IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

LAND APPEAL NO. 46 OF 2022

(Original Application No. 44/2020 of the District Land and Housing Tribunal of Njombe before Hon. G.F. Ng'umba, Chairperson).

EDWIN WILSON MTUTA ..... 1ST APPELLANT

HAWA MERNARD MWIGUNE ..... 2ND APPELLANT

VERSUS

HEZRON MTUTA ..... 1ST RESPONDENT

SOSPETER IMAJA ..... 2ND RESPONDENT

FRANSIKUSI MYEYE ..... 3RD RESPONDENT

JUDGMENT

27th April 2023 & 7th June, 2023

I.C. MUGETA, J:

The appellants had sued the respondents before the District Land and Housing Tribunal (DLHT) among other prayers for a declaration that they are the lawful owners of suit land at plot No. 5NJM3360 and permanent injunction restraining the respondents from trespassing the suit land. The DLHT decided in favor of the respondents. After abandoning the second ground of appeal, the appellants seek to challenge the said decision on the following grounds:

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1. *That, the trial Chairperson erred in law and fact in her failure to consider the testimony of PW.1, PW.2, PW.3 and PW.4 which proved the appellants' right over the suit land.*
2. *That, the trial Chairperson erred both in law and fact in holding that the appellants were mere invitees into the suit land in the absence of proof of the person who invited them into the suit land.*
3. *That, the trial Chairperson erred in law and fact in holding that the 2nd and 3rd respondents followed the procedures for buying the suit land including involving and/ or consulting the village before purchasing the suit land while the said leaders were never called as witnesses before the trial tribunal to prove the same.*
4. *That, the trial Chairperson erred in law and fact in validating the sale transaction between the respondents while the 1st respondent had no title to the suit land and/ or he failed to prove his title thereto.*
5. *That, the trial Chairperson erred in law and fact for failure to observe the procedures governing visiting locus in quo.*
6. *That, the trial Chairperson erred in law and fact in holding that the suit land is not 2.9 acres but it is*

just one acre while no measurements were taken at the locus in quo.

7. *That, the trial Chairperson erred in law and fact in deciding the dispute against the weight of evidence.*

The appeal was heard by filing written submissions. The appellants appeared in person and represented by Mr. Jerome Njiwa, learned advocate whereas the respondents appeared in person and unrepresented.

According to the pleadings, the dispute is over ownership of land measuring about 2.9 acres located at Kidegembye Village, Matindi hamlet, Kidegembye Ward, Njombe district. Briefly stated, the facts of this case are that the appellants are husband and wife. The 1st respondent and Wilson Mtuta (DW4) are brothers. Both are sons of Athman Mtuta @ Mwalugala. Wilson Mtuta (DW4) is father of the first appellant.

The owner of the land, Athuman Mtuta, had three wives. He died in 1982. Each wife had children. The 1st respondent was born to one wife and DW4 to the other. The last wife gave birth to Emilian who does not feature in these proceedings. DW4 was the eldest son. According to him each wife cultivated an area of one acre and upon his father's demise he decided that the children from the three mother's wombs shall inherit the land cultivated

by their respective mother. On that account he got one acre from his mother, the 1st respondent got an acre through her mother and Emilian got an acre through her mother. The 1st respondent decided to dispose his area to the 2nd and 3rd respondents. Such disposition is the cause of this dispute. The 1st appellant who claim to have been given the whole land by Athman Mtuta (his grandfather) in 1980 and in 2018 acquired customary right of occupancy over it sued the respondents for trespassing on his land. The 2nd appellant joined the proceedings on account of their jointly acquired customary right of occupancy. The trial tribunal dismissed their application for want of merits, hence, this appeal.

The appellants' advocate argued the 1st and 7th grounds jointly. He submitted that the appellants in their testimony proved their acquisition of the suit land and have better title against the respondents as the 1st appellant grandfather, Athman Mtuta, gave him the land in 1980 before he died in 1982. That he was supported by PW.3 and PW.4 who are neighbors to the suit land. They testified that the suit land has been occupied by the appellants all the time. To support his view, he cited the case of **Joachim Ndelembi v. Maulid M. Mshindo and 2 Others**, Civil Appeal No. 106 of

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2020, Court of Appeal – Dar es Salaam (unreported) where the Court held that proof of acquisition of land is not always by documentary evidence.

