

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

LAND APPEAL NO. 3 OF 2022

(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 196 of 2020)

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| <p>1. FATUMA MWAMAKAMBA (Administratrix of the Estate of the Late Martin Omary Mwamakamba)</p> <p>2. RUGANO MARTIN MWAMAKAMBA (Administrator of the Estate of the late Martin Omary Mwamakamba)</p> | } |APPELLANTS |
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VERSUS

GERVAS KIDUKO.....1ST RESPONDENT

MORIS MPEPO.....2ND RESPONDENT

JUDGEMENT

Date of Last Order: 04.07.2022

Date of Judgment: 09.09.2022

Ebrahim; J.

This is the first appeal, **Fatuma Mwamakamba** and **Rugano Martin Mwamakamba** under their respective capacities as administratrix and administrator of the estate of the late Martin Omary Mwamakamba are challenging the decision of the District Land and Housing Tribunal for Mbeya, At Mbeya (the trial Tribunal) in Land Application No. 196 of 2020.

At the trial Tribunal the appellants jointly sued the respondents for a farm land measuring 5 acres situated at Lusese Village in Igurusi Ward

within Mbarali District estimated at the value of 15,000,000/= (Tshs. Fifteen Million Only). It was alleged by the appellants/applicants that the disputed land was in lawful possession of the late Martine Mwamakamba (the deceased) at the time of his demise in 1998, for that the same formed part of the deceased's estates as it was in continuous possession use of the beneficiaries.

It was also the averment by the appellants that the 1st and 2nd respondents invaded the suit land in 2019. They started developing it and remained there. According to the appellants, when they asked the 1st respondent on the invasion, he said he bought the same from the 2nd respondent whereas, on his part, the 2nd respondent contended to have been given the land by his brother one Fr. Herman Mpepo.

The facts of this matter, can easily be comprehended from the evidence adduced before the DLHT. The same, as gathered from the record goes as follows; the late Martin Mwamakamba and a Catholic Church Priest (Padre) one Father (Fr.) Herman Mpepo entered in an oral contract of sale where the said Fr. Mpepo had to purchase the suit land in 1996. In 1998 Martine Mwamakamba passed on. The evidence indicates that Fr. Mpepo also passed on in 2010. That in 2019 the Catholic Church at Igurusi filed a Land Dispute in the Igurusi Ward

Tribunal against the 2nd respondent (Moris Mpepo) claiming that in 2012 he invaded the land which was bought by Fr. Mpepo. The Church was claiming that since Fr. Mpepo was a Padre at the same Church when he bought the land from the late Martine Mwamakamba, the same was forming part of the properties of the Church.

In proving her case at the Ward Tribunal, the Church called Fatuma Mwamakamba (the wife of the late Martine Mwamakamba) as witness where she testified that indeed Fr. Mpepo purchased the land from her late husband.

On his part, Moris Mpepo objected the claim, and maintained that Fr. Mpepo was his blood brother and he gave him the land as a gift at the time he bought it in 1998. He also testified that he had sold the same land to one Gervas Kiduko in 2012. The Ward Tribunal decided in favour of Moris Mpepo.

Thereafter, in 2020 Fatuma Mwamakamba and Lugano Martine Mwamakamba applied and obtained letters of administration of the estate of the late Martine Mwamakamba. Subsequently, in the same year they filed the application (the subject of this appeal). In the course of adducing evidence, the applicants (now the appellants) stated that the suit land was not sold to Fr. Mpepo as he did not settle the whole

purchasing price. They tendered a letter (exhibit P1) alleging that Fr. Mpepo through that letter admitted to have failed to pay the purchasing price. They also testified that they had been using the suit land after the demise of the deceased until when the 1st and 2nd respondents invaded it.

On his part, the 2nd respondent told the DLHT about the dispute between him and the Catholic Church regarding the same suit land. He also talked about the same Fatuma Mwamakamba to have testified in the Ward Tribunal on the purchase of the suit land by Fr. Mpepo. The 2nd respondent was thus astonished on the unprincipled habit of Fatuma Mwamakamba. He also tendered the proceedings and a judgment from the ward Tribunal, the same was admitted as exhibit D1. He again admitted that since 2012, he had sold the suit land to the 1st respondent.

The DLHT basing on the evidence of the 2nd respondent that Fatuma Mwamakamba had once told the Ward Tribunal on the sale of the suit land by the late Martine Mwamakamba, held that she (Fatuma) was estopped from giving evidence to the contrary. The decision based on **section 123 of the Evidence Act, Cap. 6 R.E 2019** (Now R.E. 2022). It thus declared the 1st respondent lawful owner of the suit land

on the reason that he lawfully purchased the land from the 2nd respondent.

Aggrieved, the appellant filed the instant appeal preferring three (3) grounds of appeal as follows:

1. That the trial Tribunal erred in law and fact when held that the Appellant was legally estopped by the evidence, she adduced at Igurusi Ward Tribunal.
2. That the Ward Tribunal erred in law and facts in finding that Gervas Kiduko is the lawful owner of the disputed land while the evidence adduced by the respondents' side fall short.
3. That the trial tribunal erred in law and facts when failed to declare that the disputed land is part and parcel of the estate of the late Martine Omary Mwamakamba.

At the hearing of the appeal the appellants were represented by advocate Angolwisye Amani whereas the respondents were represented by advocate Timotheo Frowin Nichombe. The appeal was heard by way of written submissions and the parties duly filed their respective submissions save the appellants who did not file rejoinder submissions.

Supporting the appeal counsel for the appellant contended that the DLHT misdirected itself when it held that Fatuma Mwamakamba was

estopped from testifying contrary to what she testified before the Ward Tribunal. According to him Fatuma Mwamakamba appeared in the DLHT as the administratrix of the estate who is a different person from when she appeared at the Ward Tribunal as a natural person. He also submitted that the said statement was given in the decision of the Ward Tribunal which was nullified by the DLHT so there was no averment whatsoever to be relied upon by the DLHT hence the impugned decision was error of facts.

Submitting on the 2nd ground of appeal, counsel for the appellants contended that the appellants proved the case at the required standard and had strong evidence than that of the respondents. Counsel for the Appellants contended that the DLHT relied on a Will of the late Martin Mwamakamba, while the same had already been nullified by the Primary Court as per exhibit P3 (the Ruling of the Primary Court). He also submitted that, had the DLHT considered the letter written by Fr. Mpepo i.e., exhibit P1, it would have reached to a different conclusion because the said letter evidenced that Fr. Mpepo did not settle the debt hence the suit land did not pass to him.

The Appellant's counsel was therefore of the view that the purported sale between the 1st respondent and the 2nd respondent was a

nullity as the 1st respondent had no title to pass. Also, the Appellants had strong evidence that the suit land was used by the deceased until 1998 after it was used by the Appellants until 2019 when the dispute arose, he argued.

Arguing the 3rd ground of appeal, counsel for the appellant submitted that the evidence of the Respondents was contradictory as the 1st respondent claimed to have started using the land in 1999 while the 2nd respondent said that he started using it in 1998. Also that, at the same time the 2nd respondent admitted that the land was being used by the deceased until 1998 which is the year he passed on.

Moreover, the appellant's counsel invited this court to reappraise the evidence in line with the issues framed and reach to its own findings. His view was on the complaint that the DLHT was misdirected when it resolved the issue of who is the lawful owner of the disputed land instead of resolving the issue of **'if the land in dispute form part of the estate of the late Martin Omary Mwamakamba'**.

In reply, counsel for the Respondents supported the path taken by the DLHT to hold that the 1st Appellant was estopped to give a contradicting evidence at the DLHT from what she said at the Ward Tribunal. He referred this court to the **Book of Sarkar on Evidence**

Vol. 2 14th Edition (1993) and **section 123 of the Evidence Act Cap. 6 R.E 2019** that a person is estopped from uttering one thing at one time and the opposite of it at another time.

Counsel for the Respondents also opposed the claim by the Appellants that Fatuma Mwamakamba in the Ward Tribunal and Fatuma Mwamakamba in the DLHT are different persons. To him they are one and same person since in the matter at hand there is no issue of capacity of parties. Thus, whether Fatuma Mwamakamba is the administratrix or a natural person, it cannot be dealt in the present matter. He argued that what matters is the truth that Fatuma Mwamakamba is the wife of the deceased and she had acknowledged that her late husband sold the land to Fr. Mpepo. He thus prayed for this court to dismiss this ground of appeal.

Replying to the 2nd ground of appeal counsel for the respondent stated that there was no proof that the late Fr. Mpepo did not settle the debt because the available document (the letter from father Mpepo) was just informing the late Martine Mwampamba that he remembers the debt and promised to settle the same. In the absence of contradicting evidence that he did not settle it proves that the respondent had strong evidence than the appellants he argued. Further that it was the duty of

the appellants as the applicant to prove all what they alleged **as per section 110 of the evidence Act**, (supra).

As on the 3rd ground of appeal, counsel for the Respondents told this court that the Appellants' counsel has argued the ground of appeal which was not preferred in the memorandum of appeal he thus urged the court to dismiss the appeal with costs.

I have considered the rival submissions by the parties' counsels and the record. In addressing the issues raise, I shall combine the 2nd and 3rd grounds of appeal together as they both relate to the evaluation of evidence.

Regarding the 1st ground of appeal, the appellant's counsel is not disputing the applicability of the principle of estoppel articulated under **section 123 of the Evidence Act**. He is however contending that before the Ward Tribunal Fatuma Mwamakamba gave evidence as the witness whereas at the DLHT, she appeared as the administratrix of the estate of the decease. Hence they are two different persons. I am alive of the position of the law that an administrator/administratrix may bring and defend proceedings on behalf of the estates; see **item 6 of the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2019.**

The above notwithstanding, though Fatuma Mwamakamba at the DLHT appeared as a legal personal, the same does not omit the truth that she was the wife of the late Martine Mwamakamba. This is also true that when she gave evidence before the Ward Tribunal it was due to the fact that she was the wife of the late Martine Mwamakamba. Nonetheless, it is undisputed of that her testimony at the Ward Tribunal was due to her knowledge regarding the suit land. Counsel for the Appellant did not tell this court if the land which was in dispute before the Ward Tribunal was different from the suit land before the DLHT. In the broad reasoning, it is my view that if a person has knowledge about something, the same knowledge does not simply change to fit the circumstance or purpose when the same person appears in a different capacity. If at all the credibility of that person is highly questionable.

In the circumstances, I concur with the DLHT that Fatuma Mwamakamba who testified as a witness before the Ward Tribunal regarding the same subject matter is estopped from testifying to the contrary.

There is also an averment by the Appellants' counsel that the decision of the Ward Tribunal relied by the DLHT had been nullified. However, in their evidence the appellants did not tender any document

to contradict the 2nd Respondent's evidence on the tendered proceedings of the Ward Tribunal. Moreover, counsel for the Appellants did not even state the number of the case in which the Ward Tribunal proceedings were nullified. This court therefore, as it was the position of the DLHT cannot rely on a mere oral averment that the Ward Tribunal proceedings were nullified.

Notwithstanding my stance in the foregoing ground of appeal, since this court is first appellate court in the instant matter; in resolving the 2nd and 3rd grounds of appeal, I shall as well focus on the evidence adduced by the Appellants at DLHT in proving their claim that the Respondents invaded their land.

I wish to state at the outset that, the claim by the Appellants counsel in arguing the 3rd ground of appeal that the DLHT raised a new issue is not tenable. This is because, the issue '*whether the disputed land formed the estate of the late Martine Mwamakamba*' and '*who is the lawful owner of the disputed land*' are not different, issues. This is due to the fact that if the DLHT in resolving the issue of who is the lawful owner of the suit land would have reached to a conclusion that it is the Appellants' land, it would have automatically declared that the

same was forming the part of the estate of the late Martine Mwamakamba. Hence, the complaint is rejected.

As to the weight of evidence adduced by the parties before the DLHT; the general principle is that "he who alleges has a burden of proof" as per **section 110 of the Evidence Act**. It is equally the cardinal principle of the law in a civil case that the standard of proof is on a balance of probabilities. This means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

In **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported), the Court of Appeal of Tanzania quoted with approval comments from **Sarkar's Laws of Evidence**, 18th Edition **M.C. Sarkar, S.C. Sarkar** and **P. C. Sarkar**, published by Lexis Nexis as below:

*"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden discharged the other party is not required to be called to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until***

he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...."

In the circumstance therefore, the Appellants were supposed to prove that the late Martine Mwamakamba did not sale the suit land to the Fr. Mpepo and that they were occupying and using the same from 1998 to 2019. The Appellants also had a burden of proving that the Respondents invaded the in 2019. After going through the evidence adduced by both suit-land the Appellants and the Respondents, alongside their documentary exhibit tendered, it is obviously the Appellants relied on the letter (exhibit P1). The letter nonetheless, for readymade reference is written in a relevant part as follows:

"kuhusu shamba ninayoimani kwamba utamwamini huyo Kaka Abel Justine Mpepo awe ni shahidi kwenye makabidhiano ya shamba hilo la binamu yetu Clement Albert Msalangi. Kitu ninachokumbuka tu ni kwamba bado nina deni la sh. 5000/= sina shaka kabla hujaondoka nitakuwa nimelipa hakuna wasiwasi na wala si lazima uliandike."

That pertinent part as quoted from a friendly letter written on 25.4.1996 from Fr. Mpepo to the late Martin Mwamakamba is the one relied by the appellants in proving that Fr. Mpepo did not settle the purchasing price hence the land returned to the deceased. Before I resort to consider letter, it should be noted that indisputably is the fact

that the Appellants and the 2nd Respondent are on agreement that the sale agreement between the late Martin Mwamakamba and Fr. Mpepo was an oral agreement. Thus, the appellants did not totally deny that the late Martine Mwamakamba had sold the suit land to Fr. Mpepo. The letter tendered and relied upon by the appellants wanted to prove that Fr. Mpepo did not settle the debt.

Nonetheless, it is my considered position that the letter is neither a commitment letter signifying that he (Fr. Mpepo) failed to pay nor an agreement between the two that the buyer has returned the land to the owner. When read closely, especially the reproduced part above, it is clear that Fr. Mpepo was confirming to pay the debt as soon as possible. Again, the same letter does not talk about the suit land but the land of one Clement Albert Msalangi which the Appellants did not tell the DLHT how it related with the suit land.

Still, for the sake of argument, even if this court would assume that the said land is the land at issue, the letter was written in 1996, and the deceased passed on in 1998. The Appellants did not tell the DLHT or tendered any evidence to prove that from 1996 to 1998, Fr. Mpepo did not settle the debt. On that base, it is my finding that the late Martine Mwamakamba sold the suit land to Fr. Mpepo before his demise.

It follows therefore that, the evidence adduced by Fatuma Mwamakamba before Igurusi Ward Tribunal as and as relied by DLHT and estoppel her from contradicting her own statement, was just corroborating the claim by the 2nd respondent that his brother Fr. Mpepo purchased the suit land and gave it to him in 1998.

At this juncture, the remaining controversy is the evidence from both sides (i.e the Appellants and the 2nd Respondent) each claiming that since 1998 they have been using the suit land. To resolve this contest, I have again, gone through the evidence and considered the circumstance of the case. While the Appellants are claiming that they were using the land uninterrupted; the other side also maintain that he was not interrupted for all that time. Again, while the Appellants said so and ended there, the 2nd Respondent added that he was using the land from 1998 to 2012 when he sold it to the 1st Respondent. That averment was not contradicted but was just corroborated by the evidence that in 2019 the Catholic Church sued him claiming that he invaded the land in 2012. The circumstance indicates therefore that the dispute did not raise in 2019 as the Appellants claimed.

Moreover, there is no dint of imagination and does not add up that the 2nd Respondent who was not using the land but for about 22 years

would out of nowhere emerged and decide to go in the suit land and sale the same to the 1st Respondent. This makes this court to believe the 2nd Respondent's evidence that he was using the suit land uninterrupted from 1998.

The shortfalls on the evidence of the Appellants lead this court to find that the 2nd Respondent's evidence was more credible and stronger than that of the Appellants. Owing to the findings above, I uphold the decision of the DLHT that the suit land is the property of the 1st respondent for he lawfully purchased from the 2nd Respondent hence does not form part of the deceased's estate. I therefore dismiss the appeal with costs.

Ordered accordingly.



R.A. Ebrahim

JUDGE



Mbeya

09.09.2022