IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE APPEAL NO. 86 OF 2021

(Originating from Application No. 72 of 2016 of the District Land and Housing Tribunal of Kagera at Karagwe)

SHUBIRA CLAUDIO.....1ST APPELLANT
ROSEMARY MUSHENYERA.....2ND APPELLANT

VERSUS

WILSON THOMAS MUSHENYERA.....RESPONDENT

JUDGEMENT

03rd June & 17th June 2022

Kilekamajenga, J.

In this case, the second appellant and the respondent are the children of the late Thomas Mushenyera Nkuba who died in 2000. Before the deceased died, he distributed his land to all the children including the first appellant and respondent. Also, the first appellant is the grandson of the deceased. His father also received his portion of land from the deceased as part of his inheritance. However, after distributing all the land, the deceased left behind a small plot of land where his house was built. The deceased, through his will, bequeathed that piece of land to the respondent as he (respondent) was the oldest son of the deceased and also the caretaker of Mushenyera's family. After the demise of the deceased, he was buried in the same plot of land.

Sometimes in 2015, the respondent noticed that the second appellant sold the plot to the deceased's grandson (first appellant). The respondent sued the appellants at Nyakahanga Ward Tribunal vide civil case No. 2 of 2015 where he

lost the case. He appealed to the District Land and Housing Tribunal at Karagwe vide Appeal No. 38 of 2015 where the decision of the Ward Tribunal was set aside on the reason that the respondent was not an administrator of estate of his late father Thomas Mushenyera.

Thereafter, in 2016, the respondent, after being appointed the administrator of estate, filed a case against the appellants in the District Land and Housing Tribunal vide Application No. 72 of 2016. The District Land and Housing Tribunal decided in favour of the respondent hence this appeal. The appellants, being aggrieved with the decision of the trial court, coined four grounds of appeal thus:

1. *That, the District Land and Housing Tribunal for Karagwe erred in law in hearing and holding for the respondent in a suit over a land whose location was not specifically ascertained, making the said decision un-executable.*
2. *That, the trial chairman erred in law and fact and misconstrued the facts of the case and the evidence tendered before the tribunal thus reaching a wrong decision.*
3. *That, the District Land and Housing Tribunal erred in law and fact in holding for the respondent on the ground that the respondent inherited the suit land through the will of the late Thomas Mushenyera and on the allegations of the evidence of clan members, while even the appellants had inherited the suit land through the will of the late Thomas Mushenyera and all witnesses who testified for the appellants are clan members whose testimony proved the appellants' title over the suit land.*
4. *That, the District Land and Housing Tribunal erred in law in failing to hold for the 2nd appellant who had acquired adverse possession over the suit land before she legally disposed the same to the first appellant.*

In fending the appeal, the learned advocate for the appellants, Mr. Joseph Bitakwate, informed the court on the errors in the proceedings of the trial tribunal. **First**, he argued that the issues were framed in the absence of the assessors hence violated **Regulation 12(1)(2)(3)(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003** when read together with **section 23 of the Land Disputes Courts Act.** He argued that issues are part of the hearing and the tribunal must be full constituted when framing issues. Also, Regulation 12 of the above cited Regulations obliges the tribunal to read the application in the presence of the respondent then the case proceeds for framing of issues. Therefore, the tribunal failed to afford the second appellant fair hearing of the case. **Second**, Mr. Bitakwate argued that, the case was scheduled for assessors' opinions but such opinions are missing. He invited the court to consider the case of **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017**, CAT at Mbeya in making the decision. **Third**, Mr. Bitakwate argued that, the boundaries of the land in dispute were not stated hence the decree of the tribunal cannot be executed. He averred that, in the application, the respondent simply stated, the land is located within the Ward of Nyakahanga in Karagwe. His evidence simply shows that the land in dispute is within the hamlet of Kalehe in Busheshe village within Nyakahanga Ward. He argued that, failure to state the location of the land may cause inconveniences in the execution. He fortified his argument with the case of **Felix Deogratias and Another v. Detrick Deogratias, Misc. Land**

Case Appeal No. 44 of 2019, HC at Bukoba. He also cited **Regulation 3(2)(b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations of 2003**.

Fourth, the counsel argued that, the trial tribunal failed to evaluate the evidence adduced during the trial as there was contradiction in the respondent's evidence. At some point, the respondent claims the land as the administrator of estate but also as a legal heir of the land in dispute. On the other hand, the second appellant inherited the land in 2000 after the death of the deceased. Therefore, the appellant's evidence was heavier than that of the respondent. **Fifth**, the counsel argued that, the tribunal relied on the will to grant right to the respondent but such a will was admitted but not read before the tribunal. He urged the court to expunge such a will. He fortified his argument with the case of **Semeni Ngonela Chiwanza v. The Republic, Criminal Appeal No. 49 of 2019. Sixth**, Mr. Bitakwate argued that, the second appellant acquired the land through adverse possession after possession it since her inheritance in 2000 and finally sold it to the first appellant in 2015. He finally prayed to allow the appeal and declare the first appellant the owner of the land in dispute.

