IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 25 OF 2022

(C/F Land case No.33 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi)

MSAFIRI SHABANI (As Administrator of the Estate of the late Shaban Mohamed) ..... **APPELLANT**

VERSUS

KASSIMU THABITH MVUNGI (As administrator of the Estate of the late Ramadhan Athuman) ..... **RESPONDENT**

JUDGMENT

19/10/2022 & 28/11/2022

SIMFUKWE, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) in Application No. 33 of 2018. The dispute related to a piece of land measuring 1.4 acres located at Malindi Oriya village in Kahe Ward, in Moshi District. The appellant herein alleged before the trial tribunal that the disputed land belonged to the estate of the deceased Shaban Mohamed who inherited it from his parents while the respondent herein claimed the same to be the property of the late Ramadhan Athuman which he inherited the from his grandfather one Mohamed Athumani.

The trial Tribunal decided in favour of the respondent, that the disputed land is part and parcel of the estates of the late Ramadhan Athuman. The

appellant was aggrieved and he appealed to this court on the following grounds:

1. *That the trial tribunal erred in law and fact by failing to evaluate and address the evidence properly which led to the miscarriage of justice.*
2. *That the trial tribunal erred in law and fact by not finding that the respondent herein had no locus standi.*
3. *That the decision of the trial tribunal lacks legal reasoning.*

Hearing of the appeal proceeded by filing written submissions, the appellant was not represented while the respondent had the service of Mr. Phillip Njau, the learned advocate.

In support of the first ground of appeal on failure by the trial tribunal to evaluate the evidence, the appellant submitted to the effect that during the trial, he had four witnesses including his mother DW2 whose evidence was that she has been in the disputed land since 1970 when she was married and in 1993 when her father-in-law passed away. She continued to cultivate the suit land until 2009 when her mother-in-law passed away. That, it was after the demise of her mother when relatives from Tanga were granted letters of administration. Another witness was DW3 one Dickson Oseniel who said that he was the neighbour to the suit land and knew that the suit land was owned by the appellant's late father who was cultivating the same since 2000. DW4 had the same evidence as that of DW3.

Basing on the above evidence, the appellant argued that it is not understood why the trial tribunal held that evidence of the respondent was so strong as compared to his evidence since the legal requirement is

that one who alleges to the existence of a certain fact bears the responsibility of proving it as provided for under **section 110 of the Evidence Act, Cap 6 R.E 2019**. That, in the present case the respondent had the burden of proving existence of what he alleged on balance of probabilities of which in the present appeal weight of evidence was less on the respondent's side.

In concluding the first ground, the appellant faulted the trial chairman for failure to properly analyse the adduced evidence. He urged this court being the first appellate court to re-assess the evidence adduced before the trial court as it was held in the case of **Ndiku Ngasa vs Masisa Magasha [1999] TLR 202**.

In respect of the 2nd ground of appeal which concerns *locus standi,* the appellant defined the term *locus standi* as the right to bring action to be heard in court or ability to bring action to court of law or to appear in court. It was submitted that the respondent claims that the suit land was owned by the late Ramadhani Athuman who inherited the same from his grandfather one Mohamed Athuman in 2012 while in actual sense his grandfather died in Tanga and was buried in Tanga in 1993 and his father Ramadhani Athuman died in Tanga in 2002 and was also buried in Tanga. That, it was after the death of their grandmother in 2009 when the respondent was granted letters of Administration. Thus, the said distribution that overlooked the appellant's father Shaban Mohammed at page 3 was after the respondent's grandfather and grandmother had died.

It was further stated that no evidence was tendered to substantiate the claim that the late Mohamed Athuman had bequeathed his estate to the respondent's father. That, the properties of the appellant's father are in

Kahe Ngaseni Moshi Rural and the suit land is the property of the appellant located at Oriya, Kizungo Kahe. He blamed the trial Tribunal for failure to visit the locus in quo to ascertain the actual suit land as prayed by the appellant though such prayer was not recorded in the proceedings and the trial tribunal disregarded the evidence of DW3 who is the neighbour to the suit land.

