IN THE HIGH COURT OF TANZANIA

SHINYANGA REGISRTY

AT SHINYANGA

LAND APPEAL NO. 63 OF 2021

KIDENYA NGALU
SUMAYI NGALU .....**APPELLANTS**

VERSUS

MADUHU MPEMBA.....**RESPONDENT**

[Appeal from the decision of the District Land and Housing Tribunal of Maswa.]

(Hon. J.F. Kanyerinyeri.)

dated the 18th day of November,2021
in
Land Application No. 13 of 2018

JUDGMENT

5th July, 2022 & 17th February, 2023.

S.M. KULITA, J.

This is an appeal from the District and Land Housing Tribunal for Maswa. In a nut shell, the story behind this appeal is that, the respondent instituted a Land Application No. 13 of 2018 at the District and Land Housing Tribunal for Maswa. He was claiming against the appellants over

a piece of land measured 7 (seven) acres which is situated at Nkololo village within Bariadi District in Simiyu Region.

In that case, the respondent was declared a lawful owner of the disputed land. Meanwhile, the appellants were ordered to vacate and permanently restrained to trespass into the disputed land.

That decision aggrieved the appellants, hence appealed to this Court with seven grounds of appeal as follows; **one**, the trial tribunal erred to entertain the application which did not describe the suit land properly, **two**, the trial tribunal erred to entertain the matter while the applicant (respondent herein) had no *locus standi*, **three,** the trial tribunal erred for not dealing with issues raised by appellants but entertained its own issues without affording parties right to be heard on them, **four**, the trial tribunal erred for disregarding the evidence of the appellants, **five,** the trial tribunal erred for not visiting the *locus in quo*, **six,** the trial tribunal erred by improperly admitting some exhibits, **seven,** the trial tribunal was bias for relying on the evidence of the Respondent only and denying that adduced by the Appellants.

On 5th July, 2022 the matter was scheduled for hearing. Mr. Constantine Ramadhan appeared for the appellants, whereas Mr. Frank Samwel appeared for the respondent.

Submitting in support of the appeal Mr. Ramadhani started by informing the court that, they abandon the 3rd and 6th grounds of appeal and they intend to argue the 4th and 7th grounds of appeal collectively, the same applied to the 1st and 5th grounds.

Submitting in support of the 2nd ground of appeal Mr. Ramadhani stated that, the respondent had no *locus standi* to institute the land application No. 13 of 2021. He added that, though the respondent stated that the suit land was given to him by his late father yet this evidence goes contrary to the evidence of his witnesses; PW2, PW3 and PW4. To him these witnesses showed that, the suit land belongs to the respondent's father. He went ahead contending that, the legal defect of filling a suit without *locus standi* renders the decision defective. To support his argument cited the case of **Khanan Said vs. Nevumba Salum Mhando, Land Appeal No. 81 of 2021, High Court DSM.**

As for the 1st and 5th grounds of appeal Mr. Ramadhani stated that, the respondent did not provide demarcations for the disputed land and that, the trial tribunal did not visit *locus in quo*. Explaining the same, he stated that, the respondent mentioned the disputed land to be of 7 (seven) acres but in re-examination he changed it to 8 (eight) acres. The same applies to his witnesses who once mentioned the disputed land to

be of 8 acres and later PW3 stated that, he does not know the size of it. To him, the trial tribunal gave ownership of 7 acres to the respondent without resolving the issue of size. He said that the issue of demarcation is a legal matter under Order 7, Rule 3 of the Civil Procedure Code. He said that the issue of demarcations is mandatory so as to provide identity of the suit land against other premises. To him, none providing the demarcations, renders the decision a nullity. To support his argument, he cited the case of **Said H. Lipite and Others vs. Ministry of defense and AG, Land Case No. 85 of 2016, HC at DSM.**

As for the 4th and 7th grounds of appeal Mr. Ramadhani was of the views that, the appellants' evidence was not given weight at the trial tribunal. He added that, the trial chairman just relied on the weakness of the appellants' evidence. He condemned the trial Chairman relying on the testimonies of the respondent without analyzing it properly. To him, had the trial chairman properly analyzed evidence on record, he would have reached into the conclusion that, the appellants' father was the first owner of the suit land of which he had purchased since 1963.

He added that, the Chairman ought to have visited the *locus in quo* so as to verify the size of the suit land. Eventually, Mr. Ramadhani had a considered opinion that, non-consideration of the appellants' testimonies

leads to unfair trial. He proposed the solution being dismissal of the matter by allowing the appeal.

In reply Mr. Frank Samwel, Advocate started with arguing the issue of evaluation of evidence. He said that, the same was actually done by the trial tribunal. He made reference to the judgment and contended that; the appellants' evidence was weak simply because they were not born by the time their father is said to purchase the disputed land in that 1963. Thus, they testified a hearsay.

Mr. Samwel went on stating that, even their witness one Mahunja Muhama who testified to have witnessed the sale, to him he was very young of 19 years old. Further he was not a neighbor to the suit land and he failed to mention the neighbors who witnessed the sale. Mr. Samwel was of the views that, the appellants' evidence was cooked. To cement that the appellants had cooked the case Mr. Samwel stated that, the appellants denied that their father had ever filed a case on 2010 that was dismissed for non-appearance and alleged that the same had died in 1995.

Further Mr. Samwel stated that, the respondent herein evidenced as to how he had acquired the disputed land from his father before he died. Thus, the issue of letters of administration to him is misplaced.

On the issue of demarcation Mr. Samwel stated that, the same is misplaced. He gave reasons being that, the respondent and his witnesses mentioned boundaries of the disputed land. Only difference is seen on mixing of the eastern and western sides. To him that is a minor contradiction which does not go to the root of the case.

As for the size of the disputed land, Mr. Samwel was of the considered views that, the difference does not matter and in fact it is very minor. He explained the same that, the respondent was given 8 acres by his father but the dispute fell over 7 acres.

As for the issue of visiting *locus in quo* Mr. Frank Samwel was of the views that, it is not binding for the trial tribunal to visit the *locus in quo*. It is only when there is necessity to do so. This is done when the trial tribunal is requested by a party or on its own motion. To him, the record is silent as to whether there was a party which requested for visiting *locus in quo.*

Concerning the issue of non-consideration of the defense case in the trial court's judgment, Mr. Samwel argued that the same was considered. He added that, even if that scenario happened, the solution is not to dismiss the trial court's judgment. He said that, this being the first appellate court has the powers to step into the shoes of the trial

court's proceedings and analyze the testimonies that had been left unattended by the said trial court.

In rejoinder Mr. Ramadhani reiterated his submissions in chief. He however added that, the witness of 19 years of age is sufficient to witness land sale agreement.

I have earnestly gone through the parties' submission and the available records as well. The issue is whether the appellants' appeal is meritorious. To answer that, I am going to determine the grounds of appeal one after the other in accordance with the way the appellant's counsel has submitted.

On the second ground of appeal, the appellants challenged the respondent that he instituted the Land Application No. 13 of 2021 without having *locus standi*. To them, the applicant (Respondent herein) had to have letters of administration before he instituted the said application. In my perusal over the typed proceedings of the trial tribunal, particularly at page 24, I have noticed the respondent's testimony transpiring that, the disputed land was once owned by his late father who before he died in 2010, he had passed it to him in 2007. With this version of the respondent testimony, the disputed land is owned by the respondent. There is no

need for him to have letters of administration before he instituted the application.

The same typed proceedings at page 33, 35 and 37 all respondent's witnesses PW2, PW3 and PW4 respectively, are seen to have testified that, the disputed land was initially owned by the respondent's father. The wording shows that, later the ownership changed to another person, that is the respondent who still owns it todate. With this content of the trial tribunal's record, this appellants' ground should not detain me much, suffice it to say that, the respondent had sued the appellants on his own capacity following his ownership of the disputed land that he has. Thus, there was no need of letters of administration.

Concerning the issue of demarcation of the disputed land. The respondent's testimony shows that, the disputed land is bounded by pieces of land owned by Zamu Ndilu at the East, Lubimbi Nkenyenge at the West, Emanuel Maduhu at the North and Road to river Sandai at the South. The typed proceedings of the trial tribunal particularly on pages 33, 35 and 37 transpire the respondent's witnesses to have testified that the disputed land has been bounded by the same demarcations as provided by the respondent. The only defect seen is the mixing of eastern and western sides of the demarcations. As correctly submitted by Mr.

Samwel that, it is very minor defect that does not go to the root of the case. The issue would have been worse if the witnesses would totally fail to mention the same boundaries. That is where the issue of specificity would arise. Thus, the appellants' argument is misplaced. As such, this ground of appeal also fails.

On the issue of visiting *locus in quo*, I have earnestly passed through the trial tribunal's records. I must admit that, as correctly submitted by Mr. Samwel that, no party to the case requested for the trial tribunal to visit the *locus in quo*. Not only the parties but the court also never raised *suo motto* argument, the issue of visiting the *locus in quo*. I bet, the trial tribunal did so because it found no need to do so, that is why it did not order to visit the *locus in quo*. However, had there been a need so to do, even the parties to the application would have raised it during trial. Raising it now, at this appellate stage by the appellants while they remained mute during trail is regarded as an afterthought.

However, the record shows that, there was neither a boundary issue nor an issue of uncertainty on the size of the disputed land. This is seen at page 30 of the typed proceedings. The respondent had testified that, the appearing of 7 and 8 acres in their testimonies is because the whole area he was given by his father measures 8 acres, but the appellants

invaded only 7 acres out of those 8 acres. I find this ground of appeal too fails.

Lastly, the issue of non-consideration of the appellants' evidence; first, the law concerning this issue is well settled in our country. Unlike the submissions by the appellants' counsel that non consideration of one party's testimonies renders dismissal of the decision resulted from. As correctly submitted by Mr. Frank Samwel, this being the first appellate court, the solution is for this court to step into the shoes of the trial tribunal and re-evaluate the evidence on record by considering the non-considered evidence. See, **Future Century Limited vs. Tanesco, Civil Appeal No. 5 of 2009, CAT at DSM.**

With this ground of appeal, I had to pass through the trial tribunal's records. The trial tribunal's decision shows that the Chairman had summarized testimonies of both parties. This is clearly seen at pages 2 to 4 of the judgment. What is seen from the record is that, the appellants had testified to have 45 and 48 years of age respectively as by 2021. This shows that the appellants were born in the year 1976 and 1973 respectively. As the appellants had testified that their father purchased the disputed land in 1963 from one Lujoro Mihilya, then the trial Chairman found out that, the appellants were testifying on hearsay evidence. He

gave the reason that, by that time they were very minor. But in my computation on that, I found that, by 1963 the appellants were not yet born. With that in records, it is therefore clear that the trial Chairman considered the appellants evidence at page 5 to 6 of its decision only to that extent.

The record transpires that the appellants had one witness whom his testimony shows that, he was of 19 years of age by the time the appellants' father is alleged to have bought the disputed land in 1963. However, this witness stated that, he witnessed the sale though he was not a neighbor. He went ahead contending that, during the transaction there was no any neighbor who witnessed the same.

This kind of testimony raises doubt as to why should there be no any neighbor who witnessed the sale of land in dispute? Further, why should that witness be called to witness land sale while he was very young of 19 years of age and that he was not a neighbor? All these had not been described by the Appellants during trial at the tribunal. When comparing this evidence in record to that of the respondent, I see no point to fault the trial tribunal's decision.

In the upshot, as all grounds of appeal have failed, I proceed to dismiss the appellants' appeal for being unmeritorious. The appeal is therefore **dismissed** with no orders as to costs.

S.M. KULITA
JUDGE
17/02/2023

DATED at **Shinyanga** this 17th day of February, 2023.

THE HIGH COURT OF TANZANIA

S.M. KULITA
JUDGE
17/02/2023