IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA-SUB REGISTRY)

AT ARUSHA

LAND APPEAL NO. 28 OF 2022

(Originating from the decision of the District Land and Housing Tribunal of Karatu at Karatu in Land Application No. 46 OF 2016)

ELIZABETH SINDEFU (As Administrator of the Estate of NUNUGHA PETRO) ..... APPELLANT

VERSUS

ANDREA MATTLE.....1ST RESPONDENT

DANIEL A. SULLE.....2ND RESPONDENT

TUMBAY TLUWAY.....3RD RESPONDENT

JUDGEMENT

14/11/2022 & 13/02/2022

KAMUZORA. J,

The disputed land was originally owned by the Late Petro Gitiyen who had three daughters namely Nunugha Petro (Appellant's mother), Lanta Petro @Udagawi (the 1st Respondent's mother) and Katarina (who had no children). The contention between the parties is who is legal owner of the disputed land after the death of one Petro Gitiyen. While the Appellant claimed that all the land of the late Petro Gitiyen belongs to her mother (Nunugha Petro), the Respondents claimed that, the land belongs

to three daughters of the late Petro Gitiyen on account that in 1997 they peacefully agreed on the distribution of their father's land and acknowledged that Tluway Erro (the 3rd Respondent's father) had his independent land apart from that of Petro Gitiyen and that part of the and with graveyard was to remain under the care of the 2nd Respondent Daniel Sulle.

The record shows that one Taltla Askwar was appointed to administer the estate of the late Petro Gitiyen. Currently, both heirs of the late Petro Giteyan are the deceased and upon their demise, the Appellant herein was appointed administratrix of the estate of her late mother Nunugha Petro while the 1st Respondent herein one Andrea Matle was appointed as administrator of the estate of his late mother Lanta Petro @Udagawi. The third daughter Katarina Petro died childless and there is no evidence as to the appointment of the administrator of her estate. The record also shows that the estate of the late Petro Giteyen was distributed to three daughter and part of it to the male grandchild of the deceased who is the 2nd Respondent herein. In course of distribution, part of the land was not divided on account that it was not part of the estate as it belonged to one Tluway Erro (father to the 3rd Respondent herein).

The District Land and Housing Tribunal (DLHT) made a decision that the disputed land was legally distributed by the administrator of the estate

of Petro Gitiyan to the heirs. The Tribunal went further by stating that it could not interfere with the distribution done in probate matter for its jurisdiction is only limited to land matters. It went further by declaring the Respondents as lawful owners of the disputed land and ordered the Appellant to pay costs of the case.

The Appellant being aggrieved by the Judgment and Decree of the District Land and Housing Tribunal of Karatu at Karatu in Land Application No. 46 of 2016 delivered on 14th December, 2021 lodged an appeal to this Honourable Court on eight (8) grounds as hereunder: -

1. *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact by denying the Appellant ownership of the suit land despite ample evidence supporting ownership of the suit land in her favour;*
2. *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact by declaring the Respondents' lawful owners of the suit land while there was no counter claim and no evidence in support of ownership in their favour;*
3. *That, the Honourable chairman of the District Land and Housing Tribunal Grossly erred in Law and in fact by holding that his Tribunal lacked jurisdiction to declare distribution of the suit land based on Primary Court decision in Probate and Administration Cause No. 41 of 2011, null and void;*
4. *That, the Honourable Chairman of the District Land and Housing*

Tribunal grossly erred in law and in fact by declaring the Respondents lawful owners of the Suitland, which relief is inconsistent with the facts pleaded in the Respondents' written statement of defence;

5. *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact for improper analysis of evidence and thus, arrived to a wrong and unfair decision;*
6. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and in fact for failure to find the Respondents' documents "ID-1" exhibit D1 and Exhibit D-3 collectively (inventory form No. V and statement of account form No. VI) are false, afterthought and incompetent to transfer title over the suit land to the Respondents foe being made and filed in Probate Court after more than 15 years from the appointment of the administrator Tiatlaa Askwari;*
7. *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact by disregarding High Court's binding decision in* ***Civil Revision No. 13 Of 2020, Beatrice Brighton Kamanga and Another Vs. Ziada William Kamanga (Unreported)*** *without assigning any reasons; and*
8. *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact for not indicating the assessors' opinion in his decision which omission is without any legal justification;*

Based on the above grounds of appeal, the Appellant prayed for the following; this Honourable Court be pleased to allow this appeal with costs

by quashing and setting aside the decision of the District Land and Housing Tribunal, this court be pleased to declare the Appellant lawful owner of the suit land as Administrator of the estate of the late Nunugha Petro, this court be pleased to issue an order evicting the Respondents therefrom and order for payment of compensation to the Appellant for loss of use of the suit land.

As a matter of legal representation, the Appellant was ably represented by Mr. Jofrey Mollel, learned advocate while the Respondents enjoyed the service of Mr. Samwel Welwe, learned advocate. When the matter was called for hearing on 3rd October 2022, counsel for the parties opted to the argue the appeal by way of written submissions and they both complied to the submissions schedule.

Submitting in support of the appeal, counsel for the Appellant started by faulting the trial Tribunal's judgment on account that it was poorly composed by having answered all the issues in one page which is page 6 of the typed judgment and in total disregard of the testimonies of witnesses, documentary exhibits tendered and final submissions filed by counsel for the parties. He prayed for this Honourable Court to peruse carefully the trial Tribunal's records and condemn unprofessional behavior of composing judgment by the trial Tribunal.

