IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 12 OF 2023

(Arising from District Land and Housing Tribunal for Babati Land Case No. 23 of 2021)

UO TLAGHA.....1ST APPELLANT

AXWESO UO.....2ND APPELLANT

GHAMUNA UO.....3RD APPELLANT

VERSUS

MATEO PETRO DOMEL (*SUING THROUGH NEXT FRIEND MALKIORI PETER DOMEL*) **.....RESPONDENT**

JUDGMENT

11th & 31st July, 2023

Kahyoza, J.:

Mateo Petro Domel *(Suing through next friend Malkiori Peter Domel)* sued **Uo Tlagha, Axweso Uo** and **Ghamuna Uo** for trespass before the district land and housing tribunal (the DLHT). The DLHT found in favour of **Mateo Petro Domel**. Aggrieved, **Uo Tlagha, Axweso Uo** and **Ghamuna Uo** appealed.

Uo Tlagha, Axweso Uo and **Ghamuna Uo** raised six grounds of appeal, which culminated into six issues as follows-

(1) Was the respondent's next friend appointed properly?

(2) Was the suit land allocated to the respondent during Operation Vijiji in 1976?

(3) Was the non-joinder Dw6 (RW6), the previous owner, fatal?

(4) Did the tribunal fail to analyze the appellants' evidence?

(5) Was the suit time barred?

(6) Did the tribunal fail to observe the law and give legal reasoning?

Background of this matter is that; **Mateo Petro Domel,** the respondent alleged that **Uo Tlagha, Axweso Uo** and **Ghamuna Uo,** the appellants, trespassed to his 16 acres (the suit land). The suit land was part of the 24 acres of land allocated to Petro Domel, the respondent's father, in 1975 during Operation Vijiji. In 1990, Petro Domel allocated 20 acres to the respondent. The respondent occupied the land and used part of it for the pasturing & agriculture uninterrupted until 2014. In 2014, **Uo Tlagha,** the first appellant, trespassed to 16 acres of the respondent's land. Later in 2018, **Axweso Uo**, the second appellant, build a house. And in 2019, **Ghamuna Uo,** the third appellant built a house on the suit land . It is on record that the first appellant is the father of the second and third appellants. Also, **Mateo Petro Domel** and **Uo Tlagha** are cousins.

Following the alleged appellants' trespass to the suit land, members from the two families met on 30.5.2020 to discuss and settle the dispute. The family meeting resolved the dispute by ordering the appellants to vacate

the suit land and hand it over to the respondent. Melkiory Peter Dome (**Pw1**) tendered the family minutes as exhibit P2. The appellants disobeyed the family meeting resolution.

Before the respondent instituted a suit, **Uo Tlagha** complained to the District Commissioner. The District Commissioner directed the Division Officer to consider the dispute. On 19.10.2020 the Division officer resolved that, the suit land belonged to the respondent. Melkiory Peter Dome (**Pw1**) tendered the minutes of the meeting convened by the Division officer to resolve the dispute as exhibit P.3 and a letter from the District Commissioner's office confirming the decision of the Division officer as exhibit P4.

Dissatisfied with the decision of the District Commissioner, **Uo Tlagha** complained to the Regional Commissioner, who directed the District Commissioner to reconsider the dispute. The District Commissioner ordered **Uo Tlagha** and his sons, the appellants to vacate the disputed land.

After the District Commissioner's order, **Uo Tlagha** committed a criminal trespass by cutting trees and injuring the respondent's animals. Qambassay (**Pw2**) confirmed the evidence of Melkiory Peter Dome (**Pw1**) that the appellants' father acquired 24 acres of land during the operation Vijiji in 1975. In 1990, Petro Domel, the appellants' father gave 20 acres to

the respondent and him [Qambassay (**Pw2**)] 4 acres. He deposed that in 2008, Tlagha, the first appellant's father who is also Qambassay (**Pw2**)'s father, [Qambassay (**Pw2**)] and the respondent met and agreed to use the respondent's land. In 2013, Tlagha, the first appellant's father and also Qambassay (**Pw2**)'s father returned the respondent's land. In 2014, **Uo Tlagha** trespassed to the land followed by Axwesso in 2018 and later Ghamuna trespassed in 2019.

