

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

MISC. LAND APPEAL NO. 5 OF 2022

(From the decision of the District Land and Housing Tribunal of Nzega District at Nzega in Land Case No. 39 of 2021 and Original Ward Tribunal of Mwisi Ward Application No. 3 of 2021)

NGAYABULA MSENGIAPPELLANT

VERSUS

SUZANA MGAIWA MIZIMU.....RESPONDENT

JUDGMENT

Date: 03/8/2022& 7/10/2022

BAHATI SALEMA, J.:

This is a second appeal. In the District Land and Housing Tribunal (hereinafter referred to as the Tribunal), the appellant **Ngayabula Msengi** herein, sued **Suzana Mgaiwa Mizimu** claiming to be the lawful owner of the land in dispute. The case ended in favour of the respondent.

Being aggrieved by the judgment of the District Land and Housing Tribunal of Nzega dated 29/10/2021 before Hon. V. A. Ling'wetu – Chairman hereby sets forth grounds of appeal as follows:-

- 1. That, the chairman of the tribunal erred in law and fact in not considering the issue of illegality as the respondent was suing in her*

capacity for recovery of her late father without a letter of administration contrary to the probate law.

- 2. That, the chairman of the tribunal erred in law and fact by ignoring the point of non-joinder.*
- 3. That, the chairman of the tribunal erred in law and fact in holding that the Ward Tribunal properly evaluated weights of evidence for both parties while the same was not.*
- 4. That, the chairman of the tribunal erred in law and fact by holding that the appellant invaded the suit land while he has for a long time been under actual occupation and utilization.*

At the hearing of this appeal, both parties were unrepresented.

Submitting on the first ground the appellant stated that the respondent sued in her capacity for the recovery of her late father without having a letter of administration.

As to the second ground of appeal that, the chairman did not join her relative to support if it was their area. He submitted that the respondent's sister who is living at Mizanza for a long time and was aware of the disputed area but was never joined in this case.

On the third ground of appeal, the appellant submitted that the chairman erred in law in holding that the Ward tribunal properly

evaluated evidence by considering the weights of evidence from witnesses who were from far away.

On the fourth ground of appeal, he submitted that he was born in 1973 in the disputed land and that his parents have been buried there for almost 40 years.

Replying to the first ground of appeal, the respondent submitted that she had the capacity to sue in this case since she has been appointed as administratrix of the estate by letter dated 7th January, 2021 before the commencement of the case.

On the second ground of the appeal on non-joinder of parties, she submitted that since the property belongs to their father, the one with the capacity to sue was the respondent, the administrator of the estate.

Furthermore, on the third ground of appeal, the respondent stated that from the beginning this case has been heard and started afresh. The chairman evaluated properly the evidence and concluded that she is the lawful owner. Therefore the learned chairman was right to hold that the respondent is the lawful owner because her evidence was heavier compared to the appellant all those times.

As to the fourth ground of appeal, the respondent stated that the fact that the appellant stayed on land for a long time needed strong evidence which was never proved rather it was the respondent's father

who stayed in the disputed land for more than 50 years without any dispute. She stated that according to the Ward Tribunal decision, the late father of Suzan used to occupy the disputed land for 50 years without interruption. She stated that during the hearing at the Ward Tribunal on page 2 of the record Kapola Swakala (92) supported that. Hence the evidence on the part of the respondents was weightier compared to the appellant. That is why in all places the respondent succeeded in the case. She prayed this matter to be dismissed with costs.

In a shorter rejoinder, the appellant stated that the respondent is trying to mislead the court as she never occupied the suit land, and it is not true that they stayed there for 50 years. He stated that the truth is that it was the appellant who had been in occupancy for more than 40 years undisturbed.

Upon considering the records and submissions by both parties, the issue to be determined by the court is whether the appeal is meritorious.

This being the second appeal, the question to be addressed at this juncture is whether this court, being a second appellate court, can and should re-evaluate the evidence on record. Being a second appeal, the duty of this court was explained well by the Court of Appeal in ***Amratlal D. M. t/a Zanzibar Silk Stores v A. H. Jariwara t/a Zanzibar Hotel*** [1980] TLR 31, CAT, ***D.P.P. v J. M. Kawawa*** [1981] TLR 143 as hereunder;

"On a second appeal, this Court will not interfere unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice, or a violation of a principle of law or practice".

I have prudently considered the submissions from both parties. This being the second appeal, I am guided by the principle that the second appeal court does not ordinarily interfere with findings of fact by the courts below unless there is misdirection or non-directions on the evidence.

To begin with the first ground of appeal that the chairman of the tribunal erred in law and fact in not considering the issue of illegality as the respondent was suing in her capacity for recovery of her late father without a letter of administration contrary to the probate law.

This court having perused through the court records has noted that the letter of appointment administrator dated 7/6/2021 was admitted at the ward tribunal while the appellant had nothing in respect of his grandfather.

It is a salutary principle of law that no one may have the capacity to dispose of the deceased property or sign any document on his behalf unless he has been properly appointed as the administrator or executor of the deceased's estate.

Section 99 of the Probate and Administration of Estate Act, Cap. 352 provides that;

"Character and property of executor or administrator as such the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him on such."

Guided by the above principle I find that this ground has no merit.

As to the second ground of appeal, the chairman of the tribunal erred in law and fact by ignoring the point of non-joinder.

As alluded to earlier on the first ground of appeal that since the respondent was appointed as administrator of the estate of her father, I do not agree that the appellate tribunal erred in law and fact for non-joinder of Suzan's sister rendered the proceedings fatal. I find no reason of joining other people since she was the proper party to sue.

As to the third ground of appeal that the chairman of the tribunal erred in law and fact in holding that the Ward Tribunal properly evaluated weights of evidence for both parties while the same was not.

Having perused the evidence of both parties I have noted that the evidence of PW1, Kasim Simbila who testified at the Ward Tribunal that

he used to be a casual worker of the late Mizimu for 25 years and also PW2 Kishiwa Mdazi testified that Ngayabula was living with his grandfather and used to trespass on Mizimu's land and upon been called he used to pray for forgiveness and continued trespassing in every year. He stated that in 2017 Ngayabula invaded the land but from 1965 to 2014, the appellant Ngayabula was not there. This was also corroborated by Ngayabula Msengi during cross-examination by the Applicant at the Ward Tribunal he stated that; I quote;

"Wakati umeshtakiwa kwa Mwenyekiti wa kitongoji unakumbuka uliwahi kukiri zaidi ya mara tatu juu ya kuvamia shamba hilo?"

Jibu: Ninakumbuka niliwahi kukiri lakini nilikuwa nikilazimishwa na wazee wa kitongoji.

On the contrary, the defence side, DW2 Sweya Maganga Mbuliyimo stated that in 1974 they were moved by operation Kijiji and later on they came back after 5 years. DW4 Joseph Maganga stated that in 1993 his grandfather died and was buried in the place where he was given by the government. It is an established principle that the courts should look at the weight of the evidence to rule out in his favour, the said principle was established in the case of **Farah Mohamed Vs. Fatuma Abdallah** [1992] TLR 205.

In this matter at hand, it is my considered view that the respondent's evidence was heavier than that of the appellant which the tribunal evaluated and considered. I also find no merit in this ground.

As to the last ground of appeal that the chairman of the tribunal erred in law and fact by holding that the appellant invaded the suit land while he has for a long time been under actual occupation and utilization. According to the evidence given by the respondent's witnesses, the late Mgaiwa Mizimu has been in occupation for almost 50 years without any dispute, and the evidence of DW2, Sweya Maganga testified that in 1974 they were moved, DW3 Donald Jibungulyahanze stated that for almost 9 years half they have been there.

Hence looking at the evidence on record and the decision of the Tribunal, I decline to state that the lower tribunals did not appraise the evidence, it is very clear that the tribunals discharged their obligations to evaluate the evidence on record. In this second appeal, this court does not see any misdirection or non-direction in the evidence or in the decision of the Ward Tribunal and that of the District Land Housing Tribunal.

In the upshot, this court declines to interfere with the findings of the lower tribunals. All said and done, I find that this appeal lacks merit and is hereby dismissed with costs.

Order accordingly.



A. BAHATI BAHATI

JUDGE

07/10/2022

Court: Judgment delivered under my hand and seal of the Court in the Chamber, this 7th day of October, 2022 in presence of both parties via virtual court.



A. BAHATI SALEMA

JUDGE

7/10/2022

Right to Appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

7/10/2022