

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 14 OF 2023

(Appeal from the judgment and decree of the District Land and Housing Tribunal for Mbulu at Dongobesh in Land Application No. 8 of 2022)

TSERE TLAATLA.....APPELLANT

VERSUS

MAGDALENA MATAY KWAANGW

(personal legal representative of the late

KWAANGW MATAY).....RESPONDENT

JUDGMENT

13/6/2023 & 13/7/2023

BARTHY, J.

The present appeal arises from the decision of the District Land and Housing Tribunal for Mbulu sitting at Dongobesh (henceforth the trial tribunal) in Land Application No. 8 of 2022.

It is on record that the respondent sued the appellant before the trial tribunal for trespass over un-surveyed piece of land measuring about $\frac{3}{4}$ acres situated

at Nahasey village within Mbulu Town Council (hereinafter referred as the suit land). She claimed for an assortment of reliefs against the appellant including for an order of eviction from the suit land. The appellant lodged his written statement of defence disputing the respondent's claims. He maintained that he inherited the suit from his late father in 2003. He further claimed that the suit land measures about ½ acres.

After hearing the parties, the trial tribunal decided in favour of the respondent as she was declared as a lawful owner of the suit land. Being aggrieved with the decision of the trial tribunal the appellant preferred the present appeal with four grounds of appeal as follows;

- 1. That the trial tribunal misdirected itself by alleging that the appellant corroborated the respondent's evidence that the appellants [sic] father was given the suit land by the late Kwaangw Matay in 2014.*
- 2. That the trial tribunal erred in law and in fact for failure to evaluate the evidence of the appellant's witnesses.*

3. That the trial tribunal erred in law and fact for failure to deliver the decision without giving legal reasoning.

4. That the trial tribunal erred in law and fact to entertain the suit which was time barred.

At the hearing of the appeal, Mr. John Lundu learned advocate appeared for the appellant while the respondent appeared in person. the appeal was disposed of orally.

Mr. Lundu argued the first and second grounds of appeal and prayed to abandon the third and fourth grounds.

Submitting on the first ground, Mr. Lundu contended that the trial tribunal misdirected itself in holding that the appellant was given the suit land by the late Kwaangw Matay (hereinafter referred to as the deceased) in the year 2014.

He contended that the evidence of the appellant shows that he was given a piece of land measuring about ½ acre by his father in the year 2003. He contended that the trial chairperson misdirected as clearly seen on page 3 and

4 of the typed judgment by his findings that the evidence of the appellant corroborated the evidence of the respondent.

Submitting on the second ground of appeal Mr. Lundu faulted the trial tribunal for failure to evaluate the evidence of the appellant. He submitted that the appellant was given a piece of land by his father in the year 2003 and his evidence was supported by two witnesses namely Witness Eveline Mandee and Claud Quray. He contended that comparing the evidence of the appellant and that of the respondent before the trial tribunal, the latter's evidence was weak to prove her claim. He pointed out that the respondent could not prove as to when title to the suit land passed to her. He submitted that there is no proof as to when Tlatla Matay passed away and what was done by deceased to claim back the suit land.

He contended that there was evidence that the appellant was given the piece of land from Tlatla Matay since 2003 and no one claimed it ever since.

He therefore urged the court to quash and set aside the decision of the trial tribunal and proceed to declare the appellant as the lawful owner of the suit land.

On reply the respondent contended that the suit land is about 3 acres as the other area is forestry/bushy area. She submitted that the dispute arose after her brother's children stopped her. She contended that she is just administering the deceased's estate. She contended that she attempted to settle the matter before the local government but the appellant did not show up. She therefore decided to file the matter before the trial tribunal.

On rejoinder Mr. Lundu reiterated his submission in chief.

Having gone through the rival submissions of the parties, the sole issue for my determination is whether the appeal has merits.

Essentially the appellant's submission in support of the first and second grounds of appeal faults the trial tribunal for declaring the respondent as the lawful owner of the suit land without sufficient evidence.

This court sitting on the first appeal is enjoined to re-asses the evidence on record and where it is necessary to come up with its own findings.

Having carefully gone through the record of the trial tribunal, the respondent who was the applicant claimed the suit land measuring about $\frac{3}{4}$ acres

belonged to the deceased who passed away sometimes in 2017. Looking at the pleadings filed at the trial tribunal and the evidence adduced, while the respondent claimed the suit land measures about $\frac{3}{4}$ the appellant claimed the suit land measures about $\frac{1}{2}$ acre. However, looking at the application form and the testimonies of the respondent who testified as PW1 and Hando Gilba who testified as PW2 there were contradictions in terms of size and location of the suit. While the respondent maintained that suit land measures $\frac{3}{4}$, PW2 maintained that the suit land measures $\frac{1}{4}$.

As to the location of the suit land, paragraph 6(a) (iv) of the application shows that the suit land has the following boundaries;

On the East – Gelardi Mandoo, West-Martin Mnyangu, South-Martin Mnyangu and North-Gelardi Mandoo. In her testimony, the respondent contended that the suit land has the following boarders, namely; North-Gelardi Mandoo, South- Martin Mnyangu, East- Andrea Mandoo, West- Nyumba ya Meta (Meta's house).

Hence there is a great departure between the pleadings filed and the evidence adduced before the trial tribunal. The general rule is that a party is bound by

his pleadings and should not be allowed to succeed on a case not made out in his pleadings. In **Hemchand v Peareylal**, A. 1942 PC 64 an Indian case which was quoted in approval by the Court of Appeal in the case of **James Funke Ngwagilo v Attorney General** [2004] TLR 161, the Privy Council characterized as irregular the procedure of the Trial Court in allowing evidence to be adduced on points not raised in the pleadings or issues and held that this should not have been allowed without amendment of the pleadings and issues.

The appellant gave a different account as he maintained that the suit land measures ½ acres. According to him the suit land has the following borders; North-Ama Meta, South-Andrea Mandoo, East-Gelardi Mandoo and West-Kwaang'w Matay.

Looking at the evidence in totality no doubt parties were referring to different pieces of land hence the trial tribunal was required to resolve issues pertaining to location and size of the suit land. It is unfortunate that the learned trial chairperson never attempted to resolve those issues instead it declared the suit land to forming part of the deceased's estate.

Another issue which needs to be determined is whether the respondent was able to prove her claims. In civil cases the standard of proof required is that on the balance of probabilities, as provided under Sections 110 through to 113 of the Evidence Act, [Cap 6 R.E. 2019]. The respondent herein was duty bound to lead evidence to establish that the suit land is the property of the deceased. I have carefully gone through the entire evidence adduced before the trial tribunal I hasten to state that the respondent did not adduce sufficient evidence to prove her claims.

Going by the evidence on record, the respondent claimed that suit land forms part of the deceased's estate as he acquired the same from his late father. However, PW2 while responding to the question posed by the learned trial chairman regarding how the deceased acquired the suit land, he replied that he didn't know how the deceased acquired the suit land.

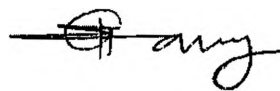
It follows therefore there was no evidence to establish that deceased ever owned the suit land. Hence looking at the evidence in its totality, had the learned trial chairperson evaluated the evidence on record and the pleadings filed he would have arrived into a different conclusion. Even the two assessors who presided over the matter were of the unanimous opinion that there were

serious contradictions in terms of the evidence adduced and the pleadings filed. Hence, they opined that the matter be remitted to the ward tribunal to start afresh. The learned trial chairperson rejected the assessors' opinion and proceeded to declare the respondent as the lawful owner of the suit land. This was a clear error because the evidence adduced did not prove the claims.

Consequently, I find the appeal to be meritorious the same is allowed. The decision of the trial tribunal is quashed and set aside. I further order each party to bear its own costs.

It is so ordered.

Dated at Babati this 13th July 2023.



G. N. BARTHY,

JUDGE

13/7/2023