IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: NDIKA, J. A., WAMBALI, J.A, And SEHEL, J. A.)

CIVIL APPEAL NO. 66 OF 2019

ERNEST SEBASTIAN MBELE.....APPELLANT

VERSUS

SEBASTIAN SEBASTIAN MBELE ..... 1st RESPONDENT
ABDUL MHAGAMA ..... 2nd RESPONDENT
KASIAN MAHAI ..... 3rd RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Songea)

(Chikoyo, J.)

Dated the 30th day of November, 2017
in
Land Case No. 3 of 2016

.....

JUDGEMENT OF THE COURT

19th April, & 4th May, 2021.

SEHEL, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Songea dismissing the appellant's suit. The subject matter of the suit was a piece of land (the land) which the appellant alleged to have been given by his parents in 1988 as a gift *inter vivos*. The appellant claimed that in 2016 the 1st respondent without any colour of right sold part of the land to the 2nd and 3rd respondents who thereafter unlawfully entered onto his land and demolished a hall foundation which he

constructed at a cost of TZS 35,000,000.00. He therefore claimed against the respondents for the following reliefs: -

i) A declaratory order that the land belonged to him;

ii) A declaratory order that the respondents were trespassers and a permanent injunction be issued restraining the respondents from doing anything in respect of the land;

iii) A compensation order to a tune of TZS 35,000,000.00 for the demolished foundation; and

iv) Costs of the suit be awarded to him.

The 1st respondent who is a brother of the appellant disputed the appellant's claim. In his written statement of defence, he averred that the land belonged to their deceased parents, thus a family land. He further averred that the administrator is yet to be appointed to administer the estates and that at no point in time the parents bequeathed the land to the appellant. He, however, acknowledged that he sold the land which he said was part of his interest as a beneficiary of the estates.

On the part of the 2nd and 3rd respondents, they jointly filed the written statement of defence to dispute the claim. It was averred that

the 2nd respondent was the lawful owner of the land having bought it from the 1st respondent and thereafter engaged the 3rd respondent, a mason, to construct for him a residential house therein.

In determining the controversy, the High Court framed the following three issues: -

i) Who is the rightful owner of the land.

ii) If the plaintiff is not the rightful owner did the 1st respondent have *locus standi* to dispose any part of the land.

iii) To what reliefs are the parties entitled.

After hearing the evidence, the learned trial Judge discussed in great detail the first issue by analyzing the evidence brought froward to prove the gift *inter vivos* and reached to the conclusion that, on a balance of probabilities, the land was a family land and it did not belong to the appellant. Concerning the second issue that deals with the sale, the learned trial Judge found that the family members, that is, the 1st respondent and his two sisters with the exclusion of the appellant, sold the land to the 2nd respondent and that the plaintiff failed to prove on a balance of probabilities that the 1st respondent disposed the land by

himself. Ultimately, the learned trial Judge dismissed the suit with no order as to costs.

The appellant was not satisfied with the dismissal of his suit. He thus lodged the present appeal advancing twenty (20) grounds in his memorandum of appeal. Nevertheless, in his written submission, filed pursuant to Rule 106 (1) and (2) of the Tanzania Court of Appeal Rules of 2009 (the Rules), the appellant condensed the grounds of appeal into two (2) and categorized them as '*ownership of land* and '*locus standi of evidence*'.

In opposing the appeal, the respondents, on their part, also filed a joint written submission in which they generally supported the finding of the learned trial Judge.

At the hearing of the appeal, the appellant and the 3rd respondent appeared in person, unrepresented whereas the 1st respondent appeared through a video link connected from Mbinga District Court. Though, the 2nd respondent was duly served with the notice of hearing he could not enter appearance because he was reported sick by his younger brother one, Ramadhan Mhagama Kazinguru. Given the fact that the 2nd

respondent lodged a joint written submission with his co-respondents, the Court deemed his appearance in terms of Rule 112 (4) of the Rules.

In arguing the appeal, the appellant submitted on the issue of ownership into two aspects. **First**, he faulted the trial judge for her failure to take cognizance of the direct oral evidence of PW2 whom the appellant argued, was present during the distribution of the wealth to the children thus witnessed the donation of the gift *inter vivos*. On this, the appellant referred us to the reply given by PW2 in her cross-examination when she said, at the time of distribution, she was there too.

He added that the evidence of PW3 and PW4 established and proved the fact that the land was in his possession during the life of his parents but the trial Judge did not give credence to their evidence. He pointed out that PW3 told the trial court, in 1999 he went to ask for an area to build a house only to be told by the appellant's parents that the whole area belonged to the appellant. He was thus requested to wait because they needed to get permission from the appellant. Upon consultation, he granted permission with condition that PW3 ought to pay to the parents TZS 100,000.00 of which PW3 paid.

The appellant further argued even PW4 told the trial court that when he went to the appellant's parents seeking land to cultivate, he was told, the whole area belonged to the appellant who was living in Dar es Salaam and he reserved it for building school. He was also requested to wait for permission from the appellant which he granted.

It was the submission of the appellant that all of his witnesses, that is, PW2, PW3 and PW4 were entitled to credence on their testimonies and that there was no good reason for the learned trial Judge not to believe them because their evidence was direct evidence which is acceptable under sections 61 and 62 (1) (a) of the Evidence Act, Chapter 6 of the Laws of Tanzania, Revised Edition 2002 (TEA).

Secondly, he argued, the land had been in his possession over 12 years without any disturbance from the family members including the 1st respondent. He added that since the allocation in 1988, he had made major developments on it including erecting his own house and other houses, building a school, installing electricity and planting trees as evidenced by PW2, PW3 and PW4. To fortify his argument that he had adverse possession of the piece of land, he referred us to our decision in the case of **Registered Trustees of Holy Spirit Sisters Tanzania v.**

January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016 (unreported). Yet, he said, the learned trial Judge failed to make a finding on his long occupation of the land.

For the issue concerning *locus standi*, the appellant faulted the finding of the learned trial Judge that there was no direct evidence proving sale was done by the 1st respondent alone. The appellant argued that the trial Judge ought to have taken cognizance of the sale agreement which was attached to the 2nd and 3rd respondents' written statement of defence showing that it was the 1st respondent alone who sold the land to the 2nd respondent.

With that submission, he urged us to allow the appeal with costs.

In response, the respondents countered that the appellant failed to prove his case because none of his witnesses said they saw the parents distributing their wealth to their children. They added that the appellant also failed to bring any deed of transfer to prove that he was allocated the land. Further, the 1st respondent contended, in the year 1988 none of the children were at Mbinga thus it could not have been possible for the parents to distribute the assets while the children were not there. He added that the property was part of the estates of their late parents

whereby the administrator was appointed but the appellant successfully objected his appointment and since then, no administrator had been appointed. They therefore prayed for the appeal to be dismissed.

The appellant briefly reiterated that PW2 was present during the donation. Concerning his objection to the appointment of the administrator, he said he had to object because he was not involved.

Having heard the submissions by the parties and gone through the record of appeal, the question, and which is the main issue before us, to which the learned trial Judge's attention was also drawn, was whether the appellant is the lawful owner of the disputed piece of land. As alluded earlier, the appellant argued that the piece of land belonged to him because it was given to him as a gift by his parents.

The law places a burden of proof upon a person "*who desires a court to give judgment*" and such a person who "*asserts...the existence of facts to prove that those facts exist*" (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6).

It is in that respect, in **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (unreported) we said: -

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."*

Proof on a preponderance of probabilities was well explained by the Supreme Court of India, and we seek inspiration, in the case of **Narayan Ganesh Dastane v. Sucheta Nayaran Dastane** (1975) AIR (SC) 1534 that: -

> *"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ...* ***a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists.*** *A prudent man faced with conflicting probabilities concerning a*

fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."

Let us now see as to whether the appellant managed to prove, on a preponderance of probabilities, the gift *inter vivos*. The appellant urged us to find that PW2 witnessed the gift *inter vivos* hence he proved his case. At this juncture we find it apposite to reproduce part of PW2's

evidence to satisfy ourselves as to whether this witness managed to prove the gift *inter vivos*. In her examination in-chief, she told the trial court that: -

> *".... In 1988 my brother Sebastian Mbele while alive distributed the whole area at Mbinga town, he gave it to the plaintiff (the appellant in this appeal). The 40 acres to his two daughters and so 2 goats and 7 cows. And the 1st defendant (1st respondent in this appeal) was given more than 1m. 1st defendant denied to be given the land."*

When cross-examined, she said: -

> *"At the time when the distribution was done by my brother, I was there too. The farm at Mjimwema was given to plaintiff (appellant). Tangi la Maji area where he had built the school too. 2 goats, 7 cows and 40 acres of farms were given to the two sisters."*

Deducing from her evidence above, it is obvious that PW2 gave a bare statement in her examination in chief that the appellant was

allocated the piece of land by his father with no more. She did not explain as to how she came to know about such donation. The mere assertion without further elaboration was not enough. We do appreciate that she explained in her cross-examination that she "was there too". But that statement also leaves a lot to be desired. If it is true that she witnessed the gift *inter vivos*, why did she not mention it in the first place when she was called to establish its existence. Worst still, she did not give any detailed account, be it in her examination-in chief or cross-examination, as to the number of witnesses who were present, the names of the witnesses and/or the place where the gift was made taking into account that the 1st respondent disputed the presence of the children at home in 1988. We think it would be wrong to place any reliance on evidence of a witness who allegedly saw the donation but failed to disclose such an important material fact in her examination in chief. With such improbable evidence of PW2, the learned trial Judge was correct in not putting any reliance on her evidence. In that regard, we find no reason to fault her.

There are other factors diminishing the credibility of PW1 and PW2. **One**, there is self-contradiction on PW2's evidence in her examination-in

chief. According to her, the whole land in Mbinga Town was given to the appellant but at the same time she stated that 40 acres were given to the appellant's sisters. This patent self-contradiction found at page 52 of the record of appeal tainted her credibility.

Two, PW2 contradicted the story of PW1. At pages 43 and 49 of the record of appeal, PW1 asserted that his father and mother gave him the piece of land in 1988 and upon their death they had no properties left behind to be administered and or distributed to the heirs and beneficiaries. Whereas, PW2 at page 53 of the record of appeal, told the trial court that the appellant's father left a house in the plot and that her house was close to her late brother's house, that is, the father of the appellant. This is a serious contradiction tainting their reliability.

Three, it is incredible for PW2 to remember an event occurred many years ago and forget the one that is more closely connected to her. She remembered the year the appellant was given the land, in 1988 but could not remember a more recent event of the death of her brother, in 2004.

Four, PW1 avoided throughout his testimony to mention the exact year when his father and mother passed away. Presumably this might

have been deliberate because according to the evidence of DW1, the 1st respondent, the father passed away in 2004 and the mother died in 2009. Thus, it is improbable to think that the parents distributed all the properties in 1988. Even, after the death of the father, the mother survived until 2009. We, therefore, take that the mother had been living in her husband's house, mentioned by PW2, until she met her death.

Five, the appellant also admitted in his cross-examination that he did not know the exact measurement of the piece of land he was given by his father. This is gathered at pages 49 and 50 of the record of appeal.

The **sixth** disturbing factor which we think tainted the appellant's case was the fact that he applied for the area to be surveyed in 2009. Exhibit P1 shows that he applied to Mbinga District Council on 9th March, 2009 and on 27th March, 2009 the Council replied to his application. We wonder as to why he waited for all those years only to make his application for survey in the year the death of her mother occured, that is, in 2009. We are more inclined to believe that the application was made after the death of the mother given the fact that on 14th April, 2009 a family meeting was convened to deliberate on how the estates

could be administered and the appellant did not attend that meeting. If the appellant was given the land in 1988 what stopped him to apply for survey of the area earlier than 2009 after the death of both parents.

Furthermore, neither PW3 nor PW4 witnessed the donation of the gift. Their evidence was to the effect that they were told by the appellant's parents that the land belonged to the appellant. Consequently, their valueless evidence was perfectly weeded out at the first instance by the learned trial Judge.

Besides, when we examined and weighed the appellant's case against the respondent's case, we find ourselves more inclined to the obvious fact that the land is a family land because all witnesses for the appellant acknowledged that at one time the land belonged to the parents of the appellant and the 1st respondent. With the absence of evidence to prove the appellant's assertion that the land was given to him as a gift by his parents in 1988, we agree with the learned trial Judge that the appellant failed to prove his case on a preponderance of probabilities.

Connected to this ground, the appellant advanced an argument that he had been in actual occupation for more than 12 years hence he

acquired it through adverse possession. With respect, we find such allegation not supported by his pleadings which he filed in the trial court. The trial court could not make out a new case altogether and declare the appellant lawful owner on account of adverse possession which was neither pleaded nor prayed for in the plaint. It is the position of the law that parties are bound by their pleadings and they cannot be allowed to raise new issues which are not backed by their pleadings unless by way of amendment (see **Scan-Tan Tours Ltd v. The Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012, **Peter Ng'homango v. the Attorney General**, Civil Appeal No. 114 of 2011 and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (all unreported)).

At the end, we find this ground regarding ownership has no merit.

We now turn to the issue of locus standi of the 1st respondent in disposing the land which we think it was unnecessarily framed by the learned trial Judge as an issue. According to the nature of the pleadings and the evidence the issues were only two, namely; whether the title passed from the parents to the plaintiff and to what reliefs are parties entitled. There was no counter claim by the respondents asserting the

right of the 1st respondent to dispose the land to the 2nd respondent. We have always emphasized that cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment (see **Anthony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported)). Therefore, this ground of appeal also fails.

In view of the above, we find no merit in the appellant's appeal. Consequently, we dismiss the appeal with costs.

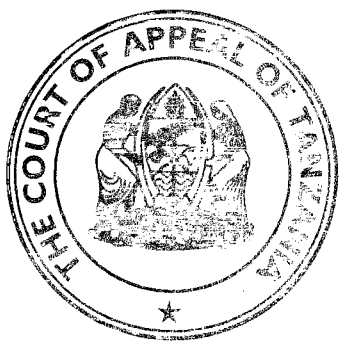
DATED at **IRINGA** this 29th day of April, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2021 in the presence of the Appellant linked via video conference at Commercial Court Dar es Salaam and in absence of the 1st, 2nd and 3rd respondents is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL