

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE APPEAL NO.36 OF 2020

(C/f Application No.4 of 2016 in the District Land and Housing Tribunal for Manyara Region at Babati.)

NATHAEL SHAURI LAGO (*As administrator of the estate of the late Shauri Lago*).....APPELLANT

Vs

LOHAY MATAY.....RESPONDENT

JUDGMENT

Date of last Order:15-9-2022

Date of Judgment:20-10-2022

B.K.PHILLIP,J

The appellant herein lodged this appeal challenging the judgment of the District Land and Housing Tribunal for Manyara Region at Babati (Henceforth "The Land Tribunal"). The grounds of appeal are reproduced verbatim hereunder;

- i) That the Trial Tribunal erred in law and fact to decide for the respondent despite that his pleadings on how he acquired the land in dispute differed from what he testified during trial.*
- ii) That the Trial Tribunal erred in law and fact to find for the respondent despite his contradictory evidence and that of his witnesses as to who allocated the land in dispute to him.*
- iii) That the Trial Tribunal erred in law and in fact to dismiss the applicant's application for reason that his evidence as to how the applicant acquired the land in dispute that it was a hear say from elders without considering the he was the holder of power of Attorney who was born after the applicant have acquired the land in dispute from his father in 1964.*

- iv) *That the Trial Tribunal failed to properly analyze the evidence given in the Tribunal and ended in giving erroneous decision.*

A brief background to this matter is that the controversy between the parties in this application is on the ownership of 15 Acres (Henceforth "the suit land") located at Ayahilongo, in Mangisa Village, Yaeda Ward in Mbulu District. At the Land Tribunal the appellant alleged that in 2010 the respondent invaded the suit land and started cultivating part of it (2 acres). He destroyed the grave of the appellant's grandmother who was buried in therein. Efforts to settle the dispute amicably failed. Finally, the appellant decided to sue the respondent vide the aforesaid Application No.4 of 2016, in which he prayed for the following orders; That the respondent to be ordered to vacate from the suit land, the respondent's employees be permanently restrained from entering into the suit land and costs of the application be borne by the respondent.

In his defence the respondent denied to have neither invaded the suit land nor caused the destruction alleged by the applicant. He contended that the suit land belongs to him. He was granted the same as a gift by one Alois Tlatla in 1974. He has been in possession the suit land since then. He prayed for the dismissal of the application with costs.

At the hearing of Application No.4 of 2016 before the Land Tribunal, Nathanael Shauri Lago (the applicant herein) appeared before the Land Tribunal on behalf of the late Shauri Lago ("deceased") who was the applicant. He was granted a power of attorney by the deceased and testified as PW1. Other witnesses for the applicant were Mr. Mathayo Magi Lago (PW2) and Daniel Petro (PW3). For the defence case, the respondent testified as DW1. Other witnesses for the defence case were Joseph Gober (DW2) and Alfonse Samay (DW3).

Upon receiving evidence from both sides, the Land Tribunal ruled out that the applicant failed to prove his case to the standard required by the law. Thus, the application was dismissed with costs. Consequently, the late Shauri Lago lodged his appeal in this Court. Unfortunately, he passed on

before the hearing of the appeal. Nathael Shauri Lago was appointed as the administrator of the deceased estate and applied to be joined in the appeal.

In this appeal, the learned advocates Ndibalema Johnson Charles and Bashir Ibrahim Mallya appeared for the appellant and the respondent respectively. This appeal was disposed of by way of written submission.

Mr. Charles started his submission by raising two preliminary points which were not raised in the petition of appeal to wit; **One**, that no reasons were recorded in the Land tribunal's file for the change of the chairman. He contended that the successor chairperson never entered any order for taking over the case nor reasons for doing so in contravention of Order XVIII Rule 10(1) of the Civil Procedure Code (CPC). To cement his arguments he cited the case of **Kajoka Masanga Vs The Attorney General and another, Civil Appeal No.153 of 2016** and **Paschal Phillipo Vs Martin and Another, Land Appeal No.93 of 2020** (Both unreported). **Two**, that the opinion of assessors were not included in the judgment of the Land Tribunal. The chairperson just acknowledged that the assessors gave opinion, but he neither included the said opinion in the proceedings nor in the judgment. In addition, he submitted that the assessors' opinion were not read out before the parties. That is a clear contravention of the law, contended Mr. Charles. He cited the case of **Hosea Andrea Mushongi Vs Charles Gabagambi, Land Appeal No.66 of 2021** (unreported).

With regard to the 1st and 2nd grounds of appeal Mr. Charles argued that the respondent's evidence is contradictory and his testimony was at variance with what he pleaded in the written statement of defence. He pointed out that in his defence the respondent stated that the suit land was granted to him by one Alois Tlatla as a gift, in 1974 and admitted that the suit land was 15 acres whereas in his testimony in chief he said that the suit land is 18 Acres and upon being cross examined he said that he was handed over the suit land by the elders of Mangisa Village.

Moreover, Mr Charles submitted that upon visiting the suit land , the Land Tribunal found out that the suit land is 15 acres and 4 acres were cleared by the respondent.

Furthermore, Mr. Charles's submitted that the position of the law is that parties are bound by their pleadings. The variance of respondent's testimony with what he pleaded is fatal and weakened his case. To cement his arguments , he cited the case of **Tarime Goodwill Foundation Health Services Hurumia Watoto Vs The Liquidator Prosperity Life Care Insurance Tanzania Limited , Commercial Case No.12 of 2012** and **Sarrchem International Tanzania Limited Vs Wande Printing and Packaging Company Ltd, Commercial Case No.31 of 2020**, (Both Unreported), to bolster his arguments.

With regard to the 3rd ground of appeal Mr. Charles argued that the Land Tribunal erred in law and fact to dismiss the appellant's application on the reason that in his evidence he did not show how he acquired the land in dispute and that his testimony was a hear say from elders without taking into consideration the fact that he was the holder of a power of Attorney and was born after the applicant had acquired the land in dispute from his father in 1964. In addition Mr. Charles submitted that PW1 testified that the appellant has been in possession of the disputed land from early 1970s to 2010 when the respondent invaded it and began to cultivating part of it.

With regard to the last ground of appeal Mr. Charles submitted as follows; That the Trial Tribunal failed to properly analyze the evidence adduced by the parties and ended up giving an erroneous decision. He contended that the evidence adduced by the respondent was not supported by any document from the Village authority and the respondent failed to clearly state on how he obtained the suit land.

In rebuttal , Mr. Mallya submitted that Mr. Charles erred to introduce new grounds of appeal in his submission. He contravened the provisions of Order XXXIX Rule 2 of the Civil Procedure Code. To cement his argument

he cited the case of **The Registered Trustees of Masjid Mkongwe Vs Athumani and 4 others , Land Appeal No. 154 of 2018** (unreported), in the alternative, Mr. Mallya conceded that there was a change of a Chairperson, but he contended that it was the appellant's advocate who insisted the matter to be proceed for hearing before another chairperson because the former chairman , C.P. Kamugisha was absent on the hearing date. To substantiate his arguments he referred this Court to pages 15-17 of the proceedings of the Land Tribunal. Moreover, he contended that assessors gave their opinion in the presence of the parties and the same were included in the judgment of the Land Tribunal . He referred this Court to pages 6 and 39 of the proceedings and judgment respectively.

With regard to the 1st and 2nd ground of appeal Mr. Mallya argued that the legal principle relied upon by Mr. Charles that parties are bound by their pleadings is irrelevant in this appeal because the Land Tribunal's judgment is based on the evidence adduced by the parties and their witnesses. He insisted that pleadings cannot be a substitute to a legal requirement for the parties to bring their evidence in Court to prove their allegations except where there are admissions. He cited the case of **Mbaraka Abdallah Alsaid and Another Vs National Insurance Corporation (T) Limited and Another , Commercial Case No.72 of 2003** (unreported).He went on submitting that the deceased failed to prove his case to the standard required by the law. The respondent's evidence was heavier than the evidence adduced by the deceased. The Land Tribunal made proper analysis of the evidence adduced and its decision is supported by the evidence on record, argued Mr. Mallya and cited the case of **Hemedi said Vs Mohamed Mbillu (1984) T.L.R. 114**, to bolster his argument.

In addition to the above, Mr. Mallya argued that in this case the respondent managed to prove that he is the lawful owner of the suit land. The same was allocated to him by village leaders of Magisa Village in 1974.His testimony was corroborated by the testimonies of DW2 (Joseph Gobre) and DW3's (Alfonse Samay) .

Moreover, Mr. Mallya added that during cross examination, the respondent testified that the suit land was not given to him by Aloyce Tlatla as pleaded in his written statement of defence and clarified that his advocate did not hear him properly as a result he wrote a wrong statements in the pleadings. In his response to question posed to him during cross examination the respondent said that he was allocated 18 acres and he is using 4 acres for cultivation purposes. The respondent's clarification aforesaid was in line with what was found during the visit of *locus in quo* by the Land Tribunal. Mr. Mallya insisted that there is no contradictions in the testimonies made by the respondent's witnesses. Relying on the case of **Omari Kipira Vs Fatuma Nassoro, Misc. Land Appeal No.9 of 2018**, (unreported), Mr. Mallya argued that it is a trite law that where the decision of a Court is wholly based on credibility of the witnesses, the trial Court / Tribunal is better placed to assess their credibility than the appellate Court which merely reads Court's records.

With regard to the 3rd ground of appeal, Mr. Mallya's response was to the effect that the appellant's testimony was contradictory and very weak since he testified that he was born in 1977 and that the respondent came in Mangisa village in 1976, that is a year before the appellate was born. Surprisingly, he claimed that the deceased acquired the suit land in 1964. What he said about the acquisition and ownership of the suit land he just heard from elders, argued Mr. Mallya and maintained that the findings of the Land Tribunal that the appellant's testimony was just hearsay and weak is legally sound and justifiable.

Moreover, Mr. Mallya submitted that the appellant failed to call material witnesses who witnessed how he acquired the suit land. On the consequences of failure to call a material witness, Mr. Mallya referred this Court to the case of **Hemedi saidi Vs Mohamed Mbillu (1984) T.L.R. 114**. In conclusion, Mr. Mallya beseeched this Court to dismiss this appeal with costs.

In rejoinder, Mr. Charles , reiterated his submission in chief and submitted that he did not err in law to raise the two preliminary points which were not part of grounds of appeal because points of law can be raised at any stage. He insisted that the Chairman of the Land Tribunal never showed any reason for taking over the case contrary to the provisions of Order XVIII Rule 10(1) of the CPC. He maintained that the appellant's evidence were sufficient to prove his case to the standard required by the law and the assertions made by the respondent were not supported by any document from the village authority.

Having analyzed the submissions made by the parties, let me proceed with the determination of the merits of the appeal. I wish to point out on the onset that , as correctly submitted by Mr. Mallya, the preliminary point raised by Mr. Charles are not part of the grounds of appeal filed in Court. I Have taken into consideration Mr. Charles' response in respect of the arguments raised by Mr. Mallya in objection to the preliminary points aforesaid, that is, a point of law can be raised at any stage. Let me make it clear that I am alive that points of law can be raised at any stage. There is plethora of authority to that effect. However, it is noteworthy that the point of laws that can be raised at any stage are the ones pertaining to the Court's jurisdiction/ powers of the trial Magistrate/Judge /chairperson in adjudication of a case before him/her. In the instant appeal there is no dispute that the two preliminary points raised by Mr. Charles are not part of the grounds of appeal. The pertinent question here is; do the new preliminary points raised by Mr. Charles qualify to be entertained by this Court?. In my considered opinion only the 1st preliminary point deserves to be entertained by this Court because it is raises an issue of law on the powers of the Chairman who took over the case from the first Chairman who was assigned to adjudicate the case, that is, whether or not he had powers to proceed with the hearing of the case without assigning reasons for doing so. In other words was the Land Tribunal properly constituted?

I have perused the Court's records and noted, as conceded by Mr. Mallya, that it is true Hon. M.S.Mahelele took over the hearing of the case without

assigning any reason. The Land Tribunal's records reveal that it was the advocate for the appellant, Mr. John Lundu , learned Advocate who was representing the appellant at the Land Tribunal who moved Hon. Mahelele to proceed with the hearing the case. The Land Tribunal's records also reveal that there was no objection from the respondent's Advocate, Mr.Paschal Peter, learned advocate who was representing the respondent at the Land Tribunal. No reasons were recorded as to why Hon.M.S. Mahelele took over the hearing of the case whereas the case was assigned to Hon. C.P. kamugisha and two witnesses had already testified before him (Hon C.P.Kamugisha).It is noteworthy that the position of the law on how case files should change hands is very clear, that is, once a case file is assigned to a judicial officer he /she has to handle it to the end and if there is any need to change hands then the reasons should be clearly indicated in the case file. The case of **Kajoka Masanga** (supra) in which the Court of Appeal said the following is relevant in this matter;

"... in the present case the successor judge also took over the continuation of the trial by continuing to receive the evidence of PW1 without recording any reasons why the case landed on his lap. We find this irregular and as we noted in Ms Georges Center's case this was highly prejudicial. Those proceedings by the successor judge cannot be spared.

Accordingly , we exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act Cap.141 R.E 2002, and upon taking judicial notice that the predecessor Judge Rwakibarila, J is now late, we quash all the proceedings , judgment and decree that it be placed before another judge of competent jurisdiction for the trial to begin afresh.."

I have taken into consideration Mr. Mallya's concern that it is the advocate for the appellant who moved Hon Mahelele to proceed with the hearing of the matter. But, I have also noted that the advocate for the respondent did not object to the prayer that was made by the appellant's advocate. However, it is noteworthy that the consensus between the advocates cannot be a justification to contravene the required legal procedures pertaining to change of hands of the case file.

From the foregoing, on the strength of the decision of the Court of Appeal in the case of **Kajoka Masanga** (supra), I am constrained to nullify the proceedings of the Land Tribunal as I hereby do. The proceedings of the Land Tribunal are hereby nullified and the judgment thereof is set aside. I hereby order that this case shall be tried *de novo* before another chairperson in accordance with the law. Each party will bear his own costs.

Dated this 20th day of October 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip", is written over a circular stamp.

B.K.PHILLIP

JUDGE