IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J. A., NDIKA, J. A. And LEVIRA, J. A.)

CIVIL APPEAL NO. 222 OF 2017

BHOKE KITANG'ITA..... APPELLANT

VERSUS

MAKURU MAHEMBA..... RESPONDENT

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

(Mgetta, J.)

Dated the 9th day of May 2016
in
Misc Land Appeal No 13 of 2013

.....

JUDGMENT OF THE COURT

16th & 20th March, 2020

MMILLA, J.A.:

This appeal has been preferred by Bhoke Kitang'ita (the appellant). It is contesting the judgment and decree of the High Court of Tanzania, Mwanza Registry, in Misc. Land Appeal No. 13 of 2013 which was decided in favour of Makuru Mahemba (the respondent).

It is common ground that initially, the parcel of land in dispute was owned and occupied by Nchama s/o Magere (PW4), who subsequently

abandoned it. After the said abandonment, somehow anyway, the parties herein moved in, culminating into each one of them claiming as the rightful owner, as a result of which a dispute arose between them.

At the height of the parties' dispute in 2011, the respondent instituted Land Application No. 15 of 2011 in the Kenyamonta Ward Tribunal (WT), in Serengeti District in an endeavour to perpetuate the right of ownership. On 22.8.2011, the said WT delivered its judgment in favour of the appellant. That decision aggrieved the respondent who unsuccessfully appealed to the District Land and Housing Tribunal (DLHT) for Mara at Musoma vide Land Appeal No. 116 of 2011. Undaunted, the respondent successfully appealed to the High Court of Tanzania, Mwanza Registry. In turn, that decision aggrieved the appellant and compelled him to lodge the present appeal to the Court.

In its judgment, the learned Judge of the High Court found that the land in dispute rightly belonged to the respondent on the basis of the evidence of PW4 who, as earlier on pointed out, was the original owner of that land before he abandoned it. PW4 had stated that after forsaking that land, the respondent was the first person to settle there, followed

by the appellant. The High Court remarked likewise that apart from the evidence from the respondent himself, there was similarly evidence from Mitambe Rogoro (PW1), Nchota Makuru (PW2) and Bhoke Mayengo (PW3) to establish that it was the respondent who gave the appellant a portion of that land for cultivation, whereupon a demarcation was set out between them. On the basis of that reasoning, it reversed the decisions of both tribunals and gave the right of ownership to the respondent as it were.

When the appeal was placed before us for hearing on 16.3.2020, neither the appellant's advocate Mr. Mashaka Fadhili Tuguta, from Kabonde & Magoiga Law firm (Advocates), nor the appellant herself entered appearance; whereas Mr. Vedastus Laurean, learned advocate, entered appearance for the respondent.

It is significant to point out that both sides had filed written submissions in terms of Rule 106 of the Rules. On that account, following the absence of the appellant and his advocate, Mr. Laurean urged the Court to consider the merits of the appeal on the basis of their

respective written submissions in terms of Rules 106 (12) (b) and 112 (4) of the Rules. We unhesitatingly granted that prayer.

The appellant's memorandum of appeal raised a lone ground as follows:-

> "That, the honourable Learned Judge of the 2nd Appellate Court erred in law and fact for failure to observe and hold that the appellant who had stayed on the suit for more than 25 years undisturbed was protected by the doctrine of adverse possession."

In his written submissions in elaboration of the above ground, Mr. Tuguta admitted firstly that the evidence on record reveals that, neither the appellant nor the respondent and their witnesses gave a specific date and/or year as to when each of them began to possess and use the land in dispute. He contended nevertheless, that the appellant disclosed in her submissions before the DLHT that she occupied the pieces of land in dispute in 1986, implying that it should be taken as the timeline and regard it as additional evidence in terms of section 34 (1) (b) and (c) of the Land Disputes Act Cap. 216 of the Revised Edition, 2002 (LDA).

Mr. Tuguta argued therefore that if that will be accepted, counting from 1986, it is certain that 25 years had elapsed, hence that the High Court ought to have applied the principle of adverse possession in favour of the appellant. He referred the Court to the case **Jackson Reuben Maro v. Hubert Sebastian**, Civil Appeal No. 84 of 2004, CAT (unreported). He concluded that since the appellant was in uninterrupted occupation and use of the disputed land for about 25 years, which is over and above the limitation period of 12 years, it is certain that he acquired title or ownership to that land by adverse possession. He urged the Court to allow the appeal.

On the other hand, the respondent's advocate was in agreement with the appellant's advocate's submission that the period of limitation to recover land is 12 years in terms of section 3 (1) of the Law of Limitation Act Cap. 89 of the Revised Edition, 2002 (the LLA) read together with Part I item 22, Part I of the Schedule of the same Act; but was resolute that the doctrine of adverse possession was inapplicable in the circumstances of this case because in terms of section 9 (2) of the LLA,

time begins to run from the date the respondent is dispossessed or has discontinued his possession of the disputed land.

Also, the respondent's learned advocate insisted that the appellant has never been in adverse possession of that land, nor was there evidence to show from which date he commenced to cultivate the said land. As such, he maintained, the assertion that he has been in possession of that land for about 25 years is fallacious because it is not based on evidence. He added that reliance on the statements made by the parties in the DLHT in Land Appeal No 116 of 2011 was a misconception because the said statements were not additional evidence since the DLHT did not make any order requiring them to adduce additional evidence. On this, he referred the Court to the case of **Morandi Rutakyamirwa v. Petro Joseph** [1990] T.L.R. 49.

Mr. Laurean's oral submission did not go beyond the contents of their written submission; save for the emphasis he made that the protection sought under the shield of the doctrine of adverse possession is baseless because it was not supported by the evidence on record. At

most, he added, it is an afterthought. He recapped his prayer for dismissal of the appeal with costs.

After carefully considering the competing arguments of counsel for the parties, we think the crucial issue is whether or not, in the circumstances of this case, the High Court ought to have found and held that the appellant acquired a legal title in respect of the land in dispute by virtue of the principle of adverse possession as is being contended.

It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession. The circumstances under which a person seeking to acquire title to land under that principle were aptly explicated in the case of the **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others,** Civil Appeal No. 193 of 2016, CAT (unreported) which quoted with approval the Kenyan case of **Mbira v. Gachuhi** [2002] E.A. 137 (HCK) in which again, reliance was made on

the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460. It was held that:-

> *"[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 12 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."

It is critical to emphasize here that time under which the adverse possessor may have been in uninterrupted occupation of that property is of great essence. As correctly submitted by the advocates for the respondent, the period of limitation to recover land is 12 years in terms of section 3 (1) of the LLA, read together with Part I item 22 of Part I to Schedule of the same Act. It is also factual that in terms of section 9 (2) of the LLA, time begins to run from the date the respondent is dispossessed or has discontinued his possession of the disputed land.

We have taken note of the appellant's advocates' concession that their client did not advance evidence during trial to show that the principle of adverse possession shielded him; or rather that he ever disclosed when exactly he occupied that land. They have however, requested us to accord her the sought protection under that principle relying on the statements she made in her submission before the DLHT.

She stated in that Tribunal that she began using that land in 1986, which translates in the fact that she had been in occupation of that land for 25 years up to 2011 when she commenced the suit in the trial Tribunal. As already pointed out, they have sought support from the provisions of section 34 (1) (b) and (c) of the LDA under which they say, the DLHT received additional evidence to that effect. They similarly referred us to the case of **Jackson Reuben Maro** (supra). Section 34 (1) (a) and (c) of the LDA provides that:-

> *"S.34 (1): The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors; and shall:-*
>
> *(a) consider the records relevant to the decision; and*
>
> *(b) N.A.*
>
> *(c) make such inquiries, as it may deem necessary."*

Surely, the above quoted provision permits the taking of additional evidence as argued by the appellant's advocates. No doubt, the law has made this allowance for very good reasons. Basically, additional evidence

may be admitted where, on examining the evidence on record as it stands, some inherent lacuna or defect may become apparent, thus necessitating the filling of that lacuna. Justification for reception of additional evidence was best expressed in the case of **Karmali Tarmohamed and Another v. IH Lakhani & Co. (3)** [1958] E.A. 567 in which the Court stated that:-

> *"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first**, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **second**, the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not to be decisive; **third**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...."*

We hurry to point out however, that where the need for additional evidence may be found indispensable, the court or tribunal seized of the

case must make an order directing the taking of such evidence and all formalities of recording it are expected to be complied with.

In the circumstances of the present case however, the appellant's advocates' attempt to persuade the Court to regard the statements which their client made in her submissions before the DLHT is misleading and cannot be accepted. We are fortified with what we said in **Morandi Rutakyamirwa** (supra) which was referred to us by the respondent's advocates.

In **Morandi Rutakyamirwa's** (supra) case, the appellant (Morandi Rutakyamirwa) filed a suit for recovery of land. The trial Primary Court found that the appellant had not bought the land from the respondent. On appeal, the District Court reversed the decision of the trial Primary Court and entered judgment for the appellant on the findings that the appellant was time barred by the Customary Law (Limitation of Proceedings) Rules, 1963 from recovering possession thereof. On further appeal to the High Court, the appellate judge found that it was wrong for the District Court to act on matters which were not raised or dealt with in the trial Primary Court, that is, the additional

evidence purportedly taken by the District Court and the matter of limitation. That court accordingly reversed the decision of the District Court and restored the decision of the Primary Court. It was held on further appeal to the Court that:-

> *"(ii) The District Court was wrong to reverse the trial court's decision because the purported additional evidence supporting the reversal was no evidence in law. The submissions made by the appellant in the course of the appeal arguing that the appellant had bought the land are not evidence but arguments on the facts and the law raised before the court. There being no evidence on the fact of sale of the land, the District Court had no basis for its finding."*

To summarize the position, given that the appellant never said anything right from the beginning depicting his desire to rely on that doctrine; and since she did not state in her evidence during trial when exactly she occupied that land; and because we have said her submissions before the DLHT cannot be properly regarded as amounting to additional evidence in terms of section 34 (1) (b) and (c) of LDA; we

are settled that the appeal lacks merit. We uphold the decision of the High Court, and thus dismiss the appeal with costs.

Order accordingly.

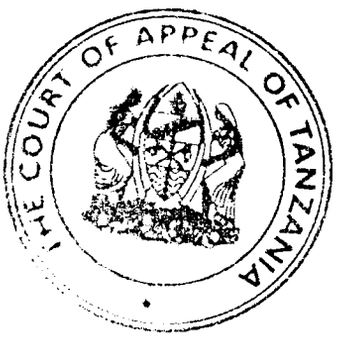
DATED at **MWANZA** this 19th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 20th day of March, 2020 in the presence of the appellant in person and Mr. Masoud Mwanaupanga, learned counsel holding brief for Mr. Vedastus Laurian, learned counsel for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL