IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

LAND APPEAL NO. 22 OF 2023

(Original Application No. 04/2020 of the District Land and Housing Tribunal of Njombe District at Njombe before Hon. G.F. Ng'humba, Chairperson)

GAUDENCE ELIASI KICHUNGULA ..... APPELLANT

VERSUS

JAMES EDWARD MGINA..... 1ST RESPONDENT

BENADICT WENDELIN SAGALA (The administrator of the estate of the **Late Taslius Wendelini Sagala**) ..... **2ND RESPONDENT**

KAMILO EDIMUNDI MNG'ONG'O (The administrator Of the deceased estate of the **Late Edimundi Mng'ong'o**) ..... **3rd RESPONDENT**

JUDGMENT

03rd October & 14th November, 2023

I.C MUGETA, J:

The appellant sued the respondents for injunction and peaceful employment of the land measuring approximately 3 acres of unsurveyed land located at Kidete village in Njombe region. In his application, he claimed that the 2nd respondent sold the dispute land to the 1st and 3rd respondents in 2014 knowing that the said land does not belong to him. The 1st and 3rd respondents then destroyed the appellant's farm by cutting down trees, uprooting them and building a hat therein.

The respondents resisted the appellant's claims. They alleged that the appellant has no rights over the dispute land and that the dispute

land is not 3 acres as averred by the applicant. The tribunal held that the appellant failed to prove ownership over the dispute land. It dismissed his application with costs.

Aggrieved by the decision of the tribunal, he has filed his appeal to this court based on nine grounds. However, during hearing he abandoned the 9th ground. The remaining 8 grounds are as follows:

1. *That the tribunal erred in law and fact in determining the case while the 2nd and 3rd respondents had no locus standi.*
2. *That the tribunal erred in law and fact making its decision based on proceedings whose parties do not match with the judgment and the proceedings were not properly taken.*
3. *That the trial tribunal erred in law and fact by failure to deal with the issue of ownership of the disputed land properly, hence, arrived at uncertain decision with regard to the issue of ownership.*
4. *That the trial tribunal erred in law and fact by failure to grant ownership of the dispute land to the appellant while his evidence was strong enough over the same (sic) and the respondents failed to prove their ownership.*

5. *That the trial tribunal erred in law and fact by granting ownership to a third party who was not party to a case one Getrude Semapile.*

6. *That the trial tribunal erred in law and fact by dismissing the appellant's application basing on the reason that there were contradictions of age of the trees planted and the time when the appellant filed an application while these contradictions do not go to the root of the case.*

7. *That the trial tribunal erred in law and in fact by denying to grant compensation of Tanzania Shillings nine million for the trees damaged and cut by the 1st and 3rd respondents without legal justification.*

8. *That the trial tribunal erred in law and fact by making it is decision in favour of the respondents basing on the contradictory and weak evidence by the respondents and their witness compared to the evidence adduced by the appellant and his witnesses which were very strong, hence arriving to unfair decision.*

The appeal was argued by way of filing written submissions. The appellant is represented by Tunsume Angumbwike whereas the respondents appeared in person.

The appellant's advocate submitted on the 1st ground that the 2nd and 3rd respondents, had no *locus standi* to defend the application as their letters of administration were neither attached nor pleaded in their written statement of defence to prove that they are duly appointed to defend the suit on behalf of the deceased persons. She cited the case of **Ramadhani Omary Mbunguni** (A legal Representative of the late **Rukia Ndaro**) **v. Ally Ramadhani and Asia Ramadhani**, Civil Application No. 173/12 of 2021, Court of Appeal – Tanga (unreported) to support her submission that the letters of administration must be pleaded and attached at institution of suit. She argued that they did not tender any evidence to prove the same. The tribunal's records only contains the letter of administration of the 2nd respondent containing name of the deceased Raphael Joseph Mahali who is not a party to this case. In her view, the proceedings are a nullity because the tribunal lacked jurisdiction. To support her view, she cited the case of **Projest Enery v. Evelina George**, Land Appeal No. 64/2021, High Court – Bukoba (unreported) where it was held that *locus standi* is one of the most threshholds of instituting a suit, if a party does not have *locus standi* to institute an action, the court would have no jurisdiction to entertain the suit.

On the 2nd ground, she argued that the 2nd and 3rd respondents, Taslaus Wandeline Sagala and Edimundi Mng'ong'o died while the case

was on progress. Therefore, the tribunal ought to have ordered an amendment to remove the said names from the record, including the deceased's names as it was held in **Florian Pantaleo Mtui v. Robert Inyas Minja**, Civil Appeal No. 420/2021, Court of Appeal – Arusha (unreported).

The learned advocate argued the 3rd and 5th grounds jointly, that the tribunal failed to determine the issue of ownership of the disputed land and erroneously granted ownership to one Getrude Semapile who was not a party to the case. In her view, the tribunal failed to deal with issues raised during hearing, therefore, contravening Order XX Rule 5 of the Civil Procedure Core [Cap. 33 R.E 2022]. Failure of the tribunal judgment to declare who is the lawful owner of the dispute land rendered the judgment defective. She cited the case of **Joseph Ndyamukama v. NIC Tanzania Ltd and Others**, Civil Appeal No. 239/2019 to support her stance that a judgment that omits to determine the framed issues is defective.

She also faulted the tribunal judgment for being at variance with the decree contrary to Order XX Rule 6(1) of the Civil Procedure Code. While in the judgment the size of the land is 3 acres, in the decree the size of the land is 5 acres. Both the judgment and decree did not state

who the lawful owner of the suit land is. This in her view, vitiates the proceedings, judgment and decree.

In the 4th and 8th grounds, she argued that the appellant's evidence was heavier compared to that of the respondents. She is of the view that the appellant and his witnesses managed to prove ownership of the dispute land. Thus, he was entitled to win as it was held in **Hemed Said v. Mohamed Mbilu** (1984) TLR 113. She contended that the respondents were not entitled to win as their evidence was full of contradictions. She argued that the contradiction on the part of the appellant's evidence on the age of the trees was minor and did not go to the root of the matter as it was normal discrepancy due to error of observation, memory failure panic as it was stated in the case of **Dickson Elia Nsamba Shapweta and Another v. R**, Criminal Appeal No. 92/2007, Court of Appeal – Mbeya (unreported).

On the tribunal's argument that the appellant delayed to file an application, the learned advocate argued that the cause of action accrued in 2014. The application was filed in 2020 so the application was within time, as the time limit for recovery of land is 12 years. To bolster her argument she cited the case of **Barelia Karangirangi v. Asteria Nyalwambwa**, Civil Appeal No. 237/2017, Court of Appeal – Mwanza (unreported).

Lastly, on the 7th ground, the appellant's advocate argued that the appellant's evidence was sufficient to prove his claims on the balance of probabilities as required in the civil cases. The appellant proved how the respondents invaded the dispute land and fell down trees and built a hut on the dispute land. Further, no respondent cross examined the appellant on this fact. She cited the case of **Paulina Samson Ndawavya v. Teresia Thomasi**, Civil Appeal No. 45/2017, Court of Appeal – Mwanza (unreported) where it was held that failure to cross examine on a particular point infer acceptance of that fact.

The respondents resisted the appeal jointly. They submitted in the 1st ground that the appellant has no objection that the 2nd and 3rd respondents are administrators of the estate of the deceased, therefore, raising this issue at this stage is an afterthought. This in their view should have been raised at the stage of hearing.

They argued the 2nd, 3rd, 4th, 5th and 8th grounds jointly that the argument that the parties do not match between the proceedings and judgment is not true. Even if it had been true, this does not entitle ownership of the dispute land to the appellant. The appellant failed to prove his ownership over the dispute land. In their view, the decision of the trial tribunal is based on the weight of the evidence adduced by the respondents and their witnesses. Further, the appellant failed to prove

that Getrude Semapile was not a wife of the deceased Talisius Wandelin Sagala.

In rejoinder, the appellant's advocate reiterated her submissions in chief. She added that the respondents attached the letter of administration in their written submission, thus, it is not part of the record. She cited the case of **Luhumbo investment Limited v. National Bank of Commerce and Another**, Civil Appeal No. 503/2020, Court of Appeal – Shinyanga (unreported) to support that written submission and its annextures do not form part of pleadings.

On the issue of *locus standi*, she reiterated her submissions in chief that, *locus standi* affects jurisdiction, thus, can be raised at anytime. She argued that both parties agree that the said Getrude Samapile was not part of the proceedings. Therefore, declaring her as the owner of the dispute land is illegal.

I will discuss the grounds of appeal as argued by the parties.

In the 1st ground, the issue is whether the 2nd and 3rd respondents had *locus standi.* The record shows that on 2/12/2021, the appellant amended his petition and pleaded the respondents as parties to the suit. Under the circumstances, the appellant cannot be heard on an argument that the suit was incompetent, he pleaded the parties wrongly. This complaint has no merits.

The complaint in the 2nd ground is that the proceedings contain parties different from those appearing in the judgment and decree, therefore, they should be nullified. I hold a different view. While the assertion is correct in respect of the proceedings, the judgment and decree contains correct names of the parties. The error in names in the proceedings is, therefore, a normal human typing errors. The same may be cured by correction inserting the correct names. The proceedings, therefore, are not a nullity. The complaint is dismissed.

The appellant's complaint in the 3rd and 5th grounds is that the tribunal did not determine ownership of the dispute land. At page 8 of the tribunal's judgment the chairperson stated as follows:

> *"Upande wa wajibu maombi wanadai eneo lilikuwa la marehemu Taslius Wendelini Sagala ambaye alikuwa ni mtoto wa Getrude Semapile alipewa eneo hilo na Wendelini Sagala baada ya kuzaa naye mtoto (Taslius Sagala) ili amtunzie hapo. Ni wazi kuwa Getrude Semapile na mwanae Taslius Wendelini Sagala ndiyo walikuwa wenye eneo hilo ..."*

Therefore, the tribunal held that the dispute land belonged to Getrude Semapile and her son Taslius Wendelini Sagala (2nd respondent). This ground, therefore, lacks merits.

The complaint in the 4th, 7th and 8th grounds is on evaluation of evidence. From the evidence on record, the appellant (PW1) testified to have been given the dispute land in 1999 by his late father before he died in 2015. He testified further that when his father gave him the said land, Taslius Sagala, Getrude Semapile, Prisca Kichungula and District Kichungula were present. PW2, Jeni Kichungula supported PW1's evidence that the dispute land was given to him by his late father in 1999. She testified further that, Taslius Sagala's farms are on the other side of the mountains called Nundu at Kilenzi. Even on cross examination she said:

> *"Nlnachotambua babu yenu nyinyi alikuwa anaishi mlima wa Nundu Kilenzi na wamezikwa 'kule".*

The evidence of PW3 and PW4 in my view cannot be relied upon as they were both not present when the said land was given to the appellant. Their evidence starts from 2008, PW3 for instance she was married to the brother of the appellant in 2008 and found the appellant cultivating on the dispute land. PW4 on the other hand testified to have seen the father of the appellant cultivating on the dispute land in 2008. The appellant did not summon any witness who was present when the said land was given to him.

The respondents' evidence all centers on the 2nd respondent Taslius Wendelin Sigala as the owner of the dispute land having obtained the same in 1974. The land allocation to Taslius was witnessed by DW3 who testified to have been present when the parent of Taslius gave him the dispute land. Taslius and his mother, Getrude Semapile then sold the dispute land to the 3rd respondent, Edmundi Mng'ong'o. This fact was supported by DW6 and DW7. DW7, Pasience Mng'ong'o testified that Getrude got the dispute land from Mwasagala a fact which was also supported by DW6.

From the evidence on record, therefore, both parties claim to have obtained the dispute land as a gift. The appellant claims to have obtained the dispute land as a gift from his father in 1999. The respondents' evidence is that the dispute land was originally given to the mother of the 2nd respondent as a gift from the father of the 2nd respondent.

I find that the respondents' evidence is heavier than that of the appellant. I hold this view because the 2nd respondent obtained the dispute land in 1974 long before the appellant was given in 1999. The said Taslius and his mother have been occupying the said land without any disturbance from 1974 until when the appellant planted trees on it in 2012.

Counsel for the appellant pointed out various contradictions in the respondents' evidence. I will discuss each contradiction outlined. The first contradiction is on the size of the dispute land. DW1 testified that he was only given ¾ acres by Tasilius (his father in law) to use the same. He did not testify on the whole size of the dispute area. On the other hand, DW2 and DW3 testified that the land measures 6 acres. But their evidence covers the whole of the land owned by Tasilius and not the dispute land only. DW2 is recorded on cross examination as follows:

> *"Benedicto Msagala aligawa mali za marehemu mwaka 1984, aligawa heka mbili mbili, Taslius ana heka 6".*

Again DW3 on cross examination stated:

> *"Eneo hilo ni la kwetu pamoja na Taslius, heka zilikuwa sita akauza mbili kwa niaba yangu (mimi ni kaka yake)".*

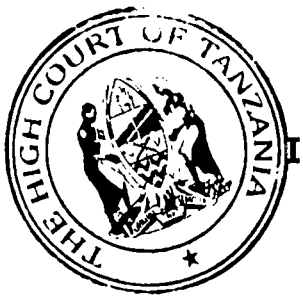
DW4 testified that the dispute land is approximately 2½ acres, the evidence of DW5 and DW7 is only based on the size of the land DW5 bought from the 2nd respondent. Therefore, there is no contradiction on the size of the dispute land.

Another contradiction according to the appellant's counsel is on the ownership of the dispute land. In my view there is no contradictions DW1 testified the land belonged to Tasilius, he was only given to use.

DW2, DW3, DW4, DW6 and DW7 all testified the dispute land to belong to Sagala as the land is held under customary title, the land is commonalty owned by the family of Sagala. Therefore, DW3 who is the brother of Tasilius Sigala is correct to testify that the land belongs to their family.

Further contradiction pointed out is on the presence of written sale agreement between 3rd respondent and Getrude Semapile. Both DW5 and DW6 testified on the presence of a written sale agreement between Getrude Semapile and the 3rd respondent. The said agreement was signed by her son Taslius (2nd respondent). DW7 in his testimony testified to have been present in the sale transaction but does not know the whereabouts of the agreement. In my view, there is no any contradiction in their evidence. Again both DW5 and DW7 testified that the land was sold to the 3rd respondent in 2000.

For the foregoing, I hold that the trial tribunal reached a correct decision to dismiss the application. I dismiss the appeal for want of merits.



I.C. MUGETA

JUDGE

14/11/2023

Court: Judgment delivered in the presence of the appellant in person, Ms. Tunsume Angumbwike, learned advocate for the appellant, 1st, 2nd and 3rd respondents person.

Sgd. M.A. MALEWO,

DEPUTY REGISTRAR

14/11/2023