

IN THE HIGH COURT OF TANZANIA

DODOMA SUB – REGISTRY

AT DODOMA

LAND APPEAL NO. 62 OF 2023

*(Originating from Iramba District Land and Housing Tribunal for Kiomboi in Land Application
No. 46 of 2019).*

ANDERSON NAKEMBETWA SHANGO..... APPELLANT

VERSUS

MARIAM YESAYA (Represented by Hamisi Abdalla

Nakomolwa)**RESPONDENT**

JUDGMENT

8th April & 10th May, 2024

MUSOKWA, J:

This is an appeal from Land Application No. 46 of 2019. In the District Land and Housing Tribunal of Iramba (DLHT) the respondent herein, through her appointed attorney, successfully filed and prosecuted Land Application No. 46 of 2019 against the appellant. Briefly, the respondent alleged title to the undisturbed use of the suit land since 1987 until 2018 when the alleged trespass occurred. The respondent prayed for judgment and decree, to be declared the legal owner of the suit land measuring 8.5 acres located at Mlekela Hamlet, Kyalosangi Village, Kinampanda Ward within Iramba District.

Aggrieved by the said decision, the appellant preferred this instant appeal advancing the following grounds of appeal:-

- 1. That, the trial tribunal erred in law in holding that the land belongs to the respondent while the respondent had no locus standi.*
- 2. That, the judgment and decree of the trial tribunal are a nullity for want of opinions of assessors.*
- 3. That, the trial tribunal erred in law and in fact in failing to record the reasons for the transfer of a case file from one chairperson to another.*
- 4. That, the proceedings, judgment and decree of the trial tribunal are a nullity for want of proper coram of composition.*
- 5. That, the trial tribunal erred in law and in fact in holding that the suit land belongs to the respondent herein basing on the weak and contradictory evidence of the respondent and her witnesses.*
- 6. That, the trial tribunal erred in law and in fact for not taking into account that he occupied and possessed the land in dispute since 1987 until when the same came into dispute in 2019.*
- 7. That, the decision of the trial tribunal does not qualify to be a judgment as it has neither analysed evidence that was put before it deliberately nor given the reasons thereof.*
- 8. That, the trial tribunal erred in law and in fact to decide in favour of the respondent while the matter was not proved as per the standards set.*

When the matter was called for hearing on 8th April 2024, the appellant enjoyed the services of Mr. Isaya Nchimbi learned advocate whereas the respondent was represented by Mr. Hamis Abdalla Nakomolwa, her personal representative.

In arguing this appeal, Mr. Nchimbi prayed to abandon the 2nd, 3rd and 4th grounds of appeal and it was marked so. The learned counsel further

prayed to argue the 5th, 7th and 8th grounds of appeal collectively whereas the 1st and 6th grounds of appeal were argued separately.

Commencing with the first ground of appeal, Mr. Nchimbi challenged the *locus standi* of the respondent herein, at the DLHT. The counsel for the appellant referred the court to the testimony of PW1, Zablou Mpinga, the respondent's first witness at the DLHT. PW1's testimony is recorded from page 29 to 33 of the typed trial proceedings whereby this witness, under oath, testified that the suit land was the property of the respondent's father, namely Yesaya Mkumbo, the deceased. However, when PW1 was cross examined, he stated that the suit land belongs to Abdalla Nakomolwa.

Mr. Nchimbi proceeded to refer to the testimony of PW2, one Barnabas Nalomba Kiula as recorded from pages 33 to 37 of the typed trial proceedings, which corroborates the testimony of PW1. That PW2 also testified that the suit land was inherited by the respondent from her late father, one Yesaya Mkumbo. Additionally, PW3, Mariam Yesaya, during cross-examination at page 43 of the DLHT's proceedings, averred that she inherited the suit land from her late father. The testimony of PW4, one Samwel Shilla Msengi, also establishes the same facts, that the respondent inherited the suit land from her late father.

Contending further, the advocate for the appellant argued that the respondent herein had no *locus standi* at the DLHT because the title to which she alleges, which according to her accrued by way of inheritance upon the demise of her father, is not automatic. Elaborating further, Mr. Nchimbi asserted that title which passes by way of inheritance is only realized upon completion of specific mandatory legal procedures. The aforementioned legal procedures include the appointment of an administrator by the court to administer the estate of the deceased. The learned counsel submitted that none of the witnesses testified as to the appointment of an administrator of the estate of the late Yesaya Mkumbo upon his demise. Submitting further, Mr. Nchimbi argued that the absence of any evidence to establish such appointment, is proof of the fact that no administrator was appointed to that effect. In this regard, he concluded that the respondent herein, Mariam Yesaya had no *locus standi* to institute Misc. Land Application No. 46 of 2019 at the DLHT.

Mr. Nchimbi stated that according to the records, Mariam Yesaya appointed Hamisi Abdalla Nakomolwa by power of attorney to represent her in the matter before the DLHT. The reason that was advanced for the appointment of Hamisi Abdalla was that the said Mariam Yesaya had health challenges and was of extreme old age hence was incapacitated to

attend the trial. The learned counsel proceeded to state that to his utter amazement, the said, Mariam Yesaya, was among the witnesses at the DLHT. Further, that she duly attended the trial and gave her testimony as recorded at page 41 to 46 of the typed trial proceedings. In consideration of the fact that the said Mariam Yesaya had already given the Power of Attorney to another person, it was his submission that legally she was not supposed to testify before the tribunal because this was the duty of the donee, Hamisi Abdalla.

Submitting further, Mr. Nchimbi asserted that the said Hamis Abdalla, apart from not testifying in court, assumed the role of cross-examining the witnesses. According to the learned advocate, even the said power of attorney of Hamisi Abdalla was never endorsed or admitted by the DLHT. Reiterating his point, Mr. Nchimbi stated that the appearance by the donor herself at the trial is contrary to the requirements of the law. The cases of **Paaringaa Jafa vs. Abdallah Ahmed Jafa and Others**, [1999] TLR 110 and **Naiman Moiro vs Nailejlet KJ Zablon**, [1980] TLR 110 were cited in support of his position.

In addition, Mr. Nchimbi submitted that the power of attorney expired upon the appearance of Mariam Yesaya. The presence and participation of both the donor and the donee at the trial, according to the learned

counsel, is an anomaly in the eyes of the law. In concluding his argument on this ground of appeal, Mr. Nchimbi reiterated that where a power of attorney has been issued, the donor ceases to have residual power to subsequently appear in court. Therefore, the appellant's counsel prayed that the proceedings, judgment and any other consequent orders that were issued by the DLHT be nullified.

Submitting on the 5th, 7th and 8th grounds of appeal, Mr. Nchimbi averred that the DLHT erred in disposing the matter based on evidence that was weak and contradictory. The application before the DLHT describes the suit land to measure 8.5 acres, however, PW1, Zablon Mpinga in his testimony as recorded at page 29 to 33 of the typed proceedings did not mention at all the size of the suit land. Further, PW2, Barnabas Nalomba Kiula, at page 33 of the proceedings, claimed that the suit land is 5.5 acres. On the other hand, PW3, Mariam Yesaya at page 41 to 46 of the typed proceedings, did not provide a description of the suit land which she claims; whereas PW4, Samwel Shilla, at page 46 testified that the suit land measures 5.5 acres.

In emphasis to the aforementioned anomalies, the learned counsel asserted that there is no evidence before the tribunal that the respondent has any claim to the 8.5 acres, which she claims title to. Mr. Nchimbi

referred to the principle of law that parties are bound by their own pleadings. In consideration thereof, it was the submission of the appellant that the respondent failed to prove title to the suit land.

In addressing the 6th ground of appeal, the learned counsel submitted that the respondent claimed that she acquired the land since 1987. However, until 2019, the land was being used by the appellant peacefully. In this regard, the counsel for the appellant submitted that the appellant herein was an adverse possessor.

