

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF ARUSHA AT ARUSHA
AT ARUSHA
LAND APPEAL NO. 08 OF 2023**

(C/F Land Application No. 50/2017 before the District Land and Housing Tribunal for Karatu)

**PETRO HABIYE (Administrator of the Estate of the
Late Axwesso Modaha.....APPELLANT**
Versus
NAWE AXWESSO.....RESPONDENT

JUDGMENT

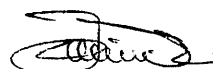
03rd & 10th May 2024

TIGANGA, J.

The appellant being dissatisfied with the decision of the District Land and Housing Tribunal for Karatu, (the trial Tribunal) in Land Application No. 50 of 2017, has lodged this appeal advancing four (4) grounds of appeal as follows;

- 1. That, the trial District Land and Housing Tribunal erred in the land (sic) and facts in not holding that the Respondent was unable to prove his case on preponderance of probabilities.*

- 2. That, the trial Tribunal erred in law and facts in being unable to analyze evidence on record and thereby arriving at an erroneous conclusion.*



3. *That, the Chairperson of the District Land and Housing Tribunal and two other members of the Tribunal erred in law in cross-examining the parties' witnesses instead of asking questions for clarification.*
4. *That, the transfer of the case file to the Chairperson who had concluded the hearing and composed the judgment resulted in misapprehension of the facts of the case and the resultant erroneous decision.*

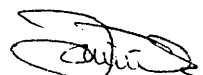
The appellant prays that the appeal be allowed and the trial Tribunal decision be quashed and set aside.

With leave of the Court, the appeal was heard by written submissions. At the hearing the appellant was represented by Ms. Anna A. Ombay, learned advocate while the respondent had legal services of Mr. Bungaya Matle Panga, learned advocate.

For purposes of brevity and avoidance of unnecessary repetition, I will not reproduce the submissions filed, but I will consider them while determining each ground of appeal. Before determining the grounds of appeal, the brief background of the dispute is apposite.

The Respondent **Nawe Axwesso** instituted a suit against the appellant, that is Land Application No.50 of 2017 before the District Land and Housing Tribunal of Karatu (the trial Tribunal) claiming that the appellant who was the Administrator of the estate of **Axwesso Modaha**, the deceased, combined the disputed land measured 3.25 acres that belonged to the respondent as part of the deceased estate in Probate and Administration Cause No. 81 of 2016, which was filed before Karatu Primary Court. She testified that being the sole surviving heir of the deceased, the Respondent has all the rights to be the owner of the deceased estate. And that the appellant being the grandson of the deceased, had no right to inherit from her grandparents while the respondent who is the child of the deceased is still alive.

In his defence before the trial tribunal, the appellant claimed to be the owner of the disputed land after he was given the same by the deceased. He alleged that he had been the owner of the disputed land even before the deceased had passed away after the deceased had given the same to him. According to him, there was a family meeting that was held when the deceased was alive, and during that meeting, the deceased told him that, she had given him the disputed land.



Based on that evidence, the trial tribunal found the application to be merited and granted the application by declaring the respondent herein to be the lawful owner of the disputed land and ordered the eviction of the appellant from the disputed land.

Disgruntled by the decision and orders of the DLHT of Karatu, the appellant preferred this appeal on the four grounds raised above.

Mr. Bungaya Panga, counsel for the appellant, while combining grounds one, two, and four, submitted that he challenged the way the tribunal analyzed evidence on record which in his view did not prove the case on the standard required by the law in civil cases or cases of civil nature. He further argued that, in paragraphs 6 (a) (iii) of the Application, the Respondent stated that her father transferred the land in dispute to her before her demise, and she had had the same ever since. This is found on page 11 of the typed proceedings.

He contended further that, on page 17 of the typed proceedings, PW2 testified that the land was in occupation of the Respondent's mother who passed away in the year 2016, while the Respondent's father passed away 14 years before 2016. Likewise, the evidence of PW6 on page 29 of the typed proceedings, contradicted PW2's testimony in testifying that the Respondent had been in long use before the death



of her parents. In his view, the respondent's evidence is self-contradicting.

