THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA SUB-REGISTRY

AT MTWARA

LAND APPEAL NO. 5084 OF 2024

(Originating from Application No. 11 of 2023 in the District Land and Housing Tribunal for Kilwa at Kilwa)

MOHAMED SAIDI PONDAGENI (as an administrator of the estate of the late **AHMADI SAIDI PONDANGENI)**.....**APPELLANT**

VERSUS

MWANABIBI HATIBU BESA .....**RESPONDENT**

JUDGMENT

28th May & 20th June, 2024

MPAZE, J.:

Subsequent the demise of Ahmadi Said Pondageni, the husband of Mwanabibi Hatibu Besa (the respondent), letters of administration were granted, appointing Mohamed Said Pondageni (the appellant) as the administrator of his deceased brother's estate.

As customary, upon the appointment of the administrator, he is required to collect the deceased's properties and file an inventory and accounts of the estate. The appellant executed this duty, and among the properties listed was a disputed piece of land, which led to the current dispute.

Following the inclusion of the disputed land (disputed shamba) in the list of the deceased's properties, the respondent approached the District and Land Housing Tribunal, hereinafter referred to as 'the DLHT', seeking the tribunal for the following;

(i) The appellant be ordered to remove the disputed shamba in the list of the deceased property in Probate cause no. 4 of 2022

(ii) That the respondent be declared the lawful owner of the disputed shamba

(iii) Costs of the Application

(iv) Any other relief(s) which the tribunal will deem just and fit to grant.

After considering the testimonies from both parties, the DLHT concluded that the disputed shamba rightfully belongs to the respondent. It was further determined that the disputed shamba is not part of the deceased's estate and therefore does not belong to the deceased. Consequently, the appellant was barred from entering the disputed shamba, and the costs of the application were awarded to the respondent.

However, this decision did not amuse the appellant, who subsequently appealed to this court, presenting five grounds of appeal namely;

1. That the trial tribunal erred in law and fact to hold that the certificate Exhibit M-1 was proper document just because the appellant did not complain at police station as to its legality should he noted that the certificate was a forged document while the appellant realized that fact after he was already sued and the disputed certificate was already made an exhibit.
2. That the trial chairman was wrong by disregard appellant's allegation that the respondent was not married on 1978 as stated in the application but she was married in the year 1980 whereby the appellant was present at the event of the marriage celebration
3. That the learned trial chairman erred in law and fact by failure to using its power vested to her by the law to order investigation over the disputed certificate Exhibit M-1 as forged document as a result reached to an erroneous decision.
4. That the trial tribunal was wrong for not taking into account evidence of DW3 who testified that he just witnessed the late husband of the respondent giving her wife (respondent) a piece of land from the disputed farm and not the whole farm as alleged by the respondent.
5. That the trial tribunal was wrong for not taking into consideration evidence of DW1, DW4 and DW5 who all testified that the disputed

farm was the property of the late Ahmad said Pondageni and he never award it to any of his wives nor his children and that the certificate Exhibit M-1 is a forged one.

Based on these grounds of appeal, the appellant prayed the court to allow the appeal, with costs, to quash and set aside the decision of the DLHT, and grant any other relief(s) deemed appropriate by the court.

In response, the respondent opposed the appeal, contesting all grounds of appeal as lacking merit. she prayed the court to dismiss the appeal with costs and uphold the decision of the DLHT.

At the outset, I provided a concise summary of the origin of this dispute. Now, I will proceed to address each ground of appeal, highlighting any pertinent facts that were not previously mentioned becoming apparent when evaluating the merits of each ground of appeal.

During the hearing of the appeal, both parties appeared in person without legal representation.

In support of the appeal, the appellant argued all grounds of appeal collectively. He contended that the DLHT erred in both law and fact by stating that Exhibit M1 was not forged based on the appellant's failure to report the forgery to the police.

The appellant questioned how he could have reported the forgery to the police when he had never seen the document before it was tendered during the hearing.

Furthermore, the appellant argued that it was the responsibility of the tribunal to assess the validity of Exhibit M1 at the time was tendered, not his.

The appellant pointed out that despite the document being admitted as Exhibit M1, the author of the document did not appear before the tribunal to confirm its authenticity. Therefore, the appellant was of the view that it was not fair for the tribunal to consider Exhibit M1 valid without the author's testimony verifying its authenticity.

On top of that, the appellant claimed that all witnesses who appeared in the tribunal, both for him and for the respondent, testified that the respondent was not allocated six acres of land, contrary to what the disputed document indicated. He continued to criticize the tribunal for disregarding this evidence.