The learned counsel for the appellant argued further that the respondents did not cross examine the appellants on material facts that the grandfather gave him the land, thus they are deemed to have admitted it. He cited the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza & 2 Others**, Civil Appeal No. 223 of 2017, Court of Appeal – Mwanza (unreported) to support his argument that failure to cross examine a witness on a material fact amounts to acceptance of the facts. Counsel for the appellant challenged the respondents' evidence for being full of inconsistencies and contradictions which flopped their case. To cement his view, he cited the case of **Mohamed Said Matula v. Republic** [1995] TLR 3 where the Court held that the court has a duty to address inconsistencies and contradictions and state whether they go to the root of the matter.

As regard to the 2nd ground, the appellants' counsel submitted that the 2nd and 3rd respondents failed to prove the sale transaction as they did not summon the village leaders who witnessed the sale agreement. He argued that where a sale transaction involves land under customary right

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of occupancy, the village authority must be involved as it was stated in **Bakari Mhando Swanga v. Mzee Mohamedi Bakari Shelukindo & 3 Others**, Civil Appeal No. 389 of 2019, Court of Appeal – Tanga (unreported) and **Priskila Mwainunu v. Magongo Justus,** Land Case Appeal No. 9 of 2020 (unreported). In his view the tribunal ought to have drawn an adverse inference against the respondents.

On the 3rd ground, he contended that the 1st respondent failed to prove his title over the suit land, thus, the sale transaction between the respondents was a nullity as he had no title to pass to the 2nd and 3rd respondents. To support his contention that he who does not have a legal title to land cannot pass good title to another person, he cited the case of **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205.

Regarding the 4th ground the learned counsel argued that guidelines and procedures for the tribunal to visit locus in quo as discussed in **Nizar M.H v. Gulamal Fazal Jan Mohamed** [1980] TLR 29 were violated. According to him the guidelines include; attend with the parties and their advocates, each witness as possible to testify in a particular matter, when the court re-assembles in court room, the notes should be read out to the parties and their advocate and any comments or amendments if relevant.

Regarding the 6th ground of appeal he argued that as no measurement were taken at locus in quo, the only evidence on the size of the dispute land is exhibit A – 2. Therefore, the finding that the dispute land is just 1 acre is erroneous.

The respondents' joint reply is somewhat unclear. It suffices to say that they support the decision of the trial tribunal. No rejoinder was filed.

I shall determine this appeal on one major complaint. That is whether the appellants' evidence was heavier than that of the respondents.

According to the nature of the evidence on record, the determination of this case lies solely on credibility of witnesses. The 1st appellant claims that he was given the dispute land by his grandfather before he died. However, there is no other witness on record who supports his contention. I do not agree with counsel for the appellant that the 2nd appellant, Hawa Mwigune (PW2) Amulisye Mwigune (PW3) and Eliud Baharia Mfugale (PW4) evidence supported the 1st appellant's contention. This is because while the 1st appellant testified that he was given the land in 1980, PW2 said she married him in 1990. On his part, PW3 did not say he was present when that gift was given and PW4 stated that he started to live with the 1st

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appellant in 1992. Therefore, the evidence of the 1st appellant that he was given the land by the grandfather is unsupported.

As I have already pointed out, the grandfather who allegedly gave the land to the 1st appellant is the father of the 1st respondent and Wilson Mtuta (DW4). None of the two are aware of this grant and no witness from the family testified to support the 1st appellant's claim. Interestingly, DW4 is the father of the 1st appellant. In his evidence, being the eldest son of Athman Mtuta, he testified that after the death of their father children inherited one acre each wife cultivated. That his land is what he gave to the first appellant and, therefore, the first appellant being his son cannot go to the land that does not belong to him (DW4).

At page 22 of the typed proceedings he testified:-

> *"Baba alipokufa wamama walirithi na wao walipokufa kila mtoto alirithi (sic) kwa mama yake"*

He further testified:-

> *"... Edwin (1st appellant) anakaa kwenye eneo la kwangu mimi, ila ameingia kwenye eneo la Hezron (1st respondent) ambaye ni mtoto wa mama mwingine. Eneo gombaniwa ni mali ya Hezron".*

The fact that the first appellant uses the land given to him by DW4 is supported by the 1st respondent who at page 18 testified:-

"Edwin amejenga kwenye kiwanja cha kaka".

