IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CIVIL APPEAL NO. 193 OF 2016

REGISTERED TRUSTEES OF HOLY SPIRIT SISTERS TANZANIA.....APPELLANT

VERSUS

JANUARY KAMILI SHAYO AND 136 OTHERS.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mziray, J.)

dated the 14th day of November, 2013

in

Land Case No. 11 of 2012

JUDGMENT OF THE COURT

12th March & 21st August, 2018

MUSSA, J.A.:

The appellant is a religions organization conducting spiritual and charitable activities under the umbrella of the Registered Trustees of the Roman Catholic Church Diocese of Moshi. For ease of reference, we shall henceforth refer the latter to as the trustees of the Diocese. The respondents are natural persons who operate for gain at Magadini Village, Sanya Juu.

In the High Court of Tanzania (Land Division), the appellant instituted a suit against the respondents over ownership of a portion of land located at what were known as Kilari farms, Sanya Juu. In the suit, the appellant claimed that she was the registered and lawful owner of farms Nos. 336/2, 336/3, 336/4, 336/5 and 336/7 all of which are held under certificates of title No. 13986 and 7311. The respondents did not deny the appellant's ownership to the referred farms, save for farm No. 336/2 (hereinafter called "the suit land") which they claimed ownership on account of having acquired it as a grant from an original owner and occupied the same for more than sixty (60) years. At the commencement of the trial, three issues were framed for the determination by the court, namely:-

> *"1. Who is the lawful owner of farm No. 336/2 with title No. 7311.*
> *2. Whether the defendants trespassed into farm No. 336/2 with title No. 7311*
> *3. To what relief(s) if any are the parties entitle to."*

In the ensuing case for the appellant, four witnesses plus a host of documentary exhibits were lined up in support of the claim. On their part, the respondents featured four witnesses as well to support the denial of

the appellant's claim. More particularly, the witnesses who gave testimony in support of the case for the respondents were, namely, John Ramadhani Karinga (DW4), Edward Mbise (DW2) Ramadhani Karinga (DW1) and Aminiel Elisamia Mushi (DW3). If the list of respondents on the record of appeal is anything to go by, these are, respectively, the 33rd, 30th 42nd and the 93rd respondents.

At the height of the trial, the High Court (Mziray, J., as he then was) found that the respondents have acquired ownership of the disputed farm on account of the doctrine of adverse possession. In the result, the suit filed by the appellants was dismissed with costs. The appellants are dissatisfied, hence this appeal which is grounded upon eight (8) points of grievance, namely:-

> *"1. The trial Honorable High Court Judge erred in Law and fact by departing from the proper pleading, issues and proceeding hence he made a wrong decision.*
>
> *2. The trial Honorable High Court Judge erred in law and fact by making decisions basing on time limitation and doctrine of adverse possession without affording the parties a right to be heard on these issues.*

3. *The trial Honorable High Court Judge wrongly interpreted the doctrine of adverse possession and he never consulted the proper law hence he made a wrong decision.*

4. *The trial Honorable High Court Judge erred in law in holding that the Respondents were adverse possessors while the available evidence shows that they were licensees without value.*

5. *The trial Honorable High Court Judge erred in law and fact by holding that the Respondents became owners of the suit farm by virtue of adverse possession, while there was no evidence that they were adverse possessors of the disputed land.*

6. *The trial Honorable High Court Judge erred in law and fact by holding that the Respondents are lawful owners of the dispute farm.*

7. *The trial Honorable High Court Judge erred in law and fact by holding that the Respondents were not the trespassers on the dispute farm.*

8. *The trial Honorable High Court Judge erred in law and fact by failing to evaluate the evidence*

in records thus he made a wrong decision of the disputed farm."

At the hearing before us, the appellant was represented by Mr. Lusajo Willy, learned Advocate, whereas the respondent had the services Ms. Fay Grace Sadallah, also learned Advocate. Both learned counsel had lodged written submissions either in support or in opposition to the appeal which they, respectively, fully adopted. In the upshot, Mr. Willy invited us to allow the appeal with costs, whereas Ms. Sadallah urged us to dismiss the appeal, similarly, with costs. Ahead of our consideration and determination of the learned rival arguments, it is necessary to revisit, albeit briefly, the evidence adduced during the trial.