In response, the learned advocate, Miss Gisera Maruka for the respondent resisted the appeal arguing that the respondent used a prescribed form to file the case. The standard form used to file the application does not require the applicant to state the neighbours to the land in dispute. As long as the form was

dully filled-in, the respondent did not violate any law. She further argued that the decision of the trial tribunal was right because the first appellant failed to tender the sale agreement to prove whether he actually purchased the land from the second appellant. The respondent and his three witnesses testified that, the land belonged to the respondent. The case was actually decided based on evidence and not based on the will alone. The issue of adverse possession was not a new issue not even raised during the trial and it is not among the grounds of appeal. So far, there was no evidence proving that the second appellant stayed in the land for such a long time. She urged the court to dismiss the appeal with costs.

When rejoining, the counsel for the appellants insisted that, the respondent was supposed to state the address and location of the suit land. The evidence shows that, the first appellant bought the land from the second appellant who owned the land through adverse possession.

The submissions from the counsels bring the matter to the determination of the grounds of appeal. The counsel raised several issues worthy of consideration and I will therefore address them according to their importance. The counsel for the appellant assailed the trial tribunal for failing to evaluate the evidence at hand. This being the first appellate court, I have an obligation to re-evaluate the evidence and come up with a sound judgment. In this case, the respondent who was the applicant summoned three other witnesses. In his own oral evidence, the respondent testified that, the land was bequeathed to him by his late father

Thomas Mushenyera. Being the head of the family and also an administrator of estate, he had the right to claim the said land. He went further stating that, the land is located at Kalehe Hamlet, Bisheshe Village within Nyakahanga Ward. He tendered form number four to prove the appointment of administration of estate. He also tendered a will left by his father showing that the land was bequeathed to him. The respondent's evidence was supported by PW2 who was an eighty eight retired Pastor and a brother of the deceased. He also confirmed that the land is located at Kalehe hamlet at Nyakahanga. He stressed that the land belongs to the respondent who acquired it from his father Thomas Mushenyera. He stated that, before the deceased died, he called his all children and some clan members and gave the land in dispute to the respondent. The land was next to the land allocated to the second appellant. He further stated that, the sale of the land to the first appellant by the second appellant was illegal because the land belonged to the respondent. PW3 who was another brother to the deceased fortified the respondent's evidence stating that, the deceased gave the land to the respondent before death. The second appellant was also given her portion. That being the case, the land was illegally sold to the first appellant. PW4 who was the hamlet chairman also confirmed that the land in dispute was given to the respondent. He further stated that the land in dispute has graves of the respondent father.

In their defence, the first appellant who was the grandson of the deceased stated that he purchased the land on 26th March 2015 from the second appellant

who also got the land from her father who died in 2000. DW2 who was a young brother of the deceased stated that the deceased distributed his estate to the heirs before his death. The second appellant and the respondent were all given their portions. He testified that, the second appellant inherited the land from her father. DW3 also confirmed that the estate of the deceased was distributed before his death and the land in dispute was given to the second appellant who later sold it to the second appellant. He further confirmed that, the deceased's will was read after the burial. DW4 who was another young brother of the deceased confirmed that the land in dispute was allocated to the second appellant who later sold it to the second appellant. DW5 also testified that the land was bequeathed to the second appellant through a will. DW6 (second appellant) stated that, the will recognises her as the owner of the land in dispute. Thereafter, the tribunal received assessors' opinions and decided in favour of the respondent.

Now, having considered the two sides of pieces of evidence, both the respondent's and appellants' evidence do not object the fact that the deceased distributed his estate to all the heirs before his death and that the deceased left a will written in 1999. None of the witnesses challenged the validity of the will. I took trouble to carefully read the will as it was written in Swahili and found the following excerpt:

> *'Nyumba yangu imeezuka kwa jua na mvua inaponyesha ninalala nimekaa na familia yangu wanajibanza jikoni mpaka hasubuhi. Nimeomba msaada*

kwa watoto wangu wote...lakini wote wamekataa, nimewaita safari 2 lakini hakuna aliyefika wamekataa kata kata kufika ila mmoja to Wilson. Ninatoa idhini kwa yeyote yule ambaye atanijengea kibanda cha kujikinga mvua ndiye yule atamiliki nyumba hiyo pamoja na shamba ambalo ni mali yangu ndugu zake wasilete kilimilimi juu ya urithi huyo na huyo atakuwa MRITHI kuu wa familia ya Thoma M. Nkuba.'

