THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 44 OF 2022

(Originating from Land Appeal No. 127 of 2020, The District Land and Housing Tribunal for Kilombero at Ifakara, arising from Land Case No. 05 of 2020, Ching'anda Ward Tribunal)

ASUNTA LITALI ..... APPELLANT

VERSUS

FILOMENA MAJENGO ..... RESPONDENT

JUDGMENT

Hearing date on: 20/06/2022

Judgment date on: 27/06/2022

NGWEMBE, J.

This is a second bit of appeal where the appellant is struggling to challenge the judgment and decree of the District Land and Housing Tribunal for Kilombero/Malinyi dated 16/03/2021. The first appellate tribunal upon determining the appeal from the ward tribunal, concurred with the decision of the Ward Tribunal, which declared the suit land measuring 26 m x 35 m as property of Filomena Majengo (the respondent). The Ward Tribunal, apart from declaring that the respondent is the true owner, also proceeded to order vacant possession and costs to the appellant. Such decision was upheld by the District Land tribunal, hence this appeal clothed with three (3) grievances.

The appellant lodged this appeal after obtaining legal assistance from Tanzania Women Lawyers Association (TAWLA) specifically from Ms. Lightness Raimos, learned advocate. The three grounds of appeal are quoted hereunder:-

1) That the appellate tribunal erred in law and facts by deciding in favour of the respondent, while the respondent was claiming for a plot of land which does not belong to her, but to one Alex Suta. Thus, had no *locus standi*.
2) That the appellate tribunal erred in law and fact by deciding in favour of the respondent, while the appellant was not accorded her right to be heard.
3) That the appellate tribunal erred in law and facts by deciding in favour of the respondent despite the fact that, the [Ward] tribunal failed to analyse and evaluate the evidence adduced by the parties.

When the matter came for hearing on 20th day of June 2022, parties were unrepresented, thus proceeded with hearing in their own. Since they were not represented obvious it was not expected for them to argue the grounds of appeal seriatim, instead they argued generally and mainly in support or in opposition of the appeal.

The appellant submitted that, she purchased the land in dispute in year 2004 from the relatives and mother-in-law of the respondent at the sale price of TZS. 130,000/=. In year 2005 – 2007 she managed to develop the said land by erecting three houses. Her family members moved in and they enjoyed the occupation undisturbed up to June, 2020 when the respondent came forward and instituted a suit before the Ward Tribunal.

Having heard the appellant's submission, the respondent stood firm objecting all grounds of appeal. She stated that, she was married in 1988 to Augustino Mkumba. They acquired several properties, including the disputed land. Her husband died in 2002, she was appointed an administratratrix in year 2003 and in 2007 she found that the land was trespassed by the appellant. However, she could not file any dispute until in year 2020, because she was attending her sick parents to their last days.

From the parties' arguments, I decided to peruse with due care the trial tribunal's records together with the 1st appellant's tribunal with a view to grasp the genesis of that conflict. The records provide diverse information inconsistent to the respondent's assertion on the ownership of the suit land. At the Ward Tribunal, it is clear, the respondent did not procure any witness apart from herself. Above all, the appellant marshalled all family members of the original owners who testified quite eloquently, that they were the true owners of the suit land and they jointly, together with their mother sold it to the appellant. One of the family members boldly said *"Mimi nimemuuzia mdaiwa kiwanja mnamo mwaka 2004, hati ya kuuziana tuliiandika mwaka 2005. Nashangaa kuona mdai anamnyanyasa mtu tuliye muuzia hilo eneo"* Simply means, 'I sold the suit land on 2004 and the contract of sale was signed in year 2005. I am surprised to find the respondent is disturbing the appellant" The same evidence was repeated by Renfrides Mkumba another relative aged 61 years old.

It was further testified that the respondent in their joint lives with her husband acquired two plots of land, which were sold by the respondent after demise of her husband. Thus had no right over the suit land sold by the family to the appellant.

On the other side, the respondent contented that, among the properties, they acquired jointly in their marriage life is the land in dispute. But the appellant categorically, holds a different view that, the land in dispute did not belong to the late Augustino, but remained a property of his parents.

The sketch map drew by the Ward tribunal upon visiting *locus in quo,* depicts the disputed land is joined with the land owned by Mkumba's family "Wakina Mkumba". There is thus, no dispute that the land in dispute is located around or at the homestead of Mkumba's family. Thus, making it part and parcel of the homestead of Mkumba.

