IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL No. 16 OF 2022

(Originating from Land Application No. 14 of 2022 from the District Land and Housing Tribunal for Katavi at Mpanda)

AUGUSTINO METHEW MBALAMWEZI.....APPLICANT

VERSUS

MARY PETRO MGOLOKA.....RESPONDENT

JUDGMENT

04/05/2023 & 21/08/2023

MWENEMPAZI, J.:

This is a second appeal to this court, whereas the appellant had before appealed against the decision of the same District Land and Housing Tribunal for Katavi at Mpanda (trial tribunal) in **Land Appeal No. 22 of 2020** and, my learned brother Honourable Judge Mkeha ordered that the trial tribunal's Judgment to be set aside, and pushed the matter to where it stood on the 02nd day of December, 2019, and that the same is to proceed before a distinct chairperson and new set of assessors with a visit to locus in quo.

Thereafter, the trial tribunal again declared the respondent as the rightful owner of the disputed land and in so doing, again, the appellant

herein is aggrieved by that decision of the trial tribunal whereas, the respondent (as an administrator of the estate of the late Petro Nicholaus Mgoloka) had sued the appellant seeking declaration that the disputed land is the property of Petro Nicholaus Mgoloka's family and also vacant possession of the same.

Attempting to turn the tables, the appellant had filed this appeal to this court which consists of seven (7) grounds in which I find best to reproduce for ease of reference. The grounds are:-

1. *That, the trial tribunal erred at law by deciding in favour of the respondent who failed to prove ownership over the disputed land.*
2. *That, the trial tribunal erred at law and fact by giving its judgment in favour of the respondent despite giving conflicting evidence regarding the date and year the appellant is said to have invaded the suitland.*
3. *That, the trial tribunal's judgment is not maintainable for its failure to observe the directives ordered by Land Appeal No. 22 of 2020.*

4. *That, the trial tribunal judgment is not maintainable by its failure to observe the rules governing visiting locus quo.*
5. *That, the trial tribunal judgment is not maintainable by its failure to recognize the Appellant's long occupation over the suitland.*
6. *That, the trial tribunal erred at law by deciding in favour of the respondent who together with her witnesses failed to point out the area/amount of the suitland neither its boundaries.*
7. *That, the trial tribunal erred at law by its act of recognizing the Appointment of the respondent as the administrator of the estate of the late Petro N. Mgoloka which was made by Mpanda Urban Primary Court, a court which had no jurisdiction as the properties of the respondent and her family are residing at Inyonga within the jurisdiction of Inyonga Primary Court.*

Whereas the appellant prays for this court to pronounce the judgment in his favour, and allow this appeal with costs.

On the date of hearing this appeal, the appellant had no legal representation and so he fended off for himself while the respondent enjoyed the legal services of Ms. Sekela Amulike, learned advocate.

Nevertheless, both sides had agreed on dealing with this appeal by way of written submissions, a prayer which was granted by this court.

On that basis, the appellant submitted first that, the standard of proof in civil cases lies upon preponderance of probability but in this case the Respondent failed to prove ownership over the disputed land and he cited section 3(2) (b) of the Evidence Act (Cap 6 R.E. 2022) which states that

> *"In civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability"*

He then added that, section 110 of the Evidence Act (Cap 6 R.E. 2022) states 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 fact 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."*

The appellant proceeded that, Evidence Act, under section 115 pronounces and he quoted,

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

The appellant therefore concluded as far as the 1st ground of appeal is concerned that; in civil proceedings the burden of proof lies upon the plaintiff.

Submitting for the 2nd ground of appeal, the appellant submitted that the respondents claim stated that the appellant invaded the disputed land in 2018, but in her testimony as SM1, she testified that the appellant invaded the disputed land in the year 2007. He insisted that, this contradictory testimony is to show in what manner the Respondent is not certain to what she was alleging before the trial tribunal.

The appellant's arguments in support of the 3rd ground of appeal was that, on the 23th day of December 2020, this Honourable court ordered the trial tribunal's Judgment to be set aside, and the matter was pushed to where it stood on the 02nd day of December, 2019, and that the same is to proceed before a distinct chairperson and new set of assessors, in his view these orders were not complied with by the trial chairperson as ordered by this court.

He then stressed further that, as per section 43 (1) (a) of The Courts (Land Disputed Settlements) Act. Cap 216 R.E 2022. Which provides that;

> *"In addition to any other powers in that behalf conferred upon the High Court, the High Court (Land Division) shall exercise general powers of supervision over all District Land and Housing Tribunal and any at any time, call for and inspect, the records of such tribunal and give directions as it considers necessary in the interests of justice, and all such tribunals shall comply with such direction without undue delay."*

Therefore, the appellant under this ground of appeal is urging this court to allow this appeal as the trial tribunal did not adhere to the orders of this court in Land Appeal No. 22 of 2020.

Submitting for the 4th ground of appeal, the appellant submitted that, when one talks about Locus in Quo, it means that the place in which the cause of action arose, or where anything is alleged, in pleading, to have been done. Thus, any party to the dispute has the duty to show his boundaries and boundaries of the neighbours and physical features on the disputed land.

The appellant then referred me to the case of **Avit Thadeus Massawe vs Isdons Assenga, Civil Appeal No.06 of 2017** (I assumed it is unreported as he did not clarify), in which this case had circumstances justifying visits to Locus in Quo are listed as follows, and the appellant quoted;

"1. Courts should undertake a visit to the Locus in Quo where such a visit will clear doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence.

2. The essence of a visit to Locus in Quo in land matters includes location of the disputed land. The extent, boundaries and boundaries neighbour and physical features on the land.

3. In a land dispute where it is manifest that there is a conflict in survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the Locus in Quo.

4.The purpose of a visit to Locus in Quo is to eliminate minor discrepancies as regards the physical condition of the land in

dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims."

It is the appellant's consideration that, in this case at hand the trial tribunal acted differently, that respondent could not show the boundaries whereby nothing she did in part of size of the disputed land nevertheless failed to mention the neighbours, that there was a contradiction as to the actual size of land in dispute.

The appellant did not end there, he proceeded by submitting for the 5th ground of appeal that, it is clear that the evidence pointed out that the appellant is the original owner of the disputed land through customary way, that the original status of the disputed land if at all she denied the appellant to be the lawful original owner.

He submitted further that, his evidence of ownership is unchallenged as held by the trial tribunal and therefore established that the appellant was the original owner of the disputed land, under deemed right of occupancy a way back in 1994. He added that, the law is settled under section 3 (I) (g) and section 34 (3) (b)(iv) of The Land Act (Cap 113 R.E. 2022) and he quoted,

"That a person occupying land shall be full compensated for loss of any interest in land and any other losses due to the interference to their occupation or land use."

The appellant added further that, similarly in the case of **Attorney General vs Lohay Akonaay and Joseph Lohay (1995) TLR 80** where the Court of Appeal held that;

"Customary or deemed right in land, though by their nature are nothing but right to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of The United Republic of Tanzania and their deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution."

As far as the 5th ground of appeal is concerned the appellant winded up that, guided by the above decision, it is evident that the owner of the customary right of occupancy has equal status with granted right of occupancy.

On the 6th ground of appeal, the appellant submitted that when the respondent fails to identify the boundaries governing the disputed land the

court or tribunal decides to conduct a visit to the Locus in Quo. That, there are certain guidelines and procedures which should be observed to ensure fair trial. He added that some of these procedures were articulated in the case of **Nizar M.H vs Gulamal Fazal Jan Mohamed (1980) TLR 29** where it was held that;

> *"When the court decides to conduct a visit at the Locus in Quo must attend with the parties and their advocates, if any and with much each witness as may have testify in that particular matter, when the court re-assembles in the court room, all such notes should be read out to the parties and their advocates and comments, amendments, or objections called for and is necessary incorporated witness, then have to give evidence of all those facts, if they are relevant, and the court refers to the notes in order to understand or relate to the evidence in court given by witnesses we trust that procedures will be adapted by the court in future."*

After the citation above, the appellant then insisted that different from the matter at hand, the trial chairman did not make any findings on

the disputed land but rushed to conclude in his decision from vacuum that the respondent is the owner of the disputed land.

Submitting for the last ground of appeal, that is the 7th ground, the appellant submitted that the jurisdiction of the Primary Court in Probate and Administration of Estate is as provided in the provisions of Paragraph 1 (1) to the fifth schedule of the Magistrates' Courts Act [Cap 11 R.E. 2022] and he then quoted the provision as herein that;

> *"The Primary Court can appoint an Administrator where the law applicable to the administration or distribution of the succession to the estate is customary law or Islamic law and that the deceased at the time of his or her death had a fixed place of abode within the local limits of the court's jurisdiction."*

He then proceeded that, it is clear from the records that the respondent was appointed to be an Administrator of the estate of the late Petro Nicolaus Mgoloka by the Urban Primary Court of Mpanda, and that was in September, 2018. That, while the proper forum for her to be appointed would have been at Inyonga Primary Court of Mlele, and in that, the appellant believes that the Mpanda Urban Primary Court had no jurisdiction to appoint the respondent as the Administrator.

After he had concluded his submissions, the appellant invited this court to allow his appeal in its entirety with costs.

In reply, the learned counsel for the respondent submitted that starting from the 1st ground of appeal, that the respondent amplifies that the appellant failed to prove his ownership on the suitland on balance of probabilities as envisaged by quoted Section 3 (2) (b) of the Evidence Act Cap 6 R.E. 2022 and also Section 110 of the same Act.

She the added that, even in the appellant's submission in chief, he failed totally to establish his ownership instead he dwelt on quoting the sections of the law which were not the dispute before the trial tribunal. That, the dispute in the trial tribunal satisfied itself that the Respondent in her capacity as administratrix of the estate of the late Petro Mgoloka proved the ownership in the balance of probabilities. Ms. Amulike urged this court to upheld the trial tribunal's standing.

Ms. Amulike proceeded by submitting for the 2nd ground of appeal, that the respondent narrates that there were no any grave contradictions in the trial tribunal which went to the root of the matter. To emphasize on her point, she referred me to the case of **Abel Adriano and 2 Others vs Republic Criminal Appeal No.184 of 2017**, HC (T) Iringa (Unreported).

Thereafter, she added that, moreover the said contradiction was not cross examined by the appellant in the trial tribunal and hence the appellant is precluded from raising the same in the appellate stage. She again referred this court to the case of **Dar es Salaam Water and Sewerage Authority vs Didas Kameka and 17 Others Civil Appeal No.233 Court of Appeal of Tanzania**, DSM (Unreported)-Page 9.

Coming to the 3rd ground of appeal, Ms. Amulike responded that the directions given by this Honourable court on Land appeal No. 22 2020 (Honourable Mkeha-J) were dully complied with by the trial tribunal as the tribunal conducted a locus in quo with the presence of new set of assessors as directed, that the appellant has failed to demonstrate which directions were not complied with, and that, it is not the duty of the court to formulate party's case. The learned counsel insisted by quoting the holding made in the case of **Barka Saidi Salumu vs Mohamedi Saidi [1970] HCD No.95** where Hamlyn, J. underscored that, and she quoted;

> *(1)"I fully agree with the opinion of the District Magistrate that it is a party to present his or her own case to the Court and not for the Court to make a case for the litigant. In the instant case, the woman made certain allegations against her husband, merely*

relying upon the evidence which she herself gave; she called no witnesses to support her complaints, and therefore, because the trial court found such evidence did not suffice to establish the facts which she alleged, the woman appeal contended that it was the duty of the court to call corroboratory evidence. This clearly is not so, and the litigant should produce what evidence there is to establish her case. It is only rarely that a court will, of its own motion, in cases such as this seek to clarify as issue by requiring an additional witness."

Ms. Amulike then underlined that relying on the precedent above as she cited, that this Court could never guess which of the directions were not complied as the appellant himself failed to state them.

She proceeded by submitting against the 4th ground that all directives given by the higher court on visiting locus in quo including the land mark case of **Nizar M. H. vs Gulamali Fazal Jan Mohamed [1980] TLR 29**, that they were duly complied as the trial tribunal visited the locus in quo with the parties, took notes of what transpired at the locus and summoned witnesses who are neighbours to the suitland to testify.

She added that the contention made by the appellant that the Respondent was the one who asked to show the boundaries is not reflected any where in the trial tribunal's proceedings, that also there was no any contradictions as to the size of the suitland since the parties knew what was the dispute between them as the matter has a long history.

Turning to the 5th ground of appeal, Ms. Amulike submitted that the contention made by the appellant that he is the owner of the suitland by way of deemed right of occupancy was not pleaded any where in the trial tribunal proceedings, starting from the Written Statement of Defence of the appellant in the trial tribunal dated 15.04.2022 as it is the cherished principle of the law that parties are bound by their pleadings. In making an emphasis to her point, Ms. Amulike referred me to the case of **James Funke Gwangilo vs Attorney General [1994] TLR 73**, and that the cited case by the appellant in **Attorney General vs Lohay Akonaay & Joseph Lohay** (supra) is distinguishable and not applicable in the circumstances of this case, because the issue of deemed right of occupancy was not canvassed at the trial tribunal.

On the 6th ground of appeal, the learned Counsel argued that the respondent never failed to identify the boundaries of the suitland rather

was it the reason for the trial tribunal's purpose of visiting the locus in quo and that, the case of **Nizar** (supra) is highly distinguishable as the prerequisite of what ought to be observed in a locus in quo visit was duly complied with.

Ms. Amulike submitted on the 7th ground that, this is a misconceived ground and unwarranted because if the appellant wants to challenge the manner the letters of administration of the deceased's estate were obtained, he ought to follow the requisite procedures, that the dispute which was handled at the trial tribunal was about the ownership of the suitland and not the respondent being an administrator. That the appellant objections on administratosrship are misconceived and the same are in th wrong channel, and in that she urged this court to dismiss the objections as they are on the domain of probate court.

Ms. Amulike concluded by submitting that it is her camps' observation that this appeal is barren of merits and that it has to be dismissed with costs.

In rejoinder, the appellant submitted that it is the cherished principle of law that in civil cases the burden of proof lies on the party who alleges anything in his favour. That, the appellant is fortified in his view that by the

provision of Section 110 and 111 of the Tanzania Evidence Act [Cap. 6 R.E. 2022] and he quoted the cited sections as herein;

> *"110. 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.*
>
> *111. The burden of proof in any suit lies on the person who would fail if no evidence were given on either side."*

The appellant added further by citing the case of **Attorney General and 2 Others vs Eligi Edward Massawe & Others, Civil Appeal No. 88 of 2002** (unreported). In that, the appellant submitted that following the principle stated above at the trial tribunal, the respondent did not prove that her late father did own the suitland.

He proceeded that, in proving possession of the disputed land, that the evidence showed that the appellant was found possessing the disputed land according to the law.

To support his argument, the appellant referred this court to the decision in the case of **Simon Ndikulyaka vs Republic, Criminal Appeal No. 231** of **2014,** Court of Appeal of Tanzania, in which the issue

of possession was discussed at page 6 when referring the case of **Mosses Charles Deo vs Republic [1987] TLR 134** and held:

> *"For a person to have possession actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them."*

The appellant argued further that, in this case at hand all the respondent's witnesses did not adduce evidence to show that the respondent exercised control over the disputed land rather than the testimony which contained inconsistency and contradictions.

Additionally, the appellant submitted that he is mindful of the fact that there is no law which forcefully and mandatorily require the court or tribunal to inspect a locus in quo as the same is done at the discretion of the court or tribunal, whereas in this case, it was the direction given by the Honourable Judge where it was necessary to verify the evidence adduced by the parties before a distinct chairperson and a new set of assessors during the trial, but the trial tribunal acted contrary to that direction, where the chairperson was the same but with the new set of assessors. The appellant again referred this court to the case of **Nizar** (supra) where the court inter alia held that;

"It is only in exceptional circumstances that a court should inspect a locus in quo as by doing so a court may unconsciously take the role of a witness rather than adjudication."

He went on to submit that this case presents a similar outlook which seals the fate of the respondent who faulted the trial tribunal to show any boundaries on regarding to the disputed land alleged to be owned by her late father.

The appellant insisted further that it is trite law that it is the administrator or executor of the deceased estate who has powers to sue in all cause of action which survived the deceased. That, this is rightly laid down under Section 100 of the Probate and Administration of Estate Act [Cap. 352 R. E. 2019], he quoted it that;

"An executor/administrator has the same power to sue in respect of all cause of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living."

He clarified that, being the case there is conditions which have to be fulfilled by the person before sealing a probate or letters of Administration

in Tanzania to which the letters of Administration relate, and may, in any case, requires such evidence as it thinks fit, as to the domicile of the deceased person. That, this is according to Section 96 of the Probate and Administration of Estate Act [Cap. 352 R. E. 2019]. He insisted that respondent's letters of administration did not fulfil the conditions stipulated by the law as it was granted by the court which had no jurisdiction and in that the appellant believes the respondent has no locus standi to institute this dispute at the trial tribunal.

Conclusively, the appellant moves this court to allow this appeal in its entirety with costs.

After exhaustively reading the submissions from both sides and indeed the records of the trial tribunal, I am fortified that the only determinant issue to be dealt with in order to dispose off this appeal is ***whether this appeal is meritious before this court.***

In dealing with this appeal, I will respond to the 1st, 2nd, 5th and 6th grounds of appeal together, then the 3rd and 4th grounds together and finally the 7th ground alone. In the submissions made by both parties, no one was in denial that a party that alleges is duty bound to prove the allegations. In the trial tribunal, the respondent as an applicant did claim

that the suitland belonged to her late father, and although she had no any document to support her argument, she did summon four witnesses who corroborated her testimony. In addition to this, the appellant and his witnesses also never denied that the respondent's father never possessed a piece of land at the area where the dispute arose.

In the case of **Barelia Karangirangi vs Asteria Nyalwambwa, Civil Appeal No. 237 of 2017** (unreported), the Court considered an oral chronicle relating to ownership of the land in question and made a finding on that basis without documentary evidence to support it. The relevant part reads:-

> *"We have observed that the respondent's own evidence at the Ward Tribunal supported by that of Busanya Katamba (PW2) and that of Bwire Mwangwa (PW3) also that of the Ward Tribunal Officers who had an opportunity to visit the locus in quo on 04/06/2007, sufficiently proved that the land in dispute belonged to her as she inherited it from her father who acquired and owned it from one Maganga (Her Grandfather). The respondent then, had on the balance of probabilities, succeeded to discharge her duty."*

Similarly in this instant case, the trial tribunal had made the decision in favour of the respondent after she had testified that the disputed land belonged to her late father, it was her testimony which was corroborated by the testimonies of Antony Victory Sungura (PW2), Fortuna Nicolaus Mgoloka (PW3), Folotea Lusambo Benedicto (PW4), Julias Edward Magili (PW5) and Leornard Fransico Mayowela (PW6). On the balance of probabilities, at the trial tribunal, the respondent had duly furnished her duty of proving ownership of the disputed land.

Nevertheless, the appellant had complained on the inconsistency and contradictions of the respondent and her witnesses at the trial tribunal. The appellant claims that the respondent did not clarify the actual date that he invaded the disputed land, was it the year 2007 or 2018. In my perspective, this contradiction does neither go to the root of the case nor deny the fact that the appellant unlawfully invaded the suitland. In the case of **Happy Ibrahim vs Patrie Paulino Mikindo, Land Appeal No. 11 of 2019** (unreported), the Court of Appeal held that the court should rule out if the contradiction and inconsistences are only minor or they go to the root of the matter.

However, the appellant also claimed that the trial tribunal did not consider his long occupation of the suitland. In my perusal of the records from the trial tribunal, I am still in dilemma as to how did the appellant inherit the disputed land from his father, while he himself in his testimony testified that after his father died, his relatives controlled the land until he retired in 1994 and he took over the possession. The appellant did neither submit any document that purported him to be the heir of his father's properties nor did he summon any of his relatives who controlled the land after the death of his father. To me, the only witnesses who could help the appellant claim his ownership over the suitland were his relatives to whom he claimed they controlled the suitland until he retired in 1994.

In **Aziz Abdalla vs Republic [1991] TLR 71** (CAT) it was held that:-

> *"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution."*

It is my strong holding that the failure of the appellant to summon any of his relatives to prove his claims, fortifies me to draw an adverse inference as the appellant did not testify if his relatives were reachable or

not, but from his own testimony, they were key witnesses in proving his long occupation of the suit land.

In addition to that, I join hands with the submission made by the counsel for the respondent that, among other reasons but visiting the locus in quo included identifying the, the actual size, the location, boundaries and neighbours of the disputed land. However, in this case there was no dispute over the location of the disputed land which could have necessitated the visit in locus in quo to afford the trial tribunal an opportunity to see objects and places referred to in evidence physically and clear doubts arising from conflicting evidence, therefore it was absurd for the appellant to claim that the respondent failed to identify the location and actual size of the disputed land, of which it was not in contention. See the cases of **Kimonidimitiri Mantheakis vs Ally Azim Dewji & Others, Civil Appeal No. 04 of 2018** and also, **Sikuzani Saidi Magambo & Another vs Mohamed Robert, Civil Appeal No. 197 of 2018** (unreported). I therefore find no merits in the 1st, 2nd, 5th and 6th grounds of appeal all together and proceed to dismiss them.

Coming to the 3rd and 4th grounds of appeal. Revisiting the records of appeal, it was indeed ordered that the matter should proceed from where it

stood on the 02nd of December, 2019 where the trial tribunal had arranged the date to visit the locus in quo. This time, this court ordered a distinct chairperson and a new set of assessors, and in the records, it is revealed that indeed there were new set of assessors but the chairperson was the same. In my view, this did not prejudice the appellant's rights at all, considering that the chairperson who visited the locus in quo had already heard the evidence adduced by witnesses from both sides.

Reflecting the cited case of **Nizar M. H. vs Gulamali Fazal Jan Mohamed** (supra) where directives on visiting locus in quo were outlined which includes the trial tribunal to visit the locus in quo with the parties, to take notes of what transpired at the locus and summon witnesses who are neighbours to the suitland to testify. According to the records of appeal, the trial tribunal followed the required directives promptly. Again, I find no merits on the 3rd and 4th grounds and consequently I proceed to dismiss them.

On the last ground of appeal, this ground should not detain much of my time as the appellants claim is on the wrong avenue. The suit against him at the trial tribunal concerned ownership of the suitland, it was not about an application for obtaining the letters of administration of the

deceased's estate. In this, I do join hands with the submission made by the counsel for the respondent that this ground is misconceived and the same is on the wrong channel as the objection is on the domain of the Probate court. This ground too falls a natural death and it is also dismissed.

In my view, the trial tribunal made a proper decision after the analysis of the evidence adduced by the respondent and her witnesses during the trial. I find no fault in the said decision and stands to be upheld. I therefore find this appeal to be meritless and in that, I proceed to dismiss it with costs.

It is so ordered.

Dated and delivered at **Sumbawanga** this 21st day of August, 2023.

T. M. MWENEMPAZI

JUDGE