IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

MISC. LAND APPEAL NO. 11 OF 2022

(Arising from Land Appeal No. 29 of 2020 of the District Land and Housing Tribunal for Kigoma; originating from the decision of the Ward Tribunal for Buhigwe in Land Case No. 03 of 2019)

EDWARD NTINKULE .....APPELLANT

VERSUS

EVARIST NTAFATO .....RESPONDENT

JUDGEMENT

9/5/2022 & 10/6/2022

L.M. MLACHA, J

The appellant Edward Ntinkule filed Application No. 3/2019 at Buhigwe Ward Tribunal in Buhigwe district, against the respondent Evarist Ntafao claiming trespass to his land, 4 acres. He told the tribunal that the land is his having inherited it from his late father. The late Ntikule died in 1973. He went on to say that after finishing school he left to Dar es Salaam for work leaving the land with his brother who used it from 1973 to 2002 when he died. A son of his brother Jairos Yohana took care of the land thereafter. He planted 39 pine trees and 12 banana plants. Jairos is still harvesting banana from the

land to date. In recent years, he got a report from Jairos that his land had been invaded by the respondent. On visit, he found that the respondent had planted Makoti (Casava) and maize on the land. He decided to sue for trespass at the ward tribunal. He gave evidence and called two witnesses. He told the tribunal that he inherited the land from his late father and therefore his. His witnesses supported him. They moved with the tribunal to the suit land to show the land and its boundaries. They could locate the land, the trees and banana plants. Neighbours who were called at the locus in quo could also testify that the land belongs to the appellant. He inherited it from his late father customarily.

The respondent's defence was that he inherited the land from his late father, Ntafato. He alleged that the land was his but accepted that he did not plant the trees and the banana plants. He had one witness who supported him but when they moved to the suit land the witness could not show the boundaries.

The ward tribunal found for the appellant. It gave five reasons. i) That, the appellant planted 39 pine trees ii) The appellant planted 12 banana plants. iii) That the respondent accepted that the trees were planted by the appellant iv). The respondent admitted that he never planted the banana

plants. v) That, the witness of the respondent, unlike those of the appellant failed to show the boundaries of the land at the locus in quo.

The respondent was ordered to harvest his 'Makoti' and maize and vacate. He was aggrieved and decided to appeal to the District Land and Housing Tribunal for Kigoma (the DLHT). The decision of the ward tribunal was vacated and set aside.

In vacating the decision, the chairman of the DLHT (M.W.Mwinyi) said the following:

> "... *the parties have no capacity to sue or be sued because they were not administrators of the estate of their late fathers.*'

The parties were found with no locus standi to sue or be sued. The appellant could not see justice in the decision. He lodged an appeal to this court presenting three grounds of appeal. The grounds of appeal can be presented as under:

> *1. That, the DLHT erred in Law and facts by finding and deciding that the appellant had filed his written submission out of time.*
>
> *2. That, the DLHT erred in law and fact to find and hold that the parties had no locus to file the suit because they were not administrators of the estates of their respective fathers while the parties had a right under customary law to inherit the Land.*

3. That, the DLHT ought to have scrutinized the evidence and decide the appeal on merits because the parties had a right to inherit the land under customary law.

4. That, if the DLHT had scrutinized the evidence on merits, it could find that the appellant is the lawful owner of the land.

The appellant appeared in person, fending for himself. The respondent had the services of Mr. Ignatus Kagashe. He was also present in court. Hearing was done by oral submissions. Submitting before the court, the appellant said that the respondent failed to file his submission in time but he was accommodated by the DLHT. He went on to say that it was not correct to say that none of them had locus because they were not related (sio ndugu).

Submitting in reply, Mr. Kagashe said that the written submissions were filed in time. He added that if they were filed out of time they could not be received. Counsel proceeded to submit that none of the parties was found to have locus standi to sue or be sued. They were directed to follow the probate procedure before coming to court. He supported the decision of the DLHT.

I had time to study the records of the lower courts carefully. I have also considered the submissions made by the parties. I will start with ground one.

The record shows that the DLHT ordered the case to be disposed by written submissions on 5/2/2021. The appellant was ordered to file his submission on 19/2/2021. The respondent was ordered to file his reply by 5/3/2021 and any rejoinder was to be filed by 15/3/2021. The appellant filed his submission on 19/2/2021. The respondent presented his submission on 1/3/2021. It follows that the respondent cannot be accused to have filed his written submission out of time because he filed it 4 days before the last date. This ground of complaint is thus baseless and dismissed.

Grounds 2, 3, and 4 are closely related. They talk of failure to find that the appellant is the owner of the land under customary law and therefore had *locus standi* to sue. I will discuss them together. I have considered this area carefully. It is an area which is always mistaken. I will try to give the chairman some guidance to avoid future mistakes. I will try to show the boundary line between two similar scenarios.

Generally speaking, a person who can sue to recover the property of the deceased it being land or anything else must the administrator of the deceased estate. That is to say, it is the administrator of the estate who can sue or be sued where the property of the deceased is at issue with a third party. The rule is that where the property of the deceased is at issue with

anybody, nobody can come in its defence unless he is the administrator dully appointed by a competent court. The rationale behind this rule is to ensure that properties of the deceased fell under safe hands. But if the property, and land in particular, has already been distributed to heirs under customary law and there has never been a resistance from any member of the clan/family for a considerable period of time, the one who is holding the land can sue or be sued without following the probate procedure because the land does not belong to the deceased any more. It is his land. I will try to show the basis.

Section 11(1) (a) of **The Judicature and Application of Laws Act,** cap 258 R.E. 2019 (JALA) recognizes customary laws and allows their application in our courts. It provides as under:

11-(1) Customary Law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in matter of a civil nature-

(a) ***between the members of a community in which rules of customary law relevant to the matter are established and accepted or between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter.***

(b) relating to any matter of status of or suceesion to a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted; or

(c) in any other case in which, by reason the connection of any relevant issue with any customary right or obligation, it is appropriate that the defendant be treated as a member of the community in which such right or obligation obtains and it is fitting and just that the matter be delt with in accordance with the customary law instead of that law would otherwise be applicable,

except in any case where it is apparent, from the nature of the relevant act or transaction, manner of life or business, that the matter is or was to be regulated otherwise that by customary law:

Provided that-

i) where in accordance with paragraph (a), (b) or (c) of this subsection customary law is applicable to any matter, ***it shall not cease to be applicable on account of any act or transaction designed to avoid, for unjust reason, the applicability of customary law****; "(Emphasis added)*

We have the codified rules and the uncodified rules. Both have the force of Law. THE LOCAL CUSTOMARY LAW (DECLARTION) ORDER (193) GN. 273 of 1963) represents the codified customary law. Inheritance of patrilineal societies is provided under the Second Schedule. It reads in part as under:

"SHERIA ZA URITHI

1. ***Urithi hufuata upande wa ukoo wa kiume.***
2. *Asimamiaye mazishi ni kaka wa marehemu aliye mkubwa au, kama hakuna kaka ndugu mwingine wa kiume aliye karibu.*
3. *...*
4. *Matumizi ya mazishi na matanga hutoka katika mali ya marehemu, lakini ikiwa marehemu hakuacha mali, hushughulika msimamizi.*
5. ***Msimamizi wa kugawanya urithi ni kaka wa marehemu aliye mkubwa, au babaye, na kama kaka au baba hakuna, ni ndugu wa kiume mwingine akisaidiwa na baraza la ukoo. Kama hakuna ndugu wa kiume, asimamie ndugu wa kike.***
6. *Baada ya matanga watu wa ukoo hukusanyika na wanahesabu urithi na kushauriana juu ya madai na madeni yote aliyokuwa nayo marehemu.*
7. *.....*
8. *....*
9. ***Baada ya hesabu madeni na madai, mpango wa kugawanya urithi unakubaliwa.***
10. *.....*
11. *Ikiwa mali ya urithi haitoshi kulipa madeni yote ya marehemu, madeni ya muhimu hulipwa kwanza na madeni mengine yanalipwa kwa sehemu kadiri iwezekanavyo.*
12. *Baki ya madeni humalizwa na warithi toka mali yao wenyewe.*
13. *Madai na madeni ya marehemu hurithiwa.*

14. Baada ya mpango kutengenezwa, mali ya urithi kwa kawaida hugawanyiwa upesi.

15. *Kama hakuna matatizo, mgawanyo wa mali unafanyiwa katika siku chache baada ya matanga na kwa vyovyote* ***muda hauzidi mwezi mmoja.***

16. .....

17. Mkuu wa ukoo akifa, mkuu mpya huchaguliwa na baraza la ukoo"(Emphasis added)

The rules allow the distribution of the deceased estate customarily after payment of debts. They allow heirs to inherit through the clan. This means that a person can inheritance land under customary law and become an owner without necessarily passing through the probate court.

Mruma J shared this view in **Asnawi Ramadhani v. Hamisi Ally**, Miscellaneous Land Case Appeal No. 24 of 2019 (High Court Tanga) pages 2, 3, 4 and 5 where he said:

> *"It has been the practice of some District Land and Housing Tribunals* ***to quash proceedings of Ward Tribunals on the ground that one of the parties (either the Applicant or the Respondent in the Ward Tribunal) is not the administrator of the estate of a deceased person to whom the suit land originally belonged. I think this is not correct.*** *In the first place there is no law which specifically requires a person who is*

suing over an estate of a deceased person to obtain letters of administration before he/she can institute a claim in the Ward Tribunal, and given the simplicity obtaining and intended in practice and procedure of ward tribunals...No wonder section 15 (1) and (2) of (the Ward Tribunals Act provides that the Tribunal shall not be bound by any rules of evidence and procedure applicable to any court and that it shall regulate its own procedure.....This essentially means that there was evidence to the effect that originally the suit land belonged to the Appellant's father and he inherited it upon death. The term inheritance is not defined under the Ward Tribunals Act, but Black Law Dictionary 9th Edition by Bryan and Garner, pg. 83 defines is as 'To receive (property) from an ancestor under the laws of intestate succession upon the ancestor's death.' ***Thus on the law applicable and the evidence on record, the suit belonged to the applicant's father and upon demise, the applicant inherited it.***"(Emphasis added)

The court recognized ownership of land under customary law through inheritance. The title of the appellant was recognized despite the fact that he did not go through the probate court.

In Land matters, people may get title or ownership to the land through inheritance under customary law. That is where a person dies; the clan or family may sit and make decisions customarily vesting the land to the clan

or family generally or give it to a person direct. Usually children inherit the land of their father or mother that way. If that happens, in my view, as was held by my brother Mruma J, title may pass directly to the son despite the fact that he did not get it from administrator. In fact in reality, majority of people in this country own their land through inheritance under customary law. It will be contrary to the law and principles of natural justice to say that all the people who own their land through customary rules of inheritance own the land illegally because they did not pass through the probate court. The majority of people in the rural areas in this country own their lands under customary rules of inheritance both patrilineal and matrilineal and there has never been a problem.

I am aware of the existence of conflicting views in this matter. That is not for this country only. It applies to most African countries which apply customary Law. In Ivory Cost for example Pauline Yao wrote the following in 2014:

> *"In Africa there is a permanent conflict between two different legal spheres: Customary Law and Modern state law. State law is based on colonial legislation and different legal texts adopted after the Country's independence. Whether prior to independence or not,* ***most of these***

texts reflect values which are foreign or even in contradiction with customary methods of managing land, water and forests. Customary rules still exist and are currently enforced. This leads to a genuine struggle between both legal rationales". *Emphasis added) (See an article by Pauline Yao,* ***The right to inherit in customary Law: an obstacle to women emancipation in Ivory Coast,*** *available on live at https:// The right to inherit in customary law an obstacle to women's emancipation in Ivory Coast.html*

We should not allow ourselves to proceed in the tag of war for the JALO have clear provision which allow an application of customary Law in matters which are civil in nature.

It is thus correct to say, as I do, that, where people have sat at clan/family level and made a decision of allowing a person to inherit the land of his father, uncle, mother or aunt under customary law and there has not been a resistance by anybody in the clan/family for a considerable period of time, title can pass to the person who was given the land despite the fact that there was no administrator of the deceased estate. This person gets a good

title to the land under customary law and becomes an owner. He can sue or be sued in his name.

In that regard, it was not correct for the DLHT to declare that the appellant who inherited his land following the death of his father in 1973 had no right to sue as an owner in 2019. I think that title had already passed to him under customary law and he had a right to sue or be sued.

That said, the decision of the DLHT is vacated and set aside. The decision of the ward tribunal is restored. Costs to follow the event.

It is ordered so.

Sgd: L.M. MLACHA

JUDGE

10/6/2022

Court: Judgment delivered. Right of Appeal Explained.

Sgd: L.M. MLACHA

JUDGE

10/6/2022

ORIGINAL