

IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 17 OF 2022

(Arising from Land Application No. 90 of 2019, Songea District Land and Housing Tribunal)

KALISTUS NYONI (The Administrator of the Estate of

The Late MEINRARD EDMUND NYONI) APPELLANT

VERSUS

ROBERT NYONI RESPONDENT

JUDGMENT

09/02/2023 & 23/02/2023

E.B. LUVANDA, J.

The Respondent, Robert Nyoni filed Land Application No. 90 of 2019 before Songea District Land and Housing Tribunal (hereinafter referred as the Tribunal) claiming the Appellant, Kalistus Nyoni had trespassed his ten acres of land situated at Nampombo- Litola Village within Namtumbo District. After full hearing the trial tribunal decided the matter in favor of the Respondent, to wit the Respondent was declared to be the lawful owner of the land in dispute and the Appellant was declared as a trespasser and a permanent injunction was issued against the later. The Appellant was dissatisfied by the decision of the trial tribunal and appealed to this Court.

The background of the matter is as follows; the Respondent stated that, he was allocated the suit land by Litola Village Council in 1996. He utilized the land in dispute till 2016 where the Appellant started to trespass over the land and claimed to be his late father's land, who is a deceased. For those years the Appellant's father never took action against him.

The Appellant denied a claim by the Respondent and asserted that, the land in dispute was the property of his late father, Meinrad Edmund Simba (who passed away in 2010) and his mother one Rosina Gervas Komba since Ujamaa Village. It measured fourteen (14) acres, the piece in dispute is only eleven (11) acres. Six years after the death of their father to wit in 2016 one Marieta Ngonyani trespassed to the suit land. He filled a complaint against her and she claimed to have been given the land by the Respondent. According to the Appellant, after suing Marieta Ngonyani the Respondent stepped into the shoes of Marieta and he claimed ownership of the land by virtue of being allocated by Litola Village Council. The Appellant alleged that the Respondent's land is three (3) kilometers away from the land in dispute.

As mentioned earlier the Appellant was a loser before the trial tribunal and now, he has come to this court with four grounds of appeal, which are:

1. That, the trial tribunal erred in law and facts its decision by failure to honor the boundaries of the disputed land.
2. That, the trial tribunal erred in law and facts by failure to honor the Appellant's evidence particularly SU3 plus annexure tendered and admitted as DW2.
3. The trial tribunal erred in law and facts by deciding the matter in the Respondent's favor basing on the time limit, while the Appellant is the one who has a long occupation over the disputed land.
4. That the trial tribunal erred in law and facts deciding the matter without visit (sic, visiting) the locus in quo so as to make fair and equitable decision, taking into account that the said land is not allocated in the ward which the Respondent claim to be allocated.

The appeal was argued by way of written submissions.

As for the first ground of appeal the Appellant submitted that, the disputed land is within Namabengo Village and Ward and not Litola as it

was alleged by the Respondent. He claimed that the contradiction was cleared by the Land Officer from Namtumbo District on 2nd May, 2018 after he visited the *locus in quo* and come with the findings that the land in dispute is within Namabengo village. He revealed the owner to be Meinrard Edmund Nyoni since 1956. The Appellant submitted that the Respondent allegation that he was located the land since 1996 is not true, rather he trespassed into the suit land in 2016. The Appellant argued that, several times the Respondent filed various cases at Litola Ward Tribunal but all ended in vain due to the lack of jurisdiction as the suit land is situated at a different ward.

As for the second ground, the Appellant submitted that from the judgment of the trial tribunal the record revealed that one of the Appellant's witness namely Allanus Hanga tendered an exhibit regarding geographical area of the dispute land which identify the boundaries and location of the suit land following the previous suit. Still, Hon Chairperson did not honor the said evidence. The Appellant submitted further that, even the documentary evidence tendered by the Respondent was stamped by Litola Village Council and not Namabengo Village Council where the land in dispute is located. It is the Appellant view that the Respondent is prohibited to denial previous statement

under the principle of estoppel. He added that someone cannot claim what he did not have.

The Appellant submitted further that; the Respondent evidence has contradiction as regard to the location of the dispute land. As per documentary evidence the Respondent was allocated land at Litola Village on 2016 and not 1996 as he claimed.

Ground three, the Appellant submitted that, the trial tribunal erred in law and facts by deciding the matter basing on time limit while the Appellant is the one who occupied the land for a long period of time than the Respondent. The Appellant submitted further that, since the Respondent trespassed to the land in dispute on 2016 till the trial tribunal decision on 2022, twelve years was not yet to be accrued as it has been stated by the trial tribunal in its decision.

Coming to ground four, the Appellant submitted that during the hearing the trial tribunal did not visit the locus in quo for the purpose of satisfying itself if there is no any contradictory evidence which do not contravene any act or somebody right. The Appellant believes that by so doing the irregularity and incorrectness could have been solved rather than basing on presumption and hear say evidences which resulted to the infringement of the Appellant's right. The Appellant submitted that

he is aware of non-existing of the law which dictate the trial tribunal or court to visit the locus, but it can be done discretionally if there is a necessity for verification of the evidence adduced by the parties during the hearing. He cited the case of **Nizar M.H. vs Gulamli Fazal Janmohamed** [1980] TLR 29, to support his argument.

From the citation above, the Appellant believes that due to the geographical contradiction of the area in dispute it was necessary for the trial tribunal to visit a locus in quo so as to satisfy itself on such contradictions and serious irregularities occurred during the hearing and resulted into unfair decision against the Appellant. He prayed the appeal be allowed.

In reply, Mr. Benard Mapunda learned Counsel for Respondent argued that the first ground of appeal has no merit and is baseless as the issue was not where the land is situated, if that could be the issue the Appellant was supposed to join Litola Village Council. The Respondent submitted further that, there was no any dispute between Respondent and Namabengo Village Council or Litola Village Council against Namabengo. He claimed further that the Appellant always tries to trespass over his land with the defiance of the letter from the office in which no one come to defend the same. The Respondent claimed that

the letter was obtained fraudulently. The Respondent advised the Appellant to sue Litola Village Council together with the Respondent if he has a right. He also submitted that the Appellant is trying to use the court to legalize the piece of land of another village without the villages being involved that will create the dispute between the villages.

As for the second ground, the learned Counsel for Respondent submitted that, the Appellant misdirects the court by relying on documents which were not tendered in court as evidence instead he annexed in his written submission contrary to the law. It is the Respondent opinion that the court cannot consider a document which was not tendered before the trial court. The learned Counsel for Respondent submitted further that, the Appellant claimed that the land in dispute was owned by his late father but there was no any dispute between him and the Appellant's father before his demise.

Third ground of appeal. The learned Counsel for Respondent submitted that he was allocated the said piece of land by Litola Village Council in the year 1996 and he utilized without any disturbance till 2016 when the dispute arose. The Respondent Counsel submitted further that all the time the Appellant was aware of the use of the said piece of land in dispute. That in 2016 the Appellant filed various disputes unfortunately

all of his decision were quashed by the District Land and Housing Tribunal for Songea due to legal defect. The Respondent revealed that on 2016 the Appellant decides to change his mind suing the Respondent under the umbrella of legal administrator of his late father one Meinrard Edmund Nyoni. The Respondent Counsel submitted further that; the Appellant obtained the letter of administration in 2007 (sic, 2017) while his father died in 2010. The Respondent added that, the Appellant right to sue was already lapse because he filled the dispute sixteen years after the death of his father.

The Respondent submitted that, the Appellants father in his life time he saw the Respondent utilizing the land in dispute but he did not file any dispute against the Respondent, the Appellant was aware too but he did not bother to ask his father till his demise in 2010.

As for the ground number four the learned Counsel for Respondent submitted that, the issue of visiting the locus in quo was not necessary. The Counsel for Respondent argued that the Appellant raised the issue as an afterthought as he did not pray to the court to do so. Even if he could pray so, the Respondent opined that it was not necessary. The Respondent Counsel submitted that the evidence adduced was enough to assist the court to decide the matter. The learned Counsel for

Respondent insisted that the issue was ownership of the piece of land, that's why the court determined the evidence adduced by the two parties and their witnesses. The learned Counsel for Respondent cemented that the Appellant has no genuine claim against him under the umbrella of being legal administrator of his father. The Respondent prayed to this court to dismiss the appeal with cost.

In his rejoinder, the Appellant reiterated what he submitted in his submission in chief. The Appellant added that, the dispute before this court is not between two villages. The relevant authority has justified the geographical location of the dispute land which is Namabengo Village within Namabengo Ward not Litola Village within Litola Ward as it was claimed by the Respondent. For that reason, the Respondent has nothing to claim from the Appellant who own the land on behalf of the deceased's family.

As for why the Appellant did not claim his father's land when his father was still alive, the Appellant submitted that before 2016 there was no any dispute, the deceased family utilized the land peacefully. For the Respondent denial of the aforementioned document, it is the Appellant submission that the Respondent is aware of the document. He asserted that, before the trial tribunal the Respondent admitted to own the land

in dispute since 2016 and not 1996. The Appellant insisted that there was no any time where he filed the case by his name but as administrator of the estate of his late father. The Appellant prayer to court is, for his appeal to be allowed.

Ground number one, according to the averments and evidence presented by the Respondent (Applicant at the trial tribunal) including his witnesses Shaibu Yasini Ngonyani (PW2) and Said Hassan Rwanda (PW3) reveal that he claims ownership of a piece of land ten acres located at Nampombo Area Litola Village within Namtumbo District, whose boundaries are as follows:

North border Shaibu Yasini Ngonyani (PW2); South border Roman Nyoni; West border a path to Njiro; East border a path towards Kwa Jafari. On the other hand, the Appellant (Respondent at the trial tribunal), pleaded and testified that the suit land is situated at Nampombo Area Namabengo Village within Namtumbo District.

According to the Appellant, his area is bordered to the North by his uncle (senior father) one Richard Edmund Simba; East his father allocated land to one Alanus Hanga @ Mashaka and Jumbe Camilius Fupi (the later was father in law of the Appellant's father); West a road from the main road towards Njiro Area Mbimbi Village where there is a

farm of Domicus Edmund @ Nondo; South there is a path for crossing cattle on the farms of Jafari Omari thereafter there is a farm of his uncle (senior father) one Domicus Edmund.

The description above, suggest that the two areas of farms are mutually exclusive.

Unfortunate, there is no evidence depicting as to when the duo villages to wit Litola and Namabengo, were established. But, importantly there is no evidence suggesting that Namabengo Village was established as a newest village by way of secession the then boundaries of or part of Litola Village, for it to be reckoned that at the time of alleged allocation in 1996, the suit land was within the area or jurisdiction of Litola Village. On the contrary, by implication it mean the duo villagers co-existed from it's inception and establishment.

In view of the above proposition, Litola Village had no mandate to allocate land belonging to another village. Indeed, the Respondent herein did not tender any documentations for allocation of land by the alleged Litola Village Council. The oral testimony of Said Hassani Rwanda (PW3) who alleged by virtue of being a member of village council at Litola, that he proceeded to the locus in quo to show and measure the area for the Respondent, is unsatisfactory. It is doubtful as

to why the actual allocation, physical exhibition and measurements were done by PW3 solo.

The evidence which was presented by the Appellant in particular a letter exhibit DW2, indicate that the professional land officers from the office of the District Executive Director of Namtumbo visited at the locus in quo and conducted verification of the suit land in the presence of the Village Chairman, Village Executive Officer, the Chairman of Ward Land Tribunal and Chairman of Social Welfare. The said letter exhibit DW2, reveal that the Appellant and Respondent were given results of verification of that farm showing that the farm is located at Namabengo in view of the mark taken as reflected in the drawing plan for surveying villages.

When the trial tribunal was deliberating on the weight of exhibit DW2, ruled and I quote,

'Kielelezo DW2 ni taarifa inayoeleza kwamba ardhi yenye mgogoro ipo katika Kijiji cha Namabengo kwa mujibu wa ramani ya kijiji, taarifa hiyo haindoi ukweli wa kwamba ardhi yenye mgogoro ni mali halali ya Mleta Maombi kwa sababu siku ya kuipima ardhi yenye mgogoro wadaawa pia walihudhuria'

With due respect, the trial tribunal failed to appreciate that exhibit DW2 had the effects of derailing and detaching the Respondent from the suit land.

This is because in his entire testimony and pleadings, the Respondent insisted his area is located at Litola Village and no clarification whatsoever was given after it was found to be located at a different village of Namabengo. Actually, the trial tribunal took that line or argument in furtherance of justifying a verdict for granting of reliefs. My undertaking is premised on a fact that, in the pleadings and testimony the Respondent sought to be declared a lawful owner over a property described to be located at Nampombo – **Litola Village** within Namtumbo District, but the trial tribunal granted relief by declaring the Respondent as a lawful owner of ten acres of land situated at Nampombo **Namabengo Village** within Namtumbo District.

It is fundamental principle in civil suit that relief not specifically sought or found on pleadings, cannot be granted. In a case of **Bachajj Nahar vs. Nilima Mandal & Anr**, Civil Appeal Nos. 5798 – 5799 of 2008, the Supreme Court of India in Civil Appellate Jurisdiction, at pages 17 and 18 established, I quote,

*'It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings... Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs. one lakh, the court cannot grant decree for Rs. ten lakhs. **In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'.** In a suit praying for permanent injunction, court grant a relief for declaration or possession. The jurisdiction to grant relief in civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in etc'.* Bold added

In view of the above, it was imperative for the trial tribunal to rule that the Respondent failed to prove his claim.

In that way, the trial tribunal was debarred to pronounce and declare the Respondent legal owner over a suit property situated at Nampombo – Namabengo Village which he did not plead.

Surprisingly, the learned Counsel for Respondent, attacked exhibit DW2, that is a mere paper, geared to misdirect the court and create dispute between the two villages. He submitted that the issue of boundaries between the two villages is a matter of administrative arrangements.

However, the learned Counsel for Respondent overlooked a fact that the said exhibit DW2, was used by the trial tribunal to rule in favour of his

client over a disputed land.

Ground number two have been taken into board when deliberating ground number one above.

Ground number three. It is in record of the trial tribunal that the Respondent stated that he was allocated the ten acres of land by the village council in 1996, and have been in occupation up to 2016 when this dispute arose. The Appellant alleged that his father the late Meinrard Edmund Nyoni inherited it from his father in 1956.

The trial tribunal ruled in favour of the Respondent that after he was allocated it in 1996, he used and developed that land without any interruption from any person more than twelve years. However, I have ruled that the alleged allocation by the village council to the Respondent in 1996 is wanting for lack of documentation for allocation by Litola Village. For another thing, the impugned land is located at a different village of Namabengo, which render allocation by Litola village if any, invalid. Above all, the Appellant who testified as DW1 at the trial tribunal stated that the Respondent said he was allocated land verbally but at the ward tribunal, the Respondent produced and tendered a document indicating he was given and handed over ten acres of land on 10/2/2016, in the presence of PW3. This fact was not cross examined.

The said document was rejected on admission, and the Appellant attached it to his written submission in support of this appeal. The learned Counsel for Respondent challenged it that it was not tendered at the trial tribunal and therefore cannot be used by the appellate court.

I entirely agree with the argument of the learned Counsel for Respondent, that a document annexed to submission which do not form part of trial tribunal records, cannot be used or given any weight at appeal stage. But as I have said above, the fact that at the ward tribunal the Respondent had documentation for allocation of ten acres by Litola Village, dated 10/2/2016 was not challenged, and therefore it is taken as having been accepted.

It is on record that DW1 stated that after the demise of his father in 2010, it is in 2016 when one Marietha Ngonyani trespassed into a suit land alleged to have been given by the Respondent. This fact was not cross examined too. The impinging effect lead to the break a chain of occupancy for twelve years consecutively. This is because the Respondent did not challenge a fact that between 2010 to 2016, the land remained idle.

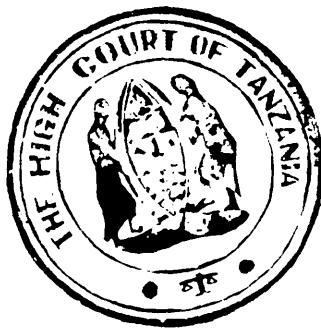
Ground number four. This ground have been taken without any substance. The records of the trial tribunal nowhere reflect any party

had requested the tribunal to visit the locus in quo. Neither the Appellant nor the Respondent staged that request. As rightly submitted by the learned Counsel for Respondent, the question of visiting the *locus in quo* was raised as an afterthought and unnecessary. This is premised on the ground that, exhibit DW2 depict those members mentioned therein visited at the locus in quo and made findings, which assisted even the trial tribunal in deciding the merit of the matter. Therefore, this ground is unmerited.

Save for ground number four, I find merit on ground number one, two and three.

I therefore reverse the decision of the trial tribunal. Ownership of a suit land by the Respondent is nullified.

Appeal allowed with costs.



E. B. LUVANDA
JUDGE
23/02/2023