IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 19 OF 2020

(Arising from Manyara District Land and Housing Tribunal in Application No. 66 of 2014)

DANIEL NATSEY..... 1st APPELLANT

HHAMIT XWATSAL ..... 2ND RESPONDENT

VERSUS

JACOB SABIDA.....RESPONDENT

JUDGMENT

4/3/2022 & 26/8/2022

ROBERT, J:-

The respondent, Jacob Sabida, filed an application before the District Land and Housing Tribunal for Manyara at Babati claiming against the two appellants landed property described as 7.6 acres of land located at Kainam Village, Mbulu District. He claimed that he inherited it from his father who was allocated the same during Operation Vijiji in 1974 and kept using it until 2005 when the respondents trespassed into the said land and started cutting down trees. The trial Tribunal decided in his favour. Aggrieved, the appellants herein preferred an appeal to this Court armed with seven grounds of appeal as follows:-

1. *That, the trial tribunal misdirected itself in awarding the applicant Tshs. 2,175,000/= as compensation for the trees alleged to have been cut by the first appellant while such amount of money was never claimed and proved by the respondent at the hearing.*
2. *That, the trial tribunal erred in declaring the respondent as the lawful owner of the suit land basing on a number of witnesses that he had instead of considering the weight and substance of the evidence.*
3. *That, the trial tribunal misdirected itself in awarding the respondent Tshs. 3,000,000/= as general damages while the same was not prayed and proved by the respondent at the hearing; the trial tribunal illegally turned itself to be an advocate of the respondent.*
4. *That, the trial tribunal misdirected itself in declaring the respondent as the lawful owner of the suit land notwithstanding the fact that the respondent did not prove his ownership of the same.*
5. *That, the trial tribunal erred in law as it denied the 2nd appellant with an opportunity of being heard.*
6. *That, the trial tribunal misdirected itself in entertaining the suit which was wrongly filed; the application was wrongly filed/ instituted against the second respondent as it was in his personal capacity.*
7. *That, the trial tribunal misdirected itself in declaring the respondent as the lawful owner of the suit land without considering the fact that the first appellant has been in possession of the suit land from 1974 up to now; the respondent has never been in possession of the suit land.*

Parties in this appeal were represented by Messrs Haruni I. Msangi and John M. Shirima, learned counsel for the appellants and respondent respectively. The appeal was argued by way of written submissions.

Submitting in support of the appeal, the learned counsel for the appellants opted to argue the grounds of appeal in three different sets. The first set comprised of the 2nd, 4th and 7th grounds, the second set comprised of the 5th and 6th grounds and the third set comprised of the 1st and 3rd grounds.

In the first set, the appellants faulted the DLHT for declaring the respondent the lawful owner of the suit land notwithstanding the fact that the respondent never proved such ownership whereas the 1st appellant proved to have been in possession of the same since 1974.

Having examined the records of this matter, this Court noted that, in proving that he was the rightful owner, the respondent who was the applicant in the DLHT testified that he inherited suit property from his father in 1979 who was allocated the same during Operation Vijiji in 1974. He maintained that, he continued use the said land peacefully until 2005 when the respondents trespassed. He brought two witnesses who testified that he inherited the disputed property from his father and had been using it until 2005 when the dispute arose after the trespass. He also tendered a map of the disputed land (7.6 acres of land) endorsed by the Mbulu District Land Officer which was admitted as exhibit P1.

The 1st appellant on the other side, testified that he was allocated two plots of land, one during the Operation Vijiji in 1974 and another one in 1990. He contended that he now owns 2 acres of land. He brought one witness who testified that the 1st appellant was allocated two plots one in 1974 and the other in 1990. He sought to tender a document used for allocation of land in 1990 to prove his contention but the document was a photocopy and he never explained where the original was so it was rejected by the trial tribunal.

This Court is aware that, the law requires that he who alleges must prove (see section 110 of the Evidence Act [Cap 6 RE 2019]). It was thus upon each of the parties to prove ownership of the disputed plot. The respondent herein proved both by oral testimony and document admitted as P1 showing that he owns the disputed property which is 7.6 acres of land. What the appellant testified however is that he was allocated two plots one in 1974 and the other in 1990 and that they all made a total of 2 acres of land.

From the evidence adduced by both parties, it was the respondent herein who managed to prove ownership of the 7.6 acres of land in dispute. It was therefore rightly concluded by the DLHT that the applicant, (respondent herein) was the rightful owner of the disputed piece of land.

With regards to the second set of grounds, the appellants complained that the application was wrongly filed against the 2nd respondent in his personal capacity and that he was denied of his right to be heard.

From the proceedings, it is very clear that the second respondent was summoned to appear and reply to the claim that was lodged against him. He filed a joint WSD and appeared several times but suddenly stopped appearing when the matter was set for hearing. He knew therefore of the claim that was against him and was represented but for the reasons known to himself decided not to enter appearance and make his defence. It is therefore not right to claim that the DLHT denied him the right to be heard. He waived his own right by choosing not to appear.

On the argument that the application was wrongly filed as the second respondent was sued in his personal capacity, this Court found that although the second respondent was a member of the Village Council in 1974 he allegedly trespassed into the disputed land in his personal capacity and not as a member of the Village Council. Hence, it was proper for the applicant (respondent herein) to sue him in his personal capacity.

Coming to the last set of grounds, it is the appellant's contention that the DLHT misdirected itself in awarding the respondent TZS 2,175,000/=

and 3,000,000/= as compensation and general damages respectively without being pleaded nor proved by the respondent.

I agree with the appellant's contention that the respondent did not prove the loss incurred due to the said trespass. He stated that he suffered loss of TZS 2,175,000/= as a result of the trees cut by the first respondent (first appellant herein) but never proved how he arrived at the claimed amount. It is the principle of law as propounded in the case of **Zuberi Augustino vs Anicet Mugabe** (1992) TLR 137 that, *"special damages must be specifically pleaded and proved".* I thus expected to see how the respondent herein proved the claimed amount before the DLHT awarded such amount. I have not seen any proof in the records. I therefore find merit in the appellants' argument and I hereby expunge an order for payment of compensation of TZS 2,175,000/- awarded by the DLHT.

As for the general damages, I find it convenient to take guidance from the decision of the Court of Appeal in the case of **Anthony Ngoo and Denis Anthony Ngoo vs Kitinda Kimaro**, Civil Appeal No. 35 of 2014 (unreported), which stated that *"general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages; however, he must assign reasons."* The records of the

matter in the trial Tribunal reveal that the dispute started way back in the year 2005 up to 2020 when the DLHT finally gave its decision. Thus, considering that the respondent spent 20 years in search for justice, I honestly believe it was right for the Honourable Chairman in his discretion to award the said damages as it can also be seen that he assigned reasons in doing so.

In the end, this appeal is partly allowed only to the extent of expunging an award of TZS 2,175,000/= for cost of trees as awarded by the trial Tribunal. Otherwise, the decision of the trial Tribunal is left undisturbed. Each party to carry its own costs for the appeal.

It is so ordered.

K.N.ROBERT
JUDGE
26/8/2022