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

LAND APPEAL NO. 69 OF 2021

(Originating from Maswa District Land and Housing Tribunal in Land Application No. 61 of 2020)

1.MFUNGO MAJULA
2.YEYELU HAULE NGOMA } **.....APPELLANTS**

VERSUS

REHEMA JOSEPH NGOMA.....RESPONDENT

(As an administratrix of the estate of he late Joseph Haule Ngoma)

JUDGMENT

9th June and 1st August, 2022

MATUMA, J;

The appellants are aggrieved with the judgment of the District Land and Housing Tribunal for Maswa at Maswa which was entered in favour of the respondent.

The brief facts of the matter is that the late Joseph Haule Ngoma possessed and owned the suit land since 1974 after he was allocated it by the village council.

The suitland is located at Bulima village, Nyashimo Ward within Busega District in Simiyu Region.

The deceased developed such land by constructing thereof two houses and planting various trees.

He later on travelled to Songea for struggle of life leaving behind his wife and among others the respondent herein who is his daughter.

The 2nd appellant who is the brother to the deceased was entrusted to take care of the decease's family.

When it got 1985 the 2nd appellant sold the suitland to the 1st appellant (exhibit D1 and D2).

Some years later the deceased came back and stayed to his home until 1996 when he passed away. It is after his demise when his family including the respondent were forcefully evicted from the suitland on the ground that the same was already sold to the 1st appellant.

By then the respondent was still young and when she grew up she processed and obtained letters of administration of the estate of her deceased father hence this suit.

The trial tribunal was satisfied that the 2nd appellant sold such land without any authority from its owner or family. It thus declared the suitland as the lawful property of the late Joseph Haule Ngoma the father of the respondent.

The appellants because aggrieved hence this appeal with four grounds to the effect that;

i) *The trial tribunal erred to entertain the suit which was time barred.*

ii) *That the evidence of the 1st appellant that he purchased the suitland in 1985 and used it as a grave yard without any objection from the late father of the respondent was ignored*

iii) *That the impugned judgment relied on the weak evidence of the respondent in disregard to the appellants' evidence.*

iv) That the trial chairman gave contradictory judgment basing on his personal views contrary to the evidence on record.

At the hearing of this appeal, Mr. Majura Magembe learned advocate represented the appellants while the respondent was present in person and had the services of Mr. Beatus Linda learned Advocate.

Arguing the 1st ground, Mr. Majura learned advocate submitted that the trial chairman ought to have found that the right to recover the deceased's land accrued in 1996 when he died and therefore this suit to have been instituted in 2020 was time barred.

He faulted the trial chairman to rely on section 24 (2) of the law of Limitation Act instead of section 9 (1) of the Law of Limitation Act supra which provides that time to recover the deceased's land starts to run on the date of death of its owner. The learned advocate cited the case of ***Yusuph same and Another V. Hadija Yusuph (1996) TLR 347*** which held that the period available to recover land irrespective of when letters of administration was obtained is 12 years.

Responding on that 1st ground Mr. Beatus learned advocate argued that the relevant provision in the circumstances of this case in respect of time limitation is section 24 (2) of the law of limitation supra as the respondent obtained letters of administration on 13/05/2020.

The learned advocate alternatively argued that even though the suit land was entrusted to the 2nd appellant for him to take care. In that respect he sold a trust property and therefore section 18(1) of the same law supra provides that the trust property cannot be barred by any period of limitation. He then cited to me the case of ***Halfani Mohamed Mpuni (as administrator of the estate of the late Mohamed Halfan***

Mpuni) versus Miraji Rajabu Mlaga & 2 others, Land Appeal no. 167 of 2019, High Court at Dar es salaam to that effect.

Mr. Beatus rested this ground by arguing that if we have to agree with the argument of the appellants' council that section 9 (1) of the law of limitation is applicable in this case, that automatically renders exhibits D1 and D2 (the purchase agreements) useless as such section implies that up to the time of death the suitland must be the lawful property of the deceased while exhibit D1 and D2 indicates that the deceased was dispossessed the land way back in 1985.

My finding on this ground is that Mr. Beatus Linda learned advocate is absolutely right that in the circumstances of this case the applicable provision in relation to the time limitation is section 24 (2) of the law of Limitation Act.

This is because there is no evidence on record that the deceased was aware of the purported dispossession (sale) of his property up to the time of his death. In that respect the cause of action cannot be said to have accrued at his life time even if there is evidence that the suitland was sold when he was still alive. The cause of action therefore did not arise in 1985 when the suitland was sold by the 2nd appellant to the 1st appellant but on when the appellants took adverse acts to the respondent and her family towards the property in dispute.

In this case it was after 1996 after the demise of the deceased. In that respect section 24 (2) of the Law of Limitation Act was properly applied by the trial chairman as rightly argued by Mr. Beatus Linda learned advocate.

When the deceased's family was forcefully evicted from the suitland after such date they could not legally do any challenge until they first seek and obtain letters of administration. In that regard section 24 (2) supra would come into play as happened in this case. The respondent as pleaded was still young when her father died and could have not processed letters of administration promptly after their eviction nor cannot be adjudged because elder members of her family did not take any action at that time. Inaction of elder members of the family does not preclude individual rights of a family member. The respondent being a daughter of the deceased, she has interest in the deceased's estate as a heir and thus cannot be estopped to claim such interest merely because when she was young her elder relatives did not fight for her interests.

I therefore dismiss this first ground of appeal by joining hands with the findings of the trial chairman on this.

On the second ground, Mr. Majura learned advocate submitted that the 1st appellant used the suitland for long time as a grave yard and there is about six tombs of his relatives. The learned advocate argued that at all this time the 1st appellant did not face any objection from even the deceased himself when he was still alive.

Mr. Beatus Linda learned advocate replying on this submitted that there is no evidence on record either that the 1st appellant used such suitland or that he used it as a grave yard.

Without wasting time on this ground, I find it without any merit. As rightly submitted by Mr. Beatus learned advocate there is no evidence on record either that the 1st appellant used the land in dispute after he

purchased it or that he used it as a grave yard. In fact Mr. Majura learned advocate conceded to that effect when he submitted before me;

"The records does not show so although my client testified as such."

In law submissions of an advocate at the appellate stage is not evidence to be acted upon for determinations of the rights of the parties. They are merely arguments of facts and law which are not even subjected to cross examination by the opponent party. See; ***Joseph Juma versus Nasibu Hamisi, Misc. Civil Application no. 48 of 2018***, High Court at Kigoma and ***Morandi versus Petro (1980) TLR 49***.

In that respect the submission by Mr. Majura learned advocate that the 1st appellant used the suitland as a grave yard is unfounded and instantly rejected.

As to whether the 1st appellant used the suitland anyhow after he had purchased it in 1985 I have seen his statement on record at page 19 of the proceedings that;

"I used the dispute land for agriculture activities."

Even though there is no back up of any evidence to substantiate such allegation. In fact there is evidence on record that the late Joseph Haule Ngoma returned to the suitland and lived in it up to 1996 when he died. In that respect the 1st appellant cannot be said to have taken full possession of the property after his purchase.

Even though, the second ground in its totality tries to raise an argument connoting adverse possession which cannot apply in this case because he claims right through purchase. See; ***Nuru Kifundawili***

versus Wema Salumu, Misc. Land Application no. 134 of 2019.
The 2nd ground of appeal is therefore dismissed.

On the 3rd ground of appeal, Mr. Majura submitted that the trial tribunal ought to have found that in selling the suitland to the 1st appellant, the 2nd appellant obtained consent of its owner Joseph Haule Ngoma, the late father of the respondent. Mr. Beatus learned advocate in response thereof submitted that the authority to sale by the 2nd appellant was not proved. He argued that exhibit D1 itself show that the 2nd appellant was authorized by a written letter by the deceased to sale but such letter was not tendered.

He further argued that during cross examination the 2nd appellant admitted that he had no document authorizing him to sale.

On this ground, it is apparent on record that the suitland was the property of the deceased. Through exhibit D1, the 2nd appellant sold the suitland to the 1st appellant without disclosing that the same was not his property. He in fact purported it to be his own property as the sale agreement dated 12/05/1985 reads;

> *"Mimi Yoel Haule N. Ngoma nimemuuzia Ndg. Mfungo Majura nyumba yangu kwa thamani ya shilingi elfu ishirini na nane tu.*
>
> *Nimepokea sh. 4000/= (elfu nne tu) zilizobaki nitapokea tarehe 01-10-85".*

In that respect, the 2nd appellant sold the suitland as his property without seeking any consent. When it came on 7/10/1985 it is when he

disclosed that the property was not his but of his brother the late Joseph Haule and that he was authorized in writing to sale it;

> *"Leo hii tarehe 7/10/1985 mimi Yoel N. Haule nimemuuzia nyumba 2 (mbili) za bati (mji) kutokana na maelezo pamoja na maagizo ya kaka yangu ndugu Joseph N. Haule aliyotuma kwenye barua yake ambayo haina hata tarehe kutokana na maagizo yake nimekubali kuuza hizi nyumba kwa thamani ya sh. 28,000/=....."*

In that respect, I agree with Mr. Beatus learned advocate that the alleged letter giving authority to the 2nd appellant to sale the suitland was the better evidence to prove authority and consent for the sale of the suitland. The same was neither tendered for scrutiny by the tribunal and even by this Court on appeal nor these was any explanation for failure to tender it.

An adverse inference is called for against both appellants for failure to produce such written authority or explain its whereabout to the effect that there was no any authority for such sale.

Since on 7/10/1985, the 2nd appellant disclosed that the property in dispute belonged to the respondent's late father and not him, the 1st appellant ought to have abstained from buying it from the 2nd appellant unless satisfied fully with such written permit from its owner. That is the principle **"buyer be aware"**

But when the evidence of the 2nd appellant is reviewed it is clearly found that he diverted altogether to the issue of the suit property being of the late respondent's father. This time he changed and purported to argue that the suitland was the property of his father and had obtained

family consent; "***it was my father land.....Nicolaus Haule Ngoma.***"

From his evidence that he sold his father's property, no doubt he contradicted his own evidence exhibit D1 and D2 in which he purported to have obtained consent from his brother Joseph Haule Ngoma to mean Joseph Haule Ngoma was the owner of the property. But he had no evidence to establish that the suitland belonged to his father Nicolaus.

All the evidence from even to himself, show that the property in question was owned by the respondent's father Mr. Joseph Haule Ngoma.

I therefore agree with Mr. Beatus that there was no proof that the 2nd appellant obtained consent from the owner of the suitland to sale it. He sold it without authority and the 1st appellant bought it at his own peril. The trial tribunal properly determined that the suitland is still the lawful property of the late Joseph Haule Ngoma subject to be administered by the appellant Rehema Joseph Ngoma, now the respondent. I uphold such decision.

The 4th ground is as well without any substance. Mr. Majura in arguing this ground, submitted that the trial chairman erred to find that the 2nd appellant acknowledged that the suitland was the property of his brother the father of the respondent contrary to the evidence of the 2nd appellant who testified that the property in dispute was a family property.

With due respect to the learned advocate, the trial chairman did not deliver a contradictory judgment nor entered it contrary to the evidence of the 2nd appellant. I agree with Mr. Beatus that the trial chairman delt with the evidence on record.

It is my humble finding that it was the 2nd appellant who had contradictory evidence and the trial chairman was dealing with such contradictory evidence of the 2nd appellant.

The 2nd appellant produced in evidence exhibit D1 to show that he sold his own property. Therefore required no consent from any. He then tendered exhibit D2 to show that the property in dispute belonged to his brother the respondent's father and he was selling it on authority. But during his oral evidence he testified that the suit property belonged to his father Nicolaus Ngoma and thus a family property.

These contradictions by the 2nd appellant himself cannot be used to fault the trial tribunal. The trial chairman in finding that the 2nd appellant acknowledged that the suitland belonged to his late brother was just acknowledging the 2nd appellant's evidence through exhibit D2 and therefore not making a decision from his own facts. I accordingly dismiss this ground.

This appeal is therefore dismissed in its entirety with costs. The right of appeal to the Court of Appeal subjected to the relevant governing laws is fully explained.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
01/08/2022