Moreover, the appellant expressed dissatisfaction with the tribunal's failure to consider his evidence, as well as that of DW4 and DW5, all of whom stated that the deceased, Ahmad Said Pondageni, never allocated any portion of his land to any of his wives or children. In relation to DW3 said this witness testified that he witnessed the deceased giving the

respondent a piece of land from the disputed farm, but not the entire farm as alleged by the respondent, he faulted the DLHT for failure to consider this piece of evidence.

Furthermore, the appellant contested the trial tribunal's assertion that the respondent was married in 1978, explaining that she was actually married in 1980. He argued that considering the deceased's existing wives at the time, it was implausible to claim that she alone was granted a disputed shamba.

Based on these arguments, the appellant prayed for the appeal to be allowed and the decision of the DLHT to be reversed with costs.

In response to the appellant's submissions, the respondent argued that the decision made by the DLHT was correct.

Regarding the issue of Exhibit M1, the respondent denied the allegation by the appellant that had only seen it for the first time during the DLHT hearing. She explained that prior to meeting the appellant at the DLHT, they had encountered each other at the ward tribunal, where the appellant had the opportunity to see Exhibit M1. Therefore, she believed that the DLHT's decision was justified to consider Exhibit M1 valid.

In response to the appellant's complaint about the DLHT's alleged failure to consider the evidence of his witnesses, the respondent argued

that the tribunal did assess their testimony. However, she noted that the witnesses themselves failed to establish that the disputed shamba was not given to the respondent.

Addressing the issue of her marriage date, the respondent maintained that she was married in 1978, not in 1980 as claimed by the appellant. She clarified that at the time of her marriage, she was unaware of the deceased having other wives, as he had never disclosed that information to her.

In concluding her response, the respondent urged the court to dismiss the appeal with costs and uphold the decision of the DLHT.

In his brief rejoinder, the appellant reiterated his earlier submissions and added that he had never attended any matter at the ward tribunal regarding this dispute.

The appellant added that it would have been impossible for him to attend the ward tribunal at that time as he had not yet been appointed as the administrator of the estate. The appellant stressed that his appeal be allowed and the respondent's claims be dismissed.

Upon examining the submissions from both sides and scrutinizing the grounds of appeal, the court finds that the central question to be resolved is whether this appeal has merit.

In addressing this issue, it is crucial to also consider whether the respondent's claim was proven on the balance of probabilities. Generally, in civil cases, the burden of proof lies with the party who asserts a claim in his favour. This principle is enshrined in section 110 of the Evidence Act [CAP 6 R.E 2022], hereinafter referred as 'the TEA'.

In civil proceedings, the party with the legal burden also bears the evidential burden, and the standard of proof is on the balance of probabilities. In simple terms, this means that the court will accede and believe the evidence that is more credible than the other on a particular fact to be proven.

This legal principle has been enunciated in a number of cases to mention few **Anthony M. Masanga v. Penina Mama Mgesi And Another**, Civil Appeal No. 118 of 2014, **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017; **Hamza Byarushengo v. Fulgencia Manya And 4 Others**, Civil Appeal No. 246 of 2018. (all unreported).

Revisiting the grounds of appeal, despite the appellant listed five grounds, he submitted them collectively. Upon evaluating the listed grounds and the submission made by the appellant, it is apparent that the grounds of appeal are centered on three main complaints;

1. That the DLHT erred in law and fact by relying on Exhibit M1, which was a forged document.
2. That the DLHT erred in law and fact by not considering the evidence from the appellant, DW3, DW4, and DW5, which indicated that the deceased never gave the respondent the disputed shamba.
3. That the DLHT failed to consider that the respondent was married to the deceased in 1980 and not in 1978.

Therefore, I will address these complaints one by one, as they encompass all five grounds of appeal.

On the first ground of appeal, where the appellant's complaint is based on the DLHT erring in law and fact by relying on Exhibit M1, which he claims was a forged document and the author was not called to verify its authenticity, this complaint is reiterated in parts of the third and fifth grounds of appeal.

Starting with the issue of failing to call the author, the appellant referred to the Village Executive Officer (VEO), whose office appears to have written and stamped Exhibit M1. While it is true that the VEO did not testify, this does not render Exhibit M1 inauthentic, as other witnesses who were present provided their testimony. It should be noted that no

specific number of witnesses is required to prove a particular fact, as stated in Section 143 of the TEA.

If the appellant considered the VEO to be an important witness, he had the opportunity to call the VEO as his own witness when he realized that the respondent's side had closed its case without calling him. Therefore, this complaint regarding the failure to call the VEO as a witness lacks merit.

