IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT TANGA

MISCELLANEOUS LAND CASE APPEAL NO. 47 OF 2012

[From the Decision of the District Land and Housing Tribunal of Korogwe District at Korogwe in Land Case Appeal No. 115 of 2011 and Original Ward Tribunal Segera Ward in Application No. 54 of 2010]

FATUMA MOHAMED.....APPELLANT

VERSUS

MRISHO SAID.....RESPONDENT

JUDGMENT

U. MSUYA, J.

The Respondent, Mrisho Said filed this suit against the appellant, Fatuma Mohamed in the Ward Tribunal at Segera within Handeni District in Tanga Region. Basically, in the trial tribunal, the Respondent complained that his farm measuring six acres were invaded by the Appellant. The Ward Tribunal visited the Locus in quo and on the balance of probability, determined the matter in favour

of the Appellant. Aggrieved with that decision, the Respondent successfully appealed to the District Land and Housing at Korogwe. The decision of appellate tribunal was based on the fact that the Respondent remained uninterruptedly in the farm in dispute for 15 years. The appellant was dissatisfied with that decision and hence preferred this appeal. Basically, in this appeal, the appellant is challenging the decision of the appellate tribunal on the following reasons: One, that the appellant tribunal erred in law for granting ownership of the farm in dispute to the Respondent. Two, that the appellant tribunal erred in law for declaring that the Respondent's father had occupied the suit farm for 15 years. Three, that the Appellate Tribunal did not consider the evidence on record to the effect that the transaction of the suit farm was a pledge for a loan and not a sale transaction. Lastly, the appellant prayed to this court to uphold the decision of the Ward Tribunal at Segera.

In brief, the facts which gave rise to this appeal are. In 1990's the house of the appellant was damaged by a blowing wind. Following such incident, the appellant borrowed Tshs. 30,000/= from her brother, the Respondent, for the purpose of repairing her damaged house. In executing such arrangement, the appellant pledged one acre of farm to the Respondent as a security of the borrowed money. During trial, the appellant insisted that such farm was subject to redemption upon payment of the borrowed money. The appellant adduced further that his brother allowed his son, Said Mrisho to cultivate the pledged farm. Instead of cultivating one

acre the latter invaded other acres of farms, the property of the appellant. The appellant's version was refuted by the Respondent who initiated this suit. During trial, the Respondent testified that he purchased the farm in dispute from the appellant. The Respondent was recorded to the effect that after such purchasing transaction, he allowed his son, Said Mrisho to cultivate the farm in dispute. It was the Respondent's testimony that in 2010, the appellant together with her daughter, Asha Yahaya invaded the farm in dispute and approached the Respondent for the purpose of refunding him the purchasing price of the farm in dispute. The Respondent refused and unsuccessfully instituted this suit in the Ward Tribunal at Segera for redress. The matter climbed a ladder to the District Land and Housing Tribunal where the trial tribunal's decision was reversed in favour of the Respondent. Dissatisfied, the appellant filed this appeal.

At the hearing of this appeal, the parties were allowed to argue it by way of written submissions.

In her written submissions the Appellant requested the court to allow the appeal under the following reasons. One, that the evidence on record indicates that the borrowed money i.e principal sum plus interest amounting to Tshs. 50,000/= was paid to the Respondent. In that regard, the appellant submitted that it was wrong for the appellate tribunal to declare the Respondent the lawful owner of the suit farm. Two, the appellant insisted that the pledge transaction of the farm in dispute was entered at the time

when the Respondent's father had already died. On that basis, the appellant argued that the appellate tribunal erred in law for pronouncing that the Respondent's father remained uninterruptedly in the farm for 15 years. The appellant also added that since the Respondent's son, Said Mrisho was in occupation of the suit farm throughout the pledge period, then the Respondent ought to have called him to testify to that effect. The appellant contended that as such witness was not summoned; then an adverse inference should have been drawn against the Respondent. She referred this court to the ***case of Hemedi Said vs Mohamed Mbilu [1984] T. L. R 113*** to the effect that:

> ***"where for undisclosed reasons, a party fails to call a material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests".***

From the above decision, the appellant insisted that Said Mrisho occupied the suit farm with full knowledge that such occupation was temporarily and not permanent. In that respect, the appellant urged this court to take into account the evidence that the occupation was temporary and not permanently. Three, the Appellant insisted that there is enough evidence on record to the effect that the transaction between her and his brother was based on pledge. In that regard, the Respondent cannot claim to be the owner of the suit farm. In supporting her version, the appellant

referred this court to the *case of Andrew Sanya vs Kalisti Kalekezi [1981] T. L. R. 90* to the effect that:

> *"where money is loaned upon a pledge of property on condition that the property vests in the pledge, if the loan is not repaid in time the property does not pass unless there is a court order to that effect"*

From the above decision, the appellant submitted that it was wrong for the Respondent to take over the suit land on the allegation that the appellant failed to repay the granted loan in time.

In his reply, the respondent insisted that the appeal has no basis on the following reasons: One, that there is abundant evidence on record which demonstrates that the Respondent purchased the suit farm from the appellant. Two, that there is no evidence on record which indicates that on the basis of pledge the Respondent occupied the farm in dispute. Three, that there is ample evidence on record which shows that the Respondent remained uninterruptedly in the suit farm for more than 15 years. In conclusion the Respondent urged the court to dismiss the appeal with costs.

Before I consider the evidence on record together with the arguments advanced for and against this appeal, let me point out that, I went through the record of the Lower Tribunals carefully. The record of the Ward Tribunal reveals two anomalies. The first

anomaly is based on parties to the suit and the second anomaly is based on the composition of the Ward Tribunal during the trial of the dispute.

To start with the first anomaly, the record indicates that on 20.09.2010 and through Application No. 54 of 2010, Said Mrisho instituted this suit against Asha Yahaya claiming that Asha Yahaya invaded his farm in dispute. The record also indicates that Said Mrisho called his father Mrisho Said to testify in his favour as PW3. Mrisho Said adduced evidence to the effect that the farm in dispute belongs to his son, Said Mrisho. It is also indicated on record that on 20.06.2011, PW3, the father of Said Mrisho instituted this suit vide the same application [i.e No. 54 of 2010] against Fatuma Mohamed, the mother of Asha Yahaya, claiming that she invaded his farm in dispute. On that basis, the record is uncertain as to who is a complainant and complaining against who in this matter. If the farm in dispute is jointly owned by Said Mrisho and his father Mrisho Said, then one would have expected them to lodge one application jointly as complainants. Moreover, since the application is one, but filed by difference people at different time, then this is a confusion, of which this court cannot be in a position to determine who is the rightful owner of the farm in dispute.

Secondly, the record of the Ward Tribunal does not indicate the composition of members who heard and determined the application. The names of members who sat and hear the application are only reflected at the time when the matter was

fixed for delivering judgment. It is a principle of law that before any proceedings commences, the coram to that effect must be indicated. In the present case, the names of members who heard the matter from its commencement till judgment cannot be ascertained. In that respect, section 11 of the Land Disputes Courts Act, No. 2 of 2002 directs as follows:

> *"Each Tribunal shall consist of not less than four non more than eight members of whom three shall be women who shall be elected by ward committee"*

In the instant case, there are seven members whose names are indicated at the end of the trial tribunal's proceedings. In law, this is not proper. Moreover, I have taken trouble to assess the handwriting in the trial tribunal and observed that the proceedings were recorded by different people. This also vitiate the trial tribunal's proceedings.

From the above analysis, since the case was instituted by two different people against two different people claiming the same subject matter and since the composition of the Ward Tribunal is not properly indicated, then the trial tribunal's proceedings are a nullity. Furthermore, the proceedings of the appellate tribunal which were also based on such improper proceedings are also a nullity. I therefore declare the proceedings of both Tribunal null and void. Under the circumstances, the case should b

e instituted by proper parties and the same should be heard by c proper constituted tribunal. It is so ordered. Each party to bear i costs. It is so ordered.

U. MSUYA,
JUDGE
24/3/2014