IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LAND APPEAL NO. 94 OF 2022

(C/F Land Case Application No. 01 of 2022 before the District Land and Housing Tribunal for Kondoa at Kondoa)

AYUBU SHABAN ALLY .....APPELLANT

VERSUS

ZAINABU ALLY SAURI.....1ST RESPONDENT
MWAJUMA ALLY SAURI.....2ND RESPONDENT
MWANJAA ALLY SAURI .....3RD RESPONDENT

JUDGMENT

Last order 22/9/2023
Judgment: 10/11/2023

MASABO, J.:-

The appellant was the respondent in Land Application No. 01 of 2022 before the District Land and Housing Tribunal for Kondoa at Kondoa (the trial tribunal). He is aggrieved that the outcome of this matter was in his disfavor. He has knocked the doors of this court by way of an appeal based on the following four grounds of appeal:

1. THAT, the Honourable Chairman of the Tribunal erred in law and in fact to hold that the respondents were granted the land in dispute by their deceased father in 1966 contrary to what they had pleaded in their application whereby they stated that they inherited the land in disputed from their father;
2. THAT, the Honourable Chairman of the Tribunal erred in law and in fact to hold that the respondents are legal owners of 10

acres of land in dispute contrary to their pleadings whereby they claimed to own 3 acres, 3 acres, and 3.5 acres respectively.

3. THAT, the Honourable Chairman of the Tribunal erred in law and in fact to hold that the respondents' evidence was firm worth to be declared lawful owner of the suit area without considering that the evidence tendered was contrary to the pleadings contained in the application which is contrary to the principle that parties are bound by their own pleadings.
4. THAT, the Honourable Chairman of the tribunal failed to evaluate properly the evidence tendered by the appellant that the land in dispute belonged to the appellant's father who passed away in 1979.

The brief background of the appeal as deciphered from the record is that, the respondents were the applicants in Land Application No. 01 of 2022 before the trial. They alleged that the respondent had trespassed into their land which they inherited from their father. The respondent denied the claim stating that the suit land belongs to his father who died in 1979. That, after the death of the respondent's father, his mother was chased away while he, the appellant, was six months old. After his mother being chased away, his paternal grandfather started tilling the suit land. At the end of the trial, the respondents emerged winners. Hence the present appeal.

On 22nd of September 2023 when this appeal was scheduled for hearing, the appellant and respondents appeared in person, unrepresented. Submitting

in support of his appeal, the appellant prayed that this court find his appeal with merit as initially, the respondents claimed they inherited the suit land from their father and that the land was measuring 9.5 acres. That, the first respondent inherited three acres, the second respondent three acres and third respondent three and a half acres which makes a total of 9.5 acres. The measurement, he argued contradicted with their evidence as they stated that the suit land was ten acres. On the third and fourth ground he argued that, the respondents' evidence was not properly evaluated. The trial tribunal considered it to be sufficient while it was not. In addition, he argued that there was no opinion of assessors. The chairman set the date of decision without taking the opinion of assessors.

In reply, the first respondent submitted that the suit land is theirs. They were born there and grew up in the same. They were tilling it throughout their life time and it belonged to their father. She argued that in 1996 his father was ill. In 1997, he gave the suit land to them and in 1998 he died. They proceeded to use it thereafter until in 2021 when the appellant trespassed into it claiming that it was his late father's land. She submitted that, the appellant who is the son of his half-brother, has no right over the suit land. Regarding the size of the suit land, she submitted that each of the respondents got approximately 3.5 acres. On the issue of assessors, she submitted that they gave their opinions.

The second respondent submitted that they owned the suit land for 26 years. It initially belonged to her mother and father who cleared it while it was

virgin. On the issue of opinions of assessors, she submitted that it is wrong to say that they were missing as the assessors gave their opinions. Supporting the first and second respondents, the third respondent submitted that the suit land belonged to their father who gave it to them. They have been using it for 26 years and it is only in 2021 when the appellant trespassed into the suit land claiming to be his father's land. Regarding the opinion of assessors, she submitted that they gave their opinion before judgment was delivered.