At the same page, first paragraph, the 1st respondent testified:-

"Baba alipofariki alikuwa analinda kaka yangu ile sehemu Wilson Athman".

I have assessed the evidence generally, it is my view that DW1 and DW4 are credible witnesses. I doubt the assertion by PW1 (the 1st appellant) that he was given the land by the grandfather. This is highly improbable considering the fact that the two sons of the giver are unaware of the deal. One of them (DW4) being father of complainant (1st appellant). I accept the evidence of DW4 that the 1st appellant got the land from him.

While I agree with counsel for the appellant that not every acquisition of land ought to be proved by documentary evidence, in this case the oral account of the 1st appellant on his acquisition of the land is incredible for the reasons I have already stated above. Further, I agree with the learned counsel for the appellant that the 1st appellant was not cross examined on his account that Athman Mtuta gave him the land in

1980. However, this does not amount to admission where evidence was tendered to prove the contrary.

In my view, a fact is deemed proved for want of cross examination if there is no evidence to counter it. In this case there is abundant evidence that the owner of the land did not disclose to his family about the disposition by gift to his grandson. I find the story of the respondent's side is logical and sensible. In ordinary course of things, a grandfather cannot give land to a grandson without disclosing it to his children including the father of the grandson receiving the gift. I am satisfied that DW4 testified against his son for the interest of justice and not anything else as there is no evidence of sour blood between them. I, therefore, hold that the 1st respondent acquired rights over the dispute land by inheritance through his mother upon his father's demise.

Counsel for the appellants has argued that the evidence of the respondents has contradictions and consistencies. He seems to lament that the 1st respondent has never lived on the suit land which is a fact. However, this is not a material fact because the 1st respondent did not claim titled due to long usage. His right is through inheritance. At the trial, counsel for the appellant put question to DW2 and DW4 suggesting that

the 1st respondent could not have acquired title by inheritance because DW4 was not administrator of the estate of Athman Mtuta. With respect, land held under customary title, particularly in villages, which is the case here, can pass to a heir by family meetings resolution not necessarily by formal appointment of administrators.

The learned counsel has faulted the trial tribunal for holding that the appellants were invitees to the land. He has argued that there is no evidence to that effect. I do not agree. DW1 testified that DW4 was taking care of his land. DW4 said he gave his land to the 1st appellant to use. In that respect he also took care of the land entrusted to DW4 by DW1 too. Consequently, by that use rights he is, indeed, an invitee to the land of the 1st respondent.

Regarding visiting the *locus in quo*, indeed, the procedures were violated. However, even without evidence of what transpired on site, the evidence of PW1, DW1 and DW4 is sufficient to decide on ownership of the suit land.

Lastly, is the complaint about whether the 2nd and 3rd respondents lawfully acquired the title to land from first respondent through sale. I find

this issue irrelevant. As the appellants are not party to such contracts and if the land does not belong to them, the legality of the process is none of their business.

I wish to say a word about exhibit A2 which is a customary title deed granted to the appellants over the suit land. According to DW4, the land belongs to him, the 1st respondent and Emilian. Therefore, when the 1st respondent disposed of the land to the 2nd and 3rd respondent, it is the one acre land which belonged to her mother. However, the appellants sued for the whole land that belonged to the three wives. It is for this reason the trial tribunal held that the dispute area is the one acre and not the whole land of the late Athman Mtuta. It is my view that the title deed was erroneous issued over the whole area considering the fact that the 1st appellant is entitled to part of the one acre which belongs to his father (DW4). The complaint in ground 6 about the finding of the trial tribunal on the size of the dispute land, therefore, has no merits. The trial tribunal was right to hold that the dispute is over one acre which the 1st respondent disposed of by sale to the 2nd and 3rd respondents.

For the foregoing, I hold that the trial tribunal reached a correct decision to dismiss the application for want of merits. For the same reason,

I dismiss the appeal for want of merits. Appellants to pay costs of this case.

I.C. MUGETA

JUDGE

7/6/2023

Court: Judgment delivered in chambers in the absence of the 1st, 2nd appellant, 2nd respondent and in the presence of the 1st and 3rd respondents in person.

Sgd. I.C. MUGETA

JUDGE

7/6/2023