Qambassay (**Pw2**) deposed that in 2019 Tlagha, his father sued to seeking to possess 6 acres, the land, which respondent's father gave him and lost. Nuhu M. Domel (**Pw2**) supported the evidence of Melkiory Peter Dome (**Pw1**) and Qambassay (**Pw2**). Dahamay (**Pw4**), **Uo Tlagha**'s son confirmed that his father, the first appellant trespassed to the respondent's land. Dahamay (**Pw4**) deposed that, **Uo Tlagha**'s father who had been licensed to use the suit land returned it to the respondent in 2013. After **Uo Tlagha**'s father returned the suit land, **Uo Tlagha** convinced his sons to trespass to suit land. Gibson Idd Ajuga (**Pw5**), a neighbor to the suit land supported the evidence of the respondent.

Axweso Uo (**Dw1**) deposed that, his father, **Uo Tlagha,** the first appellant, gave him the disputed land. He alleged that he built a house to

the disputed land in 2011. He agreed that Dahamay (**Pw4**) is his blood brother.

Ghamuna Uo (**Dw2**) deposed that, the respondent's land and **Uo Tlagha**'s land are adjacent. He stated that **Uo Tlagha**, his father gave him the part of the disputed land where he built his house in 2010.

Uo Tlagha (**DW3**) deposed that, his late father occupied 17.5 acres of land and that he did not know how his father acquired that land. He deposed that the disputed land belonged to him as it was allocated to him by his father. He deposed that in 2009 the village leaders confirmed his father's allocation to him. He deposed that, there are houses and cemetery on the suit land. He tendered a document showing that the village handed him the disputed land in 2009 as exhibit D.1.

Paulo Tluway (**Dw4**) deposed that he witnessed **Uo Tlagha**'s father giving the suit land to **Uo Tlagha**. Paulo Tluway (**Dw4**) is **Uo Tlagha**'s neighbour. During cross-examination Paulo Tluway (**Dw4**) denied to be **Uo Tlagha**'s neighbour. He deposed that **Uo Tlagha**'s father did not create any document when he allocated land to **Uo Tlagha.** Tlagha Domel (**Dw5**), **Uo Tlagha**'s father deposed that the suit land belonged to him and that he gave it to his son **Uo Tlagha**.

The last witness, Michael Matle (**Dw6**) deposed that in 1986 **Uo Tlagha** built a house to his father's land.

The appeal was heard by way of written submissions. While submitting in support of the appeal, the appellants abandoned the second and fifth grounds of appeal. I will not consider the grounds of appeal. I will refer to the submissions as and when I will be answering the issues.

Was the respondent's next friend appointed properly?

The appellants complained that the tribunal erred in law and fact by entertaining the suit via next of friend (sic) without the respondent following the procedure for instituting such a suit rendering the whole trial a nullity. To substantiate the complaint, the appellant's advocate submitted that the common practice all over the world requires a person who becomes the next friend to abide to the following procedure.

(1) The court may make an order appointing a next friend must be with or without applications

(2) An application for an order appointing a next friend must be supported by evidence on affidavit.

The appellants' advocate referred to Order III, rule 1 of the **Civil Procedure Code,** [Cap. 33 R. E. 2019] (the **CPC**). He concluded that a

person suing as the next friend at the tribunal did not get authority to sue on behalf, as he did not seek and obtain authorization of the court.

The respondent replied that, the first ground of appeal was meritless and prayed for its dismissal. He contended that there is no dispute that Mateo Petro Domel is suffering from mental challenges and therefore he could not appreciate properly questions put to him to give rational answers. He contended that the appellants did not dispute that Mateo Petro Domel was mentally sick. He contended that on 25.5.2021 the respondent's counsel prayed to withdraw an application after noticing that Mateo Petro Domel, the respondent was mentally sick.

The respondent's advocate submitted further that, the procedure to sue through the next friend was complied with. He contended that, Order VII rule 1(d) of the **CPC** requires a plaint or an application of a person suing through next of kin, to contain a statement showing that the plaintiff or the applicant is a person of unsound mind. The Application contains the statement under paragraphs (6)(a)(iii) a statement that the respondent (former applicant) is person of unsound mind.

He added that under Order XXXI rule 2(1) and 15 of the **CPC** require suits of persons of unsound mind to be represented by the next friend.

In his rejoinder, the appellants' advocate insisted that Mateo Petro Domel did not follow proper procedure to sue on behalf of the respondent. To support his submission, he cited the section 24(4)(2) and (3) of the Mental Health Act, [Cap. 93 R. E. 2019].

Having heard the rival submissions, I wish to state that the provisions of **the Mental Health Act,** does not apply to the current situation. Section 24(4) (2) and (3) of **the Mental Health Act,** refers to an application for an order for the management and administration of the estate of a person. Section 24 states that-

> *"24.-(1) The court may in any proceedings under this Act make inquiries **into the property belonging to a person alleged to be mentally disordered.***
> *(2) The court may, after being satisfied with the inquiry make such orders regarding the disposal of any movable property not exceeding three million shillings in value belonging to a person in respect of whom a reception order is made.*
> *(3) The court **may make such order as it thinks fit for the administration and management of the estate of any person with** mental disorder for the purpose of making provision for his maintenance and that of members of his family who are dependent upon him and the payment of his debts.*
> *(4) –(7) N/A" (Emphasis added)*

Suing through a next friend is a suit by a person of unsound mind through a next friend. It is different from an application of a person seeking to manage the estate of a person of unsound mind. The procedure under the **Mental Health Act,** was not applicable where a person of unsound mind sues to claim his right or he is being sued. The procedure applicable, when a person of unsound mind sues or is sued is that provided under the **CPC**. Order XXXI of the **CPC** does not require a person seeking to act as a next friend to first apply to be appointed to sue as a next friend. Order XXXI rule 1 of the **CPC** states that-

> *"1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor."*

Order XXXI rule 1 of the **CPC** although, it does not refer to persons of unsound mind, it does apply to such persons. Mulla, **the Civil Procedure Code,** 17th Ed. Vol 3 at page 923 while discussing Order XXXII of the Indian Civil Procedure Code, which is *pari materia* to Order XXXI of our CPC, quoted the decision in **Marci Celine D'souza v. Renie Fernandez,** AIR 1998 Ker 280, where it was held that-

> *"The Court is not expected to conduct an elaborate enquiry under Order 32, r.15 of the Code of Civil Procedure, before a next friend can represent a person in capable of protecting his rights it is not necessary that there should be preliminary inquiry and a finding that*

person by reason of unsoundness of mind or mental infirmity is incapable of protesting his interests. ***All that is need that is that there must be some prima facie proof as to satisfy the court that the person was by reason of infirmity incapable..."*** *(Emphasis is added)*

Looking at the proceedings, it obviously that the respondent's next friend proved that the respondent was by reason of infirmity incapable of defending his interest in the suit. He tendered the respondent's medical chit showing that the respondent was a person of unsound mind. The tribunal and the appellants were satisfied that the respondent was a person of unsound mind. I, therefore find the procedure for suing as a next friend was complied with. I find no merit in the first ground of appeal. I dismiss it.

Was the non-joinder Dw6 (Rw6), the previous owner, fatal?

The appellants complained in the third ground of appeal that the tribunal erred to deliver the judgment in favour of respondent while he failed to join (Dw6), a person who was the previous owner as a necessary party. To support the third ground of appeal, the appellants' advocate submitted that DW6 was the father of the first appellant and that he was required to be party to the family meeting and a party to the suit to answer the accusations. He added Dw6 ought to have been joined as he is the one who

gave the disputed land to the first appellant. He referred the court to Order 1, rule 7 of the CPC which states that-

> ***"7. When plaintiff in doubt, from whom redress is to be sought***
>
> *Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."*

The appellants' advocate cited also the case of **Michael Y. Simkoko v. Robnson Myala,** Pc Civ. Appeal No. 31/2019 HC at Mbeya (Unreported) to support his argument. In that case, the High Court held that-

> *"First of ail, I agree with the position that failure to call a material witness now* ***the non-joinder of a necessary party in this matter*** *may cause the court to draw an adverse inference against a party. (Emphasis was added by the appellants' advocate)*

The respondent's advocate replied that the appellants' submission was annexed with exhibits to support their arguments. He contended that the law is clear that no evidence should be annexed in the submission and he prayed the Court not to accorded any weight. To support his stance, he cited the case of **British international B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie & Bish Tanzania Ltd,** Land Case No. 9 of 2009 where the Court observed that-

"Submissions are never substitute of evidence. Law Holds so. That is, statements or submissions from the bar or parties are essentially the reflection of the general opinion over the parties' case and are therefore not evidence."

The respondent replied that third ground of appeal lacked merit, clarity, and consistence. He added that the appellants did not know who was **Dw6 (Rw6). Dw6 (Rw6)** was Michael Matle who during cross-examination deposed that **Uo Tlagha** build a house in 1986 on his father's land. He added that, why on earth should the respondent join Dw6 (Rw6) in the case as a defendant while he had nothing to do with the respondent's peaceful enjoyment of the land. He concluded that it is the appellants who forcefully and without colour of right and with impunity trespassed into the respondent's land. He added that the appellants were given an opportunity to file the written statement of defence they could have raised their concern and or preliminary objection on point of law for non-joinder of any party.

In addition, the respondent's advocate argued that the allegation that the first appellant was given the suit land by his father was introduced during the defence hearing. He added the appellants summoned the first appellant's father to testify.

Indisputably, Dw6 (Rw6) is Michael Matle. Michael Matle (**Dw6**) (**Rw6**) deposed that he was neighbour to the suit land and that that in 1986

Uo Tlagha built a house to his father's land. Like the respondent's advocate I find no ground at all for the respondent to join Michael Matle (**Dw6**) (**Rw6**) as a defendant. Michael Matle (**Dw6**) (**Rw6**) is not a trespasser nor a former owner of the suit land as alleged. Michael Matle (**Dw6**) (**Rw6**) did not qualify to be a necessary party. The Court of Appeal of Tanzania defined a necessary party in **Abdullatif Mohamed Hamisi vs. Mehboob Yusuph Othman and Another, Civil Revision No.6 of 2017(CAT-DSM)** and in **Ilala Municipal Council vs. Sylivester J. Mwambije, Civil Appeal No.** 155 **of** 2015(both unreported) as follows-

> "....a *necessary party is one in whose absence no effective or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

I am of the decided view that Michael Matle (**Dw6**) (**Rw6**) was not a necessary party. I see no merit in the third ground of appeal. Even if the appellants wrote Rw6 instead of Rw5 who is the first appellant's father, still the conclusion would not be different. The appellants had complained in the second ground of appeal that the suit land was allocated to the respondent's

father during operation Vijiji in 1975. They withdrew that complaint. The appellants' withdrawal of the complaint whether the respondent's father acquired the disputed land in 1975 during Operation Vijiji, implies that they do not oppose the find that the respondent's father acquired the suit land in 1975 during Operation Vijiji. If respondent's father acquired the suit land in 1975 and in 1990 gave part of it to the respondent and another part to Qambassay (**Pw2**), then, the original owner of the suit land was the respondent's father.

In addition, there is uncontradicted evidence from Qambassay (**Pw2**) who is the first appellant's brother and Dahamay (**Pw4**), who is the first appellant's son that, the respondent licensed Rw5, the first appellant's father to use the suit land. Qambassay (**Pw2**) and Dahamay (**Pw4**), deposed further that, after the first appellant's father returned the suit land to the respondent in 2013 , the first appellant trespassed to suit land. Thus, Tlagha Domel (Rw5) (Dw5), the first appellant's father was once a licensee. He had neither title to suit land nor did acquire title after using the suit land. It is trite law that once a licensee is always a licensee. See the case of **Mukyemalila & Thadeo Vs. Luilanga** (1972) HCD 4 where it was held that-

"An invitee cannot establish adverse possession against host even if the invitee had made the permanent improvement."

There was no ground to join Rw5, the first appellant's father who was licensed to use the land and returned a before the first appellant and his sons invaded it.

I further accept the respondent's advocate contention that, first appellant's defence that the suit land was the first appellant's father arose while the first appellant was giving evidence, hence it is an afterthought. The appellants did not state in their written statement of defence that the suit land was the property of the first appellant's father. They made an evasive denial. They had duty to explain how they acquired the suit land. Order VIII rule 4 of the **CPC** bestows that duty to defendants or respondents in an application before the land tribunal. Order VIII rule 4 of the **CPC** stipulates that-

"4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse

circumstances, it shall not be sufficient to deny it along with those circumstances."

I am of the firm view that the appellants' allegation that the suit land belonged to the first appellant's father was an afterthought as it was not raised in their written statement of defence. The first appellant's father had no any color of right to the suit land, if anything he was once an invitee to the suit land, for that reason he had no qualifications of being a necessary party. It should not escape the appellants' mind that all along it was the first appellant who was complaining to the District Commissioner and the Regional Commissioner. Thus, the first appellant's father had no interest.

To make things worse for the appellants, Qambassay (**Pw2**) who is the first appellant's brother and Dahamay (**Pw4**), who is the first appellant's son deposed that the suit land belonged to the respondent and that the first appellant invaded it in 2013. Thus, there no indication on record that Rw6 or Rw5 was a necessary party. I find the case of **Michael Y. Simkoko v. Robnson Myala**, (supra), the appellants cited, not applicable to the facts of this case. It is distinguishable.

For the sake of argument, let us agree that the suit land belonged to the first appellant's father. Does that make the first appellant's a necessary party to the suit based on trespass? My quick reply is negative. Trespass to

land is committed by unlawful entry to one's land without any colour of right. The Court of Appeal held *inter alia*, in **T/a Zanzibar Silk Stores vs A.H Jariwalla T/a Zanzibar Hotel**, [1980] TLR., 31, that-

> *"a person who enters upon the premises of another without his consent, express or implied is a trespasser."*

There is ample evidence that the first appellant's father was not in occupation of the suit land but the first appellant and his two sons, the second and third appellants are the ones occupying the suit land. They are in actual possession. I find refuge in the holding of the Court of Appeal in the case of **Simon Mugejwa & Another vs Ibrahim S. Magembe** (Civil Appeal No.123 of 2020) [2023] TZCA 17440 (20 July 2023) that-

> *"Tort of trespass is founded on possession hence it was not necessary for the respondent to name other relatives so that they could be jointly sued by the appellants as Mr. Mushobozi suggested.* ***The respondent was properly sued because trespass is an actual interference with the right of exclusive possession, which is known as the entry element.*** *Naming other relatives during his testimony was therefore not fatal and could not be taken to be an afterthought. After all, a party suing has the right to choose who to sue." (Emphasis is added)*

In the end, I find no merit in the third ground of appeal and dismiss it.

Did the tribunal fail to analyze the appellant's evidence?

The appellants complained that the tribunal did not critically evaluate the evidence of the appellants, especially the evidence Dw6, who the former owner of the disputed land. To support the fourth ground of appeal, the appellants advocate submitted that the evidence of Dw6 (Rw6), Tlagha Domel, the first appellant's father was not analyzed. He called Rw6 [Tlagha Domel (**Dw5)**] a necessary part and an important witness and the previous owner of the disputed land.

