

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

MISCELENEOUS LAND CASE APPEAL NO. 44 OF 2022

(C/F Land Case Appeal No. 40 of 2020 before the District Land and Housing Tribunal
for Singida at Singida)

SOTERI KITIKU APPELLANT

VERSUS

MARIA GABRIELY.....RESPONDENT

JUDGMENT

Last Order: 7th August, 2023

Judgment: 18th August, 2023

MASABO, J.:-

This is a second appeal. It originates from Kinyagigi Ward Tribunal, Singida District in Singida Region where one Soteri Kituku, the appellant herein unsuccessfully sued the respondent for trespass into his land measuring one and a half acre. Aggrieved, he appealed to the District Land and Housing Tribunal where the decision of trial tribunal was upheld. Aggrieved further, he has filed this appeal on the following grounds: -

1. That, the first appellate tribunal and the ward tribunal erred in law and in fact in admitting and entering the suit and entertaining the suit land in which the respondent was sued in person capacity while the land in dispute is alleged to be the property of her late father.
2. That, the first appellate tribunal and the ward tribunal erred in law and in fact in disregarding the evidence tendered by the, appellant and my three witnesses who proved on the balance of probability that I have been in the suit land developing the same for thirty-two (32) years without being interrupted.
3. That, the first appellate tribunal and the ward tribunal erred in law and in fact in holding that my witness one Anna

Mohamed told the ward tribunal that I purchased the suit land while the fact is that the purchased land is quite different to that given to me by my father one Nkungu Kitiku on 5th December 1988.

4. That, the first appellate tribunal and ward tribunal erred in law and in fact in combining the two land, one given to me by my father and that purchased by me from Nicodem Isidingo in 1993 as one land while the fact is that the same are two different land.

The brief facts of the case are that, the appellant alleges that he was given the suit land by his late father, one Nkungu Kitiku in 1988. On her part the respondent stated that the suit land belongs to his late father (the appellant's paternal uncle) and her mother. She asserted that, sometimes back, her parents gave the suit land to the appellant so that he can use it. In the year 2020, after the demise of her father, her family decided to take the suit land back for their own use but the appellant claimed it to be his land. He filed a case before the ward tribunal. That is Land Case No. 6 of 2020, suing her for trespass. The case was dismissed by the trial tribunal and when he appealed to the appealed tribunal, his appeal was dismissed for want of merit hence the present appeal.

On 07th August 2023, the matter came before me for hearing. All the parties appeared in person, unrepresented. Submitting in support of the appeal, the appellant stated that the respondent is not the lawful owner of the suit land. He argued that, the suit land belongs to him as he was given the same by his father in 1988. He proceeded that, initially, the suit land had two parts. He was given the first part and second part went to his young brother one Joseph Kitiku, who exchanged his part with one

Nicodemus Isingo. After three years, the appellant redeemed the land after paying Nicodemus Isingo a sum Tsh. 120,000/=. As from then, this part also become his and started to till it. He enjoyed occupation of the suit land uninterruptedly. He prayed the court to see the record from tribunal and dispense justice by giving him the land. He added that had the respondent been the owner of the land, she would have claimed it in the period of thirty-three years when she was using it but she did not which shows that the land is his. He concluded that, the respondent has not produced any document showing that indeed the land was bequeathed to her, thus her assertions are without merit.

In reply, the respondent submitted that the suit land belongs to Gabriel Kitiku and Basilisa Monko her father and mother, respectively. She argued that the appellant was temporary given the suit property by her father in 2013 and he started tilling it afterwards. However, after the death of the respondent's father in 2018 his family decided that the farm be returned and it be put to the family's use. They went to the village office where the appellant was told to return the farm to the respondent but he refused. After two days, the appellant filed a case at ward tribunal. She also stated that, when the matter was still before the trial tribunal, she notified the trial tribunal that the suit land does not belong to her, personally. It belongs to her late father and her mother but she was ordered to proceed with defence of the case as her mother is ailing and is too old. After the hearing, the trial tribunal decided the case in her favour, the decision which was also upheld by the first appellate tribunal. She submitted that much as she has not been formerly appointed as the administrator, her family has authorised her to stand and defend the matter. She concluded

with a prayer for this court to uphold the decision made by the first appellate court.

In rejoinder, the respondent submitted that indeed the respondent is not the owner of the land. He sued her because she is the one who was the first to sue him. She sued him before the village council and thereafter, he took the matter to the ward tribunal in retaliation. He added that, he sued her because she told him that she has been appointed by her family and she was authorised to deal with the matter.

I have considered the submissions made by both parties as well as the records of the trial and the appellate tribunals. I am now in a position to determine the grounds of appeal before me. Before I move to the grounds of appeal, it is relevant to state from the outset that the two lower tribunals ruled in favour of the respondent. It is a trite law that where there is a concurrent finding of the lower courts, the second appellate court should not interfere with such consistent findings unless it is satisfied that there was a misapprehension of evidence or miscarriage of justice or that a violation of principles of law has been occasioned (see **Samwel Kimaro vs. Hidaya Didas**, Civil Appeal No. 271 of 2018 [2019] TZCA 201 (TANZLII), **Simon Kichele Chacha vs. Aveline M. Kilawe** Civil Appeal No. 160 of 2018 [2021] TZCA 43 (TANZLII) and **Amratlal Damodar Maltaer & Another t/a Zanzibar Silk Stores vs. Jariwallat/a Zanzibar Hotel** [1980] TLR 31. This principle will guide me in determining the grounds of appeal.

Starting with the first ground of appeal, the main issue for determination is whether the lower tribunal erred in law and in fact by admitting and entertaining the suit against the respondent who had no capacity to stand and defend the suit in her personal capacity. Put otherwise, did the tribunals misapprehend the fact that the suit was instituted against a wrong party. The appellant has argued, and the respondent has conceded that, she is not the owner of the suit land as the suit land was jointly owned by her father who is now deceased and her mother who is unable to defend the case owing to ailment and old age. It is her further submission that, she has been authorised by her family to stand and defend the matter.

It is a trite law in our jurisdiction that, only a legal representative can sue or be sued in respect of a property of a deceased person. Dealing with a similar issue in **Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman & Another**, Civil Revision 6 of 2017, [2018] TZCA 25 (TANZLII), the Court of Appeal held that:

We have purposely supplied emphasis on the extracted entry to underscore the fact that the 1st respondent's ownership of the suit land was not in her personal capacity, rather, it was on account of her being the legal representative of the deceased. Thus, in our view, to the extent that the suit land was vested upon the 2nd respondent by virtue of her capacity as the deceased's legal representative, any suit with respect to that property ought to have been instituted against her in that capacity.

Since in the present case the respondent was sued in that capacity, it was crucial for the proceedings to show that, she was sued as a representative of her deceased father or in the alternative, as a representative of her

elderly and ailing mother but the record is silent. All it shows is that she was sued on his personal capacity which was materially wrong. Having been notified by the respondent that she was standing on a representative capacity, the tribunal ought to have demanded evidence of such representation or instructed the appellant to sue the respondent in his representative capacity but it proceeded notwithstanding.

In the foregoing, it is crystal clear that there was a fatal anomaly in the proceedings as the respondent was not a proper party to be sued. The first ground of appeal is, as result, found meritorious and upheld. Having uphold the first ground of appeal, I see no need to proceed to the remaining ground as this sole ground is capable of disposing of the appeal. Accordingly, the appeal is allowed. The proceedings, decisions, judgment and orders of Kinyagigi Ward Tribunal and the District Land and Housing Tribunal for Singida are quashed and set aside. Considering that the anomaly was too obvious and ought to have been resolved at the early stages of the application, I find it to be in the interest of justice that each of the parties bear her/his respective costs.

DATED and **DELIVERED** at Dodoma this 18th day of August, 2023



A handwritten signature in blue ink, appearing to be "J. L. MASABO".

J. L. MASABO
JUDGE