IN THE HIGH COURT OF TANZANIA

AT MWANZA

(LAND DIVISION)

MISC. LAND APPEAL NO. 91 OF 2008

(Appeal from the Judgment of the District Land and Housing Tribunal for Tarime at Tarime in Land Appeal No. 23/2008)

KURI AKWAMA.....APPELANT

VERSUS

AOS SETH..... RESPONDENT

JUDGEMENT

LATIFA MANSOOR, J.

Outa Advocate represented the Appellant and the Respondent appeared in person. The dispute is over a one and half acre land situate at Tarime District.

The Respondent lost the case before the Rocha Ward Tribunal, and he appealed to the District Land and Housing Tribunal at Tarime, where he was declared the lawful owner of the disputed land, hence this appeal.

The factual background of this matter is that, on 25/02/2006 one Ochuodho Riaka mortgaged this piece of land to the Respondent as security for the loan of Tshs 80,000 which he ought to have paid back after three months of the date he borrowed the

money. Ochuodho Riaki failed to pay back the loan, and the Respondent and Ochuodho Riaki had on 1/7/2006 before the Chairman of the Village agreed that the Respondent add Tshs 20,000 and that he takes the land. The mortgage agreement was in writing and was witnessed by several people including the brother and the wife of Ochuodho Riaki.

The Appellant states that this land does not belong to Ochuodho Riaki as he is not part of the Kawino Clan. He says, Ochuodho Riaki's mother was inherited by the member of the Kawino Clan when Ochuodho Riaki was already born. According to customary law of that area, a child whose mother was inherited cannot own the clan land, he can only use it. He says Ochuodho Riaki did not own that piece of land, and had no title to pass to the Respondent either by way of mortgage or sale. The Counsel for the Appellant Mr Outa had submitted that even if Ochuodho Riaki had a valid title to mortgage the land, the procedure for redemption of mortgaged land was violated, he said, since this was an informal mortgage involving an unregistered land, the procedure for recovery of loan, should have been through the court, and not by way of sale. I would disagree with the Counsel of the Appellant on this issue as the Respondent did not foreclose the land in order to recover the loan, it is said and confirmed that the Respondent and Ochuodho Riaki had mutually agreed, in the presence of the Chairman of the Village that the Land be sold to the Respondent for Tshs 100,000, of which Tshs 80,000 was already paid and the balance of Tshs 20,000 was paid at the time of purchase.

It was submitted in this Court that the law as it stands, that the mortgage can only take effect if it is registered, it is however beyond doubt that the land in dispute is not registered, and therefore as submitted by the Counsel for the Appellant this is an informal mortgage and need not be registered. Under the common law, a chargor retained his right to redeem and that, that right is only extinguished upon the entering into a purchase agreement and thereafter registration of the purchaser as the owner of the property. Before such registration, the chargor could redeem his property at any time before the sale.

In this case, an agreement for sale of the disputed land provided that the vendor was in possession of the suit land as mortgagee and had agreed to buy the suit land as such mortgagee under the power of sale reserved to him under the indenture of mortgage. I therefore hold that the procedure for redemption of land mortgaged informally was not violated.

The issue to be determined by this Court is whether or not Ochuodho Riaki had a good title over the land to enable him to mortgage the land and eventually to sell it to the Respondent.

It was submitted by the Respondent that Ochuodho Riaki is a very old man, aged over 70 years old, and has been using this land for over so many years. He says the agreement for mortgage and the sale agreement were made before the Village Leaders, and the story of Ochuodho Riaki's mother being inherited by a member of Kawino Clan was never mentioned. He knows that the land in dispute

belongs to Ochuodho Riaki. This appeal should therefore be approached, in my view, on the basis that the Rochi customary law applies to their dispute. The Appellant's case, as expounded by him, is that Ochuodho Riaki was not of the Kawino Clan as his mother was inherited after he was born and that this land was cleared and used by Kawino clan and that Ochuodho Riaki only had the right to use and not owning it, he did not have the title to either sale it or mortgage it. According to the decision of the Rochi Ward Tribunal, that as a custom of that area the right to own land is vested in the man who cleared it and his descendants and not the child whose mother was inherited. The Ward Tribunal, who heard a considerable volume of evidence and visited the scene, found as a fact Ochuodho Riaki had no title over this land and hence he could neither mortgage it nor sell it. I am content to accept Ward Tribunal's finding. For these reasons I agree with the decision of the Rochi Ward Tribunal that Ochuodho Riaki had no title to pass to the Respondent.

I entirely agree with the findings of the Rochi Ward Tribunal that the rights of the parties as between themselves in so far as their occupation of the land is concerned must be decided in accordance with their customary law and I also agree that the carefully considered judgment of the Ward Tribunal should be preferred to the judgment of the District Land and Housing Tribunal. With respect, I can find no good reason for the Chairman of the Distrct Land and Housing Tribunal's alteration of the original judgment of the Rochi Ward Tribunal, a judgment which appeared to be fair and equitable and to be in accordance with customary law.

