IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 12 OF 2022

(Originating from Land Case No. 94 of 2017, Songea District Land and Housing Tribunal)

PETRA NJOVU .....APPELLANT

VERSUS

ELIZABERTH NDAUKA .....RESPONDENT

JUDGMENT

21/02/2023 & 02/03/2023

E. B. LUVANDA, J.

The Appellant above named is appealing against the decision of Songea District Land and Housing Tribunal which decreed in favour of the Respondent as the lawful owner of land situated at Sanangula Area Songea Municipality measuring 70 x 70 paces equivalent to one acre.

In her petition of appeal, the Appellant grounded that: One, the trial tribunal erred in law when it conducted the proceedings of the matter before it contrary to the requiments of order XVIII of the Civil Procedure Code, Cap 33 R.E. 2019; Two the trial tribunal erred in law when it entertained and proceeding with the hearing of the matter which was filed contrary to the mandatory requirements of regulation 3(2) of G.N. 174 of 2003 the act which occasioned miscarriage of justice to the

Appellant; Three, the trial tribunal erred in law and fact when it held in favour of the Respondent while the later did not prove her case beyond balance of probability.

Mr. Eliseus Ndunguru learned Advocate on his submission in chief for the Appellant submitted on the first ground that on 18/3/2022 Hon. Jesca took over from Hon. Ndimbo. That throughout the time when there was exchange of hands, there was no consent of parties save for the time when Hon. Lukeha took the file for hearing on 19/4/2020 when parties were asked and consented the same. He submitted that order XVII of Cap 33 (*supra*) require the succeeding magistrate to state reasons as to why he is taking control of the file though the same is not directly stated. That this fatality caused serious miscarriage to the Appellant.

In response, the Respondent submitted that the argument of the Appellant misdirect the Court, because the record of the trial tribunal reveal that parties were notified upon every chairperson who took the proceedings from his/her predecessor and the order cited by the Appellant is all about the adjournment of the suit.

It is true that when J. Raphael took over the matter from N. Ndimbo on 21/4/2021 did not record or inform parties reasons for taking over. But J. Raphael did not hear or record evidence even of a single witness, apart

from making adjournments from 21/4/2021 to 18/3/2022 when R.E. Mjanja took over the matter. R.E. Mjanja recorded reasons for taking over being it was reassigned to him/her on a plan and strategies to dispose matters quickly. R.E. Mjanja recorded the evidence of DW2 only, then on 5/5/2022 H.I. Lukeha Chairman took over the matter and recorded reasons for reassignment being Honorable Rebeca Elias Mjanja was transferred to Lindi. The Later Chairman recorded the evidence of DW3. Thereafter on 17/6/2022 I.J. Ayo chairman, took over the matter and assigned reasons for delivering the judgement composed by his predecessor, being the presiding chairman resumed back to his/her duty station at Mtwara. Therefore the argument of the leaned Counsel for Appellant is not only misleading but borders contemptuous, as he did not assign reasons as to how the so called serious miscarriage was occasioned to his client. The learned Counsel did not expound as to how and why of the alleged serious miscarriage, in the circumstances where the chairman who did not record reasons for taking over, to wit J. Raphael ended up adjourning the matter. The question is, can someone who merely adjourn the matter then retire, be said to have occasioned any miscarriage of justice to any party. To my views it is definitely not, because the import and letter of the rule on successive trials, one of the reasons for requiring the successor to assign reasons or invite, engage

opinion of parties, is that the predecessor chairman had an opportunity and advantage of seeing, and observing demeanour of witnesses who appeared and testified before him or her, which fact the successor chairman will be disadvantageous of missing an assessment of demeanour of witnesses or forming his/her opinion on it. The rationally is, assessment of a demeanour of a witness is an exclusive domain of the chairman who hear a particular witness. Therefore, the test here will be whether the suit claim involved assessment of demeanour of witnesses. Unfortunately the learned Counsel for Appellant did not land there with his argument, his theory ended on a phrase "this fatality caused serious miscarriage to the Appellant".

To my view, the complaint is without any substance. Indeed, the provision of Order XVII Cap 33, which was cited whole sale, without specifying a specific rule, has nothing to do with successive trials, rather deals with adjournments of suit.

Presumably, the learned Counsel for Appellant meant Order XVIII rule 10, Cap 33 (supra) which provide,

> *'Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing*

rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.'

This rule above must be read together with rule 8 of the same Order XVIII, that,

'The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination'

In view of the above rules requiring the Court to record demeanour of any witness, that is why rules as to successive trials in our jurisdiction is largely relaxed, allowing the successor to deal with evidence recorded by his predecessor. The alleged consent of parties before taking over, is a brand new requirement under the civil rules.

As to ground number two, the learned Counsel for Appellant submitted that the trial tribunal erred to entertain the matter contrary to regulation 3 (2) G.N. 174/2003 which require the application to be made in the prescribed form No. 1, require the Applicant to state the location and address of the suit land. He submitted that, the Respondent mentioned the suit land located at Sanangula Area, within Songea Municipality, which tally with her testimony. To his opinion this occasioned

miscarriage of justice, as the suit premised pointed by the Respondent is not the same testified by the Appellant as boundaries are different. That each party tried to describe his or her property respectively but the tribunal opted to declare that the suit land belongs to the Respondent.

In response, the Respondent submitted that the Appellant who was represented ought to raise the objection instead of raising it at this stage as an afterthought. He cited the case of **Sospeter Kahindi vs Mbeshi Mashini,** Civil Appeal No. 56/2017, CAT at Mwanza. Also, cited section 110 of the Evidence Acts, Cap 6 R.E. 2022, that requires that the person shall convince the Court to rule in her favour by proving all necessary facts required to be proved with heavy evidence. Citing also **Hemedi Said vs Mohamed Mbilu** (1984) TLR 113. She submitted that during hearing she adduced her evidence described the size of a suit land and its boundaries. That she clearly identified the disputed land and proved her case for having heavier evidence than that of the Appellant whose witnesses were confusing themselves. She cited the case of **Bomu Mohamed vs Hamis Amir,** Civil Appeal No. 99/2018, C.A.T. at Tanga. She submitted that the trial tribunal did not see the necessity of its discretion to visit the disputed land, since from what parties and witnesses had presented were clear enough to determine the suit

without injustice. That it cannot be said that the trial tribunal was bound by the law to visit.

This complaint is also without substance, an application field by the Respondent was in compliance with the prescribed form. Paragraph three of her application, the Respondent described location of the suit land that it is situated at Sanangula Area within Songea Municipality and adduced evidence in tandem with what is contained in her application and went further to demarcate boundaries of her suit land. A mere fact that the Appellant gave account of her own stories different from the Respondent, on itself does not amount to invalidate the Applicant's application. In fact the Appellant is the one to blame, for the alleged mischief if any at all, because in her written statement of defence she made no defence at all. Indeed, the Appellant admitted the contents of paragraph three of the Respondent's application. In other words, the location of the suit land was not at issue. Had the Appellant made a material and meaningful defence, the argument of her learned Counsel could perhaps be meritorious. In other words the explanation made by the Appellant on her oral defence, had no basis at all. The Appellant is now bound by her pleading where she signed under her hand and admitted contents of paragraphs three of the Respondent's application,

in far as location and address of a suit land is concerned. And therefore she is now estopped to raise it at this stage.

Actually the evidence presented, tilt on the balance in favour of the Respondent, her witness testified coherently on a long ownership, development, occupation and use of a suit land since early 1970's, to wit in 1974 when she was allocated the same by Tanga Village Council, developed it in 1975, including cultivating permanent crops and trees.

While the evidence of the Appellant was marred by notable discrepancies as pointed out by the learned Chairman including a controversial story that she (Appellant) have long rooted ownership of a suit land counting a way back on 5/10/1955 prior Tanganyika Independence. The Appellant bragged to have been re-allocated the same land post independence by the village in 1974. She mentioned members of the allocation committee comprising of Petra Petro Njovu (presumably herself, Appellant), the late Yahaya Mapande, the late Kasiana Mbilinyi and Madwanga Nyoni allegedly is living at Shule ya Tanga. Surprisingly, the alleged Madwanga Nyoni was not summoned to officiate the alleged re-allocation done in 1974 and to vindicate her long existing ownership and occupancy since on the alleged 5/10/1955. One could ask how that could let to happen for someone with a deep rooted

customary ownership and tenure to dare let and allow the so called village allocation team, to re-allocate her own land.

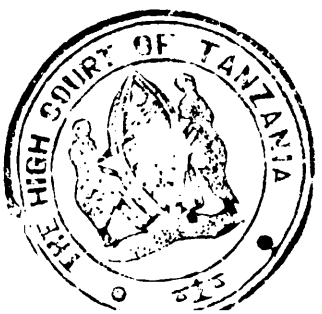
With this type of evidence on record, even a call for visiting on the locus in quo, as the learned Counsel for Appellant faulted the Chairman, to my view was out of space and uncalled for.

Equally the ground and argument by the leaned Counsel for the Appellant that the Respondent did not prove her case beyond balance of probabilities, is unknown in our civil litigation. To my understanding standard of proof in civil suit is on the balance of probabilities. Section 3 (2) (b) of the Tanzania Evidence Act, Cap 6 R.E. 2019, provide

> *'(2) a fact is said to be proved when -*
> *(a) ...N.A....*
> *(b) In civil matters, including matrimonial causes and matters, its existence is* ***established by preponderance of probability'*** bolding added

This findings take into board the third ground as well. As it was based whole on evaluation of evidence.

The appeal is dismissed with costs.



E.B. LUVANDA
JUDGE
02/03/2023