The evidence and the will show that, the deceased distributed his land to all his children but left the plot where his dilapidated hut was built. The deceased, however, clearly indicated that, as his children were not willing to build a house for him except the respondent who showed positive response, after his death, he (respondent) could inherit that plot of land. This story squarely corresponds to the adduced evidence where one of respondent's witnesses stated that the deceased was buried in the disputed land. Of course, one may invoke several legal technicalities to discredit the will for several irregularities including, some of the paragraphs are corrected and some pages torn and that the will was not witnessed as required by the law.

However, such legal technicalities do not take away the fact that the deceased allowed the respondent to inherit the land for some reasons. **First**, being the oldest son of the deceased, he automatically became the responsible person for his father's family. **Second**, the respondent built a house to shelter his father, and in turn the deceased bequeathed the land in dispute to the respondent. In my view, it would be grave injustice, for what legal technicality we may invoke,

to deny the respondent the inheritance on the land where his biological father was buried and give it to the grandson. In Africa, a parent's grave may be the only heritage left behind. The immediate person having interest in the land where somebody's parents were kept to rest is the child and not a grandson. The dispute would have been a bit complicated if the respondent's sister (second appellant) could still be claiming ownership. But in this scenario, the respondent has rights over the land than the first appellant who claimed to have purchased it but no sale agreement was tendered.

Furthermore, such piece of land, as it has the grave of the respondent's father could not be sold without the sale agreement being witnessed by the deceased's children including the respondent. In my view, such a transaction suffers the consequences of falling short of authentic in eyes of the family members. By the way, such a piece of land, being an estate of the deceased, could not be sold by the second appellant who was not an administrator of estate. The same legal requirement was invoke against the respondent who wanted to claim the land in his own name without first being appointed the administrator of estate. The transfer of the deceased's property by a person, rather than an administrator of estate, is illegal unless there good reasons to explain the contrary.

The counsel for appellants further argued that, the will was admitted but not read in court, under such circumstances, it must be expunged. (See, the case of

Semeni (supra). However, even if such exhibit is expunged, there is still good evidence to show that the respondent has the right over the disputed land.

On the issue of boundaries of the disputed land, I think, every case must be treated based on its merit. In this case, all the parties are certain about the land in dispute. So far, they are not contesting about encroachment but about ownership of a well-known plot of land. In the application, the respondent stated that, the land is at Nyakahanga Ward within Karagwe District. The evidence shows that, the land is located at Kilehe hamlet within Nyakahanga Ward. For an unsurveyed land, such description of the land is sufficient to show the location and address of the land as required by the law. So far, all the parties are in agreement about the location and size of the land. Raising such an argument is equally as trying to invoke legal technicalities for the mere reasons of stealing somebody's rights. The law should be applied to facilitate parties' rights rather than taking away their rights. It may be another grave injustice to decide that the location and address of the land was not stated whereas all the parties know the land that they are contesting on. If courts continue to allow such shoddy legal technicalities rather clinging to delivery of justice, then we are likely to turn the justice delivery machinery a game of lawyers while leaving behind the interest of justice.

The counsel for the appellant argued further that, the trial tribunal did not solicit assessors' opinions before composing the judgment. The perusal of the court file

shows that, the case was scheduled for assessors' opinions on 18th August 2021. When that date came, all the parties and assessors were present. The chairman recorded the following words:

> *Shauri limekuja kwa ajili ya kusoma maoni ya wazee wa Baraza. Wazee was Baraza Longino Sylivester na Lukuletia Saulo wamesoma maoni yao mbele ya wadaawa. Wote kwa pamoja wametoa maoni kuwa maombi haya yaruhusiwe, kwamba mleta maombi ameweza kuthibitisha madai yake kwa kiwango kinachotakiwa.'*

The assessors' opinions were therefore read on that day and the same are available in the court file. I think the requirement of the law was complied with and the parties did not even complain whether failure to reproduced the opinions in the proceedings prejudiced them in any way. The major question is how the appellants were prejudiced by the chairman failing to reproduce the opinions in the proceedings while there is clear evidence that such opinions were read and the same are annexed in the file. I generally find no merit in the grounds abd hereby dismiss the appeal and uphold the decision of the trial tribunal. I further stress that, the respondent is the lawful owner of the disputed land. The appellants should vacate from the disputed land as soon as possible and pay the costs of this case. It is so ordered.

Dated at Bukoba this 17th Day of June 2022.

Ntemi N. Kilekamajenga.
JUDGE
17/06/2022

Court:

Judgement delivered this 17th June 2022 in the presence of the first appellant and the respondent but in absence of the second appellant. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga.
JUDGE
24/06/2022