

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LAND APPEAL NO. 80 OF 2021**

*(Arising from the decision of the District Land and Housing Tribunal for  
Maswa in the Land Application No. 76 of 2020)*

**BALELE MARTINE.....APPELLANT**

**VERSUS**

**CHANILA NDEGE .....RESPONDENT**

**JUDGMENT**

*30<sup>th</sup> May, 2023 & 9<sup>th</sup> August, 2023.*

**S.M. KULITA, J.**

This is an appeal from the District Land and Housing Tribunal (DLHT) for Maswa. The story behind this appeal in a nut shell is that, the Respondent herein, **CHANILA NDEGE** lodged before the said Tribunal, a Land Application No. 76 of 2020 against the Appellant, one **BALELE MARTINE** claiming that the Appellant trespassed his land sized 13 acres located at Nyangaka Street, Kidinda Ward within Bariadi Township in Simiyu Region and erected the building thereon alleging that the said piece of land was left by his late father, Lupelengetya Maningu, who had passed away in 1987.

On the other hand the Respondent asserted that the suit land was left by his late father who had passed away in 2005. After determining the suit the DLHT decided for the Respondent herein, Chanila Ndege who was declared the lawful owner of the suit land. The Appellant, Balele Martine was ordered to vacate the premise and remove his properties therefrom.

Aggrieved with the decision of the DLHT the Appellant herein lodged this appeal relying on 4 (four) grounds which can be summarized into the following;

1. That, there was variance of evidence between that of the Respondent and that adduced by his witnesses.
2. That, the tribunal was wrong to rely on the evidence of PW3 in declaring the Respondent the lawful owner of the suit land while in 1978 he was still a child/minor, hence incapable of knowing that. Also the witnesses were not neighbors to the suit land.
3. That, the Appellant's documentary evidence were not considered by the tribunal.
4. That, the Chairman erred in law in differing with the opinion of the assessors who had the view that the land is the property of the Appellant.

The matter was disposed of by way of written submissions. The Appellant is represented by Mr. Emmanuel Sululu, Advocate of Boma Road, Singida, while the Respondent is represented by Mr. Nicholas Majebele Mayenga, Advocate from Right Mark Attorneys of Mwanza.

In his written submission the Appellant's Advocate, Mr. Emmanuel Sululu stated that the Respondent herein was wrong to sue the Appellant at the trial tribunal in his personal capacity while he was the administrator of estate.

He submitted on the 1<sup>st</sup> ground of appeal that the Applicant's (Respondent herein) evidence at the DLHT was weak and contradictory, in the sense that they varied on the issue of the year in which his (Respondent's) father had started to use the suit land, whether it was 1973 according to PW1, 1976 according to PW2, or 1978 as per PW3.

On the 2<sup>nd</sup> ground the appellant's counsel submitted that the evidence of PW1 (Respondent herein) in trying to prove that he is the lawful owner of the suit land, is unreliable as he declared to be born in 1973 which means that in 1978 he was still a child, hence incapable of knowing that his father acquired the said farm in 1976 as he alleges.

Submitting on the 3<sup>rd</sup> ground, Advocate for the Appellant stated that the Appellant's documentary evidence were not considered by the tribunal. He averred that those documents prove ownership of the suit land by the Appellant but that the trial Chairman disregarded them for no reason. The Counsel also submitted that the trial Chairman didn't consider that the suit land contains his late father's and other relatives' tombs.

On the 4<sup>th</sup> ground, the Appellant's Counsel submitted that the Chairman erred in law in differing with the opinion of assessors who had the view that the land is the property of the Appellant. He said that the Chairman is not bound with the opinion of assessors but he must give reasonable grounds in case he differs with their opinion. He added that in the judgment there is no reasonable ground stated by the Chairman on that issue.

Advocate for the Appellant, Mr. Emmanuel Sululu concluded by praying for the appeal to be allowed and declare the suit land a property of the Appellant herein.

In the reply thereto, Advocate for the Respondent, Mr. Nicholas Majebele Mayenga submitted that the issue of the Respondent not being titled as the Administrator of the estates of his late father is a newly introduced issue. He

said that it was not amongst the grounds of appeal that had been raised, hence should not be considered.

