IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 1227 OF 2024

(Originating from Land Application No. 48 of 2021, Mkuranga District Land and Housing Tribunal)

AMINI HASSANI LIUTIKE (Administrator of the Estate of the Late Hassani Saidi Liutike).....**APPELLANT**

VERSUS

ISSA SELEMANI.....**1ST RESPONDENT**

MOHAMED SHABANI MAPANDE.....**2ND RESPONDENT**

AZIZA MALIK.....**3RD RESPONDENT**

ABDULHAMAN HASSAN MEGE.....**4TH RESPONDENT**

PETER MASANGWA.....**5TH RESPONDENT**

JUDGMENT

3rd to 16th April, 2024

E.B. LUVANDA, J

The Appellant named above sued the First, Second, Third and Fifth Respondents above mentioned for a claim of eighteen acres of un-surveyed land located at Nyambwanda Hamlet, Hange Village, Mahege Ward, Kibiti District in Pwani Region, alleged trespassed by the Respondents in the following manner: The First Respondent was alleged encroached a piece of land

measuring 350 meters length and 24 meters width; The Second and Third Respondents were alleged to have jointly trespassed five and half acres without colour of claim of right; the Fourth Respondent trespassed an area of two acres and refused to give vacant possession on the explanation that other trespassers did not leave, a statement which infuriated the Appellant; the Fifth Respondent trespassed an area of four and half acres; It was not pleaded as to what was a cause of action against the Sixth Respondent.

At the end of the trial, the learned Chairman allotted the Appellant a single acre of land from the area which was sold by one Nouman Liutike to the First Respondent.

The Appellant preferred this appeal against this verdict on the following grounds: One, the Honorable Chairman erred in law and facts to determine and finally rule out in favour of the Respondents who had weak evidence compared to the Appellant; Two, the Honorable Chairman erred in law and facts for failure to consider that the Second and Fourth Respondent they got land in dispute from their parents without proof thereof; Three, the Honorable Chairman erred in law and facts to pronounce judgment having typing errors differentiated with the facts and evidence; Four, the Honorable Chairman erred in law and facts for failure to determine that witnesses of the First, Second and Fourth Respondents they got mixed up, differentiated and confused; Five, the

Honorable Chairman erred in law and facts to pronounce judgment without ruling out on land in dispute claimed by the Appellant to the Third Respondent; Six, the Honorable Chairman erred in law and facts to pronounce judgment by her estimates and wishes and not according to the evidence.

Mr. Sosthenes Edson learned Counsel for Appellant submitted that during hearing at the locus at the land in dispute, the Appellant exhibited traditional boundaries which was not disputed by the Respondents, arguing he exhibited a piece of land he claim from the First Respondent being 350 meters length and 24 meters width; exhibited the land he claim from the Second and Third Respondents a total of five and half acres; exhibited the land he claim from the Third Respondent a total of two acres and finally the land he claim from the Fifth Respondent a total of four acres. He submitted that the evidence of Amini Hassani Liutike (PW1) who is the administrator of the estate of his father the late Hassan Saidi Liutike, was supported by Said Hassan Liutike (PW2), Moshi Mpendu Ngatila (PW3). He cited section 112 of the Evidence Act, Cap 6 R.E. 2019, regarding the burden of proof. He submitted that the evidence of the First Respondent was weak, for reason that the First Respondent alleged to have purchased the land from the late Noumani Saidi Liutike and no administrator or executor who confirmed the sale, he faulted the sale agreement exhibit D1 for reason that did not depict the size of the land, and his witness Haruna Hamis

Kihororo had no knowledge over the land in dispute. He submitted that the evidence of Second and Fourth Respondent was merely based on mere words, failed to show the land and boundaries. He faulted the testimony of the Second Respondent who alleged to have inherited land from their parents who acquired virgin land by way of clearing bushes and forests. He submitted that the Tribunal did not show the position of the Second Respondent. He submitted that the witnesses who appeared for the Respondents, the records does not show who was supporting who. He cited the case of **Britestone PTE LTD vs Smith and Associated Far East LTD** (2007) 4SLR ® 855, Court of Appeal of Singapore, regarding duty of satisfying the burden and standard of proof; **Hemedi Said vs Mohamed Mbilu** [1984] TLR 113, on failure to call material witness.

Ground number two, the learned Counsel submitted that the Tribunal did not consider the statement of the Second and Fourth Respondents who alleged to had acquired land through inheritance from their parents, arguing it was mere words.

Ground number five, the learned Counsel submitted that the Tribunal made an order the matter to proceed *ex-parte* against the Third Respondent. He submitted that during trial the Appellant exhibited the land he claim against the Third Respondent, which is two acres encroached from the Appellant's land. He submitted that the Appellant proved his claim on the balance of probability,

faulted the Tribunal for not ruling out on land in dispute claimed by the Appellant to the Third Respondent.

Ground number six, the learned Counsel cited page eleven of the impugned judgment to support his argument that the learned Chairman pronounced judgment by her estimates and wishes and not according to the evidence.

In reply, Mr. Maganya Nickson Eliya learned Counsel for the First, Second and Fourth Respondent opposed the appeal. The learned Counsel submitted that the First Respondent adduced evidence that he acquired the disputed land by purchasing from the late Nouman Saidi Liutike as per exhibit D1, while the Second and Fourth Respondents testified that they inherited the suit land from their parents. He submitted that proof of acquisition of land is not necessarily by documentary evidence, citing **Joachim Ndelembi vs Maulid M. Mshindo & Two Others**, Civil Appeal No. 106 of 2020 CAT. He submitted that the Respondents called among others DW2, DW5, DW6, DW7, DW8 who disapproved the Appellant's allegation. He submitted that DW2 is a material witness for reason that he is a hamlet leader of Nyambwanda expected to have knowledge of all Nyambwanda's inhabitants, DW6 is also a material witness for being a grandchild of the late Nouman Saidi Liutike, DW5, DW7 and DW8 are neighbors to the suit land. He submitted that the First Respondent proved the case in the required standard vide exhibit D1, citing **Florian M. Manyanda**

and Another vs Maximillian Thomas, Civil Appeal No. 121 of 2020, CAT. He submitted that the case of **Britestone** (supra) support the Respondents and not the Appellant. He submitted that the Appellant's reliance on visit to *locus in quo* in support of appeal is devoid of merit, arguing it was not in conformity with the procedure enunciated in **Nizar M.H. vs Gulamali Fazal Jan Mohamed** [1980] TLR 29; **Avit Thadeous Massawe vs Isidory Assenga**, Civil Appeal No. 6 of 2017 CAT. He submitted that the evidence in support of the Appellant (sic) were very flimsy to warrant judgment in his favour, for reason that the Appellant's witnesses failed to establish how the late Hassan Saidi Liutike acquired the land in dispute. He submitted that the Appellant himself testified that he appeared (visited) at Nyambwanda in the year 2016 after the demise of his father who passed away in the year 2011 and his father had already relocated to Hanga Village. He submitted that the Appellant's testimony denotes that he was not conversant with the place where his late father occupied land, its size and boundaries. He submitted that the testimony of PW2 contains admission in support of the First Respondent, for explanation that PW2 testified that the late Nouman Saidi occupied approximately eighteen or twenty acres. He submitted that this submission covers grounds number two and five as well.

For ground number six, the learned Counsel submitted that the same has merit to the extent that the trial Chairperson went astray when she allocated one acre to the Appellant from the land occupied by the First Respondent irrespective a fact that the Appellant failed to discharge his burden of proof.

The Third and Fifth Respondents did not file a reply.

Generally speaking, the Appellant's appeal is un merited. The learned Counsel for Appellant focused on faulting the Respondents' evidence being weak compared to the Appellant. But the learned Counsel for Appellant was unable to single out even a scintilla piece of testimony which was adduced by the Appellant to prove his claim of ownership of eighteen acres of land pleaded in the amended application. In his testimony in chief, the Appellant (PW1) merely said he is an administrator of the estate of the late Hassan Saidi Liutike. The Appellant explained how the First Respondent encroached the area of his (Appellant's) father, alleged the former invited people to trespass into the Appellant's father land of three acres. PW1 alleged he claim from the First Respondent an area measuring 350 lengths by 24 widths (which according to my computation is equivalent to 8,400 square meters which is equal to around two acres); from the Second Respondent four and a half acres which the Second Respondent vended to the Fourth Respondent; the Third Respondent was alleged to have trespassed two acres. Therefore, an aggregate size of the

mentioned area is equal to a grand total of eight and half (8.5) acres which is less than what was pleaded by the Appellant in the amended application where he claimed eighteen acres of land alleged trespassed by the Respondents.

Apart from a fact adduced by the Appellant that he is an administrator of the estate of the late Hasani Saidi Liutike as per letters of administration exhibit P1 and that the Respondents trespassed the above mentioned land which is less than a half of what was pleaded by the Appellant. Nowhere the Appellant proved as to how, when and to whom the late Hasani Saidi Liutike acquired the disputed land. That might be a reason for the learned Counsel for Appellant to embark and focus much faulting the testimony of the Respondents being weak, also faulted sale agreement between the late Nouman Said Liutike and the First Respondent dated exhibit D1 that it does not depict the size of the land subject for disposition. With due respect to the learned Counsel, the Appellant is the one who sued and therefore he was under obligation to prove first his case and claim before jumping into attacking the defence tendered by the Respondents. Weak defence by the Respondents has never been a ground for the claimant to win a case.

