**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 27 OF 2019**

(c/f Arusha District Land and Housing Tribunal, Land Application No. 9 of 2012)

**LOOTA NDOIKAI .....1ST APPELLANT**

**TAJIRI LOOTA.....2ND APPELLANT**

**SANDAMU LOOTA.....3RD APPELLANT**

**VERSUS**

**JEREMIA MBULUNGA..... RESPONDENT**

## JUDGMENT

30/8/2021 & 22/10/2021

**ROBERT, J:-**

This appeal arises from the judgment and decree of the District Land and Housing Tribunal (DLHT) for Arusha in Application No. 9 of 2012. The respondent successfully sued the appellants at the DLHT alleging trespass over his landed property measuring one acre located at the village of Ilkiding'a, Arumeru District, Arusha Region. The appellant prayed to be declared the lawful owner of the suit land and a vacant possession of the suit land.

The relevant facts gathered from this matter reveals that, the first appellant is an uncle to the respondent and a biological father to the remaining appellants. The respondent filed a suit against the appellants alleging that the suit land was given to him in 1975 by his father, Mbulung'a Ndoikai, who is the brother to the first appellant. The respondent's father allegedly moved to Olokii village and left the first appellant to take care of coffee plantation in the suit land until he comes back. Later on, in 2007 when the respondent and his father went to inspect the suit land, they found that the appellant's sons had built their houses in the suit land. A dispute ensued which was eventually referred by the respondent to the DLHT of Arusha.

The main question for determination at the DLHT was who between the parties is a lawful owner of the suit land. The respondents herein summoned a total of four witnesses (PW1 – PW4) while the appellants brought a total of five witnesses (DW1 – DW5). At the end of the hearing, the trial tribunal gave its judgment in favour of the respondent on the grounds that his evidence was consistent and reliable on how he came into possession of the suit land while the evidence adduced adduced by the appellants herein was contradictory and dangerous to rely on. Aggrieved by that decision, the appellants filed the present appeal armed

with five grounds appearing in their amended memorandum of appeal as follows:

1. *He who alleges must prove, the Honourable Chairman erred in law and in fact by believing the Respondent's father to have had left the suit land to the 1st appellant from 1975 to 2009 without evidence to prove so.*
2. *That the Honourable Chairman erred in law and fact by holding that there was consistency in Respondent's evidence hence reliable despite contradictions and inconsistencies which rendered the whole evidence worthless.*
3. *That the Honourable Chairman erred in law when held different clan meetings resolved the suit land belongs to the Respondent's father against evidence on record.*
4. *That the land in dispute having been allocated to the 2nd and 3rd appellant in 1996 who developed it and are currently in occupation, the Honourable Chairman erred in law and fact for failure to consider their rights in the judgment.*
5. *That the Honourable Chairman erred in law and fact for failure to dismiss the Respondents claim as none of the witnesses was able to identify the suit land and state its size to justify judgment in favour of the Respondent.*

At the hearing of this appeal the appellants were represented by **Mrs. Christina Kimale**, learned counsel whereas the respondent enjoyed the services of **Mr. Severin J. Lawena**, learned counsel. At the request of parties, the appeal was argued by filing written submissions.

Submitting on the first and fifth grounds of appeal together, Mrs. Kimale maintained that, the respondent (PW1) testified at the DLHT that he was given the suit land by his father (PW5) in 1975 and the boundaries of the suit land are, to the North- the applicant, South- Naikodio Mutisho, East - Naikodio Mutisho and West- Loota Ndoikai. However, during cross-examination the respondent testified that he was born in 1983 and the suit land was handed to him in 2008. Further to this, the boundaries of the suit land declared in the pleadings are different from the ones indicated in the testimony of the respondent (PW1). Accordingly, she argued that the respondent lied to the trial tribunal on when the suit land was given to him by testifying that the land was given to him in 1975 which is nine years before his birth and he failed to establish the boundaries of the suitland.

She argued further that, the respondent failed to identify the suit land by proceeding to testify that in 2008 when they visited the suit land one farm was planted with cabbage while the other farm had family houses constructed by the first appellant's sons. She argued that, this is different from what is stated in the pleadings where the respondent claimed one farm measuring one acre while at the hearing she claimed two farms measuring 1½ acres. She submitted further that, the

respondent's father (PW5) described the boundaries of the suit land differently from what was described by the respondent. She indicated the boundaries stated by PW5 as, to the North- Uwanja wa Ng'ombe, South- Boma ya Motisho, West- Boma ya Motisho and East- Mama yangu who gave it to Loota. She argued that, the evidence adduced is confusing for lack of clarity on what is the suit land claimed by the respondent herein. She maintained that, if the suit land belongs to the respondent's father it could not have been difficult for them to describe it.