As we have already hinted, from a total of four witnesses and several documentary exhibits, the case for the appellant was to the effect that the Kilari farm estate, in which the disputed suit land is constituted, was acquired way back in 1971 by way of a purchase from a certain Amir Hussein Khiman who was the subsisting owner thereof. According to sister Inviolate Kessy (PW1), the transaction giving rise to the purchase of the suit land was actually done by Bishop Kilasara (now deceased) who was then head of the Catholic Diocese of Moshi. By then the appellant had not

been registered and, thus, upon purchase, on the 22nd October, 1977 the Trustees of the Diocese executed a deed of transfer of the right of occupancy to themselves (exhibit P8) which was entered in the title Register on the 10th March, 1972 (exhibit P7). It is, however, noteworthy that prior to Mr. Khiman's ownership, the suit land had passed through various hands. According Emmanuel Bundala (PW4), an assistant Registrar of titles, the title owner who immediately preceded Mr. Khiman was Mr. Malham Lawn Ray Ulyate whose title was registered on the 15th August, 1959 (exhibit P7).

The registration of the appellant as Trustees of the Holy Spirit Sisters of Tanzania was effected a good deal later, in the year 2004, whereupon on the 15th June, 2011 she executed a deed of transfer of the suit land to herself from the Trustees of the Diocese. As to what was found on the suit land at the time of the appellant's formal acquisition, this is what PW1 told the trial court:-

> *"The original owner was conducting mixed farming in the disputed area. He was doing farming work and keeping livestock. He was cultivating coffee, maize and beans. There were also matured trees which gave shed to coffee trees to grow well. There were houses constructed in the farm for the*

use of the laborers. There were also livestock animals kept in the farm. All these properties including the servant quarters were owned by the original owner. When we purchased the disputed farm, all the properties therein were sold to the plaintiff. We retained the farm workers who were originally employed by the original owner. When we took possession, we warned the laborers working there not to construct permanent structures in the disputed farm or to use it as a cemetery. We agreed with the said laborers that we were going to use them when there was work available but when there was no work then they were at liberty to find other jobs elsewhere."

The foregoing conditions were replicated, in similar tone, by the testimonial account of Father Paul Uria (PW2) who also testified that the conditions were reduced into writing. The witness claimed that most of the documents could not be traced in the wake of Bishop Kilasara's demise. Thus, he adduced into evidence only two documents (exhibit P5) which prescribed the conditions imposed on the 2nd and 40th respondents, namely, Hamisi Ally and Emmanuel Kisai, respectively. We reproduce a portion of exhibit P5 respecting Hamisi Ally as hereunder:-

"MAKUBALIANO YA UAMUZI WA MKUTANO WA TAREHE 3 AUGUST, 1972 KILARI FARM SANYA JUU.

Masista wa Roho Mtakatifu katika jimbo la Moshi wanaomiliki shamba la kilari (No. 7311 & 13986) Sanya Juu wanamruhusu Ndugu Hamisi Ally kuendelea kutumia sehemu ya ardhi aliyopewa eka ... kujipatia chakaula muda anaoruhusiwa kuishi katika shamba hili.

Sehemu hiyo ya ardhi ni lazima ilimwe na kutunzwa vizuri. Ardhi hiyo itabaki kuwa mali ya shamba la kilari, hivyo haruhusiwi yafuatayo:

1. *Haruhusiwi kiuenga nyumba ya kudumu au mazao ya kudumu kama kahawa, miti n.k.*
2. *Haruhusiwi kuuza nyumba wala kuwarithisha wanae au jamaa zake.*
3. *Haruhusiwi kuwaalika jamaa zake marafiki au wageni kuwa wakaazi katika ardhi hiyo.*

Ikitokea kifo au kuhama kilari kwa kuacha kazi ndugu Hamisi Ally analazimika kurudisha sehemu hiyo ya ardhi kwa masista wa Roho Mtakatifu kwa matumizi mengine, bila malipo au madai ya fidia.

Signed
Sr. Incharge
Signed

Bishop Joseph Kilasara
Kwa niaba ya HOLY SPIRIT SISTERS
KILARI FARM"

In the other portion of exhibit P5, similar conditions were imposed on the 40th respondent, namely, Emmanuel Kisai. There was some further evidence to the effect that upon taking over the disputed farm, the appellants built on it a primary school which was known as Kilari Primary School. According to PW1, the school was later donated to the government and, to brace the occasion, Mapendo Morris Minja (PW3) a former head teacher, produced a letter from the Education Officer, Hai District (exhibit P6) who thanked the appellant for donating the school.

According to both PW1 and PW2, with effect from year 2001 the conditions imposed on the licenses were progressively breached by the labourers, hence the suit giving rise to this appeal which was formally filed on the 17th September, 2012. Thus, in a nutshell, throughout the trial, the case for the appellant was to the effect that she is the registered lawful owner of the suit land as distinguished from the respondents who are mere licensees.

In reply, the respondents unveiled a somewhat unison tale. All the respondents, it was so told, were either employees or the descendants of the employees of the previous occupier and owner of the suit land, namely, Mr. Malham Lawn Ray Ulyate. Their joint account was to the effect that they worked for or, to some, their forefathers worked for the European

occupier with effect from the year 1959 up until 1969 when the latter left the country.

This detail is fortified by the entries in the title register which are to the effect that Mr. Malham Ulyate took over the ownership of the suit land from another Ulyate, namely, Ms. Marjorie Ann Ulyate on the 9th February, 1959. Mr. Malham then mortagaged the suit land to the Land Bank of Tanganyika on the 15th August 1959. The mortagage was discharged on the 3rd July, 1969 and, as already intimated, on that same day, the suit land was transferred to Mr. Amir Hussein Khiman by way of sale.

It was the respondents' further telling that, in the period preceding his departure, Mr. Ulyate was engulfed by acute financial constraints which disabled him to pay the employees their dues. And so, it was said, sometime in the year 1965, Mr. Ulyate granted to his employees the suit land so as to compensate them for the unpaid dues. According to them, the arrangement was blessed by Mr. Khiman who took over the occupation from Mr. Ulyate, just as it was also endorsed by Bishop Kilasara who was in the middle of the transition of the suit land from Mr. Khiman to the appellants.

Thus, in a nutshell, the respondents counter claimed ownership of the suit land and justify their occupation with the claim that the suit land

was given to them as a grant by Mr. Ulyate after he failed to pay their dues.

On the whole of the evidence, the trial Judge formulated the following facts to be undisputed:-

> " *i) The original owner of the disputed land was a settler known as Malham Lawn Ray Ulyate. He has been in occupation back in 1960's*
>
> ***ii) The defendants are descendants of the laborers of Ulyate and have been in occupation of the disputed land since early 1960's after the original owner Ulyate had given them the land after having failed to pay their terminal benefits.***
>
> *iii) There are several farms that is 336/2, 336/3 336/4 336/5 336/6 and 336/7 but the farm in dispute is only 336/2 which is presently occupied by the defendants.*
>
> *iv) In 1972 ownership of all these farms including the suit land fell under the Registered Trustees of the Diocese of Moshi and subsequently it passed ownership to the plaintiff.*
>
> *v) It is also not disputed that the plaintiff processed title deeds to the farms and in the year 2011 they got title deeds to the farms and in the year 2011 they got title deeds*

vi) *It is not disputed that when the title deeds were obtained the defendants were already in occupation.*

vii) *There is no disputed whether that the defendants have made some substantial developments in the suit land during the whole period of their occupation jointly with the efforts of the plaintiff.*

We have supplied emphasis on item no. (ii) of the undisputed facts as conceived by the learned Judge of which, to us, was very much in dispute during the trial. The appellant, for instance, consistently sought to be declared the lawful owner of the suit land and, in that regard, she did not, at any time, accede to the respondent's claim that they acquired ownership of the suit land through a grant from Mr. Ulyate. Unfortunately, on account of the misconception, the learned trial Judge proceed to make a finding:-

> *"I believe the version that the defendants are descendants of the laborers of the settler known as Malham Lawn Ray Ulyate and that they have been in occupation of the disputed land since the 1960's.* ***The said Malham Lawn Ray Ulyate had given the disputed land to the defendants after he***

failed to pay them their severance benefits. *The record shows that the said farm consisted of farms Nos. 336/2, 336/3, 336/4, 336/5, 336/6 and 336/7 with titles Nos. 7311 and 13986.* ***The farm which was given to the defendants is farm No. 336/2."*** [Emphasis supplied]

Having so found, the learned Judge went further and decided issue No. 2 in the negative and, as we have already intimated, in the upshot, the Judge found that the respondents have acquired ownership of the disputed farm on account of the doctrine of adverse possession.

We have, again, indicated the extent to which the appellant seeks to impugn this verdict upon a lengthy memorandum of appeal which was fully adopted by Mr. Lusaju Willy, the learned Advocate for the appellant at the hearing. Mr. Willy also adopted the appellant's written submissions of which he sought reliance, without more. On the adversary side, Ms. Fay Grace Sadallah, the learned counsel for the respondents, similarly adopted her clients' written submissions, also, without more.

Having read and heard the submissions from either side, we propose to approach the memorandum of appeal generally, the more so as some of

the grievances are raised repetitiously. The complaint about the improper invocation of the doctrine of adverse possession is, for instance, replicated in grounds Nos. 2, 3, 4, and 5.

To begin with, granted that the dispute in the case at hand was only with respect to the ownership of the suit land but, the learned Judge, seemingly, unreservedly shallowed the respondent's claim of having acquired the farm by way of a grant. The grant, if it was so extended to the respondents, was so vital a factual detail for the resolution of the conflict and, for that matter, the learned, Judge was enjoined to make a finding on it upon a due consideration of the whole of the evidence. That was not done and, as it turned out, the finding that the suit land was acquired by the respondents by way of a grant from Mr. Ulyate was grounded upon a paucity of evidence obtained from the respondents alone. But, sitting as a first appellate Court, we are entitled to re-evaluate the evidence afresh and arrive at our own finding with respect to this particular issue.

Our starting point will involve a reflection on the pleadings filed by the parties. The respondents, indeed, claimed, in paragraphs 3,4, and 5 (a) – (k) of their joint written statement of defence to the amended plaint, that the suit land was acquired by their forefathers by way of a grant from

Mr. Ulyate so as to offset the former's severance and terminal benefits (see page 33 to 37 of the record). More particularly, in paragraphs 5 (h) (i), (j) and (k) the respondents claimed:-

> *"(h) That the programme of Ujamaa Village which was launched in 1971, recognized and confirmed farm No. 336/2 to be one if the Hamlets in the Magadini Village which came to be divided later into Magadini and Wiri Villages.*
>
> *(i) That, in 1972 when KILARI FARM was transferred to the Registered Trustees if the Diocese of Moshi, farm No. 336/2 was not transferred to it as it was already under the ownership of the defendant's fathers as KILARI HAMLET (KITONGOJI). The Trustees adopted and reinforced the demarcations which had already been fixed by planting various traditional trees along the demarcations so as to separate KILARI HAMLET from other farms.*
>
> *(j) That the plaintiff which was by then one of the departments of the Trustees of Moshi diocese fortified such demarcation using timber plainks and planting impenetrable facing trees called "michongoma" or "K-apple."*

(k) *That, in 2011, when a suit land registered under title No. 7311 and 13986 was transferred, from No. 336/2 was not a property of the Registered Trustees of the diocese of Moshi. So it was not transferred to the plaintiff as the trust could not transfer a property not belonging to it.*

The foregoing claims, as we have already intimated, were refuted by the appellant who, in contrast, claimed in her reply to the joint written statement of defence that the entire parcels of land registered under certificate if title Nos. 7311 and 13986, which include the suit land, are her lawful belongings (see page 38 to 40 of the record of appeal). To fortify her claim, the appellant featured the already mentioned PW4 who was, at the material times, an assistant Registrar of Titles. This witness adduced into evidence two documents exhibits P7 and P8 which indicated that the right of occupancy on title No. 7311, in which the suit land was comprised, was in the name of the Trustees of the Diocese with effect from the 10th March, 1972. Then according to the documents on the 15th June, 2011 the title was transferred to the appellant.

On their part, the respondents clearly stated that the grant of the suit land from Mr. Ulyate to them was not reduced into writing. They did not,

as well, tell whether or not the transaction was authorized by the superior land lord. During the trial, Mr. Ulyate was not featured to confirm to the grant detail and, indeed, nothing was said about his whereabouts or any of his representatives, if he had any. And, neither were the local authorities called to fortify the claim comprised in the extracted paragraph 5 (h) of the joint written statement of defence. Furthermore, speaking of the conditions imposed by Bishop Kilasara for their stay at the suit land, DW1 informed the trial Court thus:-

> *"I know one Emmanuel Kisai. I also know one Hamls Ali. It is true that the two were working with me in the Europe settler farm. It is true that our terms of staying in that area were similar. It is true that there were conditions on which we agreed with Bishop Kilasara for us to say at Kilari sub-village."*

Coming to the claim that the suit land was not transferred when the certificate of title passed from Mr. Khiman to the registered trustees of the diocese of Moshi I 1972, we hasten to express at once that there is no truth in the allegation. Exhibit P7 through which title No. 7311 was transferred to the Trustees of the diocese clearly described the parcels of land comprised in the little –viz-farms Nos. 336/2, 336/3, 336/4 336/6 and

336/7. Besides, going by the testimonial account of PW4, in the year 2010 the trustees of the Diocese applied to the Registrar of Titles to prepare new certificates for title deed No. 7311 and 13986 on account that the originals were misplaced. As regards, title No. 7311, there was a further application to subdivide the farms comprised in it to six portions. The Registrar acceded to the application and if we may discern from exhibit P7, upon the division which as registered on the 27th December, 2011 the farms of Title 7311 were renamed as Nos. 336/2/1, 336/2/2, 336/3/3, 336/4, 336/6 and 336/7.

