

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 252 OF 2023

(Originating from Misc. Land Application No. 77/2018, Kibaha Land and Housing Tribunal)

SELEMAN JUMA.....APPELLANT

VERSUS

JUMANNE MSUSA.....RESPONDENT

JUDGMENT

17-22 August, 2023

E.B. LUVANDA, J

The Appellant above named is challenging the decision of the Tribunal dismissing his suit/claim of ownership of the impugned shamba, for want of proof. In the memorandum of appeal, the Appellant raised four grounds of appeal: One, the tribunal erred in law and fact by not declaring the Appellant as a lawful owner of the land in dispute measuring one acre located at Boko, Kinemela Village within Kibaha District in Pwani Region; Two, the Tribunal erred in law and fact by disregarding the evidence of the Appellant in reaching the said decision; Three, the Tribunal erred in law and fact by holding that the Appellant failed to prove his case to the required standard; Four, the Tribunal erred in law and fact by entertaining the matter without joinder of the necessary party which render the proceedings to be fatal.

Mr. Adili Kiiza learned Counsel for Appellant submitted in respect of ground number one, that there is no doubt that the Appellant established ownership over the disputed land, as vindicated by the Appellant's pleading and testimony adduced at the trial. He submitted that the Appellant told the Tribunal that he acquired the said piece of land by way of gift from his father since 1975, which evidence was collaborated by eyewitness Sauda Ramadhani Selemani (PW2). He submitted that in the written statement of defence, the Respondent admitted not to be the owner of the disputed land instead mentioned the owner to be Asha Msusa, but in the proceedings she never appeared to defend likewise the Appellant. He submitted that the Tribunal had an obligation to answer a riddle of ownership over the disputed land between the Appellant and Respondent, instead dismissed the application without declaring ownership of the disputed land, which according to him was fatal as it left the issue of ownership unresolved. He cited the case of **Joseph Utenga vs Patrick Utenga and Another**, Land Appeal No. 62020, HC Iringa. He submitted that the Tribunal therefore erred for not declaring the Appellant as the lawful owner of the disputed land.

For ground number two, the learned Counsel submitted that the evidence provided by the Appellant reflect that the Appellant succeeded to prove his

case on the required standard, citing sections 61 and 62 of the Evidence Act, Cap 6 R.E. 2022. He submitted that the Appellant clearly stated that he acquired the disputed land through gift from his late father Juma Selemani Mlembe since 1975 and from then the Appellant has been enjoying ownership without any interference until in 2016 when the Respondent trespassed therein, as collaborated by PW2. He submitted that the evidence of PW1 and PW2 was the best evidence to be relied upon to declare ownership, but instead the Tribunal disregarded the same and decided on her own assumption and belief, citing page four of the Tribunal judgment.

For ground number three, the learned Counsel submitted that in civil cases standard of proof is premised on the balance of probabilities, citing section 3(2) Cap 6 (supra), arguing need to be reflected in exercising the lawful duty of proving the allegations raised by the Appellant, citing sections 110(1) and 111 Cap 6 (supra); **Bakari Mhando Swanga vs Mzee Mohamed Bakari Shelukindo and Three Others**, Civil Appeal No. 389/2019, CAT at Tanga.

The learned Counsel reiterated his contention that the Appellant clearly stated that he acquired the land through gift from his father named Juma Seleman Mlembe since 1975, which fact was seconded by PW2. Also reiterated his contention that the evidence of PW1 and PW2 was the best

evidence to prove the case to the required standard. He submitted by reiterating that on defence, the Respondent denied to have acquired ownership over the same. He made a call for the Tribunal to had exercised her duty by summoning witnesses or compelling the Appellant to bring the witnesses, to clear the doubt entertained by the Tribunal for it to reach a just verdict. He cited section 16(1)(g) of the Land Disputes Courts Act, Cap 216 R.E. 2019; **Registered Trustees of Kanisa la Mungu vs Liberati Rafaeli**, Land Appeal No. 2/2022 HC, Manyara.

For ground number four, the learned Counsel submitted that the judgment of the Tribunal at page two indicate clearly that the Respondent had no interests whatsoever over the suit property. He submitted that the abandonment of the suit by the Respondent to appear and give evidence to defend the case, realize that has no interests over the suit property. He argued the Tribunal to have invoked her discretion and make an order for amendment of pleadings to include the necessary party. He cited Order I rule 10(2) of the Civil Procedure Code, Cap 33 R.E. 2019. He submitted that form the defence of the Respondent it was plainly clear that the Respondent was not the proper party to be sued hence had no locus standi to defend the same instead the necessary party as per the Respondent's written

statement of defence was Asha Msusa. He submitted that, the Tribunal ought to join the necessary party who is Asha Msusa for the interests of justice.

In reply, Mr. Fredrick Mwakinga learned Counsel for the Respondent submitted on point of law only. The learned Counsel submitted that preliminary objection can be raised at any time, citing **M/S Tanzania China Friendship Textile Company Limited vs Our Lady of the Usambara Sisters**, [2006] TLR 70. He submitted that it is in record that the Appellant was given the suit land by his father the late Juma Selemani Mlembe. He submitted that the Appellant ought to have acquired the status of administrator of the estate of the late Juma Selemani Mlembe before embarking on conducting this case in courts of law in his own name and capacity. He cited section 100 of the Administration of Estates Act (sic, The Probate and Administration of Estate Act), Cap 352; **The Registered Trustees of Sos Children's Village Tanzania vs Igenge Charles & Others**, Civil Application No. 426/08 of 2018 CAT. On the second point, the learned Counsel submitted that the Appellant sued the wrong person, as from the record the Respondent in his written statement of defence denied trespassing the suit land alleging to be the property of the late Msusa Pandelamwana and that Asha Msusa is the administratrix of the estate. He

submitted that the Respondent had no locus standi to be sued in his own capacity.

On rejoinder, the learned Counsel for Appellant submitted that the question of locus standi is irrelevant in the case at hand. He submitted that nowhere in the Appellant's pleadings or Tribunal records in which the Appellant has pleaded or testified that the land in disputes belong to his late father as the Respondent is trying to portray in his reply. He submitted that the Appellant testified to have acquired ownership over the disputed land from his late father way back in 1975 by way of gift and from that date ownership shifted from his father to the Appellant. He submitted that in the circumstances the disputed land cannot form part of estate of the late Juma Seleman Mlembe, henceforth the law of inheritance to wit the Administration of Estate Act (sic, The Probate and Administration of Estates Act), Cap 352 does not apply. He submitted that the Respondent cannot say he was wrongly sued by the Appellant while the Respondent himself is the one who trespassed into the land in dispute claiming ownership therein.

On my part, I will combine grounds number one, two, three and answer them jointly. As it transpired above, in the submission of the Appellant kept on repeating the same key words and facts that: that the Appellant acquired

the land through gift from his father named Juma Seleman Mlembe since 1975, which fact was supported by PW2. Also reiterated his contention that the evidence of PW1 and PW2 was the best evidence to prove the case to the required standard. He submitted by reiterating that on defence, the Respondent denied to have acquired ownership over the same.

It is to be noted that two main facts crop up on the testimony of the Appellant regarding his acquisition and ownership of the suit property. These are hanging over and usage. The Appellant alleged his acquisition was by way of his late father handing over to the Appellant the suit premises of one acre, allegedly done in 1975 in the presence of PW2. The Appellant did not mention any other person who witnessed the handing over apart from his sibling PW2, on what he allege other siblings had passed away. In this respect, it can be said that the hanging over was more and exclusively domesticity or in-house arrangements not known to the outside world and neighbours.

The second hurdle was on usage of the disputed farm. The Appellant alleged to have been in use of the disputed farm from 1975 to 2015/2016 when alleged the Respondent trespassed it, claimed ownership. This fact was supported by PW2. To my view, PW2 could not be the best witness to prove

usage of the farm, while PW2 said to be living at Tabata Dar es Salaam. To my view, in the circumstances, it is where a call for neighbours, hamlet leaders as suggested by the learned Chairperson, come in. To my view, neighbors and hamlet leaders are the one who could tell and confirm a story by the Appellant that the later have been there all long using the disputed farm for cultivating since 1975. Indeed, the Appellant mentioned his neighbours to the disputed farm including Juma Shabani, Hamis Salehe, Mwanaisha Mrisho. But neither of them was summoned by the Appellant. Instead, the learned Advocate who was representing the Appellant at the Tribunal said there is no witness to call and closed the case. Therefore, the argument for the Appellant's Counsel that the Tribunal ought to had exercised her duty by summoning witnesses or compelling the Appellant to bring the witnesses, to clear the doubt entertained by the Tribunal for it to reach a just verdict, is a misplaced idea. By the way it is not the duty of the Tribunal to assist one party to summon material witnesses. Again, the Appellant was under representation, therefore to heap blame to the Tribunal is unfair.

