

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 04 OF 2022

(Originating from Land Application No. 20 of 2019 before the District Land and Housing Tribunal of songea)

EGNO LONGINUS NYINGO.....APPELLANT

VERSUS

JOAKIMU JOAKIMU NYINGO..... 1ST RESPONDENT

DITRICK NDOMBA.....2ND RESPONDENT

JUDGEMENT

30th August 2022 & 12th September 2022

U. E. MADEHA, J.

The Appellant herein is unsatisfied with the judgment of the District Land and Housing Tribunal of Songea (henceforth 'the DLHT') which proceeded *ex-parte* against the Respondents. Basing on the record, their absenteeism before the DLHT is unjustified as service of summon as a matter of law was duly made by the Appellant.

Before the DLHT, it was the Appellant's claim through Land Application No. 20 of 2019 that; sometimes around 2017, the Respondents

trespassed the suit land (unsurvey but approximately 45 acres, located at Nakauga area in Songea District) by clearing bushes, tilling up the land and making bricks. Thus, the Appellant claimed the following reliefs; One that the application be allowed with costs. Two, the Applicant be declared to be legal owner of the suit land. Three, the Respondents be ordered to vacate the suit land.

In a nutshell, the Appellant's testimony at the DLHT was that; the suit land is the property of the Nyingo's clan by way of inheritance. That, he is the appointed representative owner of the clan land. To prove that, he tendered a special power of attorney which was admitted in evidence as Exhibit P-1. He averred that the first Respondent had sold eleven (11) acres to the second Respondent an act which is contrary to what the clansmen had set for themselves.

To substantiate his claim, the Appellant brought one witness, called Magdalene Longinus Nyingo. Her testimony was to the effect that the Applicant is the appointed administrator of the estate. She testified that the first Respondent sold about eleven (11) acres of the suit land without the family member's consent. In the end, she requested the DLHT to therefore nullify the sale by the first Respondent.

Upon conclusion of the ex-parte hearing, the DLHT ruled that the Applicant had fail to prove that the suit land is neither the clan's land nor that it is his property. In fact, the DLHT found and hold that the evidence and the document supporting the Appellant's claim was contradictory thus lacked weight. In effect he lost the case. Thus, it was against the above background, the Appellant herein preferred this appeal. He filed eleven (11) grounds of appeal which are as follows:

- 1. Kwamba, Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea kisheria kimantiki kwa kutamka ya kuwa kwa ushahidi ulioletwa wa mkata Rufaa Pamoja na shahidi wake PW2, upande wa mleta maombi umeshindwa kabisa kuthibitisha umiliki wao hiyo sio kweli.*
- 2. Kwamba, Mwenyekiti wa Baraza la Ardhi na Nyumba na Wilaya alikosea kisheria na kimantiki kwa kutamka ya kuwa katika ushahidi wao wote hawajaeleza ni lini eneo hilo la ukoo waliupata na waliupataje, pia mashahidi wote hawajaeleza maendeleo ambayo wamefanya katika hilo kuonyesha namna walivyolitumia, hiyo si kweli.*
- 3. Kwamba, Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea Kisheria na Kimantiki kwa kutamka kuwa Ushahidi wa mleta maombi hauna uzito kwani hajaeleza mipaka ya eneo hilo ili kutofautisha na maeneo mengine hiyo sio kweli.*

4. Kwamba, Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea kisheria na kimantiki kwa kutamka kuwa nimejiuliza kuwa kama hili eneo linamilikiwa na mleta maombi itakuwa shida katika kukazia hukumu hiyo kwani eneo hilo halijatambulika mipaka yake ukizingatia kuwa eneo hilo halijapimwa hiyo sio kweli.
5. Kwamba Mwenyekiti wa Baraza la ardhi na nyumba alikosea kisheria na kimantiki kwa kutamka ya kuwa mleta maombi na PW2 walieleza kuwa eneo ni la ukoo na kwamba mleta maombi kateuliwa kama msimamizi wa ukoo na ametoa hati ya mwakilishi lakini madai yamemtaja yeye peke yake kuwa ndiye mdai.
6. Kwamba mwenyekiti wa Baraza la Ardhi na Nyumba alikosea kisheria na Kimantiki kwa kutamka ya kuwa unapopewa hati ya uwakilishi (special power of attorney) inawapasa wale wawakilishwaji watokee kama wadau halafu ndipo kutumia hati ya uwakilishi aje kuendesha kesi kwa niaba yao.
7. Mwenyekiti wa Baraza la ardhi na Nyumba alikosea kisheria na kimantiki kwa kutamka ya kwamba katika madai haya mleta maombi ni moja hao wanaowakilishwa hawaonekani kuwa ni walalamikaji hivyo mleta maombi kashindwa kuthibitisha umiliki wa ukoo huo ambao pia sio sehemu ya madai haya.
8. Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea kisheria na kimantiki kwa kutamka ya kuwa Ushahidi uliokuwepo katika hati ya madai unakinzana na hivyo kukosa uzito.
9. Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea Kisheria na Kimantiki kwa kutamka ya kwamba mleta maombi anadai mjinu

Rufaa wa pili, lakini hakuna Ushahidi wa kuweza kushawishi wa kuonyesha kuwa kweli mauzo hayo yalifanyika. Hivyo ni rai yake kuwa mleta Rufaa kashindwa kuthibitisha madai yake dhidi ya wajibu maombi.

10. Mwenyekiti wa Baraza la Ardhi na Nyumba alikosea kisheria na kimantiki pale alipokubaliana na wajumbe wawili katika maamuzi yake bila kuzingatia ushahidi uliotolewa na mleta maombi ambao ulikuwa na uzito kuliko maoni ya wajumbe wawili ambao hata koramu yao haikutimia.

11. Mwenyekiti, wa Baraza la Ardhi na Nyumba alikosea kisheria na Kimantiki kutamka kuwa eneo la mgogoro lipo Kijiji cha Nakanga jambo ambalo sio kweli.

During hearing, unlike in the original case before DLHT, both Respondents being parties to the case entered appearance and opposed the appeal. Parties consented to argue the appeal orally owing to the fact that they were all unrepresented.

The Appellant began submitting that; the Chairman of the DLHT erred in law because he failed to confirm ownership of the suit land which is owned customary since way back by their ancestors. He averred that, the suit land was inherited from their parents, who died years ago. Further, the Appellant alleged that, the suit land had a single administrator called Mzee Juma. That after he had passed away, he was eventually appointed

by the clan in the clan's meeting to manage the area. He further added that all the clan members agreed that the suit land should remain to the clan.

That surprisingly, the first (1st) Respondent who is his brother's son apportioned a piece of eleven (11) acres and sold it to the second (2nd) Respondent without consent or any communication. He added that they summoned him so as to settle the issue amicably unfortunately they failed to reach any consensus. As a result, they decided to refer their dispute to DLHT. Admittedly, the Appellant argued that the DLHT was not sure about the sale of the property because there was lack of important documents proving the sale of the suit land. In the end he asked the Court to declare that, the suit land is a clan property and that the first (1st) Respondent be ordered to return the piece of land that he sold to the second (2nd) Respondent.

In response to the Appellant submission, the first (1st) Respondent submitted that, the area that he sold to the second (2nd) Respondent was the area that his late grandfather had bequeathed it to him after his death. On that note, he had therefore decided to sell it in the year 2017. That he sold each acre for one hundred (100,000) Tanzanian shillings. He asserted

that he sold it as an area left to him by his late grandfather not as an estate administrator.

The first Respondent added that after selling the alleged portion suit land his relative Egno Ndimbo went to file the case with the Tribunal to complain that he had sold the family's land. He stressed that the suit land is not a family area. He valiantly stated that the Appellant does not have the authority and mandate to administer him in the area that he was given by his late grandfather. He claimed that the area which the Appellant claim to be collectively owned is that they do not even have a customary document which shows such ownership of the area.

On his side, the second (2nd) Respondent stated that he bought a total of ten (10) acres from the first (1st) Respondent. He lamented that when buying that particular piece of land, he knew that he was buying the first Respondent's land. That, even the neighbors of that particular place confirmed to him that he was buying the first (1st) Respondent's land. He added that before buying the area he even visited the first (1st) Respondent's home whereby he found his mother who also assured him that it was the first Respondent's property. Furthermore, he stated that

they even finalized their compromise before the local government offices who also never denied that the area belonged to the First (1st) Appellant.

