

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT SUMBAWANGA**

**MISC. LAND APPEAL NO. 12 OF 2020**

*(From the Decision of the District Land and Housing Tribunal for Rukwa at Sumbawanga in Land Appeal No. 126 of 2017, Land Dispute No. 44/ 2017– Legezamwendo Ward Tribunal)*

**RAISON PAULO S/O SIMKONDA.....APPELLANT**

**VERSUS**

**JESINALA D/O NALAVWE.....RESPONDENT**

**JUDGEMENT**

23<sup>rd</sup> June – 03<sup>rd</sup> August, 2020

**MRANGO, J**

This appeal arises from the land appeal case No. 126 of 2017 of decision of the District Land and Housing Tribunal for Rukwa. The matter is originated from land dispute case No. 44 of 2017 of Legezamwendo Ward Tribunal. The appellant and respondent are fighting over land ownership and each one of them is claiming to be rightful owner of the said land in dispute.

The respondent emerged the victorious in the battle before the ward tribunal and she was declared the rightful owner of the land in dispute. Aggrieved by the decision of the ward tribunal the appellant unsuccessful

appealed to the District Land and Housing Tribunal for Rukwa which maintained the whole decision of the ward tribunal. The appellant has preferred this appeal to this court so as to challenge the decision made by the District Land and Housing Tribunal delivered on 17. 01. 2020. The appeal is therefore against the whole judgement and decree/ order made by the District Land and Housing Tribunal for Rukwa on the following grounds:-

- 1. That the appellate Tribunal erred in law by holding that the disputed land belongs to the respondent who lacked locus stand to sue the appellant on behalf of her late father.**
- 2. That the appellate Tribunal erred in law and fact by holding that the appellant was just an invitee to the disputed land while the evidence proved that the land in dispute was given to the appellant not as an invitee but to occupy and use it as lawful owner.**

When this appeal was called on for hearing Mr. Peter Kamyalile – learned advocate appeared for the appellant whereas the respondent appeared in person, unrepresented. The Mr. Peter Kamyalile prayed to argue the appeal by way of written submission; the respondent conceded the argument by the learned advocate. The parties filed their respective submissions as scheduled and ordered by this court.

Arguing in support of the appeal learned advocate Peter Kamyalile with regard to the first ground of appeal submitted that the respondent at the ward tribunal claimed that the appellant was borrowed the disputed land by her late father, and he returned it to her father. That after the death of the respondent's father the appellant trespassed on the suit land.

Mr. Kamyalile submitted further that it is trite of the law that it is only the lawful appointed legal representative of the deceased can sue or be sued for or on behalf of the deceased. Allowing parties to institute a suit while they lack locus stand are fatal and makes the proceedings and judgement of the trial court a nullity. He said the position was held in the case of **Method Bruma versus Emmanuel Stephano, Mics. Land**

**Appeal No. 24 of 2016**, High Court of Tanzania at Sumbawanga, unreported at page 8 that;

“The law is also settled that, it is only the lawful appointed legal representative of the deceased can sue or be sued for or behalf of the deceased. Allowing parties to institute a suit while they lack locus stand are fatal and makes the proceedings and judgement of the trial a nullity.”

Mr. Kamyalile further submitted that the issue of locus stand is a point of law which can be raised at any stage even on appeal stage because the superior courts have the additional duty of ensuring proper application of the laws by the courts below. He said the position was held in the case of **Marwa Mahende versus Republic [1998] TLR 249** at page 253 that;

“We think, however, that there is nothing improper about this. The duty of the court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below”

He submitted that since the respondent opened the case claiming to belong to her father who has passed away and she is not a lawful appointed legal representative of the deceased cannot sue on behalf of the deceased because she lacks locus stand to sue.

With regard the second ground of appeal, Mr. Kamyalile submitted that the evidence on records shows that the appellant father was given the disputed land for residential purpose to occupy and use it as lawful owner and not as an invitee. The evidence of DW3, which was used by the appellate tribunal show and prove that the appellant was given the disputed land to live there. He beg to quote as follow;

"Mda mrefu nilimuona Mzee Penesi Silavwe pale tulikuwa jirani. Alikuwa mzee Sikonda. Alifika pale na kumuomba Penesi Silavwe MAHALA PA KUKAA. Na kwa sababu tulikuwa jirani tulisikia Penesi Silavwe amempa Simkanda eneo MAHARI PA KUISHI."

