THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

PC CRIMINAL APPEAL NO. 01 OF 2021

MESHAKI KINDAMBA MKIKA ..... APPELLANT

VERSUS

MAULID SAID KINYOA ..... RESPONDENT

(Being an appeal from the decision of the District Court of Kilombero at Ifakara)

(B.L. Saning'o, RM)

dated the 29th day of July, 2021

in

Misc. Criminal Application No. 04 of 2021

JUDGMENT

S. M KALUNDE, J.

In this appeal the appellant, MESHAKI KINDAMBA MKIKA, is challenging the decision of the District Court of Kilombero at Ifakara (hereinafter "the district court") dated 29.07.2021 in **Misc. Criminal Application No. 04 of 2021** (hereinafter "the application"). The decision being appealed against denied the appellant his request for the transfer of **Criminal Case No. 191 of 2020** to the district. Aggrieved by that the decision the appellant preferred and appeal to this Court.

The brief background to this appeal is that: before the Ifakara Primary Court the respondent instituted, against the appellant, Criminal Case No. 191 of 2021. In the said proceedings the appellant was charged with two counts, the first count was criminal trespass and the second was

threatening to kill. The said offences were contrary to sections 229 and 89B of **the Penal Code [CAP.16 R.E. 2019]** respectively. Having dully notified of the charges against him, the appellant, a lay person and self-confessed illiterate applied to have the matter transferred to the district court. His main reason was that he did not understanding the gravity of the charges against him and that he wanted to the matter tried at the district court so that he can engage an advocate to represent his interests. The district court which heard the application, refused to transfer the case on the ground that engagement of an advocate was not the proper reason for transfer of a case. The applicant is not happy with the said decision he has now preferred an appeal to this Court.

In the memorandum of appeal filed to this Court the appellant has preferred four grounds of appeal. The said grounds may be condensed into one major complaint that is, the district court erred in failing to consider the reasons contained in the affidavit filed in support of the application and thereby refusing to grant the application.

By the consent of the parties, hearing of the appeal was disposed by way of written submission. The appellant engaged learned counsel MR. ASIFIWE ALINANUSWE in drawing and filing his submissions whilst submissions of the respondent were filed by MR. FIKIRI LIGANGA, learned advocate. Submissions were dully filed hence this ruling. However, the appellant did not file his rejoinder submissions.

I have carefully examined the records of appeal and the competing submissions advanced by the counsel for both parties, in view of the same, I think the main issue for my determination is whether the present appeal is meritorious.

The corner stone of this appeal is the appellant's complaint against the decision refusing his application to have Criminal Case No. 191 of 2021 transferred to the district court. His application was based on his desire to engage an advocate to conduct the case on his behalf. By the time the appeal was filed the law precluded advocates from appearing or acting for any party in primary courts. However, the law has since changed. Through section 53 of **the Written Laws (Miscellaneous Amendment) (No. 3) Act No. 5 of 2021**, section 33 of **the Magistrate Court Act [CAP. 11 R.E. 2019]** was amended by inserting subsection (4) to allow advocates to allow advocates to appear or act for any party in primary courts presided over by a resident magistrate. The inserted section now reads:

> *"(4) Notwithstanding the provisions of this section, an advocate or public prosecutor may appear or act for any party in a primary court presided over by a resident magistrate."*

In support of the above position of the law, the counsel for the respondent argued that the present appeal is overtaken by events in view of the amendments brought about by **the Written Laws (Miscellaneous Amendment)** (supra). The counsel argued that the introduction of section 33(4) to the MCA meant that the appellants complaint that he cannot be able to defend himself without the aid of an advocate were no longer tenable. In accordance with the counsels' view, the appeal lacked merit and ought to be dismissed. For unknown reasons the appellant did not rejoin on this issue or file a rejoinder altogether. Perhaps, they it has become apparent to their knowledge that the appeal was indeed overtaken by events.

Undoubtedly, prior to the insertion of section 33(4) of the MCA advocates were precluded from appearing or acting any party in a primary court. The then existing section 33 read as follows:

> *"33.- (1)* ***No advocate or public prosecutor as such may appear or act for any party in a primary court.***
>
> *(2) Subject to the provisions of subsections (1) and (3) of this section and to any rules of court relating to the representation of parties, a primary court may permit any relative or any member of the household of any party to any proceedings of a civil nature, upon the request of such party, to appear and act for that party.*
>
> *(3) In any proceedings in a primary court to which a body corporate is a party (including proceedings of a criminal nature) a person in the employment of the body corporate and duly authorised in that behalf, other than an advocate, may appear and act on behalf of that party." [Emphasis is mine]*

Presently, with the amendments brought about by **the Written Laws (Miscellaneous Amendment)** (supra) by inserting section 33(4) to the MCA, advocates or public prosecutors are allowed to appear or act for any party in a primary court presided over by a resident magistrate.

It is trite that procedural law operates retrospectively. The position is however different when dealing with substantive provisions. As regards to amendments or new legislation affecting the substantive rights the law is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested. This view has been affirmed in various decisions including in the case of **Municipality of Mombasa vs. Nyali Limited** [1963] EA 37;

Benbros Motors Tanganyika Ltd. vs. Ramanlal Haribhai Patel [1967] HCD 435; and **Makongoro vs. Consigilio** [2005] EA 247.

In **Municipality of Mombasa vs. Nyali Limited** (supra) the defunct East African Court of Appeal stated:

> *"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."*

See also **Gasper Peter vs. Mtwara Urban Water Supply Authority**, Civil Appeal No. 35 of 2017, CAT at Mtwara; **The Director of Public Prosecutions vs Jackson Sifael Mtares and Three Others**, Criminal Application No. 2 of 2018, CAT; and **Lala Wino vs. Karatu District Council**, Civil Application No. 132 of 2018, CAT at Arusha (all unreported). Guided by the above. Position of the law, I am satisfied that the amendments brought about by **the Written Laws (Miscellaneous Amendment)** (supra) apply to Criminal Case No. 191 of 2021 which is pending at the Ifakara Primary Court.

Having said that, it is common knowledge that the Ifakara Primary Court is presided over by a Resident Magistrate. In the circumstances, the appellant may proceed to have legal representation of an advocate in attending Criminal Case No. 191 of 2021 which is pending at the Ifakara Primary Court. His rights for legal representation at the primary court are no longer an issue. This appeal is therefore overtaken by events. Since this is sufficient to dispose of the appeal, I see the no reason to deliberate on the remaining grounds of appeal.

In the event and for the foregoing reasons, the appeal is dismissed. Given the circumstances each party shall bare its own costs.

It is so ordered.

DATED at **MORORORO** this **23rd** day of **NOVEMBER, 2022.**

S. M. Kalunde

JUDGE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISCELLENEOUS LAND CASE APPEAL NO. 44 OF 2021

UPENDO ARON MGOGO ..... APPELLANT

VERSUS

ISRAEL ARON MGOGO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of District Land and Housing Tribunal for Kilombero District at Ifakara)

(C.P. Kamugisha, CM)

dated the 02nd day of December, 2020
in
Land Appeal No. 58 of 2020

JUDGMENT OF THE COURT

S.M. KALUNDE, J.:

This is a second appeal in which the appellant is challenging the decision of the Mang'ula 'B' Ward Tribunal in Case No. 16 of 2019 (hereinafter "the ward tribunal"). Before the ward tribunal the respondent instituted a suit against the appellant for trespass into his piece of land measuring 1.76 acres with Customary Title No. 084KLM/90397 located at Kanyenja, Mikoroshini Mang'ula 'B' Ward, Kilombero District in Morogoro Region registered in the name of Tusubilege Mwasika Mwasile (hereinafter "the disputed land"). The said title was issued on the 26.08.2018.

The background leading to the dispute before the trial tribunal was that: In 2001 the respondent was taken under the care of Aaron

Mgogo *(Baba Mdogo)* and Tusubilege Mwasika Mwasile *(Mama Mdogo)*. Apparently, the late Aron Mgogo is the appellants father whilst Tusubilege Mwasika Mwasile is the appellant's stepmother. The respondent stayed at Mzee Mgogo family where he was raised and schooled for the entire period until their demise. Mzee Mgogo passed away around 2012 whilst Tusubilege Mwasika Mwasile passed away in 2019. In 2018 before her demise, Tusubilege Mwasika Mwasile, managed to survey the suit property and was granted with a customary title with registration No. 084KLM/90397. On the passing of Tusubilege Mwasika Mwasile a dispute over ownership of the suit property arose. The respondent contended that the property was given to him by the deceased before her demise. The appellant on the other alleged that the suit property was part of the property of their father. Having heard the parties, the ward tribunal was satisfied that the respondent was the lawful owner of the suit property.

The appellant was not pleased by the decision of the ward tribunal. She unsuccessfully lodged Land Appeal No. 58 of 2020 at District Land and Housing Tribunal for Kilombero/Malinyi District at Ifakara (hereinafter "the DLHT"). She has now preferred the present appeal. The Petition of Appeal contains five grounds of appeal which may be summarized into mainly one complaints; that the DLHT erred in declaring the respondent to be the lawful owner of the suit property without evidence exhibiting how the property was transferred from the late Tusubilege Mwasika Mwasile to the respondent.

The appeal was argued by way of written submissions. However, it is on record that only the appellant was able to file her submissions. The respondent did not file their submissions. I take it that they have waived their right to be heard. I will therefore proceed to determine the appeal.

In her elaboration of the grounds of appeal the appellant alleges that in the first, second and fourth grounds of appeal relates to the DLHT failure to re-evaluate and analyze the evidence available on record and thereby arriving at an inaccurate conclusion that the respondent was the lawful owner of the suit property. She contended that the ward tribunal records were clear that the suit property was registered in the name of Tusubilege Mwasika Mwasile, her stepmother and guardian to the respondent. The appellant argued that it was improper for the respondent to be declared the lawful owner of the suit property on account of inheritance without proof of letters of administration. According to the appellant, allegation that the late Tusubilege Mwasika Mwasile gave him the disputed property before her demise were unfounded as the property was registered in her name and not that of the respondent.

Arguing on the third and fifth grounds of appeal the appellant contended that the respective grounds were question the respondent locus stand to institute the matter before the ward tribunal. The appellant argued that in absence of letters of administration appointing the respondent as an administrator of the estate of the

late Tusubilege Mwasika Mwasile the respondent had no locus to file the suit before the ward tribunal. In support of that contention the appellant cited the provisions of section 33 and 71 of **the Probate and Administrations of Estate Act, Cap. 352 R.E. 2019**. As for the question of locust standi the appellant cited the case of **Lujuna Shubi Ballonzi Senior vs. Registered Trustees of Chama Cha Mapinduzi** (1996) TLR 203, this Court (**Samatta, J** as he then was) acknowledged *inter alia* that:

> *"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court..."*

Relying on the above arguments, the appellant insisted that this Court finds merit in the appeal and proceed to allow the same and consequently, setting aside the judgment and decree of the DLHT and the ward tribunal.

Now that the appellant has questioned whether the first appellate court properly re-evaluate and analyze the evidence available, I propose to start by considering whether that duty was abdicated by the DLHT. In its decision, having considered the evidence on record, the first appellate court concluded that the respondent had established his ownership over the suit property through a registrable interest under the customary certificate of title

which had devolved to him following the demise of the lawful owner Tusubilege Mwasika Mwasile. The question now is whether these findings were supported by the evidence on record.

The respondent testimony before the ward tribunal was to the effect that the late Aaron Mgogo *(Baba Mdogo)* and Tusubilege Mwasika Mwasile *(Mama Mdogo)* had been living and take care of him since around 2001. The late Aaron Mgogo passed away in 2012, thereafter in 2014 the appellant and her relatives filed a suit against the late Tusubilege Mwasika Mwasile seek for distribution of the estate of the late Aaron Mgogo. It was resolved that all the properties remained to be the property of the late Tusubilege Mwasika Mwasile. In 2018 the land was surveyed followed by issuance of a customary certificate of title was issued to the said Tusubilege Mwasika Mwasile. Part of the respondents' testimony reads as follows:

> *"Mnamo 2001 nilifika Mangula na huyu mama aliniachia hilo shamba na marehemu baba mdogo ndiyo walikuwa wananilea. Walinisomesha kuanzia darasa chekechea hadi kidato cha nne mwaka 2012, Marehemu baba mdogo alifariki dunia. Alibakia mama mdogo alinilea hadi mwaka 3/2019 akafariki dunia – Iilipofika 2014 mdaiwa Pamoja na ndugu yake mwengine waliozaliwa kwa baba mmoja waliweza kumpeleka marehemu mama mdogo Mahakamani wakidai mali ya marehemu baba yao. Baada ya mama mdogo kuwashirikisha kwamba nataka kuuza sehemu moja ya kiwanja*

changu nataka nijenge nyumba nyingine ilikuwa nyumba hiyo imechoka. Ilikuwa inavuja sana. Ndipo walipoweza kumkatalia. Na kumwambia kuwa, huna mamlaka ya kutupangia mali alizoacha marehemu baba yetu. Ndipo Watoto hawa walienda kufungua mirathi lakini ilishindwa mali ilibaki kwa mke wa marehemu. Tangu hapo mdaiwa na ndugu zake walikuwa hawasalimiani na mke wa marehemu hivyo mpaka mungu anachukua uhai wake baada ya hapo nikawa nimebaki mimi na mama mdogo tu. Baada ya ndugu zetu kututenga. ***Katika familia hiyo tarehe 22/08/2018 baada ya mashamba hayo kupimwa tulienda na mama kwenda kupima hilo shamba ndipo waliposajili kwa jina lake Tusubilege Mwasike Mwasile na anayefatia ni mimi Israel Aron Mgogo baada ya marehemu mama kufariki dunia niliendelea kulitunza. Kwa sababu hilo shamba nimeanza kulitumia 2014****. Na shamba mwaka huu 2019 nilipotaka kwenda kulima shamba hilo nimekuta shamba hilo limekwisha limwa baada kuulizwa mdaiwa ndiyo amelima."*

[Emphasis is mine]

The above testimony is supported by **Daniel Peter Mdaila (AW2)** who recalled having seen the appellant cultivating on the suit property since around 2014. Another supporting testimony came from **Rosse Mwasika Mwasile (AW3)** a sister to the late Tusubilege Mwasika Mwasile. Her testimony was that she has been

cultivating on the farm between 2010 and 2013 before her sister took over the farm and handled it over to the respondent.

In addition to the above oral testimony, the respondent tendered in evidence a copy of the certificate of customary right of occupancy issued in accordance with provisions of **the Village Land Act, Cap. 114 R.E. 2019** (hereinafter "the Act). In accordance with the Act the procedure for the application, grant and management of customary right of occupancy is provided for under sections 22, 23 and 24. Under section 25 of the Act upon conclusion of the application procedure an applicant is granted with a **"certificate of customary right of occupancy"**. Section 25 reads:

> *"25.- (1)* ***Where a contract for a grant of a customary right of occupancy has been concluded, a village council shall, within not more than ninety days of that conclusion, grant a customary right of occupancy to the applicant who accepted the offer referred to in section 23 by issuing a certificate, to be known as a 'certificate of customary right of occupancy'*** *to that applicant.*
>
> *(2) A certificate of customary right of occupancy shall be–*
>
> *(a) in a prescribed form;*
>
> *(b) signed by the Chairman and secretary of the village council;*
>
> *(c) signed or marked with a personal mark by the grantee of the customary right of*

occupancy to which it relates at the foot of each page of the certificate;

(d) signed, sealed and registered by the District Land Officer of the district in which the village is situate.

