IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE APPEAL NO. 6 OF 2019

(Arising from Land Application No. 1 of 2019 District Land and Housing Tribunal for Karagwe)

MBATINA CORONERY..... 1ST APPELLANT
MBEKOMIZE CORONERY..... 2ND APPELLANT
DIDAS CORONERY.....3RD APPELLANT
FRANK BONEVENTURA..... 4TH APPELLANT
DONASIAN THEONEST..... 5TH APPELLANT

VERSUS

ALISTIDIA CONILED (Administrator of
estate of Coniled Coronery)..... **RESPONDENT**

JUDGMENT

22nd August and 6th October, 2023

BANZI, J.:

In the District Land and Housing Tribunal for Karagwe ("the DLHT"), the respondent being the administratrix of the estate of her late husband, Coniled Coronery instituted a land case against the appellants claiming that, the first and the second appellants invaded two pieces of land ("the suit land") left by her husband, Coniled Coronery ("the deceased") and sold it to the fourth and fifth appellant, respectively. In respect of the third appellant, she claimed that, he invaded it and gave it to his son, Eliud. On the other

hand, the first, second and third appellant in their written statement of defence, they claimed to own it jointly from 1978 after being given by their father before his death. As for fourth and fifth appellant, they claimed to purchase the suit land in 2017 from the first and second appellant, respectively.

In her testimony, the respondent stated that, the suit land belonged to her late husband (the deceased) who was given the same as gift by his mother, Godeliver Coronery who died in 1997. When she was married to the deceased in 1998, the deceased showed him two pieces of land measuring $1^{1}/_{2}$ acres each. However, after the death of the deceased, the third appellant invaded part of the deceased land and gave it to his son whereas, the first and second appellant invaded the other land and divided it among them and thereafter, the first appellant sold his part to the fourth appellant whereas, the second appellant sold it to the fifth appellant. It was also her testimony that, in 2008, when her husband was still alive, the third appellant invaded the suit land by building a house and upon being confronted by her husband, he demolished the same. Her evidence was supported by clan member one Barinaba Twamala (PW2) and Mugizi Coronery (PW3) who is the blood brother of the third appellant. According to PW3, Rozaria Cornely who is the

mother of the first and second appellant, was once given part of the suit land by Godeliver Coronery for purpose of planting seasonal crops. However, the second appellant planted permanent crops, banana trees and upon seeing that, the respondent's husband ordered him to uproot and he complied.

In his defence, the first appellant (DW1) testified that, their father had four wives and each wife had her own plot. According to him, since his birth, the suit land has been used by his mother Rozaria Cornely. When their mother died in 2002, it was when they began to own the said land. When their father died in 2004, they convened a clan meeting whereby, the land was divided among them and no one had ever interfered the land of another. He admitted to be the one who sold his land to the fourth appellant. DW2 in his chief testimony stated that, he had nothing to say as DW1 had already said it all. However, during cross-examination, he contended that, the land he sold to the fifth appellant was initially owned by his mother.

On his side, the third appellant (DW3) stated that, he was given the suit land in 1983 by his father in the presence of his mother, Cesilia Cornely and he has been using it since then. However, after the death of the respondent's husband, the respondent started complaining that his land

belonged to her husband who inherited it from her mother-in-law but the clan disputed that allegation. As for fourth appellant (DW4), he stated that, he bought part of the disputed land from the first appellant in 2017 who was using it together with his family planting seasonal crops. On his part, the fifth appellant (DW5) stated that, since when he was born, he found the mother of the first and second appellant using that land and he bought that land in 2018 from the second appellant. Thereafter, he built a house therein and ever since, he has been living there with his family.

After receiving the evidence of both parties, the DLHT decided in favour of the respondent by declaring the respondent's husband as the lawful owner of the suit land. Consequently, the appellants were ordered to give vacant possession of the suit land within 30 days. Aggrieved with the decision of the DLHT, the appellants lodged their appeal before this Court containing six grounds. However, at the hearing, their learned counsel Mr. Samwel Angelo abandoned two grounds and remained with the following grounds:

1. *That the proceedings are tainted with illegality for non-joinder of Enock Boneventura as necessary party to the case (vide exhibit D2) and it denied him "the right to be heard".*

2. *That the tribunal erred in law to decide that the Suitland belonged to the late Coniled Coronery.*
3. *That the tribunal erred in law to decide in favour of the respondent over the Suitland on which its neighbours were never identified.*
4. *That the tribunal erred in law to ignore the fact that 1-3 respondents have owned and used the Suitland for the upwards of 20 years undisturbed.*

At the hearing, Mr. Samwel Angelo, learned counsel represented the appellants whereas the respondent was represented by Mr. Lameck John Erasto, the learned counsel.

Submitting on the first ground, Mr. Angelo argued that, the proceedings of the DLHT are tainted with illegality for non-joinder of Enock Bonaventura as a necessary party because the suit land was bought by Enock Bonaventura whereas, the fourth appellant was a mere witness of the sale. According to him, failure to join Enock was fatal and he was denied the right to be heard. For that reason, the decree against the fourth appellant is inexecutable. He supported his submission with the case of **Abdullatif Mohamed Hamis v. Mehbob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 CAT at Dar es Salaam (unreported) where the Court of Appeal underscored that, a necessary party is the one whose presence is

indispensable to the constitution of a suit and whose absence no effective decree or order can be passed.

Concerning the second and third grounds, he stated that, the respondent did not prove if the suit land belonged to her deceased husband because she was not present when her husband was given that land. He further stated that, since there is evidence showing that, the land was bought by deceased's father, it is not known how and when the same was transferred to his wife considering that, he had six wives. Also, there was no evidence to establish when the deceased's mother gave the suit land to the deceased as a gift. In that regard, the respondent failed to prove that the disputed land was owned by her husband. Hence, the DLHT erred to declare the suit land to be owned by the respondent's husband.

As far as the fourth ground is concerned, Mr. Angelo submitted that, the first and second appellant began to own the suit land since 2002 and 2004 respectively, after the death of their father and the third appellant started to use it since 1983 after being given by his father and has stayed in that land since then without any interruption until he built a house for his son, Eliud. According to him, as the first, second and third appellant stayed in the suit land for more than 12 years and thus, the respondent had no right

to claim for the said land pursuant to the provisions of Law of Limitation Act. He urged this court allow the appeal, the original proceedings be quashed for non-joinder of necessary party and he prayed for any other order this court may deem fit to grant.

Responding to the first ground, Mr. Erasto submitted that, non-joinder of necessary party is not fatal pursuant to Order I, Rule 9 of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") and the court can proceed to determine the issue in controversy regarding the right and interest of parties before it. In respect of the case at hand, the respondent sued the persons who invaded the suit land and it is the fourth appellant who is in possession of the suit land and Enock Bonaventura whom the fourth appellant alleged to have bought on behalf, had never been in actual possession of the suit land. Also, he has never complained to have been denied the right to be heard and therefore, Enock Bonaventura was not a proper or necessary party. Thus, even without suing Enock, the decree would be effective. He supported his submission by citing the cases of **Juma B. Kajala v. Laurent Mnkande** [1983] TLR 103, **Magdalena Daniel v. Godwin Tabula**, Land Case Appeal No. 37 of 2013 HC at Bukoba (unreported) and **Suryakant D Ramji v. Savings and Finance Ltd and**

Others [2002] TLR 121. He further argued that, Enock Bonaventura was a material witness to the fourth appellant and failure to call him without reason implies that if he was called, he could have given adverse testimony. He cited the case of **Hemed Said v. Mohamed Mbiu** [1984] TLR 113 to support his argument. In that regard, he contended that, the cited cases of **Abdulatiff Mohamed Hamisi** and **Stanslaus Kalokola** are distinguishable.

Returning to the second and third grounds, he responded that, the respondent proved her case on how the suit land was transferred from the deceased's mother to the deceased and when she was married in 1998 the same had already been given to the deceased by his mother. He further contended that, the respondent in her testimony explained on how the third appellant invaded the suit land and how he was stopped by the deceased when he was alive. He added that, the second appellant said nothing to defend himself. Apart from that, he did not cross-examine PW2 on how the disputed land was acquired which implies acceptance of the truth of opponent's testimony as it was stated in the case of **Bomu Mohamed v. Hamis Amiri** [2020] TZCA 29 TanzLII.

Responding to the issue concerning the appellant to have been used the suit land for more than 20 years, Mr. Erasto contended that, there was no any exhibit to support that allegation because no any clan member testified that the appellants were given that land through the clan meeting. DW6 in his testimony stated that, he is a neighbour to the third appellant and she knew nothing on when the he acquired that land. According to Mr. Erasto, the Chairman properly analysed the evidence of each witness and arrived into a conclusion that, the evidence of the respondent was heavier than that of the appellants. Therefore, there is no reason for this Court to fault the decision of the tribunal as the raised issues are factual which this Court cannot interfere pursuant to what was stated in the case of **Peters v. Sunday Post Ltd** [1958] EA 424. He prayed for this appeal to be dismissed with costs for want of merit.

In rejoinder, Mr. Angelo insisted that, although non-joinder of party is not fatal, in the circumstances of this case, Eliud was also a necessary party who ought to be joined and his absence affects execution. To him, there was no link of evidence establishing that, after the deceased's father bought that land, he gave it to the deceased's mother. Therefore, the fact that the deceased's mother was using it, does not make her being the owner of that

land. He added that, the third appellant in his testimony denied to demolish his house built in disputed land. He concluded that, failure to produce documentary evidence does not water down oral testimony.

I have passionately perused the record of the DLHT and after considering the arguments by learned counsel for both parties, the main issue for determination is whether the respondent proved her case on the required standard.

It is trite law that, the one who wants the court to believe his assertion, must prove that assertion. This is provided under section 110 (1) of the Evidence Act [Cap. 6 R.E. 2022] (the Evidence Act). Also, in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** [2019] TZCA 453 TanzLII it was stated:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of Evidence Act, [Cap 6 R.E. 2002]. It is equally elementary that since the dispute was in civil case,* ***the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.*** *"*(Emphasis supplied).

See also the case of **Abdul-Karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419. From the above provisions and the cited case, the respondent was duty bound to prove her allegation that the suit lands belonged to her deceased husband. Therefore, in this appeal, the focus will be on evaluation of evidence on whether the respondent proved her case to the required standards *i.e.,* on the balance of probabilities as provided under section 3 (2) (b) of the Evidence Act. Furthermore, this being the first appellate court, it is duty bound to re-evaluate the evidence of the DLHT and where necessary come out with its own findings. See the case of **Domina Kagaruki v. Farida F. Mbarak and Others** [2017] TZCA 160 TanzLII. However, in re-evaluating the evidence, the first appellate court can look into the consistency of witnesses in their testimonies.

Starting with the first ground, it is settled law that, a necessary party is one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed. This was settled in the case of **Abdullatif Mohamed Hamis v. Mehbob Yusuf Osman and Another** (*supra*). In the same case, the Court of Appeal proceeded to hold that:

"...the determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

However, according to Order 1, Rule 9 of the CPC, misjoinder or non-joinder of parties is not fatal. The rule provides as follows:

"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."

Reverting to the case at hand, according to Mr. Zephurine, the person by the name of Enock Bonaventure was a necessary party and ought to be joined as necessary party because he was the one who purchased part of the suit land from the first appellant. It is on record that, the respondent while she was in the course of collecting the deceased's properties for distribution, she faced a stumbling block after finding other people occupying the deceased's land whereby, among them was the fourth appellant. Upon being asked, the fourth appellant informed her that, he bought it from her

brother in-law. After being sued, the fourth appellant in his WSD claimed to be the owner of that land by way of purchase from the first appellant since 2017. In his testimony at page 53 of the proceedings, he confirmed to have bought it from the first appellant. Equally, the first appellant at page 43 of the proceedings, when he was cross-examined by learned counsel for the respondent, he admitted to have sold it to the fourth appellant. Thus, since from his WSD to his testimony, the fourth appellant claimed to be the owner of the suit land by way of purchase from the first appellant who also confirmed it in his testimony, there is no way the said Enock Bonaventure can become a necessary party to this suit.

The fact that, the fourth appellant tendered the sale agreement showing Enock Bonaventure as the purchaser of the suit land cannot in itself make the said Enock a necessary party rather than raising contradictions on the evidence of the fourth appellant. Also, it raises confusion and casts doubt on the authenticity of the said sale agreement. Had Enock been the purchaser of the land in question, it could have been reflected from the beginning through the WSD. Be as it may, the said sale agreement (exhibit D2) was wrongly admitted during cross-examination of DW4 as defence exhibit because as a matter of procedure, admissibility of exhibit during

cross-examination is aimed at impeaching the credibility of a witness pursuant to sections 154 and 164 of the Evidence Act which was not the case in the matter at hand. In that regard, since the fourth appellant was the occupant of the land in question at the time when the respondent was collecting the deceased properties and since he claimed to buy it from the first appellant who confirmed it in his testimony, the argument by learned counsel for the appellants on the issue of non-joinder of Enock Bonaventure as necessary party is unfounded and misplaced. His absence would not cause the decree to be inexecutable. With this finding, the first ground lacks merit.

Concerning the second to fourth grounds, the evidence by the respondent reveals that, the deceased had two pieces of land both measuring one and a half acres located at Lunyaga Stesheni, within the hamlet and village of Lunyaga, Chanika ward in Karagwe District. It was also her testimony that, in 1998 when she was married to the deceased, the deceased showed her the suit lands telling her that, he has acquired the same by way of gift from his mother. Her testimony on how the deceased acquired the suit lands was supported by PW2. According to PW2 the respondent's husband acquired the said land after being given by his mother, Godliver. The evidence of PW1 and PW2 was also supported by PW3 who is

the blood brother of the third appellant and half-brother to first and second appellant. Moreover, PW1 at page 16 of the proceedings mentioned the neighbours bordering the suit lands at the time she was showed by her late husband. Equally, PW2 at page 21 and PW3 at page 26 of the proceedings mentioned the current neighbours bordering both suit lands.

Apart from that, PW1 in her testimony clearly explained that, in 2008 while her husband was still alive, the third appellant invaded part of the suit land and constructed a house for his son. However, the deceased intervened and after asking him, the third appellant demolished it. The third appellant did not cross-examine PW1 on this vital aspect about demolishing the house he built in the suit land after being asked by the deceased. It is settled law that, failure to cross-examine on the vital point amounts to acceptance of the truthfulness of witness's testimony. See the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (*supra*). Since the third appellant failed to cross-examine PW1 on this vital point, as a matter of principle, he is deemed to have accepted that evedence and is estopped from asking the court to disbelieve what PW1 said. Equally, his denial in his defence over demolishing the house is nothing but an afterthought. If at he was the owner of the suit land, he couldn't have accepted to demolish the

house he constructed therein. This is a clear proof that, he was the trespasser from the beginning. Furthermore, the second respondent did not cross-examine PW1 at all which connotes that, he accepted the whole testimony of PW1.

Moreover, PW3 testified that, the deceased mother, Godliver had once gave her land to her co-wife Rozalia who is the mother of the first and second appellant for purpose of planting seasonal crops. However, the first appellant planted banana trees and upon seeing that, the deceased asked him to uproot them and the first appellant complied. Likewise, the first appellant did not cross-examine PW3 on this material evidence which implies that, he accepted the truthfulness of PW3's testimony. If the first appellant was the owner of the said land, he could not have agreed to uproot banana trees. Besides, if the first and third appellants were the owners of the suit lands for over twenty years, the first and third appellants couldn't have uprooted banana trees or demolished the house after being asked by the deceased.

On the other hand, in their pleadings, at paragraph 4 of their joint WSD, the first, second and third appellant averred that, they jointly owned the disputed land from their father since 1978. Nonetheless, the first appellant at page 30 of the proceedings, testified that, they began to own

the suit land in 2002 after the death of their mother. On his part, the third appellant at page 46 of the proceedings testified that, he started to own the suit land in 1983 after being given by his father. Basing on their evidence and pleadings, as rightly decided by learned Chairman, it is apparent that, what the first, second and third appellant did was to depart from their pleadings which they were not entitled as stated in the cases of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (*supra*) and **James Funke Ngwagilo v. Attorney General** [2004] TLR 161. Be it as it may, their testimonies did not prove what they pleaded in their WSD.

In that regard, and basing on the analysis above, it is obvious that, the evidence of the respondent was heavier than the evidence of the first, second and third appellants in respect of who is actually the owner of the suit lands and thus, the DLHT was correct to declare Coniled Coronery as the lawful owner of the disputed lands. Under the particular circumstances, the first and second appellants had no good title to pass to the fourth and fifth appellant. It was stated in the case of **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205 that:

> *"He who doesn't have legal title to land cannot pass good title over the same to another;"*

That being said, I find nothing to fault the decision of the DLHT. Thus, the appeal is dismissed for want of merit. The decision of DLHT is upheld. Owing to the nature of the matter which involve relatives, I make no orders as to costs.

It is accordingly ordered.

I. K. BANZI
JUDGE
06/10/2023

Delivered this 6th day of October, 2023 in the presence of the first and third appellant and the respondent and in the absence of the second, fourth and fifth appellant. Right of appeal duly explained.

I. K. BANZI
JUDGE
06/10/2023