

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 69 OF 2023/26355 OF 2023

(Originating from Land Application No. 27 of 2023, District Land and Housing Tribunal for Mbulu)

BONIFACE KIRWAY (Administrator of the

estate of the late **AMSI AKONAAY INDOY**.....**APPELLANT**

VERSUS

SAKRI DEENGW.....**RESPONDENT**

JUDGMENT

04th April & 23rd May, 2024

KAMUZORA, J.

Before the District Land and Housing Tribunal for Mbulu (hereinafter referred to as the trial tribunal), the Appellant sued the Respondent for recovery of piece of land measuring about 31.1 meters (North), 60.1metres (East) 38 meters and 42 meters (West) situated at Kainam village in Kainam ward within Mbulu district (hereinafter referred to as the suit land). The Appellant claimed that the suit land was owned by the late Amsi Akonaay Indoy and was used for farming activities but the

Respondent trespassed into the suit land in 2021 and started farming activities. The Respondent denied trespass allegation and claimed that the suit land was acquired by her late husband and she has been using the suit land since 1989 after her husband passed away.

After hearing the parties, the trial tribunal decided in favour of the Respondent as it declared her the lawful owner of the suit land. The Appellant was aggrieved with the decision and preferred the instant appeal with three grounds of appeal as follows;

- 1. That, learned chairman of the trial tribunal misdirected himself in declaring the Respondent as the lawful owner of the suit land while her evidence conflicts with her written statement of defence.*
- 2. That, the learned chairman of the trial tribunal misdirected himself in declaring the Respondent as the lawful owner of the suit land while there was inconsistency in the evidence between the Respondent and her witnesses.*
- 3. That, the learned chairman of the trial tribunal misdirected himself in declaring the Respondent as the lawful owner of the suit land without making proper analysis of the evidence of the parties, resulting to unjust decision.*

When the appeal was called for hearing, Mr. Abdallah Kilobwa learned advocate represented the Appellant but the Respondent appeared

in person. The Respondent claimed not to be fluent in Swahili language thus, Elibarick Ami was sworn in to aid in interpreting from Kiswahili into Iraqw language and *visé versa*.

In his submission in support of the first ground of appeal, Mr. Kilobwa submitted that the trial tribunal erred in declaring the Respondent the lawful owner of the suit land while there was contradiction between her evidence and the written statement of defence. He explained that in her evidence the Respondent claimed to have been allocated the suit land by his father-in-law one Muhindoy Akonnay in 1974 while in her written statement of defence, particularly under paragraph 4, the Respondent claimed that she was allocated the suit land by her late husband in 1989.

The learned advocate argued that such contradiction goes to the root of the matter on how the Respondent acquired the suit land. He prayed this court to consider that parties are bound by their pleadings as it was held in **James Funke Gwagilo Vs. Attorney General** [2004] TLR 161. He insisted that since the evidence was inconsistent with the pleadings, the Respondent would not have been declared the lawful owner of the suit land.

On the second ground, Mr. Kilobwa submitted that there was contradiction in the evidence between the Respondent and her witnesses. He explained that while the Respondent claimed that suit land to be $\frac{3}{4}$

acres, her witnesses claimed the suit land to be 1/5 acres. He argued that, since there was contradiction in evidence, the trial tribunal should not have relied upon such evidence to decide in favour of the Respondent.

Submitting on the third ground of appeal, Mr. Kilobwa argued that the trial tribunal failed to analyze the evidence on record reaching to an erroneous conclusion. That, had the trial tribunal scrutinized the evidence, it could have reached into a different conclusion that the Appellant is the lawful owner of the suit land. He therefore urged this court sitting as the first appellate court to re-evaluate the evidence of both parties and make its decision.

In reply, the Respondent argued that in 1974 her father-in-law allocated his land to three children who are Modest, Hamsi and Ami who is her husband. That, the suit land measures $\frac{3}{4}$ acres and she has right to use it. That, even the clan elders discussed the dispute between her and the Appellant's father and concluded that she is the lawful owner of the suit land but the Appellant is therefore bringing the same issue again. She insisted that the trial tribunal correctly decided the matter.

I have carefully gone through the three grounds of appeal and the pertinent issue is whether the trial tribunal correctly declared the Respondent as the lawful owner of the suit land. In responding to that issue, the three grounds of appeal will be determined jointly. From those

grounds, the learned advocate for the Appellant is faulting the trial tribunal for its failure to address the inconsistency between the pleadings and evidence, failure to consider the contradiction in evidence and failure to properly analyze the evidence on record. To him, those three things made the trial tribunal to reach to unjust decision.

Starting with failure to address the inconsistency between the pleadings and evidence, I revisited the records and indeed, the Respondent pleaded in her written statement of defence that the suit land was allocated to her husband in 1974 who gave her the same in 1989 and that she has been residing and using that land since then until now. She contended that the suit land was trespassed into by the late Amsi Akonaay Indoy in 2021 but failed to prove his ownership. In her testimony, the Respondent claimed that the suit land was allocated to her and her husband by her father-in-law in 1974 and was using the suit land since then but the dispute arose after the death of her husband. The difference is alleged on who allocated the suit land to her husband and the year to which she claimed to start owning the land. From the record, the year 1974 was mentioned both in the written statement of defence and in her testimony. My understanding to the pleadings and the proceedings is that, when she mentioned the year 1974, she was referring her co-ownership with her husband and when she mentioned the year 1989, she was

referring her ownership in the absence of her husband. For that reasons, I do not see material contradiction to vitiate her evidence.