Mr. Kamyalile further submitted that the appellate tribunal erred in law by holding that the appellant was invited on the suit land to use it temporary while in fact the evidence on record show that the appellant

father was given the disputed land to live there and he was not given the disputed land as an invitee as held by the appellate tribunal.

Mr. Kamyalile submitted further that the evidence on records prove that the land in dispute belonged to the appellant as he inherited it from his father who acquired and owned it from one mzee Penesi Silavwe the father of the respondent. He said the principle was articulated in the case of **Barelia Karangirangi versus Asteria Nyalwambwa, Civil Appeal No. 237 of 2017**, Court of Appeal of Tanzania at Mwanza, unreported held that;

“.....sufficiently proved that the land in dispute belonged to her as she inherited it from her father who acquired and owned it from one Maganga (her grandfather). The respondent then, had on the balance of probabilities, succeeded to discharge her duty.”

He said the court further held that;

“We agree with the finding of the second appellate judge that from the evidence on record it was proved that the

land in dispute was given to the respondent's father not as an invitee but to occupy and use it for good."

Mr. Kamyalile finally submitted that based on what he submitted above and the plethora of authorities pinned in, he prayed for the appeal be allowed with costs, and declare the appellant as a lawful owner of the disputed land or order trial de novo.

In replying the appellant's written submission, respondent in addressing the first ground he submitted that before the trial tribunal and the appellate tribunal the respondent stood in her capacity claiming for the land which is her land passed to her after the death of her father, and thus respondent needed no letter of administration to sue the appellant. He argued that the cited case of **Method Bruma versus Emmanuel Stephano** (supra) is distinguishable from the case at hand and therefore should not be considered by this court.

With regard the second ground of appeal, he further submitted that neither before the trial tribunal nor the appellate tribunal there was no evidence adduced by the appellant to prove that he was given the land in question to use the same and occupy it as a lawful owner. Thus in the

absence of such vital proof the appellate tribunal rightly held the appellant to be a mere invitee to the land in question and not the owner.

He finally prayed for the appeal be dismissed with costs.

Having considered the submissions and the arguments of both parties, now the question before this court is whether the appeal has merit.

With regard the first complaint, this court find this ground is a new issue which was not neither raised nor determined by the first appellate tribunal. It is settled principle of the law that a new issue which was neither raised by the trial court nor on appeal by court below, cannot be entertained on the level of an appeal. Therefore, the issue of *locus stand* as raised by the advocate for the appellant can be said to be of no worth to be considered and determined by this Court at this stage. There is a chain of authorities to support the position. See cases of **George Mwanyingili vs. Republic, Criminal Appeal No. 335 of 2016, unreported, Juma Manjano vs. Republic, Criminal Appeal No. 211 of 2009, unreported, Sadick Marwa Kisase vs. Republic, Criminal Appeal NO. 83 of 2012, unreported.**



Therefore, this ground of appeal as raised by the advocate for the appellant is short of merit to be considered and determined by this court.

With regard the second complaint, from the evidence tendered at the trial tribunal, it is undisputed fact by both sides of the dispute that the appellant herein was given disputed land to live and using for cultivation by the father of the respondent.

The general principle in civil litigation that he who alleges or asserts must prove on a balance of probabilities on the existence of material facts by adducing cogent evidence to the satisfaction of the court. The position is well captured under the provisions of **Section 110(1) and (2) of the Tanzania Evidence Act [Cap 6 R.E. 2002]** which provides that;

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”

Admittedly, the appellant asserted that the appellate tribunal erred in law and fact by holding him that he was a mere invitee and not a lawful owner of the disputed land. However, my scrutiny of the evidence as tendered at the trial tribunal, there no any piece of evidence that goes contrary to the fact that he was a mere invitee after be given a land temporarily by the late father of the respondent. Therefore, the appellant failed to convince the trial tribunal and the appellate tribunal as regard his absolute ownership of the disputed land.

In the premises, I find no reason to vary the decision of the appellate tribunal which maintained the decision of the trial tribunal as the appeal before this court has no merit. The same is dismissed with costs.

It is so ordered.



**D.E MRANGO**

**JUDGE**

**03. 08. 2020**

Date - 03.08.2020  
Coram - Hon. D.E. Mrango – J.  
Appellant - Absent/without notice  
Respondent - Present in person  
B/C - Mr. A.K. Sichilima – SRMA

**COURT:** Judgment delivered today the 03<sup>rd</sup> day of August, 2020 in presence of the Respondent in person and in the absence of the Appellant and his Advocate – without notice.

Right of appeal explained.



  
**D.E. MRANGO**

**JUDGE**

**03.08.2020**