

**UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**HIGH COURT OF TANZANIA**  
**MOROGORO DISTRICT REGISTRY**  
**MOROGORO**

**LAND APPEAL NO. 39 OF 2023**

*(Arising from Land Appeal No. 76 of 2020 of Kilosa District Land and Housing Tribunal Morogoro, Land dispute no. 22 of 2020 before Ruhembe Ward Tribunal)*

**SHANI SALUM MAKUNDI ..... APPELLANT**

**VERSUS**

**MARIAM KAMONA MATALASA ..... 1<sup>ST</sup> RESPONDENT**

**DAMAS WILLIAM NYANGE ..... 2<sup>ND</sup> RESPONDENT**

**EXPARTE JUDGEMENT**

Date of last order: 07/06/2023

Date of Ex-parte Judgement: 28/07/2023

**MALATA, J**

This is a second appeal from the District Land and Housing Tribunal for Kilosa sitting as the first appellate Tribunal. The respondents, Mariamu Kamona and Damasi Nyangi instituted a Land dispute no. 22 of 2020 before Ruhembe Ward Tribunal against the appellant Shani Salum Mkundi. The respondents were claiming that, the suit land has been trespassed by the appellant who is not the heir of the properties of the

late Agnes Kamona Matalasa.

Upon hearing the evidence of both sides, the trial ward Tribunal adjudged in the favour of the respondents, Mariam Kamona and Damas Nyangi who were the plaintiffs before the Ward Tribunal. The appellant was aggrieved by the Ward Tribunal's verdict hence appealed to the District Land and Housing Tribunal (DLHT) for Kilosa via Land Appeal no 76 of 2020. Her appeal was unsuccessful for the DLHT upheld the decision of the trial tribunal and consequently dismissed the appeal.

Still aggrieved the appellant brought the instant appeal before this court challenging the decision of the DLHT based on the following grounds;

1. That, the trial tribunal and the Honourable chairman of DLHT having failed to properly examine, evaluate, analyse the gravity and weight of evidence on record.
2. That, the trial tribunal and the Honourable chairman of DLHT erred in law and facts for not considering that, the appellant lived in the suit land and utilized the suit land for more than **sixty years** even his mother was buried in the suit land hence the respondent to claim the dispute land was time barred.
3. That, the trial tribunal and the Honourable chairman of DLHT erred

in law and fact for not considering the will written by Agnes Matalasa (grandmother of the appellant)

4. That the trial tribunal and the honourable chairman of DLHT erred in law and facts for not considering that, respondents haven't any legal documents which was admitted before the tribunals to claim over the suit land while appellant was appointed by the family as administrator of estate of the late DESDERIA M. CHAWALA who owned the suit land for many years during his life time.
5. That, trial tribunal and Honourable chairman of District Land and Housing Tribunal erred on law and fact by failing to put into consideration that the respondents have no locus standi to claim over the suit premise.
6. That, the trial tribunal and honorable chairman of DLHT erred in law and fact by failing to put into consideration the statement by YOHANA MATHAYO the chairman of Azimio Kitete Msindazi Hamlet who appeared before the tribunal to testify that the suit land belongs to the appellant as administrator of estate of late Desderia M. Chawala.
7. That, the trial tribunal and the honorable chairman of the DLHT erred in law for not taking into consideration that, the appellant

developed the suit premises for many years, take care Agnes Kamona as our grandmother until his death without respondents to appear at home.

8. That, trial tribunal and the honorable chairman erred in law and facts for not take into consideration the different lease agreement entered by the appellant family with different person with regard the suit land from the death of Desderia M. Chawala until today.
9. That, the trial tribunal and the honorable chairman of District Land and Housing Tribunal erred in law and fact for issuing a defective judgement.

Based on those grounds of appeal, the appellant prayed for this court to quash and set aside the decision of the trial tribunal and Kilosa DLHT and declare the appellant the lawful owner of the suit premises.

The hearing of this appeal proceeded Exparte against all the respondents who refused to enter appearance despite being aware of the date of hearing date. The matter proceeded under **Order XXXIX Rule 17(2) of the Civil Procedure Code (CPC)** and as per this Court's Order dated 07/06/2023.