The appellant insisted that the respondent herein had no authority express or implied to prosecute the claim where the appellant's father has been cultivating the disputed land since 1993 and after his demise the appellant's mother cultivated the land until 2009.

On the last ground of appeal, it was argued that the trial tribunal erred in basing its decision on Kahe Ward tribunal's decision in Case No. 19 of 2015 and Appeal No. 61 of 2015 whose proceedings were quashed and set aside without ascertaining the reason for the same to be quashed. That, the proceedings were quashed on the reason that the suit land exceeded 3 million.

The appellant stated that it is not disputed that it was after the demise of the respondent's grandmother in 2010 when he was granted letters of administration and that exhibits tendered i.e., Form No. VI and judgment in Criminal Case No. 1/2012 that the tribunal relied in making its decision, were all acquired after the demise of the respondent's and appellant's grandfather and mother. It was further alleged that the said documents were used by the respondent as weapons to hurt the appellant and deprive him of his rights.

It was contended that the duty of the court is to measure the weight of evidence adduced by both parties together with their witnesses, test its

credibility prior to composing a verdict in contested facts in issue. To substantiate this contention, the appellant referred to the case of **Stanslaus R. Kasusura and A.G vs Phares Kabuye [1982] TLR 338**; in which it was held that:

> *"The trial Judge should have evaluated the evidence of each of the witness, assessed their credibility and made a finding on the contested fact in issue."*

The appellant emphasized that such evidence if analysed means the concept of ownership in more than 12 years by the appellant's father ought to have been judicially noted.

The appellant prayed the appeal to be allowed with costs.

In reply, the learned advocate for the respondent narrated the gist of the dispute and argued that before the trial tribunal the issues were:

i) Whether the disputed land was part of the estate of the applicant Ramadhani Athumani or Shaban Mohamed
ii) Whether the respondent trespassed to the suit land
iii) To what reliefs parties are entitled.

Mr. Njau submitted that it is not disputed that the land belonged to one Mohamed Athuman (deceased), what is in dispute is who between the parties was bequeathed the land. Narrating the evidence before the trial Tribunal, the learned advocate argued that the respondent herein tendered documentary evidence that proved that it was Ramadhani Athumani who inherited the disputed land from the estate of the deceased Mohamed Athumani. That, the documents included Form No. VI in Probate Case No. 12 of 2010 of Kahe Primary court and copy of judgment

in Criminal Case No. 12 of 2012 which showed that Shaban Mohamed was sued and found guilty for criminal trespass over the suit land. He was sentenced to six months imprisonment.

Mr. Njau argued further that the appellant testified as DW1 whose evidence was to the effect that he was the administrator of the estate of Shaban Mohamed who was his father and the disputed land belonged to Shaban Mohamed who inherited it from his father Mohamed Athuman. It was averred that apart from his evidence he had no any proof to show how the said Shaban Mohamed came to inherit the land from the estate of Mohamed Athuman and he didn't tender any document to support his evidence. DW2 stated that she is the mother of DW1 and that the disputed land initially belonged to Mohamed Athumani and his wife Amina Jumbe who were her in laws. She said that she lived with her in laws and cultivated the land and following the death of Mohamed Athuman in 1993, she continued to live with Amina Jumbe until her death in 2009. She concluded that the suit land belonged to herself after being given a piece of land measuring 4 acres by her father-in-law without saying when she was given the said land. She urged the tribunal to see that she cultivated the land all the time, however, her evidence doesn't show whether she cultivated the land as his property. It was stated that one can draw an inference that if this evidence can be taken to be true then he was cultivating the land with the permission of the owners who were Mohamed Athuman and Amina Jumbe as they were staying together. It was averred that the scenario doesn't confer ownership of the disputed land to the said Shaban Mohamed.

Furthermore, Mr. Njau submitted that **section 7 of the Evidence Act** provides for evidence to be given of facts in issue and relevant facts. He

cited the case of **Isidore Nsangu Tusevo vs Annete Altvater and Another, Civil Appeal No. 13 of 2002 [2005] TLR HC** to buttress his position.