To say the least, the respondents' claim that farm 336/2 had not been transferred to the Trustees of the Diocese is further frowned in the face of this re-division. Thus, to this end, the claim that the respondents acquired the suit land by way of a grant from Mr. Ulyate was unsubstantiated and, if at all, the same stood on discounted facts. We would venture to add that even if there was such a transaction, as it were, involving a disposition of a portion of a right of occupancy, the position of the law, as it then stood, under regulations 3(1) to (3) of the Land Regulations, 1960 (G.N. NO. 101 of 1960) required thus: -

> *"3-(1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless*

and until it is approved by the Governor. [later to be the President.]

(2) In this regulation "disposition" means –

(a) A conveyance or assignment other than by way of mortgage, or a gift, settlement, deed of partition, assent, vesting declaration, or a sale in execution of an order of court;

(b) A mortgage other than-

(i) an Equitable mortgage by deposit of title deeds; or

(ii) a Mortgage which by law is only effectual if registered in the Register of Documents or the Land Register;

(c) a deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made;

(d) *a decree of foreclosure of a mortgage."*

There is, in this regard, a long line of authority to the effect that an oral and unapproved agreement for the disposition of land held under a Right of Occupancy such as the one relied upon by the respondents, is in-operative and of no effect. If we may just cite a few, in **Patterson and**

another v Kanji (1956) E.A.C.A. 106, dealing with a similar regulation, the defunct Court of Appeal for Eastern Africa stated that one cannot seek *"to enforce at law which he can only establish by relying on a transaction declared by law to be inoperative".* That decision was followed in **Patel v Lawrenson** [1957] E.A. 9; **Kassam v Kassam** [1960] E.A. 1042; and **Nitin Coffee Estates Ltd v United Engineering Works Ltd** [1988] TLR 203 (CA). In the latter case, the Court observed: -

> *"A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of leasee vis-a-vis the superior landlord. A right of occupancy is for a term, and is held under certain conditions. One of the conditions is that no disposition of the said right can be made without the consent of the superior landlord. There is no freehold tenure in Tanzania. All land is vested in the Republic. So land held under a right of occupancy is not a freely disposable or marketable commodity like a motor car. Its disposal is subject to the consent of the superior and paramount landlord as provided for in the relevant Land Regulations."*

We are, nonetheless, keenly aware that, in a subsequent development, the foregoing position of the law was refined by a full bench

of the court in the case of **Abualy Alibhai Azizi versus Bhatia brothers Ltd** [2000] T.L.R. 288 thus: -

> *"1. In ascertaining what we consider to be the correct interpretation of the expression,* ***"shall not be operative"*** *in regulation 3 of the Land Regulations, 1948 and 1960, we are going to be guided by two underlying principles. The first principle is explained in NITIN's case, that is, "a Right of Occupancy is something in the nature of a lease and a holder of a Right of Occupancy is something in the nature of a sort of lessee vis-à-vis the superior landlord. The corollary of this principle is that a transaction for the disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and the purchase or donee, but also involving the superior landlord.*
>
> *2. The second principle concerns the law of contract and originates form the English Common Law. That principle is the principle of Sanctity of Contract.*
>
> *3. Thus guided by these two principles and the provisions of sub-section (2)of section 2 of the Law of Contract Ordinance, we are satisfied*

that the expression, "shall not be operative" as used under regulation 3 of the Land Regulations 1948 and 1960, does not mean 'void' or another meaning to the same effect.

