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

AT SHINYANGA

LAND APPEAL NO. 86 OF 2021

(Arising from Land Application No. 36 of 2020 of the Shinyanga District Land & Housing Tribunal)

JOSEPH MAYUNGA..... .....APPELLANT

VERSUS

MAGENGATI MALABA.....RESPONDENT

JUDGMENT

22nd July & 19th August 2022

MKWIZU,J:

This appeal emanates from Shinyanga District Land and Housing Tribunal in Land Application No. 36 of 2020 determined in favour of the Respondent. Dissatisfied, appellant has lodged this appeal on 3 grounds stating that; -

1. *That the trial tribunal erred Chairman erred in law and facts by not considering the credible evidence adduced by the appellant regarding how he acquired the land in dispute in 1987.*
2. *That the learned trial tribunal misdirected itself and arrived at a wrong and unjustifiable decision by not taking into account that the Appellant stayed and used the land in dispute for exactly 25*

years without interruption from anyone including the Respondent.

3. *That, the trial tribunal erred in law and fact and arrived at a wrong and unjustifiable decision by relying on the Respondent's evidence which was too weak and fabricated.*

The parties' dispute is on the ownership of the un-surveyed piece of land measuring four (4) acres located at Busongo Village, Kizumbi Ward within Shinyanga Municipality with well-specified boundaries estimated at 8,000,000/=worth. The appellant had in his application claims to be a lawful owner of the suit land since 1987 when the suit land was allocated to him by his grandfather, the late Magengati Mwamba. He claimed further that in 2012 and without any justification, the respondent convened a clan meeting in view of distributing the suit land to other family members the mission which he objected to successfully.

He also averred that, sometime later in 2015, the respondent together with his bother named Kulwa Malaba lodged a complaint to the Shinyanga Municipal Director who resolved the matter in his favour. The respondent again, in 2019 forcefully surveyed the suit land retraining the appellant from using the suit land. He maintained that he is the lawful owner and that the respondent is a trespasser and therefore they should be so declared.

The respondent's defence was a denial of the appellant's claim. He said the suit land was given to five children of the deceased.

When this appeal was called for hearing, both appellant and the Respondent appeared in Person. In support of his appeal, the appellant

submitted that the court should consider his grounds of appeal as the disputed land was given to him in 1987 by his grandfather. And he has stayed in the disputed land for 25 years without interruption, developing it and selling part of it.

He negated the evidence that Kalembe was on the occupation of the suit land. On this the appellant said, Kalemba had left his father to Mwankinga to Mzee Malawa, her husband where she lived until her death in 2019. She never complained over the suit land for over 25 years.

On the third ground, the appellant blamed the Trial tribunal for failure to consider his evidence that the respondent is his nephew who was still young at the death of his grandfather and admitted that he was not around when the land was handled by the appellant. He submitted that, the 2nd and 3rd defence witnesses were still young in 1987 and the 3rd defence witness was staying at Chibe, knowing nothing about the suit land and that their evidence is just a hearsay.

He in his last ground questioned the respondent's appointment as administrator of his mother's estate in 2021 after the filing of this dispute at the Ward Tribunal. He also argued that the respondent administration is in respect of his mother's estate and not the suit land. He prayed for the appeal to be allowed with costs.

The respondent's response to the appeal was that long use of the suit land by the appellant alone does not give him the right of ownership. He said the land belonged to their grandfather who divided the same among his children and two grandchildren Kabula Malaba and Kabula Ulong'wa. In

2019, he personally identified the suit land to the land surveyor on behalf of his mother, but the appellant interfered claiming the land to be his.

He further claimed that the appellant later conceded that the land is not his and he was required to put his concession into writing making the end of the dispute. However, the appellant later filed the suit before the Ward Tribunal. He prayed the court to dismiss the appeal.

My objective evaluation of the grounds of the appeal in relation to the parties' submissions and evidence depicts one general issue for determination, and this is who is the lawful owner of the suit land. In his three grounds of the appeal, the appellant's main complaint bis on the failure of the trial tribunal to properly evaluate the evidence adduced leading to a wrong conclusion. This being the first appellate court, I will engage in re-evaluation of the entire evidence adduced by the parties at the trial tribunal as underscored in **R.D.Pandya versus Republic** [1957]EA 336 where it was stated that:

> *"It is a salutary principle of law that a first appeal is in the form of re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to critical scrutiny and if warranted arrive to its own conclusion"*

The appellant's evidence was to the effect that he was given the suit land by his grandfather during his lifetime in 1987 in the presence of his uncle Mwamba Magengati, Magengati Mayunga (his brother), Khangu Luhende and Gertrude Shija, Shija Mayunga and Kabula Malamba also his relative,

the grandchildren to the owner of the land. His testimony went further to specify that, his grandfather had also notified his daughter Kalembe Magengati. According to the appellant, his grandfather had also insisted his two sons, Mwamba Magengati and Kalembe Magengati to stick to what he had given to them and should not disturb the appellant and the other granddaughter who was as well given land. After the death of his grandfather, the family members were all notified of the allocation of the land to the two grandchildren, appellant inclusive.

He used the land peacefully until 2012 when the respondent began the interference. He called a meeting in view of dividing the suit land to all the grandchildren, the proposal which was refused by the appellant. The respondent did not end there, together with his brother Kulwa Malaba complained to the Municipal Director Shinyanga over the suit land and he was allowed to go as the respondent was not responsive to the directors' directions. They stayed calmly until 2019 when the respondent trespassed on the suit land and surveyed it forcefully.

His evidence was supported by three other witnesses, namely Mathia Andrew Mahala, PW2, Ngwesha Busanda(PW3) and Zaitune Chanzi Ndaki(PW4) a clan member who witnessed the announcement at the clan meeting held after the death of the appellant's grandfather that the land in dispute has been given to the appellant.

Respondent admits that the land belonged to their grandfather the late Magengati Mwamba. And that his land was divided among his five children,

his mother Kalembe Magengati inclusive. That's his mother used her portion of the land until her death in 2019. Respondent went further to claim that the dispute arose in the year 2019 when he took the surveyors to survey the suit land belonging to his mother.

I should, perhaps before going further restate the cherished principle of the burden of proof in a civil case as provided under sections 110 (1) and (2) of the Evidence Act Cap 6 [R.E 2022] that: -

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, itis said that the burden of proof lies on that person".*

It is established by both parties that the land belonged to the deceased, Magengati Mwamba, the parties' grandfather. It is also not disputed that one Kalembe Magengati was living at a Chibe where he was married and blessed with 9 children respondent inclusive. The evidence from PW2, PW3, and PW4 testified on how each learned how the appellant was given the suit land by the original owner, the late Magengati Mwamba in 1988. The fact that the appellant had given part of the suit land to his son George Mayunga in 2007 remains uncontroverted in the records. It is also clear from both sides that George Mayunga has constructed a house in the suit land and that he is residing there. This piece of evidence is supported by the defence evidence. Su2-**Mwagi Kachoji** in

his evidence on page 38 and 39 of the trial tribunals records was recorded that:

> *"Sasa hivi kuna majengo mawili kwenye eneo hilo na kuna mtu anaishi humo ambaye ni mtoto wa Joseph Mayunga*
>
> *...Mtoto wa Joseph Mayunga aliingia kwenye eneo hilo bila ridhaa ya wanaukoo na hivyo mtoto huyo anaishi na familia yake na ana zaidi ya miaka 5 sasa"*

SU3 – **Ndekwa Mayunga Magengati** at page 41 said:

> *"Kwa sasa hivi eneo hilo lina nyumba imejengwa ndani ya shamba hilo na nimeanza kuiona mwaka 2012"*

SU4-**Tungu Washa** on page 45 was recorded thus:

> *"Namfahamu George ambaye ni mtoto wako na amejenga nyumba na George yupo katika eneo hilo kwa miaka mingi ila sina kumbukumbu Zaidi"*

The above evidence confirms physical possession and substantial improvement of the suit land by the appellant before 2019 as he himself alleged in his evidence.

I have as well considered the respondent's evidence adduced at the trial tribunal. There are several contradictions. ***One*** is on the issue of the legal owner of the suit land. Paragraph 6 of the respondent's WSD reads:

> *"The respondent avers further that the disputed property was given to the five children of the deceased person"*

The above averment was also supported by SU3 **Ndekwa Mayunga Magengati** who at page 40 of the proceeding's was recorded to have said:-

> *Babu alipofariki maeneo yake yaligaiwa akapewa kalembe Magengati, na Mayunga Magengati, Mwamba Mwamba Magengati na Mwashi Magengati, Noveji Magengati, ambapo 3 walishapewa haki zao wakati wa uhai wa marehemu Magengati hivyo wakabaki, Babu alipofariki wanandugu wakawagawia eneo Mayunga na Kalembe.*

This witnesses' evidence, however is deficient of the basic information on who, when and how the distribution was done to the three elders before the deceased death and later to the two elders *Mayunga and kalembe.*

Contrary to his own pleadings and the evidence by SU3 above, respondent's evidence kept on changing after every few sentences in of his evidence. He first informed the trial tribunal that the suit land was allocated to his mother Kilembe Magengati after his grandfather's death. He later claimed the land to be his, given to him by his mother without an explanation on how and when the land shifted from the late Magengati Mwamba, the grandfather, to his daughter, the late Kalembe Magengati then to the respondent.

SU2's evidence is weak to be relied upon in this appeal. He neither known Magengati Magengati, original owner of the suit land nor attended his burial ceremony. This witness admitted to having been 10 years of age in

1987. He contrary to other respondents' witnesses said the deceased land was distributed to the heirs, in 2012 in a meeting chaired by the appellant. While alleging there being minutes of the meeting that divided the land to the legal heir of the deceased Magengati Mwamba there was no documentary evidence adduced in support thereof leaving this fact hanging without proof.

Secondly, is on the issue of the occupation of the suit land by the respondent. While insisting that the dispute arose in 2019 and that they were in a peaceful occupation of the suit land before that, the respondent said,

> *"Tuligawana kienyeji lakini 2012 tuliamua kuyabaini tena na kuwekea mipaka wakati tunaandikishana 2012 marehemu Kalembe alikuwepo.*
>
> *Kipindi hicho 2012 hakukuwa na mgogoro hivyo mama Kalembe asingeweza kutatua mgogoro ambao haupo"*

This version of the respondent's evidence is contradicted by SU2, SU3 and SU4 who confirmed the existence of two houses owned by the appellant's family including his son George Mayunga on the suit land even before 2012. Worse enough, SU4's evidence was wobbly, changing here and there, leaving the court without a proper position to stand on. He at first claimed that the suit land is bear with shrubs and Baobab tree (Mbuyu), he later said there is an unfinished house on the suit land constructed after the disputed. He also informed the tribunal that George

Mayunga's house was constructed outside the suit land, and he concluded that appellant had not invaded the Kalembe's land. When cross examined by the appellant, SU 4 said

> *"Eneo la Kalembe lipo wazi na wewe hujavamia eneo la Kalembe"*

Since the appellant was in occupation of the suit land since 1987 uninterruptedly, the silence of Kalembe Mugengati despite knowledge of the development on the suit land, signifies knowledge of the appellant's ownership of the suit land.

I am thus in agreement with the appellant's complaints that the trial tribunal failed to evaluate the evidence. Had it properly scrutinized the record, it would have found that appellant evidence is heaver on the balancing scale than that of the respondent. The Appeal is therefore allowed with a net effect of declaring the appellant owner of the suit land. Appellant to have his costs of the appeal. Ordered accordingly.

DATED at **SHINYANGA** this 19th day of **AUGUST 2022.**

E. Y. MKWIZU
JUDGE
19/08/2022

COURT: Right of Appeal explained.

E. Y. MKWIZU
JUDGE
19/08/2022