

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 20 OF 2021

GASPER VENANS AKILEO 1st APPELLANT

FRANK VENANS KANYENDA 2nd APPELLANT

FLORENCE VENANS KANYENDA 3rd APPELLANT

VERSUS

EVARIST KAPUFI RESPONDENT

(Appeal from the Judgment and Decree of the District Land and Housing tribunal Land

for Rukwa at Sumbawanga),

(J. Lwezaura, Chairperson)

Dated 6th Day of July, 2021

In

Land Application No. 8 of 2018

JUDGMENT

Date: 30/05 & 18/08/2022

NKWABI, J.:

The land dispute that arose between the parties in the year 2016, over the piece of land where the respondent planted crops. After sometimes, he found the appellants cultivating and planting crops therein. He lodged a land application in the trial tribunal which decided in his favour. The respondent was declared owner of the disputed piece of land. The appellants were ordered to vacate the suit land. The appellants were aggrieved with the

decision of the trial tribunal hence this appeal. The appellants' counsel preferred two grounds of appeal as follows:

1. That, the Trial Tribunal erred in law and fact by declaring the respondent to be the lawful owner of the disputed land while he failed to discharge his legal burden of proof on how he acquired the disputed land.
2. That, the Trial Tribunal erred in law and fact in evaluating the evidence on ownership of the disputed land which was adduced by the parties hence reached to wrong decision.

It was prayed, for the appellants, that judgement of the District Land and Housing Tribunal be quashed and set aside and declare the appellants to be the lawful owner of the disputed land with costs.

When the matter was called up for hearing, the appellants were duly represented by Mr. Peter Kamyalile, learned counsel. The respondent appeared in person, represented.

In his submission, Mr. Kamyalile who submitted collectively on the grounds of appeal, contended that the respondent did not prove ownership of the land in dispute. He cited section 110 of the Evidence Act, to the effect that he who alleges must prove. One of the issues is who was the owner of the disputed land. Mr. Kamyalile added that on their side they submit that the respondent failed to discharge the burden of prove. He failed to prove how he acquired the disputed land, pointed Mr. Kamyalile. In examination in chief the respondent claimed that the appellants had invaded the disputed piece of land, when he was cross – examined by the 1st appellant he said that he started cultivating the land in the year 1986 and that he was married and aged 20.

He further contended that the judgment of the trial tribunal at page 4 in 5th paragraph, there is no record which indicate that he stated that the land is his property. Mr. Kamyalile also asserted that in the year 1986, the respondent was a minor and could not have the capacity to own land. When he testified in 16/06/2022 the respondent said was 48 years of age. If one takes 2000 – 48 then he was born in the year 1972, then when he started owning the shamba in the year 1986 then we get he was aged 14 years. It

was improper for the trial tribunal to hold that he was the owner of the disputed land since the year 1986 while he was minor incapable of owning land or to enter into a contract. He referred me to **Asha Juma v. Hawa Juma Zakumba**, Civil Appeal No. 118/2009 Court of Appeal of Tanzania at Dar es Salaam at page 9.

Mr. Kamyalile is also suggesting that the appellant contradicts himself by saying he inherited the piece of land when his father died and when he inherited. That was raised by tribunal assessors which denied the appellant's rights for re-examination, explained Mr. Kamyalile.

He also revealed that the evidence of Regina Shabani is not evidence of a reliable witness. She claims the land is her property. She then claims she is the wife of the respondent and that she was married in the year 2000 by the respondent. Mr. Kamyalile also pointed out that in examination Mrs. Regina, explained that when she was married, the respondent was using the disputed land. When testifying she said she was aged 25 years. 2020 – 25, then she was born in the year 1995. Then from 2000 when she was married,

she was aged 5 in which case she could not be married, then her evidence cannot be relied upon, stressed Mr. Kamyalile.

It was also the observation of Mr. Kamyalile that the evidence of PW1 Joseph Kasakwa, who claimed that he had let the land to Evarist Simbeye. At page 2 of the judgment is indicated that PW1 hired the land from Evarist Kapufi. That is contradictory as they are two distinct persons. In the premises, contended Mr. Kamyalile, the respondent failed to prove ownership of the land in dispute.

