THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT MOSHI

LAND APPEAL NO 16 OF 2022

(Originating from Land Application No. 14 of 2021, District Land and Housing Tribunal of Same at Same)

TWAKUMBUKWA UZZE SANGIWA ..... 1ST APPELLANT

JOEL UZZE SANGIWA ..... 2ND APPELLANT

MOSES UZZE SANGIWA ..... 3RD APPELLANT

UPENDO UZZE SANGIWA ..... 4TH APPELLANT

VERSUS

PETER UZZE SANGIWA ..... RESPONDENT

JUDGMENT

Last Order: 1.11.2022
Judgment: 24.11.2022

MASABO, J:-

This appeal emanates from a dispute over ownership of a parcel of land measuring three acres located at Ndolwa in Kambeni Village, Mamba ward within Same District in Kilimanjaro Region (suit land). The respondent moved the District Land and Housing Tribunal of Same at Same (trial tribunal) through Land Application No. 14 of 2021 claiming ownership of the suit land and for eviction of the appellants.

It was contended that ownership of the suit land devolved to the respondent by way of inheritance from his father, one Uzze Sangiwa Mbwambo, who died interstate in October, 2010 being survived by the respondent and his siblings namely Fariji (whereabouts unknown),

Elizabeth, Maliaki, Nuru (deceased), Rahaeli and Rachel Uzze Sangiwa all born from his marriage to Tuteinkwa Uzze Sangiwa who died in April 1972. After the demise of his wife in 1972, the late Uzze Sangiwa married the 4th appellant, Upendo Uzze Sangiwa, in a customary marriage in 1976 and during their marriage, they were blessed with three issues, Twakumbukwa, Joel and Moses Uzze Sangiwa who are the 1st, 2nd and 3rd appellants herein respectively. According to the respondents, the paternity of these three children was doubtful. There was a strong belief that mzee Uzze Sangiwa Mbwambo, did not father these children as they were a product of an affair between Upendo and one, Gledson Kiangi, a fellow villager. After the demise of mzee Uzze Sangiwa Mbwambo, several unfruitful attempts were made to set the dust. The respondents unsuccessfully convinced the appellants to take a DNA test to ascertain their paternity and later on made a formal application, Application No. 1 of 2021 before Same District Court where they obtained an order for DNA but the appellants acted in contempt as they refused to submit themselves for a DNA test.

Following the death of their father in 2010, respondent's brother (PW2) was appointed by this court, Arusha Registry, as an administrator of the estate of the late Uzze Sangiwa in Probate and Administration No. 4 of 2016. Upon his appointment he discharged the duties of his office, filed an Inventory and Account of Estate (exhibit P1) and the said probate was marked closed on 24.4.2017 as per exhibit P2 (S.C Moshi, J.). As per the accounts, in the course of his duties, he allocated the suit land to the respondent herein. Other properties were allocated to the 4th appellants and other children of the first wife only. The 1st, 2nd and 3rd appellants were not allocated any property.

Meanwhile the appellants continued to occupy the suit land which had been allocated to the Respondent and they forcefully constructed houses therein. When asked to relocated they refused hence the application before the trail tribunal in Land Application Np. 4 of 2021 in which the respondent prayed for a declaratory order that he was the legal owner of the suit property and for an eviction order against the appellants and their mother. On the appellant's side, it was asserted that the suit land belongs to them as it was allocated them by the father, the late Uzze Sangiwa, who allocated each of the first 3 appellants ¼ acre each. Having been allocated the said land, they managed to build houses therein which they, and their respective families have occupied since 1990's, well before the demise of late Uzee Sangiwa, thus they cannot be easily uprooted. Their further assertion was that, they are legal sons of the late Uzze Sangiwa and are entitled to inherit from him. While not disputing the order requiring them to undergo a DNA test to ascertain their paternity, they faulted the process as their paternity had never been at issue during the lifetime of their father and as for the probate and allocation of the land to the respondent, they dispute any knowledge over the same.

