

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
MISC. LAND APPEAL NO. 09 OF 2021

(Originating from Decision of the District Land and Housing Tribunal for Rukwa District at Sumbawanga in Land Appeal No. 06 of 2018 Original Land Dispute No. 06 of 2018 Kaengesa Ward Tribunal)

SALVATORY KAYOWA (The Administrator of Estate of Late) **KARITAS KAYOWA**.....**APPELLANT**

VERSUS

GODFREY NYAMI.....**RESPONDENT**

JUDGEMENT

Date of last Order: 09/09/2022
Date of Judgment: 02/11/2022

NDUNGURU, J.

This is a second appeal. The matter has its genesis from Kaengesa Ward Tribunal (henceforth the trial tribunal). At the trial tribunal the respondent herein successfully sued the appellant claiming ownership of piece of land. Dissatisfied the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Rukwa (henceforth the Appellate Tribunal) where the respondent was declared the rightful owner of the disputed land.

Aggrieved by the appellate tribunal decision, the appellant has preferred this appeal by lodging the following grounds of appeal;

- 1. That the Appellate Tribunal erred in law and fact for entertaining the matter in favour of respondent against the appellant who died during the appeal without giving relative of deceased person opportunity to appoint the administrator of deceased estate of appellant to stand on behalf of deceased.*
- 2. That the Appellate tribunal erred in law and fact by failure to consider the principle of adverse possession.*
- 3. That the Appellate tribunal erred in deciding the dispute without analyzing the evidence of appellant properly which prove the ownership of disputed land by appellant*
- 4. That the appellant tribunal erred in law and fact for failure to consider that the decision of trial tribunal does not show how it was arrived.*

As this appeal was called on for hearing, the appellant had a legal service of Ms. Neema Charles, learned advocate whilst the respondent appeared in person, unrepresented. Both parties agreed for the appeal be disposed by way of written submissions. Written submissions were filed as scheduled by this court.

In support of his appeal, Ms. Neema Charles submitted that as regards the first ground that the appellate tribunal erred to allow Salvatory Kayowa to argue the appeal of late Karitas Kayowa by way of written submission without been appointed as administrator of estate the late Karitas Kayowa contrary to Order XXII rule 3 of the Civil Procedure Code Cap 33 RE 2019 which provides that surviving party is

required to make an application for legal representative of the deceased to be joined in the proceedings failure may lead for the suit to abate. She submitted further that on 07th day of November 2019. Mr. Salvatory Kayowa before being appointed administrator of estate of late Karitas Kayowa informed the appellate tribunal that the appellant (now deceased) had passed away on 17th day of July 2020. Mr Neema Charles contended that the proceedings of the appellate tribunal a nullity for failure to observe the law, and she fortified her position to the Court of appeal case of **Sharifu Nuru Muswadiku vs Razaka Yasau and Mswadiku Chamani**, Civil Appeal No. 48 of 2019 and case of this court of **Kasiano Kasamya vs Deus Seula**, Misc. Land Case No. 16 of 2010.

As to the second ground, Ms. Neema Charles submitted that the evidence adduced by the appellant (the deceased) and his witness proved the ownership of land in dispute since the lawful owner of the land in dispute was his late father for long time since 1972 up to 2000 when he was demised and the respondent filed the land in dispute on 2018 to claim that the land in dispute belong to him while the whole time before the demise of the late father of appellant now deceased person has been cultivating the disputed land without any disturbance from the respondent neither claim that the late father of appellant now deceased person was invitee to the said land in dispute. She said by

instituting the land in dispute in 2018 at the Kaengesa Ward Tribunal lacked jurisdiction to entertain it. She referred the case of **Shaaban Nassoro vs Rajab Simba** [1967] H.C.D 233. She submitted that the appellant (the deceased) and his late father now deceased person has been in possession of the disputed land for 46 years, cultivating and developing it while the respondent did nothing to stop him, or institute the suit before a tribunal with competent jurisdiction.

As to the third ground, she submitted that the evidence adduced by the appellant (the deceased) and his witness proved the ownership of the said land in dispute and the evidence adduced by Salvatory Kayowa which prove that the father of Karitas Kayowa started to own the land in dispute since 1972 up to 2000 when he passed away. The appellant (the deceased) continued to use the land from 2000 up to 2018 without any interference from the respondent. She contended that the principle of invitee was wrongly invoked as respondent failed to claim the land during lifetime of the appellant's father.

