IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 16 OF 2021

(Originating from the District Land and Housing Tribunal for Mtwara at Mtwara in Land Application No. 101 of 2018)

NURDIN YUSUFU SUNDUVA (Administrator of the Estates of the late Yusufu Athumani Sunduva).....**APPELLANT**

VERSUS

HAWANA BILISHI MKAYAKA .....RESPONDENT

JUDGMENT

4th Nov. & 7 Dec., 2021

DYANSOBERA, J.:

In the instant appeal, the appellant Nurdin Yusufu Sunduva is challenging the decision of the District Land and Housing Tribunal for Mtwara at Mtwara which dismissed his suit for recovery of the suit farm.

The brief background of the matter is as follows. The deceased that is Yusufu Athumani Sunduva was the lawful owner of the suit farm located at Litule, Mambamba village in Ndumbwe Ward, Tandahimba District which the respondent occupies and which is the subject of this appeal. The deceased passed away on 27th day October, 2017. After the death of Yusufu Athumani Sunduva, the appellant was appointed administrator of the estate as evidenced by the letters of administration (exhibit P.1),

He sought to distribute the said farm but the respondent refused to release it arguing that it was her property she had lawfully bought from the deceased. His efforts to recover the land from the respondent through other avenues was unsuccessful. On 7th November, 2018 he sued the respondent before the District Land and Housing Tribunal for Mtwara at Mtwara whereby the appellant and respondent testified. Each was supported in their evidence by one witness. While the appellant called Lukia Athuman Sunduva (PW 2), the respondent called Juma Athumani Sunduva (DW 2). After evaluating the evidence, the Hon. Chairperson was unanimous with the two assessors that the applicant had failed to prove his case on preponderance of probabilities. He found that the farm in dispute was legally sold by the deceased to the respondent on 11th day of February, 1997. The respondent was, therefore, declared the lawful owner of the disputed farm.

Aggrieved, the appellant has appealed to this court on seven grounds of appeal as follows:-

1. **That,** the trial Chairman erred in law and in fact for entering declaration that Hawana Bilishi Mkayaka (respondent herein) is the lawful owner of the suit basing on doubtful evidence ("D1" and "D2") depating with the strong evidence of the appellant that the late Yusufu Athumani Sunduva did not whatsoever put the disputed land on sale (PW2).

2. **That,** the trial Chairman erred in law and in fact for failure to examine well the exhibit "D1" as it has a total of four witnesses (two for a seller and the other two for a buyer) but neither of four was availed by the respondent at the Tribunal to testify not did she tell as to their whereabouts of the two witnesses of the buyer written therein (mussa Namwanga and Hamisi Hassani Nankonda) both of whom are actually still alive sound to be brought before the Tribunal for testifying.
3. **That,** the trial Chairman erred in Law and in fact according weight the exhibit "D1" without considering its fakeness as it bears an Arabic signature purported to be of the late Yusufu Athumani Sunduva which in his lifetime he never used it anywhere and it varies with that used in exhibit "D2" the document purported to have been written by the late Yusufu Athumani Sunduva distributing his estate to his thirteen (13) surviving children (as testified by DW2) and that, the document is never attested anywhere neither in the clan meeting not at the court before the appointment of the appellant.
4. **That,** the trial Chairman and so the trial Tribunal erred in law and in fact for believing the testimony of DW2 that the administered the distribution of estate of the late Yusufu Athumani Sunduva for the material estate are not yet districted pending availability of the instant suit land and never ever did DW2 was appointed to administer whatever the material estate.
5. **That,** the Chairman erred in law and in fact for departing with the firm testimony of the appellant that, never before or after the appointment of the

appellant herein to be a legal administrator of the estate of the late Yusufu Athumani Sunduva, did anyone else been appointed to be the legal administrator of the estate of the late Yusufu Athumani Sunduva or left with anything of a like apart from the appellant.

6. **That,** the Chairman and so the trial Tribunal erred in law and in fact for denying the concern of the appellant to visit the disputed land despite the fact that he gave in to shoulder the cost to be incurred by the visit.
7. **That,** the Chairman and so the trial Tribunal erred in Law and in fact for favouring the respondent basing on the fact that, she stayed in land in dispute for twenty (20) without any interruption but this is not a reliable means of granting her right of ownership because before and after his retirement, late Yusufu Athumani Sunduva never lived in the land apart from partly cultivating and partly subletting (as per PW2 and the respondent)

At the hearing of this appeal, the appellant appeared in person while the respondent made no appearance. The appeal was, therefore, heard ex parte. The appellant opted to be heard by way of written submission.

Having duly considered the record of the District Land and Housing Tribunal, the grounds of appeal and the appellant's submission in support of the appeal, the issue calling for consideration is whether the respondent was a mere invitee to or the purchaser of the suit farm.

According to the evidence before the District Land and Housing Tribunal, the appellant argued that in 1996, the deceased gave the suit farm to the respondent on their existing affection to oversee it on the understanding that she would return it back to either the deceased or the heirs. After the death of the deceased, the appellant and his fellow heirs asked back the farm but the respondent was not ready to surrender it. As to why the when the deceased died the farm remained in the hands of the respondent, the appellant argued that the deceased considered that the respondent had not yet well established herself (kujiweka sawa). In his testimony, the appellant mentioned the neighbours to the suit farm. Lukia Athuman Sunduva (PW 2) was in support of the appellant's version.