Again, Mr. Kamyalile submitted that the evidence of the 1st appellant was corroborated by the evidence of 2nd and 3rd appellants. So, it was wrong for trial tribunal to declare that the appellant is the owner of the disputed property, observed Mr. Kamyalile. He urged the appeal be allowed with costs and the Appellants be declared owners of the disputed area.

In response, the Respondent contended that the submissions of the Counsel for the appellants are false. He maintained, a person of 20 years age has

the right to own a piece of land. It was just for him to inherit the piece of land from his late father, the respondent pointed out.

He further asserted that the appellants invaded the piece of land in the year 2016. The District Land and Housing Tribunal dispensed justice in accordance with the law.

The respondent also declared that the evidence of his wife is correct because she was using the land. He added, he had also won a case against another person in the District Land and Housing Tribunal. He maintained that the piece of land is his property. He then prayed for justice to stand.

Cementing his submission in chief, Mr. Kamyalile contended in rejoinder that the evidence in the court file does not show that the respondent inherited the land. There is also no evidence to prove that he was cultivating the piece of land for a long time, Mr. Kamyalile stressed. He strongly maintained that the respondent is the one who stated he was aged 48 years. So, there is contradiction in respect of the age, Mr. Kamyalile stressed.

It was further the argument of Mr. Kamyalile that the evidence about the age of wife, she could not be married while she was aged 5. That is impossible, Mr. Kamyalile explained. The law is clear, about the judgments he secured, those were not received in evidence and they are new revelations. They are unacceptable, Mr. Kamyalile implored this Court to hold so.

Mr. Kamyalile further argued that the claim that Joseph Kasaliwa is Evarist Simbeye and not Evarist Kapufi while in fact they are two persons who are distinct. No evidence to prove that Evarist Simbeye is Evarist Kapufi, he added. In the circumstance, prayed Mr. Kamyalile, their appeal be allowed with costs and the appellants be declared the lawful owner of the disputed land.

I have given this appeal a deserving consideration. I have carefully examined the arguments of both sides and the record. I am of a firm view that this appeal is unmerited. Mr. Kamyalile strenuously dwelt much in arguing about the age of the witnesses of the respondent. That is the respondent himself and the wife of the respondent. In all which he termed as evidence of the

age of the respondent and that of the wife of the respondent, that does not qualify as evidence. So, they cannot be considered as the evidence regarding their age. To conclude so, I place reliance on **Tano Mbika v Republic**, Criminal Appeal No. 152 of 2016, CAT, (unreported):

"Applying the above principle in the case and reasoning by analogy the citations of the age of the victim in the charge sheet and before giving evidence are not part of the evidence and cannot be used to prove the age of the victim." [Emphasis added].

As to the ownership of the piece of land, the respondent claimed to have inherited it from his late father. The 1st appellant claims that he also inherited it from his late parents. No one tendered any evidence (documentary evidence in respect of the distribution of the estate) to prove that indeed one had the ownership through inheritance. Truly, he who alleges must prove. Now, that parties are at the same level, what remains, is decision by credibility of witnesses. The trial tribunal decided in favour of the respondent as it found his evidence credible. No cogent reason has been advanced for me to think otherwise.

Further, the case of **Asha Juma** cited to me by Mr. Kamyalile is distinguishable with this case because, in that case, the Court of Appeal was making findings in respect of capacity to contract under the Law of Contract Act. In this case the respondent, just as the appellants is claiming ownership of the piece of land by way of inheritance.

The trial tribunal was satisfied that the appellants encroached on the piece of land of the respondent as their piece of land is adjacent to that of the respondent. As said, I find no reason to interfere with the decision of the trial tribunal.

The appellants claim that the respondent trespassed on their land which they were cultivating way back is untenable. I wonder why did they fail to institute a land case in court (tribunal). Their claim that they used to use the land and they own the same, seems to be unwarranted and not backed by any substantive evidence.

For the above reasons, I find the appeal wanting in merit. I uphold the findings of the trial tribunal. I dismiss the appeal with costs.

It is so ordered.

DATED at **SUMBAWANGA** this 18th day of August, 2022.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE