IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND CASE APPEAL NO. 3 OF 2023

(Originating from Land Case No. 19 of 2023, Songea District Land and Housing Tribunal)

SHOLASTIC GALUS NDAUKA ..... APPELLANT

VERSUS

ONESMO MBAWALA (Administrator of Estates of Josepha Ndauka) ..... 1ST RESPONDENT

MAGRETH MASSAWE (Administrator of Estate of Innocent Andrea Massawe) .....2ND RESPONDENT

MAGRETH MASSAWE .....3RD RESPONDENT

JUDGMENT

28/02/2023 & 30/03/2023

E.B. LUVANDA, J.

In the memorandum of appeal, the Appellant above named, presented three grounds of appeal to challenge the decision of the Songea District Land and Housing Tribunal (hereinafter the trial tribunal), which dismissed her claim of ownership and trespass by the Respondent: One, the trial tribunal erred in law and facts when it (sic) against the Appellant without justification; Two, the trial tribunal erred in law when it relied on the evidence collected during the *locus in quo;* Three, the

trial tribunal erred in law when it heard the matter contrary to the law and evidence.

Mr. Nestory Nyoni learned Advocate for the Appellant argued the first and third grounds jointly and submitted that the trial tribunal erred in law and fact when it held against the evidence and law, hence declaring the third Respondent as the lawful owner of the suit land, on the grounds that the Appellant failed to prove her case, while the Appellant did prove her case by summoning four witnesses, including the Appellant herself (PW1), Amiri Amiri Banda (PW2), Petra Petro Njovu (PW3) who is the Appellant's mother and Editha Galus Ndauka (PW4) who is the Appellant's sister and neighbour, who all witnessed when the Appellant was given land by one Galus Ndauka (deceased) in 2000, also PW3 was present when the deceased was allocated land by the Village Council. He submitted that it was testified clearly that the Appellant was given four acres of land by her deceased father in 2000, where the first Respondent trespassed 2.5 acres and vended to the second and third Respondents, as per PW1, PW2 and PW3. He therefore faulted the trial tribunal for holding that all Appellant's witnesses did not state a size of a trespassed land, including a holding that the Appellant's case was built on false evidence, or that the Appellant was lying for alleging being not aware whether her mother had a case with Joseph Ndauka or that her

mother claimed ownership too. The learned Counsel faulted the trial tribunal for unprocedural taking judicial notice contrary to section 59 of the Tanzania Evidence Act, Cap 6 R.E. 2019. He submitted that the trial tribunal misdirected itself to say the Appellant did not state a size of land trespassed, while categorically stated in paragraph 6(a)(i) of the application filed in the tribunal on 01/06/2017. The learned Counsel for Appellant, faulted the trial tribunal for holding that the Appellant failed to call the village chairman, on account that no number of witness is required to prove a case, citing section 143 Cap 6 *(supra).* Regarding a holding by the trial tribunal that the Appellant did not state as to when a dispute arose, the learned Counsel submitted that the dispute started when the second and third Respondent purchased a suit land in 2013 which fact was not denied by the dual. He submitted that the witnesses for Respondent's (DW4) confessed to have purchased the land which did not belong to Joseph Ndauka but to the land of the Appellant's father where PW1, PW2, PW3 and PW4 testified that the same was given to the Appellant, shows clearly inconsistence on the defence case.

For the second ground, the learned Counsel submitted that the proceeding at the *locus in quo*, nowhere reflect that the Appellant failed to identify boundaries, because proceedings do not speak so, including

the 3 acres alleged shown by the Appellant and 5 acres shown by the Respondent are missing in the proceedings.

In opposition, Mr. Makame A. Sengo learned Counsel for Respondents cited sections 110, 112, 115 of Cap 6 *(supra)* regarding burden of proof, or whom burden of proof lies, knowledge. Also cited **Hemedi Said vs Mohamed Mbilu** (1984) TLR 113 for a proposition that in measuring the weight of evidence, quality of evidence matters most. He submitted that the Appellant failed to name the size of the land alleged to have been allocated by her father, insisted it is PW2 who mentioned the size of land allocated to the Appellant including that alleged trespassed by the third Respondent. He submitted that PW3 failed to tender the alleged written agreement for handing over the land by the deceased to his daughter (Appellant). The learned Counsel admitted a fact that the court cannot dictate on the number of a witnesses which a party to a case can present, but there are those witnesses who are very important to be called to prove the existence of a certain fact which a party to a case claim to exist. He cited section 143 Cap 6 (supra); **Aziz Abdallah vs Republic,** (1991) TLR 71. He submitted that the village chairman who alleged witnessed when the Appellant was given land in writing was not called, instead summoned the village accountant (PW2), and did not explain as to why they failed to summon the village chairman. He

submitted that the evidence reveal the Respondent trespassed in 2013, a suit was filed in 2017, while the Appellant allege she was cultivating the suit land, why she took long about four years to sue? He cited a case of **Said Salim Mtomekela vs Mohamed Abdallah Mohamed,** Civil Appeal No. 149/2019 C.A.T. at Dar es Salaam (unreported), for a proposition that parties are bound by their own pleadings. He submitted that the Appellant never explained as to when the dispute arose only explained it during hearing. He submitted that the Appellants was precluded to add those facts during hearing, that is the reasons the trial tribunal disregarded her evidence regarding as to when the cause of action arose. The learned Counsel cited sections 71 and 100 of the Probate and Administration of Estate Act, Cap 352 R.E. 2019: **Omary Yusuph (Legal Representative of the Late Yusuph Haji) vs Albert Munuo**, Civil Appeal No. 12/2018 C.A.T. at Dar es Salaam, for a proposition that the evidence of DW1 was not hearsay rather testified under a capacity as an administrator of the estate of the deceased.

Regarding ground number two, the learned Counsel submitted that at the *locus in quo* there was no collection of new evidence or adding any new issue during visitation.

May be for clarify, it be known that after dismissing the Appellants case (claim), the trial tribunal nowhere declared the third Respondent as the

lawful owner of the suit land, as pondered by the learned Counsel for Appellant at his opening statement.

Be as it may regarding an argument that the Appellant proved her case as required by the law four witnesses, PW1, PW2, PW3 and PW4. It is true that the Appellant summoned that number of witnesses to prove her case, but in reflection, PW2, PW3 were Appellant's sibling, that is biological mother and sister, respectively, save for PW2 who was a former village accountant and secretary. But importantly as alluded by the Counsel for Respondents, quality of evidence matters most. In the case of the **Hemedi Saidi** *(supra),* the court held, I quote,

> *'According to the law both parties to the suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of evidence'*

The learned Counsel for Appellant submitted that all those witnesses to wit PW1, PW2, PW3 and PW4 were present when the Appellants was given the suit land by the late Galus Ndauka in 2000, and on top of that PW3 was present when the late Galus Ndauka was allocated the suit land by the Village Council. However, it is to be noted that amid the testimony the Appellant's witnesses specifically PW1 and PW3, asserted that the deceased handed over the suit land to the Appellant before the

Village Chairman, PW3 added that it was done in writing, a fact which was supported by PW2. But as alluded by the learned Counsel for Respondents, the alleged Village Chairman was not summoned to support the alleged formal and legal handing over between the late Galus Ndauka and the Appellant, and the documentation for the alleged transaction of handing over were not forthcoming. It is to be noted that PW1 and PW3, alleged that the handing over was done before the Village Chairman, the dual made no mention of the village accountant or secretary (PW2) as among witness present during handing over. But PW2 alleged that he was among the witnesses to a handing over in 2000. This create a discrepancy in the testimony of PW1, PW2 and PW3. For another thing, PW3 alleged to have allocated those farm by the Village Council in 1974, which fact was supported by PW2. However, when PW2 was asked a question by the wise assessor, PW2 confessed that he was not there in 1974 when PW2's husband was allocated the alleged 20 acres by the Village Council. With these all disparities, no wonder why the learned tribunal chairman disbelieved the story by the Appellants and her witnesses and ruled it being marred with lies and falsehood.

On similar vein, PW1 alleged that she used to cultivate maize in the suit land which were uprooted or destroyed by the third Respondent. But as

argued by the learned Counsel for Respondents, why the Appellant took long for about four years from 2013 when alleged trespass occurred to 2017 when formerly sued the Respondents.

On the other hand, ownership of suit land by the first Respondent from 1978 or 1979 was supported by Onesmo Jailus Mbawala (DW1), Elizabeth John Ndauka (DW2) and Karo Karo Puguru (DW3).

Regarding an argument that a size of a suit land is reflected in the application at paragraph 6(a)(i) filed on 1/6/2017 and a fact that Appellant's witnessed PW1, PW2 and PW3 stated that the Respondents trespassed 2.5 acres, contrary to what was held by the trial tribunal. It is true that in the application (sic, amended application) filed on 1/6/2017, at paragraph 6(a)(i) the Appellant pleaded that a land alleged trespassed by the first Respondent and disposed to the second and third Respondent measured 2.5 acres. Therefore, the trial tribunal is faulted in this respect, for holding that the Appellant did not state a size of her trespassed land in the pleading.

It is true that PW1, PW2 and PW3, stated that a size of trespassed land is measuring 2.5 acres. However, on examination in chief, PW2 was recorded to had said that he is not certain on the exact size trespassed,

but said it is like 2.5 acres. And this is what exactly the trial tribunal ruled. Therefore, the trial tribunal is faulted for nothing.

Regarding an argument that the trial tribunal held that the Appellants is lying because she said she did not know whether her mother had a case with one Josepher Ndauka. It is true that the Appellant (PW1) during cross examination said she do not know if her mother had a case with Josepher Ndauka, and dispelled knowing Land Case No. 23/2021 before the tribunal or High Court.

However, the Appellant's mother (PW3), during cross examination, was recorded to had stated, at page 34 of the typed proceedings, I quote,

> *'kesi ilikuwa kati yangu na mjibu maombi namba moja, sikumbuki ilikuwa lini. Ndio eneo liliuzwa 2013 na kesi ilifunguliwa mwaka uleule. Ndio kesi hii imefunguliwa 2017. Mleta maombi alikuwa hapa.'*

During re-examination DW3, Stated further at page 35 of typed proceedings, I quote,

> *Miaka hiyo mingine tangu kuuzwa tulienda Mahakama ya Mwanzo tukaenda Mahakama Kuu wakahamisha tena na kuleta haya... kesi kati yangu na Yosefa alitukana niondoke na watoto wangu.'*

From these facts deduced above, a call for a judicial notice or appraisal by judgment or decree, to my view was unnecessary. As those facts are self explanatory that indeed PW3 was previously litigating with the first Respondent. The wording of PW3 is on plural form and more importantly, PW3 stated that the first Respondent disowned PW3 and children altogether. Meaning the Appellant being inclusive. Now, the Appellant to say she is completely not aware of the existence of that case, creates doubt. Actually this conduct by the Appellant of lying on obvious facts, aggravated for the trial tribunal misbelieving her testimony. In the case of **Zakaria Jackson Mgaya vs Republic,** Criminal Appeal No. 411/2018 C.A.T. at Dare es Salaam, the apex Court ruled I quote,

> *'We have held in the past that a witness who lies in an important point cannot be believed in others'*

In the case of **Aziz Abdallah** *(supra),* it was held, I quote,

> *' The general and well known rule is that the prosecution is under prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being sown, the court may draw an inference adverse to the prosecutions.'*

Herein, the Appellant for no apparent reasons failed to summons the Village Chairman who was crucial witness to a fact of handing over alleged took place in 2000.

Regarding an argument that DW1's evidence was hearsay because he said his mother was given suit land by one John Ndauka in 1978 while DW1 was born in 1978. As I have said above, that the testimony of DW1 was supported by DW2 and DW3. Above all, DW1 is an administrator of the estate of the late Josepha Petro Ndauka as per a letter of administration exhibit D1. As such to say DW1's evidence is a hearsay, is legally untenable. To my view, once an administrator is granted with letters of administration he assume the position and act as presentative of the deceased. Section 71 Cap 352 *(supra),* provide,

> *'After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted* ***shall have power to sue or prosecute any suit,*** *or* ***otherwise act as representative of the deceased,*** *until such probate or letters of administration shall have been revoked or annulled'*

Ground number two, the Counsel for Appellant argued that the trial tribunal erred in law to base its findings on evidence which was collected during *locus in quo.* It is true that the trial tribunal when determining on the size of land alleged by the Appellant to have been trespassed by

the Respondent *vis-a-vis* a land purchased by the third Respondent to the first Respondent, the trial tribunal on its findings made a reference to the evidence of surveyor collected at the *locus in quo,* visited on 7/11/2022 including findings or report of the surveyor ref, No. STC/29144/VOL.11/3129 dated 9/11/2022 although office rubber stamp of the trial tribunal reflect was received on 8/11/2022.

A said letter is attached with annexure 1:A and 1:B, where depict the area shown by Scolastica Ndauka (Appellant herein) is 3:053 acre and the area of Magreth Massawe (first Respondent herein) is 5.993 acre respectively. Presumably, measurements referred by the trial tribunal were extracted in the above letter, although a judgment is silent. But going on the proceedings of *locus in quo,* is silent on the aspect of size of land exhibited by each party.

Admittedly, proceedings of *locus in quo* reveal the trial tribunal was accompanied by surveyors, who nevertheless remained anonymous, neither made formerly as tribunal witnesses for that matter nor took oath. The proceedings at the *locus in quo,* reflect the so called surveyor being invited by the trial tribunal to take measurements after each party demonstration of his or her area. But the purported surveyor was not disclosed his name and credentials, let alone been referred as tribunal

witness or administered any oath as aforesaid. The alleged letter or report of a surveyor was not read aloud neither disclosed to parties.

In the case of **Nizar M.H. vs Gulamali Fazal Janmohmed** (1980) TLR 29, the Court had this to say, I quote,

> *'When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as my have to testify in that particular matter ... When the court re-assembles in the court room, all such notes should be readout to the parties and their advocates, and comments, amendments, or objections call for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future.'*

In the recent decision by the apex Court in **Kimonidimitri Mantheakis vs Ally Azim Dewji And Seven Others**, Civil Appeal No. 4/2018, amplified the guidelines and procedure when the court visit the *locus in quo*, I quote,

> *'... for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: One, ensure that all parties, their witnesses, and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; Three, allow cross examination by*

either party or his Counsel; Four, record all the proceedings at the locus in quo; and Five, record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any.'

To my view, the procedure of visiting *locus in quo*, was flawed. I therefore discard findings and report of the surveyor altogether.

In the premises, I find merit on the second ground, however the same cannot enable the Appellant's appeal to sail through, as her evidence did not prove her claims on the balance.

Therefore the judgment and verdict of the trial tribunal is upheld.

The appeal is dismissed with costs.

E.B. LUVANDA

JUDGE

30/03/2023