In rejoinder, the appellant stated that he did not trespass into the suit land. Rather, the farm belonged to his father. After his father's death, his grandfather utilised it until in 1998 when he died. He concluded by saying the suit land does not belong to the respondents.

Order XXXIX rule 2 of the Civil Procedure Code Cap 33 prohibits parties from arguing a point other than the one set out in the memorandum of appeal, It nevertheless allows the court when deciding an appeal not to be constrained by such grounds. It may decide the appeal based on a ground(s) other than the ones set out in the memorandum of appeal provided that, the parties are afforded the right to be heard on such new point. It is in this view, I permitted the parties to address the court on the point regarding the opinion of assessors which, although not set out in the grounds of appeal, is a pure point of law.

Addressing the court on this issue, the appellant argued that the assessors did not give their opinions whereas all the respondents argued that a assessors gave their opinion. It is a mandatory legal requirement that at the end hearing of the suit the two assessors who sit with the Chairman of the DLHT should give their opinions. The requirement is embodied in section 23 of the Land Disputes Courts Act, Cap 216 read together with Regulation 19 of the District Land and Housing Tribunal Regulations, 2003. Section 23 reads as follows:

> 23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors; and
>
> (2) The District Land and Housing Tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment.

And, Regulation 19 (2) provides thus:

> 19(2) Not withstanding sub regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.

These above provisions have been applied by Court of Appeal in a number of authorities including the cases of **Sikuzani Said Magambo &Another vs. Mohamed Roble,** Civil Appeal No. 197 of 2018 [2018] TZCA 310

TanzLII **Edina Adam Kibona vs. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017 [2018] TZCA 310 TanzLII and **Tubone Mwambeta vs. Mbeya City Council,** Civil Appeal No. 287 of 2017 [2018] TZCA 392 TanzLII. In all these cases, the Court of Appeal has consistently stated that the opinion of the assessors should be in writing and their contents must be stated in the presence of the parties and the failure of which vitiates the proceedings. In **Dora Twisa Mwakikosa vs. Anamary Twisa Mwakikosa,** Civil Appeal No. 129 of 2019 [2020] TZCA TanzLII, the Court of Appeal stated thus:

> Failure by the chairman to require the assessors to state the contents of their written opinions in the presence of the parties rendered the proceedings a nullity because it was tantamount to hearing the application without the aid of assessors. We are supported in that view by our previous decision in the case of **Tubone Mwambeta** (supra) cited by the appellant's counsel.

Guided, therefore, I have painstakingly studied the proceedings of the DLHT, to unravel whether the assessors gave their opinions. The record show that during the hearing of the application, the trial chairman sat with two assessors who are identified as Hidaya Hassan and Yusufu Msalu. Further revelations from page 41 ad 42 of the typed proceeding are that, after the defence closed it case on 03rd November 2022, the Chairman adjourned the matter to 10th November 2022 to give the assessors time to prepare their opinion to be given on 10th November 2022. Both assessors prepared their written submissions which are both in the case file and are dated 7/11/2022. When the hearing resumed on 10th November 2022, the opinions were read

over to the parties. Thus, there was full compliance with the mandatory legal requirement as the assessors not only gave their opinions in writing and but the opinions were read out to the parties. The argument that there was non-compliance with the law is baseless.

Having resolved this, I now revert to the grounds of appeal set out in the petition of appeal. In the first, second and third grounds of appeal, the appellant has argued that the respondents did not prove their ownership of the suit land as their evidence and pleadings were inconsistent. It is a cherished principle of law that in civil cases the burden of proof lies on the person who alleges in his favour. This is the genesis of the provision of section 110 of the Evidence Act Cap. 6 R.E 2019 which stipulates as follows:

> 110(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Therefore, in civil proceedings such as the one at hand, a party who alleges anything in his/her favour bears the evidential burden of proof and the standard of such proof is on the balance of probabilities which means that the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved (see the cases of **Antony Masanga vs. Penina Mama Ngesi and Another,** Civil Appeal No. 118 of 2014 [2015] TZCA 556 TanzLII, **Godfrey Sayi vs. Anna Siame**

as legal Representantive of the late Mary Mndolwa, [2017] TLR 136, and **Hamza Byarushengo vs. Fulgencia Manya and Four Others**, Civil Appeal No. 246 of 2018 [2022] TZCA 207) TanzLII.

Sequel to the above principle is another cardinal principle of the law that, the parties are bound by their pleadings. Under this rule, parties are not allowed to present a case contrary to their pleadings. In the case of **Martin Fredrick Rajab vs. Ilemela Municipal Council and Synergy Tanzania Company Limited,** Civil Appeal No. 197 of 2019 [2022] TZCA 434 TanzLII the Court of Appeal cited with approval a persuasive authority of the Court of Appeal of Kenya in **David Sironga vs. Francis Arap Muge and Two Others [2014] Ekir** in which it was stated thus:

> It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the one who set the agenda, and subject to the rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of

> pleading is also to ensure that parties define succinctly the issue so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense [the emphasis is added].

Articulating the same principle in **Makori Wassaga vs. Joshua Mwaikambo and Another** [1987] TLR 88, the Court of Appeal stated thus:-

> A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case.

Amplifying his complaints, the appellants has stated that, when giving evidence before the trial tribunal, the respondents departed from the pleadings. Their evidence on how they acquired the suit land was inconsistent from the pleadings. In the pleadings it was stated that they inherited the same from their late father whereas in their evidence they testified that they acquired it by being given by their father while he was still alive in 1996. He has as well argued that, the measurement of the land pleaded is also inconsistent to the one stated in the evidence.

To appreciate his argument, I will begin with what was pleaded by the respondents in paragraph six (6).

> 6(a) Cause of action/brief statement of facts constituting the claim

(i) That the applicants are natural persons and residential (sic) of Mrijo Ward at Chemba District who are the owners of the land **measured 10 acres approximately** located at Mrijo Ward within Chemba District, they **owned the land since 1996 after the inheritance from the deceased father Ally Sauri.**

(ii) That the applicants hereof have been in occupation of the Land in dispute of 10 acres which is divided as Zainab Ally Sauri 3 acres, Mwajuma Ally Sauri 3 acres and Mwanjaa Ally Sauri 3.5 acres and have been using it for cultivation activities for more than 25 years without embarrassment until the respondent invaded the land in this year 2021 at October.

What was pleaded by the respondents in these paragraphs with respect to the acquisition of the suit land is plainly clear. They acquired the same by inheriting it from their late father. However, as argued by the appellant, their evidence in respect to acquisition of the suit land departed from their pleadings. All they stated is that the land was given to them by their father during his life time. Hence, it did not pass to them as inheritance but as gift *inter vivos*. Going by the cardinal law that the parties are bound by their pleadings, it was crucial for the respondents to parade evidence to support what they had earlier on pleaded and not to depart from their pleadings in respect of how they acquired the land. The first ground is therefore with merit.

There were also inconsistencies as regards the actual measurements of the suit land. As per the complaint, the farm measured approximately 10 acres, three acres owned by the first respondent, 3 acres by the 2nd respondent and 3.5 by the third respondent which, as stated by the appellant entails that, the suit land was 9.5 acres. In their testimony, PW1 stated that each of them owns 3.5 acres; PW2 stated that she owns 3.5 acres and the PW3 stated that she has 3¼ acre which entails that the suit land is measured 10¼.

That said, I have found the respondents to have not proved how they acquired ownership of the suit land. The first ground of appeal is therefore found with merit. Based on this sole ground which sufficiently disposes of the appeal, the appeal is allowed with costs.

DATED and **DELIVERED** at Dodoma this 10th day of November 2023

J. L. MASABO

JUDGE