After the trial tribunal have heard both parties, it decided in favour of the respondent on the ground that the suit land has already been allocated to the respondent through a Probate and Administration Cause. Disgruntled by the decision, the appellants filed this appeal on the following grounds;

1. That, the trial tribunal erred in law and in fact in deciding that the appellants had right of ownership of the suit land basing on documentary evidence that was received contrary to the law;

2. That, the trial tribunal erred in law and in fact in relying on the respondent's testimony which was contradictory with that of his witness.
3. That, the trial tribunal erred in law and in fact in failing to visit the *locus in quo* so as to satisfy itself as to the boundaries and the actual size of the suit land.
4. That, the trial tribunal erred in law and in fact in failing to note the testimonies gives by the appellants.

During hearing which proceeded through written submissions, the appellants appeared in person, unrepresented whereas the respondent was represented by Mr. Edwin Silayo, learned advocate.

Supporting the appeal, the appellants jointly submitted on the first ground that, the trial tribunal erred in relying on Form No. 80 and 81, that is, the Inventory and Account of the Estate while they were not properly produced. They argued that, two documents were tendered as exhibit P1. Of these, only one was read out while the other was not. Moreover, exhibit P2, was admitted without the other appellants being given a right to object or otherwise save for the 3rd appellant. In fortification of this argument, they referred to the case of **EX-D.8656 CPL Senga Idd Nyembo and 7 Others vs. The republic**, Criminal Appeal No. 18 of 2018 (unreported) where the importance of giving the party right to comment on the admission of evidence in court and to cross examine on the same was emphasized. They also cited the case of **The DPP vs. Ashamu Maulid Hassani & Two Others**, Criminal Appeal No. 39 of 2019 (unreported) in which the Court of Appeal insisted on reading the documentary exhibits

after admission. Based on these they argued that the two documents be expunged from the record and disregarded.

As to the second ground, the appellants submitted that, the respondent's testimony was contradictory to that of his witness. The respondent testified under oath that he was given the suit land by PW2 and that the 4th appellant was also allocated one acre in which they were to build her a two roomed house. Further, PW2 admitted under oath that when he was allocating the suit property to the respondent, he was well aware that the appellants had been living therein. In the circumstances, had the late Uzee Sangiwa been doubtful of their paternity, he would have evicted them and not allowed them to build anything in the suit area. This materially contradicted with the respondent's story.

He referred the court to the case of **Aristaco Kaumi Bwire vs. Bwire Manyama**, Land Appeal No. 104 of 2020 (unreported) and argued that in law, minor contradictions in evidence are permissible save where they go to the root of the case and shake its merit. In the present case, the contradictions go to the root of the case as PW2 erroneously allocated the land to the respondent while knowing that it was occupied by the appellants whom the respondent accuses for trespass.

On the third and fourth grounds, the appellants challenged the trial tribunal in failing to visit the *locus in quo* on the ground that, this matter was premised on a probate nature. They argued that, had the trial tribunal visited the suit land, it would have discovered that PW2 had told lies and it would have satisfied itself on the actual size of the suit land. They referred the Court to the cases of **Mukasa vs. Uganda** [1964] EA 698 at

700, **Avit Thadeus Massawe vs. Isdory Assenga,** Civil Appeal No. 6 0f 2017 (unreported) which all underscored the importance of visiting *locus in quo* for purposes of clearing doubts, seeing physical features and boundaries, eliminating contradictions that led to the dispute etc.

Lastly, they challenged the trial tribunal for not according weight to their evidence. They argued that, the 1st, 2nd and 3rd appellants all told the court how they started making their own bricks and started building houses by the time each reached standard six at the age of 15 years. That, they got support from their late father, finished their houses, got married and are living in the suit land with their families to date, facts which were totally ignored by the trial tribunal. They cited the case of **Goodluck Kyando vs. Republic**, [2006] TLR 363 which unscored the need to accord credence to every witness. Further, they argued that, the trial tribunal's observation that it was improper for them to own pieces of land at young age was absurd.

They finally prayed that, this court nullify and set aside the decision and proceedings of the trial tribunal by ordering trial *de novo* and costs be borne to the respondent.

Disputing the appeal Mr. Silayo submitted on the first ground that, the trial tribunal followed all the procedures necessary in tendering and admitting the exhibits as required by the law as seen at page 6 and 7 of proceedings. More so, the appellants were given room to challenge the admitted exhibits but only the 3rd appellant challenged exhibit P2 while others did not do so and the trial tribunal gave its ruling. He also argued that, they were given ample time to cross examine the witness and the tendered

exhibits as shown at page 12 -14 of proceedings but none of them questioned the exhibits which shows that they did not dispute the contents hence they cannot claim that they were denied the right to be heard. He referred the court to **section 45 of the Land disputes Courts Act** [Cap 216.R.E 2019] which states that;

> "No decision or order of Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on the account of any error, omission or irregularity in the proceedings before or during hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice"

He argued that, the appellants have not proved how they were denied their right to be heard and how that occasioned miscarriage of justice as they had opportunity to cross examine the witnesses. He also argued that, the case of **The Director of Public Prosecutions vs Ashamu Maulid Hassani and two others** and the case of EX-D.8656 CPL **Senga S/O Idd Nyembo and 7 Others V. The Republic** cited by the Appellants are distinguishable from this case as first, they are criminal cases whose standard of proof is different from civil case. Secondly in the said case the appellants were denied the right to cross examine while in this case the Appellants were granted that right and thirdly the documents or exhibits in dispute in that case are very different as in this case the exhibits challenged are court documents as stated above.

Replying to the second ground of appeal regarding the contradictions between the testimony of the respondent and his witness, the learned advocate submitted that, going through the application, proceedings and judgment, it is crystal clear that the respondent's testimony and that of his witness are clear, precise, coherent and free from contradictions. The trial tribunal being guided by the issues raised, analysed the evidence of both parties and came into conclusion that the respondent was the rightful owner of the suit land which devolved to him through inheritance from his late father as clearly indicated under exhibit P1. As per the record, PW2 is the one who distributed the asset and allocated the suit land to the respondent while on the other hand, the appelants have failed to demonstrate how they got ownership of the suit land. As for the cases cited, he challenged them for being distinguishable from the dispute at hand.

As regards visit to the *locus in quo,* Mr. Silayo submitted jointly on the third and fourth grounds and argued that there is no mandatory requirement to that fact. As correctly stated in the case of **Avit Thadeus Massawe vs Isdory Assega** (supra), it is only necessary when there are exceptional circumstances. Such circumstances include where there are disputes on boundaries which was not the case. The dispute at hand was not over boundaries, it emanates from distribution of the estate under probate hence visitation to *locus in quo* was not necessary. Lastly, he submitted that the appellants evidence was duly considered. The trial tribunal considered all evidence adduced and was satisfied that it was the respondent who had strong evidence compared to the appellants.

In rejoinder, the appellants reiterated their submission in chief and maintained that this appeal be allowed with cost.

I have carefully considered the submission by the parties and the lower court records which I have carefully read. As the summary above demonstrate, the dispute emanates from distribution of the estate of the late Uzee Sangiwa, who was allegedly a father to the first three appellants and the respondent, and a husband to the 4th appellant. Moving to the grounds of appeal which I have been called upon to determine, in the first ground of appeal, the parties contend over the procedure followed in admitting exhibit P1, comprised of the inventory and final accounts of the estate of the late Uzze Sangiwa both filed in this court, Arusha Registry on 30/12/2016 in Probate and Administration Cause No. 4/2015 and Exhibit P2, comprising an order of this court dated 24/4/2017 by which Probate and Administration Cause No. 4/2015 was marked closed. The major contention is that, these two documents by which the suit land allegedly devolved to the respondent were unprocedurally admitted as their contents were not read out in court after they were cleared for admission and the appellants were not fully accorded an opportunity to comment on their admissibility.

The content of page 7, 8 and 9 of the word-processed proceedings of the trial tribunal unveils what transpired during the admission of the contested exhibits. The record in these pages is silent on whether the appellants were asked to comment on the admissibility of the inventory and the final account. It is also silent on whether the contents of Exhibit P1 were read out after admission. With regard to exhibit P2, the record show that when PW1 sought to tender it, the 3rd appellant objected unsuccessfully and the

same was admitted as Exhibit P2 and its content was read out. The question to be answered from these facts is whether there was any procedural irregularity in the admission of these exhibits and if so, whether the same is fatal and renders the two documents incompetent.