I would, however depart with the finding of the decision of the Rochi Ward Tribunal on the locus standi of the Appellant. On this I concur with the finding of the District Land and Housing Tribunal that the Appellant had no locus standi to sue on behalf of the Kawino Clan. The Appellant ought to have sued as a representative of the clan, and his authority to do so should have explicitly shown. The parties to this dispute should have been all members of the Kawino clan, and not the Appellant alone, or the Appellant as the representative of the Kawino Clan.

I therefore quash the proceedings of the Rochi Ward Tribunal as well as those of the District Land and Housing Tribunal. The Appellant, if he so wish, can institute fresh proceedings at the Ward Tribunal not in his name but as the Representative of the Kawino Clan.

This appeal succeeds, in the sense that the proceedings of the Rochi Ward Tribunal, and the proceedings judgment and decree of the District Land and Housing Tribunal for Tarime in Land Appeal no. 23/2008 are quashed, with no orders as to costs.

Latifa Mansoor,
JUDGE
02 NOVEMBER 2012

IN THE HIGH COURT OF TANZANIA

AT MWANZA

(LAND DIVISION)

MISC. LAND APPEAL NO. 92 OF 2008

(Appeal from the Judgment of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Appeal No. 37/2007)

SABINA MALANDO ....APPELANT

VERSUS

EMMA N. MHAIRWA.....RESPONDENT

JUDGEMENT

Latifa Mansoor, J

The matter started from Butimba Ward Tribunal where Sabina Malando failed. She appealed to the District Land and Housing Tribunal for Mwanza, again she lost, hence this appeal.

Mr Feran Kweka, Advocate, represented the Appellant while the Respondent was not represented. The Appeal was heard by written submissions.

The dispute is over the piece of un-surveyed land located at Ibanda. The Appellant purchased a piece of land from one Salu Lukasi and

the Respondent purchased a piece of land from Magema Mtoni. It appears from the records that Salu Lukasi sold part of the land which was already sold to the Respondent by Magema Mtoni located at the hills, this piece of land forms the subject of this appeal, where the Advocate for the Appellant states that the dispute is over the boundaries and not a piece of land.

In his submissions, the Counsel for the Appellant raised an issue that one of the assessors sitting in this appeal, namely Mrs. Juma was also sitting as an assessor in the District Land and Housing Tribunal, hence she should be disqualified. On this, I would say that, this appeal was heard by written submissions, and these submissions were not passed over to Mrs. Juma for her consideration, it follows therefore that Mrs. Juma did not sit and determine this appeal as an assessor as suggested by Mr Kweka, the Counsel for the Appellant. Further, on 17/10/2012 when this matter was called for hearing, Mrs. Juma walked out of the court room, and the matter did not proceed, and it was ordered that the matter be argued by written submissions. The observation by the Counsel for the Appellant lacks merits.

The Counsel for the Appellant also submitted that the dispute before the lower Tribunals was on boundaries, and it was wrong for the District Land and Housing Tribunal to make its finding that the dispute was over a piece of land. Secondly, Mr Kweka, the Counsel for the Appellant submitted that the Vendor who sold the land to the Respondent did not give his evidence, and he could have been the most important witness for the

determination of this dispute before the District Land and Housing Tribunal, on an appeal.

It is clear from the records of the Ward Tribunal that the dispute is over a piece of land sold by one Masaru Lucas or Salu Lucas to the Appellant. The Agreement entered between Masaru Lucas and the Appellant reads as follows:

> *"Mimi Ndugu Masaru Lucas nimemuuzia shamba langu ndugu Sabina Malando kwa kiasi cha shilingi laki tatu na kumi na tano elfu....."*

The judgment of the Ward Tribunal reads:

> *Mzee Magema Mtoni ndiye aliyemuuzia Bi Emma Mhairwa- aiiliambia Baraza ya kuwa yeye allmuuzia Bi Mhairwa eneo lake mnamo October 1999, sehemu yote ya matuta mpaka mwisho wa mlima. Salu Lukas aliliambia baraza ya kuwa yeye alimuuzia sabina malando eneo la mlima tu....."*

It is in evidence that disputed land is the land that belongs to the Respondent, and that the main issue is the land which forms the boundary between the Appellant's land and that of the Respondent. This piece of land was sold to the Appellant by Salu Lukas, and this piece of land is located on the hills. The dispute is over a piece of land (the hills) which is also the boundary. The boundary in this case is not a mark, or a beacon, but it is a piece of land...sehemu yam lima". The hill "the mlima" is land, and the dispute is over this mlima. The Apelate Tribunal did not err in

deciding that this hill (mlima) is the land in dispute, and that since it was first sold to the Respondent, it is legally belonging to the Respondent.

It is also in evidence that one Mzee Magema Mtoni, the person who sold this land to the Respondent was the key witness before the Ward Tribunal, and he gave his testimony. This is clearly evidenced by the records and judgment of the Ward Tribunal. It was not necessary that Mzee Magema Mtoni to be called again before the District Land and Housing Tribunal to testify as he had already testified before the Ward Tribunal.

This appeal lacks merits and is hereby dismissed with costs.

Appeal dismissed.

Latifa Mansoor J

05 NOVEMBER 2012