Submitting in rejoinder, the Appellant emphasized that, the first (1st) Respondent did not own a private area thus he sold an ancestral land. He argued that the Respondents have not tendered any evidence to prove that there was such a comprise before the local government after all they made appearance before the DLHT. He added that he was entrusted by the clan that's why he was given a power of attorney. Lastly, he requested that this Court be pleased to nullify the sale hence declare the suit land a clan land.

First and foremost, I should state that the Appellant's claim as presented at the DLHT was vague. While he sued the Respondents for trespass and claimed to be declared the legal owner of the suit land, he prayed that the DLHT be pleased to nullify the alleged sale of a portion of the suit land all the same he contended that the suit land is an inherited clan property.

After having the perused the record, the grounds of appeal together with the submission from both sides I find that the controversial issue calling for my determination is whether the DLHT failed to evaluate the

evidence on record thus reached a wrong conclusion. My response to the afore question is in the negative. This is because, it is my considered view point that the Appellant failed to prove his claim on the balance of probabilities. I say so on account of the following findings:

From the entire record it can be observed that; one, the suit land is alleged to be a clan inheritance property, that each side do claim that the land belonged to their respective deceased persons. Two, there is no evidence that the same was or has been divided among the prospective heirs save that the 1st Respondent barely stated that the portion he sold to the 2nd Respondent was owned by his deceased father since 1983. Three, the suit land has not been subjected to probate administration hence likely the resultant trespass dispute which the Appellant claims an inheritance tittle on and for behalf of his relatives.

Moreover, it is on the record that 'exhibit P-1' (special power of attorney) was executed on the 26th day of March 2019 between the Nyingo clan (who are seventy-seven members) as the donors and the Appellant herein as donee. It solely appointed the donee (Appellant) to be the lawfully attorney for the purpose of acting as a representative before the

DLHT for Ruvuma at Songea in Misc. Land Application No.20 of 2019 which the same was filed on 12th February 2019.

Therefore, it can be noted that the Appellant sued the Respondents relying on a power of attorney. He claimed that the instrument introduces him as a legal representative and equally as the probate administrator as he was appointed by his relatives. However, a thorough reading of the document does not specifically imply that the Appellant is the appointed administrator of the deceased estate. Add to that, only one of the doner (PW2) appeared in the DLHT as a witness to support his claim of trespass.

In my understanding a power of attorney accords a party (donee) the legal capacity to act on behalf another(doner) who mostly is by certain circumstances hindered from acting, for-instance the doner could be ill, outside the country, very aged etcetera unlike in the instant case. It is still unclear to me as to why the Appellant opted to prosecute the case vide a special power of attorney. Needless to observe, the same is not registered as required under *section 8(1) of the Registration of Documents Act Cap 117*.

I opine that, under the circumstances such clan inherited land deserves administration by a probate administrator who should be appointed through Court process. To the best of my understanding, an inherited clan land cannot be claimed and thus declared a lawful property of a sole person merely by virtue of such person being accorded a special power of attorney to prosecute a land trespass dispute. In other words, I am of the view that since the claim to title in this matter owes its genesis from a right of inheritance among parties the same is a probate dispute which should primarily be entertained by a probate Court.

As rightly held by the DLHT in its page 3 of its judgement, the Appellant having claimed to represent the Nyingo clan vide the power of attorney, it was expected that clan members would have been listed as the Applicants and made parties to the case where it could have been clearly shown that they are suing under power of attorney of the Appellant to confirm their ownership too. Reference may be made to the case of **Mrs. Theresia J. Mubiru v. Zainab Zakaria** Civil Appeal No.24 of 1998 Arusha (unreported) where in this Court speaking through Mrosso, J. (as he then was) stated that where an attorney is appointed, he cannot purport to give evidence on behalf of the principle.

In the circumstances and in all fairness, I find and hold that the Appellant did not have the necessary locus to sue the Respondents. He did not therefore establish and prove his case. In view of the foregoing, I therefore concur with the findings of the DLHT and conclude that the appeal is devoid merits. It is hereby dismissed in its totality with costs.

DATED at **SONGEA** this 12th Day of September 2022



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal flourish extending to the right.

U.E. MADEHA

JUDGE

12/09/2022