**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**LAND APPEAL NO. 34 OF 2022**

*(Originating from the District Land and Housing Tribunal for Mbeya in Application No. 94 of 2020)*

Between

**PETRO SIMKOKO ..... APPELLANT**

**VERSUS**

**JOHN SIMKOKO .....1ST RESPONDENT**

**FRYWELL SIMKOKO .....2ND RESPONDENT**

**DANIEL JAMES SIMKOKO .....3RD RESPONDENT**

**ESTER JAMES SIMKOKO .....4TH RESPONDENT**

**MAXWELL SIMKOKO .....5TH RESPONDENT**

**JUDGMENT**

*Date of last order: 18th October, 2022*

*Date of judgment: 15th December, 2022*

**NGUNYALE, J.**

The respondents successfully sued the appellant in the District Land and Housing Tribunal for Mbeya in Application No. 94 of 2020 for his failure to surrender the land measuring thirty (30) acres located at Nkangamo Hamlet, Nkangamo Village with Momba District in Songwe Region.

What is obtained in record is that the first respondent on 15/4/2020 lodged the above application in the tribunal against the appellant. On 5/5/2020 the appellant filed his defence denying every allegation. On 4/2/2021 the first respondent then applicant prayed to amend the application by adding respondents. The amended application is not in record if it was filed but what is clear is that the appellant then the first respondent on 31/3/2021 filed the amended written Statement of defence. Again on 29/4/2021 the first respondent Prayed to amend the application by adding the applicants when now the current respondents became the applicants and the appellant became the respondent as depicted in amended application lodged on 3/5/2021. Records is not clear if the appellant filed his defence.

The application is not concise but what is obtained from the evidence is that the disputants are blood related whereas the appellant is the son of the respondent's brother that is the respondents and appellant's father shared father. The suit land was previously owned by the late James Simkoko, after his death Jimu Simkoko, the respondents' father inherited the shamba. Jimu Simkoko while the respondents were abroad distributed the farm about 970 acres and left only 30 acres for his children who were not present (respondents). The respondents alleged that it was left to the

appellant's father as a caretaker, in 2018 when they returned, they demanded from the appellant to be given the farm in vain. In the tribunal the respondents above testified as PW1, PW2, PW3, PW4 and PW5 respectively. They also called Abraham Samwel Siame (PW6), and Andson Simkoko (PW7) in their support.

On his part the appellant alleged that the suit land initially belonged to his father later Solomon Simkoko and in 1997 he gave it to him. He started using it for agriculture and in 2004 he applied and was granted a customary right of occupancy. He called two witnesses Bialess Simumba (DW2), Luka Robert Silozi (DW3) in his support.

Upon the trial, the chairman was impressed by the respondents' evidence that the appellant's father was just a caretaker after their father had left for his children who were not in the country and therefore declared them the lawful owner. Aggrieved the appellant has lodged the memorandum of appeal consisting of three grounds of appeal;

1. *That the trial tribunal erred in law and fact by entering the judgment in respondents' favour while they didn't have locus stand to sue the appellant hence reached to unfair decision.*
2. *That the trial tribunal erred in law and fact for failure to properly evaluate and analyse the evidence to decide in favour of the respondents hence led to unjust decision.*
3. *That the trial tribunal erred in law and fact as the respondents failed to prove their case on the balance of probabilities.*

When the appeal was place before me for hearing, parties appeared in person. They prayed the appeal to be disposed through written submission, the prayer was granted. Written submission of the appellant was drawn and filed by Isaack Chingilile, learned advocate of Chile advocates.

In the first ground Mr. Chingilile submitted that the respondents had no *locus standi* to sue because the suit land was claimed as part of the estate of their late father. He contended that rules on *locus standi* derives its origin on equity that a person cannot maintain a suit unless has sufficient interest in the subject matter. He cited the case of **Peter Mpalanzi vs Christina Mbaruku,** Civil Appeal No. 153 of 2019, CAT at Iringa (Unreported). Mr. Chingilile further argued that the title of the person who was in-charge of the distributed estate was not disclosed that is whether was the administrator or executor. He added that no ruling of the court was produced to prove that the disputed land was indeed distributed to them.

The second and third grounds were argued jointly, he submitted that the law as to burden of proof under sections 110 (1) (2) and 111 of the Evidence Act was not met. He stated that although the respondents said that they acquired ownership through bequeath but the title of the said

person was not clear in which capacity he acted and was not called as a witness. He contended that the very person was a material witness and their failure implies that he could have given evidence against them. He cited the case of **Hemedi Said vs Mohamed Mbilu** [1983] TLR 113 to support the preposition. He reasoned that there was no ruling or inventory from the court showing how the disputed land was distributed to them.

The other reason advance by the appellant's counsel was that, he tendered customary right of occupancy without objection from the respondents nor was the appellant cross examined on it. This he submitted was the acceptance of the truth of what the witness said. He cited the case of **Bomu Mohamed vs Hamis Amri**, Civil Appeal No. 99 of 2018, CAT at Tanga. He went on to argue that ownership of the appellant through customary right of occupancy was not in dispute and was not challenged by the respondents. From the submission he concluded that the respondents failed to proof their case as per section 3 (2) (b), 111 and 112 of the Evidence Act. He prayed the appeal to be allowed with costs.

Responding to the above submission the respondents submitted that the issue of *locus standi* was a new issue hence not maintainable at this stage. They challenged the appellant for not grasping their testimonies. The

respondents went on to submit that there was evidence that their late father had 1000 acres, 970 was distributed to the appellant and four others and 30 acres to them as they were not present at home. They added that the said land was unevenly distributed to them, but 30 acres were left to the appellant as the guardian after being appointed by the clan. They challenged the case of **Peter Mpalanzi**(supra) for being irrelevant.

The respondents went further to submitted that customary law is among the sources of law in this country since 1963 via G.N. 279 and 436 of 1963. They contended that PW6 and PW7 being the chiefs of Nyamwanga testified how the estate was distributed as per the customary law which existed among the Nyamwanga.

Regarding the second and third grounds, the respondents submitted that their evidence adduced in the tribunal was strong and watertight to prove the case on balance of probability. They contended that the appellant led no evidence to prove that he was given the suit land by his late father as no family member was called in support. They stated that under customary law the head of the family need not necessary to be the administrator rather the elder and in this case the appellant's father was so appointed to be a custodian of their land and it is after his death the

appellant wants to grab the land from them. They challenged the appellant's submission that they ought to have called him while he was aware that he is died. Regarding customary right of occupancy, they submitted that they objected to its admission because it was in the name of the appellant's brother, Jox Simkoko who had a dispute in the ward tribunal of Nkangamo in 1918 with the first respondent. They distinguished the case of **Bomu Mohamed** (Supra) relied by the appellant with the present one. They added that the tribunal was right to make reliance on their evidence as PW6 and PW7 were the village chairman and head chief where the disputed land is located and who participated is the distribution of the land to them. From the above submission they prayed the appeal to be dismissed with costs.

In rejoinder Mr. Chingilile submitted *locus standi* is the issue of law which can be raised at any stage of proceedings even at the appeal. Regarding the suit land being distributed under customary law he stated that customary law is not applied by ignoring the law which requires the administrator or execute to be appointed for distribution of the deceased estates. He added that the respondents were supposed to apply to the primary court to have the estates distributed in accordance with section 18 (1) (a) (i) and 5th schedule of the Magistrates' Courts Act and rule 3 of

the primary court (Administration of Estates) Rules G. N. No. 49 of 1971. He said if the clan distributed it was the executor of his own wrong.

On evaluation of evidence, submission in chief was restated. He added that the respondents were supposed to bring their action within twelve years as was stated in the case of **Yusuph Same vs Hadija Yusuf** [1996] TLR 346.

Having carefully considered the record and the submissions of the parties, the appeal will be determined in the way it was argued by the parties that the first ground will be determined separately and the second and third will be canvases together.

