

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 47 OF 2022

*(Arising from Land Application No. 35 of 2022 from the District Land and
Housing Tribunal for Maswa at Maswa)*

NSULWA KIYAYA..... 1ST APPELLANT

MASANJA KIYAYA 2ND APPELLANT

VERSUS

MINGA KISENARESPONDENT

JUDGMENT

04th April & 30th June 2023

MASSAM, J:

The Appellants herein were aggrieved by the decision of the District land and Housing Tribunal for Maswa at Maswa (henceforth "the trial Tribunal") which ruled in favour of the Respondent herein. In the trial Tribunal, the Respondent sued the Appellants for trespassing into her piece of land measuring four acre, located at Iyogelo street, Kisesa Village in Meatu District within Shinyanga Region (henceforth "the suit land").

Facts of the dispute giving rise to this appeal as elaborated to the record of the case go as follows: The Respondent was among the three wives of the late Ginyebu K. Ngelele and that her husband gave her the suit land on 08/09/2007 through a clan meeting and was using the same peacefully until 06/05/2022 when the Appellants herein being the children of her late husband trespassed into the disputed land by grazing the crops of the respondent and later on started to cultivate the said land by using tractor. It was then that the Respondent instituted an application before the trial tribunal against the Appellants herein claiming that she is the lawful owner of the suit land and that the Appellants are trespassers to the suit land.

It was the defence by the Appellants before the trial tribunal that the suit land belonged to the deceased Ngele Ginyebu K Ngele (to who the 1st Appellant is the administrator of his estate) who cleared the forest in 1947 and start using it so he stated that the land was not owned by Ginyebu K. Ngele hence they generally denied to have trespassed to the Respondents land.

After full trial, in a judgment delivered on 05th August 2022, the trial Tribunal was sufficiently convinced that the Respondent managed to prove the claim on the required standard. She was declared the lawful

owner of the suit land and the Appellants were declared trespassers and ordered to give vacant possession of the suit land to the respondent. The Appellants were also ordered to pay costs of the case.

Following that decision, the Appellants were seriously aggrieved, hence this appeal which has been prefaced by the following grounds of appeal:

- 1) That the learned trial chairman erred in law and in fact by dismissing the preliminary objection while the 1st appellant is a representative of the deceased one Ngele Ginyeu therefore he cannot be sued on his own name without being indicated to have been sued as a representative.*
- 2) That the learned trial chairman erred in law and in fact by holding in favour of the respondent who failed to state where her deceased husband one Kiyaya Ngele got from the suit land.*
- 3) That the learned trial chairman erred in law and in fact by relying on the clan meeting minutes which gave the suit land to the respondent while her deceased husband was alive.*
- 4) That the learned trial chairman erred in law and in fact by holding in favour of the respondent while the evidence of the respondent and that of her witness are in consistence and contradictory as who gave the suit land to the respondent.*
- 5) That the learned trial chairman erred in law and in fact by holding that the suit land belongs to the respondent while the clan meeting has no authority to divide land in the absence of*

the administrator of the estate appointed by the courts of law and while the owner of the suit land is still alive.

6) That the learned trial chairman erred in law and in fact by admitting the exhibit P1 which was not cleared for admission.

7) That the learned trial chairman erred in law and in fact by receiving and determining the matter which it had no jurisdiction to hear.

8) That the learned trial chairman erred in law and in fact by disregarding section 41(2) of the Land Disputes Courts Act [Cap 216 R.E 2019]

Based on the above reproduced grounds of appeal, the Appellants prayed that the appeal be allowed with costs, the decision and order of the trial Tribunal be quashed and set aside and a declaration that the suit land belongs to the deceased one Ngele Ginyebu.

At the hearing of the appeal which was conducted viva voce both parties appeared in person with no any legal representation.

Arguing in support of the appeal, the 1st Appellant submitted in support of the appeal and stated that, he was sued in his personal capacity as opposed to the capacity of administrator of the estate of the late Ngele Ginyeba and that the Respondent even failed to tell the court where she got the disputed land from and that the trial tribunal relied to

the letter from the clan meeting which was not read over to the court to proof the same.

On the side of the 2nd Appellant, he submitted that the evidence of the respondent contradicts each other on where she got the suit land, there was a piece of evidence which she said that she got the same from her husband and later on she said that she was given the same by a clan meeting where the clan has no mandate to allocate properties to someone who is still alive.

Responding to the grounds of appeal, the Respondent submitted that, the appellants being the sons of her late husband they are chasing her with no any reason and appellants never made any useful reply in respect of the grounds of appeal.

Upon a brief rejoinder submission made by the 1st and 2nd Appellant they made a rejoinder that before the trial tribunal the Respondent sued them for trespass while the Respondent sold the said land which belongs to Ngele Ginyebu without consulting members who gave her the said land for cultivation purpose only and she had no mandate to sell it.

I have gone through the record of the trial Tribunal, the grounds of appeal and submissions for and against the appeal by both parties. The issue to determine is **whether this appeal has merit.**

To determine the same this court will determine all grounds of appeal jointly as they both relate to the analysis of evidence before the trial tribunal to ascertain as to whether it held right to declare the respondent as the lawful owner of the suit land and not the appellant.

It is the principle of law that any person who wants the court to rely on established facts has a duty to prove as it was required by **Section 110 of the Evidence Act**, cap 6 R.E 2019 which read as follows that

110(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

Further to that in **Anthony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT-Unreported) it was held that: -

*"Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections **110** and **111** of the Law of Evidence Act, Cap. 6 Revised Edition, 2002."*

In fact, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption

A per the trial tribunals record the Respondent claimed to be the lawful owner of the suit land as she was allocated the same by her husband on 08/09/2007 through a clan meeting and the same was evidenced by exhibit P1 that the suit land was used by the respondent for cultivation purpose for 15 years uninterrupted. That after the death of the Respondent husband in year 2021 it was when the dispute arose

in the suit land. The evidence of the respondent was supported with that of PW3 and PW4 who stated on how the respondent was allocated the suit land and traced even its origin starting from the respondent's father-in-law one (Ngele Ginyebu) come to the respondent's husband and later on the respondent. According to that, it meant that the Appellants invaded into the said suit land.

That the 1st Appellant claims that being the administrator of the estate of the late Ngele Ginyebu, concerning the suit land the 1st Appellant pursuant to page 15 of the trial tribunal proceedings stated that the Respondent was allocated the suit land by elders for the purpose of cultivating only but not selling it or owning it that was supported by the evidence of DW2 and DW3. DW3 however conceded to the fact that he was present when the Respondent was allocated the suit land, when DW3 was asked questions for clarification by the trial tribunal he conceded to the fact that the Respondent was allocated the suit land and was cultivating in the suit land but she was given for cultivation only.

The trial tribunal ruled that the land is lawfully owned by the Respondent for the sole reason that, the Respondent managed to prove that she was allocated the suit land in year 2007 by her husband and

before the clan meeting and that even the 1st Appellant was among the witness.

As per the trial court record it is undisputed fact that the suit land initially belonged to Ngele Ginyebu who passed away in year 1985 survived by his son who is the respondent's husband whom again pursuant to exhibit P1 allocated the suit land together with other parts of his land to his three wives including the 1st Respondent herein. That, in the said allocation the 1st Appellant was among those who participated in the said meeting conveyed by the respondent's husband to allocate the suit land to the Respondent.

Regarding the claim that, the 1st Appellant was sued in his personal capacity as opposed to his capacity of being an administrator of the estate, I find this claim wanting in merit the reason behind the same is due to the fact that the Appellants were sued for trespassing in to the suit land and the act of trespassing was not done by the deceased rather the Appellants in person hence it was inapplicable and inappropriate to sue them under the capacity of administrator ship which has no any link to the circumstance of the present case.

In the final analysis, this court finds that the trial Tribunal rightly concluded that the disputed land belonged to the Respondent. I

therefore uphold the decision of the District Land and Housing Tribunal of Maswa at Maswa and proceed on dismissing the appeal with costs for want of merit.

It is so ordered.

DATED at **SHINYANGA** this 30th day of June 2023



A handwritten signature in black ink, appearing to read "R. B. Massam".

R. B. Massam
JUDGE
30/6/2023