IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

LAND APPEAL NO. 27 OF 2022

(Originating from Application No. 12/2019 of the District Land and Housing Tribunal of Iringa before Hon. A. J. Majengo, Chairperson.)

THOBIAS KISWAGA	.....	**1ST APPELLANT**
ELENIKA KISWAGA	.....	**2ND APPELLANT**
TITO GWEGIME	.....	**3RD APPELLANT**
	VERSUS	
JOHN KISWAGA	.....	**RESPONDENT**

JUDGMENT

2nd March & 2nd May, 2023

I.C MUGETA, J:

The subject for contention between the parties to this appeal is the ownership of 11 acres located at Kilolo A. Consequently, the respondent sued the appellants for recovery of the said land. The DLHT declared the respondent to be the legal owner of the suit land. As a result, the appellants were restrained from trespassing onto the said suit land and to pay costs of the case. The appellants were discontented with the decision. They have preferred this appeal based on five grounds:

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1. *That the tribunal erred in law and fact by holding that the appellants were trespassers in the suit land while it is the respondent who invaded the suit land.*
2. *That the tribunal erred in law and fact to decide in favour of the respondent without considering the long occupation and use of the suit land by the appellants without any interruption.*
3. *That the trial tribunal erred in law to deny right to be heard on preliminary objections raised by the appellants.*
4. *That the trial tribunal erred in law and fact for failure to evaluate and critically analyze the evidence on record hence reached the said decision.*
5. *That the trial tribunal erred in law and fact by considering the improvements made on the suit land by the 2nd appellant.*

The appeal was argued by way of filing written submissions where the appellants were represented by Mr. Omary Khatibu, learned advocate while the respondent enjoyed the services of Ms. Joyce Francis, learned advocate.

In supporting the appeal, the appellant's counsel argued the 1st, 2nd and 5th grounds jointly. He submitted that the 2nd appellant has been in possession

of the suit land for more than 12 years consecutively and made improvements therein without any interruption. The improvements include two small huts built in 1998, and trees such as mango, cassava, bamboo and guava trees. To support his argument on long use of land without interruption he cited the case of **Thomas Matondane v. Didas Mawakalile & 3 Others** [1989] TLR 210.

He contended further that even during site visit, the 2nd appellant clearly testified on the physical features contained in the suit land unlike the respondent. Thus, the appellants' evidence was heavier than that of the respondent, therefore, entitled to win the case as it was the position in **Hemed Said v. Mohamed Mbilu** [1984] TLR 113.

On the third ground, the learned counsel submitted that a preliminary objection can be raised at any time before judgment that before hearing, the appellants raised a preliminary objection. However, the tribunal ordered that the matter proceed for hearing without affording the parties right to address it on the preliminary objection. In his view, this is an infringement of the principles of natural justice as observed in **Mbeya –**

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Rukwa Auto parts and Transport Ltd v. Jestina George Mwakyoma [2003] TLR 251.

On the last ground, the learned advocate argued that the respondent's evidence was not heavy to convince the tribunal to decide in his favour. This is because PW.1 testified that the suit land belonged to her father but did not state whether she had used the said land for any activity or lived in that land. He added that, PW.2 and PW.3 only testified that they had been working with the respondent but did not state as to when the suit land was given to him. Paragraph (vii) of the respondent's application provide that the respondent went to Mbeya in 1998 and left his wife one Upendo Kitindi who was never called in court to testify. Therefore, the court should draw an adverse inference against the respondent for failure to call a material witness as held in **Hemed Said case** (supra) and **Aziz Abdallah v. Republic** [1991] TLR 71. To the contrary, the learned counsel contended, the 2nd appellant in her WSD provided that she started using the land since 1992 undisturbed until 2016 when the dispute arose unlike the respondent who did not testify to have used the land.

On his side, the respondent's counsel submitted that the respondent has been in possession of the land since 1989 when it was given to him by his late elder brother, Mwanzali Kiswaga. That he was in possession of the said land until 1998 when he travelled to Mbeya and left his wife who became sick in 2012 and left the land for treatment for one year. He added that when she returned in 2013, she found the appellants having trespassed into the suit land. Her efforts to recover the land were unfruitful until 2018 when the respondent returned.

The respondent's counsel further submitted that the fact that the 2nd appellant was born there and used the land for agricultural activities does not entitle her to ownership of the said land. The 2nd appellant, he argued, did not plead in her WSD nor tendered evidence that she had been in occupation of the suit land for more than 12 years. In her view, this is a new fact raised at an appeal stage, hence, denying the respondent the right to be heard on the alleged issue. To buttress her argument, she cited the case **of Pacificus Joseph Rutakumilirwa v. Mariam Ally Kihelelo**, Civil Appeal No. 48 of 2021, High Court – Mwanza (unreported). She distinguished the **Thomas Matondane case** cited by the appellants as in

that case the appellant acquired title to the piece of land after redeeming it unlike in the present case where the appellants are trespassers.

The learned counsel contended further that the 2nd appellant knowing the boundaries and features of the suit land does not entitle her ownership. She cited the case of **Omari Kipira v. Fatuma Nassoro**, Misc. Land Appeal No. 9 of 2018 (unreported) which provides that the trial court is better placed to assess the credibility of witnesses than the appellate court. She thus distinguished the **Hemed Said case (supra)** cited by the appellant as the respondent's case was heavier than that of the appellants which contained contradictions as to the ownership of the land in dispute.

The respondent replied to the 3rd ground stating that the DLHT directed that the preliminary objections be heard in the course of hearing as the same required evidence. He submitted further that the law is well settled in **Mukisa Biscuit Manufactures Co. Ltd v. West End Distributors Ltd** [1969] E.A 696 that a preliminary objection must be a pure point of law. She thus distinguished the **Mbeya – Rukwa Autoparts & Transport Ltd case** (supra) cited by the appellants as in that case the right to be heard

was infringed but in the present case the right to be heard was not infringed.

On the 4th ground, the respondent's counsel argued that the respondent's evidence was sufficient to persuade the tribunal to decide in his favour. She submitted that the appellants did not cross examine the respondent's witnesses. On failure to summon the respondent's wife he submitted that the witness could not be called due to health issues.

In rejoinder, the appellants' counsel basically reiterated his submissions in chief and added that parties are bound by their pleadings filed in court.

It is my view that the 1st, 2nd, 4th and 5th grounds of appeal can be determined under one complaints that the trial DLHT erred to hold that the appellants are tresspassers to the suit land.

I have examined the evidence on record, there is no dispute that the suit land was a property of Mwanzali Lupituko Kiswaga. According to Sebastian Kiswaga (DW5), Mwanzali is the father of Damson Mwanzali Kiswaga. Damson is the father of the 2nd appellant. The respondent claim to have acquired the suitland in 1989 from the owner (Mwanzali) upon exchanging it with his land at Ugele. To the contrary the 2nd appellant claims to have

inherited the land through her father who inherited it from the owner as his son. The evidence of the 2nd appellant through her witnesses is very clear on how she acquired the land. On their part, the 1st and 2nd appellants are mere users of the land on the authority of the 2nd appellant. Therefore, the respondent decided to joint the in his claim for the land which action is unfounded in law.

In view of the foregoing facts, the decision in this case depends on credibility of witnesses. The learned DLHT chairman found the respondent and his witnesses credible. He discredited the appellants' case on ground that their evidence was not pleaded. In doing so he differed with the assessors' opinions. I respectfully, differ with the learned chairperson. In their joint WSD, paragraph 2, it is averred that the 2nd appellant has used the land since 1992 when her grandfather was still alive who never told her that he exchanged it with the respondent. In evidence, the 2nd appellant testified on how she inherited the land. Therefore, it is not true that their evidence was not pleaded.

Regarding the respondent's title to the land, I am satisfied that besides the assertion that Mwanzali exchanged the suit land with him, there in no other

proof of that deal. All the Mwanzali family members who testified on the side of the 2nd appellant denied awareness of it. I have evaluated the evidence on record I am satisfied that the learned chairperson erred to believe the respondent's story. This is because according to the 2nd appellant, Mwanzali died in 2002 while in possession of the suit land. She is supported in that respect by Thobias B. Kiswaga (DW2). Similar evidence was given by Sebastian Kiswaga (DW5). After death of Mwanzali his son Damson inherited the farm and used it up to his death in 2005. That is when the 2nd appellant inherited it per her evidence which is supported by DW5. Therefore, her title is founded on inheritance rights not long usage. In his evidence the respondent did not explain why after the alleged exchange, the farm remained under Mwanzali. Mwanzali house's remains are still apparent on the suit land together with houses constructed by the 2nd appellant thereon. The same were shown by the 2nd appellant when the DLHT visited the *locus in quo*.

The only evidence about the respondent ownership and use of the dispute land is that of PW2 and PW3. PW3 is the son of PW2. PW2 claimed that she witnessed the farm exchange and, thereafter, the respondent allowed her to use it from 1989 - 1991. I do not believe their story in light of the

fact that Mwanzali was in possession and lived on the farm to his death in 2002.

The argument of counsel for the respondent that the ability of the 2nd appellant to show physical features in the suit land is not proof of ownership is misconceived. Despite the truth of the argument, that ability supports the proposition that the concerned person is familiar with the dispute land and with other proof of ownership may be collaborative evidence. In this case, the identification of physical features in the land by the 2nd appellant proved that she was familiar with it and, indeed, developed it.

According to the respondent's evidence the appellants trespassed in 2013. This evidence cannot be true. In her evidence the 2nd appellant testified on how she developed the land after her father's death in 2005. That she constructed the houses thereon in 2007 and 2009 and planted trees thereon. She showed these properties when the tribunal visited the *locus in quo*. The respondent presented no proof of his use of the dispute land.

In the application at paragraphs 6(VII), the applicant seems to suggest that he used the land up to 1998 when he left for Mbeya leaving his wife

there. That the wife left in 2012 after she fell sick. Unfortunately, these fact, besides being pleaded were not substantiated by evidence. Nobody gave evidence to that effect which makes them to remain mere allegations. Pleaded facts which are not substantiated by evidence cannot be acted upon by the court.

For the foregoing, I am satisfied that the DLHT chairman misapprehended the evidence. On that account, I am entitled to interfere with his finding on the credibility of witnesses. On the balance of probability, I hold, the appellants' evidence was heavier than that of the respondent. The assessors' opinion was correct.

The complaint in the 4th ground is about failure to decide on the preliminary objection raised. Indeed, the appellant had raised an objection that the application violated the principle of adverse possession. The learned chairperson ignored it for a reason that it ought to have been raised in the written statement defence. I find the submission by counsel for the respondent that the chairperson promised to deal with it later as it required evidence as misconceived for not being in line with what the chairperson decided. The chairperson, therefore, misdirected himself. Since

the notice of objection was raised before hearing commenced, he ought to have considered it. This notwithstanding, I think the error did not cause failure of justice as the nature of the objection, had it been considered, which is not based on jurisdiction or time limitation, would not have led to the dismissal of the suit. The irregularity is, therefore, curable under Section 45 of the Land Disputes Courts Act [Cap. 216 R.E 2019].

In the event, I find merits in the appeal. I allow it with costs. The respondent's application at the DLHT is dismissed for want of merits.

I.C. MUGETA

JUDGE

02/05/2023

Court: Judgment delivered in the presence of the 1st and 2nd appellants and Omary Khatibu, advocate for the appellants and in the absence of the 3rd appellant and the respondent who was represented by Anjelika John Kiswaga, his daughter.

Sgd. I.C MUGETA

JUDGE

02/05/2023