It was his submission therefore that the appellant's version of testimony, that he was asked by his grandfather to stay with him since when he was a very young boy, and that he started and completed primary school while living with his grandparents as proved by the proceedings on pages 36 to 37 of the typed proceedings, stands undisputed. That is the base as to why after the death of his grandmother in 2016, he filed a probate case in which he was appointed the administrator of the estate of his deceased grandmother, He said. According to the counsel, after being so appointed as the administrator, the appellant distributed the land to himself as the sole beneficiary of the deceased estate. It was his submission further that the appellant's evidence was stronger than that of the Respondent therefore the DLHT was supposed to rule in his favour.

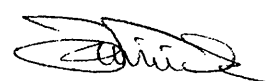
The third ground of appeal raises a complaint that the trial tribunal itself through its members cross-examined the witnesses instead of asking questions for clarification, the Counsel argued that how the trial was conducted indicates in the proceedings that each time after the parties' cross-examination, the Chairman of the tribunal, and assessors

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took part in cross-examining witnesses before the witnesses were re-examined. This has been repeatedly done throughout the hearing conducted from the 12th day of June 2019 to the 17th day of November 2022, when a new chairman Hon. M. R. Makombe, Chairman took the conduct of the matter.

He argued further that, the members of the tribunal went beyond asking questions for clarification as required by law, instead they cross-examined. He cited the case of **Mashaka Juma Ntalula vs The Republic**, Criminal Appeal No. 159 of 2015 (Unreported) to cement his position. He prayed for the whole proceedings, judgment, and decree of the trial tribunal to be nullified with directives that the matter be heard afresh before another Chairman with a different set of assessors.

In response to the appeal, Ms. Anna A. Ombay resisted and opposed the appeal. She submitted that; the respondent proved her case to the required standard. She maintained that the trial tribunal sustained and upheld the evidence of the respondent with blood-related witnesses and the biological father to the appellant after finding the same to be more credible than that of the appellant. In support of that contention, she cited the case of **Joao Oliveri and Another v It**



started in Africa Ltd and Another, Civil Appeal No. 186 of 2020, to cement his position.

In the same line, she argued further that, the appellant is the biological child of the respondent. The evidence is clear that the respondent being the sole child to the late Axwesso Modaha, was given and occupied the land in dispute measured 3 $\frac{3}{4}$ before the demise of her father in 2004, and stayed in occupation of the land undisturbed.

She averred that the testimony of AW2 on page 16 of the typed proceedings, AW1 on page 11, and AW7 on page 31 of the typed proceedings is clear on that issue. She further submitted that the evidence shows that Mrs. Axwesso Modaha died while too old, thus it's illogical to believe that the appellant being the male grandson cared for an old grandmother where her daughter, the respondent was with her.

Furthermore, she submitted that the land in dispute was granted to the respondent before the demise of her parents, and the family meeting on which purportedly the appellant recommended to be the administrator was improperly procured by not involving the respondent, the sole child, and beneficiary to the deceased estate who has interest than anyone whomsoever. The conduct of the appellant of hiding where

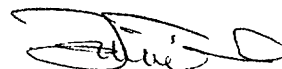
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and when the meeting was held is proof of the appellant's ill motive to robe the respondent's land.

She argued further that, in Exhibit D2, the Primary Court judgment, the appellant being appointed administrator, was directed to distribute the estate solely to the respondent as she was the only child of the deceased. The appellant failed to bring a will or evidence to prove that he was given such land by the deceased.

In respect of the third ground of appeal, Ms. Anna Ombay submitted that throughout the proceedings, the assessor's aid to the tribunal was fair and in conformity with the law by asking questions for clarification. He also submitted that the case cited by the appellant is distinguishable from this case, as in that case the questions asked were geared at testing veracity and not clarification, unlike in this case where the questions asked were for clarification. She in the end asked for the appeal to be dismissed with costs.


Having read the rival submissions by both parties and the judgment of the trial Tribunal, I will commence to address the combined three grounds (that is first, second, and fourth grounds of appeal) as follows:

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I have carefully gone through the records and evidence adduced before the trial tribunal. It is on records that has not been disputed that the appellant is the biological son of the respondent. The respondent is a biological daughter of the deceased; therefore, the appellant is a grandson of the deceased. It is also on record that, initially the appellant instituted Probate Cause No. 81 of 2016 before Karatu Primary Court, and he was appointed as an Administrator of the deceased (his grandmother's) estate. The Appellant used that power as an administrator to distribute the property to himself claiming to be the sole heir of the deceased thus becoming the lawful owner of the same.

That act disgruntled the respondent, consequently, she applied to the trial tribunal to be declared a lawful owner of the deceased property, as she was the sole child and heir of the deceased Aqwesso Modaha. Therefore, being the claimant before the tribunal, in terms of sections 3(2)(b) and 110 of the Evidence Act, the respondent was duty-bound to prove her claim.

It is also elementary that a land case being a case of civil nature, its standard of proof is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is also the law that



the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case.

As it was rightly pointed out by the Hon Chairman, it is a trite principle that he who alleges must prove, this principle was discussed in the case of **BARELIA KARANGIRANGI VERSUS ASTERIA NYALWAMBA, CIVIL APPEAL NO.237 OF 2017, CAT** (Unreported) where the court held inter alia that:

"At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must Prove."

The court went further to highlight the origin of this rule by stating that:-

"The rule finds a backing from sections 110 and 111 of the Law of Evidence Act, [Cap 6 RE 2019] which among other things state:

110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in suits lies on that person who would fail if no evidence at all were given on either side"

Also, in the same case while discussing the evidential burden in civil proceedings the court held as follows: -

"It is similarly, that in civil proceedings, the party with legal burden also bears the evidential burden, and the standard in each case is on the balance of probabilities."

Again, in the case, of **Anthony M. Masanga vs Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 Of 2014, CA, (Unreported) the court held *inter alia* that:

"...in civil cases, the burden of proof lies on the party who alleges anything in his favour..." [emphasis added].

See also the case of **Attorney General & Others vs. Eligi Edward Massawe & Others**, Civil Appeal, No. 86 of 2002, CAT (Unreported).

Before the trial tribunal, parties tried to establish their ownership of the disputed land based on inheritance. Now, in law, to establish proof of land ownership based on inheritance, one will need to follow the legal process outlined by the law. The respondent asserted that the land belonged to her because she was the only surviving heir of her deceased mother, and therefore it was wrong for the appellant to list the land in the estate of the deceased and distribute the suit land to himself.

On the other hand, the appellant averred that; the deceased gave him the land in dispute. However, he did not support his assertion with any proof on how the legal title was transferred (passed) from the deceased to the appellant. In the case of **Serikali ya Kijiji Karumo vs Wahalalika Siyonka**, Land Appeal No. 02 of 2021, this Court at Mwanza Sub-Registry, had a very long and detailed discussion which I opt to borrow and be guided by relating to the mode of acquisition of Land in Tanzania. And held as follows:

*'It is the principle of law that, in this country land may be acquired for ownership by an individual via the following methods, **one**, by one person purchasing it from another. In that process, the vendor must be the lawful owner having also acquired the land legally before he passes title to the purchaser. **Secondly**, land may also be acquired by government or land allocating authority allocating to any person a piece of land on the conditions attached to that grant. **Thirdly**, land may be used by way of inheritance where a person with good title dies and the persons entitled to inherit his estate inherit the land from among the estate of the deceased among the estate of the deceased relative. **Fourthly**, land may be acquired as a gift by a person with a good title giving it to another person out of love and affection.*

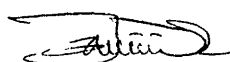
In all these four modes of acquisition, the holder of land



*must have proof of how he acquired the land. For instance, in government allocation, it is expected for a person to prove by offer or right of occupancy/title deed, bearing his or her name. In the mode of acquisition by way of purchase, the person is expected to prove the acquisition and ownership by exhibiting the sale agreement or where the land is registered by transfer. While where the same is by inheritance, **he is expected to show the probate and administration process which really passed the said land from the deceased to him or her. Last, if the acquisition is by way of gift, then the owner is expected to prove it by the deed of gift.** In this case, the respondent said he acquired the land by way of **inheritance**, but he did not in his evidence prove by telling the court the whole administrative process which made him acquire such land."*

In the case before the trial tribunal, there is no evidence led by either of the parties to prove that, she inherited the land by telling the Court the complete legal process of inheritance that proves that the land passed to him or her.

If we are to believe that the deceased, **Axwesso Modaha** passed the title to any of them before dying, then it was expected the deed of gift to be given in proof of that transfer. It is the cardinal principle of law that, every land transfer must be in writing. In the instant appeal, it is vivid that no will, deed of gift, or sale agreement was produced before

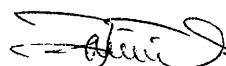


the trial tribunal to prove his alleged mode of acquisition of the land in dispute, instead of mere words.

I have scrutinized the records of the trial tribunal, to ascertain whether the respondent successfully proved to be the lawful owner of the deceased estate. To my dismay, that was not done.

It is my firm view that, the respondent is obliged to prove that she acquired the disputed land, under the sober and proper procedures enshrined under the probate administration of estates process. Before the land Court, one cannot claim to own the land by inheritance from the deceased just by being the sole child of the deceased. The inheritance procedures required that one should undergo the whole process of the land being distributed by the appointed administrator to him as an heir. That process should be after the filling of inventory and final accounts detailing how the distribution was done and lastly, the closure of the probate cause itself.

Having gone through the records of the trial tribunal, I have not seen anywhere in the trial tribunal records which reveals that, the respondent acquired that disputed land under the normal probate rules of procedures. The records reveal no proof that the inventory or final account of the deceased estate was adduced before the trial tribunal as

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evidence or as an exhibit to prove that the respondent acquired the said disputed land. Although the respondent may have proved to be the sole heir of the deceased something that entitles her to be the owner, for there is no evidence that repudiates that fact. I hesitate to hold so in this case and it was dangerous for the trial tribunal to do so without the said respondent passing the probate and administration process first and before the probate Court.

Neither did the appellant do the same, to be entitled to be declared as the owner of the disputed land. Therefore, the mere fact that he was appointed as an administrator of the deceased estate before Karatu Primary Court, did not automatically make him the owner of the said property.

In my strong view therefore, both parties, neither the appellant nor the respondent, successfully proved before the trial tribunal and this court that; they are the lawful owners of the disputed land. It is through the due process of inheritance, that one can acquire land that initially belonged to the deceased, this was not proved before the trial tribunal.

More so, both parties agreed that the landed property in dispute initially belonged to the deceased. As a matter of fact, and law as the title of land in dispute was never transferred nor disposed, of under the

due process of the law, be it inheritance or any other form of disposition.

Then, holding that the disputed land is still under the ownership of the deceased one Axwesso Modaha is the correct position, until the due process of inheritance threshold is met, as stipulated on the specific probate rules of procedures governing that particular deceased estate. By the above findings, I have found that the first, and second grounds of appeal have merit. Whilst, the third, and fourth grounds are devoid of merit.

For those reasons, I hereby allow the appeal, to quash the decision and orders of the DLHT of Karatu. The appeal is partly allowed to the extent explained above. Although the appeal is partly allowed, but between the parties, there is no one to be declared as the lawful owner following the fact that none of them has proved the ownership. That said, parties are advised to go back to the probate court to establish who is the rightful heir. No order as to costs.

DATED delivered at **ARUSHA** this 10th day of May 2024.




J. C. TIGANGA

JUDGE