IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA

LAND CASE APPEAL No. 04 OF 2023

(Originating from Land Application No. 74 of 2016 in the District Land and Housing Tribunal for Muleba at Muleba)

PAULINA PAUL ..... 1st APPELLANT

RADIA PAUL ..... 2nd APPELLANT

VERSUS

PROJESTUS BALINGIRA TINABO ..... 1st RESPONDENT

PRISCA BANTANDIKA BARONGO ..... 2nd RESPONDENT

JUDGMENT

14th November & 08th December 2023

OTARU, J.:

At the District Land and Housing Tribunal for Muleba at Muleba (DLHT), the 1st respondent **Projestus Balingira Tinabo** sued the 2nd respondent **Prisca Bantandika Barongo** together with the appellants **Paulina Paulo** and **Radia Paulo** over ownership of suit land in Ruhanga Village via Land Application No. 74 of 2016. After hearing the parties, the matter was decided in favor of the respondents.

Aggrieved, the appellants through the services of Mr. Remidius G. Mbekomize, learned Advocate, filed this appeal challenging the decision and orders of the DLHT. The grounds of appeal are couched as follows;-

1. *That the learned chairman of the trial tribunal erred in law and fact by failure to consider the testimony and evidence adduced by the appellants and their witnesses.*

2. *That the learned chairman of the trial tribunal erred in law by deciding the matter basingon fabricated evidence by the respondent together with his sale agreement which has no legal basis or legs to stand before the eyes of the law. Furthermore, the trial tribunal decided the matter basing on the contradictory evidence of the respondent and his witnesses therefore the matter decided against the weight of evidence.*

3. *That the learned chairman of the trial tribunal erred in law and fact by failure to consider or accept visiting prayers of the 2nd and 3rd respondents during the testimony which amounts to failure of justice. This is due to the facts that the matter involved two different lands that had to be visited so that the tribunal can draw its findings properly.*

On the bases of the foregoing grounds, this court has been humbly asked to quash the judgment and orders of the DLHT and allow the appeal. The court has also been asked to declare the appellants as the lawful owners of the suit land and condemn the respondents to bear the costs of the appeal.

The grounds of appeal have been strongly resisted by the respondents in their separate replies to the Petition of Appeal and when the appeal was called on for hearing, the appellants did enjoy the services of Enrich Associates (Advocates) through Mr. Remidius G. Mbekomize and Mr. Derick Zephurine. The 1st respondent enjoyed the services of Mr. Dunstan Mutagahywa learned Advocate while the 2nd Respondent appeared through a close relative, one Ester Elias.

The facts leading to the dispute and which were presented at the trial are such that in the year 2015 the 1st respondent purchased the suit land from the 2nd

respondent. In 2016, the appellants claimed to be the owners of the suit land. Unconvinced, the 1st respondent sued them for encroachment into his land. To establish his claim, the 1st respondent relied on his own testimony as well as of two (2) other witnesses. He also tendered three (3) exhibits. The 2nd respondent testified in favour of the 1st respondent and called two (2) other witnesses to prove that she was the lawful owner of the suit land until 2015 when she sold it to the 1st respondent. The appellants, on their side, claimed to have inherited the suit land from their father, Paulo Zakaria Barongo who died in 1980 thus they came to claim what was lawfully theirs.

Having heard the evidence from both sides, the trial tribunal was of the considered view that the 1st respondent had established his claim while the appellants did not, as a result, it did decide the case in favour of the 1st respondent. Such decision prompted the appellants to file this appeal. The matter was heard by way of written submissions whereby the agreed schedule was complied with.

To amplify their grounds of appeal, the appellants argued that their father Paulo Zacharia Barongo was the brother of the 2nd respondent. That the said Paulo inherited the suit land from his father and bestowed the same upon them.

On the 1st ground the appellants' counsel argued that there was strong evidence that Paulo Zacharia was buried on the suit land. They faulted the trial decision arguing that there was no will tendered to prove that the 2nd respondent inherited the land in question from her father. They also challenged the trial tribunal's decision of disbelieving their identities as daughters of the late Paulo while the

leadership as well as the neighbours in Ruhanga village recognized the appellants as daughters of Paulo.

On the 2nd ground, the appellants claimed that the sale agreement tendered by the 1st respondent was fabricated for lack of blessings from Ruhanga Village Council. In support of the contention, they cited the case of **Methuselah Nyagaswa v Christopher Mbote Nyirabu** [1985] TLR 103 where the court held that land sale to the appellant was void for lack of approval from the village council. It held that;-

> *'Rights to land held in a registered village could only be transferred with the approval of the village council'.*

They further argued that the trial tribunal should have visited *locus in quo* in order to determine if the suit land was the same where Paulo was buried or otherwise. They claimed that the 2nd respondent's land is not the suit land as her land is in Kabale Hamlet and that she sold their father's land, not hers. Counsel further claimed that, because the appellants were not cross examined when they testified at the trial, the same amounted to admission by the respondents. They relied on the cases of **Shadrack Balinago v Fikiri Mohamed @Hamza & Others** [2018] TZCA 215 TanzLII and **Paulina Samsom Ndawavya v Theresia Thomasi Madaha** [2019] TZCA 453 TanzLII. They further argued that although visiting *locus in quo* is not mandatory but discretionary upon the court/tribunal, yet the tribunal should have visited the *locus in quo* so as to establish that the suit land was indeed the land belonging to their late father. On importance of visiting *locus in quo,* counsel cited the cases of **Avit Thadeous Massawe v Isdory Assenga** [2020] TZCA 365

TanzLII and **Akosile v Adeye** [2011] 17 NWLR cited with approval in the **Avit** case (supra).

On the third ground, the appellants claimed that the DLHT had no jurisdiction to determine the matter because the 1st appellant sued in her personal capacity instead of suing as administratrix of the estate of her late father as the owner of the suit land, thereby claiming that the trial proceedings were a nullity. The appellants have thus humbly implored this court to allow the appeal and reverse the decision of the trial tribunal.

In their replies to the written submissions, each respondent vehemently disputed the appellants claim that the trial tribunal failed to consider the evidence of the appellants. They submitted that the chairperson evaluated all the evidence crucial in determination of the case as per the framed issues. The place of burial of Paulo was not one of such issued to be determined neither was the parentage of the appellants. The 2nd respondent has never recognized the appellants as the children of her late brother Paulo who was buried at Maruko and not at the suit land. The same has however not been part of the issues for determination at the trial. The 1st respondent also stated that the trial tribunal was obligated to decide the case on the basis of the issues on record. He cited the case of **Said Mohamed Said v Muhusin Amiri & Muharami Juma**, Civil Appeal No. 110 of 2020 (CAT Dsm) (unreported) to support his arguments.

On the 2nd ground about the sale agreement between the respondents, the 2nd respondent admitted to have sold the suit land to the 1st respondent. The 1st

respondent admits to have purchased the same. They stated that the appellants have no right in questioning the validity of the said agreement which, in any case, will not give the appellants any right to the suit land. Concerning the blessing by the village council of the sale agreement, the 1st respondent argued that the suit land was not village land thus having no interest in the suit land the village council's consent is not required.

On visiting the *locus in quo*, the respondents replied that there was no question of demarcations and according to the record, it was not requested by any of the parties. Thus not visiting the *locus in quo* can not be blamed on the trial tribunal.

In rejoinder to what has been submitted on behalf of the respondents, counsel for the appellants submitted that the dispute arose when the appellants were renovating their father's grave. Thus the issue of grave and parenthood of Paulo were important issues for determination by the trial tribunal. Counsel also reiterated on the question of consent of the village counsel, land ownership as well as visiting *locus in quo.*

Having heard the rival parties' submissions, read the case files as well as the relavant law, what stands for determination before this court is whether the appeal has merits.

The crux of the contention from the two disputing sides centres on the weight of evidence that was received at the trial. The 1st respondent had claimed to have acquired the suit land through purchase from the 2nd respondent. Ownership of the suit land by the 2nd respondent through inheritance from her father in 1961 was not

shaken during cross examination. She explained that she and Paulo did share the same father but had different mothers. Their father had two wives and two pieces of land. That prior to his death in 1961, their father bequeathed upon each of his wife a piece of land. Paul and his mother received the Maruku land while her mother, who had two children, received the Ruhanga land (suit land). The 2nd respondent shared the Ruhanga land with her brother Zebron. Upon Zebrons' death she inherited the whole piece. Her ownership was substantiated through her own testimony, supported by the testimonies of PW2, PW3, DW2 and DW3. She also insisted that when Paulo died in 1975 he left no family behind. The appellants having suddenly emerged in 2016 to claim the land was doubtful, because, since Paulo's death 36 years ago the family had no knowledge of their existence until now.

The appellants on the other side claimed to have been born on the suit land and lived there for 10 years until 1976 when they moved with their mother to Shinyanga. This was according to their own testimonies via DW4 and DW8, supported by testimonies of DW5, DW6, DW7 and DW9 who stated that they recognized the appellants as the children of the late Paulo. Even though they claim to have inherited the suit land since 1980, they had stated in their testimonies that they had no knowledge of Paulo's death until 2016 when they came searching for him.

From the evidence adduced at the trial and it's valuation by the trial chairman, in answering the issue whether the 2nd respondent had the land title capable of being transferred to the 1st respondent, the answer was '*yes*'. At page 19 of the judgment, the trial chairman stated that he was convinced by the witnesses who testified for

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The appellants on the other side claimed to have been born on the suit land and lived there for 10 years until 1976 when they moved with their mother to Shinyanga. This was according to their own testimonies via DW4 and DW8, supported by testimonies of DW5, DW6, DW7 and DW9 who stated that they recognized the appellants as the children of the late Paulo. Even though they claim to have inherited the suit land since 1980, they had stated in their testimonies that they had no knowledge of Paulo's death until 2016 when they came searching for him.

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both respondents as they were clan members of the 2nd respondent with knowledge of the family affairs and he had no reason to doubt any of them.

The 2nd respondent having been living in Moshi, within Kilimanjaro region had entrusted the suit land under the care of one Edna Deusdedit (PW2) for about 10 years. The trial chairman considered this fact when he declared the suit land to belong to the 2nd respondent. He was firm that the 1st respondent had discharged his duty of proving ownership as required. He also stated why the appellants' claim to the title was doubtful. The reasons are they never proved their claim that they were born at the suit land. Even though the appellants claimed to have inherited the suit land since 1980, they had testified that they had no knowledge of Paulo's death until 2016 when they came searching for him. The trial chairman considered them to be impostors. I can not blame him for that, because in my view too, that is exactly what they are.

The 2nd respondent having proved the title to the suit land, the question of validity of the sale agreement between the respondents, as per the 2nd ground of appeal, is no business of the appellants. I thus agree with the respondents on this point that even if the agreement was defective, it could not give any right to the appellants. Further, since there is no evidence that the suit land was village land, I agree with the respondents that the issue of consent from the village council does not arise. Therefore, this ground cannot stand.

On the 3rd ground of visiting the *locus in quo*, as submitted by the respondents, I too do not see how this could have helped the appellants in their case. First of all,

it is not on record that there was a prayer to visit *locus in quo* thus appears to be an afterthought. Secondly, even if there was such a prayer, the appellants needed more than visiting *locus in quo* to prove their case.

The 1st respondent was the one who filed the suit at the DLHT. By virtue of section 110(1) and (2) of the **Law of Evidence Act** (Cap. 6 R.E. 2019) the burden was upon him to prove his case. He did it. After discharging his burden, the appellants were called upon to prove their case on a balance of probabilities but they failed to do it.

The Court, in the case of **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama** drew inspiration from the extract from the book of **Sarkar's Laws of Evidence**, 18th Edition by M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, published by Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (CAT Mza), (unreported) that:

> *'... the burden of proving a fact rest 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...'* [Emphasis added].

I too wish to draw the same inspiration. After the 1st respondent discharged his burden of providing his case, Tthe duty shifted to the appellants. As the respondent's case was already well proved and the appellants having failed to discharge their duty, they have no one to blame for that.

Lastly on the question of jurisdiction of the DLHT, the 1st respondent sued the appellants in person due to their actions and they defended the suit in person. Thus, the tribunal had jurisdiction to hear the matter as it did.

If the appellants wanted to establish ownership, they could have submitted the relevant evidence had they had it. Apparently thed did not it. To the contrary, the respondents did tender evidence to substantiate the 2nd respondents title to the land which was then passed to the 1st respondent. When the evidence by the two sides is put onto the scale, the respondents' outweighs that of the appellants'.

On the bases of the foregoing, it is my holding that the learned trial chairman was justified to decide the case in favour of the respondents, making the appeal preferred before this court to be without founded bases. I therefore dismiss the appeal for want of merit. The respondents to be reimbursed their costs.

It is so ordered.

DATED at **BUKOBA** this 8th day of December, 2023.

M.P. Otaru
Judge