In reply, the respondent submitted that, the 1st witness of the defense at the DLHT, Anderson Nakembetwa, testified that he acquired the land from one Tyati Mpilu as per page 63 of the DLHT's proceedings. Further that he bought the land at a price of TZS 14,000/= and 2 goats but he failed to describe the color and gender of the said goats. The respondent further argued that while the appellant claimed to have purchased the land in 1987, he was unable to produce proof thereof by failing to producing copies of the sale agreement. The respondent further questioned the truth of the appellant's claims on the witnesses who allegedly witnessed the purchase who were named as Mohammed Sheila, Alexander Zephania Mrumba, George Petro, and Milangton Mgodo including the ten-cell

leader. In concluding this point, the respondent averred that the procedures in acquiring the suit land were questionable.

With regard to the competency of PW1 Mariam Yesaya to testify before the DLHT, the respondent stated that PW1 was summoned by the trial tribunal to testify, hence her appearance. Further in relation to the discrepancies in the size of the suit land as testified by the witnesses, the respondent submitted that the suit land as described in the application before the DLHT was 8.5 acres. This, he asserted, was a mere typing error and that the suit land is in fact 5.5 acres as testified by some of the witnesses.

The respondent further stated that all the witnesses of the defence were completely unreliable including DW3 who testified that the area was measured by one Zephania Mlumba. Whereby DW4 stated that the area was measured by Alexander Mlumba. Submitting further the respondent asserted that the witnesses knew nothing about the land bordering the suit land hence, they were incompetent witnesses. In rebutting the arguments advanced by the appellant that he had title to the suit land since 1987, the respondent argued that the said claims are unfounded because no proof was tendered during the trial to that effect. In conclusion, the respondent reiterated that the allegations in relation to

the issue of *locus standi* at the DLHT were baseless and that the respondent had *locus standi* to institute the matter before the DLHT.

In rejoinder, Mr. Isaya Nchimbi adopted his submission in chief. He added that, on the legal status of the respondent, he does not dispute the fact that he was given the power of attorney, and that the appointment was legally done. The point of contention is that it was not proper for both the donor and the donee to appear at the tribunal to testify. He argued further that, the donee assumed the responsibilities of an advocate by examining and cross examining the witnesses. Further, that the respondent's claims that PW1 was summoned in court to give her testimony is not true as nowhere in the proceedings was this recorded.

As to the size of the suit land he referred to pages 2, 4, 8, 9, 11, 13 and 33 of the typed trial proceedings, further disputing that 8.5 acres was a typing error. All the documents submitted in court, he asserted, refer to 8.5 acres. According to him, the contents in the aforementioned pages prove that the complainant was given the opportunity to amend his application.

In relation to the time when the dispute arose, the learned counsel asserted that even if the cause of action had arisen in the year 2000, the appellant would still be an adverse possessor. The learned counsel

concluded by stating that the witnesses of the appellant at the DLHT gave clear and reliable evidence and that failure by the one witness to state the gender of the goats is an extremely weak argument. The learned counsel therefore prayed that this honorable court to grant this appeal with costs.

Having examined the records of the DLHT and hearing the parties' rival arguments, I will direct myself towards the issue of *locus standi*. The position of the law on *locus standi* was discussed in the case of **Lujuna Shubi Balonnzi vs. Registered Trustees of Chama cha Mapinduzi (1996) TLR. 203, 208** where the Court of Appeal of Tanzania (CAT) held as follows: -

*"A principle governed by common law whereby in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that **he is entitled to bring the matter before the court.**" [emphasis added]*

Further, in the case of **William Sulus vs. Joseph Samson Wajanga**, Civil Appeal No. 193 of 2019 the CAT also stated that: -

"Locus stand is the legal capacity or competency to bring an action or to appear in court. It is a long-settled principle of law that for a person to institute a suit, he/she must have locus standi. [emphasis added]

From the above cited authorities, it is apparent that *locus standi* is one of the thresholds for instituting a suit and it is a point of law. On that basis,

locus standi can be raised at any time in the proceedings as in the instant appeal.

