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

LAND APPEAL NO. 71 OF 2021

(Arising from the decision of Maswa District Land and Housing Tribunal in Land Application No. 17 of 2018)

1. MASAKA IBEHO
2. SITA LUCAS
3. ELISHA LUCAS ..... **APPELLANTS**
4. CHEYO S. NJEGELO
5. MADUHU MHOGOTI

VERSUS

DANIEL DAGALA KANUDA.....RESPONDENT

(Administrator of the deceased

Mbalu Kushaha Buluda's Estate)

JUDGMENT

2nd August, 2022

MATUMA, J;

The respondent herein sued the appellants in the District Land and Housing Tribunal for Maswa Claiming for 33 acres of Land alleging to have been owned by the late Mbalu Kushaha Buluda which is located at Kidamalida Village within Bariadi District.

His claim was that the suitland was originally owned by his grandfather one Butilyaga Dindayi and that before his death he gave it to his late grandmother Mbalu Kushaha supra. The respondent's claim went on that the 1st appellant who is his relative (brother) encroached into that

land and started to cultivate it and selling part of it to the rest of the appellants.

On the other hand the 1st appellant disputed the claim stating that the late Butilyaga Dindayi had two wives; Mbalu Kushaha (Senior wife) and Musayi Kuyi (Junior wife). He is personally a grandson of the junior wife of the deceased Butilyaga Dindayi while his relative the respondent is the grandson of the Senior wife. That after the death of their grandfather the clan distributed the suit land to the deceased's wives (their grandmothers) whereas the senior wife and her family were allocated 20 acres and the junior wife 13 acres. That he was then given the 13 acres by the clan which were previously allocated to his grandmother and he neither sold it to any nor encroached into the 20 acres which were allocated to his senior grandmother to whom the respondent belongs.

The rest of the appellants also disputed neither to have bought any piece of land from the 1st appellant nor to have used it anyhow.

After a full trial, the trial tribunal allowed the respondent's claims and decreed that the 33 acres belonged to the late Mbalu Kushaha and proceeded to order vacant possession against the appellants to the respondent.

The appellants became aggrieved hence this appeal with four grounds of appeal whose major complaints are two to the effect that;

i) *The 2nd, 3rd, 4th and 5th appellants were wrongly sued. For there was no evidence that they purchased any piece of land from the 1st appellant nor there was any evidence that they were in use of it.*

ii) *That the evidence of the appellants were ignored.*

I will thus determine this appeal through the two complaints supra which are gathered from the four grounds of appeal. This appeal was argued by way of written submissions.

In their written submissions in support of the appeal the appellants laments that there was no evidence on record to the effect that the 1st appellant sold any piece of land to the rest of the appellants or even that such other appellants are in use of the suit land and therefore they were wrongly sued. That it was wrong for the trial tribunal to order vacant possession against them as they have nothing to give vacant possession.

In his reply to this ground, the respondent did not bother to elaborate whether he adduced any evidence to substantiate his claims that the 1st appellant sold part of the suitland to the rest of the appellants. He ended submitting that the complaint that the 2nd, 3rd, 4th, and 5th appellants were wrongly sued was not an issue at the trial tribunal and therefore cannot be entertained at this appellate stage.

On my side I find this ground with merits. It was the respondent who drew the cause of action against the 2nd, 3rd, 4th and 5th respondents to the effect that they purchased the suit land from the 1st appellant. He ought thus to prove that indeed those appellants purchased the said land from the 1st appellant. Throughout the records, there is no tangible evidence that the 1st appellant sold any piece of land to the rest of the appellants nor that those appellants are in use of it.

The respondent gave bare claims without any back up evidence to establish that indeed the 1st appellant sold part of the suit land to the rest of the appellants. Under the circumstances, it was expected the respondent to prove the alleged sale and even the use of the suit land by the 2nd, 3rd, 4th and 5th appellants.

As those appellants disputed categorically to have purchased such suit land or use it and the fact that the 1st appellant also denied to have sold any piece of land to them, it was wrong for the trial tribunal to decree the respondent against the 2nd, 3rd, 4th and 5th appellants for vacant possession as they have nothing to give vacant possession. The trial tribunal in absence of vivid evidence on record either that the 2nd to the 5th appellants bought part of the suitland from the 1st appellant or that they are in use of it ought to have visited the suitland to satisfy itself whether the 2nd to the 5th appellants are really in use of the suitland. The respondent failed totally to establish his claim against the 2nd, 3rd, 4th and 5th appellants and I accordingly allow this ground of complaint.

In the second set of complaint relating to the evidence of the parties, I have gathered from the records that both parties are in agreement that the suit land was originally owned by the late Butilyaga Dindayi their grandfather. The problem between them arises from the fact that while the 1st appellant claims that the late Butilyaga had two wives Mbalu Kushaha and Musayi Kuyi, and that upon his death his land measuring 33 acres now in dispute was distribute to the two wives whereas Mbalu Kushaha got 20 acres as a senior wife and Musayi Kuyi got 13 acres which was later given to him by the clan, the respondent on the other hand disputed the late Butilyaga Dindayi to had married two wives.

In other words, he does not recognize Musayi Kuyi from whom the 1st appellant traces his origin as a grandson in accordance to the evidence on record. Even though, the respondent and his witnesses acknowledge that the 1st Appellant is indeed the relative of the respondent in the same very relationship explained herein above. They are all grandsons of the late Butilyaga Dindayi. He did not however disclose how they became

relatives in the meaning that he decided to hide some material facts relevant to his claim that the late Butilyaga had only one wife whom he stands as an administrator of her estate so that he takes possession of all the 33 acres.

Even though, whether the late Butilyaga Dindayi had two wives or not, that was not a matter for adjudication before the trial tribunal or even in this Court.

The pertinent question is whether the late Butilyaga Dindayi prior to his demise he gave his 33 acres to his wife Mbalu Kushaha as alleged by the respondent so that such land can be administered by the respondent who was dully appointed administrator of her estate.

Going through the evidence on record, I find no tangible evidence from the respondent to the effect that before his demise the late Butilyaga Dindayi had given all his land to his wife Mbalu Kushaha. What is on record is a bare allegation by the respondent that his grand father who died in 1948 had given his land to his wife Mbalu Kushaha. There is no evidence on record to show when and before whom such giving was effected and whether the respondent witnessed the alleged giving. None of the respondent's witnesses supported him that the late Butilyaga had given that suit land to Mbalu Kushaha. Even common sense does not dictate that the late Butilyaga could have given all of his land to his wife without further evidence as to whether he remained with any for his use. Where did he went to live after such alleged giving. Or what were the terms of giving such land; was it that after he had given it to his wife would continue to use it until his death or was he to quit and give vacant possession to his wife by tracing another land for his survivor.

All these queries which have no answers on record are inconsistent with the allegations of the respondent that the late Butilyaga dispossessed himself all the land he had by giving it to his wife. What I find, is a claim of inheritance in disguised manner to the effect that after the death of Butilyaga in 1948, the land in dispute automatically came into possession of his wife Mbalu Kushaha. And that since the respondent is the grandson of Mbalu Kushaha he has to administer such land for protection of the interests of the estate of the said Mbalu Kushaha. But since the respondent has chosen a different route towards his claims by contending that the late Butilyaga gave such land to his wife, the trial tribunal ought to have determined whether there was such evidence on record which I find none as herein above stated.

In the circumstances I hold that the suit land as a whole belonged to the late Butilyaga Dindayi up to the time of his death. Such land is not subject to administration by the respondent as he is not the administrator of the state of the late Butilyaga Dindayi.

On the other hand, there is also no tangible evidence on record to show that the 1st appellant was given the 13 acres except his bare allegation to that effect. It is very dangerous to accept bare allegation by both parties; the 1st appellant and the respondent as it may be detrimental to justice and prejudicial to other beneficiaries of the estate in question. Both the 1st appellant and the respondent are grandsons of the late Butilyaga. They are litigating on the suitland without disclosing the fate of the children of the said Butilyaga. Are those children aware of the current dispute between these grandsons? What would be the effect of decreeing either of the parties herein as a lawful owner of the suit land against the interests of whoever would appear later as the real beneficiary of the late Butilyaga!

In the circumstances, I restore the suit land into the estate of the late Butilyaga Dindayi to be administered as his estate and distributed to his beneficiaries whether customarily or through other legal and lawful channels.

I direct the 1st appellant and the respondent to resume back to the clan of the late Butilyaga Dindayi for amicable resolution of the dispute and customary distribution of the suit land to the real beneficiaries. If they do not honour the clan mechanism of dispute resolution, they are at liberty to commence a suit in the Court of competed jurisdiction to have the fate of the suit land determined as part of the estate of the late Butilyaga Dindayi and not as the estate of Mbalu Kushaha, Musayi Kuyi, or of the 1st appellant or the respondent.

I am aware that the 1st appellant testified that the clan already dealt with the matter by distributing the suit land to the two wives of the deceased Butilyaga whereas 20 acres were given to the senior wife Mbalu Kushaha who is the grandmother of the respondent and 13 acres were given to the Junior wife Musayi Kuyi who is his own grandmother. Unfortunately, I have not seen such evidence on record apart from the mere averments of the 1st appellant.

Even the attached clan minutes date 19/12/2011 is merely recognizing the distribution made on 24/09/2011 by the clan. Such relevant minutes dated 24/09/2011 is not on record. Those attached minutes are not relating to the dispute between the parties herein but to one Nsiya Butilyaga and Mbuke Butilyaga who are the children of the late Butilyaga. They were complaining to the clan for having been denied inheritance from the estate of their late father. It is thus difficult to agree with bare statements of the first appellant which might prejudice the rights of other entitled beneficiaries of the estate.

If really there was such clan distribution, then it should be executed customarily by the clan itself to end up the matter. Otherwise, whoever claims interest in the estate of the late Butilyaga Dindayi should take the proper course.

With the herein above observation, I am in agreement with the appellants that had the trial tribunal considered the evidence on record property it would have not reached the decision it had entered. I thus allow the second set of complaint to the effect that the respondent is not the lawful owner of the suit land. The lawful owner thereof is the late Butilyaga Dindayi whose estate is yet administered.

To maintain peace and harmony, I order status quo to be maintained until appropriate measures are taken by either party. For clarity the status quo ordered herein is that the clan members who are in use of the suit land including the parties herein shall continue to use their respective portions under currently under their use without father extension until when the estate shall be administered and distributed accordingly be it through customary mechanism or through court process. Every one in use of the suit land shall have to cooperate with the administrator of the estate in question to end the mater peacefully.

In the final analysis, this appeal is allowed. The judgement of the District Land and Housing Tribunal is hereby quashed and the decree thereof set a side.

The appeal is allowed with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
02/08/2022