The procedure for admission of documentary evidence has been extensively litigated in criminal cases and it is now settled that, prior to admission the document must first be cleared for admission in which case, the parties must be accorded an opportunity to comment on it and after its admission, its contents must be read out. In ***Robinson Mwanjisi and Three Others v. Republic*** (supra) the Court of Appeal emphatically held that;

> 'Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."

As regards the essence of reading out the document after admission, in **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported), the Court underscored that: -

> "We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr; Mbogoro that, on account of the omission..."

Based on these authorities, it is obvious that the omission to give the parties an opportunity to comment on the admissibility of the two documents before they were admitted and the failure to read out the content of Exhibit P1 after its admission constituted an irregularity. As per the authorities above, the latter is an incurable defect. The respondent's counsel has implored upon this court not to extend the authority above to this case at it is inapplicable in civil cases. I respectfully decline the invitation, as this principle is a general rule of evidence applicable in criminal and civil cases as held in ***Shabani Hussein Makora v Republic***, Criminal Appeal No. 287 of 2019, where the Court of Appeal while considering the procedure for admission of documentary evidence stated thus:-

> 'It is settled law that, whenever It is intended to introduce any document in evidence, it should be admitted before it can be read out Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibit because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision." [The emphasis is mine].

The first ground of appeal is therefore found to have merit especially with regard to exhibit P1 whose content was not read out after its admission an omission which, as stated above, constitutes a fatal irregularity. As for Exhibit P2, much as there was an irregularity prior to its admission, I find the irregularity curable considering that unlike exhibit P1, the 3rd appellant

commented on the admissibility of this exhibit and its content was read out immediately after its admission. Also, as correctly argued by the respondent's counsel, Exhibit P2 is an order of this court and bears a seal of the court to which I am obliged to take judicial notice under section 59(1)(d) of the Evidence Act [Cap 6 RE 2022]. The invitation to expunge/disregard this exhibit cannot stand.

Reverting to Exhibit P1 which I have found to have been marred by a fatal irregularity in its admission, section 45 of the Land Institution's Act provides that:

> 45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.

To remedy the injustice, the court has been clothed with revisional powers section 43(1)(b) of the same Act. Under this provision, this court is empowered, while exercising it appellate jurisdiction, to invoke its general revisional powers over the DHLT by making such orders as it deems fit for purposes of remedying any injustice occasioned by an error material to the merits of the case.

In my firm view, the present case is a fit case to invoke the revision powers conferred in this court because, *first,* the anomaly in the admission of the

Exhibit P1 is pregnant with an infringement of the appellant's right to a fair hearing, hence within the purview of the exception stated under section 45. *Second*, the inventory and the final accounts are critical in determining the dispute between the parties as the respondent's main assertions is that the ownership of the suit land vested in him via a lawful court order which endorsed the inventory and final account of the estate the late Uzze Sangiwa as contained in Exhibit P1. Thus, the dispute between the parties cannot be conclusively and fairly determined in the absence of this document.

Moving on to the third ground of appeal, the appellants contend that, considering the nature of the matter, it was imperative for the trial tribunal to visit the *locus in quo* so whereas on the other hand, it has been argued for the respondent that, vesting *locus in quo* is not a mandatory legal requirement of law and it can only be invoked when the circumstances of the case so require, say where there is a dispute over boundaries of the suit land, an argument which I unreservedly subscribe to. Looking at the circumstances of the present case in which the appellants claim to have constructed houses in the suit premises and to have occupied the same since 1990's, a claim sternly disputed by the respondent who also claims that he too had built a family house in the disputed land even before the probate matter and has apportioned one acre of land for the 4th appellant, I am convinced that, it would have been prudent for the trial tribunal to visit the *locus in quo* for purposes of eliminating contradictions and clearing the doubts emanating from the evidence rendered by the parties.

For these two reasons, I agree with the prayer advanced by the appellants in their joint submission that the case file be remitted back to the trial tribunal for *trial de novo*.

Accordingly, the judgment and decree of the trial tribunal are quashed and set aside and the case file is consequently remitted to the trial tribunal for trial *de novo*. Considering that the dispute emanates from a probate matter and involves parties with family ties, I find it proper for each of them to shoulder its respective costs.

It is so ordered.

DATED and DELIVERED at Moshi this 24th day of November, 2022.

X

Signed by: J.L.MASABO

J. L. MASABO

JUDGE

24/11/2022