In their joint written submission, the counsel for the Respondents

submitted that the allegation on shortness of the trial Tribunal's Judgment is unfounded as the same is short but clear and concise containing all ingredients of a good Judgment including summary of the facts or evidence, issues for determination, the decision and reasons for the decision.

Reading the said judgment of the Tribunal, I agree with the submission by the Respondents' counsel that although it is short, the judgment precisely reflected all aspects required in a judgment. The Chairman clearly analysed the evidence, raised issues and responded to the issues. He also gave reasons to his decision though in a brief way. It is not true that the findings of the Tribunal is found at page 6 only. Going through the typed judgment of the Tribunal, the reasoning of the Chairman starts from page 5 to page 6. The Chairman considered both oral evidence of the parties as well as exhibit D1 in reaching to a conclusion that the Respondents were rightful owners of the disputed land. Although the Chairman did not indicate in his judgment if the parties' final submissions were considered, that omission cannot vitiate the judgment. This is because final submission is made at the option of the parties with intention of assisting the court on key issues to be deliberated upon but it does not form part of evidence of the case. Thus, its non-consideration cannot render the judgment fatal in anyway. In that regard,

I find no reason to fault the trial Tribunal's judgment based on chairman style in composition of the judgment.

Turning to the grounds of appeal, arguing the first ground of appeal the counsel for the Appellant submitted that, the Honourable Chairman of the DLHT grossly erred in law and in fact by denying the Appellant ownership of the suit land despite ample evidence supporting ownership of the suit land. He insisted that the Honourable Chairman was wrong as he failed to observe the evidence on record which clearly revealed that the parties were not in dispute that the suit land was originally owned by the late Petro Gitiyen who used and occupied it until his death. That, it was also not in dispute that upon death of the said Petro Gitiyen the Appellant's mother Nunugha Petro was the one left in occupation and use of the suit land. Referring Exhibit "P2" which is the decision of Karatu Primary Court in Probate and Administration Cause No. 41 of 2011, dated 14/11/2012, the Appellant's counsel submitted that Tlatlaa Askwari who was the administrator of the estate of the late Petro Gitiyen made declaration in writing that he never distributed the deceased's estate and the same was in possession and use of the Appellant's mother Nunugha Petro. That, the Respondents were estopped from denying the said declarations and turn around claiming to have distributed the estate in 1998. He invited this Honourable Court to invoke the provisions of section

123 of the Evidence Act (Cap. 6 R. E. 2019) by rejecting the Respondents' claim based on 1998 distribution which never existed. That, the above provision of the Evidence Act prohibits the administrator and the Respondents from denying that the suit land was not distributed to them and that the same was in the possession and use of the Appellant's mother on whose behalf the Appellant sued.

The Appellant further submitted that the Respondents tried to rely on Exhibit "DI" which is purported to be family meeting minutes dated 18/01/1998 as evidence of administrator's distribution, and this was accepted by the trial Tribunal as evidence of distribution. That, this is very wrong as Exhibit "DI" is not the legally acceptable evidence of distribution of deceased's estate. He contended that since there are forms prescribed for that purpose, and since there is no evidence in record of 1998 form No. V and form No. VI (inventory and statement of accounts respectively) filed by the administrator Tlatlaa Askwari showing to have distributed the deceased's estate to the Respondents in 1988 or to other persons, the Respondents' evidence was weaker than that of the Appellant thus, the Appellant properly proved ownership of the suit land. He urged this court to allow the first ground of appeal with costs.

Counsel for the Respondents on the other hand argued that the Appellant did not prove her case during trial and therefore the trial

Tribunal's decision is justified. He insisted that, the disputed land is in the occupation and use of the Respondents herein. Referring section 119 of **the Evidence Act, Cap 6 R.E 2019,** the Respondents' counsel argued that the Appellant has legal duty of proving that the Respondents who are in possession of the disputed land are not lawful owners. The Respondents' counsel further argued that there is no dispute that historically big portion of the disputed land was among the properties of the late Petro Gitiyen, the father of the late Lanta Petro, Katarina Petro and Nunugha Petro. That, the Appellant has totally failed to prove on the balance of probability how the property was transferred from Petro Gitiyen to only one daughter among three that is Nunugha Petro in order for the Appellant to administer. That the Appellant, AW1 in her evidence admitted that, the disputed land was owned by the parents of Nunugha, Lanta and Katarina, however, she claimed that Lanta declined to be given land instead she demanded 2 cattle as compensation for her share in her parents' land. The Respondent considered this as an illogical argument with no supportive evidence. He added that the Appellant's evidence contradicted that of AW2 who claimed that the 1st Respondent's mother was given 6 cattles from Kwaslema as compensation for inheriting land from Petro Gitiyen. That, even in the agreement dated 10th September, 1997 exhibit DI, it does not indicate if there was a prior agreement

between Nunugha Petro and Lanta Petro for Lanta to be given cattle instead of land as claimed by the Appellant. That, the said exhibit DI was signed by all daughters and no claim of forgery and the same support the fact that, each of the Petro Gitiyen's daughters including the Appellant's mother and 1st Respondent's mother are entitled to inherit equally the property of the late Petro Gitiyen. That, there is no any proof on the alleged compensation to the late Lanta Petro in terms of cattle.

The counsel for the Respondents further submitted that, the Appellant mentioned Tlatlaa as among the elders who attended the meeting when Lanta Petro was compensated with Cattle but the said Tlatlaa testified in the trial Tribunal as DW6 and did not recognize the said compensation rather only recognized the meeting of 10/9/1997 of which all three daughters agreed to have equally divided the property of the late Petro Gitiyen. The Respondents' counsel insisted that Exhibit DI having been properly signed by all children of Petro Gitiyen is a valid document and in case it was not proper, those signatories ought to have challenged it timely, otherwise the Appellant herein cannot successfully challenge it in 2016 after the lapse of approximately twenty years. The Respondents maintained that they successfully proved their case by both oral and documentary evidence.

In his rejoinder submission the counsel for the Appellant faulted the

Respondents' counsel's argument on the first ground which was to the effect that three daughters of the late Petro Gitiyen peacefully in 1997 agreed on distribution of their deceased father's land. He submitted that, distribution of deceased's estate is a matter of law which must be proved by legally prescribed distribution form No. VI, and not by minutes of the family meeting Exhibit DI which the Respondents' Advocate is trying to rely on. He insisted that in this case there was no evidence of 1997's distribution form No. VI distributing the suit land to the three daughters of the late Petro Gitiyen, and therefore, it is erroneous for the Respondents' Advocate to conclusively submit that the three daughters of the late Petro Gitiyen peacefully in 1997 agreed on distribution of their deceased father's land. That, the said minutes of the family meeting Exhibit DI relied on by the Respondents' Advocate is not an agreement and thus, cannot be relied upon as evidence of distribution of the deceased's estate.

On the argument that the Appellant has not discharged her legal duty under section 119 of the Evidence Act, Cap. 6 R. E. 2019 the Appellant submitted that the evidence on record and particularly Exhibit P2 shows that the basis of the Respondents' entry into the suit land is the decision of Karatu Primary Court in Probate and Administration Cause No. 41 of 2011, dated 14/11/2012. That, the said Tlatlaa Askwari as the

administrator of the estate of the late Petro Gitiyen made declaration in writing that he never distributed the deceased's estate and same was in possession and use of the Appellant's mother Nunugha Petro. That, it was sufficiently established that the said decision of the Primary Court, Exhibit P2 was nullified by the District Court vide Civil Revision No. 2 of 2013 which was admitted as Exhibit "P3" thereby rendering the Respondents' occupation and use of the suit land unlawful. That, it is also clear from exhibit D2 tendered by the Respondents that the suit land was distributed to some other people and not to the Respondents and therefore, it is erroneous for the Respondents' Advocate to conclusively submit that the Appellant did not prove that the Respondents are not lawful owners of the suit land.

From the record, there is no dispute that the dispute land was originally owned by Petro Gitiyen. It is also not disputed that Tlatlaa Askwar was appointed administrator of the estate of the late Petro Gitiyen. The dispute is on the division of the estate of the late Petro Gitiyen. While the Appellant claimed that the whole land of the late Petro Gitiyen was bequeathed to her late mother, the Respondents claimed that the land was equally divided to the three daughters of the deceased. The evidence reveals that the deceased, Petro Gitiyen demised in April 1997. On 10/09/1997 Tlatlaa Askwar convened a family meeting as per the family

minutes, exhibit D1 in which, the deceased children agreed to the distribution of the deceased land among themselves in exclusion of 2 acres of land owned by Tluway Erro (the 3rd Respondent's father). He then applied to be appointed administrator of the estate for purpose of officiating the distribution and he was so appointed vide letter of appointment issued on 13/11/1997 in Mirathi No. 24 of 1997. After his appointment, the administrator Tlatlaa Askwar convened another family meeting as per the family minutes dated 18/01/1998, part of collective exhibit D2. One of the agenda in that meeting was the distribution of the deceased's properties. Later, in 2012 after several squabbles between them, the administrator convened another meeting on 22/12/2012 for the purpose of completing the distribution by filing inventory and final accounts, part of collectively exhibit D2. In the final account, the names of the original heirs were indicated including the name of the 2nd Respondent whom the family agreed based on customs perspectives that he was to inherit part of the land containing family graveyard. The final account was endorsed by the primary court.

In my view, the above pointed out analysis proves the Respondents' ownership over the disputed land. Although the Appellant's counsel claimed that the Respondents' names were not indicated in the final accounts filed by Tlatlaa Askwar, it is clear that the 1st Respondent stands

as beneficiary of his late mother Lanta and the second Respondent was well indicated in the final account. The third Respondent could not be indicated in the final account as the land he claims was excluded from the estate of the deceased. Much as there is no dispute that the Respondent's ownership accrued from the right obtained by their parents, the DLHT was correct to declare the Respondents lawful owners of the disputed land.

On the argument that the basis of the Respondents' entry into the suit land is the decision of Karatu Primary Court in Probate and Administration Cause No. 41 of 2011, dated 14/11/2012, this court finds that argument a misconception. I do not agree with the arguments by the Appellant's that by nullifying the decision of the Primary Court in the above case, it rendered the Respondents' occupation and use of the suit land unlawful. It is on record that, the above two cases concerned the estate of the late Nunugha Petro and it has nothing to do with the estate of Petro Gitiyen. The applicant in Mirathi No. 41 of 2011 was the Appellant Elizabeth Sindefu and she was objected by one Ginada Dundurda. The decision therefrom was revised by the district court in Revision No.2 of 2013, exhibit P3. The Respondents were never parties to that mirathi neither did the order in that mirathi interfered with the administration by Tlatlaa Askwar in Mirathi No.24 of 1997.

On the 2nd ground of appeal, the counsel for the Appellant submitted that the Honourable Chairman of the DLHT grossly erred in law and in fact by declaring the Respondents lawful owners of the suit land while there was no counter claim and no evidence in support of ownership in their favour. That, the decision of the Tribunal was improper as it was not supported by evidence as it was based on the distribution by the administrator of estate without reference to any evidence of distribution by the administrator. He insisted that according to Exhibit "D2- D3" (Minutes, inventory form No. V and accounts of estate form No. VI) there was no any valid distribution in favour of the Respondents herein. That, the inventory form No. V shows that the deceased estate to wit house, farm, oxen plough and cat worth Tshs 17,850,000/= were not distributed up to 27/12/2012 when the said inventory was presented before Karatu Primary Court by the said Administrator Tlatlaa Askwari who was appointed on 13/11/1997 more than 15 years back. That, there is also no dispute that upon death the deceased was the last person entitled to be in possession of the suit land and there was no dispute that Nunugha Petro the Appellant's mother took possession and used the same for more than (12 years until her death in June 2010. That, even if there was a counter claim, the same ought to have failed for being time barred in terms of section 9(1) of the law of Limitation Act, 1971 and thus, the

Respondents and the Administrator Tlatlaa Askwari were precluded by the law of limitation from claiming the deceased's estate in the year 2012. That, as the deceased died in 1973, the Respondent's claims were hopelessly time barred and thus, there were no any justifiable reasons for giving them ownership of the suit land.

He maintained that even the administrator's distribution form in Exhibit "D2" (accounts of estate form No. VI) does not indicate any property distributed to the Respondents. He added that the Respondents' evidence was inconsistent with their pleaded facts and therefore, improperly relied on by the trial Tribunal as proof of the Respondents' ownership over the suit land. To support the argument that a claim cannot be proved when the evidence is inconsistent with the pleadings the Appellant's counsel referred the case of **Makori Wassanga Vs. Joshua Mwaikambo and Another** (1987) TLR 88. He maintained that the Appellant is lawful owner of the suit land and therefore, the second ground of appeal be allowed with costs.

The Respondents' counsel submitted that, there is sufficient proof that the Respondents are the lawful owners of the disputed land. That, as per Paragraph 3, 4 and 5 of the written statement of defence and throughout the evidence the Respondents claimed to be the owners of the said land and there was sufficient evidence to declare the

Respondents as lawful owner.

The Respondents' counsel further submitted that section 9 (1) of the law of Limitation Act, 1971 is not applicable in this case because the case herein is not between the Appellant and administrator of the estate and that the disputed land has never been under possession of the Appellant at any point in time, therefore, limitation of time cannot preclude the Respondents or administrator. He added that there is no any proof that the Appellant or her mother enjoyed possession of the disputed land for the long time. That, even if that would have been the case still all principles of adverse possession were not proved by the Appellant. To buttress his argument, the counsel for the Respondent referred the Court of Appeal decision in Civil Appeal No. 193 of 2016, **the Registered Trustees of Holy Spirit Sisters Tanzania verses January Kamili Shayo and 136 others.** He explained that there are eight things mentioned which are to be proved by adverse possessor including that the absence of possession by the true owner through abandonment and that the Adverse possessor has no colour of right to be there other than his entry and occupation. He contended that there is no proof that the land was ever abandoned by the lawful owners and that as member of the family the Appellant or her mother cannot in any case claim adverse possession.

The Respondents also submitted that the 3rd Respondent's land is not among the estate of Petro Gitiyen as seen in the exhibit D1, an Agreement between lawful heirs made in 1997. That, there is no any contradiction between the Respondent's pleadings and the evidence adduced in court and in case of any contradiction, still are minor which do not go to the root of the case.

In his rejoinder on the Respondents' argument that the evidence proved the Respondents as lawful owners of the suit land, the Appellant submitted that the law is clear that the evidence must be consistent with the facts pleaded. That, in this case the Respondents did not plead facts constituting counter claim and in the WSD they pleaded to have inherited the suit land but did not tender any evidence on how and from whom they inherited the suit land. That, even Exhibit D2 (form No. 5 and 6) do not support the Respondents' claim of ownership through inheritance because the names appearing in the said distribution forms are different from the Respondents' names and the said Exhibit DI which is the minutes of the family meeting which they claim to be distribution of their mothers (which is disputed) is not legal evidence of distribution of the deceased's estate, and therefore, it is highly erroneous for the Respondents' Advocate to submit that the evidence tendered in record proved the Respondents to be lawful owners of the suit land.

In considering the argument by the parties, it my settled view that it does not need a counter claim for the court to declare the defendant rightful owner of the disputed property where the evidence reveals so. As well discussed in the first ground, the Respondents were able to prove their ownership on the balance of probability hence the Tribunal was correct in declaring them rightful owners of the disputed land.

On the argument in relation to section 9(1) of the Law of Limitation Act, 1971, I agree with the Respondent's counsel that the said section does not apply to this case and if it has to apply, then both parties could have precluded from instituting a suit. However, it must be noted that the cause of action accrued from the distribution made by the administrator and officiated on 12/11/2012. It is not true that the dispute started because the administrator Tlatlaa Askwari started claiming the deceased's estate from the Appellant on ground that he did not distribute the same. The administrator only revived the Mirathi proceedings which was not closed by filing the inventory and final account and the same were accepted and endorsed by the primary court which dealt with the Mirathi. Thus, it cannot be said that the Respondents were overtaken by time to be declared lawful owners of the disputed land.

On the argument by the Appellant's counsel that the inventory was presented before Karatu Primary Court by the said Administrator Tlatlaa

Askwar who was appointed on 13/11/1997 more than 15 years ago hence overtaken by event. It is my view that the DLHT was correct to restrain from dealing with legality of the court proceedings or order's in Mirathi No. 24 of 1997. If anyone was aggrieved in the way the same was handled, the proper court was the same that determined the Mirathi and not the DLHT.

The above finding also answers the 3rd ground of appeal in which the Appellant faulted the Tribunal holding that it lacked jurisdiction to declare distribution of the suit land based on Primary Court decision in Probate and Administration Cause No. 41 of 2011. It was argued by the counsel for the Appellant that, such finding was contrary to Exhibit "P3" which is the decision of the District Court in Civil Revision No. 2 of 2013 dated 28th May 2013 which quashed and set aside Karatu Primary Court's decision in Probate and Administration Cause No. 41 of 2011 dated 14/11/2012, (Exhibit "P2"). The Appellant was of the view that the Tribunal was wrong for refusing to exercise jurisdiction vested on it by finding the Respondents lawful owners of the suit land based on the administrator's distribution in the said Probate and Administration Cause No. 41 of 2011, whose decision was already quashed and set aside by the District Court vide Revision No. 2 of 2013.

Based on the above submissions, the Appellant is challenging the

validity of the administrator's action and orders issued by the primary court in the probate matter. As well deliberated in the first and second grounds the Tribunal was correct not to interfere with the proceedings and decision or orders made in probate matter. Although the DLHT referred Mirathi No. 41 of 2011 as containing the distribution, the records are clear showing the distribution was made in Mirathi No.24 of 1997 which likewise, the DLHT had no jurisdiction to interfere. I therefore agree with the Respondents' counsel view that, the trial Tribunal properly held that it had no jurisdiction to overrule the decision or order made by the probate court. As well submitted by the Respondents' counsel, the trial Tribunal properly warned itself from interfering with the order of the primary court and indeed it did not have jurisdiction to challenge validity of what was done before the probate court in probate matter. It is clear that the distribution done by the Administrator was never contested or overturned by any higher court. I therefore find no merit in this ground of appeal.

On the 4th ground of appeal, the counsel for the Appellant submitted that, the Tribunal grossly erred in law and in fact by declaring the Respondents lawful owners of the suit land, which relief is inconsistent with the facts pleaded in the Respondents' own written statement of defence. That, the Respondents' joint Written Statement of Defence filed

before the trial Tribunal on 13th September 2016 does not contain prayer for their declaration as lawful owners of the suit land. Instead, it contains prayer for dismissal of the Appellant's application. He insisted that the Tribunal granted relief not prayed by the Respondents which is a serious irregularity according to Mogha's Law of Pleading in India, 10th Edition page 25. He thus invited this court to find merit in the 4th ground of appeal and allow it.

Based on the discussion in the second ground of appeal, I reiterate that it does not need a counter claim for the court to declare the defendant rightful owner of the disputed property where the evidence reveals so. I agree with the Respondents' counsel's submission that, nothing restrain the court from issuing proper order in the circumstance deemed proper. It is clear that, while responding to the claim, the Respondents also raised in their written statement of defence that they were lawful owner of the disputed land. That surfaces the claim which the court can rely upon to issue an award. I do not see how the pleading principles were contravened by the Respondents. As well pointed out by counsel for the Respondent and based on the Mogha's Law of Pleading in India, 10th Edition, the Respondents' claims flow naturally from the grounds of claim stated in the written statement of defence. The contention by the Appellant that the Mogha's law of pleadings requires

the Court to grant relief that flows naturally from the grounds stated in the Plaint and not in the Written Statement of Defence is unwarranted. It is my settled view that the court upon being satisfied on the evidence, it has duty to declare the rightful owner of the disputed property irrespective of who lodged the complaint. Therefore, the declaration of ownership to the Respondent was a proper award to be granted in the case at hand even in the absence of a prayer.

On the 5th and 6th grounds of appeal which were argued jointly, the Appellant submitted that the Tribunal grossly erred in law and in fact for improper analysis of evidence and thus, arrived at a wrong and unfair decision. That, the Tribunal erred for failure to find the Respondents' documents "ID-1", exhibit D2 and Exhibit D-3 collectively (inventory form No, V and statement of account form No. VI) were false, afterthought and incompetent to transfer title over the suit land to the Respondents for being made and filed in Probate Court after more than I5 years from the appointment of the administrator Tlatlaa Askwari. The Appellant also submitted that from the evidence on record, the Appellant tendered a total of four documentary exhibits and the Respondents tendered a total of three documentary exhibits but the trial Tribunal never referred any of the documentary exhibits on record. That, by failure to consider the said evidence the Tribunal failed to appreciate that based on Exhibit "P2" the

Primary Court decision in Probate and Administration Cause No. 41 of 2011, at pages 1-2, the Administrator Tlatlaa Askwari made declaration that he never distributed the deceased's estate prior to 2012 and that for those years, the estate was left to Nunugha Petro who is the Appellant's mother. That, the trial Tribunal also failed to note that Exhibit "P3" which is the decision of the District Court nullified the decision of the Primary Court, Exhibit P2, and consequently, it nullified the administrator's distribution in Probate and Administration Cause No. 41 of 2011. He added that, the Tribunal equally failed to note statements made by the witnesses in Criminal Case No. 66 of 2014 exhibit "P4". That, the trial Tribunal also failed to note that the Respondents' claim was that the deceased Petro Gitiyen died in 1973 and his wife in 1985 and the 2nd Respondent was appointed administrator in Primary Probate and Administration Cause No. 03 of 1994 and later his appointment was revoked by Mbulu District Court in Civil Appeal No. 22 of 1996. That, the Tribunal failed to draw an adverse inference against the Respondents for failure to tender report of the 2nd Respondent's administration prior to appointment of Tlatlaa Askwari and for failure to bring evidence as to why Tlatlaa Askwari was not appointed in the Probate Cause No. 3 of 1994 following revocation of the 2nd Respondent and instead he opened a new Probate Cause No. 24 of 1997 as per Exhibits "D2" and "D3". That, Tribunal failed to note that the said

Tlatlaa Askwari committed fraudulent misrepresentation by indicating in his letters of administration Exhibit "D2" that the deceased Petro Gitiyen died in April 1997 which clearly contravened the Respondents' own evidence that the deceased died in 1973. That, the trial Tribunal failed to note that the said Tlatlaa Askwari did not distribute the suit land vide exhibit "D2" and "D3" and particularly form No. VI because he refused to have ever signed the same. That, the trial Tribunal failed to note that the evidence of the 3rd Respondent as DW3 was hearsay evidence as he heard from his father that they had two acres over the suit land and thus, contravened the Tribunal's finding that 3rd Respondent was given suit land by the Administrator Tlatlaa Askwari. That, the trial Tribunal failed to note that the Respondent's claim was time barred.

In the light of the above referred contradictions of the Respondents' evidence the Appellant insisted that the trial Tribunal failed in its analysis of evidence as it is clear that the Respondents were not certain as to when or how they got the suit land. That, their evidence poses serious doubts which ought to have been resolved in favour of the Appellant but the trial Tribunal said nothing regarding the above referred contradictions an act the Appellant consider to be contrary to the decision of this Court in the case of **Mohamed Said Matula Vs. Republic** (1995) TLR 3. The Appellant prayed for this court to find that the trial Tribunal's decision was

unreasonable for failure to resolve the above referred contradictions and thus, this Court be pleased to find that the trial Tribunal's decision is unjustified, null and void and therefore allow the 5th and 6th grounds of appeal.

The Respondents' counsel submitted that the evidence was properly analysed and probate Forms were genuine, proper and sufficient to transfer ownership. He added that should those probate forms (No. V and VI) be false, incompetent or filed out of time, that issue can and would only be raised before the probate court (primary court). That, it was not the duty of the Land Tribunal to test legality of the probate forms. That, since the same were filed and not successfully objected at the probate court, the trial Tribunal was justified to rely on them and they are capable of transfer ownership/title. That, the argument that those probate forms were filed out of time has no room to stand now since the competent court (probate court) was properly moved by the Administrator and extended time to file them. That, should the Appellant raise this during hearing of the case at the trial Tribunal, the Administrator would have proved how he was allowed to file those probate forms.

The Respondents' counsel further submitted that there is no proof that, the wording contained in the Ruling of Karatu primary court in probate cause No. 41 of 2011 was given by the said Tlatlaa Askwar and

by the way those words have nothing wrong. That, from exhibit DI which is the agreement between three daughters of the late Petro Gitiyen, there were properties which had not been divided which obvious fall into the hand of the said Administrator and therefore he was correct to say that he did not distribute. He did not refer to those two acres to each of the three daughters which was already divided out of their agreement. He insisted that the arrangement made by three heirs since 1997 should not be interfered because if not legally executed, they would have challenge the same at earliest possible time and not after more than 20 years. The Respondents' counsel added that there is no any contradiction in the testimony of the said Tlatlaa Askwar hence this ground be dismissed.

This ground is already partly responded to in the preceding grounds, I will therefore not make unnecessary repetition. In addition to what was discussed, I will respond to what the Appellant's counsel referred as contradiction in the proceedings that were not considered by the trial Tribunal.

It was contended by the Appellant's counsel that, the Tribunal failed to note the statements made by the witnesses in Criminal Case No. 66 of 2014 exhibit P4. That, the trial Tribunal also failed to note that the Respondent's evidence was to the effect that the deceased Petro Gitiyen died in 1973 and his wife in 1985 and the 2nd Respondent was appointed

administrator in Primary Probate and Administration Cause No. 03 of 1994 and later his appointment was revoked by Mbulu District Court in Civil Appeal No. 22 of 1996. That, the Tribunal failed to draw an adverse inference against the Respondents for failure to tender report of the 2nd Respondent's administration prior to appointment of Tlatlaa Askwari and for failure to bring evidence as to why Tlatlaa Askwari was not appointed in the Probate Cause No. 3 of 1994 following revocation of the 2nd Respondent and instead he instituted a new Probate Cause No. 24 of 1997 as per Exhibits "D2" and "D3". That, the Tribunal failed to note that the said Tlatlaa Askwari committed fraudulent misrepresentation by indicating in his letters of administration Exhibit "D2" that the deceased Petro Gitiyen died in April 1997 which clearly contravened the Respondents' own evidence that the deceased died in 1973.

Looking into the said judgment in criminal case No. 66 of 2014 I did not find anywhere the Respondents claimed Petro Gitiyen died in 1973 and his wife in 1985. That was the evidence of the Appellant as per page 1 of the typed judgment of the trial court. The Respondents evidence reveals that at first in 1994 Danile Sulle instituted a Probate matter but he was successfully objected by Lanta. Andrea Matle testified on the dispute that arose in 1998 and Tumbay Tluway testified that he acquired the land through operation vijiji but the land was included in the dispute

during administration of the estate of the late Petro Gitiyen but it was released on the agreement that was entered in 1997. Form that analysis, I did not find material contradiction of the testimony by the Respondent in that criminal case and what they testified before the DLHT.

On the argument that the trial Tribunal failed to note that the said Tlatlaa Askwari did not distribute the suit land vide exhibit "D2" and "D3" and particularly form No. VI because he refused to have ever signed the same, I find such argument irrelevant. The evidence by Tlatlaa Askwar before the Tribunal reveal that he admitted to have distributed the properties to the heir but did not file inventory and final account which he later filed in 2012. He admitted that he was not the one who recorded but the court but he do not deny being the one who initiated the inventory and final account. Not recording the same cannot be fatal if the witness was admitting the content of the distribution. The evidence also reveal that he was denying to be the one who distributed the land to the 2nd Respondent as he claimed that plot was given to the 2nd Respondent by the deceased's daughters through their agreement entered in 1997. In that regard, I agree that the noted contradiction does not go to the root of the matter.

It was also argued that, the trial Tribunal failed to note that the evidence of the 3rd Respondent as DW3 was hearsay evidence as he heard

from his father that they had two acres over the suit land and thus, contravened the Tribunal's finding that 3rd Respondent was given suit land by the Administrator Tlatlaa Askwari. The evidence is clear and already pointed out the land that was divided to the Respondent emanated from the family meeting which agreed to exclude the said land from the deceased's estate. Thus, the claim that the 3rd Respondent's evidence was hearsay is unmaintainable. I therefore conclude that Exhibit DI is relevant evidence as its genuiness was never contested in any court of law and no evidence was tendered to negate its genuiness thus, claim that it is fake document is baseless. Nevertheless, the said exhibit does not stand as the sole evidence in establishing the rights of the parties. Looking on the evidence in its totality, the conclusion is obvious that, the Respondents established their rights over ownership of the disputed land.

On the 7th ground of appeal, the Appellant submitted that, the Tribunal grossly erred in law and in fact by disregarding the High Court binding decision in Civil Revision No. 13 Of 2020, **Beatrice Brighton Kamanga and Another Vs. Ziada William Kamanga** (Unreported) without assigning any reasons. He was of the view that, the Respondents' ownership was illegal because the said Administrator Askwari Tlatlaa was appointed on 13/11/1997 (Exhibit D2) and distribution was made on 27/12/2012 (Exhibit D2) which is after 15 years from the date of his

appointment and therefore in contravention of the position of the law set by the High Court in the above case. He insisted that the Administrator exercised powers while his appointment had ceased to exist by operation of the law and his existence was illegal hence, his activities were null and void for being carried after expiration of his appointment. That, the Honourable Chairman ought to have found the administrator incapable to transfer any tittle over the suit land to the Respondents. He therefore prayed for the 7th ground of appeal to be allowed with costs.

I agree with the Respondents' counsel's submission that the principle in Civil Revision No. 13 Of 2020, **Beatrice Brighton Kamanga (supra)** is irrelevant in this matter. The validity of the forms in probate matter cannot be challenged in the land court as the same ought to have been raised in the original probate file. I reiterate that the DLHT had no jurisdiction to correct errors committed by the probate court if any. Thus, whether the inventory and final account forms were filed out of time with or without an order extending time to do so, that was not an issue that could be determined by the land Tribunal. On the argument that forms No. V and VI cannot be relied upon as basis of the Respondents' ownership over the suit land as they contained names of different persons, I reiterate my discussion on the preceding grounds of appeal.

On the 8th ground of appeal, the Appellant submitted that, the

Tribunal grossly erred in law and in fact for not indicating the assessors' opinion in his decision which omission is without any legal justification. The Appellant explained that on the first hearing date on 05/04/2017 the Tribunal Assessor as per the coram were R. Panga and J. Akonaay but at page 10 set of Assessors changed to Mr. Mushi and Mrs. Panga and indication as to what happened with Mr. J. Akonaay. That, on 18/8/2020 hearing proceeded without presence of Tribunal Assessors and without reason for doing so and on 06/10/2020 the hearing proceeded with two (2) Tribunal Assessors namely Mrs. Panga and Mr. Mushi but no reason for doing so and Mrs. Panga cross examined the witnesses. That, at page 35 of typed proceedings the questions from assessors were recorded without indicating the name of the Assessor who cross examined witness. That, on 05/01/2021 hearing proceeded with one (1) Tribunal Assessor Mrs. Panga and without indication of any reason as to what happened to the other Assessor. That on 07/10/2021, hearing of DW5 proceeded with two (2) Tribunal Assessors namely Mrs. Panga and Mr. Akonaay without stating reason as to why there was a new assessor. That on 18/12/2021 only one member namely Mrs. R. Panga gave her opinion. For him, the 2nd Tribunal Assessor did not give his opinion which means the Tribunal did not take into account opinion of the 2nd assessor contrary to the requirement of section 24 of the Land Disputes Courts Act, (CAP 216 R.

E. 2019). That, even the opinion of one assessor Mrs. R. Panga was not recorded in the case file to form part of the record and therefore the Chairman did not consider the said opinion in composing judgment.

The Appellant insisted that this was a serious irregularity and contrary to the law requiring trial Tribunal's Chairman to record and consider Assessors' opinion in preparation of judgment. That, the position of the law on the need to record assessors' opinion was emphasized by the Court of Appeal in Civil Appeal No. 154 of 2015, **Ameir Mbarak and Another Vs. Edgar Kahwili (Unreported).** The Appellant's counsel prayed for the 8th ground of appeal to be allowed with costs.

The Respondents' counsel submitted that there is no any irregularity committed by the trial Tribunal in as far as opinion of the assessors is concerned. That, the opinion formed part of the record of the trial Tribunal and were well signed by the assessors. That, the assessors give their written opinion in distinct paper and the same were filed in the original file. That, the participation of the assessors has no any problem because the quorum was sufficient at all the time and the law allows the trial chairman and the remaining assessor to conclude the case as required under **section 23 of the Land disputes courts Act, Cap. 216 R.E 2019.** The Respondent insisted that there was nothing wrong for Mrs. Rukia Panga to give opinion as the Assessors who were appearing were

Mr. Mushi and Mrs. Rukia Panga and after the death of Mr. Mushi the fact which is well known to both parties, Mrs. Panga proceed alone. He added that typing errors cannot vitiate the proceedings and prayed this ground to be dismissed with costs.

In the alternative to the above and in case this court finds merit on this ground the Appellant prayed this court to consider that the remedy is to order the remission of the original file before the trial Tribunal so that opinion is well recorded or in other case nullify the proceedings and not to declare the Appellant as lawful owner as proposed by the Appellant's counsel. In concluding, the Respondents prayed that this Appeal be dismissed entirely for lack of merit.

I have perused the proceedings and judgment of the trial Tribunal and specifically the original handwritten proceedings to clear doubt raised by the Respondents' counsel alleging typing errors. It is clear that on 05/04/2017 page 4 of the proceedings indicated two names of members/assessors; R. Panga and J. Akonay. The proceedings on the same date at page 10, indicate Mrs. R. Panga and Mr. Mushi as assessors who cross examined the witness. The original handwritten proceedings do not indicate the assessor in the coram rather it indicated Mrs. R. Panga and Mr. Mushi as assessor who cross examined a witness. That being the case I agree with the counsel for the Respondent that writing J. Akonay

was a typographical error on that date.

On 18/8/2020 it is true that no record on the attendance of Tribunal Assessors however, the witness was unable to proceed with hearing and they were given chance to prepare themselves. The hearing was resumed on 06/10/2020 in the presence of two Assessors namely Mrs. Panga and Mr. Mushi. Thus, since the evidence of DW1 was recorded in the presence of assessors, I find nothing fatal that can vitiate the proceedings. The argument that, only Mrs. Panga cross examined the witnesses is baseless as there is no hard and fast rule that each assessor must examine the witness.

It was also alleged that at page 35 of typed proceedings the questions from assessors were recorded without indicating the name of the Assessor who cross examined witness. I however did not find such proceedings at page 35 rather page 37 of the typed proceedings. Despite the fact that no name of assessor was indicated, it is clear that those questions were asked by assessors who in turn were recorded in the coram. The Appellant's counsel did not point out if not recording the name of the assessor who asked the question prejudiced the Appellant in any way. I therefore find this error minor and does not vitiate the proceedings.

On argument based on Tribunal consideration of opinion of assessors, I agree with the Appellant's counsel submission that the

Respondent's argument that Mrs. Panga proceeded alone after the death of Mr. Mushi is not supported by the trial Tribunal's records. The proceedings show that on 05/01/2021, only one assessor Mrs. Panga attended and the hearing proceeded in the absence of the other assessor Mr. Mushi but no reason was recorded. On the following date on 07/01/2021, again the second assessor Mr. Mushi was not in attendance but this time the Chairman recorded that he had retired from a position of assessor. In any of the two circumstances, the Tribunal is allowed under the law to proceed with the remaining assessor where the attendance of the other assessor could not be precured. This is in conformity with the provision of section 23 (3) which read: -

> *"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."*

On Appellant's counsel's argument based on the case of **Ameir Mbarak and Another** (supra) it is my observation that the decision of the Tribunal in that case was nullified because there was change of set of assessors and the assessors who gave opinion were not involved throughout the entire trial. The Court of Appeal held that the trial was not

conducted by a duly constituted Tribunal as required by section 23 (1) and (2) of the Land Disputes Court Act, Cap 216. The circumstance in that case is different from the case at hand as the assessor one Mrs. Panga was involved throughout the trial and she made her opinion that was considered by the Tribunal in its decision. There is a handwritten opinion in the Tribunal records and the same was acknowledged in the judgment of the Tribunal at page 7. Thus, the argument by the Appellant's counsel that the opinion of the assessor was not considered is misconceived. I therefore find no merit on the 8th ground of appeal.

In the final analysis, I find no merit in all grounds of appeal. I therefore proceed on dismissing the appeal in its entirety with costs.

DATED at **ARUSHA** this 13th Day of February 2023

D.C. KAMUZORA

JUDGE