

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

**IN THE SUB-REGISTRY OF SONGEA**

**AT SONGEA**

**LAND CASE APPEAL NO. 40 OF 2023**

**MWENYEKHERI MOHAMED NDIMBO ..... APPELLANT**

**VERSUS**

**ALLY ALLY KANGANYA ..... RESPONDENT**

**(Appeal from the decision of the District Land and Housing Tribunal of  
Songea in Land Application No. 87 of 2022)**

**JUDGMENT**

24<sup>th</sup> August & 4<sup>th</sup> October, 2023

**KISANYA, J.:**

The appellant, Mwenyekheri Mohamed Ndimbo is appealing against the decision of Songea District Land and Housing Tribunal (the trial tribunal) in Land Application No. 87 of 2022 which declared the respondent, Ally Ally Kanganya, as the lawful owner of Plot No. 2125, Block QQ (disputed land) situated at Mjimwema area within Songea Municipality.

The facts of the case and the decision which has led to this appeal may be briefly stated as follows: Through letter Ref. No. 8797/1/IM dated 11<sup>th</sup> April, 2001, Songea Town Council (now Songea Municipal Council) offered the appellant, a right of occupancy of Plot No. 2125, Block QQ. On 5<sup>th</sup> October, 2021, he learnt that the respondent had trespassed into the disputed land. Subsequently, on 11<sup>th</sup> October 2021, the appellant referred

his complaint to the Municipal Director of Songea Municipal Council (hereinafter "SMC"). As the matter was not resolved by SMC, the appellant referred the same to the Ward Tribunal for mediation.

The mediation was marked failed. The appellant opted to sue the respondent before the trial tribunal. He prayed for the following reliefs: *One*, the respondent be declared as a trespasser into the disputed land; *two*, an order for vacant possession against the respondent; *three*, the appellant be declared as the lawful owner of the disputed land; *four*, costs of the suit; and *five*, any other relief as the trial tribunal deemed fit and just to grant.

The appellant testified as the sole witness (PW1) of his case. He tendered, among others, the letter of offer which was admitted in evidence (part of Exhibit MN1 collectively). He stated on that, on 5<sup>th</sup> October, 2021 he discovered that the respondent had trespassed into the disputed land. It was his further evidence that, upon making follow up of the right of occupancy, on 11<sup>th</sup> October, 2021, SMC notified him that there was another person who was making follow up of the right of occupancy on the same land. He urged the trial tribunal to grant the foresaid reliefs.

On the rival side, the respondent denied the appellant's claim, vide his written statement of defence. He claimed that the disputed land was part of the estates of the late Ally Mohamed Kanganya, which he was

administering by virtue of the letter of probate administration granted to him by Mfaranyaki Primary Court in Probate Cause No. 15 of 2013 (Exhibit AK1 collectively). He testified that the late Ally Ally Mohamed Kanganya was his father and that he died intestate in 2002. The respondent further stated that, the disputed land was surveyed in 2000. It was his further evidence that he had been following up the letter of offer to the relevant authority. The respondent stated that the probate court had ordered SMC to handle over the disputed land to him.

The appellant told the trial court that, the disputed land was not sold to any person and that his family not compensated by any authority for acquisition of the same. He expounded that the other plots which belonged to the late Kanganya were Plots No. 2125, 2101, 2124, 2126, 2127, 2128, 2129, all at Block QQ, Mjimwema, Songea. According to him, the probate court had ordered SMC to resolve the dispute between the parties herein, when the latter conceded to have re-allocated the dispute land to the appellant.

The respondent called the chairman of Mjimwema local government one, Kidandile Anyelwise Fungo (DW2). He testified that his office had failed to resolve the dispute. It was also his evidence that the disputed land and other piece of plots around that area were owned by individuals. He

stated further that, the said land was surveyed by SMC and that, the previous owners were entitled to compensation.

After due consideration of the evidence from both sides, the trial tribunal dismissed the appellant's application. It went on declaring the respondent as the lawful owner of the disputed land and ordering that the respondent is entitled to be registered as the lawful owner of the disputed land, as an administrator of the estates of the late Ally Mohamed Kanganya. In addition, the appellant was declared as the trespasser to the disputed land and he was condemned to pay costs of the suit.

Being aggrieved with the decision and orders of the tribunal, the appellant appealed to this Court. His memorandum of appeal is predicated on five grounds of appeal as follows:

1. That, the trial tribunal erred in law and in fact when it entertained and decided the suit whereas the respondent had no *locus standi*.
2. That, the trial tribunal also erred in law and fact when held the appellant failed to call a key witness.
3. That the trial tribunal erred in law and in fact when it declared the respondent the lawful owner of the suit land while he failed to prove the suit on the balance of probabilities.

4. That, the trial tribunal erred in law and in fact when it failed to pronounce the appellant as the lawful owner of the suit land despite documentary exhibit of ownership been tendered during hearing of the suit at the trial tribunal.
5. That the trial tribunal erred in law and in fact when it disregarded the evidence and the exhibit of the appellant by declaring the respondent the lawful owner of the disputed land.

During the hearing of this appeal, the appellant was represented by Mr. Kitara Mugwe, learned advocate, while the respondent appeared in person without legal representation.

On the first ground of appeal, the appellant's faulted the tribunal for entertaining the matter while the respondent had no *locus standi*. It was his submission that, since the respondent stated that he was the administrator of the estate of his late father, the trial tribunal ought to have ordered that the respondent to be joined as a party to the case in the said capacity. To support his argument, the learned counsel cited the decision of this Court in the case of **Agness Hinju v. Panckras Kayombo and 3 Others**, Land Appeal No. 28 of 2018 (unreported).

Mr Mugwe combined the second and third grounds of appeal. He submitted that, the appellant tendered a letter of offer which proved that

he was the lawful owner of the disputed land. He therefore, faulted the trial tribunal in holding that the witness from the relevant authority was not called. In that respect, he was of the firm view that, it is the respondent who was duty bound to prove the contrary, including, that the suit land belongs to his late father. It was his contention that, the respondent did not prove on the balance of probabilities that the disputed land belonged to his late father.

In respect to the fourth and fifth grounds of appeal, Mr. Mugwe submitted that, the appellant proved his ownership over the disputed land by tendering the letter of offer and land rent receipts. Therefore, he was of the view that the trial tribunal ought to have declared the appellant as the lawful owner of the disputed land.

On the foregoing, Mr. Mugwe urged this court to allow the appeal with costs and declare the appellant as the lawful owner of the disputed land. In alternative, he asked this Court to nullify the proceedings of the tribunal based on the first ground of appeal.

The respondent had nothing useful to respond. He just adopted his reply to the memorandum as his submission in reply. Pursuant to the reply to the memorandum of appeal, the respondent stated that he had *locus standi*. As for the second and third grounds of appeal, he stated that the appellant did not call any witness to support his claim on how he acquired

the disputed land. On the fourth ground, the respondent averred that the documents relied upon by the appellant did not hold water as most of them were irrelevant. With respect to the fifth ground, he stated that the appellant failed to prove his case on the required standard. He therefore prayed that the appeal be dismissed with costs.

Having gone through the respondent's reply, Mr. Munge had nothing to submit in rejoinder. He reiterated what he had submitted in his submission in chief.

I have dispassionately considered the submissions made by both parties. The main issue for determination is whether the appeal has merit or otherwise.

I prefer to start with the first ground which is based on the issue, whether the respondent had a *locus standi*. It is imperative to note that, this issue was not raised before the trial tribunal. As a result, the issue of *locus standi* does not feature in the impugned judgment. Nevertheless, the law is settled that, the principle of *locus standi* connotes the right to bring an action to the court or given forum. See for example, the case of **Madam Mary Sylvanus Qorro vs Edith Donath Kweka**, Civil Application 102 of 2016, [2019] TZCA 47 (TanzLII) in which the Court of Appeal cited with approval the case of **Lujuna Shubi Ballonzi vs The**

**Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 where in this Court held:

*"Locus standi is governed by Common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with."*

As the record bears it out, the respondent did not institute the application which gave rise to this appeal. It is the appellant who brought the matter to the tribunal. He averred in paragraph 6(i) and (ii) of his application that, the respondent had trespassed into his land by constructing a residential building thereon. Therefore, the appellant was duty bound to prove his claim against the respondent. The principle of *locus stand* could not apply to the respondent who was sued by the appellant. I am bolstered by the case of **Madam Mary Sylvanus Qorro** (*supra*) where the Court of Appeal had this to say on the applicability of the principle of *locus standi*:

*"... the applicability of the principle is in regard to the person who brings a matter to court as opposed to the appeal at hand where the respondents were sued."*

Guided by the above stated position, the first issue is answered not in the affirmative. In the case of **Agness Hinju** (*supra*) referred to this Court by Mr. Mugwe, the principle of *locus stand* was applied against the



party who initiated the proceedings. For the foregoing reasons, I find that the first ground of appeal is unmerited.

