

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

LAND APPEAL NO. 4 OF 2023

*(Arising from Land Application No. 59 of 2022 in the District Land and
Housing Tribunal for Maswa)*

MICHAEL SYLIVESTER.....APPELLANT

VERSUS

KABULA MTIMBA.....RESPONDENT

JUDGMENT

25th May & 28th July 2023

MASSAM, J.:

The appellant herein Michael Sylvester being aggrieved with the decision of Maswa District Land and Housing Tribunal which decided in favour of the respondent herein and ordered him to vacate to the disputed land and pay costs of the case. He appeals to this court based on the following grounds:

1. That the subject matter being deceased Kudema Chanila properly the respondent had no legal capacity to initiate and and take the proceedings for want of appointment as administratrix of the estate..
2. That, the trial Tribunal erred in law when it failed to find that as there is no administrator of the deceased property decision by clan members had no legal effect.
3. That the trial Tribunal erred in law and fact to order the appellant to vacate the land on pretext that the appellant was wrong given the land by the deceased Kudema Chanila notwithstanding that the appellant was on the land since 1988.
4. That being on the land for 35 years built houses, planted trees and occupying it peacefully and un interrupted the trial tribunal erred in law for failure to hold that the claim was time barred.
5. That having stayed on the disputed one acre of land un-interrupted the trial tribunal erred in law when it failed to find that ownership of the land had passed to the appellant under the adverse possession.
6. That the trial tribunal erred in law and fact for failure to find that the claim by the respondent was not proved to the required standard for want of evidence on size of the land she claims and the date (year) encroachment is said to be made.

Briefly, the respondent filed an application at Maswa District Land and Housing Tribunal claiming from appellant the piece of land

estimated to be four acres which she was given by her mother. The appellant objected the claim for the reason that the said piece of land was given by his father who was a brother of the respondent. At the end it was decided in favour of the respondent herein and being aggrieved the appellant preferred this appeal based on the grounds adduced herein above.

During the hearing of this appeal, Mr Robert Salim Masige learned counsel appeared for the appellant and respondent appeared in person un presented. The appeal was argued by way of written submission.

Supporting the appeal, counsel for the appellant opted to consolidate ground no 1 and 2 and 3,4 and 5 and ground no 6 to urge it separately., he told the court that in gist of ground no 1 and 2 neither the respondent nor the clan members had legal capacity to deal in the landed property as the same was belonged to Kudema Chanila who died since 1998 whose administrator was not yet appointed.

But in para 6(A)(i)of the respondent application it shows that she was a lawfully owner of the said piece of land which she was given by the clan committee, it reads"*Kwamba muombaji ni mmiliki wa*

ardhi inayobishaniwa kwa sababu ardhi hiyo ya ekari nne aligawiwa na baraza la ukoo wa marehemu Kudema Chanila”.

He added that at page 3 at the bottom paragraph of the trial tribunal proceedings respondent in her evidence told the tribunal that *Mwenyekiti wa kitongoji akaniambia nikusanye ndugu, ndugu walipokuja wakaanza kutugawia mashamba.....”*

He also said that the said piece of evidence was supported by the evidence of PW2 one Julius Buchilu who said that”*kama wana ukoo tukagawa mashamba hekari zote kwa watoto wa marehemu Kudema Chanila.*

Also appellant in her submission complained that the respondent was not administratrix of the estate of the deceased Kudema Chanila so she had no locus standi to initiate and prosecute matters related to deceased Kudema Chanila . To cement his urgency he mention the case of **Amit Dinesh Bhikha and another vs Leo Developers Ltd and others** Misc civil application NO 620 OF 2021 which held that “.....*according to the law it is only the lawful appointed legal representative of the deceased who can sue or being sued for or on behalf of the deceased’.*

So he said that the reliefs sought by the respondent was unmaintainable and incompetent before the tribunal as the respondent could not claim the deceased land to be hers as elaborated in the case of **Daniel Dalaga Kanuda(administrator of the estate of the late of the late Mbalu Kashaha Buluba vs Mashaka Ibebo and High court of Tabora Land Appeal No 26 of 2015(unreported))** it was held inter alia *tribunal do have jurisdiction to entertain incompetent matters*”

In submitting ground no 3,4,5 which boil down to one ground which was the claim by respondent that the claim was time barred,he said that the trial court erred to unseat the appellant who had stayed on the disputed land for a considerable number of the years and acquired ownership under the doctrine of adverse possession.

He continued by saying that when appellant was cross examined by respondent he said that “.....*kwenye eneo hilo una miaka kumi hapo baba yako ndio alikupa idhini ujenge pale.....*”

The PW2 the respondents witness Julius Bachilu when cross examined by the appellant said that the appellant came there since 2004 and a place he had built a house was given by his father. The said

witness said it at page 6 top paragraph of typed trial tribunal proceedings which read as follows

kiwanja anachokaa kabula alipewahumo kiwanja pale wakati huo wewe ulishajenga hapo ulipewa sehemu na baba yako ulikuwa Geita na ukarudi 2004"

Appellant testified that he came to the land on 1988 and lived there until on 1998 when his grandmother died, and DW3 and DW2 supports the said evidence, he also said that he lived there on decades of the years he built houses and planted trees , so he continued to say that if appellant was wrongly allocated the said land respondent was supposed to start the matter soon after demise of the owner Kudema Chanila in 1998 instead of waiting until 2017 and if he was trespasser why respondent did not intervene only to make the appellant stay on the land decade of years that make the claim of respondent to be time barred as per Section 22 of Part 1 to the Schedule of the Law of Limitation Act Cap 89 R.E 2019.

Appellant also said that to justify that he was not trespasser when he was cross examined by him, respondent in page 2 para 1 on the trial proceedings he said that "*.....kwenye eneo hilo una miaka*

kumi hapo baba yako ndio alikupa idhini wewe palepale kwa mama yangu nimekaa miaka mingi'

In ground 6 appellant complained that respondent failed to prove his case to the required standard namely on balance of preponderance. In record it shows that respondent was claiming a plot of land of not more than an acre in size, and when one of assessors wanted to know the size of the land respondent said.....*eneo tunalogombania halifiki hekari ni kama nusu.*

Regarding to the issue of size Pw2 Julius Bachilu told the tribunal that.....*wana mgogoro wa kiwanja chenye ukubwa wa heka moja 70 kwa 70.*

Appellant continued to say that the respondent evidence had contradiction especially to the issue of size of the disputed land. Respondent in her application she claim a land of four acres but in her evidence she mention the land she claim to be one acre or less. So according to that he pray this court to allow the appeal.

In reply to the appellant submission respondent submitted that in order this court to understand this dispute she will give a history on it as follows, Kudema Chanila married with two husbands but in different periods, the first husband was namely Masalu Ngoko, Kudema and her

her first husband owned a land of 10 acres for cultivation and also one plot where they built their houses. Later on the said husband passed away and Kudema and her children stayed in the said land ,Kudema Chanila re married again with one Mtimba Lusingi after that she moved to the land of the new husband.In 1988 Kudema Chanila divided her properties to her children who were from different father as follows, the 10 acres which she acquired from her first husband he gave it to her children from her first marriage and her 9 acres which she acquired from her second marriage she gave it to her children from her second marriage.She continued to say that it was not right for appellant to claim that respondent has no locus stand to claim the said land where the appellant lives .She added that respondent is not claiming the land of her mother but the land which she was given by her mother before she passed away and clan meeting did not sat to divide properties of Kudema Chanila but condemn the division of the clan meeting which was called secretly by the father of appellant one Sylvester. The said meeting did not change the division but bless it as it was already divided by her before passed away that happened in order to block Michael Sylvester and his father to continue using the said land.

In brief rejoinder, the appellant's counsel argued that respondent brought her submission without abide with court order of seeking extension of time to file the same ,as she was required to bring her submission on 22/6/2023 but she brought it on 23/6/2023. So he pray this court to disregard the same submission. Again he said that the respondent brought a new facts and new evidence which was not pleaded at the trial court .Respondent told the life history Kudema Chanila and purport that Kudema did divide her properties to her children before she passed away.

In the Shauri la Ardhi No 59/2022 in para 6(A) (1) respondent said that she was allocated the said land to the clan meeting, as it is trite law that a party is bound by their pleadings and can succeed on what is not pleaded in the pleadings and cannot be allowed to bring new evidence this was elaborated to the case of **Makori Wasaga vs Joshua Mwaikabo**. Respondent also said nothing concerning with the appellants grounds of appeal but she brought new facts as it held in the case **National Bank of Commerce Limited vs Somo Contractors Ltd** (2004) TLR which it held that *final submission must be confined to the pleadings and evidence*. So according to that he pray this court to allow the appeal and find it with merit.

Having gone through the record of the appeal together with the submissions from the counsels, the issue for determination is **whether the trial tribunal was justified in its decision.**

It is a cardinal principle in Civil cases that he who alleges must prove the alleged facts as it was held in the case of **Lamshoe Limited and J.S. Kinyanjui vs Bazanje K.U.D.K** [1999] TLR 330 that:

"He who alleges a fact has the duty to prove it"

The same was provided under Section 110 of **the Evidence Act**, Cap 6 R.E 2022 that:

" (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(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."

In our present case, at the trial court the respondent alleged that she claiming her piece of land which is amounted to 4 acres and she was given by the clan members of Kudema Chanila on 2017. Also she said that appellant trespassed and built a house. So according to the

evidence given this court has no doubt that the said land was given to respondent by the clan meeting and no one else.

In determine this appeal this court will start with ground no 6 which appellant complained that respondent failed to prove her case to the required standard for want of evidence on size of the land in replying the same this court on perusal on the respondent application, respondent stated that the disputed land estimated to be 4 acres. But in her testimony she mentioned that the disputed land had one acre, and her evidence was supported by her witness PW2 one Julius Bachilu who testified that the land in dispute had 70*70 which is one acre. So her evidence together with of PW2 differ from her application which brought to the tribunal which she claim mention 4 acres. Again when Pw2 was cross examined by the appellant she said that the said disputed land was not one acre but half of it. So this court is asking itself what was the size of the said land in dispute. So according to the said piece of evidence make this court to support the submission from appellant that the respondent failed to prove the size of the disputed land.

Also the respondent in her application said that the said land was given to the by the clan meeting in para 6 (A) (I) to his application it

says that *"kwamba mwombaji ni mmiliki halali wa ardhi inayobishaniwa kwa sababu ardhi hiyo ya ekari 4 aligawiwa na baraza la ukoo wa marehemu Kudema Chanila mwaka 2017"* but in her testimony she said that the said land was given to her by her mother before she passed away, in 1998, this court is in dilemma who gave that land to respondent and if respondent was already given by her mother was there any need of clan meeting to divide it again?. And if there was a need of doing so the clan meeting was a right person to do that while the said land was belonged to one Kudema Chanila who was deceased?

Respondent when cross examined she said that the clan meeting did bless what her mother was already did, but the said piece of evidence was not supported by any witness nor shown in her application. Failure of the said evidence this court is also in support of appellant submission that the respondent was not proved her case to the standard required by the law because she failed to prove how she got in possession of that land, herself together with her witness who said that she was given that land by her mother and some of her witness together with her application said that she was given by her clan. There is another piece of evidence which show that appellant trespassed to the said disputed land and built the house and trees, this

evidence creates doubts to this court because if respondent was the owner of the said disputed land why she left the appellant to trespass to her land and built the house without claiming the same since then? In supporting that appellant was trespasser respondent in her application in para 6A (iii) said that -----***mjibu maombi bila haki yeyote alivamia ardhi ya mwombaji ambaye ni shangazi yake na kujenga nyumba bila idhini ya mwombaji.***

So according to above findings of this court is in support of the appellant submission that the respondent failed to prove that the said land belonged to her but to her mother Kudema Chanila, so in replying to the said ground this court finds out that the respondent had no locus stand to claim to that land as she was not administrator of her mother Kudema Chanila as it was seen in page no 3 when Pw1 testifying to the court by saying that ".....*mwenyekiti wa kitongoji akaniambia nikusanye ndugu, ndugu walipokuja wakaanza kugawanya mashamba*" that evidence was supported by the evidence of PW2 who said that.....*kama wana ukoo tukagawa mashamba hekari yote kwa watoto wa marehemu Kudema Chanila*"

So according to the evidence of PW1 and PW2 there was no dispute that the said land belonged to the deceased one Kudema

Chanila , and not respondent nor clan members had locus to prosecute the matter before trial tribunal , this is according to the elaboration which given to the case of **Amit Dinesh Bhikha and another (supra)** that as according to law it is only the lawful appointed legal representative of the deceased who can sue or being sued for or on behalf of the deceased, and respondent nor clan members were appointed to be the administrator of the estate of the Kudema Chanila, so this court is therefore uphold the sixth ground of appeal.

Coming of the mentioned piece of evidence that the clan meeting was the one who divided the said land to the heirs of the Kudema Chanila, this court finds out that the said clan meetings had no power to divide the estate of the deceased as it was not the legal representative nor administrator of the said deceased, so therefore upheld 1st and 2nd ground of appeal.

Due to the above findings I am inclined to the answer the main issue posed above negatively that the respondent failed to prove her case to the standard required by the law, also she has no locus standi to prosecute the matter before the trial court as she was not a legal representative of the deceased one Kudela Chanila.

That said and done I feel not obliged to test the rest of the grounds of appeal since the sixth ground which I have upheld was a major ground and suffices in disposing of the entire appeal.

For the stated reasons above this court is hereby find this appeal has merit and hereby allowing it with costs and the District Land and housing tribunal judgment to be quashed and set aside.

It is so ordered.



DATED at SHINYANGA this 28th day of July 2023


R.B. Massam

JUDGE

28/7/2023