

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

**LAND CASE APPEAL NO. 39 OF 2023**

*(Arising from Application No. 70 of 2022 District Land and Housing Tribunal for Karagwe)*

**RIBENT GASPARY..... APPELLANT**

**VERSUS**

**ELASTO ELENEST (Administrator of the Estate**

**Of the late ERNEST GASPARY..... RESPONDENT**

**JUDGMENT**

2<sup>nd</sup> August and 8<sup>th</sup> September, 2023

**BANZI, J.:**

Before the District Land and Housing Tribunal for Karagwe (the trial tribunal), the respondent as the administrator of the estate of his late father Ernest Gaspary, instituted a land suit against the appellant over a piece of land located within the hamlet, village and ward of Iteera. According the respondent, the disputed land is owned by his late father since 1961 who bequeathed the same to his female children under the condition that, it should be in the care of his wife Peragia Ernest for purpose of maintaining his mother one Anyesi Gaspary until her death when it will be handed over the beneficiaries. In 2022 when the respondent's grandmother, Anyesi Gaspary passed away, the appellant invaded the disputed land claiming to be owned by his mother.

On the other hand, the appellant claimed that, the disputed land is owned by his late mother Anyesi Gasparry who acquired it after the death of his father. After a full trial, the trial tribunal decided in favour of the respondent by declaring the late Ernest Gasparry as the lawful owner of the disputed land and issued permanent injunction against the appellant and his agents. Aggrieved with that decision, the appellant has filed the present appeal comprising eight grounds thus:

- 1. That, the trial tribunal erred in law and on fact for entertaining a suit land which lacked a clear description and the same issue was raised in the written statement of defence hence the tribunal lacked jurisdiction to entertain the same dispute.*
- 2. That, the trial tribunal erred in law and on fact by failing to appreciate that the respondent failed to prove how the late ERNEST GASPARY acquired the suit land from his mother ANYESI GASPARY who was in occupation at the suit land up to the date of her death.*
- 3. That, the trial chairman erred both in law and on fact by believing respondent evidences (sic) which was based on the written will but without neither tendering the alleged will in evidence nor proving the whereabouts of the alleged will.*
- 4. That, the trial tribunal erred in law and on fact by granting a relief which has never been prayed for by the respondent herein.*

5. *That, the trial tribunal erred in law and on fact by disbelieving appellant's side evidences (sic) including the clan chairman's evidences (sic) which were stronger than the respondent's side.*
6. *That, the trial tribunal erred both in law and on fact by leaving disputable issues undecided which arose from the pleading including "will" which alleged to have distributed the suit land.*
7. *That, the trial tribunal erred in law and on fact for relying on evidences (sic) which were improperly admitted and some were not admitted in evidences (sic).*
8. *That, the trial tribunal erred both in law and on fact to entertain an application which the respondent lacked locus standi.*

At the hearing, the appellant was represented by Mr. Egbert Mujungu, learned Advocate, whereas the respondent appeared in person unrepresented. The appeal was argued orally.

Mr. Mujungu began his submission with a prayer to abandon the seventh ground. Arguing jointly the second and fifth grounds, Mr Mujungu submitted that, the respondent did not tender any document or brought any clan member to prove that, his deceased father was given the disputed land by his mother, Anyesi. On the other hand, the appellant brought Chairman of the clan (DW3) who proved that, the disputed land belonged to Anyesi.

Also, none among the surviving children of Anyesi ever witnessed their mother giving away her land to respondent's father. He added that, part of testimony of DW2 which was relied by the learned Chairman did not prove ownership to respondent's father because the rest of her evidence proved that, the disputed land is owned by Anyesi and it was included in her Will.

Arguing the third and sixth ground jointly, he contended that, the respondent failed to prove existence of Will of his deceased father. Concerning the fourth ground, he argued that, by declaring Ernest Gaspari as the lawful owner of the disputed land, the trial tribunal committed an error because it granted the respondent the relief which was not amongst his prayers in his pleading considering that, parties are bound by their pleadings. In respect of the eighth ground, he submitted that, the respondent had no *locus standi* to institute the suit as administrator of the estate without producing letters of administration to prove the same and thus, whatever transpired in the trial tribunal was a nullity. He supported his argument by citing the case of **Lujuna Shubi Ballonzi v. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203. Mr. Mujungu concluded his submission with the first ground by arguing that, the respondent in paragraph 3 of his application described the disputed land by mentioning its location without describing its size or boundaries which is

contrary to what has been stated in the case of **Agast Green Mwamanda (as administrator of the estate of the late Abel Mwamanda) v. Jena Martin** [2020] TZHC 2478 TanzLII as it may lead into inexecutable decree. According to him, the trial tribunal lacked jurisdiction because of such failure by the respondent to describe the suit land. Finally, he prayed for the appeal to be allowed with costs.

In his reply, the respondent contended that, whatever has been submitted by learned counsel for the appellant is a lie because his deceased father owned the disputed land since 1961. Personally, he was born in 1967 within the disputed land and until today, he still lives there. He added that, the disputed land was bequeathed to his sisters through the written Will which was under the custody of their uncle Apolonary Gaspari who in 2022 emerged with another Will of Anyesi showing that, she owns the said land. It was further his submission that, his evidence before the trial tribunal was ample enough to prove ownership of the disputed land in favour of his father. Also, his mother proved the same as at the time when she was married to his father, she found him in the disputed land. Equally, the evidence of his aunt DW2 proved the same.

He further argued that, he is the administrator of the estate of his father duly appointed by court and in his application before the trial tribunal,

he attached letter of appointment which satisfied the learned Chairman and thus, he has *locus standi*. He added that, his testimony contained description of the disputed land including the size and boundaries. In that regard, he prayed for this appeal to be dismissed.

In his rejoinder, Mr. Mujungu stated that, his submission is nothing but the truth because it is supported by record. He further insisted that, there was a need for the respondent to call clan member in order to prove ownership in favour of his father. He added that, Apolonary Gaspary was the material witness but was not called to testify. Besides, Peragia and her daughter were witnesses with own interest to save as acknowledged by learned Chairman at page 16 of the proceedings. He reiterated his submission about description of the disputed land and prayed for this appeal to be allowed with costs.

Having carefully examined the grounds of appeal, evidence on record and the submissions of both sides, it is now pertinent to determine the merit or otherwise the demerit of this appeal. In doing so, this Court being the first appellate Court, has a duty to re-evaluate the evidence of the trial tribunal, and where possible, come out with its own findings as it was stated in the case of **Domina Kagaruki v. Farida F. Mbarak and Others** [2017] TZCA 160 TanzLII.

I will begin with the eighth ground concerning *locus standi*. It is undisputed that, the document which initiated the suit before the trial court shows that, the respondent was suing as administrator of the estate of the late Ernest Gaspary. It is also undisputed that, in his application at paragraph 6 (i), the respondent clearly stated that, he was suing under the capacity as administrator of the estate of the late Ernest Gaspary and he attached copies of Form No. 4, letter of appointment and judgment of Nkwenda Primary Court in respect of his appointment. The appellant in his statement of defence, he partly disputed the contents of paragraph 6 (i) of the application by claiming that, the letter in question was obtained in the absence of the clan's blessings. As correctly decided by learned Chairman at page 18 of his judgment, the fact about the respondent being the administrator of the estate of the late Ernest Gaspary was undisputed because the appellant himself acknowledged it which as a matter of law, did not require evidence to prove during the trial. Besides, the respondent in his testimony began by mentioning the same fact.

Worse enough, the appellant did not cross-examine the respondent on this vital fact about him being the administrator of the estate which means, he accepted the truthfulness of the respondent's testimony. It is settled law that, failure to cross-examine on the vital aspect amounts to acceptance of

the truthfulness of witness's testimony. See the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** [2019] TZCA 453 TanzLII. Under these circumstances, the fact that, the respondent did not tender the letter of appointment does not affect the *locus standi* of the respondent nor does it vitiate the proceedings of the trial tribunal as suggested by learned counsel for the appellant. Thus, I find the eighth ground without merit and it is hereby dismissed.

Turning to the third and sixth ground, it is undisputed that, the respondent did not produce the Will of his father alleged to be made in 2012. However, the matter before the trial tribunal was not about probate but rather, the land matter. Nonetheless, at page 9 of the proceedings when the respondent was cross-examined by the appellant, he clearly stated that, his father's Will was lost in the hands of Apolonary Gaspary who was given for custody. Besides, had the Will still being in the custody of Apolonary, it would have been produced in the probate case. Furthermore, the respondent did not need the Will to prove ownership of his father over the disputed land because for it to be used in land court, it ought to be passed validity test before the probate court. In that regard, the third and sixth ground lack merit too.



Reverting to the fourth ground, it is common knowledge that, parties are bound by their pleadings. I have carefully perused the prayers by the respondent contained in his application. It is not disputed that, declaration that Ernest Gaspary is the lawful owner of the disputed land was not among his prayers. However, at item iv of his prayers, the respondent prayed for any other relief the tribunal deemed just to grant. Among the issues raised by the trial tribunal was whether the disputed land is part of the properties of the deceased, Ernest Gaspary. So, by declaring Ernest Gaspary as the lawful owner of the disputed land, the trial tribunal did not commit any error but rather it was concluding in answering the issues before it. Also, it had all powers and discretion to grant the same by relying on the fourth prayer where the respondent prayed for any other relief the tribunal deemed just to grant. This concludes the fourth ground which is also dismissed for being unmerited.

Returning to the first ground, regulation 3 (2) of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003 ("the Regulations") requires the application before the tribunal to contain among other things, the address of the suit premises or location of the land involved in the dispute to which the application relates. The rationale behind description of the suit land is to make it properly identifiable in order to make

the decree executable. In the matter at hand, the location of the disputed land is disclosed under paragraph 3 of the application. According to that, paragraph, the same is located at Iteera hamlet, Iteera Village, Iteera Ward in Kyerwa District. Also, in his testimony at page 10, the respondent stated that:

*"Shamba hilo lina ukubwa wa heka moja, lina mipaka ya njia kwa pande zote. Majirani zake, Mashariki yupo Nicholas Felecian, Magharibi yupo Marehemu Venanti Karungi, Kaskazini yupo France Baguma na kusini Mjibu maombi."*

It is apparent that, the respondent in his application described the disputed land by disclosing its location as required by law under regulation 3 (2) (b) of the Regulations. In addition, in his testimony quoted above, the respondent went further by disclosing the size and boundaries of the disputed land. Thus, the argument by learned counsel for the appellant on the respondent's failure to disclose the disputed land is misplaced. Likewise, the cited case of **Agast Green Mwamanda** is distinguishable because, unlike in the matter at hand, in that case, the respondent did not disclose the district, ward or village where the suit land was situated. Also, in her testimony, she did not even disclose the boundaries surrounding the suit land. With this finding, the first ground lacks merit too.

Now, reverting to the second and fifth grounds, it is settled law that, a person with heavier evidence is the one who should win the case. This was stated in the case of **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113 where it was held that:

*"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

In the matter at hand, the evidence of the respondent reveals that, the whole land was formerly owned by his grandfather and the same was divided into two parts. His father began to own the disputed land since 1961 after being given by his mother and the other part of the land was given to the appellant but it was left under the care to their mother until he attained the age of majority. The respondent's evidence further reveals that, the appellant was living with her mother Anyesi but later he chased her away. After seeing his mother being chased away, the respondent's father built a house for her within the disputed land with a permission to use the land for cultivating beans and harvest banana for food but she was not allowed to harvest coffee. The respondent was asked to live with his grandmother so that he could assist her whereby, he lived with her since 1997 until 2013 when his father died. Before his death, in 2012, he bequeathed the disputed land to his daughters in the meeting whose minutes were lost in the hands

of his uncle Apolonary Gaspary who after the death of Anyesi, he emerged with her Will.

His evidence was supported by his sisters, AW2 and AW3 who stated that, their father was using the disputed land after being given by their grandmother. Also, they used to harvest coffee with their father in the disputed land until their grandmother passed away when the dispute arose. The respondent's evidence was also supported by the testimony of his mother who found her husband using the disputed land when she was married to him. She added that, her husband was using the disputed land until he died. From their evidence, it is undisputed that, at the time the respondent's father was given the disputed land in 1961, neither the respondent nor his witnesses were present. Their evidence on his ownership is based on the fact that, he was using the disputed land until he died. Although this might not be the conclusive evidence over his ownership, the evidence of the respondent's aunt who testified for the appellant as DW2 corroborate the version of respondent's evidence. When DW2 was cross-examined by the respondent, she admitted that, the respondent was given part of the disputed land by his father (DW2's brother) under the assistance of Anyesi. If the respondent's father was not the owner of that land, he could not have given it to his son, the respondent. If it was Anyesi's land, she could

not have assisted her son to give away her land but instead, she could be the one to give it to the respondent. This part of DW2's testimony is a clear proof that, the disputed land was not the property of Anyesi but, the property of the respondent's father.

In that regard, I am constrained to agree with the learned Chairman who did not find any reason to disbelieve the testimony of the respondent and his witnesses which was corroborated by DW2 over the ownership of the late Ernest Gasparry. In other words, the respondent had managed to prove on the balance of probabilities that, the disputed land belonged to his father, the late Ernest Gasparry.

That being said, I find no reason to fault the decision of the trial tribunal which declared the respondent's father one Ernest Gasparry as the lawful owner of the disputed land. Thus, I dismiss the appeal for want of merit and the decision of the trial tribunal is hereby upheld. Owing to the nature of the matter that, parties are relative, I make no orders as to costs.



**I. K. BANZI**  
**JUDGE**  
**08/09/2023**

Delivered this 8<sup>th</sup> day of September, 2023 in the presence Mr. Rogate Assey, learned counsel who is holding brief of Mr. Egbert Mujungu, learned counsel for the appellant and the respondent in person. Right of appeal duly explained.



A handwritten signature in blue ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish.

**I. K. BANZI**  
**JUDGE**  
**08/09/2023**