Second for consideration are the second, third and fourth grounds of appeal. I find it convenient to address the said grounds conjointly because they hinge on the issue whether the appellant proved his case on required standard. This being a first appeal, the Court has a duty to scrutinize and re-evaluate the evidence on record before confirming the decision of the trial tribunal or arriving at its own findings and decision.

It is a general principle of law, set out under sections 110 and 111 of the Evidence Act, Cap. 6, R.E. 2022, that, in civil proceedings, a person who alleges on certain facts has a duty prove the allegation in his or her favour. Further to this, section 3(2)(b) of the Evidence Act (*supra*) provides that, the standard of proof in civil case including, tort of trespass as in this case, is on the balance of probabilities. The court will sustain the evidence which is more credible than the rival side on a particular fact that is required to be proved. I am fortified, *inter alia*, by the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal No 45 of 2017 [2019] TZCA 453 (TanzLII) where it was held that:

*"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on*

*consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*

As indicated herein, the appellant's cause of action was founded on tort of trespass to land. According to, Mr. C.S. Binamungu, in his book titled "Law of Torts in Tanzania" cited with approval in the case of **Avit Thadeus Massawe vs Isidory Assenga, Avit**, Civil Appeal No. 6 of 2017 (unreported), tort of trespass is committed when one person enters into the land that is in occupation of another without permission or authority. Thus, for the tort of trespass to land to stand, the plaintiff must prove that he is the lawful owner of the suit premises. In that regard, one of issues framed at the commencement of the trial was "who is the lawful owner of the disputed land". Since each party claimed to be the lawful owner of the disputed land, it was duty bound to produce evidence to justify its respective allegation.

Mr. Mugwe invited me to find that the appellant proved ownership of the suit property vide a letter of offer which bears his names. Indeed, the appellant (PW1) testified that it is SMC which allocated the disputed land to

him. In addition to the certified letter of offer, the appellant relied on the loss report (dated 6<sup>th</sup> September, 2021) of original letter of offer, letter dated 6<sup>th</sup> October 2021 which he addressed to SMC and receipts for purchasing blocks (all Exhibit MN1 collectively). Having scanned the appellant's oral testimony and Exhibit MN1 collectively, I have noticed the following:

**First,** the original letter of offer was not produced during trial. Relying on the loss report dated 6<sup>th</sup> September, 2021, the appellant stated that the original letter of offer had lost. However, the loss report names the letter of offer of Plot No. 2250 SQM, Block QQ, Mjimwema Songea and not Plot No. 2125 LD, Block QQ, Mjimwema Songea appearing in the certified copy of letter of offer which was admitted in evidence. It is my considered view that, the said contradiction on description of the land in dispute raises doubt on the whereabouts of the original letter of offer of the disputed land.

**Two,** even if the certified letter of offer (part of Exhibit MN1 collectively) is considered, the settled position of law is to the effect that, land becomes legally owned or a right of occupancy is established, once an offer for it is made and the fees is paid by the offeree. See the case of **Sarjit Singh vs Sebastian Christom** [1988] TLR 24 in which this Court (Kyando J, as he then was) referred to the case of **Col. S.M.A. Kashimiri**

**vs Maginder Singh Matharu**, Civil Appeal. No. 4 of 1988 (unreported)

wherein the Court of Appeal held:

*"Respondent was required to pay the necessary fees for the plot within thirty days from the date of this offer of right of occupancy before the plot could be legally deemed to have passed to him."*

In the case at hand, the appellant was required to pay the fees listed in paragraph 2 of the letter of offer. It was categorically stated in paragraph 4 of the letter of offer that, unless the offer was to be accepted and all fees paid within 30 days from date of thereof, the offer would lapse without further notice to the appellant. In the circumstances, for the letter of offer to be considered by the court, the appellant was required to prove that he paid the necessary fees on or before 10<sup>th</sup> May 2001.

Now, in evidence in chief, the appellant (PW1) did not state whether the required fees were paid within the time stated in the letter of offer. Upon being cross-examined by the respondent, he stated to have paid TZS 36,800/= to Songea Town Council or SMC. He neither state the exact date nor produce the receipts to prove payment of all fees listed in the letter of offer within time specified thereto.

It is worth of noting that, one of the fees listed in paragraph 2 of the letter of offer is a survey fees (*ada ya upimaji*) of TZS 22,500/=. However, what was tendered in evidence is a pay in slip showing that survey fees of

TZS 40,000/= was paid 5<sup>th</sup> October, 2021. According to the oral testimony of the applicant, that was also the date when he learnt that the respondent had trespassed unto the disputed land. In any case, the pay in slip suggests that the survey fees were paid twenty years from the date of the letter of offer. It is not known as to why the amount of survey fees stated in the letter of offer and pay in slip are at variance and it took the appellant twenty years to pay the same. Given that the appellant was given time within which to pay the fees, including the survey fees, it is not known as to whether the letter of offer was or is still valid.

Further to the above, the appellant was required to pay annual land rent as stated in paragraph 1(ii) of the letter of offer. Neither his oral evidence nor exhibits indicate if the appellant paid the land rent from 2001.

All the above considered, I find that the letter of offer tendered by the appellant was not sufficient to stand as a proof of ownership

**Third,** the appellant claimed to have bought the disputed land from SMC after applying for the same. It is trite law that, no one can transfer the title over the land he does not have unless it is proved that, one was a bonafide purchaser for value or that there was no notice of any encumbrances at the time of sale. I am supported by the case of **Furaha Mohamed vs. Fatuma Abdallah** [1992] TLR 205], where it was stated that:

*No one can give a title that he does not have to another person. Nevertheless, there are exceptions to the principle, thus; where it is proved that one was a bonafide purchaser for value or where there was no notice of any incumbrances at the time of sale.*

According to the certificate (part of Exhibit MN1 collectively) in which the Ward Tribunal stated to have failed to mediate the parties, the appellant was aware that the respondent claimed to have been owning the disputed land vide customary rights. In that respect, there a need for the appellant to bring a witness from SMC, which allocated the disputed land to him. Apart from proving her title to the land allocated to the appellant, SMC was an important witness to enlighten the trial tribunal on whether the appellant had paid the necessary fees and land rent and whether he (the appellant) was still the lawful owner of the disputed land. This was not done. As if that was not enough, the appellant did not assign the reason of his omission to call SMC as his witness. I am alive to the position of law, under section 143 of the Evidence Act, there is no specific number of witnesses that is required to prove certain facts. However, the law is also settled that, the court is enjoined to draw adverse inference on party's failure to call an important witness who is within his reach and without assigning reasons. That being the case, I find no reason to fault the trial tribunal's finding on that position.

From the foregoing reasons, I am satisfied that the appellant did not prove his case on the balance of probabilities. Thus, the second, third and fourth grounds are dismissed for want of merits.

Last for determination is the fifth ground in which the trial tribunal is being challenged, *inter alia*, for declaring the respondent as the lawful owner of the disputed land. I have considered that the appellant's claim was to the effect that the respondent had trespassed into his land. On the other hand, the respondent denied the appellant's claim. He did not raise a counter claim. Further to this, the respondent did not pray, in his written statement of defence, to be declared the lawful owner of the disputed land. In view of the pleadings filed before it, the trial tribunal ought to have resolved whether the appellant had proved his claim of tort of trespass to land. Considering further that the respondent stated that the disputed land belonged to his late father, it was wrong for the trial tribunal to go ahead and declare him (the respondent) the lawful owner of the said land. In the circumstances, I find merit in the fifth ground of appeal.

In the end result, the appeal is partly allowed and partly dismissed as shown herein. For avoidance of doubt, the trial tribunal's decision and decree which declared the respondent as the lawful owner of the disputed land and the appellant as a trespasser into the same land are quashed and set aside; the rest of the orders of the trial tribunal remain undisturbed.

The appellant is at liberty to front his claim against SMC which allocated the disputed land to him. Each party shall bear its own costs.

Dated this 4<sup>th</sup> day of October, 2023.



S.E. KISANYA  
**JUDGE**  
04/10/2023

**Date:** 04/10/2023

**Coram:** Hon. S.E. Kisanya, J

**Appellant:** Absent

**Respondent:** present in person

**C/C:** Ms Mwangosi

**Court:** Judgment delivered through video conferencing this 4<sup>th</sup> day of October, 2023 in the presence of the respondent and in the absence of the appellant.

Right of appeal explained.



S.E. KISANYA  
**JUDGE**  
04/10/2023