It should be noted that Exhibit M1, which is being contested, is a document indicating that in 2014, Ahmad, the now-deceased husband of the respondent, gave the respondent the disputed shamba measuring 6 acres. The document was witnessed by Amani Yusufu Nongwa and Saidi Ally Lutambi, who signed as witnesses for the giver, and Ally Abdallah Athumani and Saidi Kuchilinda, who signed as a witness for the recipient.

The appellant's contention is that this document is forged. He criticized the DLHT for not acknowledging this and instead placing the burden on him to report it to the police. The appellant was puzzled as to how he could report it to the police when he saw the document for the first time when it was tendered as an Exhibit in the tribunal.

The respondent refuted this complaint, alleging that the DLHT reached the correct decision and that the document in question is valid. She disputed the appellant's claim that he saw the document for the first time during the hearing, stating instead that he had seen it when they appeared before the ward tribunal, a fact which the appellant denied.

However, upon examining the DLHT's records, I noted that in the application filed by the respondent, it contained 8 paragraphs. In paragraph 6(a)(iv), she averred that;

> *'Kwamba, zoezi la KUTOA na KUKABITHI SHAMBA bishaniwa kwa mwombaji, lilikuwa la wazi na lilifanyika katika ofisi ya Mwenyekiti wa kitongoji cha Njianne likishuhudiwa na mashahidi wa pande zote mbili na hatimaye kuthibitishwa na mwenyekiti wa kitongoji hicho kama inyoonekana kwenye HAI rasmi iliyoandaliwa, kiambatisho* ***MHS-1*** *ambayo baraza hili linaombwa kuitambua HATI hiyo kama sehemu ya Maombi haya.*

In his reply to this paragraph in his written statement of defence, in paragraph 6(iii), the appellant (respondent) asserted;

> *'Kipengele hiki kina ubishi na Mjibu Maombi anakanusha vikali kuwa maelezo yaliyomo kwenye kifungu hiki si ya kweli mleta maombi hajapewa SHAMBA bishaniwa na marehemu mumewe, na HATI aliyoitoa kiambatisho MHS-1 ni ya*

kughushi hakikuandikwa na Marehemu Ahmadi Saidi Pondageni mumewe, vinginevyo athibitishe.

Looking at this paragraph, it is clear that the appellant was already aware of the document in question, which he alleges is forged before the hearing of the case. Therefore, he had the opportunity to raise his concerns about this document with the relevant authorities for investigation to determine its authenticity. It is important to note that forgery is a criminal offence that cannot be proved in a civil case.

In **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another**, (Civil Appeal No. 270 of 2018) published on the website, www.tanzlii.org [2023] TZCA 102 the Court stated;

'Without prejudice to the aforesaid, even if the signatures were forged as alleged, ***it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint.*** *In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge.'*

As shown above, the document was attached to the application, and even in his response under paragraph 6(iii), the appellant described it as forged document. Given these facts, how can he now claim that he first saw Exhibit M1 during the hearing? I find this claim to be an afterthought.

Guided by the authority above, despite the appellant claiming that he could not report Exhibit M1 to the police as a forged document because he first saw it when it was presented as an Exhibit, this is not true, as indicated in his reply he had a prior knowledge of the existence of Exhibit M1 which was annexed in the application before it was tendered in the tribunal.

Given this, the court finds that the appellant was aware of the existence of Exhibit M1 early on and thus had the opportunity to take the necessary steps regarding this document, as stated by the trial chairman in his decision. Therefore, I find this complaint to have no merit.

Regarding the complaint that the DLHT erred in law and facts by not considering the evidence from the appellant, DW4 and DW5 which indicated that the deceased never allocated the disputed shamba to the respondent, and that of DW3 who asserted that the respondent was just given a piece of land, this claim it reminds me of the duty of the first appellate court, which is to reassess, analyze, and scrutinize the evidence from the trial court and, if necessary, arrive at its own conclusions.

Upon thorough examination of the DLHT judgment, I observed that when addressing the first issue, the trial chairman carefully weighed the evidence from both sides. He evaluated the appellant's testimony along with that of DW3, DW4, and DW5, ultimately concluding that the respondent's evidence was more compelling than that of the appellant.

As the first appellate court, I have further scrutinized the contested evidence. Beginning with the appellant's testimony, he asserted that the land in question belonged to his deceased brother and was never given to the respondent. However, he failed to substantiate his claim with compelling reasons or evidence proving that the deceased did not allocate the land to the respondent.

Regarding the witnesses DW3, DW4 and DW5 collectively testified that the disputed shamba was purchased by the deceased and remained his property until his death, emphasizing that he never transferred it to the respondent.

However, DW3 added that despite the deceased having more than one wife, each lived separately, and he stated that the disputed area was dwelt by both the respondent and the deceased.

Besides, after evaluating the evidence as presented in the DLHT, I noticed in ground 4 of the appeal, where the appellant claimed that the DLHT failed to consider the evidence of DW3 who testified that he just

witnessed the late husband of the respondent giving his wife (respondent) a piece of land from the disputed farm and not the whole farm as alleged by the respondent. I think DW3 may have misspoken, as DW3 did not testify about witnessing the deceased giving a portion of the land to the respondent. I believe the appellant meant PW3, who testified that he witnessed the deceased saying, '***this piece of land is given to my wife, the respondent***'

Addressing this complaint, upon reviewing the record, the respondent never claimed that she was given the entire farm. Instead, she testified that she was given a portion of the farm. Even when questioned by Mzee Kumpita, one of the members in the DLHT, the respondent replied that '***the land was 12 acres, I was given 6 acres.***'

Therefore, based on this evidence, it is clear that at no point did the respondent claim to have been given the entire farm.

On the other hand, the respondent's testimony explained how the disputed shamba became her property, given to her by her husband as her rightful share during their time together. She tendered Exhibit M1 as proof.

In addition to this evidence, she brought witnesses PW2 and PW3, who both testified to witnessing the deceased allocating the disputed shamba to the respondent.

Based on the evidence given regarding whether the deceased allocated the disputed shamba to the respondent or not, the pivotal issue lies in assessing whose evidence carries more weight, adhering to the principle of balance of probabilities and credibility of testimony. This forms the crux of the dispute.

As stated earlier, apart from the respondent's oral testimony, she provided Exhibit M1 to support her oral account. This Exhibit was also witnessed by PW2 and PW3 as witnesses of the giver of the disputed shamba to the respondent.

Section 100(1) of the Tanzania Evidence Act provides;

> *'When the terms of a contract, grant, or* ***any other disposition of property, have been reduced to the form of a document,*** *and in all cases in which any matter is required by law to be reduced to the form of a document,* ***no evidence shall be given in proof*** *of the terms of such contract, grant, or* ***other disposition of property,*** *or* ***of such matter except the document itself,*** *or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.'*

There is no dispute that the disputed shamba belonged to the deceased. However, despite it being his property, the respondent, PW2 and PW3, testified that on 28th October, 2014 the deceased allocated 6 acres of the disputed shamba to the respondent. This allocation was

documented in writing and admitted as Exhibit M1, clearly indicating the deceased's intention to give this portion to the respondent.

It has been stated in various decision of the Court of Appeal that Oral account cannot supersede documentary evidence. See for example **Barreto Hauliers(T) Ltd & Another v. Mahamood Mohamed Daule**, Civil Appeal No 7 of 2018, **Agatha Mshote v. Edson Emmanuel & 10 Others**, Civil Appeal No. 121 of 2021 and **Martin Fredrick Rajab v. Ilemela Municipal Council & Another**, Civil Appeal No. 197 of 2019.

Applying the principle in the cited cases therefore, the contents of Exhibit M1, which directly support the respondent's claim, outweigh the oral assertions made by the appellant and his witnesses that the deceased did not allocate the disputed shamba to the respondent. Therefore, based on this evidence, I find the appellant's complaint on this ground to be without merit.

In his final complaint, the appellant criticized the DLHT for not considering that the respondent was not married to the deceased in 1978, as he claimed she was married in 1980. His argument aimed to show that the respondent was not the deceased's first wife. However, whether the respondent was the first wife or not does not negate the fact that she was allocated the disputed shamba by the deceased.

Despite the appellant's assertion that the first and second wives were Binti Lingwali and Bint Said respectively, he did not specify when they were married. Additionally, Binti Said, whom he claimed was the second wife, provided evidence as DW2 stating that she was the first wife, contrary to the appellant's statement.

Furthermore, DW3, who was also a wife of the deceased, confirmed during examination by the chairman that the respondent was indeed the first wife she encountered.

Therefore, the appellant's argument that the deceased could not allocate the disputed shamba because he had other wives before the respondent holds no merit. Even if there were other wives, if the deceased decided to allocate his property to one of his wives, he had every right to do so. Hence, I find this ground of appeal to be without basis and dismiss it.

Based on the discussions I have undertaken the court is satisfied that the respondent substantiated her claims on the balance of probabilities. Consequently, there are no compelling reasons to interfere with the findings of the DLHT. Therefore, I find no merit in the appeal and hereby dismiss it in its entirety, with costs.

It is so ordered.

Dated at Mtwara this 20th June 2024.

M.B. Mpaze

Judge

Court: Judgment delivered in Mtwara on this 20th day of June 2024 in the presence Mohamed Saidi Pondageni the appellant and Mwanabibi Hatibu Besa the respondent.

M.B. Mpaze

Judge

20/6/2024