Again, the evidence of PW1 and PW2 who are sibling, sharing one father and mother, is at variance. While PW1 stated that at the time of handing over it

was done in the presence of PW2 alone because other sibling passed away, PW2 suggested that their father summoned their mother and grandmother as well, where their father said he is handing over the farm to the Appellant. According to the evidence presented by the Appellant, was that at the time of receiving the disputed farm there was a mud house where the Appellant alleged to have lived therein. However, the Appellant suggest that the mud house is no longer there, because it demolished out of dilapidation. The Appellant did not say as to where is currently living after falling of a mud house. The Appellant could not even tell the type of agriculture done on the disputed farm, neither mentioned any crop or whatever exhausted development carried so far at the disputed land.

On the ground number four, the learned Counsel for Appellant made a self defeating argument that the defence of the Respondent is plainly clear that the Respondent was not the proper party to be sued hence had no locus standi to defend the same instead the necessary party as per the Respondent's written statement of defence was Asha Msusa. The learned Counsel once again heaped blame to the Tribunal, arguing the Tribunal ought to join the necessary party who is Asha Msusa for the interests of justice. These compliant are unfounded at all.

The records of the Tribunal indicate that the Appellant had sued the Respondent for trespass via an application filed at the Tribunal on 10/01/2018. On 18/06/2018, the Respondent filed a written statement of defence, with evasive denial on the Appellant's claim. On 13/11/2018 the Respondent made a prayer to amend a written statement of defence, which was granted and subsequently on 16/11/2018 the Respondent filed an amended written statement of defence, where at paragraph two pleaded the following facts, I quote,

'... I am not the legal owner of the suit land but I have the knowledge and evidence that the suit land is one of the estate which are under the custody of Asha Msusa as administratrix of the estate of the late Msusa Pandelamwana, for that reason Asha Msusa is the solely legal owner of the suit land, and she is defending the same suit land at the pending Land Application No. 47 of 2015, before Hon. MBUGA'

At paragraph six of amended written statement of defence, the Respondent attached an annexure of a copy of letter of Asha Msusa administratrix of estate of Msusa Pandelamwana Kaya.

On 23/11/2020, the learned Counsel for Appellant made a prayer before the Tribunal to amend the application to join Asha Msusa in the suit. The Appellant was given fourteen days to present the intended amended application/plaint. On 19/01/2021, the learned Counsel for Appellant addressed the Tribunal that he did not find the real cause of action against Asha Msusa and prayed leave of the Tribunal to withdraw his prayer to amend the application. In response, the Respondent who had appeared in person on that date, made the following remarks, I quote,

'Since it is a family land and the administrator of the estate is Asha Msusa, I don't have locus standi to stand for the case'

The learned Counsel for Appellant, rejoined as follows,

'The way we see, it is not a family land. He once filed a criminal case against the Respondent (sic, Applicant), we have cause of action against him'

Thereafter, the Respondent never appeared before the Tribunal again, hence the matter proceeded on such terms.

I therefore shake hands with the Counsel for Appellant and Respondent that the Respondent was wrongly sued as did not have locus standi to defend a

suit land alleged belong to the late Msusa Pandelamwana. However, I am not in agreement with the argument of the learned Counsel for Appellant, who lamented the Tribunal for not joining the necessary party Asha Msusa, because the Tribunal is faulted for nothing. In the circumstances where the Respondent in his amended written statement of defence in good faith disclosed a fact that Asha Msusa was the administratrix of estate and also viva-voce repeated the same facts before the Tribunal, warning them that he did not have a locus standi to defend the suit, but still the Counsel for Appellant insisted to sue the Respondent under his personal capacity on trivial issues that it is because the Respondent at once charged the Appellant for criminal trespass. May be the Counsel for Appellant overlooked by thinking he was suing the Respondent for a tort of trespass.

The appeal is dismissed with costs.



E.B. LUVANDA
JUDGE
22/08/2023

Judgment delivered in the presence of Mr. Adili Kiiza learned Advocate for the Appellant and Mr. Fredirick Mkinga learned Counsel for the Respondent, who is also present.



E.B. LUVANDA
JUDGE
22/08/2023