On the argument that there was contradiction in evidence between the Respondent and her witnesses regarding the size of the suit land, I have carefully gone through the trial tribunal's proceedings. The Respondent's mentioned the size of the suit land as $\frac{3}{4}$ acre at page 16 of the typed proceedings. Her two witnesses also mentioned the same size of the suit land; SU2 mentioned $\frac{3}{4}$ acre at page 18 of the typed proceedings and SU3 mentioned $\frac{3}{4}$ acre at page 20 of the typed proceedings. I did not find any contradictory evidence regarding the size of the suit land from the Respondent and her witnesses. I therefore find this issue unfounded.

On the argument that there was no proper analysis of evidence by the trial tribunal, I have carefully read the trial tribunal's judgment. In fact, the tribunal chairman captured a brief summary of the case, summarized the evidence and captured issues guiding the decision. There is clear analysis and evaluation of evidence from both parties at page 5 of the typed judgment before he came to a conclusion deciding in favor of the Respondent. I had ample time to assess the tribunal's evaluation in evidence and I am satisfied with the conclusion reached thereto. For

purpose of clarity, I will demonstrate why I support the trial tribunal's conclusion.

The Appellant was the complainant before the trial tribunal hence was bound to establish his claims on balance of probability that suit land forms the estate of the late Amsi Akonaay Indoy. In an attempt to substantiate his claims, the Appellant testified before the trial tribunal and called four more witnesses.

In his evidence, the Appellant claimed that the suit land was the property of the deceased because he used to see him using the suit land. The Appellant did not give explanation on how the suit land was acquired by the deceased. When responding to a question posed by the learned trial chairperson, he agreed that he was not aware as when the suit land was acquired as he was not present when the late Amsi Akonaay Indoy acquired the suit land. Other witnesses who testified for the Appellant did not give plausible explanation on how the deceased acquired the suit land. SM2 claimed to be the wife of the late Amsi Akonaay and testified that upon getting married to her husband, she found her father-in-law using the suit land and later gave the same to her husband. That, the Respondent was staying in SM2's house and never owned the suit land. When probed with questions, she gave different stories; at first, she claimed that the Respondent was staying with her in her house but later,

she changed the story and claimed that the respondent was staying at Karatu before she again changed the story and claimed that her husband constructed a house for the Respondent on the suit land. This somehow supports the Respondent's account that she had been the one using the suit land and not the family of Amsi Akonaay.

SM3, claimed that the suit land belongs to her father but when cross examined, she admitted that she was not present to witness the allocation of the suit land to her father. SM4 one Bernatus Bernad is the village chairman but he started attending the conflict over the suit land by 2000. He however admitted to have not witnessed the allocation of the suit land to Amsi Akonaay. SM5 also never testified on how the suit land was acquired by the late Amsi Akonaay except that he witnessed Amsi selling trees from the suit land. SM5 testified further that he participated in surveying the suit land in 2003 after they were informed that the land belonged to Amsi Akonaay but admitted not to be aware on how the suit land was acquired by the late Amsi Akonaay.

Based on the above evidence, I respectfully differ from the argument by the learned advocate for the Appellant that such evidence was strong proving the Appellant to be the lawful owner of the suit land. Such evidence in my view, was not sufficient enough to prove the claim for ownership on the balance of probabilities. Instead, the Respondent's

evidence was more convincing for anyone to believe that she is the lawful owner of the suit land. She demonstrated that she and her husband had been using the suit land since 1974 and when her husband died, he left her using the suit land. Such fact was supported by SM2, the wife of the late Amsi Akonaay who admitted in her evidence that her husband constructed a house for the Respondent on the suit land and she was residing and taking care of her children in the suit land.


In his evidence, the Appellant admitted that there was dispute over the suit land between the late Amsi Akonaay and the Respondent in which, a suit was instituted but dismissed. Thus, the Appellant's claim that the Respondent trespassed into the suit land in 2021 is baseless. The Respondent's evidence was also supported by SU2 and SU3. SU2 explained that the suit land was originally owned by the Respondent's father-in-law who is also the father to the late Amsi Akonaay. That, there was a dispute between the late Amsi Akonaay and the Respondent, they resolved the dispute by installing demarcations between the Respondent's land and the land of the late Amsi Akonaay. That, the Respondent has never moved out of the suit land and she has been living there and using the suit land since 1974. SU3 is the Respondent's daughter who claimed that she was she grew while knowing that the suit land belonged to her

family. She denied the fact that her mother shifted to Karatu at any point in time.

From that evidence, this court is satisfied that the Respondent's evidence was strong and convincing to conclude that she is the lawful owner of the suit land. The trial tribunal therefore correctly decided in her favour and I find nothing tangible to fault its decision. I therefore find the appeal lacking in merits and I proceed to dismiss it with costs.

DATED at **BABATI** this 23rd Day of May 2024.




D. C. KAMUZORA
JUDGE