

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB - REGISTRY)

AT IRINGA

LAND APPEAL NO. 31 OF 2023

*(Originating from the District Land and Housing Tribunal for Njombe at
Njombe in Land Application No. 4 of 2022)*

MESHACK NDEWELE APPELLANT

VERSUS

TEREZA MKINGA RESPONDENT

JUDGMENT

Date of last Order: 02/05/2024
Date of Judgment: 30/05/2024

LALTAIKA, J.

The Appellant herein **MESHACK NDEWELE** is dissatisfied with the decision of the District Land and Housing Tribunal for Njombe at Njombe (the DLHT) in Land Application No. 4 of 2022. He has appealed to this court by way of a memorandum of appeal containing six grounds. I take the liberty to reproduce them hereunder not only for record keeping purposes but also for ease of reference:

- 1. That the trial tribunal erred in law and fact for entertaining the matter that was already determined by the Lifuna ward tribunal in the favour (sic!) of the appellant.*
- 2. That the applicant had no power to sue since the property was of his (sic!) father one George Mkinga who died in 2007.*
- 3. That the trial tribunal erred in law and fact in deciding the land dispute in favour of the respondent who claimed the disputed land being of her father who was not even mentioned by the respondent but said to be dead since 2007 hence the respondent had no locus to sue for recovery of estate of the deceased including the disputed land.*
- 4. That the trial tribunal erred into (sic!) law and fact for entertaining the matter without determining boundaries of the disputed land as required by the development of the law.*
- 5. That the trial tribunal erred in law and fact in deciding the land in dispute over the property of the deceased after a lapse of 15 years since his died (sic!) without observing requirements of s. 9(1) of Cap 89 R.E. 2019.*
- 6. That the trial tribunal erred in law and fact for failure to evaluate good and heavier evidence adduced by the appellant than that of the respondent.*

A brief factual backdrop necessary to connect the dots is considered essential. The Appellant and Respondent are daughter and son to the late Mzee George Mkinga and Mzee Yohana Ndeweke respectively who lived in

the **slopes of Ipala Mountains** in the early 1980's. It appears that initially the late Mkinga was a resident of Makonde but moved to Nsisi where he was welcomed by Mzee Ndewele and given a piece of land to cultivate.

The disputed land is located in what is now known as Kinywesi Hamlet, Nsisi Village, Lifuma Ward in the District of Ludewa in Njombe (in those years it was a part of Iringa Region). It is estimated to be about five (5) acres and valued at TZS 3,000,000/= It is an agricultural land allegedly used by the Appellant for agroforestry.

In 2022, the Respondent knocked the doors of the DLHT lamenting that the Appellant had invaded her land and used for cultivation. She told the tribunal that although her late father was initially given a piece of land by one Yohana Ndewele aka Yohana Mungumungu way back in 1982, he decided to establish a new settlement (the suit land) on the other side of the Ipala. She claimed that her father had returned the land initially given to him and that the suit land was not a part of the said land. The Appellant on his part, refuted the allegations insisting that the suit land belonged to his late father *Mzee* Ndewele and that he was the administrator of estate of his late father.

Having considered the evidence of both parties including testimonies of three witnesses each, the DLHT ruled in favour of the Respondent. The tribunal declared her the rightful owner of the suit land and proceeded to order the Appellant and any of his relatives to refrain from interfering with the Respondent's peaceful enjoyment of the suit land. The Appellants is strongly dissatisfied with the said decision of the DLHT hence this appeal.

When the appeal was called on for hearing on the 5th of March 2024, the Appellant appeared through **Mr. Octavian Mbungani, learned Advocate**. The Respondent, on the other hand, appeared in person unrepresented. Parties chose to proceed by way of written submission and having received a note of acceptance from this Court, the following schedule was ordered: (i) The Appellant's written submission to be filed on 19/3/2024. (ii) The Respondent's reply to be filed on 2/4/2024 (iii) The Appellant's rejoinder if any to be filed on 9/4/2024 (iv) Mention for necessary orders to fix the date of Judgement 9/4/2024.

Save for a slight deviation, the schedule was complied with satisfactorily, and I hereby register my commendation to Mr. Mbungani and the unanimous legal aid provider who assisted the Respondent for complying

with the Court's order. The next part of this judgment is a summary of submissions by both parties.

Mr. Mbungani submitted that the appellant had lodged six grounds of appeal. He indicated that he would address the first ground of appeal separately and argue the remaining grounds together. On the first ground, he cited Section 10 of the **Civil Procedure Code Cap 33 R.E. 2019**, which prohibits the respondent from instituting a further suit on the same cause of action in any court to which this code applies.

According to Mr. Mbungani, the appellant had previously instituted land case No. 01/2022 at the Lifuma ward tribunal, which was heard *ex parte* due to the respondent's failure to attend despite numerous summonses. The judgment was in favor of the appellant, as evidenced by the testimony of Onesmo George Mkinga (witness no. 2 from the applicant in the trial tribunal, now the appellant).

Mr. Mbungani pointed out that this fact was undisputed by the respondent during the trial at DLHT, implying acceptance of the appellant's position. He referenced the case of **Tom Morio vs. Athumani Hassan and 3 Others**, Civil Appeal No. 179 of 2019 (unreported) CAT at Arusha, which

held that failure to challenge a witness on a serious matter ordinarily implies acceptance of the witness's evidence. He also cited **Maginiko Petro vs. The Republic**, Criminal Appeal No. 552 of 2019, where the CAT speaking through Wambali JA found that the appellant's failure to cross-examine witnesses and offer a defense implied agreement with the testimony presented.

Mr. Mbungani argued that once a matter is decided by a competent authority, the dissatisfied party should seek remedies available thereafter, not initiate a fresh suit on the same matter. He cited **Pravin Girdhar Chavda vs. Yasmini Nurini Yusufali**, Civil Appeal No. 165 of 2019, where the CAT (with Kihwelo J.A. as its mouthpiece) stated that fresh litigation on the same matter should not be permitted, as it would lead to endless litigation.

Mr. Mbungani also referenced **Jebra Kambole vs. The Attorney General**, Civil Appeal No. 236 of 2019 (CAT), where Kihwelo J.A. emphasized that the rule of res judicata is based on public policy to ensure finality of court decisions and prevent repeated litigation. He argued that the respondent's fresh suit contravened the principle of res judicata.

On the second ground of appeal, Mr. Mbungani argued that the respondent lacked the locus standi to sue over the properties of her late father, George Mkinga, who died in 2007. He cited the principle that only a person whose rights or interests are interfered with can bring a claim, referencing **Chama Cha Wafanyakazi Mahotelini na Migahawani Zanzibar (HORAU) vs. Kaimu Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar**, Civil Appeal No. 300/2019 (unreported).

Mr. Mbungani further argued that the respondent's claim to the land after over 15 years violated the law of limitation, which allows only 12 years to recover land from the date of the deceased's death, as stated in Section 9 (1) Cap 89 R.E. 2019 and the case of **Yusuph Same and Another vs. Hadija Yusufu** [1996] TLR 347.

On the sixth ground, Mr. Mbungani contended that the trial tribunal failed to evaluate the evidence properly. He forcefully submitted that the respondent could not demonstrate how she acquired the disputed land and was not the administratrix of George Mkinga's estate, lacking the legal standing to sue. The appellant however, Mr. Mbungani reasoned, tendered a letter for the administration of estates, strengthening his position. Mr.

Mbungani prayed for the court to allow the appeal and dismiss the trial tribunal's judgment and orders with costs.

In her reply to the above submission by counsel for the Appellant, the Respondent stated that it was proper for her to file a fresh suit in the DLHT because, at that time, the law did not provide a remedy for setting aside an ex parte judgment.

The Respondent pointed out that during the filing of the case at the Ward Tribunal, jurisdiction was a critical consideration. The estimated value of the land was TZS twenty million (20,000,000), which exceeded the pecuniary jurisdiction of the Ward Tribunal. Therefore, the Lifuma Ward Tribunal lacked jurisdiction when the Appellant filed the complaint. Consequently, the concept of res judicata did not apply since the matter was heard and decided by an incompetent authority. For a matter to be res judicata, the Respondent averred, the forum must be competent, as established in the case of **Peniel Lotta v. Gabriel Tanaki and 2 others** (Civil Appeal No. 16 of 2001) [2001] TZCA page 3.

The Respondent argued that it was wrong from the beginning for the matter to be brought before the Ward Tribunal. Considering the Ward

Tribunal made an ex parte judgment and there was no remedy for setting it aside, she filed a fresh suit in the District Land Tribunal, which was the proper forum to hear and determine the matter. Thus, the question of res judicata did not apply.