It would appear that the late Tusubilege Mwasika Mwasile complied with the application procedure provided for under the Act. As a result, on 26.08.2018 she was granted with Customary Title No. 084KLM/90397. In terms of section 27 of the Act the Customary Title was given to the late Tusubilege Mwasika Mwasile for an indefinite period. The said certificate was tendered and admitted in evidence. According to "FOMU YA UHAKIKI WA MASLAHI KWA MPANGILIO" the late Tusubilege Mwasika Mwasile is registered as the lawful owner of the suit property and the respondent ISRAEL ARON MGOGO is registered as a person with registered interest over the suit property (**"Mtu/Watu wenye Maslahi"**). Neither the appellant or any member of the family objected to the issuance or grant of the customary right of occupancy to the late Tusubilege Mwasika Mwasile. I do not think it would be appropriate for them to appear and interfere was property now.

On the other hand, through her testimony, the appellant insisted that the suit property formed part of the property of her father. **Justin William Mdimi (RW2**) informed the ward tribunal that he was a neighbor to the suit property. This is correct and he indicated as such in the customary certificate of title. In addition to

that he said that the appellant was the daughter of the late Aron Mgogo. That was about it, there was nothing pointing to the fact that the witness knew the appellant as the owner of the suit property. **Kaisi Hosea Cheyo (RW3)** testified that the suit property was rented to Afredi Nyirenda after the demise of the late Aaron Mgogo and Tusubilege Mwasika Mwasile to avert family disputes. Throughout her evidence the appellant did not present any credible evidence that her father remained the lawful owner of the property of that she was the lawful owner of the suit property. In her testimony she admitted that the owner of the suit property was her stepmother. However, her complaint in this appeal and the appeal before the DLHT was that the respondent was not the owner but a mere beneficiary. But as I have endeavored to demonstrate above, the respondent is not merely a beneficially of the suit property has registered interest in the suit property.

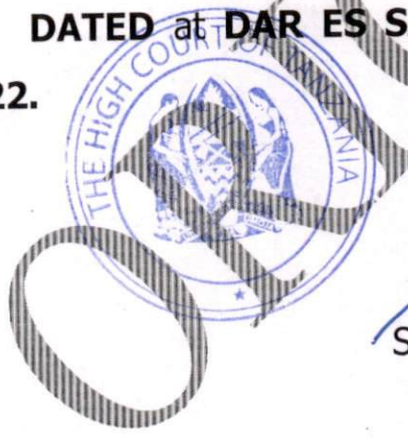
All said and done, like the two courts below, I am satisfied that the respondent had a right in instituting the suit before the ward tribunal because under the certificate of customary right of occupancy the respondent has a registered interest over the suit property. In my view he was not supposed to stand and watch when the appellant trespassed and interfered with the property to which he has registered interests. In similar vein, I am convinced that the two lowers' courts were correct in declaring the respondent to be the lawful owner of the suit property.

For the above reasons, I cannot interfere with the concurrent findings of the two lower courts because I have not seen any misapprehension the evidence or omission to consider available evidence. There is also no indication that the two lower courts have drawn wrong conclusions from the facts, or that there is a misdirection or non-direction on the evidence. As stated earlier, I see no reason to disturb or interfere with concurrent findings of the two lower courts.

In the end and for the above reasons, I am satisfied that the appeal is destitute in merits. It is accordingly dismissed. Given the circumstances, no order for costs is made.

It is so ordered.

DATED at **DAR ES SALAAM** this **24th** day of **NOVEMBER, 2022.**



S. M. Kalunde

JUDGE