

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPEAL NO. 82 OF 2018

(Arising from the Judgment of Kilombero/Ulanga, the District Land and Housing Tribunal in Land Case Appeal No. 173 of 2017, Original Land Case No. 2 of 2017 Katindiuka Ward Land Tribunal)

OMARY TH. MKWETA **APPELLANT**

VERSUS

FADHIL TH. MKWETA **1ST RESPONDENT**

HAJI TH. MKWETA **2ND RESPONDENT**

J U D G M E N T

Date of Last Order: 04/07/2020

Date of Judgment: 06/11/2020

MANGO, J.

The Appellant Omary Mkweta appealed against the decision of the District Land and Housing Tribunal of Kilombero/Ulanga in Land Case No. 173 of 2017 on five grounds of appeal which can be summarized as follows:-

1. That, the Honorable District Land and Housing Tribunal for Kilombero/ Ulanga erred in law and fact by allowing the Appeal and declaring the respondents' as lawful owners of the suit premises despite the respondents failure to prove their ownership over the suit premises.
2. That, the Honourable District Land and Housing Tribunal chairman erred in law by concurring with the unanimous opinion of the wise assessors without considering the testimony of Zuhura O. Sambilanda

the lawful wife of the late Thabit Mkweta on the age of the 1st Respondent at the time allocation of land was effected;

3. That, the Appellate Trial Tribunal erred in law and in fact in declaring the Respondents to be lawful occupiers of the suit premises and in not considering that the Appellant is the approved administrator of Thabit Mkweta's estate and that the Respondents did not dispute the appellant's appointment to be the administrator of their late father's estate.
4. That, the Honorable District Land and Housing Tribunal chairman erred in law by declaring the Respondents as lawful owners of the suit premises despite the fact that they did not produce their allocation documents as evidence and they did not dispute inclusion of the suit premises in their father's estate.
5. That, the Appeal is in time as the Judgment of the District Land and Housing Tribunal was delivered on 31st May, 2018 copy of judgment was ready for collection on 25th June, 2018.

The Appellant instituted case No. 2 of 2017 before Katindiuka Ward Tribunal against the Respondents claiming plots of Land allegedly belonging to their late father one Thabit Mkweta as part of his estate. The Respondents denied such allegation, and claimed that the disputed plots are not part of their father's estate because they were allocated to them by the village authority. The trial tribunal ruled in favour of the Appellant. Dissatisfied with the decision of the Ward Tribunal, the respondents successfully appealed before the District Land and Housing Tribunal for Kilombero/Ulangua which declared the Respondents as lawful owners of the suit land.

The Appellant was aggrieved by the decision of the District Land and Housing Tribunal thus, he preferred the appeal at hand.

The grounds of appeal raised by the Appellant concerns evaluation and consideration of evidence adduced before the trial tribunal. This is reflected in the 1st , 2nd , and 4th grounds of Appeal.

The main issue in this appeal as it was before the two tribunals is whether the suit plots forms part of the estate of the late Thabit Mkweta.

For that reason the 3rd and 5th grounds of appeal are irrelevant because the 3rd ground of appeal concerns the appointment of the Appellant to be the administrator of the estate of the late Thabit Mkweta. The Respondents do not dispute that the appointment was not objected thus, the Appellant Omary Mkweta is the administrator of the late Thabit Mkweta's estate.

The 5th ground of appeal is a submission that the appeal is not time barred. The appeal is indeed not time barred. Therefore the two grounds will not be considered by this Court because they are irrelevant in determination of this appeal.

The Appeal was argued by way of written submissions. In their submissions the appellant and respondent argued the entire Appeal generally.

In his submission the Appellant argued that the Respondents have not produced any evidence to prove their allegations that the suit plots belongs to them. Their testimony that they have been allocated the plots by the village authority is not backed up by any documentary evidence. It was

basically mere words. According to him, the Respondents failed to prove how and when they acquired the suit plots.

He argued further that, the Respondents are aware of the fact that the suit plots belongs to their late father that is why they did not dispute inclusion of the same in the estate of their late father during the family meeting. He submitted that Thabit Mkweta, their late father, was allocated the suit plots in 1975 by Katindiuka Village Government and that the averments by the Respondents that they acquired the plot in 1984 and 1985 are misleading and unfound.

In their reply submission, the Respondents argued that the grounds of Appeal raised by the Appellant are unjustifiable and baseless. The Respondents submitted that the Appellant has raised a new issue that he is acting as an administrator of the estate of the late Thabit Mkweta. According to them this issue has never been raised during trial thus, the Appellant has departed from his own pleadings. They argued that parties are bound to their pleadings and this Court cannot consider a new issue in determining this Appeal. They argued further that, the fact alleged by the Appellant that he owns the suit plots as an administrator is not proved and it has no legal foundation.

I have considered court record and submissions made by the parties to this appeal. The Court record reveals that the issue of the Appellant acting as the Administrator of the estate of the late Thabit Selemani Mkweta is not new. It has been raised before the trial tribunal when the Appellant was filing his case against the Respondents. And it is clear that the appellant

claim ownership over the suit land by virtue of being the administrator of his father's estate.

The capacity of the Appellant as an administrator of the deceased estate ought to have appeared on the title of the case, however, non-disclosure of such capacity in the title of case cannot be considered to be fatal because in the entire proceedings the Appellant was considered to be the Administrator of the estate of the late Thabit Selemani Mkweta. Therefore, the Omission can be served by Section 45 of the Land Disputes Courts Act, [Cap. 216 R. E. 2019] which restricts alteration of the decisions of the tribunals on procedural irregularities that did not occasion failure justice to any of the parties as in the case at hand.

The dispute as to who is the lawful owner of the suit plots between the Respondents and the late Thabit Mkweta was the centre of the dispute during trial. Court record establish that the dispute regarding ownership of the two plots emerged during the family meeting which was conducted for the purpose proposing the Administrator of the late Thabit Mkweta's estate. In the said family meeting, properties that form part of the estate were identified and there was no consensus as to who is the owner of the suit premises between the late Thabit Mkweta and the respondents. Evidence establishes further that, family members had to vote in order to determine whether the plots belongs to the Respondents or their late father. According to the copy of minutes of the family meeting which was tendered in a probate case and this case as evidence, 8 family members voted for the Respondent as owners of the suit premises and 7 family members voted for the late Thabit Mkweta as the owner of the suit premises.

This means, objections over inclusion of the suit plots into the estate of the late Thabit Selemani Mkweta started from the family meeting. Such findings disposes the ground of Appeal which concerns non-objection to the inclusion of the two plots into the deceased's estates. Record shows that the Respondents objected inclusion of the suit plots into the estate of their late father and they went ahead refusing to have the plots distributed to other heirs of the late Thabit Selemani Mkweta. Family members seems to have failed to resolve the dispute amicably that is why the Appellant had to resort to the Court process by instituting Case No. 2 of 2017 before Katindiuka Ward Tribunal.

Thus, the issue of not objecting the inclusion of the two plots in the estate of their late father is unfound.

The most important issue in this Appeal is whether available evidence establish that the plots form part of the estate of the late Thabit Selemani Mkweta. The Respondents summoned witnesses who witnessed the allocation process including neighbors around the suit plots. In addition, the testimony of the wife of late Thabit Mkweta one, Zaluba Sambilanda, was to the effect that, her late husband was allocated a single plot and that the disputed plots were allocated to the respondents. Her testimony was not controverted by the appellant. This made the evidence of the respondents to be stronger than the appellant.

It should be noted that the respondents did not institute the suit, therefore the duty to prove ownership on the required standard was on the appellant. The law, section 110(1) of the Evidence Act [Cap 6 R.E 2019] is very clear that whoever alleges must prove. Therefore the appellant had

the duty to prove his case on the balance of probabilities. Unfortunately he failed to discharge that duty as evidence brought by the appellant was weaker compared to the evidence of the respondents. It is trite law that the party whose evidence is stronger than the other must win, as it was held in the case of **Hemed Said Versus Mohamed Mbilu** [1984] TLR 113. In that regard the District Land and Housing Tribunal for Kilombero/Ulangu was right in allowing the respondents appeal.

For that reason I hereby uphold the decision of the Appellate tribunal.

Appeal is hereby dismissed with costs.


Z. D. MANGO
JUDGE
06/11/2020