It was reiterated that since there is no dispute that the disputed land initially was the property of Mohamed Athumani the issue before the tribunal was who bequeathed the same following the death of the said Mohamed Athuman. That, the applicant tendered Form No. VI which showed how the deceased's propertied were distributed among the heirs. That, the applicant further tendered judgment of Criminal Case No. 1/2012 in which the said Shaban Mohamed was found guilty of trespass. On the other hand, the appellant herein had no document to prove his allegations and Probate Cause No. 12/2010 remained unchallenged to date. That, the tribunal Chairman found that the disputed land belonged to the estate of Ramadhani Athumani and not Shaban Mohamed the decision which purely based on the balance of probability as to who had stronger evidence. Mr. Njau supported the findings of the tribunal Chairman.

Contesting the 2nd ground of appeal that the respondent herein had no *locus standi,* it was the contention of Mr. Njau that this ground is totally misconceived since the said Shaban Mohamed whom the Appellant is claiming to be administrator of the estate died without having established his ownership over the disputed land. There is no record showing that he was given the land by Mohamed Athuman. What can be derived from the evidence of DW2 is that the said Shaban Mohamed and DW2 used to cultivate the land at the pleasure of the deceased Mohamed Athuman and his wife Amina Jumbe. Mohamed Athuman died in 1993 and Amina Jumbe died in 2009. It is only after the death of Amina Jumbe in 2009 that the

appellant came to claim his inheritance which is in line with African way of life and the wishes of Mohamed Athuman who had indicated that his grandson would inherit the land after the demise of himself and his wife Amina Jumbe.

Moreover, the learned counsel submitted that it is natural that administrators of an estate shall claim the property that belonged to the deceased at the time of his death. That, in the instant case, the deceased Athuman Mohamed did not own the disputed land and the appellant who is his administrator cannot be heard to claim a property that was not established as owned by the deceased at the time of his death.

Responding to the third ground of appeal, that the decision of the trial Tribunal lacks legal reasoning, it was submitted that the records are very clear that the decision and the proceedings were quashed because the tribunal had discovered that the appellant herein had instituted the case at Kahe Ward Tribunal purporting to have Power of Attorney issued by the said Athuman Mohamed who by then was deceased person. That, the deceased person cannot issue power of attorney and the Tribunal was correct to quash that decision. That as correctly stated by the appellant, in the cited case of **Stanslaus** the duty of a court is to measure the weight of evidence adduced by both parties together with their witnesses, test its credibility prior to composing a verdict.

From the evidence tendered during hearing of Land Application No. 33 of 2018 at the trial Tribunal, the learned counsel submitted that the decision reached by the trial tribunal was clothed with legal reasoning which dispensed a fair justice to the parties.

Mr. Njau prayed the court to make a finding that this appeal is devoid of merit and proceed to dismiss it with costs.

I have considered the grounds of appeal, the parties' rival submissions as well as the trial Tribunal's records. In the due course of scrutinizing this appeal, I will deal with one ground after another.

On the first ground of appeal, the appellant faulted the trial tribunal for failure to evaluate the evidence and address the evidence properly which led to miscarriage of justice. The learned counsel for the respondent argued to the contrary; that the trial tribunal properly evaluated the evidence before it. That, evidence of the respondent herein before the tribunal was heavier than that of the appellant herein.

I have gone through the trial Tribunal's judgment; the learned trial Chairman was of considered opinion that evidence of the respondent herein was stronger than that of the appellant.

I also examined the trial tribunal' records to ascertain the findings of the trial Chairman. The trial Chairman did not evaluate evidence of the appellant herein *vis a vis* that of the respondent. In other words, he did not consider well evidence tendered by the appellant. Therefore, as rightly submitted by the appellant, this being the first appellate court, the court is duty bound to re-analyse and re-evaluate evidence of both sides and come up with its own findings. This has been stated in numerous authorities of the Court of Appeal, for instance, in the case of **Makubi Dogani vs Ngodongo Maganga, (Civil Appeal No. 78 of 2019 [2020] TZCA 1741** at page 11 it was held that:

"...this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision."

On the available evidence in the record before the trial tribunal, the respondent testified that the disputed land belonged to the late Ramadhani Athuman which was previously belonged to his grandfather one Mohamed Athuman. He tendered Form No. VI which was admitted as Exhibit P2 to substantiate that the said suit land was distributed to the late Ramadhan Athuman. He also testified that Shaban Mohamed trespassed to the said land and was convicted in Criminal Case No. 1 of 2012 as seen in the copy of judgment which was admitted during the trial as exhibit P3. His evidence was supported by the evidence of PW2.

On the other side of the coin, before the trial tribunal, the appellant herein testified that the suit land belonged to his late father Shaban Mohamed who inherited the same from his parents one Mohamed Athuman and Amina Jumbe. His evidence was supported by the evidence of DW2 and the neighbours DW3 and DW4 whose evidence was to the effect that the suit land belonged to appellant's father who inherited it from his parents and that they used to see him there.

From the above evidence, if the same is weighted on the scale of balance of probabilities, the only evidence which the respondent herein presented was Form No. V1. I clearly examined the said Form but I failed to see where the disputed land was distributed to the said Ramadhan Athuman. The said form only shows that Ramadhan Athuman was given *shamba ekari 5.5* and one roomed house. The form does not categorically state where the said properties are located. In addition, in this case, the

disputed land is 1.4 acres while in Form No. VI the distributed land is 5.5 acres. It has not been disclosed whether the disputed land is part of the distributed 5.5 acres. Thus, I am of settled opinion that the trial Chairman misdirected himself by declaring the said estate to be part and parcel of the properties of the late Ramadhan Athuman basing on such Form No. VI.

I am not in the same line with the trial Chairman that the disputed land belonged to the late Ramadhan Athuman simply because his representative presented Form No VI. There is enough evidence from the appellant herein to the effect that the said suit land belonged to Shaban Mohamed as he inherited the same from his parents and he resides on the said land as testified by his wife (DW2) and the neighbours to that suit land (DW3 and DW4). This goes without saying that the appellant's evidence before the tribunal was heavier than that of the respondent and I don't hesitate to conclude that, the disputed land was part and parcel of the estate of the late Shaban Mohamed. In the case of **Daniel Apae Urio vs Exim (T) Bank, Civil Appeal No. 185 of 2019 [2020] TZCA 163** the Court of Appeal cemented the principle of balance of probabilities by stating that:

> *"The yardstick of proof in civil cases is the evidence available on record on whether it tilts the balance one way or the other. Departing from this yard stick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases."*

On the second ground of appeal, it has been alleged that the trial Chairman failed to note that the respondent had no *locus standi*. It was argued that the respondent claimed that the disputed land was owned by

the late Ramadhan Athuman who inherited it from his grandfather and that there was no evidence to prove that the late Mohamed Athuman bequeathed the estate to the appellant's father.

I am aware that *locus standi* is the first determinant factor before instituting the case and it is a legal principle that the one bringing a claim before the court must have a right to do so (*locus standi)*. This has been well elaborated in the case of **Peter Mpalanzi vs Christina Mbaruka, Civil Appeal No. 153 of 2019 (CAT).**

In the instant case, the legal representative of Ramadhan Athuman one Kassimu Thabit Mvungi filed the case as legal representative of the late Ramadhan Athuman. This implies that he had *locus standi* since he claimed that the suit land belonged to Ramadhan Athuman. Therefore, this ground has no merit.

On the last ground of appeal, it was argued by the appellant that the decision of the trial tribunal lacks legal reasoning. This ground will not detain me since the same has been covered under the first ground of appeal on evaluation of evidence. The findings on the first ground of appeal have pre-emptied the 3rd ground of appeal.

Basing on the above findings of this court, I hereby quash and set aside the findings of the trial tribunal, I hold that the disputed land is part of the estate of the late Shaban Mohamed and allow the appeal with costs.

It is so ordered.

Dated at Moshi this 28th day of November 2022.

S. H. SIMFUKWE

JUDGE