IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 53 OF 2022

(Originating from Land Application No. 145 of 2017 of the Kahama District Land and Housing Tribunal for Kahama at Kahama)

NDALO MANYANDA)..... APPELLANT

(Administrator of the estate of the late Manyanda Nkwabi)

VERSUS

MAKOYE MAKENYA .....1ST RESPONDENT

NDOMA MAYILA .....2nd RESPONDENT

WILLIAM KATWIGA.....3rd RESPONDENT

JUDGMENT

20th February & 28th April 2023

MASSAM, J

The appellant herein Ndalo Manyanda as administrator of the estate of the late Manyanda Nkwabi) at the trial tribunal was claiming the piece

of land of 6 acres from the respondents at the end of the trial the appellant loss the case for being filed out of time and want of merit.

Being aggrieved with the whole decision of the District Land and Housing Tribunal for Kahama at Kahama (herein DLHT), appealed to this court armed with the following grounds:

1. *That, the learned Chairman grossly erred in law when he held that the land application was time barred while the same was filed in the year 2017 and the tress pass was committed in the year 2013 and 2016.*
2. *That the learned chairman further erred in law and fact when he proceeded with hearing of the land application No. 145 of 2017 on merit while the same had already held that the said land application was time barred.*
3. *That the learned chairman was erred in law and fact when he delivered his judgment by relying on statement made by the respondents that the family of Manyanda Nkwabi (deceased) had already sold their land while the land allegedly to be sold is not that is in dispute now.*

4. *That the learned chairman further erred in law and fact when he declared that the respondents are lawfully owners of the suit land while the same told the trial tribunal that the suit land is a property of clan.*
5. *That the learned chairman further was erred in law and fact in holding that the appellant failed to understand when the respondents trespassed into the suit land while the same told the trial tribunal that the respondents trespassed into the suit land in the year 2013 and 2016.*

Therefore, he prayed for the appeal to be allowed with costs.

When the appeal was called for hearing on the 20th day of February 2023, both the appellant and the respondents appeared in person, unrepresented. The appeal was argued by way of written submission with the leave of the court.

Supporting to his appeal, the appellant told this court that the Chairman erred to held that the land application was time barred while the same was filed in 2017 and trespass was committed in the year 2013 and 2016 after the death of Maziku Mhangwa who was taking care of it, also

respondents did not disapprove it in their defense nor inform the tribunal that they started to use that land on 1997.

He added by saying that it was wrong for the Chairman to record to the judgment that there were two houses belongs to 2nd and 3rd respondents on the disputed land while the said houses were erected on a piece of land that is not in dispute.

Again, he said that section 24 and 25 of the Law of Limitation Act provides for the exclusion of time in matters relating to administration of estate. Section 24(1) reads; where a person who would if he were living have a right of action in respect of any proceeding, dies before the right of action accrues the period of limitation shall be computed from the first anniversary of the date of the date of the death of the deceased or from the date when the right to sue accrues to the estate of the deceased whichever is the later date."

And section 25 (1) provides that where a person dies after a right of action in respect of any proceedings accrues to him the time during which an application for letters of administration or for probate have been

prosecuted shall be excluded in computing the period of limitation for such proceedings"

He added that the two sections above accommodate two dissimilar situation a period of one year from the date of death of the deceased or the period or the period before the accrual of the right of action whichever is a later period is to be excluded in computing the time limitation, and section 25 addresses situation where accrual of right of action arises before the death of the deceased person, so the period where the complainant was prosecuting an application for letters of administration or probate shall be excluded as elaborated in the case of **Shomari Omari Shomari** (administrator of the estate of **Suleimani Ibrahim Machila vs Asha Selemani Ibrahim and another** Land Appeal No. 171 of 2018 High Court Land Division where the court held that time limit for pursuing an action for and against an estate of the deceased is not without exclusion.

Also he said that in this present case the latter date of the accrual of the cause of action is 2013 when the respondent trespassed into the suit land and the time from 1996 to 2013 is excluded from calculation of the 12

years time limit, so from 2013 to 2017 is 5 years so his case was within the time as under section 9 (1)of limitation Act gives limitation to 12 years.

In submitting to the 2nd of appeal that the chairman erred in law and fact when he proceeded with hearing of land application on merit while the same had already held that the said land application was time barred, he added that the tribunal was wrong to determine it while it was declared that it was time barred the remedy was to dismiss it without considering the merit on it as stated to the section 3 (1) of the law of limitation Act cap 89 R.E 2019 which provides that "subject to the provision of this Act and which is instituted after the period of limitation prescribed there for opposite thereto in the second column shall be dismissed whether or not limitation has been set up as defense.

Again in submitting the 3rd ground of the appeal appellant complained that the learned chairman erred in law and fact when he delivered his judgment by relying on statement made by respondents that the family of Manyanda Nkwabi (deceased) had already sold their land while the land alleged to be sold is not that in dispute now as there was no was no connection with the land in dispute and the one which alleged to be

sold, so the chairman was wrong to declare the respondents as lawful owner.

In Submitting to the 4th ground of appeal he complained again that the chairman was erred in law and fact when he declared the respondents the lawful owners while the same told the tribunal that the suit land is property of clan. In their side they never adduce the evidence like that because in Land Application No 145 of 2017 the respondents told the court that they were given that land by the village authority and not by clan.

Again in submitting to the 5th ground of appeal appellant claiming that the chairman was erred in law and fact in holding that the appellant failed to understand when the respondents trespassed into the suit land while the same told the trial court tribunal the respondents trespassed into the suit land in 2013 and 2016 and that evidence is found in page 2 of the typed judgment.

Lastly appellant reminded this court his complainant concerning the act of Chairman proceeding with the said case on merit while he was already dismiss it for being time barred, so he pray this court to allow this appeal with costs.

In the side of respondent he did not file his reply to the appellants written submission with no reasons as the date when this court fixed the date he was present.

Having heard the submission from the appellant **the main issue for determination is whether the appeal has merit or not.**

In determine this appeal I will start dealing with 1st ground which appellant complained that the chairman was erred in law and fact that when he held that application was time barred while the same was filed in 2017 and tress pass was committed on 2013 and 2016 this court after perusal of the evidence on the appellant's side SM1 (appellant) in this case told this court that the disputed land belongs to the clan, after the death of their parents they shifted to Runzewe and she has 10 years there at Runzewe but after the death of her brother they came in order to divide that land and be told by 3rd respondent that the said land was already given to others because they were no longer there. she continued to tell the tribunal that they are claiming land of 6 acres from respondents,SM2 who was the witness of appellant said that the said land was trespassed on 2016 and he knows nothing if respondent was given that land or not but

he said that the respondent was there since 1994,SM3 testified that he don't know the time respondent is using that land but what he knows that the said land belongs to the father of appellant ,and he don't know the year which the said land was trespassed.

In the side of defence DW1 (1st respondent told the tribunal that the land which is claiming to 2 and ½ he owned since 1994 and he was given by his grandfather one Makonda Gagi ,he continued by mention the father of the appellant to be his neighbour but later on he sold that land and shifted to another place, in his evidence he mention the boundary of his land that at south there was a road which castles use to pass, at north there is a land of one Mayila Nchuba a father of 2nd respondent and at west side there was a garden of Mayila Nchuba ,DW2 said that the said land was given to him by his father in 1994 ,and the said land is 2/12 acres. DW3 said that he is that land since 1994 which he was given by his father in law one Makonda Gagi, he said that appellant father died on 1996 and appellant and their siblings shifted on 1997,DW4 said that the disputed land belonged to respondents who were given by one Makonda Gagi,2nd respondent and his father are brothers and 1st respondent is a grandson of Makonda Gagi,DW5 testified that the said land belonged to Makonda Gagi

he gave 1st respondent as his grand son,2nd respondent as his son and 3rd respondent as his son in law, they started to use that land failed to told since 1993.

This court after analyze the evidence of both sides it is here by support the finding of the tribunal that the appellant failed to inform this court when does the respondent trespassed to that land, appellant who testified as SM1 said nothing about when the said land was trespassed but the SM2 who was the witness of appellant told the tribunal that the tress pass happened on 2016,again to their evidence they said that the said land was given to their brother as a care taker who died but they don't know when their brother died ,in their evidence they are agreed that they shifted and came back after the death of their brother and being told that the said land was already given, so according to that failure this court is in view that the respondent evidence was heavier than of appellant as they succeeded to prove to tribunal that they were using the land since 1994 which they were given by one Makonda Gagi, also they succeeded to mention the boundary of the said land to show that the said land belonged to them, so the act of appellant and her witness to claim that the trespass happened on 2016 has no proof, so this make this court to support the

finding of the tribunal that the act of appellant to file this matter in 2017 was out of time which required to be dismissed. So according to that this court find 1st ground of appeal has no merit so it is hereby dismissed.

In his 2nd ground of appeal the appellant stated that the chairman was erred in law and fact as proceeded to hear the matter while the same was already held that it was time barred. He added that the application was required to be dismissed without considering the merit on it, by that Statement this court finds that appellant was in support that his application was time barred that's why he brought this ground of appeal that the Chairman was wrong to proceed the matter on merit. So this court is this facts this court is in support of the appellant's submission that when the matter is dismissed it is wrong the court/tribunal to determine it on merit. I perused the proceedings of the said application it has found out that it is true that the said application was dismissed for being filed out of time on 20/12/2019 as it is seen in page 9 of typed proceedings that;

Munyengi advocate

"This matter is coming up for hearing but perusal of the applicants application I noted the deceased passed away the

year 1996 and the applicant filed this application in 2017 hence it is more than 20 years hence ,I pray for dismissal of this application with costs."

Applicant;

"I heard what has been stated by the advocate for the respondents but immediately after the death of Maziku Mhangwa in the year 2016 the respondent did tress pass within the disputed land".

Tribunal ;

Upon went through the form 1v ya "usimamizi wa mirathi" dated on 27/01/2017 I found that the applicant filed this application in the name of deceased Ndalo Manyanda who passed away on the 15/4/1996 almost 21 years before the filing of this application which is contrary to section 9(1) of the law of limitation Act cap 89 R.E 2002 hence it suffices to say that the applicant herein is banned from instituting a suit in the name of the above named deceased

consequently this application is hereby dismissed for the above reasons of limitation of time. Each party to bear its own costs. it is so ordered.

This court went on to peruse the proceedings on page 11 where the matter was before Chrispin Hatson the chairman informed the court that ;

Tribunal;

This file has been assigned to me after the direction of the high court that it be heard by the different chairman" so the matter was fixed for hearing on 11/12/2020,"

So according to the following order this court finds out that the said case proceeded for hearing and determined on merit after the direction of the high court, after the order of dismissal dated on 20/12/2019, So it was wrong for the appellant to claim that the dismissed application was heard on merit after been dismissed for being filed out of time.

So according to the said reasons this court find that this ground of appeal has no merit and it's hereby dismissed.

This court finds the ground No. 3,4 and 5 are related so this court will determine the same jointly as follows, that appellant complained that the tribunal erred in law on relying to the evidence of respondents that the family of Manyanda was already sold the disputed land while the land alleged to be sold is not that in dispute now, also the tribunal erred by declared the respondents the lawful owner of the suit while the same told the tribunal that the suit land belongs to clan, and lastly is that the court was wrong to held that appellant failed to inform the tribunal when the respondents trespassed to their land.

This court in dealing with all mentioned grounds of appeal find the piece of evidence of SM1 the 1st respondent in this appeal who said that the land which had dispute it is 2 and 1/2 acres which was belonged to one Makonda Gagi and he gave to all three respondents on 1994 to use it and they are using it to date, and he succeeded to prove that the appellant did shifted to Runzewe after he sold the said land, that piece of evidence partly was supported by the appellant and her witnesses who agreed that after the death of their father they shifted to Runzewe and left the land to their brother who later died and left the said land without any care, after been asked which year her brother died, she had no answer on it.

Again appellant failed to mention the boundary of the land in dispute in order for this court to prove that they were the owner of the said land but she just claim that the said land was 6 acres, this information is contradictory with the information which found in paragraph 3 in the appellant application who told the tribunal that their land is estimated of more than 8 acres so this court finds out that appellant also does not know the size of the land which she is claiming for, but in the side of respondent succeeded to tell the size of their land and its demarcation, they stated that the disputed land had 2 and 1/2 acres and not 6 or 8 acres as stated by appellant so this court finds out that because the appellant was applicant in the trial tribunal was required to prove what she was alleging.

At this juncture I think it is pertinent to state the principle governing proof of the case in civil suits, the general rule is that he who alleges must prove ,this finds backed from section 110 and 111 of the law of evidence Act cap 6 R.E 2002 which among other things state section 110

"Whoever desires any court to give judgment as to any legal right or liability dependant on existence of facts which he asserts must prove that those facts exists"

Section 111 the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side" see also the cases of **Attorney General and two others versus Eligi Edward Massawe and Others** Civil Appeal No. 86 of 2002, **Godfrey Sayi vs. Anna Siame Mary Mndwolwa Civil Appeal No. 114 of 2012.**

> *"In civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities".*

From the evidence on record there was no doubt that the respondents evidence adduced at Tribunal was heavier evidence than appellant who said that the said land belonged to the clan but he bring no clan leader or any document to prove the same, also she failed to prove that when does the respondent was trespassed to that land, the burden of proof then lied to her, the question was that did she successfully discharge her duty?

Lastly appellant failed to mention the boundary of the land which she claims to be theirs, that was against the requirement of the law in regulation 3(1) of the land disputes courts (the District Land and Housing

Tribunal Regulation GN NO 173 of 2003 which insist among other things indication of proper address ,this legal position was well elaborated in the case of **Daniel Gadala Kanuda** (administrator of the estate of the late **Mbalu Kushaha Buluba vs Masaka Ibeho** and others land appeal no 26 of 2015,and **Mathias Lugwala vs Lamadi Village Council** Land Appeal No. 9 of 2021.

Another case of M**ohamed Salehe vs Fatuma Ally Mohamed** Land Appeal no 182 of 2018 9unreported) was held that

> "Omission *to clearly and sufficiently describe the suit property was violative of the mandatory requirement of order v11 rule 3 of the Procedure Code Cap 33 R.E 2019....."*

In our case the description of the suit land is shown in para 3 of the application which reads that

Location and address of the suit premise/land estimate to be more than 8 acres located at Mwagala sub village Igungh"wa village within Kinaga ward Kahama District, this information is too general it gives only the size of the land, that it estimated to be 8 acres but it said nothing

about the boundary, the information was required to show direction and demarcation in order to assist the court to give proper and executed orders ,the appellant ought to have given the proper location of the suit isolating it from the rest of the land.The said error or failure its remedy was the chairman to dismiss the said application.

For the reasons I have given, I find no merit in all grounds. I dismiss this appeal in its entirety, the decision of the District Land and Housing Tribunal of Kahama is left undisturbed. As this case involving family members, no order for the costs.

It is so ordered.

DATED at **SHINYANGA** this 28th day of April 2023.

THE HIGH COURT OF TANZANIA

R.B. Massam
JUDGE
28/4/2023