

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SONGEA

AT SONGEA

LAND CASE APPEAL NO. 42 OF 2023

DEOGRASIA KOMBA APPELLANT

VERSUS

KANDIDUS MITI RESPONDENT

**(Appeal from the judgment and decree of the District Land and Housing
Tribunal for Songea at Songea in Land Application No. 76 of 2022)**

JUDGMENT

23rd August & 7th September, 2023

KISANYA, J.:

This appeal arises from the decision of the District Land and Housing Tribunal of Songea at Songea (the DLHT) in Land Application No. 76 of 2022. In that decision, the appellant, Deograsia Komba, lost the suit which she had instituted against the respondent, Kandidus Miti. In short, the respondent was declared the lawful owner of a parcel of land of 15 acres situated at Mgoha area, Nakahuga Village, Litisha ward, within Songea Rural District (henceforth “the disputed land”).

In terms of the application lodged before the DLHT, the appellant was granted the disputed land by the clan elder, one Eusebius Komba, in 2016. Subsequently, she owned the said land until in 2019 when the respondent trespassed thereto. It was alleged that the respondent

destroyed natural trees and crops on the disputed land. On 31st October, 2022, the appellant referred the matter to Litisha Ward Tribunal for mediation. As mediation was marked failed, the appellant instituted the suit at the DLHT. She moved the DLHT to declare the respondent as a trespasser; declare the appellant as the lawful owner of the disputed land; issue an order of permanent injunction against the respondent; grant costs of the suit; and issue any other relief which it deemed fit to grant.

The suit was strongly contested by the respondent. Basically, the respondent averred in his written statement of defence that, he is the lawful owner of the disputed land and that he had been occupying and using it from 1992 when he was given the same by his parents. Among others things, the respondent prayed for the DLHT to declare him the lawful owner of the disputed land.

The DLHT framed the three issues as follows: **One**, who is the lawful owner of the disputed land. **Two**, whether the respondent trespassed to the disputed land. **Three**, to what reliefs are the parties entitled.

In order to prove her case, the appellant testified as PW1. She called other two witnesses namely Eusebius Joseph Komba (PW2) and Beata Samson Makasi (PW3); and tendered one exhibit to wit, certificate of reconciliation (Exhibit DK1) in which the ward tribunal confirmed to have

failed to mediate the parties. On the adversary side, the respondent testified as DW1 and paraded three witnesses namely, Jovin Marcus Gama (DW2) and Lutgen Severin Miti (DW3).

After the DLHT heard evidence from both parties, it found that the appellant had failed to prove her claim against the respondent. Eventually, the suit was dismissed with costs and the respondent declared lawful owner of the disputed land.

Aggrieved, the appellant has approached this Court equipped with a memorandum of appeal containing four grounds of appeal to the following effect: *One*, the trial chairperson erred in law and fact by holding that the appellant (PW1) and PW2 contradicted each other. *Two*, the trial chairperson erred in law and fact by misdirecting himself and discussing an issue of ownership prior to the appellant's ownership without according the parties the right to be heard on that issue. *Three*, the trial chairperson erred in law and fact by failing to consider the evidence of PW3 in relation to the respondent's destruction of the crops planted by the appellant on the disputed land. *Four*, the trial chairperson erred in law and fact by failing to decide the matter in favour of the appellant while she proved her claim on the balance of probabilities.

When the matter was placed before me for hearing, Mr. Augustino Mahenge, learned advocate, appeared for the appellant, whereas the respondent appeared in person.

Submitting in support of the first ground of appeal, Mr. Mahenge contended that the DLHT erred in holding that PW1 and PW2 contradicted each other. It was his submission that, the DLHT misconstrued the issue of inheritance. His argument was based on the ground that both witnesses were referring to the clan land which they inherited. The learned counsel was of the further view that, the appellant did not give evidence which was contrary to the pleadings.

On the second ground of appeal, Mr. Mahenge faulted the DLHT for deciding the issue of ownership of land prior to the appellant's ownership, while that parties were not at issue on that fact. He also contended that, parties were not accorded the right to be heard on the said issue. It was his further contention that, parties were not obliged to prove ownership of land before 2016 because at that time the disputed land had not passed to the appellant. To support his argument, he cited the case of **Benjamin Mungo vs Sisi Auction Mart and General Brokers and 3 Others**, Land Appeal No. 1 of 2022, HCT at Mwanza (unreported), in which this

Court held that it is fatal to determine an issue which was not raised during the trial.

As for the third ground of appeal, Mr. Mahenge submitted that the DLHT failed to consider the evidence of PW3 who testified to have witnessed the respondent destroying the crops planted by the appellant on the disputed land.

With respect to the fourth ground of appeal, the learned counsel submitted that the DLHT erred by failing to hold that the appellant had proved her case on the balance of probabilities. He pointed out that, the appellant testified to have acquired the disputed land from her clan; PW2 confirmed that the disputed land was allocated to the appellant by the clan; and PW3 stated that the appellant had cultivated on the disputed land but the respondent destroyed the crops thereon. According to him, the said evidence was sufficient to resolve the matter in favour of the appellant. Therefore, the learned counsel prayed that this appeal be allowed with costs and that the decision of the DHLT be quashed and set aside.

The respondent contested the appeal. On the first ground of appeal, he submitted that PW1 and PW2 contradicted each other on how the appellant acquired the disputed land. He further contended that the

pleadings show that the appellant obtained the disputed land from her clan, while she testified to have inherited the said land from her father.

Reacting to the second ground, the respondent was brief, that, the DLHT was enjoined to consider the issue of ownership before 2016 basing on the evidence adduced by both parties.

Countering the third ground, the respondent submitted that PW3 did not produce evidence to prove that he (the respondent) destroyed the appellant's crops on the disputed land. It was his further submission that he was not found guilty in respect of the criminal offence which was laid against him.

As regards the fourth ground, the respondent submitted that the appellant did not prove her case. He contended to have successfully sued PW2 who gave the disputed land to the appellant. The respondent expounded that the matter was lodged before Litisha Ward Tribunal. Therefore, he asked this Court to dismiss the appeal for want of merit.

Rejoining, Mr. Mahenge submitted that the appellant did not testify to have obtained the disputed land from her parents. He reiterated his stance that the DLHT ought to have heard the parties on the issue of ownership before 2016. It was his further submission that PW3's evidence was direct and that nothing to suggest that PW2 gave the appellant a land

which belonged to the respondent. He reiterated his prayer that, the appeal be allowed with costs.

Having considered the rivalling submission and the record before this Court, the grand issue is whether the instant appeal is meritorious.

In the first ground of appeal, the DLHT is blamed for holding that PW1 and PW2 contradicted each other. Indeed, in its decision, the DLHT arrived at a finding that PW1 and PW2 contradicted each other on whether the disputed land belonged to the appellant's father or the clan. The DLHT further considered that the appellant's evidence on how he acquired the land was contrary to the pleadings.

Pursuant to the pleadings, the applicant averred as follows in paragraph 6 (a)(ii) of the application filed before the DLHT:

"That the applicant is the lawful owner of the land in dispute whereby she had been owning and developing agricultural activities in the said land since 2016 till to date after being allocated by the clan leader one Eusebius Komba."

As it can be glanced from the quoted paragraph of the application, the appellant claimed to have been given the disputed land by the clan leader. She called the clan leader (PW2) who confirmed that he is the one who allocated the disputed land to the appellant. Further to this, the

appellant stated that the disputed land was inheritance of her father. Her evidence went as follows:

"Eneo lenye mgogoro ni urithi wa baba yangu niligawiwa na mwana ukoo Esebius Komba. Eneo lenye mgogoro niligawiwa mwaka 2016.

Having considered the pleadings and the evidence of PW1 and PW2, I am of the opinion that, PW1 did not depose to have inherited the disputed land from his father. Although she told the DLHT that the disputed land was an inheritance of her father, she was firm that it was allocated to her by her co-clan (PW2). In that regard, PW1 and PW2 did not contradict each other on whether the disputed land was allocated to the appellant by the clan or otherwise. Furthermore, the appellant's evidence did not deviate from the facts pleaded in the application as held by the DLHT.

From the foregoing reasons, I find merit in the first ground of appeal. Thus, the DLHT erred in law and fact when it held that PW1 and PW2 contradicted each other on whether the disputed land was allocated to the appellant by her clan. However, the issue whether or not the appellant proved her case will be dealt with in the subsequent grounds of appeal.

The second ground of appeal suggests that the DLHT's decision is tainted with illegality. The DLHT is faulted for discussing the issue of ownership of land prior to the time when the appellant acquired the disputed

land. According to the appellant's counsel, parties herein were not at issue on the said fact and were not given the right to be heard on the same.

I agree with Mr. Mahenge that, in terms of the settled law, the decision must be based on the issues on record. Where the court finds it necessary to add or amend any issue, parties should be heard on the additional or amended issue. This stance was emphasized in **Mussa Chande Jape vs Moza Mohammed Salim**, Civil Appeal No. 141 of 2018, CAT at Zanzibar (unreported)]. It is trite law that, any decision made in violation of the right to be heard enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended) is a nullity. See the cases of and **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza Iboy**, Civil Application No. 33 of 2002 (unreported) and **Mbeya - Rukwa Autopafits Ltd v. Jestina George Mwakyoma** [2003] TLR 25.

In the instant appeal, the appellant pleaded in paragraph 6(a)(ii) that she acquired the disputed land in 2016 when it was allocated to her by the clan leader. That fact was vehemently disputed by the respondent. He averred in paragraph 5 of the written statement of defence that he was the lawful owner of the disputed land and that he had been occupying and using the same from 1992 when his parents gave him that land. That being the case, parties were at issue on whether the disputed land belonged to the

appellant or the respondent. As indicated herein, that was the first issue for determination of the dispute between the parties herein.

In order to prove their respective positions on the foresaid issue, both parties were duty bound to prove how they were the lawful owner of the disputed land. Considering that the respondent pleaded to have been using the disputed land from 1992, the appellant and in particular, the clan leader who gave the disputed land to the appellant were required to substantiate that the appellant's clan had been in lawful possession of the disputed land which was allocated the same to the appellant. Certainly, the appellant's clan leader (PW2) testified that their parents were living on the disputed land. When cross-examined by the respondent, PW2 stated that he had been at the disputed land from 1992, while the appellant responded that the disputed land was left intact from 1992.

From the above findings, I am of the view that the fact on ownership of the disputed land before 2016 was part and parcel of the first issue. It arose from the pleadings filed before the DLHT. The record displays that, both parties were duly accorded the right to be heard on the issue of ownership of land. In the circumstances, the contention that the DLHT's decision was based on the issue which was not framed; and without according parties the

right to be heard is not supported by the record. I accordingly dismiss the second ground of appeal.

Next for determination is the fourth ground. It is resolved by considering whether the appellant proved her case on the balance of probabilities. First for consideration is whether the first issue ought to have been decided in favour of the appellant. In other words, did the appellant prove on the balance of probabilities that she was the lawful owner of the disputed land? I have shown herein that the respondent stated in his written statement of defence that he had been occupying and using the disputed land from 1992.

From the evidence on record, nothing to indicate that the appellant's clan was using the land which PW2 allocated to her. As rightly observed by the DLHT, when cross-examined by the respondent, the appellant (PW1) told DLHT that the disputed land was not cultivated from 1992, while PW3 testified that the said land was not cultivated for years. On the other hand, the respondent (DW1) stated on oath to have been using that from 1992. He also paraded DW2 who stated that the respondent was his neighbour. DW2 further testified that the respondent had been using the disputed land.

Furthermore, evidence of both parties implies that the disputed land was subject to a dispute between the respondent and PW2. According to the

respondent, when PW2 started to demand the disputed land in 2013, a land dispute was referred to Litisha Ward Tribunal and it was decided the matter in his (respondent) favour. Although, the respondent's copies of judgment were not admitted in evidence, his oral evidence on that issue was not challenged during cross-examination. Also, during cross-examination, the appellant (PW1) admitted that fact when she stated:

*"Eneo hili lilishakuwa na mgogoro na kukatiwa rufaa...
Eusebius Komba hatma ya kuishtakiana baraza la kata
sijui"*

However, PW2 who gave the disputed land to the appellant stated that he could not remember to have sued or been sued before the ward tribunal. In the circumstances, it is not known as to why PW1 and PW2 were not ready to disclose the end result of the dispute referred before the ward tribunal.

All the above considered, I am of the view that the appellant did not prove her case on the balance of probabilities. The fourth ground is dismissed for being meritless.

In the third ground of appeal, it is contended that PW3's evidence on destruction of the appellant's crops was not considered. Having resolved herein that the appellant did not prove to be the lawful owner of the disputed land, the issue whether the respondent destroyed the crops cannot arise. The third ground lacks legs to stand on.

In the upshot of the foregoing, save for the complaint in the first ground which is allowed, the appeal is dismissed with costs for want of merit.

DATED at SONGEA this 7th day of September, 2023



S.E. KISANYA
JUDGE

Court: Judgment delivered this 7th day of September, 2023 in the presence of the appellant, Augustino Mahenge, learned advocate for the appellant and the respondent in person.

Right of appeal explained.



S.E. KISANYA
JUDGE
07/09/2023