Addressing the second ground, the Respondent countered the Appellant's argument that she had no locus standi to sue for her late father's properties. She asserted that she was the owner of the disputed land, which she inherited from her father after his death in 2007. She testified during the trial that her father had acquired the land by clearing a bush, and after his death, she succeeded to the land.

The Respondent proved her ownership by specifying the disputed land and its boundaries. Even her second witness testified that the land belonged to her father, Mr. George Mkinga, who acquired it by clearing the bush. This testimony, as seen on page 7 of the proceedings and page 2 of the trial tribunal's judgment, indicated that Mr. Mkinga had returned land given to him by Mr. Ndeweke. The Respondent contended that the Appellant sought to take advantage and obtain both lands.

She argued that she had locus standi to sue for her property, as explained in the case of **Lujuna Shubi Balonzi v. Registrar of Chama cha Mapinduzi** [1996] TLR 203.

On the issue of time limitation for recovering land, the Respondent contended that she had never lost ownership of the property. According to the records of the district tribunal, she had been using the land for over 40 years and remained the owner under adverse possession, having stayed on the land for more than 12 years without disturbance. This was supported by the case of **Registered Trustee of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others** Civil Appeal No. 193 of 2016 (CAT Arusha).

Additionally, she testified that she had gone to the Makonde Ward Tribunal, where she won against Andrea and Salai, with the Appellant as their witness. Therefore, the provision on time limitation was not applicable, as she had not lost ownership until the Lifuma Ward Tribunal's decision, which was by an incompetent authority.

Regarding the sixth ground of appeal, where the Appellant argued that the trial tribunal erred in fact and law by failing to evaluate better evidence

than that of the Respondent, she countered that the number of evidence does not guarantee victory. While the Appellant had numerous pieces of evidence, none linked to the disputed land. For instance, Exhibit No. 2, an agreement of handing over land given to Mr. George and his fellow, did not specify that the disputed land was one of the returned lands.

The Respondent maintained that her testimony and that of her witnesses were sufficient to establish her rightful ownership of the land. She referenced the case of **Joachim Ndembele v. Maulid M. Mshindo and Another** Civil Appeal No. 106 of 2020 (Unreported), where it was ruled that land ownership need not be proven by documents alone but could be established through testimony.

She concluded by stating that she had testified in the trial tribunal on how she acquired the disputed land, demonstrating her rightful ownership. Her witnesses corroborated her claim, knowing the land's location and specifications, contrary to the Appellant's witnesses, who lacked detailed knowledge of the disputed land. This was noted by the Honorable Chairman of the trial tribunal on page 4 of the judgment. Therefore, the Respondent prayed for the Honourable Court to dismiss the appeal with costs.

In his rejoinder submission, Mr. Mbungani pointed out that the respondent admitted there was a judgment from the Lifuma Ward Tribunal in favor of the appellant. However, she incorrectly claimed that there was no remedy to set aside an *ex parte* judgment at that time. Mr. Mbungani questioned why, if this were true, the respondent did not appeal the judgment or take any other action until 2022, two years after the Lifuma Ward Tribunal's judgment.

Mr. Mbungani addressed the respondent's argument that the Lifuma Ward Tribunal lacked jurisdiction because the value of the disputed land was Tshs 20,000,000, and thus, the concept of *res judicata* did not apply. He emphasized the principle that a judgment holds power until it is challenged and quashed by a higher court or competent authority. He argued that the respondent should have challenged the Lifuma Ward Tribunal's jurisdiction at the Njombe District Land and Housing Tribunal rather than filing a fresh land case on the same matter with the same parties, which is against the law and invokes *res judicata*. If the respondent believed the ward tribunal lacked jurisdiction, she should have used it as a ground for appeal, not a point of argument at this stage.

He further contended that the respondent's claim that the Lifuma Ward Tribunal lacked jurisdiction due to pecuniary limits was an afterthought. He maintained that the court now has no mandate to address such issues in this manner, as there are proper legal procedures to challenge such judgments. Therefore, he argued that this point was baseless and should be dismissed.

Regarding the respondent's locus standi to sue, Mr. Mbungani noted that the respondent claimed locus standi because she inherited the land from her father after his death in 2007. He argued that there are legal procedures for inheriting land, which the respondent did not follow. He pointed out that the respondent's father died in 2007, but she instituted the land case in 2022, which violates the law of limitation under Cap 11, Section 9(1). He asserted that it is legally wrong to recover land of a deceased person after 12 years and that there was no good evidence to support the respondent's claim of using the disputed land for 40 years.