She faulted the trial tribunal for deciding on the respondent's favour while he failed to prove the case to the required standard and for neglecting the appellants' evidence despite their long occupation over the disputed land. For the reasons stated, she prayed for the 1st and 5th grounds of appeal to be allowed.

Opposing the first and fifth grounds, Mr. Lawena submitted that, the first appellant admitted that the suit land belonged to the respondent's father (PW5) when he testified that the suit land was the property of Mbulung'a (PW5) until 1975 when he purportedly bought the same. He argued that the 1st appellant failed to prove that he really bought the same from Pw5 as alleged thus his claim has no merit. The evidence of

the respondent was corroborated with the one of Pw2 (Clan elder) and Pw3 (Mshili wa Ukoo).

The second and third grounds were consolidated and argued together. Mrs. Kimale submitted that, the conclusion made by the Hon. Chairperson that ownership of the suit land belongs to the respondent's father based on the testimony of PW2, PW3 and PW4 that the different clan meetings resolved that ownership of the suit land was vested to the respondent's father was wrong.

She submitted that the respondent failed to produce before the trial Tribunal evidence to prove the said clan meeting was conducted as alleged. She submitted further that, although it was testified that the first appellant signed memorandum of agreement to handover the suit land to the respondent, a copy of the said memorandum was not tendered as evidence.

She argued that although the respondent's witness testified that by the time the respondent's father moved to Olokii the respondent was still very minor, this is in contradiction to the testimony of the respondent who testified that he was born in 1983 while his father moved to Olokii in 1975. Thus, the respondent's evidence was contradictory and unhealth for the court to rely on such evidence.

Replying to the 2nd and 3rd grounds, Mr. Lawena stated that, the clan elders were called and they testified that the suit land was given to the respondent by his father, the testimony which was never disputed by the appellants. Thus, there was no need for a minutes of a clan meetings due to the fact that those who were present in those meetings were given a chance to testify and their evidence were not disputed. The allegation by the 1st appellant that he redeemed the said land from the respondent's father proved that, the original owner of the suit property is the respondent's father (Pw5). Further to that, the alleged contradictions have no merit and the respondent proved his claim on the balance of probability as required by the law. In the end, the 2nd and 3rd grounds of appeal have no merit.

Coming to the ground no. 4, Mrs Kimale submitted that, the second and third appellants were allocated the suit land in 1996 and the respondent did not complain as the respondent's father alleged to have been visiting the said suit land, he could have realized that the second and third respondents constructed their houses in the suit land. She argued that, the appellants have been using the suit land for more than 13 years undisturbed and the customary law in which the parties belong, the limitation period to claim a land occupied by another person is 12

years and the trial tribunal did not take that into consideration. Thus, the appellants have rights over the suit land as it has never been left under the care of the 1st appellant.

It was their humble submission that the appeal is meritorious the same to be allowed with costs.

Contesting this ground, Mr. Lawena submitted that, there was no evidence adduced at the trial tribunal to prove that the second and third appellants were handed the suit land by the first appellant in 1996. He submitted that the evidence given at the trial tribunal proved that the first appellant was given the suit land to take care of while PW5 was developing his new residence at Olokii, Nduruma. Thus, the first appellant was not the owner but just an invitee, thus he had no good tittle to pass to the 2nd and 3rd appellants. He made reference to the case of **Samson Wambene vs Edson James Mwanjingili**, TLR 2001 No. 1.

He maintained that, the argument by the appellants that they used the land for more than 12 years has no merit because they were mere invitees to the land. Thus, they prayed for the appeal to be dismissed with costs.

In his rejoinder, counsel for the appellants submitted that, there is no proof that the first appellant was an invitee to the suit land for a period

of 34 years from 1975 to 2009. He argued that, the respondent and his father (PW5) failed to call witnesses who were present during the handover of a suit land to the 1st appellant as a caretaker as alleged.

She reiterated that, it was impossible for the respondent's father to leave the suit land in the care of the first appellant to be handed to the Respondent as it was not known if the respondent's father would be blessed with a male child in 1983.

She maintained that, the first appellant purchased the suit land when the suit land was being sold by Gateu Primary Court. It was a clan land and his mother wanted him to buy it to avoid being sold to non-clan members. On the fact argument that there is no primary court called Cateu. She submitted that there was a misspelling but the Primary Court was in existence in 1975 known as Ngateu.

On the case of **Samson Wambene** cited by the respondent to defend the legal position of an invitee in someone's land, she argued that the case is distinguishable from the present case as the respondent failed to prove that the first appellant was an invitee in the suit land. She maintained that he who alleges must prove.