Replying the 1<sup>st</sup> ground of appeal, the Respondent's counsel submitted that the Respondent being the son of the deceased and found him using the said piece of land since the time he was born, also the administrator of his estates, obvious he is a reliable witness on the time for acquisition of the suit land by his late father. He added that minor contradictions between witnesses, on the year that the Respondent's father had acquired and started to use the suit land, is something unavoidable.

On the 2<sup>nd</sup> ground, that the trial tribunal was wrong to rely on the testimony of Maghembe Joseph Maghembe (PW3) who was still young/minor to be in knowledge whether the suit land was given to the Respondent's father in 1978 as he had stated, the Respondent's Counsel submitted that, being a child/minor is not a test of knowledge. He said that PW3 was capable to testify on that fact as he was knowing and remembering history in respect of that matter. He added that the Appellant never challenged that matter in the cross examined during the testimony of PW3.

As for the 3<sup>rd</sup> ground, Mr. Nicholas Majebele Mayenga, Advocate submitted that the documentary evidence adduced by the Appellant during trial were considered. He said that most of the said documents were the decisions of the tribunal, which were later on quashed by the High Court. He said that the Chairman analyzed that issue at page 11 of the judgment and came up with the finding that the said documents were valueless. The Counsel averred that, it is not true that the DLHT didn't consider the Appellant's documents in making its decision.

On the 4<sup>th</sup> and last ground of appeal that the Chairman was wrong to depart from the opinions of assessors without giving reasons for the said departure, the Respondent's counsel submitted that at page 5, 10 and 11 of the Judgment the Chairman gave the reasons for departing from the Assessors' opinion. Thus, the requirement of section 24 of the Land Disputes Courts Act was complied with by the Chairman.

The Respondent's counsel, Mr. Nicholas Majebele Mayenga concluded by praying for appeal to be dismissed with costs.

In rejoinder Advocate for the Appellant, Mr. Emmanuel Sululu reiterated what he had submitted in his submission in chief. He just added that the

variance in evidence by the Respondent's witnesses on the time that the Appellant's father came into ownership of the suit land is an issue that goes to the root of the case, hence the impugned judgment should be quashed. That marked the end of rejoinder submission.

Nature of the appeal and the submissions that have been presented make me to analyze the grounds of appeal collectively as follows;

Regarding the issue of age of PW3 being a child/minor in the year 1978 that he alleged to have witnessed the Respondent's father cultivating the suit premise, I have this to say; For a person who was 52 years old by 2021 like PW3 as it can be transpired in the record, it means he was born in 1969. Therefore, in 1978 he was 9 (nine) years old. Actually, the rate of intelligence differs from one person to another. Thus, I cannot conclude that it was impossible for the said witness to remember the said incident which he alleges to have witnessed while he was 9 years old.

As for the testimony of PW1, the Respondent herein, who is also the son for the late Ndege Kanoni, he found his late father using the said piece of land since the time he was born in 1973, and the fact that he was the administrator for the deceased's (his late father's) estates after he had

passed away in 2005, I find him a reliable witness to testify on the time for acquisition of the suit land by his late father.

When you go thoroughly on the testimonies of these two witnesses, PW1 and PW3, you can note that while PW3 testified for a time that he had seen the late Ndege Kanoni (PW1's father) cultivating the suit land which is 1978, PW1 who was born in 1973 testified to have found his father cultivating the said premise since the time he was born, which means that his late father had been owning it since that said year or before. On these two categories of testimonies, I don't see any discrepancies on the Applicant's case during trial.

Further, the record reveals the testimony of Shenye Ndege (PW2) who testified to the effect that his late father, Ndege Kanoni cleared the suit land in 1976 after the Respondent had tried to encroach it. Such evidence does not collide with the above said finding, as this witness (PW2) just evidenced on the year that their late father had cleared the suit land, not the year that he had acquired it.

On this, I also find no contradiction on the Appellant's case when tried by the tribunal.

Whatever the case, even if we regard them as discrepancies, that 1973, 1976 and 1978 are the years stated by the Applicant's (Respondent's) witnesses being the periods for the acquisition of the suit land, still we remain with the fact that the Respondent's father acquired the suit land sometimes between 1973 and 1978.

As there is no proof of proper record on that fact, and the fact that the time that has passed since then is long, over 40 (forty) years to the dates that the said witnesses, PW1, PW2 and PW3, appeared to testify before the DLHT, the possibility of forgetfulness, hence variance on their testimonies during trial is great. Even if we take the above mentioned periods 1973, 1976 and 1978 as discrepancies, they fall in a very short term period as compared to the time that had passed before the said witnesses appeared and testified before the tribunal which was 2021. I find the said discrepancies are minor and do not go to the root of the case, hence cannot affect the testimonies that have been adduced.

In the case of **DIRECTOR OF PUBLIC PROSECUTION V. DANIEL WASONGA, Criminal Appeal No. 64 of 2018, CAT at Mwanza** it was held that if the discrepancy is minor and does not go to the root of the case

it can be glossed over. I find the same position exists in the matter at hand, hence the ground of appeal on this issue is regarded to have no legal weight.

The record also transpire that, in justifying that he is the lawful owner of the suit premise, the Appellant relied the documents that his late father, Lupelengetya Maningu, had left before he had passed away in 1987, that he had a land dispute with the Respondent's late father in respect of the suit land. However, the said documents that were tendered to the tribunal do not prove that the Appellant herein nor his late father being the lawful owner of the said piece of land. For example judgment of the High Court Shinyanga in the Land Appeal No. 23 of 2016, on 15/01/2019 nullified all decisions of the tribunal in respect of that matter. In that sense, it is wrong for the Appellant to rely on it to justify that he is the lawful owner of the suit land.

As for the issue of the tombs of the Appellant's late father and relatives being available over there at the suit premise, though it was not replied by the Respondent's counsel in his submission, I find that ground with no merit for two reasons, **first**, the record does not transpire proof on that, **Secondly**, this issue was not among the grounds of appeal that the Appellant had raised.

The record and submissions further transpire that the Appellant constructed a building over the suit premise in 2019, just a year before institution of the original suit, Land Application No. 76 of 2020 at Maswa DLHT. If the said conflict existed since a long time ago, before death of his father in 1987, why the Appellant went to construct the said structure on the suit land later, in 2019. Worse enough the Appellant did so while the High Court Shinyanga in the Land Appeal No. 23 of 2016 had already nullified all prior decisions on that matter. It means there was no court judgment which justified the Appellant to erect the said building on the suit land while the High Court judgment was already delivered since 15/01/2019.

As for the issue of the Respondent suing in his personal name instead of the Administrator of estate, I find it a new issue. It was not among the grounds of appeal that had been presented. It is an afterthought idea by the appellant. Thus, cannot be acted upon in this appeal.

Concerning the opinion of the assessors who had the view that the land is the property of the Appellant, the Chairman is not bound with the opinion of assessors. According to **section 24 of the Land Disputes Courts Act [Cap. 216 RE 2019]** the Chairman is actually supposed to give reasons for departing from the assessors' opinion. I can see the reasons in the impugned

judgment being that, the Assessors' argument that the appellant has been winning cases at the DLHT has no legal weight as those decisions were nullified by the High Court in the Land Case Appeal No 23 of 2016 on 15/01/2019. Also there was no evidence that the Appellant's father was given the said area by Mzee Isamula as alleged by the 1<sup>st</sup> assessor. Further, contrary to the assessor's opinion, the Chairman Stated in the judgment that there is an ample evidence that the Respondent started to use the premise before his father had passed away in 2005. In my view those reasons, as they can be seen on pages No. 5, 10 and 11 of the tribunal's judgment are genuine for the trial Chairman to depart from the Assessors' opinion.

In upshot, I find this appeal with no legal weight, hence **dismissed** with costs.



  
**S.M. KULITA**  
**JUDGE**  
**09/08/2023**