Mr. Mbungani addressed the sixth ground of appeal, stating that the respondent's submission merely discussed the quantity of evidence and Exhibit No. 2 regarding the handling of the disputed land to the appellant's family. He emphasized that it was undisputed that the disputed land was handed over to the appellant's side, belonged to the appellant, and that the

respondent's father, who died in 2007, was no longer alive. He argued that the respondent had no standing to claim her late father's land 15 years after his death when she filed the dispute in the Njombe District Land and Housing Tribunal.

Mr. Mbungani concluded that the trial tribunal had a duty to evaluate all these points but failed to do so. He believed the trial tribunal did not properly evaluate the appellant's stronger and more substantial evidence compared to that of the respondent.

I have dispassionately considered the rival submissions and keenly examined the records of the trial tribunal. The following five (5) issues call for determination

- (i) *Whether the Lifuma Ward Tribunal had jurisdiction to adjudicate the matter.*
- (ii) *Whether the principle of res judicata applies.*
- (iii) *Whether the respondent had locus standi to sue.*
- (iv) *Whether the respondent's claim is barred by the law of limitation.*
- (v) *Whether the trial tribunal properly evaluated the evidence*

On the first issue, the respondent contends that the Lifuma Ward Tribunal lacked jurisdiction as the value of the disputed land was Tshs

20,000,000, exceeding the tribunal's pecuniary limits. The appellant, however, maintains that the judgment of the Lifuma Ward Tribunal should stand until overturned by a higher court.

In the case of **Peniel Lotta v. Gabriel Tanaki and 2 others**, (supra), it was held that for a matter to be *res judicata*, the forum must be competent. Given the uncontested evidence that the Lifuma Ward Tribunal lacked jurisdiction, its decision is void ab initio. Therefore, this court finds that the Lifuma Ward Tribunal did not have jurisdiction to determine the matter, and thus, its judgment cannot have a *res judicata* effect.

In **Pravin Girdhar Chavda v. Yasmini Nurini Yusufali**, (supra), it was emphasized that *res judicata* applies only when the earlier decision was rendered by a competent authority. Hence, the respondent's fresh suit before the Njombe District Land and Housing Tribunal was appropriate and necessary to address the jurisdictional defect of the Lifuma Ward Tribunal.

Coming to the *locus Standi* of the Respondent, the appellant contends that the respondent lacked *locus standi* to sue for her late father's property without proper letters of administration. The respondent argues that she succeeded to her father's land upon his death. I see no merit on this

technicality. The respondent has consistently testified and provided evidence that she inherited the land from her father and has been in possession of it, thus demonstrating a legitimate interest. Not all families in this country who inherited land from their deceased ancestors went to court to obtain letters of administration of such estates. This is a legal technicality per excellence. Legal technicalities, if unchecked, can be used as tools for daylight robbery.

As for limitation period, the appellant asserts that the respondent's claim is barred by the limitation period under Section 9(1) of the Law of Limitation Act, Cap 89 R.E. 2019. The respondent counters that she never lost ownership and has been in adverse possession for over 40 years. In **Registered Trustee of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others**, Civil Appeal No. 193 of 2016, the court held that continuous and undisputed possession for over 12 years establishes adverse possession. The evidence indicates that the respondent has been in possession of the land for an extended period, thereby negating the appellant's limitation defense.

This brings me to the last issue which is an important part of my task as the first appellate court namely evaluation of evidence. The appellant

argues that the trial tribunal failed to evaluate the evidence properly. However, the respondent and her witnesses provided consistent and credible testimonies regarding the ownership and history of the land, which the trial tribunal found persuasive. I also found the history not only appealing but also credible.

In **Joachim Ndembele v. Maulid M. Mshindo and Another** (supra), it was noted that land ownership should not necessarily be proven by documents but can be established through credible witness testimony. The trial tribunal correctly relied on the respondent's comprehensive testimonies and evidence, which were sufficient to establish her claim.

In the upshot, I find that the appeal lacks merit. The same is hereby dismissed with costs. The judgement and all orders of the DLHT for Njombe are upheld.

It is so ordered.



E.I. Laltaika

E.I. LALTAIKA
JUDGE
30.05.2024

Court

Judgement delivered under my hand and the seal of this court this 30th day of May 2024 in the presence of the Appellant in person and in the absence of the Respondent.

 *E.I. Laltaika*
E.I. LALTAIKA
JUDGE
30.05.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

 *E.I. Laltaika*
E.I. LALTAIKA
JUDGE
30.05.2024