IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

LAND APPEAL NO. 29 OF 2023

(Arising from the District Land and Housing Tribunal for Karagwe, Land Application No. 67/2022)

MARCO NDIMUBANZA..... APPELLANT

VERSUS

ABEL MARCO..... RESPONDENT

JUDGMENT

21st February and 15th March, 2024

BANZI, J.:

The appellant, Marco Ndimubanza and the respondent, Abel Marco are father and son fighting over a piece of land measuring two acres (the suit land) located at Chabakazi hamlet, Rutunguru village, within Kyerwa District. Before the District Land and Housing Tribunal for Karagwe (the trial tribunal), the appellant instituted a land suit claiming to be the lawful owner of the suit land after being given by his father in 1980. He further contended that, the respondent and his mother trespassed into the suit land, harvested the coffee and cut banana trees claiming to be the owner of the said land.

The efforts to secure the attendance of the respondent before the trial tribunal proved futile and thus, the suit was heard *ex parte* against him. In his testimony, the appellant stated that, he had already given his son, the

respondent the land to live in. However, when he went for treatment, the respondent invaded the suit land which belongs to his father, built a house and ever since, he has refused to vacate from it. Supporting his claims, his witness (AW2) Geofrey John, who is also the neighbour to the suit land stated that, when the appellant's father died, his land was bequeathed to the appellant and his sister. But the respondent has built the house into that land despite being prevented by the appellant. AW2 added that, after the appellant had married a second wife, the appellant's wife and the respondent raised fracas against and took the land forcibly.

At the end of the trial, although the assessors were of the view that, the land belongs to the appellant, in his final verdict, the learned chairman dismissed the application reasoning that, the suit land is still the property of the appellant's father as there is no evidence showing that, the appellant was given that land by his father before his demise. Aggrieved with that decision, the appellant knocked the doors of this court with this appeal containing three grounds thus:

1. *That, in essence the trial tribunal grossly erred in law by admitting and proceeding with the suit in contravention with the version of the settlement made by the Ward Tribunal as demonstrated in the certificate.*
2. *That, even after having cited (sic) the authorities governing the principles of burden of proof and balance*

of probability, the learned chairman imminently misdirected himself by dismissing the claims laid down by the Appellant who had amply testified on the root of title over the Suitland and the encroachment made by the Respondent at the certain material time.

3. *That, though not bound to consent with the Assessor's opinion, the trial Chairman totally erred in law and fact for failure of valuating (sic) the available testimonies which established the cause of action occasioned by the Respondent.*

Before this court, the respondent defaulted the appearance since the inception of this appeal despite being aware of its existence after being duly served as proved by the affidavit of court process server. Thus, the appeal was heard *ex parte* against him. Ms. Herieth Barnabas learned counsel, appeared for the appellant.

Arguing in support of the first ground, Ms. Barnabas submitted that, initially, the appellant referred the dispute before Rutunguru ward tribunal where the parties were heard and the certificate of settlement was issued. In that regard, the tribunal chairman entertained the dispute that was already settled by the ward tribunal.

Submitting jointly on the second and third grounds, she stated that, in civil cases, the standard of proof is on the balance of probabilities. In this

matter, the appellant discharged his duty and proved his case to the required standard by explaining how he acquired the suit land and how the cause of action arose. She further contended that, the chairman failed to apprehend principles of burden of proof in civil cases because through his reasoning, he wanted the appellant to prove his claims beyond reasonable doubt. She cited the case of **Mbatina Coronery and 4 Others vs Alistidia Coniled (Administrator of Estate of Coniled Coronery)** [2023] TZHC 21625 TanzLII to support her submission on burden of proof in civil cases. Finally, she prayed for this court to allow the appeal by reversing the decision of the trial tribunal. She also prayed for this court to re-evaluate the evidence and come up with its own findings. She further pressed for costs.

Having carefully considered the evidence of the appellant and his witness before the trial tribunal and the submission made by Ms. Barnabas, it is now pertinent to determine the merit or demerit of this appeal. Considering that the appellant in his appeal complained that, the learned chairman failed to evaluate the evidence on record, as a matter of law, this court being the first appellate court, has a duty to re-evaluate the evidence and where possible come out with its own findings as it was held in the case of **Domina Kagaruki vs Farida F. Mbarak and Others** [2017] TZCA 160 TanzLII.

Although the case was heard *ex parte*, still the appellant was duty bound to prove that, the suit land is legally owned by him. According to his pleadings, the appellant alleged to have acquired the suit land after being given by his father in 1980 before he passed away in 1982. In that regard, the appellant was supposed to prove what he alleged in his pleadings. It is the requirement of the law that, in civil cases, he who alleges the presence of a certain fact has a duty to prove existence of that fact. See section 110 (1) (2) of the Evidence Act [Cap. 6 R.E 2022].

Looking at the testimonies of the appellant and his witness, it is clear that the parties are father and son respectively. The main part of evidence of the appellant is found at page 9 of the proceedings which I find it apposite to quote as hereunder:

> *"Nilipotoka kwenda kutibu sukari yangu nikakuta amejenga kwenye* ***shamba la baba la ukoo,*** *mimi nikamshtaki Kata, nikawapeleka baraza la kata nikamuambia* ***hili shamba ni la baba*** *yeye achukuwe shamba langu* ***aache la baba ...Naomba baraza linipe mali yangu ya baba ya ukoo.*** *"*(Emphasis added).

When he was responding to the question from one of the assessors, the appellant had this to say:

> *"Nina watoto kumi na wote nimewapa maeneo yao.* ***Hili neo bishaniwa linapakana na eneo langu, hili ni la baba la ukoo lina ukubwa wa heka mbili (2).***" (Emphasis supplied).

Likewise, his witness, AW2 who is also his neighbour, at page 10 of the proceedings stated as follows:

> *"...huyu* ***mleta maombi ni jirani yangu ila baba yake alipofariki alimuachia shamba bishaniwa yeye na dada yake.*** *Ila sasa mjibu maombi amejenga kwenye hilo shamba.* ***Mleta maombi alimuambia mjibu maombi asijenge kwenye shamba la baba yake na mleta maombi,*** *ila mjibu maombi alikataa, ndio wakapelekana Kata."* (Emphasis is mine).

In the main, a close look at the evidence adduced by the appellant and his witness reveals that, the suit land is the property of the appellant's father who is now a deceased. Although in his pleadings the appellant claimed to be given that land in 1980 before his father passed away, there is nothing in his chief testimony to support his assertion. When he was responding to the question from the second assessor, the appellant claimed to be given that land by his father and mother. However, he did not explain when he was given that land in order to prove what he alleged in paragraph 7(a)(i) of his application. Without clear evidence from the appellant, it is not known

when such land was passed into his possession either before or after the demise of his father.

Furthermore, basing on the evidence of AW2, it is clear that, the suit land passed into possession of the appellant after the death of his father. It is undisputed that, the appellant has a right to inherit the suit land after the death of his parents. However, such land cannot automatically be transferred into the possession of the appellant without following the procedure of the law. Besides, he did not tender any evidence showing how that land was transferred to him after the death of his father. Legally, the property of the deceased cannot be disposed or transferred to the rightful heir(s) in the absence of letters of administration or probate granted by court of competent jurisdiction. Inheritance cannot be assumed by virtue of death, the procedures preceding transfer of title of that land to the heir has to be followed. Nevertheless, in this case, nothing was said to be done. Hence, in the absence of proof on how he inherited the suit land, the appellant had no right to claim ownership of the said land because legally, it is still the property of his father. In that regard, the tribunal chairman was right by holding that, the appellant has no right over the suit land.

Furthermore, despite the fact that the suit land was not legally transferred to the appellant, it is undisputable that, he has been taking care

of the said land since the demise of this parents. The respondent, on the other hand, as one of the children of the appellant, has a right to inherit from his father. However, there is no evidence to establish how he acquired that land after he forfeited his right to defend his interest on the suit land. Without ado, just like his father, he had no any colour of right to own that land which is still the property of his grandfather without establishing how the same was legally passed to him. For that matter, even though the appellant was not legally owning the suit land, the respondent also has no right to possess or own the said land. This concludes that second and third grounds of appeal which are dismissed for being unmerited.

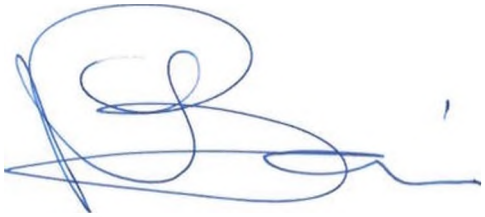
Reverting to the first ground, it was the contention of Ms. Barnabas that, the trial tribunal was wrong to entertain the dispute that had already been settled by Rutunguru ward tribunal. It is worthwhile noting here that, following the amendment of section 13(2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] via section 45 of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2021, wards tribunal are no longer vested with jurisdiction to enquire into and determine land disputes. Their main role is to mediate the parties. In the matter at hand, it is undisputed that, before knocking the doors of the trial tribunal, as required by law, the appellant

referred his dispute before Rutunguru ward tribunal. Part D of the attached certificate reads as follows and I quote:

> *"HAKI NI YA MDAI (YAANI SHAMBA ILO NI LA URIDHI WA BABA YAKE)."*

This passage does not in any how connotes settlement of dispute between the parties. Conversely, it implies that, the dispute was heard on merit to the extent of determining who is the lawful owner of the suit land which is not within the jurisdiction of the ward tribunal. Thus, the argument by learned counsel for the appellant about the dispute to be amicably settled is unfounded.

That being said and done, the appeal is with no merit, and it is hereby dismissed. Considering the relationship between the appellant and the respondent, I make no order as to costs. If the appellant is still interested with the suit land, he is at liberty to initiate legal actions to administer the estate of his father so that the same can be passed legally to the rightful heir(s). It is so ordered.



I. K. BANZI
JUDGE
15/03/2024

Delivered this 15th day of March, 2024 in the presence of Mr. Derick Zephurine, learned counsel who is holding brief of Mr. Lameck John Erasto, learned counsel for the appellant and in the absence of the respondent. Right of appeal duly explained.

I. K. BANZI
JUDGE
15/03/2024