THE HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 64 OF 2022

(*Appeal from the decision of the Moshi District Land and Housing Tribunal in Land Application No. 81 of 2020 dated 20/10/2022*)

PETER BAZIL KOMU.....APPELLANT

VERSUS

HASHIMU M. KOMU.....1ST RESPONDENT

BIBIANA BAZIL KOMU.....2nd RESPONDENT

JUDGMENT

30th March & 7th June, 2023

A.P.KILIMI, J.:

The appellant Peter Bazil Komu sued the first and second respondents hereinabove in the District Land and Housing Tribunal for Moshi, in Land Application No.81 of 2020 over a piece of land measured 15 to 17 located at Karikacha, Rau Ward Moshi Municipality. Before the trial tribunal the appellant prayed the following orders;

(a) Declaration that the applicant is lawful owner of the disputed land.

(b) A declaration that the suit land is not party of deceased estate

(c) The cost of this application

(d) Any other relief (s) which trial tribunal deemed fit to grant.

According to the facts gleaned from pleadings at the tribunal, the applicant demanded that, he acquired the suit land from his late father several years back, the time before the death of his father. This act was witnessed by a good number of clan members most of them are currently dead. Also, he averred before that, he had a case no. 20/1995 before the Moshi Urban Primary Court between the Applicant versus the late father and others, the dispute was about the ownership of the suit land of which the applicant won the case, and was granted a way to pass to the said land. He therefore had a peace stay over the suit land for ten years, then after the demise his father in 2005, there was Will left by the deceased father stating the current status of the suit land that belong him and it is not a part of the estate of his late father. In their reply to these pleadings the respondents vehemently disputed and urged the appellant at the trial tribunal to prove the same.

The trial tribunal decided in favor of the respondents by rejecting the appellant's application. Being aggrieved by the said decision the appellant

preferred an appeal before this honorable Court advancing three grounds of appeal as stated hereunder;

1. *That the trial Tribunal erred in law and fact by failure to properly evaluate evidence and therefore reaching a wrong decision.*
2. *That, the Trial Tribunal erred in law and in fact for failure to consider the weight of the Applicant's evidence and testimonies from his witnesses.*
3. *That, the Trial Tribunal erred in law and fact by not relying on the documents tendered by the Applicant during trial as evidence.*

In view of the above grounds, the Appellant prayed this Honorable Court to allow this Appeal and make orders quashing the proceedings and judgment of the trial Tribunal and declare the appellant lawful owner of the disputed land.

At the hearing of this appeal, appellant appeared in person while Mr. Tumaini Materu the learned advocate, appeared for the respondents. The hearing proceeded orally.

To support his grounds, appellant contended that the Trial tribunal did not evaluate his exhibits which he tendered, which show that the disputed land belongs to him. First, he tendered the Will dated 17th of October 2004 from appellant's deceased father who distributed the estate to his heirs.

Second, he tendered the judgment of primary court in civil case No.20/1995 dated 23rd of May 1995 which decided in favor of appellant that he was given the disputed land by clan meeting. And third he tendered a letter which was directed to District Commissioner but Trial Tribunal rejected it on reason that it was not needed.

The Appellant argued further that, the Trial Tribunal rejected those documents for the reasons that they are copy but the Will was original. He further stated that he did not brought witnesses before Trial Tribunal because all clan elders have died.

Moreover, the Appellant contended that during the proceeding before trial tribunal he was asking questions but chairman rejected his question on ground that those are not questions to be asked. He argued further that the chairman was not writing during the hearing hence the appellant prayed to get his right.

Replying on above contentions, Mr. Tumaini the learned counsel replied on 1st and 2nd grounds together that, this appeal is from Application No.81/2020 at Moshi District land and Housing Tribunal and in respect to

claim of evaluating the evidence, he sees the Trial Tribunal did it well and reached in right decision.

In respect to civil case No.20/1995 of Moshi Urban Primary court, Mr. Tumaini argued that the Trial Tribunal looked on it, and held the dispute on that case was for easement and not on disputed land, therefore it was right for trial tribunal to hold that the matter was not concerned with the suit land. The counsel further said in the same case it was claimed that the appellant sold the land he was given by his father to one Msaki, where his father stopped the easement, so in primary court it was a dispute between appellant and his father where appellant was stopped to sale the said land.

Replying in respect of ground number three, Mr. Tumaini contended that, the letter which appellant wrote to District Commissioner and the judgment of Primary court, all cannot prove his case. In respect of the Will, the counsel argued that the same was not tendered as evidence, however their deceased father wrote the will to give land to his daughter where the said will contended that male children had already given their area. The counsel insisted that even if the will produced as evidence will not help the appellant.

The counsel contended further that respondent's father did not distribute the area, he stayed with his wife together with the area of 15 to 17 paces. Then after his, one Albert Komu was appointed to administer the deceased estate. The appellant successful filed land case No.27/2017 at Moshi District land and Housing Tribunal, where respondents successful lodged appeal No.26/2019 at High Court Moshi, where 2nd respondent in this appeal was among them and the High Court ruled that the appellant failed to prove his claim. But before the decision of High Court being issued, appellant filed the case No. 81/2020 at Moshi District land and housing Tribunal. The counsel contended that, the appellant did it knowingly because he brought application for the leave to court of appeal Misc. Land Application No.35 of 2020, which was decided on 29th of June 2021.

Considering the above, Mr. Tumaini submitted that the disputed land was already decided by High Court on Appeal No.26/2019. Bibiana Bazil was the party in the said matter also in this appeal, however Albert Komu was an administrator but also appellant sued Hashimu komu who is also an administrator of their father's estate. Therefore, the counsel contended that

the parties are the same and the land in dispute are the same, hence this case was res judicata, and thus the complaint by applicant was not true.

In his brief rejoinder, the Appellant submitted that he tendered the original will before Trial Tribunal where he was directed to certify the same and original copy remained in Tribunal, when Appellant asked for original copy, the Tribunal refused to give him. After that the appellant wrote to the commissioner until now, he was not given the original copy so he retains the judgment by Primary court.

After going through the grounds of this appeal, submission of appellant, learned counsel and trial records, I am aware that this being the first appellant court, it is trite law that a first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact if necessary. This position was held in the case of **Future Centruary L.T.D v. Tanesco, Civil Appeal No.5/2009** where the Court of Appeal held that;

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.*

According to all grounds raised, to my view they centered or both based on evaluation of oral evidence and exhibits tendered before tribunal. Thus, the appellant claims are that the tribunal rejected his exhibits and accorded no weight to his evidence. Therefore, in that regard, I have asked myself whether the trial tribunal failed to properly evaluate the both evidences tendered by appellant? It is undisputed facts that the appellant did not bring the witnesses and he made it clear that he failed to do so because all witnesses were clan members who all died.

I now discuss each exhibit tendered by appellant during the hearing at Trial Tribunal as follows; Starting with the copy of judgment of Urban Primary court, civil case No.20/1995 dated 23rd of May 1995. (Exhibit "P2").

I have careful gone through to the "Exhibit P2" the judgment on civil case No.20/1995. It was not disputed that the parties where appellant and his deceased father where appellant claimed two things from his father; the farm and easement because his father stopped him easement by selling the land together with easement heading to the appellant residence. To make it

easily, I prefer to quote the evidence of the Appellant as witness (PW1) at the trial in page 1 of the trial tribunal's judgment, Appellant stated that;

> *".....mnamo mwaka 1987 mdaiwa alimpa shamba....eka mbele ya kikao cha ukoo. Shamba hilo lilikuwa sehemu ya mdogo wake aiiyefariki. Mahali hapo alimalizia nyumba aliyokuwa ameiacha marehemu akijenga. Pia aliongezea vyumba vinne (4). Alistawisha miti, migomba, mihogo ambapo anatunza hadi sasa....."*

According to the above evidence from Appellant, in his testimony he described the land given by his deceased father. As shown above, it clear, the farm that Appellant claimed in primary court consisted of houses, appellant testified that he finished the house that was built by his deceased young brother and later on he built four rooms in the same farm. In my view, the document tendered before trial tribunal, nowhere the land in dispute described to have houses. It is therefore my opinion I should subscribe with the finding of Trial Tribunal that as per Exhibit P1, the land disputed in civil case Na.20/1995 is the different from disputed land at hand. Thus, I have a settled mind that the trial tribunal properly evaluated the evidence in regard to "exhibit P2".

In respect to the second exhibit, a copy of deceased "WILL" marked as "PBK2" appellant complained that the trial tribunal rejected the copy of will because was not an original copy. However, in reply to Mr. Tumaini learned counsel, Appellant asserted that he tendered the original Will before Trial Tribunal where he was directed to certify the same and original copy remained in Tribunal, when Appellant claimed for original copy, the Tribunal refused to give him. Responding in respect of the WILL the learned counsel for respondents submitted that the WILL was not tendered as evidence, however their deceased father wrote the will to give land to his daughter where the said will contended that male children had already given their area.

Before I discuss the above contentions on said Will, I wish to point out that, it is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. Therefore, is a serious document which should not be lightly impeached. (See the cases of **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527 and **Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Reference No. 12 of 1994 (unreported).

According to the handwritten proceeding when the said Will was tendered, the respondents objected, then the trial tribunal ruled on it as follows;

> ***"Baraza:*** *Baada ya kupitia nyaraka hii nimeona kwamba ni photocopy kwa sababu hata Saini ya dole gumba haineshi kuwa ni nakala halisi Pamoja na kwamba kuna mhuri wa mwenyekitl wa mtaa lakini unaonyeshwa kugongwa juu ya nakala ambayo siyo halisi (photocopy). Kwakuwa wosia huu haujathibitishwa na wakili kama nakala ya nakala halisi hivyo basi unapokelewa na baraza hili kwa ajili ya utambuzi kama "ID1"*

Moreover, the trial tribunal at page 9 of the typed Judgment had this to say in respect to the said will tendered for identification purposes;

> *"Aidha kwa upande mwingine mleta maombi alisema kwamba kuna wosia uliachwa na baba yake wa kumgawia eneo hilo. Hata hivyo mleta maombi hakuweza kuwasilisha nakala halisi ya wosia huo. Hivyo wosia huo kupokeiewa kwa ajili ya utambuzi tu. Hakuweza kuelezea nakala halisi (original document) ilipo na badala yake akasema kwamba wosia huo uchukuliwe kama nakala halisi kwa kuwa una muhuri wa Mwenyekiti wa Mtaa. Ni msingi wa kisheria kwamba nyaraka halisi (original document) huwa ndiyo inayotolewa na kupokelewa na Mahakama kama kiel elezo labda pawepo na sababu kama zilivyoelezwa kwenye kifungu cha 67 cha ya ushahidi Sura ya 6 R. E. 2019, Nyaraka inayopokelewa kwa ajili ya utambuzi haina thamani ya kuwa ushaihidi. Msimamo huu wa kisheria ulielezwa na Mahakama ya Rufaa Tanzania kwenye kesi ya* ***Udaghwenga Bayay & 16 Others v. Halmashauri***

Ya Kijiji Cha Vilima Vitatu & Another, *Civil Appeal No. 77 /2012, Cat Arusha"*

Therefore, according to the above, I also concede with the trial tribunal that the WILL was rejected on the reason that the appellant failed to tender the original WILL. Nonetheless, for secondary evidence to be admitted as evidence it must satisfy the provision of Section 67 of the Evidence, Act Cap 6 R.E.2022 (See also the case of **Edward Dick Mwakamela v. Republic** (1987) TLR 122. But the appellant at the trial did not even reach to this extent of proving.

In the premises, I find that the trial tribunal properly evaluated the evidence in regard to the exhibit (WILL) at page 9 of it is judgment. The tribunal rejected it is admission with the reasonable grounds as per the requirement of the law.

Be as it may, it is also my view, even if it could have been tendered the original, the validity of the will cannot be determined by land tribunal, by so doing, it means the dispute on the ownership of the suit property is connected with issues pertaining to inheritance, therefore the proper court is the probate

court. (See the case of **Malietha Gabo Vs Adamu Mtengu, Misc Land Appeal No.21 of 2020** (unreported).

Next is exhibit marked as "P1" which is the letter directed to District Commissioner, the appellant claimed that the same was rejected by trial tribunal and did not evaluate it. In regard to this exhibit, the learned counsel for the respondent submitted that the letter which appellant wrote to District Commissioner, cannot proved his case. To my view I also concede with this stance, since the said letter was written by clan chairman and the dispute was easement so it was irrelevant in this matter.

