

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPEAL NO. 4 OF 2022

(From the decision of District Land and Housing Tribunal of Mkuranga in Land case Appeal No. 16 of 2021 and Original Ward Tribunal of Mwaseni Ward in Application No. 30 of 2020)

SIJALI RAJABU NZELEKELA.....APPELLANT

Versus

DAMFA ATHUMANI RUBUA.....RESPONDENT

JUDGMENT

06/07/2021 & 10/08/2022

Masoud J.

In the ward tribunal of Mwaseni, the appellant herein lodged a complaint against the respondent. The complaint involved ownership of suit land and trespass. The claim by the appellant at the ward tribunal was that he was the lawful owner of suit land situated at Mloka village, Chamkange, Rufiji which he inherited from his father. He claimed further that the respondent has trespassed into the suit land and had therein built a house in which her mother resides.

On the other hand, the respondent disputed the claim by the appellant in the ward tribunal. The respondent maintained that the suit land originally belonged to her father who, for the first time, cleared it from the jungle after satisfying himself that the suit land was not owned by anyone. To reinforce her defence, the respondent narrated as to how her father, namely, Athuman Rubua, was charged and fined for his failure to maintain the suit land, and how her father cleared the suit land, built a hut thereon and lived therein until he died in 2009.

In a bid to establish the case in the ward tribunal after the parties' claims were taken and recorded, parties were allowed to adduce evidence in support of their respective case and defence. It is on the record that the appellant called witnesses. I will for this purpose refer to the evidence of the three witnesses who adduced evidence in support of the appellant's case, namely, the appellant himself (Sijali Rajabi Nzelekela), Zena Nzelekela, and Mwalim Nzelekela. There was also the evidence of one Saidi Mwinshehe Mwanga who narrated how he passed the information to the Rubua family about the dispute in respect of which they were being looked after. There was also on the record the evidence from the respondent in relation to the appellant's claim.

The evidence adduced by the said witnesses of the appellant at the trial tribunal, if looked at as a whole, was to the effect that the suit land belong to the appellant having inherited the same from his late father. The evidence had it further that the appellant's father (Rajabu Nzelekela) told the appellant about the suit land which could be shown to him by his uncle, namely, Mwalimu Nzelekela, if he wanted to get it.

It was after the death of the appellant's father in 2006, that the appellant started follow-ups as to his ownership of the suit land. He met his uncle as he had been told by his late father. It was not disclosed in evidence as to when exactly he met his uncle after the death of his father in 2006.

Furthermore, the evidence adduced in support of the appellant's case had it that it was upon such follow-ups that the appellant was taken by his uncle to the suit land and having reached the suit land he realised that the respondent had trespassed on the said suit land. Worth noting, though, it was not clear in the evidence as to when exactly the appellant and his uncle went to claim ownership of the suit land following the death of the appellant's father in 2006 as it is when exactly the appellant's deceased father told the appellant about the suit land.

It is noteworthy that the said Mwalimu Nzelekela who was allegedly entrusted with showing the suit land to the appellant was clear that he had nothing to testify on how the appellant's father came into the ownership of the suit land and how the suit land was in the possession and occupation of Rubua family. It is in his evidence that it was the appellant's aunt who could testify on that.

It was not mentioned as to whether one Zena Nzelekela who testified for the appellant was the appellant's aunt referred to by the said Mwalimu Nzelekela. Assuming that she was the one, her evidence however felt short of addressing what the said Mwalimu Nzelekela could not testify on. I say so because the said Zena Nzelekela was not clear as to how the appellant's father came into the alleged ownership of the suit land and how the same came into the possession and ownership of the respondent.

The evidence on the record from the respondent indicated how the respondent's father came into the ownership of the suit land. In this respect, one must note that there was no similar evidence or assertion from the appellant or from any of his witnesses. The history as to how the suit land came into the ownership of the respondent is consistent with the

undisputed fact that the suit land is also in the possession and occupation of the respondent.

Having heard the parties and their evidence, the trial tribunal decided the dispute in the favour of the appellant. It found that the appellant was the lawful owner of the suit land and went further to fine the respondent for allegedly not telling the truth about ownership of the suit land. As the respondent was aggrieved by the decision of the ward tribunal, she preferred an appeal to the District Land and Housing Tribunal fronting several grounds of appeal. In the end, and having heard the parties and reviewed the evidence on the record, the district tribunal found in favour of the respondent.

As the appellant was aggrieved by the decision of the district tribunal exercising its appellate jurisdiction, he lodged an appeal before this court on only one ground of appeal. The ground of appeal raised, in a nutshell, attacked the Chairman of the district tribunal for his failure to consider the watertight and credible evidence of the appellant which was adduced at the ward tribunal.

The appeal was argued by way of filing written submissions. The submissions were duly filed pursuant to the schedule which was set by

the court. The submissions by the appellant were detailed. They paid attention to a number of aspects of the evidence on the record in a bid to show that the district tribunal failed to properly evaluate the evidence and hence not according value to the watertight evidence of the witnesses who testified against the respondent.

It was thus argued that the respondent father was not living on or occupying the suit land but he was residing in a different place; that such piece of evidence ought to have been considered but it was not; that the evidence of the respondent proved that the appellant father paid a fine of Tshs 5,000 in respect of the suit land which show that the appellant father was the lawful owner of the suit land; and the respondent's failure to tender evidence establishing how her father came into the ownership of the suit land.

It was also argued that the appellant had led evidence through Zena Nzelekela that the respondent's father was a mere invitee for whom title could not pass regardless of years of his stay in the suit land. Counsel for the appellant relied on **Maigu E.M Magenda v Arbogast agenda**, Civil Appeal No. 218 of 2017, among others, to the effect that an invitee cannot own land to which he was invited to the exclusion of his host

whatever the length of his stay. Furthermore, there were arguments about credibility of witnesses and authorities were cited in this respect without any connection whatsoever to the witnesses who testified before the ward tribunal.

On the other hand, the submission in reply by the respondent was very much consistent with the evidence on the record as testified by the respondent. It underlined the history as to how the respondent's father came into the ownership of the suit land and how he occupied the same, having cleared and built a hut thereon. It also underlined that the respondent's father and the respondent had ever since and even after the death of the respondent's father been peacefully in occupation of the suit land.

I have considered the evidence on the record in relation to the ground of appeal and the judgment of the district tribunal. The issue is whether the district tribunal failed to consider the evidence as alleged in the ground of appeal raised. I have in this respect paid regard to aspects raised in the submissions by the counsel for the appellant and the reply by the respondent.

In his five-page judgment, the Chairman of the district tribunal revisited the evidence and supported his reasoning and finding with the evidence. In all, he was satisfied that the appellant who was the claimant in the ward tribunal did not discharge his burden of proving on the balance of probability that he is indeed the owner of the suit land as against the respondent whose evidence is overwhelming as to how her father came into the ownership of the suit land and as to how they have ever since been occupying the suit. I have in this respect had regard to the provision of section 110(1) of the Evidence Act, cap. 6 R.E 2019, and the recent decision of the Court of Appeal in the case of **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, which relate to burden of proof in respect of one who initiated the proceedings.

In the light of the above, the district tribunal found on the evidence on the record, correctly in my view, that that there was no evidence led by the appellant on the record that the appellant's father or the appellant had at any particular time been in the ownership and occupation of the suit land. The only evidence, which is in my view insufficient to establish the alleged ownership in the favour of the appellant, was the evidence by

the appellant that he was told by his late father about his father's ownership of the suit land and hence his entitlement to ownership of the said suit land and should as such use his uncle to identify the suit land for him.

As earlier discussed, Mwalim Nzelekela, who seem to be the alleged uncle of the appellant was clear in his evidence that he was not competent to testify on how the appellant's father was allegedly the owner of the suit land and how the appellant and her father came into the occupation and possession of the suit land. To make it worse, even the testimony of one Zena Nzelekela, who could be the appellant's aunt referred to by Mwalimu Nzelekela in his testimony was not cogent on such aspects and could not be relied upon in the absence of any other evidence.

The other thing that is apparent in the judgment of the district tribunal as regard to the evidence on the record is that from the evidence on the record, it is vivid that the Rubua family had been in the possession and occupation of the suit land as owner for quite a long time. The observation and reasoning of the learned Chairman of the district tribunal in that respect are appalling and well founded in my view.

If one counts from the year 2006 when the appellant's father died upto the time when the appellant lodged the complaint before the ward tribunal sometime in 2020, it is over 12 years period. There is no doubt that the period would be much longer if one were to count from the moment the appellant was told by his late father about the suit land. Unfortunately, however, it was not stated when exactly the appellant was first told by his father about the suit land. It is my finding that this period of time would operate to bar the appellant's claim of ownership of the suitland.

The evidence on the record has it that it is the respondent's father who was fined over the suit land, and not the appellant's father. This piece of evidence was lucidly covered herein above in my analysis of the evidence adduced at the trial tribunal. I need not go into any details of the evidence once again. It should only suffice to say that what appears in the typed judgment of Hon Chairman of the district tribunal is a result of typographical errors.

I am of the above position as to the typographical errors because my perusal of the hand written judgment shows that reference to "*mrufaniwa*" (respondent) in the relevant pages (1-2) of the typed judgment was for "*mrufani*" (appellant) in the relevant pages (2-3) of the


handwritten judgment. I am in this regard mindful that the respondent herein was the appellant in the district tribunal.

In view of the foregoing, there is nothing upon which the finding and conclusion of the Hon Chairman of the district tribunal can be faulted on the ground of failure to properly evaluate the evidence and thus failure to consider the evidence of the appellant on the record. What is on the record and considering that the appellant was the one who brought the matter against the respondent in the first place, he was entitled to establish his allegations by credible evidence on the balance of probabilities. As he did not do so, as shown herein above, the claim that he brought must fail so is this appeal.

In the upshot, the appeal fails for lack of merit and is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 10th day of August 2022.


B.S. Masoud
Judge