The appellant, when invited to submit in support of the appeal chose to argue the grounds of appeal together and she stated that, the land in

dispute totaling three acres belonged to her mother (The late Desderia Chawala) who acquired the land in dispute from Agness Kamona Matalasa who was her elder mother (mama mkubwa). The late Desderia Chawala was given the land as gift by the late Agness Kamona Matalasa in 1969. The late Desderia Chawala built the house there on and continued to own and use the land up 2005 when she passed away. The late Desderia Chawala was buried in the same land in dispute, when the late Desderia Chawala passed away, Agness Kamona Matalasa started to live with the children of the late Desderia Chawala.

In 2015 Agness Kamona Matalasa approached the hamlet chairperson of Azimio one Yohana Mathayo with view of reducing into writing on the properties of the late Desderia Chawala which needed to be inherited by her heirs.

Agness Kamona Matalasa passed away in 2018 leaving no dispute. The dispute occurred between Shani Salum Makundi and Mariam Kamona Matalasa and Damas William Nyange, the respondents herein who are neither children of either Desderia Chawala nor Agnes Kamona or heirs. The appellant submitted further that, respondents have no title over the land and further they are not heirs of either Desderia Chawala nor Agness Kamona Matalasa. They are just trespassers.

The appellant together with all children of the late Desderia Chawala are living in the late Desderia Chawala house built in the land in dispute and all of them were born the land in dispute. Before the death of Agness Kamona Matalasa who gifted the land to the late Desderia Chawala there was no ownership dispute between Desderia Chawala and Agness Kamona Matalasa and the respondents herein.

The Ward Tribunal and District Land and Housing Tribunal erred in law and facts by failure to accord weight the evidence by appellant side which proved how the land fall into the hands of the late Desderia Chawala thence the appellant (daughter of the late Desderia Chawala and heirs) but gave weight to the evidence of the stranger who are neither children of the afore stated deceased Desderia Chawala and Agness Kamona Matalasa and no fact showing how they claim ownership over the land in dispute given the fact that they are not relative of the late Agness Kamona Matalasa.

There is no document by Agness Kamona Matalasa revoking ownership to Desderia Chawala granted in 1969, the respondent has no any justification to claim for such land.

The appellant prayed the court to reverse the judgement of the District Land and Housing Tribunal and Ward Tribunal and declare that the land belonged to late Desderia Chawala. She further prayed for cost.

Having gone through the submissions and evidence on record this court has gathered issues for determination that;

1. Whether the either party this appeal has locus standi to institute the suit?
2. Whether there was there any prove that the late Agnes Kamona Matalasa owned the land in dispute and at once transferred e to Desderia Chawala, the mother of the appellant?
3. Whether the exhibit left by Agnes Kamona Matalasa was nullified.
4. What reliefs are the parties entitles to.

To start with, it is a trite law that the onus of proving claims in civil cases lies on a party who alleges. This legal position is provided in section 110, 112 and 115 of the Law of Evidence Act, Cap 6 R.E.2022. The section 110 (1) and (2) reads

*"(1) whoever desire any court to give judgment as to any legal right or liability depend 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 that the burden of proof lies on that person,"*

section 112 provides that

*"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

Section 115 provides that;

*In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

The burden of proof does not shift unless stated by the law to that effect.

In the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal no. 45 of 2017 unreported the court of appeal held that;

***"The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason.... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until***

***he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party..."***

In this case, the onus of proof was on the appellant who alleged to be the owner of the suit land. Her responsibility so to say is to establish with plausible evidence on the ownership of the disputed land. The question arising here is whether the duty was discharged. I am aware that, this being the second appeal the court is not required to re value the evidence. That is the duty of the first appellate court which must review the evidence and consider the material before the trial court. It was held by the then East Africa Court of Appeal in the case of **Pandya vs.**

**Republic [1957] E. A 336** that: -

*The second appellate court has no duty to reevaluate the evidence adduced at the trial but it has the duty to consider the facts of the appeal to the extent of considering the relevant points of law or mixed law and facts as raised in the second appeal. In the process it may review the evidence (i.e. facts) adduced at the trial and particularly so if the first appellate court failed to discharge its primary obligation to re hear the case by subjecting the evidence presented to the trial court to afresh and exhaustive scrutiny and re appraisal before coming to its own decision.*

Following the death of Agness Kamona Matalasa and Desderia Chawala the question is, who is the lawful owners of the land in dispute between the appellant and respondents. The above question goes to the locus standi of appellant and respondents to raise interest on the land in dispute. Existence of interest is a foundation of one's right to institute a suit and raise any claim against the infringed rights or interests. It is a settled principle of law that for a person to institute a suit he/she must have locus standi and this was emphasized by the High Court in the case of **Lujuna Shubi Ballonzi, Senior vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 (HC) where it was stated that:

*"Locus standi is governed by Common Law, according to which a person bringing a matter to court should be able to show that his rights or interest has been breached or interfered with"*

Apart from fully subscribing to the cited decision, I am of considered view that, the existence of legal rights is a vital pre-requisite of initiating any proceedings in a court of law. The general rule known worldwide is that, when the property in dispute belongs to the deceased person, the only person with locus standi to sue on behalf of the estate is the one who has sought and obtained letters of administration of the deceased's estate. See **Omary Yusuph (Legal representative of the late Yusuph Haji) versus Albert Munuo**, Civil Appeal No. 12 of 2018 CAT

(Unreported) and **Dominica Pius versus Kasese@John Lumoka**, Civil Appeal No.93 of 2010 CAT (Unreported)

In this particular case, since Agnes Kamona Matalasa passed away, according to the law, it is only the lawful appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased (Agnes Kamona Matalasa).

A follow up question in the present case, is who ought to have initiated the proceedings before the Ward Tribunal as the legal representative of the deceased against the respondent.

As it can be gleaned from the records and the proceedings Damas William Nyangi was the administrator of the estate of the Late Agnes Kamona Matalasa. However, the suit was filed by Mariam Kamona Matalasa (the first respondent herein) and Damas William Nyangi (the second respondent and the administrator of the late Agnes Kamona Matalasa), clearly Mariam Kamona Matalasa had no locus in the suit as she was not a co administrator, she alleged that she is the heir to the estate, the heir doesn't have legal capacity to sue while there is administrator already appointed by the court. Therefore, only Damas William Nyangi had locus standi to institute the suit, that make Mariam Kamona Matalasa a stranger to the proceedings. Therefore, the answer to issue number one is in affirmative to the extent that only the second respondent had locus to

institute the proceedings at the Ward Tribunal on behalf of the late Agnes Kamona Matalasa.

Having so said, it is evident therefore that, Damas William Nyangi was dully appointed legal administrator by the court to wear the shoes of the late Agnes Kamona Matalasa and Shani Salum Makundi was as well as appointed legal administratrix of the late Desderia Chawala.

In that regard I hereby expunge from record the name of Mariam Kamona Matalasa for lack of locus standi.

Damas William Nyangi, the administrator did bear the duty to prove before the tribunal that the land in dispute belonged to the late Agnes Kamona Matalasa and that there was no arrangement of whatever kind between the late Agnes Kamona Matalasa and Desderia Chawala.

The ownership of land was to be proved by Damas William Nyangi that the late Agnes Kamona Matalasa owns that land and that she never transferred it in any way before her demise. Such, duty could have been in execution of legal obligation under section 110,112 and 115 of the Evidence Act, Cap. 6 R. E.2022.

This court has noted that, the late Agnes Kamona Matalasa who as per the evidence on record lived with the late Desderia Chawala from 1969 left the late Desderia Chawala together with her family to continue, using, owning, developing and burring the late Desderia Chawala in the land

belonged to the late Agnes Kamona Matalasa without any arrangement up to the time of demise in 2015.

Counting from 1969 when the land in dispute was in occupation and ownership of the late Desderia Chawala up to 2015 when she passed away, it is forty-six (46) years passed without any interference by the late Agnes Kamona Matalasa. This demonstrates nothing but consent with implied surrender of ownership to Desderia Chawala unless the contrary is proven which was not.

There was no documentary or oral proof by the respondent that, the late Agnes Kamona Matalasa just gave the late Desderia Chawala to live and use the land with intention to return back upon her demise.

To the contrary, as per the evidence presented by the appellant herein together with the hamlet chairperson and documentary evidence including the declaration, in the eyes of this court it proved beyond sane of how the late Agnes Kamona Matalasa wanted her estate to be distributed. The version by the appellant herein bears nothing but in eyes of law the truth as no contrary evidence to disprove it save for the respondents' feelings, greedy, jealous, individualistic, manhood against all of which has been demonstrated by testimonies by respondents' side as to how was it possible for the late Agnes Kamona Matalasa to have uttered such words in the absence of the respondents.

In fact, the respondents want the family of the late Desderia Chawala with her family, the appellant inclusive, to leave the land handed/ allocated to them by the late Agnes Kamona Matalasa since 1969 and that the declaration by late Agnes on how her estate to be distributed be put aside. It is on record that the late Agnes Kamona Matalasa passed away living no child as she never get blessed, thus the respondents are just far relatives who were not living with the late Agnes Kamona Matalasa.

Furthermore, the declaration by the late Agnes Kamona Matalasa on how she wanted her estate to be distributed has not been challenged and found to be invalid for any reasons.

The law of evidence is clear on the proof by documentary evidence, that is, section 100(1) of the Law of Evidence Act, Cap 6, R.E 2022. The position is that where evidence is reduced into writing, no other evidence shall be given to prove the terms of such matter except the document itself. The said provision of the Law reads;

*100.-(1) When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document*

*itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.*

This section speaks similar with Indian Code of Evidence where Sarkar on Evidence Fifteenth Edition at page 1269 insisting on the need to respect the documentary evidence that;

*"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that **where written documents exist, they shall be produced as being the best evidence of their own contents.** Whenever written instruments are appointed, either by requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, **any other evidence is excluded from being used, either as substitute for such instruments, or to contradict or alter them.**"*

In brief, the best evidence is the content of the documentary evidence until it invalidated.

Expounding the above position of the law, Court of Appeal of Tanzania in the case of **Tanzania Fish Processors Ltd vs. Christopher Luhanyula**, Civil Appeal no. 21 of 2010, the court had this to say when a

document is reduced into writing no evidence shall be given to proof its term;

*"The subsection is premised on the fact that the document is supposed to speak by itself."*

It follows therefore that, where there is documentary evidence, the content of the document shall tell all on what was agreed upon, on what terms and capacity.

The exhibit relied upon by the appellant at the Ward Tribunal headed **MGAWANYO WA MASHAMBA NA UWANJA/ KIWANJA ILIPO NYUMBE KWA WAJUKUU ZAKE AGNES MATALASA**, in the document written by the late Agnes Kamona Matalasa Part of the documents stated that;

*"Agnes Matalasa nathibitisha mbele ya kikao kuwa ekari 1  $\frac{3}{4}$  na ekari 1 ni mali/ eneo lililomilikiwa na mama wa Watoto watano. Watoto hao ni*

- 1. Agnes Salumu Mkundi'*
- 2. Selina Salumu Mkundi*
- 3. Shani Salumu Mkundi*
- 4. Modestus Mgina*
- 5. Maria Selistini Ulungi*

*Jumla ya eneo ambalo ni haki ya Watoto hawani ekari 2 ¾ (ekari mbili na robo tatu). Robo tatu ¾ atapewa Ndg Damas William Kiyawike. Kwa sasa mashamba haya bado yapo chini ya mamlaka ya Ndg Agnes Matalasa. Endapo bibi huyu ataaga dunia mali hizi zitakuwa chini ya uongozi wa serikali ya kitongoji cha Azimio. Eneo lenye nyumba ni mali ya Watoto watano waliotajwa hapo juu, mgawanyo wa mashamba na uwanja huo watagawana sawa kwa sawa ambao ni familia ya hayati Desdelia Chawala."*

On the basis of what transpired at the Ward Tribunal since there is an exhibit that provides as to whom the suit land should pass, such document can't be contradicted, varied, added or subtracted by oral evidence. Further, flimsy evidence or feelings however strong can't stand against documentary evidence and be used to contradict or disprove the contents of that document. There must strong or cogent evidence and reasons for invalidating such primary evidence.

As stated from the beginning, it was the duty of the second respondent to prove that the late Agnes Kamona Matalasa is the owner of the land in dispute. No evidence was adduced by the respondents strictly to prove

that the land is owned by the late Agnes Kamona Matalasa. For the readymade reference I quote the judgement of the Ward Tribunal

*Kwa kuwa hii ni Mahakama ya uwazi wajumbe wa baraza hili wanatamka kwa uwazi kwamba dai la wadai limethibitika, wajumbe wa baraza hili wakiwapa haki wadai wamezingatia kwamba **kutokana na kesi ya mirathi na. 31/2020 iliyoamuliwa na mahakama ya Mwanzo Ruaha KII wilaya ya Kilosa inayothibitisha Damas William Nyangi kuwa ndio msimamizi wa mirathi ya Agnes Kamona Matalasa na ndiye anayekubalika na pande zote kwamba mali hizo zilikuwa ni za Agnes Kamona Matalasa.** Na kwamba Shani msimamizi wa mirathi ya marehemu Desderia Chawala wajumbe wanaona Agnes Kamona na Desderia Chawala ni watu wawili tofauti. Wajumbe wa baraza wanaona kama kweli mirathi hiyo ingekuwa inawahusu wadaiwa wangepungua mirathi ya Agnes Matalasa na sio ya Desderia Chawala.*

This marked a worse departure from the evidence on record. Being an administrator does not necessarily entitle one to be an heir. Based on the above quoted reference of decision, it is clear that, prove of ownership

was based on a mere fact of the respondent being appointed an administrator. It should be remembered that, the administrator wears the shoes of the deceased to prove existence of any fact on ownership of land. On the other hand, the appellant proved how their late mother came to own the land in dispute by his oral evidence and the exhibit she tendered at the Ward Tribunal, the evidence of the appellant was supported by the evidence of Yohana John Likingo and Melesiana Joseph who testified at the Ward Tribunal.

Yohana John Lukingo testified that;

*Akiwa madarakani alifika bibi Kamona akiwa na wajukuu wawili na kusema kwamba anaomba awarithishe mirathi ya shamba ili wasisumbuliwe akifa, baada ya kuandika waraka huo akatokea mtu aitwaye Madenyaaka na kutoa maelezo yake kwamba mwenyekiti huyo hakupaswa kuandika waraka huo bila ya kuhusisha wanafamilia..*

Melesiana Joseph Kimbindamile testified that;

*Anakumbuka kwamba mama wa mdaiwa alikabidhiwa shamba na kiwanja vyote viwe Pamoja na nyumba na Damasi Nyangi alipewa eneo akae kwa muda tu. Sijawahi kumuona Mariamu Kamona kwenye eneo hilo.*

Relying on the reasoning by the Ward Tribunal that the respondents are the lawful owners for the reason that the 1<sup>st</sup> respondent is the administrator, being an administrator doesn't give a person the right to own property alleged to be of the deceased.

In consideration of the vital two points that, who is the lawful of the land in dispute, the answer therefore is that, the land given to Desderia Chawala by Agnes Kamona Matalasa belongs to Desderia Chawala thence the property of Desderia Chawala's family.

As to the second issue, whether the late Agnes Kamona Matalasa made declaration on how her estate is to be distributed, the answer is **YES**, she did. All parties to this appeal and whoever possess interest must respect the deceased declaration. The surviving people must learn to find their own property rather than waiting to fight for inheritance from the deceased who might have made exclusion as to who should inherit and to what extent. This is demonstrated by the parties herein who are questioning why the deceased made such declaration. The declaration made by the late Agnes Kamona Matalasa who passed away leaving no child has to be respected by all relatives. The deceased can not be recalled and asked on the declaration he/she made.

All in all, the Ward Tribunal and the DLHT did not properly directs its mind to the evidence on record. It also wrongfully acted on exhibit and arriving


to the conclusion that the respondent is the lawful owner without any evidence to that effect.

In the event, I find the appeal has merit, the decision of DLHT and Ward Tribunal are quashed and based on the evidence on record, I hereby declare, the family of the late Desderia Chawala represented by the appellant herein to be the lawful owner of the land in dispute. Further, I declare that, the said family is also the owner estate of the late Agnes Kamona Matalasa to the extent of the declaration.

In the result, I hereby allow the appeal with costs.

**IT IS SO ORDERED**

**DATED at MOROGORO** this 21<sup>st</sup> July 2023.

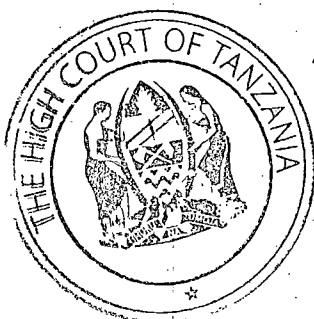


G. P. MALATA

**JUDGE**

21/07/2023

**Exparte Judgement DELIVERED at MOROGORO 21<sup>ST</sup> JULY 2023.**



G. P. MALATA

**JUDGE**

21/07/2023