

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

LAND APPEAL NO. 188 OF 2022

(Arising Out of Land Application No. 98 of 2022 before the District Land & Housing Tribunal for Arusha at Arusha.)

SIARA MOYAKI MOLLEL _____ **APPELLANT**

VERSUS

HERI KOWERO _____ **RESPONDENT**

JUDGMENT

06/03/2024 & 03/05/2024

BADE, J.

Aggrieved by the judgment of the District Land and Housing Tribunal for Arusha at Arusha (Henceforth "The Land Tribunal"), the Appellants herein lodged this appeal to challenge it. The grounds of appeal are reproduced verbatim hereunder;

- i.* That, the trial tribunal erred in law and in fact for holding that the land in dispute was properly purchased by the Respondent's son and that the Respondent was right to interfere with the Appellant's process of registration/survey of the said land with the pretext of protecting his deceased son's land while the Respondent was not

the administrator of the estate of the deceased an act which rendered injustice to the Appellant herein.

- ii.* That, the chairperson of the trial tribunal failed to evaluate the evidence adduced by the Appellant herein and his witnesses in particular PW3 who categorically told the tribunal that the land in dispute is owned by the Appellant and that he misled himself by making a human error in signing the purported sale agreement which was brought to him while at home without even seeing the parties to the contract but the record to the judgment did not reflect any thing on this strong statement, an act which rendered injustice to the Appellant.
- iii.* That, the Chairperson of the trial tribunal misled himself by contending that, the Respondent's act to interfere with the process of registration of the disputed land was right while the administrator of the estate of deceased Rodrick Kowero who could take action to protect the same did not see the reason to interfere therewith.
- iv.* That, the Chairperson of the trial tribunal misled himself by holding that the Respondent's act of interfere with the Appellant registration of the land in dispute with the pretext of protecting

the land of his deceased son was right and held that he did not see reason why the Appellant herein instituted case against the Respondent while the land was not owned by him (Respondent) an act which is contradictory.

- v. That, the Chairperson of the trial tribunal mislead himself by entering into judgment the facts contrary to what was adduced by the witness PW3, an act which rendered injustice on the part of the Appellant and make the judgment unreliable.
- vi. That, the Chairperson of the tribunal erred in law and in fact for admitting exhibits D1 and D2 despite being objected by the Appellant's advocate for being forged and unworthy admission, an act which rendered injustice on the part of the Appellant.

Before going to the merits of this appeal I will briefly look at the background that led to this appeal. The Appellant sued the Respondent before the District Land & Housing Tribunal for Arusha, claiming that the Respondent trespassed into his land measuring 12 meter length and 8 meter width which is located at Simanjiro Hamlet in Sombetini Ward within City of Arusha.

It was the Appellant's evidence that the disputed land belongs to him given to him by his parents, and that the disputed land was given to

the Respondent's son who is now deceased for him to do business and then divide and share the profit. That, the dispute arose in 2019 when the Respondent interfered with the process of measuring the disputed land by removing the beacons.

On the other side, the Respondent testified that the disputed land belonged to his son now deceased, and that after his death the disputed land was under the administrator of his estate by the name of Elimwokozi Heri Anaseli Kowero. the Respondent further testified that his son bought the disputed land from the Appellant and there is a sale agreement to that effect. That, before his death his son built his shop and left it to his sister for her to sell veggies. He also erected a foundation on the disputed land and was not interfered by any person. The Respondent further testified that, the dispute arose when surveyors erected a beacon on the disputed land, of which he complained of and the beacons were removed.

This appeal was disposed of by way of written submission with the Appellant being represented by Advocate Mr. Jacob V. Malick, while the Respondent enjoyed the service Mr. Willson Ezekiel, also learned Advocate.



Counsel for the Appellant dropped the second and fifth grounds of appeal and submitted on first, third and fourth grounds of appeal jointly and the sixth ground separately.

Mr. Malick submitted that the Respondent had no locus standi to interfere with the Appellant process of registration of the disputed land. He referred this court at page 3 of the typed proceedings. That, the administrator of the estate of the Respondent's son one Elimwokozi Heri Anael Kowero lives in the same hamlet where the disputed land was situated meanwhile the Respondent lives in Moshi District, over 100kms from the disputed land. Its Mr. Malick's contention that it is true that the administrator of the estate of the deceased was legally bound to take action in case of any interference with the deceased's estate and not the Respondent who is the father of the deceased, and that he was not the administrator of the estate of the deceased. He also admitted that the Respondent if he had perceived any unwanted conduct against the estate of the deceased, should have simply informed the administrator of the estate of the deceased and advise him to take action to curb the situation rather than interfered as he did. Mr. Malick insisted that the Chairperson of the tribunal should have noted that the Respondent had no locus standi to get involved into what the Respondent alleged to be

protecting his son's property while the administrator of the deceased estate was present. He referred this court to page 5 paragraph 2 of the trial tribunal's judgment.

Moreover, Mr. Malick submitted that the Respondent was the right person to be sued for interference with the Appellant in the process of registration of the disputed land and had no locus standi to act as such, insisting that it is a misconception for the Chairperson of the tribunal to hold that the Appellant had no locus standi to sue the Respondent. Mr. Malick further argues that the Respondent is a right person to be sued since the intermingling and interference was done by him having no legal authority from the administrator of the estate of the late Rodrick Kowero to so do. To support his position, he cited the cases of **Hamisi Waziri vs Mwanaidi Salim**, Misc. Land Application No. 13 of 2020 and the case of **Wiliam Sulus vs Joseph Samson Wajanga**, Civil Appeal No. 193 of 2019.

He further contended that DW3 on his testimony when shown the document (exhibit D1) at his house by the late Rodrick H. Kowero, who was his friend during his lifetime was requested to sign it. He alleged that since he trusted his friend and knew the other party to the contract (PW1) as he was a ten cell and customary leader, he did

not hesitate to sign it despite the fact that he did not see the parties to the contract entering into the agreement. He reasoned that it is wrong for the Chairperson of the tribunal to find for the Respondent herein basing on the existence of exhibit D1 and D2. Mr. Malick argues the Respondent was not a right person to tender exhibit D1 and the said exhibit contains contradicting information. That, the Respondent was not there when the alleged contract of sale was contracted, neither was he a party to the contract nor a witness, which meant he knew nothing about the purported contract, so he could not legally tender it to defend this case. He further added that the Chairperson of the tribunal was supposed to concur with the Applicant's advocate objection that the Respondent was not the right person to tender that document at the trial tribunal.

With regard to the sixth ground of Appeal, Mr. Malick submitted that the Respondent in his defense tendered two exhibits to support his case and were both admitted and marked as exhibits D1 and D2 respectively, arguing further that admission of these documents was objected by the Appellant's advocate but the objections were overruled by the Chairperson who proceeded to admit the same basing his decision to grant victory to the Respondent. Mr. Malick further contended that the Appellant and the late Rodrick Kowero

were neighbors and the land of Rodrick Kowero is situated on the eastern side of the land owned by Appellant, with the land in dispute being a portion of the land from the Appellant's land. He prayed this Court to go through the exhibit D2 to check the relevance of the said exhibit as well as the framed issues by the trial tribunal, arguing that the objection raised about exhibit D1 is that the said exhibit lacks the qualities to deserve to be admitted, firstly because it contained some new handwritten information which was contradictory with the former typewritten information purportedly to be the correction agreed between the parties before the then ten-cell leader one John Kutandawa.

He further contended that going through the contents of exhibit D1, one will realize that according to what was agreed on 28/03/1998 between late Rodrick and the Appellant, the measurement of disputed land was 10 steps length and 8 steps width and the price was TZS 175,000 but according to the handwritten information

alleged to be a correction done on 31/03/1998 on the same exhibit, the size of the land is 14 steps length and 10 steps width and the purchase price was TZS 500,000, with the said correction said to have been done before Mr. Kutandawa, but neither the Appellant nor the wife of the late

Rodrick had countersigned it, adding that these facts were contradictory and one could not know which fact is true regarding the contents of exhibit D1, and surprisingly, the Chairperson of the tribunal decided to turn a blind eye and proceeded to admit exhibit D1. Further, he contends that exhibit D1 was a photocopy and was admitted without taking into consideration the existence of section 66 of the Law of Evidence Act, [Cap 6 R.E 2022]. Mr. Malick further argued that if the said correction was valid then the parties into that contract had to cancel the first contract and signed a new contract. In his opinion, the Chairperson of the tribunal was wrong to relate the content of D2 to the land in dispute and admitted the same as not only was it objected to, but that it was secondary and had nothing related to the disputed land.

Opposing the appeal, Mr. Wilson submitted that the Chairperson of the tribunal correctly resolved the issue of ownership in favor of the Respondent basing on correct evaluation of evidence tendered before him, arguing that the evidence of AW1, AW2, AW3, AW4 was well countered by the Respondent when he tendered the sale agreement of the disputed land which clearly showed that the Appellant sold such land to the Respondent's son, the late Rodrick H. Kowero way back 1998.

It is Mr. Wilson's argument that it is a well settled position of the law in our jurisdiction that once terms of any contract, grant or other dispositions of property have been reduced into writing then a party to such contract or his representative in interest is not permitted to adduce oral evidence for the purpose of contradicting, varying, adding or substituting from its terms. To support his argument, he cited the section 101 of the Evidence Act and the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & 2 Others**, Civil Appeal No. 38 of 2012 (unreported).

His further contention was that the Appellant and late Rodrick H. Kowero entered into an agreement of sale of land which they reduced in writing as per exhibit D1 which the Appellant did not challenge its admission on the basis of either fraud, intimidation, illegality, want of due execution, want of capacity in any of the contracting party, want or failure of consideration or mistake in fact or law and AW1, AW2, AW3 and AW4 being persons of interest to exhibit D1 and disputed land, are all barred in law from adducing oral evidence contradicting it. That even if the evidence of AW1, AW2, AW3 and AW4 was to be considered, it only established how the Appellant acquired the disputed land, which is through inheritance from his parents. That, such evidence in law managed to prove good title onto the Appellant over the disputed land

which he passed to the Respondent's son, the late Rodrick Kowero and any other evidence was adduced from the Appellant's side to prove that such title reverted to the Appellant at any point in time, which meant that the disputed land remained under the ownership of the late Rodrick, and upon his death, the land remained under the ownership and possession of the Respondent's family where it so remains to date save for the Appellant's attempt to retake it back, which was stopped by his own family leaders as it can be seen in exhibit D2.

On the argument that the Respondent had no locus standi to interfere with the Appellant's process of registration of the disputed land, Mr. Wilson argues that the Respondent never interfered with the Appellant's process of registration of the disputed land, but he reported the Appellant's act to the clan leaders who intervened and resolved that the land in dispute was legally sold to the late Rodrick during his lifetime, and the Appellant should not interfere with its use. He referred this court at page 3 of the trial court's judgment, discerning that from the statement of the Respondent as per page 3 above, it cannot be said from any angle that the Respondent interfered with the Appellant's process of registration of the disputed land, which he did not have.

In his view, the issue of locus standi would have come into play if the Respondent decided to pursue a claim touching the disputed land in a court of law or any quasi judicial body. To support his position, he cited the case of **Ally Ahmed Bauda (Administrator of the estate of the late Amina Hussein Senyange vs Radha Hussein Ladha Damji and 2 Others**, Civil Application No. 525/17 of 2016 (unreported). Mr. Wilson insisted that the question of Respondent's locus standi could not arise as he did not bring any action in court in connection with the disputed land. He merely thought an amicable solution over the disputed land as per his testimony before the tribunal as proved by exhibit D1. That, the case of **Hamisi Waziri** (supra) cited by the Appellant's counsel is distinguishable from this case as in the cited case, parties had brought their claims to the court on their personal capacity, with the facts of that case revealing that they were claiming on behalf of a dead person, while in this matter, the Respondent was merely brought to court on claims of trespass by the Appellant.

As a matter of fact, Mr. Wilson's argue that the case of **William Salus** (supra) cited by Appellant's counsel supports his argument that the issue of locus standi would only arise if a person brought the matter to the court on behalf of the deceased and not when the parties are outside the court.

On the argument that DW1 was not the right person to tender exhibit D1, Mr. Willson submitted that the position on who is a competent person to tender an exhibit in court is well settled in our jurisdiction whereby the test for tendering exhibits is whether the witness has knowledge and he possessed the exhibit in question at some point in time even if it is for a short time. To cement his argument, he cited the case of **The DPP vs Mirzai Piribakhish @ Haji and 3 Others**, Criminal Appeal No. 493 of 2016 (unreported), explaining that in that case, the Respondent explained that he was the custodian of exhibit D1 and D2, and had knowledge of those documents because he saw them before testifying in the tribunal.

On the sixth ground of appeal, Mr. Wilson testified that the objection against admission of exhibit D1 and D2 was taken into consideration by the Chairperson of the tribunal and was found without any merit, and thus overruled, resulting into the objected exhibits being legally admitted in evidence, arguing further that the issue of the hand written corrections made on exhibit D1 were cleared by the testimony of DW3, one John Kutandawa, who was by then a ten-cell leader, and who testified that the said correction was made before him by the parties, and he signed on the same to affirm that he witnessed the said correctios, and both parties agreed on the same.

On the allegation that exhibit D1 was tendered as a copy, Mr. Willson argued that is a lie made to mislead this court because the Appellant's counsel is aware that exhibit D1 was tendered as the original copy, and that is why his objection on its admission was never raised on the ground of it being a photocopy of the original. Mr. Wilson added that to prove that the Appellant counsel was untrue, he attached a letter which they wrote to the tribunal on 19/10/2020 and filed the same on 04/11/2022, in which they requested that the tribunal return the original copy of exhibit D1 and supply it with a certified copy of it for the tribunal's record, a request which was duly granted on 04/11/2022.

Moreover, Mr. Wilson insisted that counsel for the Appellant did not cite any law which bars the parties to the contract to correct their contract by any means they wished.

With regard to the allegation that exhibit D2 was secondary evidence and it had no relations to the land in dispute, Mr. Wilson submitted that the tribunal admitted it as secondary evidence after the Respondent followed the procedure set by law to prove the contents of a document by secondary evidence, where it is done by filing before the tribunal a notice to rely on secondary evidence, which was

filed on 6th October 2022. On the allegation that exhibit D2 had no relation to the disputed land, Mr. Wilson submitted that there is unchallenged evidence by the Respondent that what was being discussed by his family and the Appellant's family on 20/07/2020 was a dispute over the suit land. That, this fact is supported by the Appellant's witnesses who testified that they were aggrieved by the decision in the meeting of 20/07/2020 in which exhibit D2 was signed by the Appellant, his wife, his son one Daudi Moses Siara, the Respondent and other members of such meeting.

In rejoinder, Mr. Malick reiterated his submission in chief adding that the late Rodrick Kowero never purchased the disputed land or lived on the land, other than being a neighbor who later purchased a piece of land from the Appellant, developed the same and lived there during his life time, insisting that this is different from disputed land but later on he forged a document purporting to have purchased the land in dispute.

Also Mr. Malick made a note submitting that counsel for the Respondent insisted on submitting on the second and fifth grounds of appeal which he abandoned, as well as the fact that the Respondent

counsel submitted on dead law, to wit; the Evidence Act, Cap 6 R.E 2019 instead of Cap 6 R.E 2022.

Concerning the allegation that the Respondent was a right person to tender the exhibit because since he was knowledgeable with its content, Mr. Malick submitted that the Respondent had no true knowledge of the document as he was not a witness on the purported sale of the disputed land.

Going through the record of this appeal and rival submission by parties I think the task before me is to determine, **one**, whether this appeal is maintainable and **two**, if the answer is in affirmative, whether the decision of trial tribunal was erroneous by declaring the Respondent's son the legal owner of the disputed land.

It is on the record that the disputed land was previously owned by the Appellant. It is also on the record that the said land is purported to have been sold to the Respondent's son who is now deceased. The evidence of the Respondent revealed that the deceased has a legal representative and the Appellant did not dispute this evidence. If this is the case, then obviously the Appellant sued the wrong party. The legal representative of the deceased was a necessary party who was required to be sued by the Appellant. The argument by the counsel


for the Respondent that the Respondent was the right person to be sued because he is the one who interfered with the process of surveying and registration of the disputed land is misconceived as the reason that the Respondent did not claim ownership of the disputed land. In any case, the Respondent made it clear that the administrator of the deceased was already appointed a fact that was not disputed by the Appellant. In a civil suit, there has to be a right of relief against such a party in respect of the matter involved in the suit. In this matter, one cannot claim a right of relief against a Respondent due to the reason that the Respondent does not claim ownership of the disputed land. No executable relief could be granted as against the Respondent personally with respect to the suit land as he is not the administrator of the estate of his late son who purported to be the owner of the land in dispute.

It would be idle and pointless for the court, so to speak, to pass a decree that would be of no practical utility to the plaintiff. Suing the administrator of the Respondent's son instead of the Respondent would enable the court to adjudicate and pass an effective and complete decree.

Having said so, the entire proceedings below crumble just as the judgment and resultant decree and it is hereby set aside. This matter is, accordingly, pushed back to where it was immediately before the institution of the suit. The Appellant may re-institute a fresh suit before a competent tribunal if he so wishes.

It is so ordered.


DATED at ARUSHA this 03rd day of May, 2024.



A. Z. BADE
JUDGE
03/05/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **03rd** day of **May, 2024** .





A. Z. BADE
JUDGE
03/05/2023