Before, as observed that there is no WSD by the appellant to the amended application lodged on 3/5/2021. After revisiting the record, I have found the anomaly not fatal because the application lodged had no substantial changed as it is only parties who changed and all along the appellant had been filing his WSD which also had no changes. Keeping up with the overriding objective principle in our law under section 3A and 3B of the Civil Procedure Code which propagates for the substantial justice by the Court without regard to undue technicalities, the omission was not fatal to the proceedings.

In the first ground, I will start with the complaint by the respondents that it is a new issue. As rightly argued by the appellant's counsel the issue of *locus standi* is a point of law which can be raised at any time even at the second or third appeal even if it was not decided by the lower courts. See the case of **Kariakoo Auction Mart vs Mashaka Dyanga,** Civil Appeal No. 234 Of 2019, CAT at Dar es Salaam (Unreported). Therefore, the respondents' complaint is unmerited.

Submitting on *locus standi* the Mr. Chingilile argued that the respondents claimed inheritance of what they claimed to be part of the estate of their father while there was no evidence of distribution by the administrator or executor. In reply the respondent submitted that it was distributed according to customary law of Nyamwanga. *Locus standi* is a principle which is governed by common law according to which, a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. See **Chama cha Wafanyakazi Mahoteli na Mikahawa Zanzibar (Horau) vs Kaimu Mrajis Wa Vyama Vya Wafanyakazi na Waajiri Zanzibar**, Civil Appeal No. 300 of 2019 (unreported).

Any person alleged to have interest to the estates of the deceased according to the law can only initiate the suit if is the lawful appointed

legal representative of the deceased who can sue or be sued for or on behalf of the deceased. See **Omary Yusuph vs Albert Munuo**, Civil Appeal No. 12 of 2018, CAT at Dar es Salaam (unreported).

In this appeal the question whether the respondents where claiming inheritance from the estate of their father cannot be resolved by pleading, the application which has no any useful information in tracing the respondents' title. From the evidence given by the respondents they did not claim the suit land as their inheritance from their late father rather by being given during his life time. This is well obtained from their evidence when they testified that their late father distributed his land to all his children and left 30 acres for his children who were out of the country. From those evidence the issue of having letter of administration cannot arise. Likewise, the issue that the land was distributed as per Nyamwanga customary law is not here or there. To this end the first ground is dismissed for want of merits.

Determination of the second and third grounds hinges on whether the respondents proved that they were given the suit land by their father. Before embarking into the issue, I propose to start with the complainant that customary right of occupancy was not considered by the tribunal. The respondents in their evidence challenge it that the certificate was

obtained through fraud. In the application filed by the respondent's fraud was not pleaded, apart from that it was not proved. See the case of **City Coffee Ltd vs The Registered Trustee of Ilolo Coffee Group**, Civil Appeal No. 94 of 2018 (unreported). Therefore, failure to plead and strictly proof fraud, the respondents cannot be head to complain in this appeal.

Regarding complaint that it was not considered by the chairman, upon going through the record, I have found nowhere the appellant tendered the said certificate. It is trite law that an annexure not admitted as an exhibit is not part of the evidence for the court of law to act and rely upon. See the case of **Patrick William Magubo vs Lilian Peter Kitali,** Civil Appeal No. 41 of 2019, CAT at Mwanza (Unreported).

Coming to whether the respondents proved their case. Since the pleadings constitute the foundation of a civil case, I begin with what was pleaded by the respondents in paragraphs 6 (a) of the application at the trial which reads;

> *6(a)* ***Cause of action/brief statement of the facts constituting the claim:*** *the respondent has illegally denied to surrender the disputed land to the applicants the land which was he was previously a custodian.*
>
> *(b) list of relevant to be annexed if any - NIL*

It is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to present a case contrary to the pleadings. See **Martin Fredrick Rajab vs Ilemela Municipal Council & Another** Civil Appeal No. 197 of 2019, CAT at Mwanza (Unreported)

Another cherished principle of law is that in civil cases, the burden of proof lies on a party who alleges anything in his favour. The principle is embraced in section 110 of the Evidence Act [CAP 6 R.E 2002]. A party with legal burden also bears evidential burden and the standard of proof is on the preponderance of probabilities. Proof on a preponderance of probabilities was well explained in the case of **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & 2 Others,** Civil Appeal No. 66 of 2019, CAT at Iringa (Unreported) in which the court quoted with approval the Indian case of **Narayan Ganesh Dastane v. Sucheta Nayaran Dastane** (1975) AIR (SC) 1534 that: -

> *'The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ...a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular*

*fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities, the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.'*

The respondents in their application did not disclose nature of their claim against the appellant, the application is silent on how the appellant became the custodian. Evidence tendered was that the suit land was given to them by their father while outside the country and other children were given their portion. They added that after being given the land was placed to the appellant's father as the caretaker. In their submission they stated PW6 and PW7 were present when their father distributed the land to his children.

After going through the evidence and submission I have found evidence and submission wanting in merits. If at all the respondents were outside the country evidence that their father distributed the suit land to them is hearsay which is inadmissible under section 62 of the Evidence Act. PW6 did not testify that he was present when the suit land was being distributed to the respondents. He just gave the history of the suit land and during cross examination by the appellant he said *mimi sijui kwanini wanakusumbua baba zako wadogo.* This implies that PW6 was not aware

if the suit land was distributed to the respondents as submitted by them. Construing from PW7 evidence, he just gave a bare statement in her examination in chief regarding the suit land, never testified that the respondents were given by their father. During cross examination by the appellant, it is when he said the respondents were given, this casts doubts on his evidence as to why did he not say in first place when he was called to testify? The anomaly goes to the consistence of the evidence and the credibility of the witness. Akin scenario was discussed in the case of **Ernest Sebastian Mbele (supra).** In this case a witness gave general evidence that the appellant was given the land, during cross examination is when he said he was present and mention the land given to the appellant. The court after considering the evidence held that;

> *'If it is true that she witnessed the gift inter vivos, why did she not mention it in the first place when she was called to establish its existence. Worst still, she did not give any detailed account, be it in her examination-in chief or cross-examination, as to the number of witnesses who were present, the names of the witnesses and/or the place where the gift was made taking into account that the 1st respondent disputed the presence of the children at home in 1988. We think it would be wrong to place any reliance on evidence of a witness who allegedly saw the donation but failed to disclose such an important material fact in her examination in chief.'*

The same applies in this case, PW7 did not say he was present when the respondents' father mention to have left the land for the respondents, he

never mentioned the persons who were present and if indeed the appellant's father was given as the caretaker. Submission that PW6 and PW7 were chiefs from where the suit land is located is unsupported by records, no such evidence was adduced either by the respondents or PW6 and PW7 themselves.

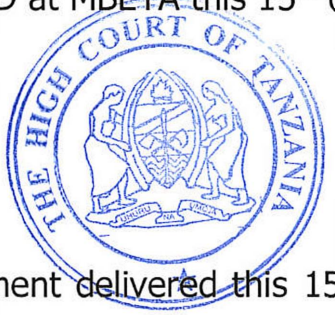
On part on the appellant, he gave the detailed account on how he came into possession of the suit land since 1997 and that he has been using the same. He added that he is the registered owner under customary right of occupancy. The chairman decision that the respondents called family members to prove that their father left the suit land for respondents is not supports by the record. Apart from the respondents themselves they only called PW6 and PW7 who were neither family members nor present when the respondents' father is said to distribute the farm to his children. It was a misdirection on part of the chairman who held that PW6 and PW7 were present when the respondents' father distributed the land, his conclusion is not supported by the record.

In this appeal the respondents having set the suit in motion, it was upon them to prove that the suit land was left for them by their father after distributing his land to all his children. Their failure to plead and prove how the land went into possession of the appellant means they failed to

discharge their legal and evidential burden per section 3 and 110(1)(2) of the Evidence Act what they alleged to exist.

From what have been discussed above, I find the appeal has merits I hereby quash and set aside the judgment, decree and any resultant orders. The appellant is declared the lawful owner of the suit land. The appeal is allowed with costs.

DATED at MBEYA this 15th day of December, 2022.




**D.P. Ngunyale**
**Judge**

Judgment delivered this 15th day of December 2022 in presence of the appellant in person and the 1st, 2nd and 4th respondents.

**D.P. Ngunyale**
**Judge**