The respondent's advocate responded that Rw6 was not the first appellant's father. He added that even if the appellants were referring to (Rw5) Tlagha Domel, that witness did not establish how he acquired the suit land.

I will not dwell on this point for I have partly dealt with it when answering the third ground of appeal. Looking at the tribunal's judgment I am of the view that, the tribunal considered the evidence on record. As submitted by the respondent's advocate, the tribunal considered Exh.D1 and gave it no weight as it was not annexed to the written statement of defence. It considered the totality of the evidence and exhibits tendered and concluded that the respondent's evidence had more weight than the appellants' evidence. I cannot fault the tribunal. There is evidence of the

family meeting showing that they resolved that the suit land was the respondent's property. The tribunal considered the evidence properly.

Even if, the tribunal did not consider the first appellant's father's evidence, this Court being the first appellate court has a duty to reconsider and re-evaluate the evidence. See the decision in a criminal case of **Siza Patrice V. R** Cr. Appeal No 19/2010, where the Court of Appeal held that-

> *"We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the enter evidence in an objective manner and arrive at its own findings of fact, if necessary."*

I had cursory review of the evidence on record as shown above. To say the least, Rw5 Tlagha Domel's evidence did not strengthen the appellants' case. Rw5 Tlagha Domel did not account how he acquired the suit land. There is ample evidence from Qambassay (**Pw2**) who is (Rw5) Tlagha Domel's son that the suit land belongs to respondent. Qambassay (**Pw2**) deposed that the respondent licensed him (Rw5 Tlagha Domel) to use the suit land in 2008 and that Rw5 Tlagha Domel used the suit land up to 2013 when he returned it. Qambassay (**Pw2**)'s evidence was supported by the evidence of Dahamay (**Pw4**), who is the first appellant's son. Thus, Rw5 Tlagha Domel was once a licensee to the suit land. Given the evidence

on record, even if, the tribunal had considered the evidence of Rw5 Tlagha Domel, the conclusion would not have changed.

I find no merit in the fourth ground of appeal. I dismiss it.

Did the tribunal fail to observe the law and give legal reasoning?

The appellants challenged the decision of the tribunal for its failure to observe the law and delivering a decision without giving legal reasoning. The appellants' advocate did not submit specifically to this issue.

I went through the judgment of the tribunal to find out whether the tribunal heinous transgressed the law. There is nowhere did the tribunal commit any obvious violation of the law. The appellants complained in their submission that, the tribunal did not take ample time to scrutinize, evaluate, analyze and give the decision based on the evidence of Rw6 evidence. They argued that had the tribunal considered the evidence of Rw6, this matter would have come to an end because Rw6 was the previous owner. They concluded that the tribunal's default denied them a fair hearing as they had built houses to the disputed land.

Having gone through the tribunal's record, there is no indication that the appellants were denied a fair hearing. The appellants filed the defence and summoned witnesses including the alleged previous owner of the suit

land. The evidence of the alleged previous owner did not establish to the required standard that he previously owned the suit land. Tlagha Domel (Rw5) (Dw5) did not counter the evidence that, it was the respondent's father who acquired the suit land during Operation Vijiji and gave it to the respondent. Even if, Tlagha Domel (Rw5) (Dw5) was made a party, he would not have anything more to offer than his testimony.

I am of the firm view that the tribunal did not violate any law. I find no merit in the appellants' complaint.

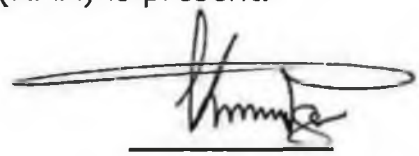
In the upshot, I find the appeal without merit and proceed to dismiss it with costs. Consequently, I uphold the tribunal's judgment and decree.

I order accordingly.

Dated at Babati this **31st** day of **July**, 2023.

John R. Kahyoza,
Judge

Court: Judgment delivered in the presence of the appellants and the respondent. Ms Fatina (RMA) is present.



John R. Kahyoza,
Judge
31. 07.2023