

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

**(LAND DIVISION)**

**AT ARUSHA**

**LAND APPEAL NO. 65 OF 2022**

(C/F application No. 127 of 2018, District Land and Housing Tribunal for Arusha at  
Arusha)

**MBABAYO BANAKERA.....1<sup>ST</sup> APPELLANT**

**LOKWENI BANAKERA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NAKYATU BANAKERA.....RESPONDENT**

**JUDGMENT**

22/08/2023 & 18/09/2023

**MWASEBA, J.**

The appellants herein were sued by the respondent at the District Land and Housing Tribunal of Arusha at Arusha in Application No. 127 of 2018. The trial tribunal adjudicated the application in favour of the respondent, the decision which grieved the appellants hence this appeal on the following grounds:

- 1. That, the trial tribunal solemnly erred in law since it ruled in favour of the respondent while the respondent failed to prove her case as per legal requirements*



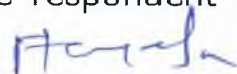
2. *That, the trial tribunal erred in law as it failed to dismiss the application since the respondent evidence was tainted with inconsistencies and contradiction*
3. *That, the trial tribunal erred in law and fact by rejecting to admit a potential document which was to be tendered by 2<sup>nd</sup> appellant in order to ground his case*
4. *That, the trial tribunal erred in law and fact by ruling in favour of the respondent while her witnesses testified against her pleadings especially as to size of land allocated to the respondent by her late husband*
5. *That, the trial tribunal erred in law for failure to consider and evaluate evidence adduced by the appellants' witnesses.*
6. *That, the trial tribunal strongly erred in law and fact by declaring the appellants as trespassers while the respondent failed to prove trespass.*
7. *That, the trial tribunal erred in law and fact by deciding in favour of the respondent while the respondent failed to arraign material witness to ground her allegations especially how the appellants obstructed her to hand over her disputed land to the purported buyer.*

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Briefly, the appellants are step children of the respondent. Their dispute was based on ownership of a piece of land measuring at nine (9) acres located at Meserani juu village at Meserani ward in Arusha District. The respondent claimed to be the owner of the disputed land as she was given as a gift by her late husband (appellants' father) while the appellants claim the disputed land to belong to their young brother (half siblings) who is the biological son to the respondent. The trial tribunal after hearing four applicant's witnesses and five defence witnesses decided that the respondent herein is a lawful owner of the disputed land. The appellants were not happy with the said decision hence they filed this appeal having the grounds listed hereinabove.

At the hearing of this appeal, both parties were represented. Mr. Salehe Salehe and Mr. Jacob Malick both learned counsels appeared for the appellants and respondent respectively. Both of them agreed that the appeal be disposed of by way of written submission.

Submitting in support of the appeal, Mr. Salehe argued on the 1<sup>st</sup> ground that the respondent failed to prove her allegations that the appellants trespassed to the suit land. More so, the buyer was never called to testify as to how and when appellants objected him from being handed over with suit land. More to that, the respondent did not call



material witnesses or persons who witnessed disposition of land from her husband to her. He implored this court to be pleased to follow the decision of the case of **Hemed Said v. Mohamed Mbilu**, (1984) TLR, 113 whereby the court held that failure to call material witness without justification entitled the court to draw an inference that if the witness was called, he or she would have given evidence contrary to his case.

Mr. Salehe further argued that in civil action the question of ownership of land is not established by mere empty words but clear and cogent evidence that will resistibly and specifically point to the source of acquisition and occupation of the property under contest. He was of the view that the respondent failed to prove her case as she did not tender any documentation to prove ownership. To bolster his arguments, he referred this court **Section 64 (1) (a) and (b) of the Land Act** (Cap. 113 R.E 2019 and the case of **Lamshore Limited and J.S Kinyanjui v. Bazanje K.D.U.K** (1999) TLR, 330. He further challenged the respondent's evidence that, she testified that she already sold the disputed land. Therefore, she had no locus stand to sue on the said land.

Mr. Salehe submitted on the 2<sup>nd</sup> ground that the respondent's evidence was tainted with inconsistencies and contradictions. He pointed out the

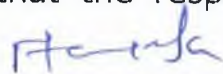
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contradictions that the respondent's pleadings shows that the disputed land is measured at 9 acres while in her testimony she said it is 12 acres. Further to that, the PW2, PW3 and PW4 testified that the disputed land is measured at 10 acres. Thus, he was of the view that the description as to the size of the disputed land is questionable for want of certainty. The same goes to the root of this matter so the trial tribunal ought to rule the said contradictions in favour of the appellants. He referred this court to the cases of **Mohamed Saida Matula v. Republic** (1995) TLR No. 3 and **Jeremia Shemweta v. Republic**, (1985) TLR No. 228 to support his contention.

Regarding the 3<sup>rd</sup> ground of appeal, Mr. Salehe complained that the trial tribunal violated **Regulations 10 (1) (2) and (3) of The Lands Disputes Courts (The District Land and Housing Tribunal) Regulations**, 2003 by denying to admit a minutes of 10/10/1998 which the DW1 wanted to tender to prove who was given the disputed land. He was of the view that the admission of the said document would have not prejudice the respondent since she could be availed with the right to cross examine DW1.

Submitting on the 4<sup>th</sup> ground, the learned counsel for the appellants added to what he submitted in his 2<sup>nd</sup> ground that the respondent's



evidence as to the size of the disputed land went out of her pleadings. He said parties are bound by their own pleadings hence testifying out of her pleadings is fatal irregularity as it was settled in the case of **James Funke Gwagilo v. Attorney General**, (2004) TLR. 161. He submitted further that the respondent never pleaded in her application as to the obstructions done by the appellants in the due process of hand over of the suit land to William Loi.

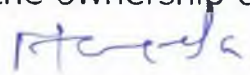
With regard to the 5<sup>th</sup> ground, he complained that the appellants' evidence was not considered and evaluated by the trial tribunal. He urged this court to step into the shoes of the trial tribunal and re- assess the evidence of each witness and make findings that the respondent has no legal right over the suit land but Tipiraa Banakera. To support his argument, he referred this court to the cases of **D.R. Pandya v. Republic** (1957) EA.336 and **Philipo Joseph Lukonde v. Faraji Ally Said** (2020) TLR, 576.

Concerning the issue of trespass, Mr. Salehe submitted on the 6<sup>th</sup> and 7<sup>th</sup> grounds that the respondent failed to prove the same. This is due to the fact that the respondent failed to prove the ownership of the land in dispute. Furthermore, he said the purported buyer of the suit land never appeared at the trial tribunal to testify as to how and when the

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appellants trespassed in the land bought from the respondent. Furthermore, neither the village leader nor local leader was called to testify at the tribunal keeping in mind that the respondent alleged that she involved the village office in selling the suit land. Thus, the respondent failed to arraign material witnesses to ground her allegations especially on how she was obstructed to hand over the disputed land to the purported buyer. He therefore prayed that the appeal be allowed with costs.

Responding to the appeal, Mr. Malick argued on the 1<sup>st</sup> ground that the respondent called all the material witnesses who testified before the trial tribunal. Concerning the purported buyer, he was not a material witness as he knew nothing about the ownership of the land in dispute. Concerning the land ownership, he clarified that the respondent obtained the suit land from her late husband Banakera. He argued that the evidence was properly given by eye witnesses to the satisfaction of the trial tribunal that the land in dispute belongs to the respondent and the appellants are mere trespassers. He argued on the issue of discrepancies as to the size of the disputed land that the same was not disputed in their written statement of defence. Further to that, Mr Malick submitted that the issue at the tribunal was on the ownership of the suit



land. He said the appellants declared at the tribunal that they were not claiming for ownership of the land in dispute but were fighting for someone. That means they had no locus stand as the said person was a grown-up person who could stand along to claim for it. He said all cases cited by the counsel for the appellants are irrelevant. He said the issue of locus stand as to the respondent to sue the appellants was not raised as a ground of appeal thus it can not be raised at the stage of written submission. He referred this court to the case of **Hadija Ally v. George Masunga Msingi**, Civil Appeal No. 384 of 2019, CAT (Unreported) to support his argument.

Replying to the 2<sup>nd</sup> ground of appeal, Mr. Malick argued that there were no inconsistencies or contradictions in the respondent's case as the evidence of all witnesses collaborated each other. On the other hand, he clarified that the appellants are not right persons to question about the size of land as they don't have locus stand for lack of authority to represent one Tipiraa Banakera. The act of the appellant's interfering the respondent from land disposition was wrong and that was the cause of action.

Mr. Malick respondent to the 3<sup>rd</sup> ground that the document the appellant alleges to be denied was never annexed to their written statement of



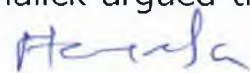


defence. He said it is not the legal position that whatever document tendered as evidence should automatically be admitted even if it is properly objected. Thus, it was his humble view that this ground has no merit.

Responding to the 4<sup>th</sup> ground, Mr. Malick opposed the allegations that the respondent's witnesses testified against her pleadings. He insisted that the appellants herein were not the right persons to obstruct the respondent herein in her right of disposition of her property. In addition to that, the appellants were not claiming for ownership of the land rather they were doing an act which is illegal since they didn't have locus stand to obstruct the selling and hand over of the property to the intended purchaser.

Replying to the 5<sup>th</sup> and 6<sup>th</sup> ground Mr. Malick disputed the fact that the appellants evidence was not considered. He said the same was considered and the respondent proved well that there was trespass. This is due to the fact that she proved ownership of the disputed land and further she proved the act of the appellants obstructing her from selling her landed property.

Concerning the complain that the respondent failed to call material witnesses as per their 7<sup>th</sup> ground of appeal, Mr. Malick argued that the



appellant did not dispute that they obstructed the respondent. He was of the view that the four respondent's witnesses were material witnesses and adduced their evidence fully at the trial tribunal.

In his rejoinder, Mr. Salehe learned counsel reiterated what he submitted in his submission in chief.

Having heard the rival submissions from both parties and going through the record, the issue for determination is whether the appeal has merit or not.

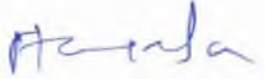
Starting with the 1<sup>st</sup>, and 6<sup>th</sup> grounds of appeal, the appellants complained that the respondent failed to prove her case to the required standards. In their submission Mr. Salehe learned counsel for the appellants argued that the respondent failed to prove her allegations that the appellants trespassed to the suit land. More so, the buyer was never called to testify as to how and when appellants objected him from being handed over with suit land. On his side, Mr. Malick learned counsel for the respondent asserted that the respondent proved her case to be the owner of the disputed land and that the appellant trespassed to the disputed land by obstructing her from handing over the suit land to the buyer. He further stated that the appellants admitted that the suit land does not belong to them but their young half-brother.

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So he was of the view that they do not have *locus standi* to claim this land on behalf of their half-brother who is an adult.

I have revisited the record and found that, the main issues that were framed at the trial tribunal were basically on whether the suit land is owned by the respondent and whether the appellants trespassed the suit land.

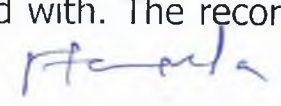
Regarding the issue of ownership of the disputed land the respondent averred that she acquired the suit land from her late husband more than 30 years ago and she has been using it for grazing livestock. Her evidence was supported with the evidence of PW2, PW3 and PW4. On their side, the appellants testified before the trial tribunal that the land in dispute belongs to their young brother one Tipiraa. This is evidenced by the testimony of DW1, DW2, DW3 and DW4. That means none of the appellants is the lawful owner of the disputed land. Thus, trial tribunal found that the respondent is the lawful owner of the disputed land. I agree with the hon. Chairman due to the fact that the respondent's evidence was supported by the evidence of PW2, PW3 and PW4 who are eye witnesses as they were present when the respondent was given the land in dispute with her husband. See **Section 62 (1) (a) of the Evidence Act**, Cap 6. R.E 2022.



Concerning the issue of trespass, the same was not disputed at the trial tribunal. The appellants admitted before the tribunal that they stopped the respondent from selling the disputed land. I wonder they did it under which capacity? They clearly admitted that the land does not belong to them. They said it belongs to Tipiraa who is actually an adult. He went to the tribunal and gave hearsay evidence that the land in dispute was given to him by his father who died when he was 5 years. From the piece of evidence narrated hereinabove, it goes without saying that the appellants had no interest with the disputed land and had no authority to fight on behalf of Tipiraa while he was an adult. Therefore, I concur with the counsel for the respondent that the appellants have no locus standi to challenge the ownership of the suit land on behalf of their half-brother. The issue of *locus standi* was considered in the famous case of **Lujuna Shubi Ballonzi, Senior v. The Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 HC.

*"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.**" (Emphasis added)*

Following the above settled position, the appellants herein have not showed how their right or interest has been interfered with. The record



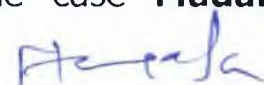


shows that none of them claimed to be the owner of the disputed land but rather they said it belongs to their half-brother, Tipiraa. The said Tipiraa is neither a party to the case and he has never complained about the ownership of the land in dispute.

In addition to that, the fact that the land in dispute belongs to the said Tipiraa came out as an afterthought. The appellants never pleaded it and they never raised it until when the defence case started. I wish to be guided by the holding in the case of **JALUMA GENERAL SUPPLIES LTD v. STANBIC BANK (T) LTD. (2013) T. L. R. No. 269** whereby the court had this to say:

*"Courts should determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for the court's determination by the parties and it is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case..."*

Being guided by the above decision and looking at the case at hand, it goes without saying that the allegation that the land in dispute belongs to Tipiraa is alien to the pleadings and the same was not part of the framed issues at the trial Tribunal. See the case **Madam Mary**




**Sylvanus Qorro v. Edith Donath Kweka and Wilfred Stephen Kweka**, (2019) TLR No. 434.

In the circumstances, the appeal is found with no merit and is hereby dismissed forthwith. The decision of the trial tribunal is upheld save for costs of the case. The parties being relatives, each party should bear its own costs.

It is so ordered.

**DATED** at **ARUSHA** this 18<sup>th</sup> day of September, 2023.



  
**N.R. MWASEBA**  
**JUDGE**