IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 137 OF 2017

YERIKO MGEGE ..... APPELLANT

VERSUS

JOSEPH AMOS MHICHE ..... RESPONDENT

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

(Kihwelo, J.)

dated the 12th day of December, 2016
in
Miscellaneous Land Appeal No. 12 of 2015

JUDGMENT OF THE COURT

5th & 18 May, 2020

MWAMBEGELE, J.A.:

This third appeal has its genesis in the decision of the Njombe Urban Ward Tribunal of Njombe in Land Case No. MD/166/2014 wherein the respondent, Joseph Amos Mhiche, instituted the suit against the appellant, Yeriko Mgege, claiming that the latter had trespassed into his land. The respondent contended in the Ward Tribunal that he was the lawful owner of the parcel of land

(henceforth "the disputed land") as he had purchased the same from the appellant's father; a certain Revesko Msafiri, on 31.03.1999. He added that the appellant was a witness of the seller to the Sale Agreement. The respondent also claimed that, after purchasing the disputed land, he allowed the appellant's father to continue excavating stones in it.

Upon the death of the appellant's father, the appellant stepped into his shoes and, on permission by the respondent, he proceeded to excavate stones in the disputed land. At a later stage, the appellant started to build a foundation under the pretext that the disputed land belonged to him. This is what sparkled the dispute between the parties. On the other hand, the appellant told the Ward Tribunal that he did not build the foundation on anybody's land. He said the land was his, it being bequeathed to him by his father through the administrator of his estate; a certain Peter Mgege Msafiri. The Ward Tribunal, upon hearing both sides and examining exhibits tendered, ruled that the respondent was the rightful owner of the disputed land.

The appellant was not happy with the decision of the Ward Tribunal. He thus appealed to the District Land and Housing Tribunal for Njombe, at Njombe (henceforth "the DLHT"). The DLHT (G. Kagaruki, Chairperson) upheld the decision of the Ward Tribunal holding that the disputed land was sold to the respondent by the appellant's father before his death and therefore, it could not be included in his estate.

Undeterred, the appellant appealed to the High Court on second appeal. The High Court (Kihwelo, J.) observed that the records of the two courts below revealed in clear terms that the disputed land was bought by the respondent from Msafiri Mgege on 31.03.1999. On this premise, the High Court, relying on **Musa Mwaikunda v. Republic** [2006] T.L.R 387, was loath to interfere with the concurrent findings of facts by the two tribunals below it. The appellant lost in the second appeal as well.

Undaunted, the appellant, after having sought and obtained the requisite certificate of the High Court, has knocked the door of this

Court on a third appeal armed with three grounds of grievance which, for reasons that will be apparent in the course of this judgment, we reproduce them hereunder:

1. *"That since there had been no dispute in both the Njombe District Land and Housing Tribunal Land Appeal No. 79 of 2014 as well as in the trial Njombe Urban Ward Tribunal Case No. MD166/2014 that the Appellant had been using the disputed piece of land continuously and undisturbed for 17 years, the High Court on 2nd Appeal erred in law in giving ownership of the disputed land to the respondent contrary to item 22 of Part I of the Schedule to the Law of Limitation Act, (Cap. 89, R.E 2002);*
2. *That the High Court on 2nd Appeal erred against order XX Rule 4 of the Civil Procedure Code (Cap. 33 R.E 2002) by not giving out any reason for rejecting the six ground of appeal filed by the Appellant.*
3. *That, the High Court on 2nd Appeal and the Njombe District Land and Housing Tribunal erred in law against Section 62(1)(a) of the Evidence Act, (Cap. 6 R.E 2002) in holding that the Appellant*

had witnessed the sale of the disputed land to the respondent when the appellant had denied at the trial to have ever witnessed or signed the alleged sale."

The appeal was placed before us for hearing on 05.05.2020 during which the appellant appeared in person, unrepresented. The respondent had the services of Mr. Batista John Mhelela, learned advocate. Both parties had earlier filed written submissions and reply written submission for and against the appeal respectively. When we called on the appellant to argue his appeal, he simply sought to adopt the written submissions he earlier filed as part of his oral arguments and prayed that the appeal be allowed. As for the respondent, Mr. Mhelela, like the appellant, adopted the reply submissions filed on 05.01.2018 and prayed for the dismissal of the appeal with costs.

In the written submissions, the appellant consolidated the three grounds of appeal in arguing the appeal. He submitted that the second appellate court and the two tribunals below did not consider the fact that he has been in continuous and undisturbed occupation of the disputed land. He argued that the law provides that a trespasser

who occupies land for over twelve years should be left undisturbed. The appellant, however, did not cite to us any law to back up his argument. He assailed the documents appearing at pp. 86 – 88 which were produced by the respondent in the Ward Tribunal that they are worthless in that; **one**, the writer is not mentioned; **two**, the alleged seller (the appellant's father) did not testify in the Ward Tribunal; and, **three**, the appellant denied to have witnessed the sale.

The appellant also argued that he brought to the fore cogent evidence proving that the disputed land belonged to his father and was bequeathed to him by the said Peter Mgege Msafiri who was an administrator of the estate of the appellant' s father. On this premise, he contended, the respondent should have sued the said Peter Mgege Msafiri who was the administrator of the appellant's father estate. He reiterated that he has been in continuous and undisturbed occupation of the disputed land for seventeen good years. He should therefore not be disturbed, he charged.

For the respondent, in the reply submissions, the learned counsel started his onslaught by challenging the appellant for not arguing the second ground of appeal without saying he has abandoned it. That, he argued, offends rule 106 (3) (b) (i) of the Tanzania Court of Appeal Rules which dictates that if an appellant is abandoning any point taken in the memorandum of appeal, he shall so state in the written submissions. The learned counsel thus implored us to take the second ground of appeal as abandoned and refrain from entertaining it.

Arguing the grounds of appeal generally, the respondent's counsel submitted that it was undisputed that the appellant had been using the disputed land for more than twelve years after the passing on of his father. However, he could not own that land by adverse possession because in order to succeed in adverse possession, the following must be proved: **one**, possession must be actual; **two**, possession must be exclusive; that is, the adverse possessor of that land must be first claiming right over the land in question and secondly must have the intention to exclude others, including the true

owner and the public; **three**, possession must have an object; and, **finally**, possession must be hostile; that is, possession of land must be without permission from the owner.

The learned counsel contended that the appellant was just permitted to use the land the effect of which was to entitle the owner to claim the right to the disputed land despite the fact that twelve years expired. To buttress this proposition, the learned counsel cited **Makofia Merianangа v. Asha Ndisia** [1969] H.C.D. n. 204. Mr. Mhelela added that the disputed land could not have been bequeathed to him by the administrator of his father's estate because it was sold to the respondent before his death. The learned counsel referred us to P. 10 of the record where it is shown that the appellant agreed that the disputed land was sold to the respondent.

Having summarized the facts of the case as we could decipher from the proceedings in the Ward Tribunal as well as in the two appellate courts below, we now turn to determine the grounds of appeal as reproduced above.

The first ground of appeal seeks to challenge the second appellate court for upholding the findings of the two courts below it without taking into consideration the provisions of item 22 of part I of the schedule to the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "the law of Limitation"). This item puts a limitation of twelve years in suits for recovery of land. On this argument, the appellant claims to have been an adverse possessor of the disputed land having occupied it for seventeen years.

A pragmatic determination of this ground, in our view, must first investigate how the appellant came into possession of the disputed land. The evidence adduced at the trial, as the second appellate court observed and to our mind rightly so, had it loudly and clearly that the disputed land belonged to the respondent who bought it from the appellant's father on 31.03.1999. In addition to documentary exhibits tendered in the Ward Tribunal, the respondent fielded Frank Sanga, William Mhiche and Diana Simime who joined forces with him to testify that he bought the disputed parcel of land from the appellant's father. We will let the exhibits paint the picture. They are handwritten. The

first one is a document of sale dated 31.03.1999 signed by the respond as a buyer and the appellant's father as the seller. It was witnessed by two persons. It appears at p. 86 of the record. It reads:

> *"31-3-1999*
> *MIMI REVESKO MSAFIRI NIMEMUUZIA KIWANJA BWANA JOSEPH MUHICHE KWA BEI YA SH. 80,000 TU HELA AMETOA MBELE YA USHAHIDI HANA DENI HILO ENEO NI LAKE JOSEPH MUHICHE.*
>
> *MIMI MUUZAJI: R. M. MSAFIRI (sgd)*
>
> *SHAHIDI WANGU: YERIKO MGEGE (sgd)*
>
> *SHAHIDI: WILLIAM MHICHE (sgd)*
>
> *SAHIHI YA MUNUNUZI: (sgd)*
>
> *MIMI RIVESKO MSAFIRI BADO NIMEOMBA KUCHIMBA MAWE."*

Two things of sufficient importance in this appeal can be gleaned from the above document. These are; **one**, that the appellant

witnessed the sale of the disputed land between his father and the respondent; and, **two**, the seller had asked to excavate stones in that land.

Another document appears at p. 87 of the record. It is a permission to excavate stones in the disputed land from the respondent to the appellant's father. It reads:

> ***"KIBALI CHA KUCHIMBA MAWE KATIKA ENEO NILILONUNUA KWA REVESKO MSAFIRI***
>
> *MIMI JOSEPH MHICHE NAMRUHUSU NDUGU REVESKO MSAFIRI KUENDELEA KUCHIMBA MAWE KATIKA ENEO NILILONUNUA MPAKA NITAKAPOHITAJI KUJENGA NYUMBA*
>
> *SAHIHI YA MWENYE ENEO: (sgd)*
>
> *SAHIHI YA SHAHIDI: (sgd)*
>
> *SAHIHI YA SHAHIDI: Yeriko Mgege (sgd)*
>
> *SAHIHI YA MUOMBAJI: (sgd)"*

As can as well be gleaned from the above document the appellant's father was given written permission to continue excavating stones in the disputed land and the appellant's signature has been affixed, among others, as a witness.

Flowing from the above, after the death of his father the appellant stepped into his shoes and continued to excavate stones in the disputed land on permission from the respondent. This was testified to by the respondent himself (at p. 4 of the record) as well as William Mhiche, Frank Sanga and Diana Simime as appearing at p. 8, 21 and p. 22 in that order. In actual fact, the appellant did not deny that the respondent bought the parcel of land from his father. At p. 17, when he testified before the Ward Tribunal, he is recorded as saying:

> *"... kwa kuwa kiwanja alinunua kwa mzee nilikuwa nataka tufikie muafaka. Mimi kwa vile nimeanza kujenga pale naomba nimrudishie gharama zake za kiwanja. Mimi nilikuwa tayari kurudisha shilingi 400,000/="*

Literary translated, in the above testimony, the appellant stated that in view of the fact that the respondent bought the disputed land from his father, and since he had started construction on it, he was ready to refund the purchase price to him. He added that he was ready to refund Tshs. 400,000/= as the purchase price.

Given the foregoing testimony, we are certain that the three courts below rightly decided that the appellant had been using the disputed land on permission by the respondent. He was therefore an invitee. He cannot therefore be saying that he acquired that land by long and undisturbed occupation. We are certain that the appellant misconceived the law when he argued that a trespasser acquires land on which he trespassed after twelve years of occupancy. To the contrary, the law is settled in this jurisdiction that no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited - see: **Maigu E. M. Magenda v. Arbogast Maugo Magenda**, Civil Appeal No. 218 of 2017 - [2018] TZCA 214 at www.tanzlii.org and **Musa Hassani**

v. Barnabas Yohanna Shedafa, Civil Appeal No. 101 of 2018 - [2020] TZCA 34 at www.tanzlii.org the decisions of the Court. In **Musa Hassani v. Barnabas Yohanna Shedafa** (supra), for instance, we grappled with a similar complaint and observed at p. 6 of the typed judgment:

> *"... an invitee cannot own a land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter that the said invitee had even made unexhausted improvements on the land on* which he was invited."

Likewise, we grappled with an akin argument in **The Hon. Attorney General v. Mwahezi Mohamed (As Administrator of the Estate of the late Dolly Maria Eustace) and three others,** Civil Appeal No. 391 of 2019 - [2020] TZCA 27 at www.tanzlii.org in which an appellant claimed adverse possession only on account that he had been in occupation of the land in dispute for over forty years. In determining that issue we relied on our previous decision in **Registered Trustees of Holy Spirit Sisters Tanzania v. January**

Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016 – [2018] TZCA 32 at www.tanzlii.org to hold that the assumption was incorrect. At p. 24 of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others** (supra) we observed:

> *"... it [cannot] be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession.* ***Possession and occupation of land for a considerable period do not, in themselves, automatically give rise to a claim of adverse possession****."*
> [Emphasis added].

Similarly, in the case in **Maigu E. M. Magenda v. Arbogast Maugo Magenda** (supra), we observed at p. 13 of the typed judgment:

> *"We do not think continuous use of land as an invitee or by building a permanent house on another person's land or even paying land rent*

to the City Council of Mwanza in his own name would amount to assumption of ownership of the disputed plot of land by the appellant."

See also: **Samson Mwambene v. Edson James Mwanyingili** [2001] T.L.R 1 and **Makofia Merianangа v. Asha Ndisia** (supra), decisions of the High Court to which we subscribe.

On the authority of the foregoing decisions, we are settled in our mind that the appellant, as an invitee to the disputed land, could not have owned the said land to the exclusion of the respondent. Also, he could not claim adverse possession simply because he stayed in the disputed land for seventeen undisturbed years. He was an invitee and his status remains so. The law of Limitation cannot, therefore, be applicable in the circumstances of this case. In the premises, we find and hold that the three courts below rightly so found and held. The first ground of appeal, therefore, fails.

Next for consideration is the second ground of appeal which is a complaint that the judgment of the second appellate court did not

comply with the dictates of Order XX Rule 4 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (now Revised Edition, 2019) by not giving out any reason for rejecting the six grounds of appeal filed by the appellant. For ease of reference, we reproduce the rule noncompliance of which is the subject of this complaint. It reads:

> *"4. Contents of judgments*
>
> *A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."*

In the second appellate court, the appellant complained in ground six that the DLHT erred in holding that there was a sale agreement between his deceased father and the respondent while the appellant had disowned the signature appearing in the alleged agreement. We think this is a wrong accusation against the second appellate court. We are of this view because the second appellate court adequately addressed this point. We shall demonstrate.

At p. 142, the learned first appellate judge came out clearly that he will not deal with the grounds of appeal separately. He relied on the observation of the Court in **Melita Naikininjal & Loishilaari Naikiminjal v. Sailevo Loibaguti** [1998] T.L.R 120 at 130 to do so. He observed at p. 143 of the record that the respondent's evidence was stronger compared to that of the appellant in that the latter's "was too general and did not in any way touch upon the suit". Relying on the principle of he who alleges must prove, he dismissed the appellant's consolidated ground of appeal and decided in favour of the respondent by dismissing the appeal with costs. We think this satisfied the response to the sixth ground of appeal. The provisions of Rule 4 of Order XX of the CPC were, therefore, not offended. The second ground of appeal has no merit as well. We dismiss it.

We now turn to consider and determine the last ground. We should state at this juncture that at first we thought that this is a ground of appeal not involving a point of law. However, upon mature reflection, we discovered that the gist of the complaint in this ground is that the second appellate court erred in upholding the decision of

the first appellate tribunal; the DLHT and the Ward Tribunal which did not consider his evidence denying to have signed the Sale Agreement between his late father and the respondent. We will, therefore, determine this ground in that context.

Having examined the record, we do not think this ground will detain us. There was evidence from the respondent that the appellant witnessed the sale agreement. That testimony received support from William Mhiche who also witnessed the Sale Agreement. That was quite sufficient to prove on a balance of probabilities that the appellant signed the document under discussion. We understand the appellant is trying to impute that the signature was forged. If that is what the appellant forestalled, we think, under the principle of he who alleges must prove embodied in section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2019, it was incumbent upon him to prove. And because this averment imputes a crime, its proof must be to a standard higher than that in normal civil cases. That this is the law has been held by the courts in this jurisdiction since time immemorial - see: **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314

and **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R 169. In **Ratilal Gordhanbhai Patel v. Lalji Makanji** (supra) at p. 316, the principle was articulated by the erstwhile Court of Appeal for East Africa in the following terms:

> *"Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required".*

The principle was reiterated by the Court in **Omari Yusuph v. Rahma Ahmed Abdulkadr** (supra) in which, without referring to the **Patel case** above, the Court observed:

> *"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases ..."*

The Court went on to state the rationale behind this otherwise stringent principle as follows:

> *"... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof, though as Rupert Cross cautions and illustrates in his text-book on Evidence at page 124 the application of that rule is not always commodious ..."*

In view of the foregoing authorities, it is obvious that the burden of proof of fraud in civil cases is heavier than a balance of probabilities generally applied in civil matters. Thus the appellant must have applied the same standard to prove that the signature in the Sale Agreement was not his as asserted by the respondent. This was not done and to our mind the complaint is but an afterthought. We dismiss it.

In view of what we have endeavoured to state hereinabove, we are loath to meddle with the concurrent findings of the three courts

below. This appeal was lodged without any scintilla of merit. It is, consequently, dismissed entirely with costs to the respondent.

DATED at **IRINGA** this 15th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 18th day of May, 2020 in the presence of Yeriko Mgege for Appellant and Joseph Amos Mhiche for Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL