of the record.

From the above discussion, it is apt to note that the Tribunal chairperson properly analyzed the evidence on record, and carefully scrutinized the tendered exhibits by both sides leading her to the conclusion she made. Therefore, the complaint by Mrs Shakale that the judgment was not based on the evidence on record, is with due respect, misconceived. The first issue is resolved in the affirmative.

I now turn to the first, second and then last issue. The questions which follows: Are there two plots or one and same plot? Is it correct to say, compensation transferred title. Did that mean the appellants should give vacant

possession or were invitees, Lastly, who as between the two parties is the rightful owner?

The above issues, are the pivotal of the appeal. According to the evidence of PW1, the suit land measures $\frac{1}{4}$ acres. According to exhibits P2 and P3, which are the judgments of the Resident Magistrates' Court and that of the High Court, when visited the *locus in quo*, the Resident Magistrates' Court measured the suit land and it was found to be 23 by 16 paces. When I try to quantify figures found by the court at the *locus in quo*, by simple calculation, $23 \times 16 \div 4900 = 0.07510$. Approximating it to 0.075 which is also $\frac{1}{4}$ of an acre. I have realized that there is no difference between the size the respondent complained of and that which was found by the court during the visit of the *locus in quo*.

According to the evidence of PW1, PW2 and PW3 in the Tribunal, the land belonged to Isack Loniek, the father of the late William Kichao. According to the evidence on record, the land was leased to the late Paulo Sefu (the 2nd appellant's father) as evidenced by the tenancy agreement, exhibit P6. The evidence further deduced that the tenancy agreement gave Paulo Sefu right to erect commercial building and latrine only, it did not extend him powers to own the suit land. There is no dispute that after the death of Paulo Sefu, the suit land was inherited by William Kichao, the respondent's father.

The evidence further reveals that the parents of the appellants instituted Civil Case No. 64 of 1988 in the Resident Magistrates' Court of Arusha. The

decision in respect of that case declared the respondent's father the lawful owner of the suit land, save where Paulo Sefu had built his house and the latrine. They were dissatisfied, on appeal to this Court vide RM Civil Appeal No. 22 of 1996, the High Court dismissed the appeal in addition to that it overruled the decision of the Resident Magistrate's Court which reserved the land that the 2nd appellant's father had built his house and the latrine. The High Court dismissed the appeal in its entirety holding that the 2nd appellant's father was a mere tenant and the 1st appellant's father was declared invitee, therefore they could not own land. Therefore, the respondent's father was declared the lawful owner of the entire suit land as well shown in Exhibit P3.

The defence version is that the 2nd appellant's father is the lawful owner of the suit land. However, there is no evidence that led to prove how the land became in the ownership of the late Paulo Sefu. For example, DW3 and DW4 relatives of the appellants herein, stated that they do not know how the late Paulo Sefu came to own the suit land. The fact that the suit land was given to the appellants by their respective fathers on 9/2/1996 as evidenced by exhibit D3 is without any proof as to how it was first allocated to their fathers.

According to exhibit D3, it shows that the land was allocated to the appellants on 9/2/1996 while RM Civil Appeal No. 22 of 1996 was still pending. It is not stated as to how the land could have been transferred to the appellants in the pendency of the suit, considering the fact that it was the respondent's father who was declared the lawful owner at that moment by the Resident

Magistrates' court. Further, none of the neighbours who witnessed the handing over was called to testify, except the appellants' relatives.

The complaint put forth by Mrs. Shakale that there are two portions of land, is not supported by any evidence. The land subject of all the cases that were filed in courts, is one and the same, that is ¼ an acre. In the final result, this court is at one with the decision of the trial Tribunal that the respondent is the lawful owner of the suit land, as the administrator of the estate of the late William Kichao. The respondent's evidence seems more of evidential value than that of the appellants. The 2nd appellant's father was a mere tenant and the 1st appellant's father was equally an invitee. Both could not own land because it is a settled principle of the law that no invitee can exclude his host whatever the length of occupancy, see **Mkakofia Merinanga vs. Asha Ndesia** (1969) HCD 204. There cannot be valid transfer as well for the same reasons. The second issue is resolved in favour of the respondent.

For the above stated reasons, the appellants had no superior title than the respondent who acquired it through his late father William Kichao after being given same by Louniek Kichao. The respondent is the lawful owner of the disputed land. This appeal stands dismissed with costs.



M. G. MZUNA,
JUDGE.
July 23, 2021.