She submitted further that, the first appellant owned the suit land for 34 years and distributed the same to the 2nd and 3rd appellant in 1996

Most importantly, evidence purporting to show that PW5 allocated the suit land from the first appellant to the respondent in 2009 is marred with contradictions and inconsistencies and therefore unsafe to rely on. Whereas the pleadings at the DLHT indicates that the suit land was bequeathed to the respondent on 30th December, 2009, PW1 stated initially in his testimony that the suit land was given to him in 1975 and during cross-examination he changed the story and testified that he was born in 1983 and the suit land was handed over to him in 2008. Similarly, PW2 testified that the suit land was handed over to the respondent in 2008. PW3 testified during cross-examination that the suit land was given to the respondent herein by his father at the clan meeting in 2008. However, PW4 maintained that, the clan meeting reached a consensus and it was resolved that the land in dispute be divided to two brothers Mbulung'a (PW5) and Loota (first appellant).

Further to this, while the respondent's witnesses testified that the suit land was handed over to the respondent by his father (PW5), the testimony of PW5 did not indicate that he handed over ownership of the suit land to the respondent. In fact, throughout his testimony PW5 referred to the suit land as his property.

With regards to whether the respondent's witnesses properly identified and described the suit land, Counsel for the appellants maintained that the respondent's witnesses were unable to identify the suit land and describe its size.

Having looked at the records of the DLHT, this Court noted that, the pleadings indicated that the suit land measures one acre and its boundaries are as follows, to the north it is bordered with the land of the respondent herein, to the south and to the east it is bordered with the land of Naikodio Mutisho and to the west it is bordered with Loota Ndoikai.

Looking at the evidence gathered during trial, it is evident that, the respondent (PW1) did not indicate the size of the suit land in his testimony but he described its boundaries that it was bordered to the east by Naikocha Mitisho, West by Loota, Northen by Naikodha Mitisho and South by Jofrey. PW2 indicated that the size of the suit land was almost one acre and described its boundaries that, to the east it was bordered by Mitisho, west by Loota Ndoikai, North by Mitisho and south by Mitisho. On his part PW3 stated that he had forgotten the measurements of the suit land. He testified that the respondent was given around 4 plots of land (mashamba 4) by his father (PW5). During cross-examination he stated that all shambas are in dispute as they were all handled over to the

respondent herein. He testified that the suit premises bear different measurements one is about ¾ acres some ½ acres etc. PW4 testified that he could not tell exactly the measurement of the suit land while PW5 stated that the suit land is 1.5 acres in size.

Considering the differences and inconsistencies on the description of the boundaries and size of the suit land between the pleadings and the witnesses as well as between the witnesses themselves as revealed in the analysis above, this court is in agreement with the learned counsel for the appellants that the suit land was not properly identified by the respondent and therefore it was not safe for the trial tribunal to rely on the description given to make a decision on the ownership of the purported suit land without clarifying the inconsistencies first.

Coming to the second and third grounds of appeal, from the submissions made by the parties in respect of these grounds, the question for determination is whether the DLHT was right in holding that ownership of the suit land belongs to the respondent's father based on the evidence adduced by witnesses that different clan meetings resolved that the suit land belongs to the respondent's father.

This Court is aware that, as the appellants were in possession of the suit land, the burden of proving that they are not the owners of the suit

land is on the person who asserts that they are not (see section 119 of the Evidence Act). As alluded to in the analysis of the first and fifth grounds above, the testimony of witnesses in this case is flawed with contradictions and inconsistencies making it unreliable to establish the respondent's ownership of the disputed land or proving that the appellants are not the lawful owners.

Even if the testimony of witnesses regarding what the clan meetings resolved in respect of ownership of the suit land is believed to be true, the DLHT was not bound to validate the decision passed in the clan meeting without considering the evidence adduced to establish the respondent's ownership of the suit land. It should be noted that, although PW2, PW3 and PW4 stated that the clan meeting resolved that the suit land be handed over to the respondent and parties signed a memorandum of understanding the said memorandum was not tendered in court as evidence. Even worse, PW4 proceeded to give a contradictory testimony by stating that the clan meeting reached a consensus and it was resolved that the land in dispute be divided between the two brothers, i.e. the respondent's father and the first appellant. On that basis, this Court finds the evidence on the alleged clan meeting and what it resolved to be wanting in establishing ownership of the suit land.

Lastly, on ground number four, since the respondent failed to prove that he is the lawful owner of the suit land and to establish that the appellants were invited to the suit land, this court finds it obsolete to make a determination on whether the appellants are holding the suit land as adverse possessors against the respondent.

In view of the foregoing, I find merit in this appeal. Consequently, I quash and set aside the decision of the trial tribunal. Appeal is allowed. I give no order for costs as this is a dispute between relatives.

It is so ordered.

K.N.ROBERT
JUDGE
22/10/2021