IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL NO. 80 OF 2022

(Originating from Land Application No. 76/2020 at the District Land and Housing Tribunal for Singida at Singida)

MWANAIDI KILONGO LUHI..... APPELLANT

VERSUS

MWAJUMA ILUGHU.....RESPONDENT

JUDGMENT

Date of last Order: 06/03/2024

Date of Judgment: 19/03/2024

LONGOPA, J.:

This is an appeal against the decision of the District Land and Housing Tribunal for Singida on dispute over land ownership. The appellant sued the respondent for judgment and decree on the following orders: declaration that the appellant was the lawful owner of the disputed land; declaration that the respondent was a trespasser to that land; vacant possession of the land; permanent injunction from interference with the land; as well as costs.

The appellant stated to have acquired the land from her late father as gift *inter vivos* in 1974 during his lifetime and that she has used the land peacefully and uninterruptedly until 2003 when she left the land in custody

of Athumani Kihongwa Mpomboo to use it only. It was stated that Athumani was allowed to use the land for agricultural activities and that soon upon death of one Athumani Mpomboo the appellant consulted the respondent to return the land, but the latter refused thus she decided to institute the Land Application against the respondent.

Upon conclusion of the trial, the District Land and Housing Tribunal entered judgment and decree in favour of the respondent thus this appeal by the appellant who was dissatisfied with both judgment and decree of the trial Tribunal. On 21st September 2022, the appellant instituted this appeal seeking this honourable Court to dismiss and set aside the decision of the trial Tribunal with costs for being very unfair and unjust on the following grounds, namely:

1. *That, the trial tribunal erred in law and in fact to decide in favour of the respondent who produced weak and false testimonies during the trail to prove her ownership on the land in dispute.*
2. *That, the trial Tribunal erred in fact and in law to decide in favour of the respondent while the appellant proved her ownership on the land and the respondent and her husband just were given the land to use only.*
3. *That, the trial Tribunal erred in law and in fact to ignore evidence of the respondent's clan meeting which proves that the respondent has no ownership on the land in dispute.*

On 6th March 2024, the parties appeared before me for viva voce hearing of the appeal. Both parties fended for themselves. The appellant, Mwanaidi Kilongo Luhi submitted that the trial Tribunal was wrong to enter judgment in favour of the respondent. She argued that the evidence was to the effect that a clan meeting resolved that the respondent was not the owner of disputed land. The Minutes of the Clan Meeting was tendered and admitted as Exhibit P. 1 before the trial Tribunal.

It was her submission that she proved the ownership of the land by calling two witnesses, Jumanne Mchawa and Juma Shaban gave testimonies that the land belonged to her late father Mr. Kilongo. It was her argument that such land devolved to her as a daughter of Kilongo Luhi that is why she is claiming for land. It was her further argument that she has never been appointed by the Court as administrator of estate, but she is entitled to that land.

Moreover, she argued that there are graves of her relatives namely her late grandfather and those of her parents in the area/ land under dispute thus seeking the Court's assistance to get her land rights. Appellant finalised by stating that the trial Tribunal was wrong not to award judgment in her favour as she is the one entitled to that disputed land.

On the other hand, one Juma Abdallah Mpomboo who appeared for respondent with registered full powers of attorney to prosecute the case refuted the appellant's submission and grounds of appeal. He stated the

respondent was granted that land by her late husband since 1964. She has been using that land throughout the years thus the trial Tribunal was correct to award her the entitlement to that land.

It was submitted further that the respondent had two witnesses, namely Swalehe Athumani who testified that the respondent has been using that land since 1964. The second witness was Ramadhani Mwaka who was the Village Chairman and testified that during his leadership between 2004 to 2010 there was no dispute over the land as the land belongs to the respondent. The dispute arose in 2020.

On these grounds, the respondent prayed that this Court uphold the decision entered by the District Land and Housing Tribunal at Singida for this appeal lacks merits. That was all in the submissions by the parties.

Having heard both parties, this Court is enjoined to determine whether this appeal has merits. I have thoroughly reviewed the available record both proceedings and the judgment to determine the issues before me.

All the three grounds shall be argued jointly as they appear to indicate that trial Tribunal erred in law and in fact to decide against the appellant after the appellant managed to prove the case to the required standard thus establishing that she is the owner of the land.

I shall sum up the evidence on record to get a gist of the contention between the parties to this appeal. PW 1 testified that land in question belonged to her. First, she was granted the land by her later father in 1970 during lifetime of her father. Second, the respondent's husband was given the land to use by her late father who died more than 15 years ago though she cannot remember dates. Third, she has never been appointed administrator of her late father's estate. Fourth, she does not remember the year her late father entrusted disputed land to the Athumani Mpomboo to use it until the disputed land is needed. Fifth, when Athuman died, the land was not claimed back by herself. Sixth, she does not remember when respondent's husband died. Seventh, that land was given by her father to respondent's husband after 2004 as she used to cultivate on that land from 1970 to 2004. Eighth, there were no witnesses when Mr. Kilongo Luhi gave land to Athuman Mpomboo (respondent's husband).

PW 2 testimony reveals that in 2020 when the dispute arose the children of respondent's husband agreed that their father was given that land by Kilongo Luhi to use only. He only learnt about this in 2020 joint clan meeting intended to resolve the dispute. It was his evidence that Kilongo Luhi (appellant's father) died sometimes back in 1982/1983. It was further evidence of PW 2 that appellant's family used the land prior to 1959. However, PW 2 was not there when the appellant's father entrusted the land to respondent's husband. Also, it was his evidence that respondent lives at the suit land.

PW 3 testified that respondent's husband was entrusted to use land belonging to appellant's father until when the same would be needed by appellant's father children. PW 3 was not there when the land was given to the respondent's husband and that he does not remember when the land was entrusted on the respondent's husband. Further, he testified that on 2020, the children of respondent's co-wife did admit that disputed land belong to Kilongo Luhi. That is summary of all evidence on the appellant's side.

On the other hand, DW 1 testified to the effect that: First, she was married to one Athuman Mpomboo in 1964 and it her late husband who cleared a three acres land and used it for cultivation until his death. Second, that land is located Nkhangu village at Munyiyanyi hamlet bordering Mpunde on north, Swalehe on South, Luhi on East. Third, DW 1 stated to have been cultivating groundnuts in one acre and millet on 2 acres as the land belongs to her after her husband died. Third, she denied having participated in any meeting in 20/7/2020. Fourth, she was married when she was still young, lived and used that disputed piece of land with her late husband Athumani Mpomboo in his lifetime until his death. Todate, she has not stopped using the land since 1964.

DW 2 testified that he was born in 1964 and he has been living at his late grandfather's place one Athumani Mpomboo who was the husband of the respondent. Further, he testified that the land in question has been used by the respondent's husband and the respondent throughout uninterruptedly to the present day. He stated that he is not aware of any

clan meeting held in 2020. Also, he testified that Athumani Mpomboo died in 2004.

DW 3 testified that respondent was married to late Athuman Mpomboo in 1964 and used the suit land jointly until 2004 when Athumani Mpomboo died. He stated that the land belongs to the respondent. It was his further evidence that between 2004 and 2010 he was the Village Chairman and no dispute ensued regarding that land as the owner (respondent) was using it peacefully. That was totality of the evidence on record.

Was there any tangible evidence to prove that the appellant is the owner of the land in dispute? The answer is in the negative. The record of the trial court reveals that evidence of the appellant is wanting. The totality of appellant's evidence indicates that there are vivid contradictions regarding the disputed land.

There are several issues that related addressing the issues which can resolve the appeal at hand. The first is on the mode of acquisition of the said land by the appellant. PW 2 stated that she acquired the land by way of being given as a gift by her late father *inter vivos* in 1970s. She used the land uninterruptedly until 2003. It is her testimony that thereafter her father entrusted the land to respondent's husband to use it only. Thus, respondent's husband was given usufructuary rights only over that piece of land.

PW 2 and PW 3 stated that such land belonged to the appellant's father who entrusted to the respondent's husband to use only. These

witnesses only knew about the respondent's husband been given land during a clan meeting in 2020. According to PW 2 and PW 3, the appellant father died sometimes in 1982/1983. Neither of the three witnesses for the appellant was present when disputed land was given to the respondent's husband. It is not certain as to when was the land given to the respondent's husband to use it.

The testimonies of the appellant's side have two parallel arguments. First, that it was the appellant's father who gave the land to the respondent's husband. That land belonged to the appellant's father one Kilongo Luhi. Second, that land was already given to the appellant as a gift *inter vivos*. These two arguments do not tally. One aspect tends to indicate that such land had already been transferred to the appellant prior to the death of the appellant's father. Alternatively, the land was still a property of appellant's father until when the same was given to the respondent's husband to only use it temporarily.

In the circumstances, the appellant has failed to clearly state the mode of acquisition as PW 1 states to have been given a gift *inter vivos* while PW 2 and PW 3 state that land belonged to appellant's father thus appellant traces ownership through inheritance despite absence of any administration of estates since the death of the appellant's father. There is no description of the land given to the appellant as gift *inter vivos*, appellant failed to name even persons who witnessed her being given the land or witnessing her using the land from 1970 to 2004. She failed to

recall time when the land was given to respondent's husband to use it temporarily neither the terms of the use of such land including duration are stated.

However, respondent's version of story is straightforward that respondent's husband acquired the same via clearing of the virgin land and used the said land jointly with the respondent throughout since 1964 todate. The use of the land by the respondent has been consistent and uninterrupted.

All the three witnesses' testimonies point that the respondent and her husband jointly have been using the land since her marriage in 1964 without any disturbances from any person whatsoever. The former Village Chairman indicated that during his tenure as the Chairman in the village where the land is situated, it has always been used peaceful and uninterrupted by the respondent.

Further respondent ably described the land in question by indicating all neighbours to the land, size of the said land, as well as location of the land. This evidence appears to be more plausible than that of the appellant.

In the case of **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others** (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021) [TANZLII], at page 11 the Court of Appeal had this to say:

...it is obvious that PW2 gave a bare statement in her examination in chief that the appellant was allocated the piece of land by his father with no more. She did not explain as to how she came to know about such donation. The mere assertion without further elaboration was not enough. But that statement also leaves a lot to be desired. If it is true that she witnessed the gift inter vivos, why did she not mention it in the first place when she was called to establish its existence. Worst still, she did not give any detailed account, be it in her examination-in chief or cross examination, as to the number of witnesses who were present, the names of the witnesses and/or the place where the gift was made taking into account that the 1st respondent disputed the presence of the children at home in 1988. We think it would be wrong to place any reliance on evidence of a witness who allegedly saw the donation but failed to disclose such an important material fact in her examination in chief. With such improbable evidence of PW2, the learned trial Judge was correct in not putting any reliance on her evidence. In that regard, we find no reason to fault her.

It is incumbent upon the person claiming to be the owner of land through either given as a gift *inter vivos* or inheritance to demonstrate fully

on the mode of acquisition and bring evidence to substantiate the same sufficiently. This was the position taken by the Court of Appeal of Tanzania in the case of **Hamis Sultan Mwinyigoha vs Zainabu Sultan Mwinyigoha** (Civil Appeal No. 447 of 2020) [2024] TZCA 150 (29 February 2024). At pp. 5-6, the Court stated that:

> *We have therefore underscored in the context of this case that, validity of a gift essentially lies on the intention to give and acts incidental to that intention which may include the physical handing over of the gift. See* ***Micky Woodley, Osborn's concise Law Dictionary (supra)*** *at Page 200-201. It is also essential and paramount for the gift to be voluntary on the part of the donor and without any element of consideration on the part of the donee. As per the commentaries contained in Justice Y.V. Chandrachud, P Ramanatha Aiya Concise Law Dictionary, 3rd Edition, Lexis Nexis Butterworths Wadhwa, page 493; love, affection, spiritual benefit and many others may enter into the intention of the donor to give or make a gift. In the law of property therefore, three elements must exist for a gift to be legally valid. One is, as alluded to above, intent to give by the donor, two, delivery of the gift to the recipient, the donee and three, is the acceptance of that gift by the donee. These three elements, by any standard, are exhibited by way of evidence, no more no less. It is to*

say, in the instant appeal, there must be evidence proven on balance of probabilities that the late Sultan Mwinyigoha granted the suit property to the appellant by way of a gift.

In my humble view, the appellant failed to demonstrate before the trial Tribunal that she was given the land as a gift *inter vivos*. Apart from her statement that she was given the land in 1970s, there is nothing on record demonstrating that there was delivery of the land to appellant, and she received/accepted the handover of the said land. The rest of the evidence on record indicates that it is appellant's late father who entrusted the land to the respondent's husband. Essentially, that appellant evidence of PW 1, PW 2 and PW 3 that it is the appellant father who gave the land to the respondent's husband one Athumani Mpomboo leaves no doubt that such land was never transferred to the appellant thus there was not gift of the land *inter vivos*.

Where the ownership of land would have been transferred to the appellant, she would have brought evidence in trial Tribunal that disputed land was delivered to her and she accepted to take that land thus the appellant's late father would not have capacity to entrust that land to any other person as the same would have been transferred to the appellant. It is obvious that there was no such transfer of land to the appellant. Appellant's failure to bring any witnesses who witnessed the delivery and acceptance of the transfer of such land from the appellant's father to the

appellant makes the transfer of land *inter vivos* more improbable than not to establish that there was transfer of land.

The second limb is the departure from pleadings that can be observed in this case. We have noted that in the claim, the appellant stated that the land was given to her *inter vivos* in 1970s by her late father and that she used it consecutively until 2003 when she moved to another village. She claimed further that in 2003/2004 she personally entrusted the land to respondent's husband to take care of it and use it for cultivation until when the same shall be needed.

However, the evidence tendered before the District Land and Housing Tribunal reveals a different story. All the three witnesses for the appellant testified that it is the appellant's father who entrusted the land to the respondent's husband. The timing for such use of land by respondent's husband is unknown as well as timing of handing back the land.

It is my considered view that was a departure from pleadings which is not permitted under the laws of Tanzania unless pleadings are amended. The appellant pleaded something different from what the evidence tendered revealed. There is no evidence that it is the appellant who gave the land to the respondent's husband to for use only temporarily. PW 1 did not tender such evidence. On the same line PW 2 and PW 3 are loud that the land belonged to the appellant's father who entrusted the same to respondent's husband for use of the land only. The details as to when such

arrangement was made is not known to any of the appellant's witnesses including PW 1, PW 2 and PW 3. All are not aware as to when was the disputed land given to the respondent's husband.

Also, the evidence on record reveals that the appellant started demanding the return of disputed land in sometimes in July 2020. The respondent's husband died in 2004. This evidence is not controverted on the death date of respondent's husband. Arguably, this evidence departs substantially from the claim that appellant demanded the alleged disputed land upon death of the respondent's husband. From 2004 to 2020 is approximately 16 years. It cannot be said that is soon after the death of respondent's husband who is allegedly was entrusted to hold the land and use it.

A quick guidance on this aspect can be found in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019) [TANZLII), at p. 13 where the Court of Appeal instructively noted that:

> *The other remark which we find ourselves compelled to make relates to pleadings. In doing so we cannot do better than reiterate what we said in James Funke Gwagilo vs. Attorney General [2004] TLR 161 whereby we underscored the function of pleadings being to put notice of the case which the opponent has to make lest he is taken by surprise. From that same decision we reiterated another*

equally important principle of law that parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.

From this decision it is reiterated that parties are bound by their own pleadings. They can not depart from such pleadings at their pleasure. If there is departure from pleadings, tendered evidence that establishes a different dimension should be disregarded. This was the position taken in the case of **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) (TANZLII), at page 11 where the Court of Appeal observed that:

We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored - see James Funke Ngwagilo v. Attorney General [2004] TLR 161. See also Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others, Civil Appeal No. 56 of 2012; and Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others, Civil Appeal No. 38 of 2012 (both unreported).

As the appellant never brought any evidence that she was given the land as gift *inter vivos*, failed to bring evidence that she has been in occupation of the land from 1970 to 2004 instead tendered evidence that indicates the land has been property of her late father since 1959 but entrusted it to the respondent's late husband on unknown dates for unknown time limitation and for unknown conditions. This departure has impaired the credence of the appellant's case.

Another limb is the burden of proof which is another important aspect to resolve this appeal. It was the burden of proof of the appellant to establish to standard required by law. In **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019), at page 14 the Court of Appeal of Tanzania has reiterated this aspect. It stated that:

> *It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.*

As I have noted that evidence of the appellant was seriously contradictory to an extent that the witnesses are neither credible nor

reliable. The evidence of PW 1 is contradicted by PW 2 and PW 3 regarding ownership of the land and the nature of the appellant's source of ownership. As per testimonies of PW 2 and PW 3, disputed land belongs to the appellant's father one Kilongo Luhi and on his death it revolved to the appellant. All the three witnesses for the appellant have not stated if there was any administration of estates proceedings that made the appellant owner of the land in question either as administratrix or lawful heir whose part of inheritance granted to her is the disputed land.

Another aspect on this part of analysis is adverse inference that can be drawn from the evidence of the appellant. Failure to claim back disputed land from the respondent on death of respondent's husband is clear sign that such disputed land does not belong to the appellant. I concur with the findings of the trial Tribunal Chairman that in land matters failure to claim within sixteen (16) years cannot at any rate be said to be soon.

Further, the appellant argued that failure by the trial Tribunal to erred by failure to accommodate the Minutes of the Clan Meeting to establish that the appellant is the owner of that land. I have reviewed the Exhibit P.1 that is Minutes of the Clan Meeting. In that evidence, it is indicated that on 20/7/2020 there was held a meeting involving the appellant and respondent's clan. First, the totality of the evidence in that alleged meeting reveals that it was signed by all except the respondent. Though the respondent's name appears, there is nothing indicating presence or otherwise. Second, the contents therein contain no decision on the person

entitled to that piece of land. I am certain that there is nowhere in the minutes of the Clan meeting that indicate that there was admission on party of the respondent that disputed land belonged to the appellant. Third, conspicuous lack of signature of the respondent makes it doubtful if the meeting was so held. Fourth, the appellant herein failed to call any of those allegedly have expressed at the meeting that land belonged to the appellant as witnesses. Cases are established by presentment of witnesses who would normally testify in Tribunal or Court of law on the existence or otherwise of a given fact. Fifth, there was no evidence to explain or expound the contents of the alleged clan meeting.

Absence of anyone from the respondent's side to confirm about the contents of the alleged clan meeting make the contents of Exhibit P1 unreliable and lack credibility. The trial Tribunal was right to ignore the Exhibit P. 1 to establish that appellants are entitled to that land.

Generally, the contents of the alleged clan meeting could not establish the ownership of land in dispute. The reasons are straightforward that such meeting was one sided. There is no iota of evidence that the respondent was party of that meeting. Indeed, a party can is not bound by the document he has neither signed nor participated in its preparation.

Technically speaking, Exhibit P1 though was admitted and marked properly it lacks a crucial aspect of tendering of documentary evidence and exihibits. That is absence of reading loudly in court of contents of the

admitted exhibit. Such failure has watered down the evidential value of the tendered exhibit.

In the circumstances, the appellant failed to establish that she was the rightful owner of the disputed land. All the necessary evidence establishing ownership of the appellant on the disputed land is conspicuously lacking.

The appellant has failed to establish that she secured the disputed land from her father either by being given a gift *inter vivos* or the land devolved to her through inheritance as there is nothing on record establishing that there was probate or administration proceedings on the estate of the appellant's late father. The alleged Exhibit P. 1 which is a clan meeting minutes does not meet he threshold of reliability and credibility. As such, I am certain that its evidential value is negligible. The appellant's evidence is to the effect that appellant is quite a stranger to that piece of land as she miserably failed to establish with clarity and certainty the link of ownership of that land.

I entirely concur with the analysis and findings of the trial Tribunal that the evidence on record does not support the appellant case at any rate. Analysis contained in pages 5 to 8 of the judgment reveals contradictory nature of the appellant's evidence and absence of proof of the case to the required standard. In the circumstances, there was nothing for the appellant to complain against the decision of the District Land and

Housing Tribunal. That judgment is correct and valid presentation of the finding of the Tribunal as per available evidence on record. The trial Tribunal acted properly to enter judgment and decree in favour of the respondent. I shall uphold the same as it is correct and appropriate decision.

At this juncture and on account of all the analysis above regarding the available evidence on record, it is safe to conclude that neither of the grounds of appeal contained in the petition of appeal has been supported by any cogent reasons. The appeal lacks merits as it does not reveal any weaknesses on the part of trial Tribunal in determination of this case before it.

In short, I dismiss all the three grounds of appeal for being destitute of merits. Available evidence on record points to the direction that respondent is the owner of the disputed land. The judgment and decree of the District Land and Housing Tribunal for Singida is upheld for being correct and legally sound. The appeal stand dismissed with costs.

It is so ordered.

DATED at **DODOMA** this 19th day of March 2023.

THE HIGH COURT TANZANIA

E. E. LONGOPA
JUDGE
19/03/2024.