On her part, the respondent Hawana Bilishi Mkayaka (DW 1) maintained that she was the lawful owner of the suit farm after she had purchased it from the deceased. According to her, the deceased had, in his life time, bought two farms. One was with cashewnuts while the other was a desert. The respondent got the latter in which she planted cashewnuts. She then, in 1997, bought it at Tshs. 350, 000/= in two instalments though she had started working on it in 1974. After the death of the deceased, she produced the sale agreement and argued that the deceased had distributed all his properties to his thirteen children but the farm in dispute was accepted. She refused the suit farm to be included in the distribution because it was not a probate matter. It was the respondent's further argument that the Mdumbwe

Ward Tribunal declared the respondent the lawful owner of the suit farm and when the appellant appealed to the District Land and Housing Tribunal, he was advised to sue as a personal legal representative. Juma Athumani Sunduva (DW 2) told the trial Tribunal that the respondent was the lawful owner of the suit farm. She supported the fact that the deceased had already distributed his estate to his thirteen children and suit farm was not among the probate property. DW 2 supported his argument by producing documentary evidence (exhibit D2).

As said before, the trial District Land and Housing Tribunal was satisfied that the appellant had failed to prove his claims.

Submitting on the first ground of appeal, the appellant argued that the deceased's voter's identity card impeached the sale agreement (exhibit D 1) and that there was no supportive evidence to the sale agreement as no witnesses were called to support the sale transaction between the respondent and the deceased. The appellant supported his argument by citing the observation by the Tribunal at p. 12 of the typed judgment.

I have considered the record and I am in no doubt that the citation referred to by the appellant is of no assistance to him. The Tribunal was clear that the appellant failed to prove that the deceased did not use other type of signatures in signing his other documents. At the same page, the Tribunal is recorded to have said:-

'kwa kuongeza, ni kwamba Mleta maombi (the appellant) ameshindwa kuthibitisha kuwa marehemu Yusufu Athumani Sunduva hakuwahi kutumia sahihi nyingine kwenye nyaraka zake'

Indeed, the Hon. Chairman was supported in this by what this court observed in the case of **Godfrey Machange v. R**, [1977] LRT, 31 that:-

'hakika, watu kwa utashi wao wanaweza kubadilisha miandiko yao. ...'

Besides, although the appellant asserted that the deceased did not sell the suit farm to the respondent but had only given it to him on affection grounds, he admitted that he did not know when such giving was made and that the respondent together with her husband had all along been using the same suit farm even after the demise of the deceased. This is clear from the response by the appellant during cross examination when he was recorded to have stated at page 21 of the typed proceedings:-

I don't remember when the respondent was given by the late Yusufu Athuman Sunduva.

Respondent and her late husband were using the disputed farm during the subsistence of their marriage. From 1996 up to now, respondent is occupying the disputed farm.

Exhibit D 1 was impeccable and proved the sale transaction. The fact that no witness to the sale transaction was called in court to testify did not affect the credibility

of the respondent and her witness on the question of the sale nor did it impeach the sale agreement.

For those reasons, I am satisfied as was the Tribunal that the respondent proved by h testimony and documentary evidence that she bought the suit farm from the eased. This disposes of the first and second grounds of appeal.

With regard to the third, fourth and fifth grounds of appeal, the argument by the appellant that exhibit D 2 was faked was not proved. The appellant failed to lead evidence to prove that assertion. Indeed, the said document was produced by DW 2, the deceased's brother who was emphatic that the heirs and the widow were satisfied that there was no any estate other than that indicated in exhibit D 2 which was subject to distribution. This is clear from the evidence of DW 2 as elaborated at p. 40 of the typed proceedings. Exhibit D 2 was the evidence of the estates of the late Yusufu Athuman Sunduva. The appellant did not offer any evidence showing that the suit farm was a probate property and subject to distribution particularly taking into account that he vowed that he was the sole administrator of the deceased's estate. In other words, the appellant failed to prove that the suit farm was a probate matter. This explains why it was not subjected to distribution as was other properties.

The appellant complained in his 6th ground of appeal that he was denied his concern to visit the disputed land. This complaint has no basis. The record is clear that visiting the locus in quo was among the prayers he had made before the Tribunal. According to p. 20 of the trial Tribunal's proceedings, the prayers by the appellant were the following:-

> 'I pray for the following reliefs
>
> This Tribunal to declare the late Yusufu Athumani Sunduva as the lawful owner of the disputed farm and respondent to be declared as were caretaker of the disputed farm. I pray to be awarded damages.
>
> That is all for this witness'.

Even if, the appellant had made such prayer, the law is clear that the purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (by the Court of Appeal in the case of **Avit Thadeus Massawe v. Isidory Assega**, Civil Appeal No. 6 of 2017). The sixth ground of appeal has no merit.

The fact that the respondent never lived in the suit farm does not disentitle her rights of ownership particularly where it is clear that she bought the suit farm and legally owns it.

Since the appellant failed to prove that the suit farm was a probate matter and the respondent sufficiently proved that she legally bought it from the deceased, the decision of the District Land and Housing Tribunal cannot be faulted.

For the reasons I have given, I find this appeal devoid of any merit. Accordingly, I dismiss it.

I t is so ordered.

W.P. Dyansobera

Judge

7.12.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 7th day of December, 2021 in the presence of both parties but unrepresented.

W.P. Dyansobera

Judge