Another point raised by respondent counsel, which need me to take into charge, is that the matter was Res judicata. In determining this issue, I find it necessary to detail some governing principles of ***Res Judicata.*** In our law res judicata is regulated by section 9 of the Civil Procedure Code Cap 33 R.E 2019 which provides that;

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially issue in a former suit between the same parties or between parties under whom they or any of the claim litigating under. The same title in a court competent to try such subsequent*

suitor the suit in which such issue has been subsequently raised and has been heard and finally decided by such court".

According to the High Court judgment on Land Appeal No 26/2019 which tendered as exhibit D3 and Land Application No. 81/2020, in consideration with the law above, the two differs term of parties, the parties in Exhibit D3 are not exactly the parties in Application No. 81/2020, the former were four appellants while the later were two respondents. I am mindful that the second respondent Bibiana Bazil Komu are among the appellants in Land Appeal No.26/2019, it therefore my view the said principle cannot be invoked squarely.

Nonetheless, in my view the subject matter is same, and since it evidenced it was decided by this court, it goes without saying that this court can not overrule its own decision. I am saying this because, it is evidenced in handwritten proceeding of the trial tribunal, when the applicant was cross examined by first respondent had this to say;

"Katika eneo hilo nililopewa na baba yangu lenye ukubwa wa karibia heka moja ndipo lilipomegwa eneo lenye ukubwa wa hatua 17 kwa 15. Shauri namba 27/2017 lilikatiwa rufaa

Mahakama Kuu. Kwenye Rufaa hiyo walipewa ushindi wale ndugu zangu. Wavamizi ndio walipata ushindi mahakama ya juu. Shauri hili la Mgogoro wa eneo la ukubwa wa 17 X 15 nimelileta kwa mara ya piii katika baraza hili. Ni kweli wakati rufaa ikiwa mahakama Kuu nilikuja kufungua shauri hili."

The above lead me to know that this court have already decided on the said land in dispute vide Land appeal no. 26 of 2019, wherein on 19/5/2020 this court observed that;

*"It is apparent on face of record that the respondent herein (**the appellant herein**) who was the applicant in the District Land and Housing Tribunal did not have any witness. His allegations were not proved; he relied on a copy of a will which was not tendered as evidence. That means the decision of the tribunal to declare the applicant owner of the suit plot was based on the applicant's testimony which was not substantiated. This is wrong because rights of parties are decided basing on evidence brought to court. In his findings the honorable chairman stated that mere words of the respondents cannot be proof"*

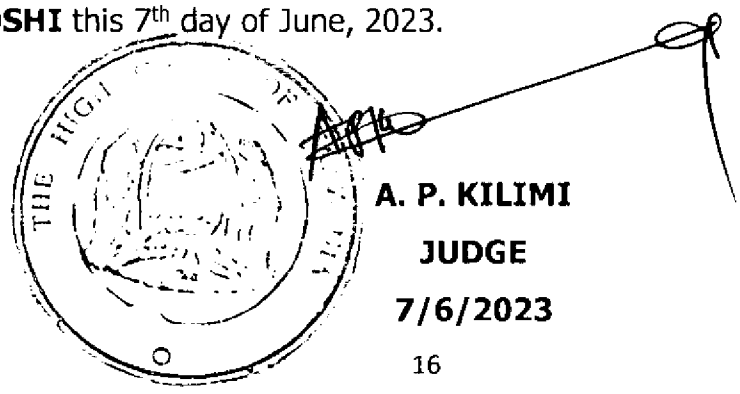
Then this court proceeded to allow the appeal, thus the respondent lost the case for want of prove his allegation. The appellant is the one who was the respondent in the former matter in this court, as anyone can see above facts,

issue relied is the WILL which is the same happened in this matter. Also, there is evidence that, the appellant who was respondent in former case filed an application seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this court, in such respect he filed **Misc. Land Case Application No. 35 Of 2020.** This court on 29/6/2021 found he has failed to establish prima facie case worth consideration by the Court of Appeal, hence dismissed the application.

In the circumstances shown above, I am of considered opinion the matter in respect to the said land has been already determined by this court in the former case, to do otherwise in this matter will be mockery of justice and double standard. Consequently, in light of the above, I find no reason to fault the trial tribunal's decision. Thus, this appeal has no merits and I proceed to dismiss it with costs.

It is so ordered.

DATED at **MOSHI** this 7th day of June, 2023.



A. P. KILIMI

JUDGE

7/6/2023