IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 22 OF 2023

(Originating from Application No. 78 of 2014 of the District Land and Housing Tribunal for Moshi at Moshi).

1. **TEGEMEO EVANCE TARIMO**
2. **SIA KISAKA**
3. **DEUSDEDITA KISAKA**

Administrators of the estate of the late Theodori Andrew Kisaka — **APPELLANTS**

VERSUS

1. **JOAQUINE ANTONITE DE- MELLO (Administratrix of the estate of the late Dominico Francisco De Mello)**
2. **GASPAR V. MOSHA**

RESPONDENTS

JUDGMENT

04/9/2023 & 09/10/2023

SIMFUKWE, J.

The Appellants herein were aggrieved by the decision of the District Land and Housing Tribunal of Moshi (The trial Tribunal) in Application No. 78 of 2014 delivered on 22nd March, 2023.

Briefly, the genesis of this appeal is to the effect that there is a land dispute over ownership of the piece of land measured 20 paces to 23 paces located at Msaranga. The appellants claimed before the trial tribunal that the said land belonged to the late Theodori Andrew Kisaka who handled the same to the late Dominico De Mello on condition of building a milling machine. That, if failed to do so, he would return the said land to the said Theodori Kisaka. In 2004 the said Dominico De Mello sold the said land to the 2nd respondent. In 2014, the said Theodor Kisaka planted some plants around his premises including the disputed land. The 2nd respondent stopped him and charged him before Msaranga Ward Tribunal for criminal trespass. Thereafter, the said Theodor Kisaka instituted a land dispute before the trial tribunal.

The 1st respondent the Administratrix and the daughter of the late Dominico De Mello alleged that the disputed land belonged to his late father as he purchased it from one Ngowi and legally sold it to the 2nd respondent. The 2nd respondent added that after he had bought the said land from the late Dominico De Mello, he continued to develop it by building another house and renovating the old house.

After full trial, the trial Tribunal dismissed the application of the appellants after being satisfied that the 2nd respondent is the lawful owner of the disputed land after he had bought it from the original owner the late Dominico De Mello. The appellants were aggrieved and preferred the instant appeal on the following grounds:

1. *That the learned Chairman misdirected himself in entering judgment in favour of the respondents while there was*

enough evidence that the land is dispute belonged to the late Theodori Andrew Kisaka and his wife Balbina Theodori Kisaka since 1972 and that the same was not the property of the late Dominic De- Mello.

2. *That the Learned Chairman misdirected himself in disregarding the document P2 which shows that the land in dispute was given to the late Dominick De- Mello on 4/2/1985 for the purposes of building there on a grinding machine a condition he failed to fulfill, but resorted to sell the land unlawfully to the 2nd respondent without the knowledge of the late Theodori Andrew Kisaka and/or his wife Balbina Theodori Kisaka vide the document D1.*
3. *That if the Learned Chairman had properly evaluated the evidence, he would have entered judgement for the appellants.*

The appellants prayed the appeal to be allowed with costs.

The appeal proceeded orally. Mr. Faustine Materu argued the appeal on behalf of the appellants while Mr. Chiduo Zayumba contested the appeal on behalf of the respondents.

Mr. Materu opted to argue the grounds of appeal jointly. He submitted to the effect that SM2 Balbina Theodori Kisaka, in her evidence testified that she got married to Theodori Kisaka in 1972 and found her husband owning the disputed land. That, pursuant to exhibit P3 the house of SM2 is behind the disputed house. Also, exhibit P2 is self-explanatory as the same is evidence of the acquisition of the disputed land by Dominico De Mello who

was given the said land on condition of building a milling machine only and not otherwise. However, the said Dominico De Mello built a house contrary to the contract. The dispute arose in 2014 when the appellants wanted to plant a fence whereby the 2nd respondent, Gasper Mosha instituted a dispute before the Ward Tribunal claiming that Mzee Theodori Kisaka was trespassing into his land. Since the late Theodory Kisaka was sick, his wife Balbina appeared on his behalf.

Mr. Materu continued to state that, although the 2nd respondent tendered the sale agreement entered between him and Mzee De Mello (Exhibit D1), in the said exhibit Theodori Kisaka and his wife did not sign although the name of Mzee Theodor Kisaka appeared therein. Also, all witnesses on part of the appellants were not involved in the said sale. He commented that the sale agreement dated 23/10/2004 was void *ab initio*.

Mr. Materu faulted the findings of the trial Tribunal that the disputed land was the property of Mzee De-Mello who was not justified to sell the disputed land. Unfortunately, both Mzee Theodor Kisaka and Mzee De Mello passed away while the matter was still pending. Also, he disputed the findings at page 9 of the trial Tribunal's judgment that the 2nd respondent was the lawful owner of the disputed land after purchasing it from Dominico De-Mello. He said that the appellants were not aware of the said sale and they could have taken any action.

Mr. Materu believed that evidence of SM2 Balbina was heavier than that of SU1 Joaquine Antonito De Mello, the administratrix of the estates of the late Dominico De Mello who admitted that she was still young when his father

was given the disputed land. The learned advocate was surprised why the trial Tribunal decided against the appellants. He was of the opinion that had the trial Tribunal evaluated properly evidence of the appellants, it could have decided in favour of the appellants who are lawful owners of the disputed land since 1972.

In his final remarks, Mr. Materu prayed the appeal to be allowed with costs and the second respondent be ordered to vacate from the disputed land.

In reply, Mr. Chiduo Zayumba notified this court that the following facts are not disputed: **First,** both parties do not dispute that since 1985 the disputed land was not possessed by the deceased Theodor Kisaka and that the same was possessed by the deceased Dominico De Mello as testified by the 1st respondent that their deceased father was the owner even before 1985. **Second,** he said it is undisputed fact that the dispute arose after 29 years from the year when it was alleged that the 1st respondent's father was given the said land. **Third,** there is no dispute that in 1987 the father of the first respondent had already built a permanent building of five rooms. Also, the 2nd respondent Gasper Mosha after he had purchased the disputed land in 2004, he constructed a permanent house thereat.

Responding to the 1st ground of appeal that there was enough evidence that the deceased Theodori Kisaka was the owner of the disputed land; Mr. Zayumba specified that as decided by the trial Tribunal at page 8 last paragraph of the judgment, no witness stated how and when the deceased Theodori Kisaka acquired the disputed land. That, it is on record that when SM2 Balbina got married, she found the disputed land owned by her late

husband. Thus, it is not true that evidence of SM2 was heavier and the appellants failed to prove ownership of the disputed land. He cited **section 110 and 119 of the Evidence Act**, Cap 6 R.E 2022 which provides that the burden of proof lies to the person who requires the court to believe him. **Section 119 of the Evidence Act** (supra) concerns the burden of proof regarding ownership. That, the party who questions the party who is in possession of the disputed property is the one who has the burden to prove that the one who is in possession of the disputed property is not the lawful owner.

Mr. Zayumba submitted further that the present dispute arose after 29 years of possession. He referred to the case of **Said Mfaume vs Rajab Fuko (1970) HCD 106** which held that:

> *"When a claimant returns more than twenty years to assert ownership of land which he has never occupied and which the person against whom he claims has been occupying and improving, then he must bring very convincing evidence if he is to succeed."*

In this case, Mr. Zayumba argued that there was no very convincing evidence that the deceased Theodor Kisaka was possessing or owning the disputed land. The first person to possess the disputed land is the deceased De Mello. All witnesses on part of the appellants were children thus, they knew nothing. Also, the wife of the deceased did not know how the disputed land was acquired.

Arguing against the second ground of appeal that the appellants' exhibit P2 was disregarded, Mr. Zayumba was of the view that the said exhibit was considered but it had no merit. That, starting with the names of witnesses in the said exhibit, none of them was called to testify for the appellants and no reason was given. He referred to the case of **Hemed Said vs Mohamed Mbilu [1984] 113** in which it was held that:

> *"Where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference contrary to the party's interest."*

Mr. Zayumba insisted that, if the mentioned witnesses witnessed the contract, they could have been called to testify. SM2 Balbina the wife of the deceased did not witness the said agreement.

Mr. Zayumba noted another reason for objecting the said exhibit to the effect that the purported agreement does not make sense. That, the deceased was given land to build a milling machine and that in case he failed he should have returned it. He formed an opinion that allowing someone to build a permanent structure on a land means that the said land has been given to him. He cited the case of **Kamando Kimatale vs Edward Mahedi [1978] LRT 47** in which there was a similar scenario in which in 1947 the deceased was alleged to have been given the land for building a shop. The dispute arose in 1973 after 25 years.

Mr. Zayumba contended further that even if it is assumed that the deceased Theodori Kisaka was the owner of the disputed land, it does not make sense that the deceased claimed the same after 29 years after the father of the 1st

respondent had built a permanent structure on it, sold part of the land to the 2nd respondent who had already built a house on it. He averred that, if the deceased had breached the agreement the time limit for challenging the same was in 1997. He referred to the case of **Yusuf Hamis Hamza vs Juma Ally Abdallah**, Civil Appeal No. 25 of 2020 (CAT) [Tanzlii] which stated that the issue of time limitation may be raised even on appeal. The learned advocate stressed that the trial tribunal accorded enough weight to exhibit P2.

On the third ground of appeal which concerns evaluation of evidence, Mr. Zayumba replied that the trial tribunal evaluated evidence of the parties properly and found that there was evidence to prove that the deceased Theodori Kisaka gave the disputed land to the deceased Dominico De-Mello. That, even if the same was not given to the deceased De Mello the appellants are time barred.

The respondents' counsel prayed the court to dismiss the appeal and the decision of the trial Tribunal be affirmed.

In rejoinder, Mr. Materu reiterated that evidence of Balbina SM2 established that when she got married, she found her husband owning the disputed land. That, from 1972 to 1985 the said witness and her husband had used the disputed land for thirteen years and soon after they had noted the trespass, the deceased Theodor Kisaka instituted a case. Thus, it is not correct that the appellants did not take action as they never knew about the trespass. That, their witnesses stated that when they asked Mzee De Mello about the

alleged sale, he said that he had not sold the disputed land. He maintained that the appellants' evidence is heavier.

I have keenly considered the submissions of the parties in line with the grounds of appeal as well as the trial Tribunal's records. The appellants' grievance is centred on failure to evaluate evidence. In determining this appeal, I will examine all the grounds of appeal as filed being guided by two principles. Firstly, this being the first appellate Court, I am enjoined to re-evaluate the evidence, subject it to critical analysis before arriving to an independent finding. See: **Standard Chartered Bank Tanzania Limited vs National Oil Tanzania Limited & Another** (Civil Appeal 98 of 2008) [2013] TZCA 228 [Tanzlii] at page 9.

The second guiding principle which will guide me in dealing with this appeal is the requirement of the law that the one who alleges must prove as envisaged under **section 110 (1) and (2) of the Evidence Act**, (supra) and that the standard of proof in civil cases is on balance of probabilities.

As the first appellate court I now resort to evaluating evidence tendered by both parties before the trial tribunal to see whether the appellants managed to prove on balance of probabilities that the disputed land was owned by the late Theodori Kisaka.

Before the trial Tribunal, it was the appellants' evidence that the disputed land belonged to the late Theodori Kisaka. That in 1985 their late father handled the said disputed land to Dominico De Mello on agreement that he should construct a milling machine. The said agreement was tendered before the trial Tribunal and admitted as **exhibit P2**.

The appellants' testimonies established further that the said De Mello constructed the house containing five rooms but did not construct the said milling machine. PW2 testified that, she made follow up to know why De Mello did not obey the agreement. It was testified further that later on the said land was sold to the 2nd respondent who was the tenant of the said De Mello. PW6 testified that the late Theodori once told him that the land belonged to him and he even requested this witness to draw the sketch plan for him in 2014.

On the other hand, the 1st respondent who is the daughter and Administratrix of the late Dominico De Mello among other things testified that the disputed land belonged to her late father. She said that, his late father bought it from one Ngowi, the TANU party Chairman. Later, her father sold it to the 2nd respondent.

The 2nd respondent testified that the disputed land was sold to him by the late De Mello in 2004 in the presence of witnesses. He tendered the sale agreement which was admitted as **exhibit D1**. To substantiate that the said land was sold to him, the 2nd respondent called witnesses to wit: DW3 the chairman of Local Government and DW4 who witnessed the said sale agreement.

The trial Tribunal while determining the issue of ownership at page 8-9 of its judgment has this to say:

> *Kwa mujibu wa Ushahidi uliopo kwenye kumbukumbu ni Kwamba hakuna hata shahidi mmoja wa upande wa waleta*

maombi aliyeweza kueleza ni kwa namna gani Theodory Kisaka alivyopata eneo hilo…

Aidha tukirudi kwa upande mwingine kuwa mzee De Mello alipewa eneo hilo na Theodory Kisaka kwa ajili ya kujenga mashine nimeona kwamba ushahidi huu hauonyeshi uhalisia wake. Hata kama tukidhania (Assuming) kwamba Theodory Kisaka alimpa eneo kwa ajili ya kuweka machine kama kielelezo P2 kinavyosema, ni kwamba alishapewa eneo hilo na hivyo ni mali yake. Kwa mujibu wa kielelezo P2 inasemekana De Mello kupewa eneo hilo mwaka 1985. Masharti yakiwa kujenga nyumba kwa ajili ya mashine….

Kwa mujibu wa P2 ilikuwa na masharti kwamba endapo atashindwa (De Mello) kuendeleza sehemu hiyo ya mashine angerejesha eneo hilo kwa Theodory…

…kwa mujibu wa Kielelezo P2 hakuna kipengele chochote au sharti lolote la De Mello kurejesha eneo hilo kwa Theodory Kisaka baada ya kujenga jengo hilo la mashine. Lakini pia Baraza hili linajiuliza ni kwa nini kwa muda wote tangu Mwaka 1985 Kisaka hakudai kurejeshwa eneo mpaka 2014 mgogoro ulipoibuka?"

From the above findings of the trial tribunal, with due respect to Mr. Materu, it is not correct to say that **exhibit P2** was disregarded and that the evidence was not properly evaluated since the above quoted words speak louder that evidence of each party was considered. On the issue as to whether the

appellants' evidence was heavier as contended by Mr. Materu, I hasten to say that as the first appellate court, I agree with the trial Tribunal's findings that the appellants did not manage to prove their claims on balance of probabilities.

Firstly, as rightly decided by the Trial Chairman, the respondent did not state how the said land came to the hands of the late Theodory Kisaka. Neither the wife of the late Theodori nor his children stated how and when the deceased Theodori Kisaka acquired the disputed land. On part of the respondents, the 1st respondent who is the daughter of the late Dominico De Mello at page 58 of the typed proceedings explained that the said land belonged to his father De Mello. Also, at page 57 of the typed proceedings the 1st respondent explained that his late father bought the disputed land from one Ngowi, the TANU party Chairman. Therefore, it goes without saying that, the respondents managed to prove how the disputed land was acquired.

Secondly, Exhibit P2 the alleged agreement between the late Dominico De Mello and the late Theodory Kisaka is not complete as it does not state the location of the land given. Thus, it is hard to prove that it is the same land which is subject of dispute in this case.

Thirdly, As rightly found by the trial Chairman, even if it is assumed that the late Dominico De Mello was given the said land for the purpose of building the milling machine; still there is no any convincing reason to explain why the late De Mello continued to own the same from 1985 to 2004 despite his failure to build the milling machine as agreed. I agree with Mr. Zayumba that allowing someone to build a permanent structure on a land means that the

said land belonged to him. In the case of **Shaban Nasoro V. Rajabu Simba (1967) HCD 233** it was stated that:

> *"The court has been reluctant to disturb persons who have occupied land and developed it over a long period…"*

Lastly, there is sufficient evidence from the respondents that the said land was sold by the late De Mello to the second respondent in 2004. The 2nd respondent continued to develop the disputed land until 2014 when the dispute arose. Had it been that the said land was not the property of the late De Mello, he could not sell it to the 2nd respondent by involving the local authority (DW3).

Basing on the above evaluation of evidence and the findings of this court, as the first appellate court, I am of considered opinion that the trial tribunal's findings were justifiable as the appellants failed to prove their claims on balance of probabilities.

It is on the basis of the above reasons that I hereby dismiss this appeal with costs. It is so ordered.

Dated and delivered at Moshi this 09th day of October, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

09/10/2023