Moreover, it is evident that when the respondent sued the appellant at the ward tribunal, she did not join Gaudensi and Renfrides Mkumba from the same family of Augustino Mkumba, while she was fully aware that they were the ones who sold it to the appellant. At the trial tribunal, the respondent testified that, the land belonged to one Alex Suta, (Mdaiwa amevamia kiwanja cha Alex Suta) who gave her a Special Power of Attorney to sue and prosecute the land case. But later testified in the contrary that, the land belonged to her husband as they acquired in their marriage and fall in the estate she is administering.

There is another version that, the suit land belonged to her husband, later they agreed to give such land to Alex Suta, who in turn gave her the power of attorney to sue for that land, but the case was not instituted in the name of Alex Suta, but by her good name of Filomena Majengo.

Having such contradicting versions of evidences from the trial Ward tribunal, this court has observed that, there are principles which were defied during trial and on the 1st appellate tribunal. First, the rule

of *locus standi* which in the course will also raise the question of joinder of parties, specifically necessary parties and the duty of the court or tribunal to analyse properly the evidences laid before it.

In respect to *locus standi*, the law is clear that, *locus standi* is fundamental to be determined at the earliest stage of adjudication. *Locus standi* touches the jurisdiction of a court or tribunal itself. The spirit of the rule is that a person bringing an action to court should be able to show that, his right or interest has been interfered with and he is entitled to bring the matter before the court or tribunal for redress.

Notably, *Locus standi* in any civil or suit of civil nature including land dispute is a cornerstone upon which, the whole suit is built. The plaintiff/applicant must demonstrate that he/she has *locus standi* over the disputed matter, failure of which no court or tribunal may dare to sit and decide on it. In the case of **Attorney General Vs. the Malawi Congress Party and another, civil appeal No. 22 of 1996** the Malawian Supreme Court provided a long lasting precedent on *locus standi* as quoted hereunder:-

> *"Locus Standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in a sufficient close relation to it so as to give a right which requires prosecution or infringement of which he brings the action".*

The reasoning of Malawian Supreme Court, is similar to ours, since the same is now settled that *locus standi* is a right to bring an action or to be heard in a given forum. Therefore, a person without *locus standi* has no right to bring any action or suit in a court of law. **Justice**

Samatta JK (as he then was) took pain to amplify and provide a comprehensive guidance on *Locus Standi* in the case of **Lujuna Shubi Balonzi Vs. Registered Trustees of Chama cha Mapinduzi [1996] TLR 203.**

when he said:-

> *"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court:* ***Courts do not have power to determine issues of general interest: They can only accord protection to interests which are regarded being entitled to legal recognition****. They will thus not make any determination of any issue that is academic, hypothetical, premature or dead. Because a court of law is a court of justice and not an academy of law, to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application. Of course, provided the interest is recognised by law, the smallness of it is immaterial. It must also be distinctly understood, I think. That not every damage or loss can be the subject matter of court proceedings".*

The principle in *locus standi* confer jurisdiction to the court/tribunal to admit and determine disputes known by law. Therefore, always the court/tribunal must be certain on identity of the parties, so as to avoid entertaining fictitious or dishonest persons intended to mislead the court/tribunal, at the end, rights and entitlements should go to the rightful persons and liability likewise, should go to the proper liable person. This position is supported by several precedents including the cases of, **Unilife Group Investment Vs. Biafra Secondary School and another, Civil Appeal No. 144 (B) of 2008, at Dar es Salaam,** (unreported). **K. J. Motors and 3 others Vs. Richard Kashamba and others, (CAT) Civil Appeal No. 74 of 1999, at Dar es salaam** (unreported) and **Christina Mrimi Vs. Coca cola Kwanza Bottlers Ltd, Civil Appeal No. 112 of 2008.** I fully, underline the same position in this case at hand.

The rationale as to why courts and parties should adhere to the rule of *locus standi* was further elaborated in the case of **Leonard Peter Vs. Joseph Mabao and another, Land Case No. 4 of 2020, at Mwanza (unreported),** where it was held: -

> *"The rationale for the rule of locus standi underlined above is, in my settled opinion, that, it avoids a situation where a party who is not entitled to a given right sues in court successfully or unsuccessfully, but afterwards the rightful party sues before the court in his own capacity or under the same title for the same claim. The danger of this situation, if not well checked by courts of law is that, it will cause inter alia, a serious injustice to persons who are entitled to some rights and chaos in courts for opening flood gates of endless litigations."*

The immediate question is whether the principle of *locus standi* is applicable in the circumstance of this suit? Confusingly, the *locus standi* of the respondent in this appeal was neither established nor certain. While she claimed the land in dispute was owned by herself and her late husband, that being a widow *cum* administratrix, then has every right to own it. Thus, sued on her own name. On the other hand, she strongly testified that the suit land belongs to Alex Suta and she obtained Power of Attorney to stand on behalf of Alex Suta. There was no evidence on how the said Alex Suta came into possession of the suit land and why Alex Suta did not stand alone to sue for that land? More confusingly the alleged power of Attorney was not produced before the tribunal to rely upon.

Even in this appeal it is not known on which position the respondent stood for when she sued the appellant. An immediate question is which capacity the respondent sued the appellant at the Ward tribunal? Was it under capacity as an heir and administratrix of the estate of late Augustino Mkumba? Or as the *donee* of the Special Power of Attorney from Alex Suta? Unfortunate may be to the respondent; no Power of Attorney was presented before the trial tribunal and was not recorded.

Therefore, the issue of *locus standi* of the respondent herein during trial at the Ward Tribunal and throughout up to this appeal, is unclear under which capacity she instituted that suit at Ward tribunal.

As it is cautioned in the **Leonard Peter's** case (supra), the said Alex Suta or the heirs and beneficiaries of the late Augustino's estate would come up again and commence land suit on the same suit land. Thus, will defeat the public policy against multiplicity and prolonged

litigations, the policy which courts of law pay homage to. This principle was also defended in the case of **Stephen Masato Wasira Vs. Joseph Sinde Warioba and the Attorney General [1999] T.L.R. 334.**

The root of title of the appellant on the suit land is stemmed from Mkumba's family members through the sale. The appellant having proved all that she had to prove, there was nothing left for her to do. I am of the view that by deciding that the land belonged to the respondent who sued without even proving her *locus standi* was wrong. More so, the respondent sued the buyer of the suit land without joining the sellers whom she knew them very well and actually were brother in law and mother in law.

The question as to who is a necessary party was discussed by this court in the case of **Juma Kadala Vs. Laurent Mnkande [1983] T.L.R. 103,** where the person who sold the land was sued while the buyer was not joined. The court, *inter alia* ruled as follows: -

> *"This present occupant of the disputed piece of land ought to have been sued jointly with the respondent for recovery of the piece of land in dispute. Failure to do so was fatal to the proceeding because on the facts of the case, most of which do not appear to be disputed, it is impossible to make any orders in this matter without affecting the rights of Omari Kuziwa who has not had any chance of being heard in this matter at all."*

I am aware that to determine who is the necessary party to a suit would vary from one case to another depending on the facts and circumstances of each particular case. Some of the determining factors were considered in the case of **Abdullatif Mohamed Hamis Vs. Mehboob Yusuf Osman & Another, Civil Revision No. 6 of 2017,**

(CAT); first, there has to be a right of relief against such a party in respect of the matter involved in the suit; and second, the court must not be in a position to pass an effective decree in the absence of such a party. These, two tests are in substance similar to what was decided in **Kadala's** case.

It is I think correct rule that one cannot sue the seller without the buyer, equally correct that, one cannot sue the buyer without the seller.

Driving from the above, and considering the nature of this case I may conclude that Gaudensi and Renfrides Mkumba were necessary parties. The assessors of the District Land and Housing Tribunal, Mr. Mohamedi Kawele and Fatuma Shabani unanimously found this defect of non-joinder, but their respective opinions were ignored. In conclusion, the first ground must be allowed.

The second ground is on the complaint that the appellant was not afforded his right to be heard. The appellant touched this ground very lightly in her submission by only stating that the tribunal forced her son ALOIS MSOLOMOKA to appear before the Ward Tribunal on her behalf. The respondent did not address it at all.

The right to be heard is, under the Latin maxim of *audi alteram partem,* an obligation to the courts and quasi-judicial bodies not to decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. The Court of Appeal underscored that duty in various decisions. In the case of **Onesmo Nangole Vs. Dr. Sterven Lemomo Kiruswa, Civil Appeal No. 129 of 2016, CAT at DSM** held:-

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

In this case, I have made a thorough perusal to the proceedings before both tribunals below. I found that the appellant, though she did not physically appear before the Ward Tribunal, there is evidence that she appeared by a relative representing her. The relevant law enumerates about appearance before the Ward Tribunal by a family member or a relative. The provision of section 18 (2) of the **Land Disputes Courts Act, [Cap. 216, R.E 2019]** is quoted:-

***"18**.- (1) N.A*

(2) Subject to the provisions of subsections (1) and (3) of this section, a Ward Tribunal may permit any relative or any member of the household of any part to any proceeding, upon request of such party to appear and act for such party.

(3) N. A"

I think the appellant's letter dated 18/07/2020 to the effect that she appointed one ALOIS MSOLOMOKA her son to attend before the tribunal and hear the case on her behalf, qualified to be a request under the above provision. The records at the tribunal also shows openly that, the said MSOLOMOKA appeared on her behalf and entered the defence along with GAUDENSI and RENFRIDES. Though I admit that right to be

heard is fundamental as above highlighted. In this case, it was not infringed as against the appellant. The ground is therefore dismissed.

The third ground, the respondent testified alone without calling any other witness. On the appellant's side there were three witnesses who proved positively that the land in dispute was bought from Gaudensi and Renfrides Mkumba. The record is clear that the Ward tribunal failed in appreciating and analysing the evidence before it. That being the case, the District Land and Housing Tribunal was bound to re evaluate that evidence. But it seems to me the chairman's revaluation did not bring any change, hence making two concurrent findings. I know this being a second appeal, it is unlikely to vary the concurrent findings of the lower tribunal. However, if there is misinterpretation of law or failure to underscore the gist of the real issue in dispute, even the Court of Appeal has mandate to depart from the concurrent finds of the lower courts. This was held in the case of **Helmina Nyoni Vs. Yeremia Magoti, Civil Appeal No. 61 of 2020, (CAT – Tabora),** held: -

> *"It is trite law that second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice"*

It is evident that the appellant proved to have bought the suit land from the family of Mkumba. Such fact was established and proved by the appellant to the required standard on balance of probability. While on the other side, the respondent did not establish and prove anything in respect to ownership of the suit land if same is of herself and the late

husband or is a property of Alex Suta. Thus, the respondent did not deserve an award on unproven ownership of the suit land. Had the trial tribunal analysed properly the evidences before it, obvious it would have arrived into a different conclusion.

Failure of the respondent/applicant at trial, to prove ownership of the suit land, offended the basic principle of evidence as per sections 110 and 111 of the **Evidence Act, [Cap 6 RE. 2019].** The respondent at trial had uncompromised duty to prove each fact constituting her claim. The rule on burden and standard of proof is a non-dispensable requirement which must be followed religiously. (**See the cases of Twazihirwa Abraham Mgema Vs. James Christian Basil (As Administrator of the Estate of the Late Christian Basil Kiria, Deceased) Civil Appeal No. 229 of 2018,** and **Godfrey Sayi Vs. Anna Siame (as legal representative of the late Mary Mndolwa), Civil Appeal No. 114 of 2012.**

Therefore, the reasoning by majority members of the Ward Tribunal were based on misconception of the rule on evidential burden. They ruled that the respondent wins because she was a legal wife of the late Augustino Mkumba and she was recognised by the Probate court as an administrator of the estate of the late Augustino Mkumba. Such reasoning was unfounded and total misconception of basic principles of law. The Ward tribunal had a duty to prove if such land was owned by the late Augustino before same could be decided in favour of the respondent herein. Being an administratrix or administrator does not mean that she can administer even on properties which were never owned by the deceased.

Even by assumption, the respondent stood on the shoulders of ALEX SUTA, still nothing would add to her case, because there would need proof of right of ownership over the suit land from ALEX SUTA.

In this case, it is obvious that the findings of the two tribunals were based on misapprehension of evidence and violation of basic principles of evidence. as I have expounded above, the same had the effect of occasioning miscarriage of justice. The third ground of appeal is meritorious same is allowed.

There was also an issue of time limitation against the respondent though not raised in the grounds, but was argued on the hearing. Time limitation to claim landed property is twelve (12) years. In respect to this appeal the cause of action arose on 2004/2005 when the appellant purchased the suit land. Since then to 2020 is equal to sixteen (16) years. In any event the claim was lodged to the Ward tribunal after lapse of twelve years. The mere statement that she was attending her sick parents is not worth to account for fifteen years of delay. This ought to have been considered by the trial tribunal.

At the end and for the reasons so stated, this appeal must be allowed. I therefore, proceed to quash the decisions of both tribunals, consequently restore the status of the suit land to the appellant. The respondent is estopped from any interference to the ownership of the suit land by the appellant. The circumstance of this appeal demand that the respondent be condemned to pay costs of this appeal and below to the appellant.

It is so ordered.

Dated at Morogoro in Chambers on this 27th day of June, 2022.

P. J. NGWEMBE

JUDGE

27/06/2022

Court: Judgment delivered in chambers on this 27th day of June, 2022 in the presence of the appellant and respondent who appeared in persons.

Right to appeal explained to parties.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

27/06/2022