4. *We have asked ourselves if the expression "shall not be operative" does not entail invalidity, what then does it mean? Logically, it means at least that the contract in question is valid. According to Mr. Chandoo, such contract has all the attributes of a valid contract. That submission is consistent with the doctrine or principle of sanctity of contract. We note however, and Mr. Chandoo is likely to agree with us, that the principle of sanctity of contract is qualified by certain factors, including that of public policy as stated in the paragraph we have cited from CHITTY's Law of Contracts. The factor of public policy in contractors for the disposition of a right of occupancy is consistent with the second principle guiding us, and which concerns the relationship between the holder of a right of occupancy and the paramount landlord as explained in NITIN's case. It is our considered opinion that a contract falling within the scope of regulation 3 has all the*

> *attributes of a valid contract, except those, of which performance before the requisite consent is sought and obtained, is prejudicial to the interests of the paramount landlord.* ***Such are, for example, terms of which performance has the effect of replacing the holder of a right of occupancy with another person without the consent of the paramount landlord. Such terms, though valid, are unenforceable on the grounds of public policy, which protects the interests of the paramount landlord. In our considered opinion, this unenforceability of a valid contract is what is meant by the expression "shall be inoperative" under regulation 3."***
>
> [Emphasis supplied.]

Thus, all factors considered, we are fully satisfied that, to the extent that the performance of the terms of the agreement between the respondents and Mr. Ulyate was, in effect, desired to replace the subsisting holder of a right of occupancy without the consent of the paramount landlord the same was, so to speak, unenforceable on the grounds of public policy. In our considered opinion, this unenforceability of a valid

contract is what is meant by the expression "shall be inoperative" under regulation 3.

To this end, during the trial, the case for the respondents was grounded upon an alleged agreement which was inoperative, not only for lack of approval, but also for lack of writing. Accordingly, the trial Judge seriously non – directed himself on this legal requirement and consequently lent himself on an alleged agreement which was unenforceable. All said, it cannot be said that Mr. Ulyate's title to farm N0. 366/2 was lawfully granted to the respondents.

In our well-considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession. Possession and occupation of land for a considerable period of time do not, in themselves, automatically give rise to a claim of adverse possession. To this proposition, we find inspiration from the Kenyan case of **Mbira v Gachuhi** [2002] 1 EA 137 (HCK) wherein it was held: -

> *"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupier's right to occupation was derived from the owner in the form of permission or agreement, it was not adverse"*

In the foregoing remark, the High Court of Kenya had referred and followed two English decisions - viz - **Moses v Lovegrove** [1952] 2 QB 533; and **Hughes v Griffin** [1969] 1 All ER 460. In those cases, it was held that it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Thus, on the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -

(a) *That there had been absence of possession by the true owner through abandonment;*
(b) *that the adverse possessor had been in actual possession of the piece of land;*
(c) *that the adverse possessor had no color of right to be there other than his entry and occupation;*
(d) *that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
(e) *that there was a sufficient animus to dispossess and an animo possidendi;*
(f) *that the statutory period, in this case twelve*

years, had elapsed;

(g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

(h) that the nature of the property was such that, in the light of the foregoing, adverse possession would result.

In the situation at hand, the respondents sought to establish that their right to adverse occupation is derived from the original owner in the form of permission or agreement or grant. Such is, so to speak, not adverse possession: Possession could never be adverse if it could be referred to a lawful title, such as the present situation which was based on alleged grant. It has always been the law that permissive or consensual occupation is not adverse possession. Adverse possession is occupation inconsistent with the title of the true owner, that is, inconsistent with and in denial of the right of the true owner of the premises (see the referred English cases of Moses **v Lovegrove** and **Hughes v Griffin** (supra).

Having discounted the respondent's claim of a grant from Mr. Ulyate as well as the finding that they acquired the suit land through adverse possession, we would, on a balance of probabilities, accede to the appellant's claim that the respondents were mere licensees who were

invited to stay on the suit land on the terms prescribed in exhibit P5. In the end result, this appeal succeeds with an order that the appellant is hereby declared the lawful owner of the suit land, save for that portion comprised in Kilari Primary School which was donated to the local Government. It is further ordered that the respondents stay on the suit land is at the option of the appellant subject to the terms prescribed by exhibit P5 or, if the appellant is minded to revoke exhibit P5, at such other conditions as she may prescribed. The appellant is awarded costs for her quest here and below. Order accordingly.

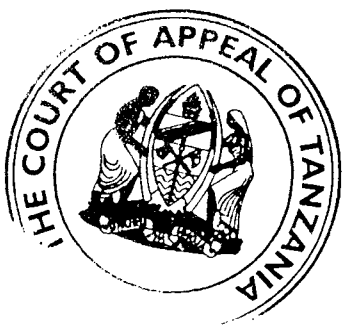
DATED at **DAR ES SALAAM** this 6th day of August, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. M. KULITA
DEPUTY REGISTRAR
COURT OF APPEAL