To my view, the argument of the learned Counsel for the Appellant regarding weak defence, could be valid only if the Appellant had led tangible evidence to prove how and when his late father acquired the land. It is during cross-

examination by the First Respondent, where the Appellant asserted that his father inherited the suit land from their parents. But yet could not tell as to when, neither mentioned the size of the land which the late Hasani Saidi Liutike inherited from his parents.

Said Hassan Liutike (PW2) alleged that they own eighteen acres and the area in dispute is 350 meters by 24 meters encroached by the First Respondent and four and half acres trespassed by the Second Respondent. PW2 said nothing regarding how they acquired the alleged eighteen acres. When was asked question by the Tribunal members, PW2 said the late Nouman Saidi had an area measuring approximately eighteen to twenty acres. PW2 said about eleven acres of their farm was not trespassed. The fact that the late Hassani Saidi Liutike owned eighteen acres or that an area of eleven acres remain un-trespassed was not stated by PW1, which form departure of the two version of stories. Another area of discrepancy, is that while PW1 evidence suggest the trespassed land measures 8.5 acres, the testimony of PW2 reflect the trespassed land is only 6.5 acres.

For these reasons, the argument of the learned Counsel for Respondents that the evidence presented by the Appellant was flimsy to warrant judgment in his favour, is valid. Sequel to that, the argument by the Appellant that the Tribunal did not rule out on land in dispute claimed by the Appellant to the Third

Respondent, is legally untenable. Because there was no evidential material to warrant adjudication in his favour. In fact, even the one acre allocated to the Appellant was wrongly decreed in his favour, because there is no piece of evidence to support this verdict entered by the Tribunal. To my view, this was a reason for both the learned Counsel for Appellant as well as the learned Counsel for Respondents who faulted the Tribunal on this aspect. For easy of referencing, I reproduce the impugned passage at page eleven second paragraph of the impugned judgment, I bold portion marred with entanglement of confusion and contradiction.

> *'SM1 aliteuliwa 16/6/2016 kusimamia mirathi hii na ndipo aliiweka shamba la baba yake kama sehemu ya mirathi yake. Yeye hakuwepo Nyambwanda na ndiyo maana mashahidi wengi hawamfahamu, akiwepo SU7, ndugu yake kabisa. Jambo hili limemfanya achelewe kuja kulitambua eneo la mzazi wake. Kutoakuja huko ndiko kulikompa ujasiri Norman kuuza eneo lote mpaka la baba yake tarehe 9/12/2015 kwa mujibu wa kielelezo D-1.* ***Ninafikiri SM1 ana madai ya msingi kwa eneo hilo analolidai SM1. Kwa kuwa hajui hata ukubwa wake, atapewa hekari moja tu. Ninatoa hii kutokana na Ushahidi wa wengi kwamba eneo la Norman lilikuwa kubwa, alikuwa na nguvu ya kulima mpunga****; na pia walikuwa na maeneo madogo madogo wakilima na kuondoka. Ekari hiyo moja itapimwa ndani ya eneo alilonunua SU1 kutoka kwa Norman Saidi Liutike'*

This verdict was not supported by evidence on records. Instance I have cited the testimony of PW2 who is among family members of the Appellant, confirmed that the late Nouman Said Liutike owned an area measuring between eighteen and twenty acres. The First Respondent in his evidence asserted that he purchased twenty acres from the late Norman saidi Liutike. Nouman Juma Liutike (DW7) who introduced as a grandson of the late Nouman Saidi Liutike, when cross examined by the learned Counsel for Appellant, asserted that the late Nouman Sadi Liutike disposed the whole farm to the First Respondent.

Above all, in the above passage the learned Chairperson was contradicting herself, instance she made some segment showing that the Appellant failed miserably to prove his case when the learned Chairperson ruled that PW1 is having a substantive claim on his case at the same time ruled that PW1 does not know eve a size of his land, still the learned Chairperson slept into an error to proceed to allocate the Appellant one acre which he did not prove neither claimed or pleaded in the amended application. Actually, the learned Chairperson overstretched and usurped powers which does not have for allocating land to litigants.

I therefore allow ground number six and fault the finding and verdict by the Tribunal

Save for the above ground number six where the verdict of the Tribunal is faulted to the extent depicted above, the rest grounds of appeal stand to be dismissed for want of merits and for reasons stated above.

The appeal is dismissed. No order for costs.

E.B. LUVANDA
JUDGE
16/04/2024

Judgment delivered in the presence of Ms. Beatrice Njau Advocate holding brief for Mr. Sosthenes Edson learned Counsel for the Appellant, Mr. Maganya Nickson Eliya learned Counsel for the First, Second and Fourth Respondents, and in absence of the Third and Fifth Respondents.

E.B. LUVANDA
JUDGE
16/04/2024