As to the fourth ground, she submitted that the decision of the trial tribunal did not observe section 4 (4) of the Ward Tribunal Act, Cap 206 RE 2019 that the decision of the majority of members present shall be deemed to be the decision of the tribunal.

Finally, she prayed for the appeal be allowed, revise and quash the decision of the trial tribunal and the appellate tribunal with costs.

In reply, as to the first ground ideally the respondent conceded the fact that Salvatory Kayowa prosecuted an appeal by submitting written submission without applying to the court to be made a party to an appeal.

Further, the respondent submitted that he called a witness at the trial tribunal who testified to have witnessed borrowing of disputed land to the appellant's father and that there was no dispute between respondent and Karitas Kayowa's father who observed terms and conditions of borrowing including boundary marks. He submitted further that there is no doubt that Karitas Kayowa was an invitee on the disputed land and Karitas Kayowa's father was invited to the disputed land as per the case of **Maigu E. Magenda vs Arbogast Mango Magenda**, Civil Appeal No. 218 of 2017.

Further, the respondent submitted that since Karitas Kayowa testified to have had a right of entry as an heir, he cannot again claim to be the owner of the disputed land through adverse possession. He submitted that Karitas Kayowa occupation of the disputed land cannot said to be amounting to adverse possession as the same is derived from

the respondent's permission. He contended that on balance of probability the appellant failed to prove the case.

Lastly, he submitted that Chairman of the tribunal is independent in exercising his powers of adjudication and shall take into account the opinion of the assessors but shall not be bound by it, except that the chairman shall in the judgement give reasons for differing with such opinion.

He prayed for the dismissal of the appeal with costs.

In rejoinder, the appellant prayed for the appeal be allowed basing on his grounds of appeal.

I have keenly followed the arguments of the learned counsel for appellant and that of the respondent and I have read between the lines the appellant grounds of appeal and the entire proceedings of the tribunals below.

Foremost, I am aware that it is on very rare and exceptional circumstances the Court will interfere with the findings of fact of the lower courts. See the cases of **Materu Laison and Another vs R. Sospeter** [1988] TLR 102 and **Amratlal Damodar and Another vs H. Jariwalla** [1980] TLR 31. In the case of **Amratlal Damodar and Another vs H. Jariwalla** [supra], the Court of Appeal held that: -

"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure."

Let me, addressing the first complaint by the appellant that the appellate tribunal erred in law for failure to provide opportunity to the relatives of the deceased to appoint the administrator of the deceased one Karitas Kayowa who died during hearing of the appeal.

It is on record of the appellate tribunal proceedings that on 7th day of November 2019 when an appeal came for hearing, Mr. Salvatory Kayowa notified the appellate tribunal that the appellant one Karitas Kayowa died on 27th day of October 2019, he however prayed for the appeal to be argued by way of written submissions since the administrator has not been appointed. Surprisingly, the appellate tribunal instead of informing Mr. Salvatory Kayowa representing the deceased the right to cause the legal representative of the deceased plaintiff to be made a party so as to proceed with the suit as per **Order XXII rule 3(1)** of the Civil Procedure Code, Cap 33 RE 2019, it proceeded to order for the appeal be argued by way of written submissions. Mr. Salvatory Kayowa who was yet to be appointed

administrator of the estate of late Karitas Kayowa by then was ordered to file written submission which I think was fatal.

The appellate tribunal ought to have provided opportunity for the deceased relatives to appoint administrator first before proceeding with the suit, short on that the suit abate as per **Order XXII rule 3 (2)** of the Civil Procedure Code [supra]. Consequently, the Judgment and decree of the appellate tribunal reads the name of the deceased who died during the hearing of an appeal.

Having noted the above irregularity which goes to the root of the suit which suffice to dispose of the entire appeal without discussing other grounds of appeal. I find necessary for this court to interfere the findings of the appellate court as there is violation of the principle of law as hinted above. See **Sharifu Nuru Muswadiku Vs. Razaka Yasau & Another**, Civil Appeal No. 48 of 2019 ACT (Unreported) at Bukoba Sub registry.

I view of the above reason, I nullify the proceedings, judgement and decree of the District Land and Housing Tribunal for Rukwa at Sumbawanga. I order the judgment and decree of Kaengesa Ward Tribunal to be in force until it is otherwise varied through a properly conducted appeal.

Considering the justice of this case, I make no orders as to costs.

It is so ordered.



D. B. NDUNGURU

JUDGE

02. 11. 2022

ORIGINAL