The law on probate matters provides that property that is left behind by the deceased must be administered and distributed to the heirs through a duly appointed administrator. Further, such administrator has the legal mandate or *locus standi* to sue or be in sued in relation to any matter that concerns the estate of the deceased. I refer to the case of **Omary Yusuph (Legal Representative of the late Yusuph Haji) vs. Albert Munuo**, Civil Appeal No. 12 of 2018 CAT, (unreported).

In the instant appeal, the respondent herein sued the appellant at the DLHT for the suit land which belonged to her late father. However, the provisions of section 71, 99 and 100 of the Probate and Administration of Estates Act, Cap. 352 R. E 2019, provides that: -

*"71. After any grant of probate or letters of administration, **no person other than the person whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as a representative of the deceased**, until such probate or letters of administration shall have been revoked or annulled." [emphasis added]*

99.- The executor or administrator, as the case may be, deceased person is his legal representative for all

purposes, and all the properties of the deceased person vests in him as such...."

100.- An executor or administrator has the same powers to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death as the deceased had when living."

In the above cited provisions of the law, it is clear that only the administrator can sue or be sued on behalf of the deceased person. This position also was held in the case of **Swalehe Juma Sangawe as an administrator of the late Juma Swalehe Sangawe) and Another vs. Halima Swalehe Sangawe**, Civil Appeal No.82 of 2021.

The respondent's witnesses at the DLHT, therefore PW1, PW2 and PW3 all testified that the land in dispute belonged to the respondent's late father. For ease of reference, the records of the DLHT at pages 29 to 30 provide for the testimony of PW1 as follows: -

"PW1 Name: Zablon Mpinga

*Your hon, I know the suit land well. The land belonged to Mariam Yesaya's father called Yesaya Mkumbo. The applicants father died many years ago **and the applicant being his daughter inherited the same...**" [emphasis added]*

Further, the testimony of PW2 is recorded at page 33 to 34 of the DLHT's records as follows: -

"...I have known the suit land since my childhood. The land belonged to Yesaya Mkumbo who was Mariam Yesayas father."

Furthermore, at page 44 of the DLHT's proceedings when PW3 was cross examined, she stated that: -

*"The land belongs to my father who had built there. **My father has passed away** many years ago...I am the only child left; therefore, the land became mine." [emphasis added]*

According to the evidence adduced before the DLHT as quoted above, I am of the settled view that the respondent is not an administratrix of the estate of the late Yesaya Mkumbo. In that regard, the respondent had no *locus standi* to institute Land Application No. 46 of 2019 before the DLHT as correctly submitted by the counsel for the appellant. The law is clear that, an administrator or administratrix of the estate of the deceased is the one who is mandated to institute a suit on behalf of the deceased. Evidently, the matter before the DLHT ought to have been instituted by a duly appointed administrator or administratrix of the estate of the late Yesaya Mkumbo and not otherwise. In the circumstances, I see no need to proceed to discuss the remaining grounds of appeal as this ground is sufficient to dispose this appeal.

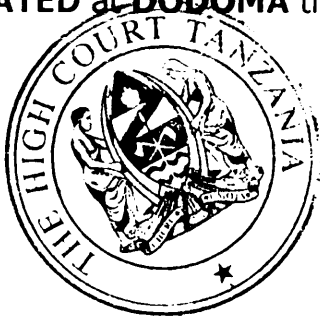
In view of the foregoing reasons, I therefore allow this appeal and quash and set aside the judgment, decree and proceedings of the DLHT.

Notably, the respondent is at liberty to pursue her rights after compliance with the prevailing laws. Each party to bear own costs.

It is so ordered.

Right of appeal explained.

DATED at DODOMA this 10th day of May, 2024



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I.D. MUSOKWA

JUDGE

Ruling delivered in the presence of the appellant and his advocate, Mr. Isaya Nchimbi, and in the presence of the respondent.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA

JUDGE

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