IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 399 OF 2024

(Arising from Land Application No. 62 of 2018 at Mbulu District Land and Housing Tribunal)

PAULO MICHAEL TLATLAA (As an administrator of estate of the late MICHAEL TLATLAA TLUWAY ....APPELLANT

VERSUS

KWASLEMA TSEEMA..RESPONDENT

JUDGMENT

2nd May and 6th June, 2024

MIRINDO, J.:

The appellant, Paul Michael Tlatlaa, the administrator of the estate of his late father, Michael Tlatlaa Tluway, moved the Manyara District Land and Housing Tribunal for a declaration that a certain plot measuring 25 metres by 15 metres situated at Waama Maringo Village in Mbulu District belonged to the estate of his deceased father. He equally prayed that Kwaslema Tseema, the respondent, be ordered to vacate the disputed land and for costs and any other reliefs that the Tribunal may consider fit and just to grant under the circumstances. Following the recusal of the presiding chairperson in Manyara District Land and Housing Tribunal and subsequent establishment of Mbulu

District Land and Housing Tribunal, the land dispute was transferred to and determined by the latter Tribunal.

The appellant's case was that his late father used to licence the disputed land to the appellant's uncle, the late Tseema Dohho, the respondent's father, between 1971 and 1986. The appellant's father obtained the disputed land from the appellant's grandfather, the late Tluway Dagharo. It was agreed by elders either in 1986 or after the appellant's father death that he should use the disputed land. Upon the appellant's father death in 2012, the appellant was appointed as an administrator of his estate. When he attempted to include the disputed land among the properties of the deceased estate, he was prevented by the respondent who claimed the plot to be his.

The respondent's evidence was that he inherited the disputed land from his late father in 1991 and that his father inherited it from his forefathers in 1945. At the end of the trial the Tribunal's Chairman held in favour of the respondent having disagreed with the assessors' opinions. Against this decision, Paul Michael Tlatlaa has come before the High Court with three grounds of appeal. At the hearing of the appeal, the appellant argued that it was wrong for the tribunal's chairman to disagree with the assessors' opinions which were in his favour. He argued that there was ample evidence to support his claim especially

because the respondent's mother once stated that the disputed land belonged to the appellant's family. The respondent simply supported the decision of the trial Tribunal and had nothing to add.

In their totality, the three grounds of appeal contain a single point of complaint: the trial Tribunal misapprehended the evidence adduced at the trial in holding in favour of the respondent, Kwaslema Tseema.

In dealing with this major point of complaint I will revisit the evidence adduced before the trial Tribunal. It should be pointed out that in the present case the appellant claimed ownership of the disputed land through oral inheritance and so proof of its acquisition by the appellant and its original owner was indispensable.

Was there such evidence? The appellant's evidence was that the disputed land, which formed part of estate of his father, belonged to him. He testified in-chief that:

> Eneo la mgogoro la ukubwa wa mita 25x 15 Kijiji cha Waama Maringo Kata ya Uhuru ni mali ya marehemu Michael Tlatlaa Tluway baada ya kupewa na babu yetu Tluway Dagharo ikiwa na mipaka ifuatayo....

He testified further that:

> Nilipewa jukumu la kukusanya mali za marehemu ikiwemo eneo hilo nikiwa Pamoja na mke wa marehemu Tseama Dohho ndipo mgogoro ukaibuka baada ya Mdaiwa kukataa mali hiyo isiunganishwe kwenye mirathi ya marehemu huku akidai kuwa eneo hilo ni mali ya kwake....

In cross-examination, he stated that:

> Babu yangu alimuazimisha Mzee Tseama Dohho mwaka 1971 kwa mkataba wa maneno kila mwaka hadi mwaka 1986 ndipo nilipoitwa nilitumie mimi

In these accounts, nowhere does the appellant prove how his grandfather, father or he himself acquired the disputed land. The claim that he was given the disputed land is dubious. The exact period in which the appellant claims to have been given the disputed land is unknown. In his examination -in-chief, he stated it was agreed by elders that he should use the disputed land but the period in which this decision was made is unknown just as the name of those elders.

In cross-examination, he suggested that he was given the disputed land in 1986 but on being examined by an assessor, Eustela Massay, the appellant testified that:

> Kuna majirani walio shuhudia mzee Tseama Dohho akipewa eneo hilo kutumia na Michael Tlatlaa japo hao majirani wengine ni marehemu, Jirani aliye kuwepo kwasasa ni Petro Aweda ndiye alishuhudia ukodishwaji huo bali niliambiwa na baba yangu, kabla ya kufariki mwaka 2012 aliyekuwa akilitumia

> ni mtoto wa Tseama ambaye ni mdaiwa bila mkataba wowote wa ukodishwaji.

This part of evidence indicates that prior to the appellant's father death, the disputed land was in possession of the respondent's family until 2014. For, on being examined by an assessor, Martin Genda, the appellant testified that:

> Nalifahamu eneo la mgogoro tangu nilipozaliwa ni mali ya baba yetu, kabla ya mwaka 1980 eneo hilo tulilitumia sisi, mnamo mwaka 1971 Tseama Dohho ndio aliazima eneo hilo kwa marehemu Michael Tlatlaa na mimi nilikuwa na miaka mitatu (3) mwaka 1980 eneo hilo lilirudi kwetu kwa ajili ya kilimo kisha likarudi kwa Tseama Dohho mwaka 1984 akaazimishwa Tseama Dohho na halikurudi tena mpaka sasa hivi, mwaka 2014 mke wa Tseama Duhho aliwahi kutamka kuwa eneo hilo ni mali ya kwetu mbele ya Mwenyekiti wa kitongoji Felisian Tluway lakini bado Mdaiwa akadai eneo hilo ni mali ya baba yao lakini ndugu zake walikubali kuwa sio eneo lao bali ni la kwetu, Mdaiwa ndiye anayelitumia eneo hilo.

Both portions of evidence raise many interesting questions. It suffices at this stage to conclude that throughout the entire life of the appellant's father, the late Michael Tlatlaa Tluway, there was no dispute between the respondent or respondent's and the appellant's father regarding the land in dispute. For this reason, I am not satisfied that Paul Michael Tlatlaa was given the plot in 1986.

There is a second claim that it was agreed by elders that the disputed land be given to the appellant. As mentioned earlier, the period in which this directive was given is unclear. It is part of the appellant's evidence that in 2014 the respondent's mother, the late Maria Gwasma, declared in front of Kitongoji chairman, one Felisian Tluway, that the disputed land belonged to the estate of the appellant's father and returned it to the estate of the appellant's father but the respondent resisted the move. Part of this evidence is hearsay. There is no evidence that the appellant was present before the Kitongoji Chairman. Neither was his second witness Petro Aweda.

The only admissible evidence on this claim is the evidence of Malkiadi Jacob, the third appellant's witness who on examination by an assessor, Martin Genda stated that:

> Mdaiwa ni ndugu yangu tumbo moja, eneo hilo lina ukubwa wa hatua 25 kwa 15. Eneo hilo ni mali ya Tlatlaa Tluway, mama yangu Maria Gwasma aliwahi kuniambia shamba hilo ni mali ya Tlatlaa Tluway mwaka 2000, nilikuwepo mama alivyorudisha eneo hilo kwa familia ya Tlatlaa Tluway mimi sikuwepo ila mdaiwa alipinga kurudishwa kwa eneo hilo, na mama alimpinga kuwa eneo hilo siyo mali yao, Mwenyekiti wa kitongoji alihudhuria kikao hicho aitwae Paulo Ovade.

I consider this portion of evidence doubtful. To start with, it begs the question why the disputed land was returned to the deceased's estate after his death while this fact was not in dispute throughout his entire life. Secondly, there is aconflicting testimony regarding the Kitongoji Chairman in whose presence the fact of repossession was revealed. The appellant mentions one Felisian Tluway while his third witness refers to Paulo Ovade. Thirdly, the third appellant's evidence is inconsistent about his presence when his mother returned the disputed land to the appellant's estate.

Fourthly, all the facts regarding the respondent's mother were at best hearsay. The testimonies of persons who attended the meeting and the relevant Kitongoji chairperson were of particular significance, these persons should have been called to testify on these facts. Besides, no details were forthcoming of the meeting in which the mother attended for the purpose claimed by the appellant

Thus, there was no evidence to show that the disputed land belonged to the estate of the appellant's father. The appellant has not discharged the burden imposed by section 119 of the Evidence Act [Cap 6 2002]. Section 119 enacts the presumption that possession is prima facie evidence of title. No evidence has been adduced to rebut the respondent's possession.

There is another problem in accepting the appellant's claim of ownership of the disputed land since 1986. If this claim were true, it would be irreconcilable with the appellant's case that the disputed land belongs to his father's estate. If the disputed land was his personal property he should have sued in his personal capacity and not as an administrator. It was from this confusion that the appellant overlooked to refer himself as the administrator in his petition to this Court. I considered this to be a mere oversight and this judgment will refer him as the administrator as was the case before the trial tribunal.

Does anyone know when and how the appellant's father acquired the disputed land? The appellant's case is that his father inherited it from the appellant's grandfather. But the second appellant's witness, Petro Aweda who might be in a better position to know this dispute on account of his old age, gave a different version. In response to questions from the Tribunal's Chairman, he stated that:

> Sijui kwanini Mdaiwa alilitumia eneo hilo hadi leo wakati mama yake Maria Gwasma alisharudisha eneo hilo kwa marehemu, Michael Tlatlaa alilipata eneo hilo kwa kufyeka.

I am of the view that this was not sufficient proof even though it is inconsistent with the appellant's own testimony.

As there was no proof of either ownership or possession of the disputed the issue of licencing by the appellant's father cannot arise.

At this point, I would like to point out that the respondent's case was largely hearsay as the respondent did not testify. The respondent conducted his defence through his donee of a power of attorney, one Petro Nicodemus Geay. It is an anomaly that the trial Tribunal did not order amendment of pleadings to reflect this fact but given that this was a matter before a Tribunal which is not strictly bound by rules of pleadings, I consider this omission to be a mere oversight; and more so, as the written statement of defence was signed by the respondent himself.

The donee testified as the first respondent's witness to the effect that the respondent inherited the disputed land from his late father and gave conflicting narration of the years in which either the respondent or the respondent's father acquired it. This evidence was completely hearsay, as the witness implicitly admitted in response to the Tribunal's Chairman question seeking clarification:

> Mdaiwa alipewa eneo hilo mwaka 1991 na baba yake Tseama Duhho na walio shuhudia ni Boi Niima Nachan ambaye ni Jirani wa eneo hilo, mimi sikuwepo wakati anakabidhiwa eneo hilo.

In **National Agricultural Food Corporation v Mulbadaw Village Council and Others** [1985] TLR 88, it was held that the right to act on behalf of a party to proceedings does not authorise the representative testifying on matters within the parties' personal knowledge.

However, in his testimony Boi Niima Nachan, while reiterating that the disputed land belonged to the respondent, said nothing about his presence when the respondent was given the disputed land.

The only relevant evidence is that of Moshi Wenslausi, the third respondent's witness, who testified that in 1977 when he was in Standard One the disputed land was being farmed by the respondent's father. However, the appellant's evidence is as well inconclusive:

> ...Mwaka 1977 nikiwa Darasa la Kwanza eneo hilo alikuwa akilima Tseama Duhho mpaka mwaka 1990 pamoja na familia yake, mdaiwa alikuwa rafiki yangu tulikuwa tunalima Pamoja eneo letu na la kwao na mwaka 1991 January Mzee Tseama Duhho na Margwe Qande walinikuta mimi na mdaiwa kwenye eneo hilo tukiwa tunapalilia, huku Boi Nima (SU2) alikua analima eneo lake Pamoja na wazee Boay Qwaray (marehemu),Safari Qwaray na mzee Tluway Tlemay (marehemu) ndipo Boi akaulizwa kama eneo hilo ni mali yake akajibu kuwa ni mali yake na kwa kuwa alikuwa Jirani wakazunguka shamba

nakuona hakuna mgogoro ndipo akasema anamkabidhi eneo hilo Mdaiwa, ndipo tukaendelea kulima na Mdaiwa akalitumia eneo hilo mpaka leo.

This portion of evidence casts doubt on the respondent's case and it is important to state that without a counter-claim, the respondent in his written statement of defence claimed for the following reliefs:

i. A declaration and order that the Respondent is the lawful owner and occupiers of the Suitland. [*sic*]

ii. A Permanent Injunction restraining the Applicant from interring [*sic*] the said land and disturbing or harassing the Respondent in any away as regards the Suitland.

iii. Costs of the Suit to be borne by the Applicant.

iv. Any other or further relief (s) that this Honourable Court deem fit to and just to grant.

Without a counter-claim, these reliefs could not be granted. Even assuming that there was a counter-claim, there was no evidence to support them. However, one of the fundamental rules of evidence is that the burden of proof is not discharged if the applicant or the plaintiff leads evidence which does not establish the cause of action.

In conclusion, I hold that the appellant's case was not proved on the preponderance of probabilities. Since there was no counter claim, I set aside the second, third and fourth reliefs granted by Mbulu District Land and Housing Tribunal. I uphold the Tribunal's decision dismissing the case for want of merit with an order that the status quo at the time when the disputed land was taken before the District Land and Housing Tribunal be maintained. Save for the variation of the decision of the trial tribunal, this appeal is dismissed. Each party to bear its own costs.

DATED at BABATI this 2nd day of June, 2024.

F.M. MIRINDO

JUDGE

Court: Judgment delivered this 6th day of June, 2024 in the presence of both parties. B/C: William Makori (RMA) present.

Right of appeal

F.M. MIRINDO

JUDGE